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# Judicial and statutory definitions of words and phrases

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JUDICIAL AND STATUTORY DEFINITIONS 47

- OF

# WORDS AND PHRASES

## SECOND SERIES

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# JUDICIAL AND STATUTORY DEFINITIONS

OF

## WORDS AND PHRASES

### SECOND SERIES

### VOLUME 4

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#### **PUBLIC**

See Due the Public.

See, also, Private.

"Public" means of or belonging to the people at large, relating to or affecting the whole people of a state, nation or community, not limited to any particular class of the community, and means more than the limited class defined by the relation of landlord and tenant, or by nearness of location, as neighbors. *Cawker v. Meyer*, 133 N. W. 157, 159, 147 Wis. 320, 37 L. R. A. (N. S.) 510.

To render the use of a corporation, organized to furnish power, a "public use," it is not necessary that the company's services be available to the whole population of the state; the word "public" meaning all those who require power and are willing to pay reasonable rates therefor to the full extent of the capacity of the enterprise. *Wisconsin River Imp. Co. v. Pier*, 118 N. W. 857, 862, 137 Wis. 325, 21 L. R. A. (N. S.) 538.

The word "public" in the expression "the road is open to public use" means "all those who have occasion to use" the road. *Gillespie v. Duling*, 83 N. E. 728, 730, 41 Ind. App. 217.

The supervisors of a county granted to a street railway company a franchise to operate a railroad on all of the highways of the county. The company built a branch along a public road, and thereafter the supervisors granted to the commissioners of the Vicksburg National Military Park authority to control the county roads in the park without interfering with the use of the roads by "the public." Held, that the words "the public" meant the general public at large, and not the street railway company, and the commissioners could forbid the company from laying its line over a road into the park. *Vicksburg Traction Co. v. Warren County*, 56 South. 607, 609, 100 Miss. 442.

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#### **Common synonyms**

The word "public" in its common acceptance and use has all the significance of and is synonymous with the word "common." *People ex rel. Clark v. Keeper of New York State Reformatory for Women at Bedford*, 68 N. E. 884, 887, 176 N. Y. 465 (dissenting opinion).

#### **As the people or state**

A dedication by the state to the "people of New Orleans for public use for a public park or amusement park purposes," of a parcel of land lying beneath the waters of Lake Pontchartrain, is none the less a dedication to the public because the words "people of New Orleans" are used, since those who are not so may become people of New Orleans; or may avail themselves of the dedication without becoming people of New Orleans. *Saucier v. City of New Orleans*, 43 South. 999, 1002, 119 La. 179.

#### **Corporation as part of public**

An application for a writ of quo warranto challenging the right of a railroad company to purchase water from a water company in a territory within which such company is authorized to supply water to the public will be dismissed; the railroad company being a part of the public. *Commonwealth v. Pennsylvania R. Co.*, 81 Atl. 196, 198, 232 Pa. 183.

#### **PUBLIC ACCOMMODATION**

See Place of Public Accommodation.

#### **PUBLIC ACKNOWLEDGMENT**

The words "publicly acknowledging," as used in Civ. Code, § 230, providing for legitimation of a bastard by the father "publicly acknowledging" that he is the child's father, must be taken in their ordinary sense. In *re Gird's Estate*, 108 Pac. 499, 503, 157 Cal. 534, 187 Am. St. Rep. 131.

**PUBLIC ACT**

See, also, General Law.

**Charter**

The charter of a village is a "public act," of which the court will take notice in considering pleadings. *Atherton v. Village of Essex Junction*, 74 Atl. 1118, 1119, 83 Vt. 218, 27 L. R. A. (N. S.) 695, Ann. Cas. 1912A, 339.

**PUBLIC AGENCY**

Office as, see Office.

**Political committee**

County boards and board of election commissioners are "public agencies," within the rule that it is not in the power of the Legislature to abdicate its functions or to subject citizens and their interests to the interference of any but lawful public agencies, but county central committees of political parties, where they exist as the representatives of purely voluntary organizations, cannot be said to be "public agencies," as they represent, not the state or any political division or department thereof, but a political party, which may be composed of only an inconsiderable portion of the people. *Rouse v. Thompson*, 81 N. E. 1109, 1114, 228 Ill. 522.

**Schoolbook publisher**

A foreign corporation engaged in the publication of schoolbooks, having obtained a contract from the state text-book commission to furnish all the schoolbooks of the state, as provided by Acts 1899, p. 423, c. 205, and having contracted with a dealer within the state to establish depots for the sale of schoolbooks in the state, was not a public agency of the state, endowed with governmental or public functions, and was, therefore, not exempt from taxation, under Acts 1903, p. 632, c. 258, § 2, exempting all property of the state, etc., used exclusively for public purposes. *American Book Co. v. Shelton*, 100 S. W. 725, 726, 117 Tenn. 745.

**PUBLIC ALLEY****Cul-de-sac**

That a portion of an alley is a cul-de-sac does not preclude it from being a "public alley." *Johnston v. Lonstorf*, 107 N. W. 459, 461, 128 Wis. 17.

**PUBLIC AMUSEMENT**

See Place of Public Amusement.

Any such place of, see Any.

Other amusement, see Other.

See, also, Public Diversion.

Under Pen. Code 1895, art. 199, punishing one opening on Sunday his place of public amusement, and declaring that the term "public amusement" means theaters, etc., for which an admission fee is charged, the opening on Sunday of a place of amusement is not prohibited, unless an admission fee is

charged. *Ex parte Jacobson*, 115 S. W. 1193, 1194, 55 Tex. Cr. R. 237.

**PUBLIC BEACH**

"A 'public beach' is one left by the state, or those claiming under it, open to the common use of the public, and which the unorganized public and each of its members have a right to use, while it remains such." *Dawson v. Town of Orange*, 61 Atl. 101, 109, 78 Conn. 96.

**PUBLIC BENEFIT**

"Public use" is not synonymous with "public benefit." *Wisconsin River Imp. Co. v. Pier*, 118 N. W. 857, 862, 137 Wis. 325, 21 L. R. A. (N. S.) 538.

**PUBLIC BRIDGE**

As highway, see Highway.

"A bridge which constitutes a portion of the public road is necessarily a 'public bridge.'" *Early County v. Fain*, 58 S. E. 528, 529, 2 Ga. App. 288 (quoting and adopting *Tattnall County v. Newton*, 38 S. E. 48, 112 Ga. 780; *Howington v. Madison County*, 55 S. E. 942, 126 Ga. 700).

**PUBLIC BUILDING**

Any building, see Any.

As public road, see Public Road.

**Camp meeting building**

In St. 1877, p. 470, c. 98, creating a corporation for the purpose of holding personal and real property where a wharf, hotel, and other "public buildings" might be erected, and expressly empowering the corporation to erect and hold "public buildings," the term "public buildings" was used in such a sense as to include camp meeting buildings. *Nye v. Whittemore*, 79 N. E. 253, 256, 193 Mass. 208.

**High school building**

Under White's Ann. Pen. Code, art. 504, declaring it an offense to injure public property pertaining to any public building as defined in article 500, which states that the term "public building" embraces certain enumerated buildings, and all other buildings "held for public use" by any department or branch of government, an indictment charging injury to property pertaining to a public building, to wit, "the Colorado High School Building," should allege that such building was held for public use; it not being one of those enumerated in the statute. *Hughes v. State*, 128 S. W. 904, 59 Tex. Cr. R. 360.

**Schoolhouse**

A schoolhouse is a "public building," within Pen. Code, art. 500, defining the term "public building," with reference to the article prohibiting the injuring or defacing of a public building, as any building held for public use by any department of the government, state, county, or municipal. *Thurston v. State*, 125 S. W. 31, 32, 58 Tex. Cr. R. 308.

**PUBLIC BUSINESS****Telephone**

See, also, Public Interest; Public Service.

"A franchise to operate a telephone is a privilege to operate a 'public business.'" *Lowther v. Bridgeman*, 50 S. E. 410, 411, 57 W. Va. 306.

**Water supply**

The term "public business," as used in Rev. Laws 1905, § 2842, authorizing the classes of corporations specified in section 2841 to condemn such private property as may be necessary or convenient for the transaction of the public business for which they were formed, includes the construction of works for supplying the public with water. *Minnesota Canal & Power Co. v. Pratt*, 112 N. W. 395, 397, 101 Minn. 197, 11 L. R. A. (N. S.) 105.

**PUBLIC CALLING****Water supply**

Where defendant contracted with a city to furnish water for fire and other purposes, it did not thereby enter into a "public calling" in any sense different from the public duty to supply the city with water with which it could combat fire; nor was the water company's business a "dangerous calling," so as to impose upon it a duty to property owners within the city to furnish proper fire pressure so that for mere nonfeasance property owners damaged could recover against it in tort. *German Alliance Ins. Co. v. Home Water Supply Co.*, 174 Fed. 764, 769, 99 C. C. A. 258, 42 L. R. A. (N. S.) 1005.

**PUBLIC CAPACITY**

A borough which undertakes to supply water to its inhabitants acts in a private and not a "public capacity." *Carlisle Gas & Water Co. v. Carlisle Borough*, 67 Atl. 844, 845, 218 Pa. 554 (citing *Jolly v. Monaca Borough*, 65 Atl. 809, 216 Pa. 345; *Baily v. City of Philadelphia*, 39 Atl. 494, 184 Pa. 594, 39 L. R. A. 837, 63 Am. St. Rep. 812).

"A public service corporation is to be considered in two aspects. It has duties which it owes to the public and which it must perform. It has other duties not of a public nature which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation." A public service corporation in the performance of duties not of a public nature, though incidental to those of a public character, stands on the same footing as a private corporation. Thus where a railroad company maintained tracks in its round-house yard on which it stored, blew out, cleaned, and fired engines while not in use and in the open air, which constituted a nuisance to adjoining property, the railroad's acts were committed in its private and not in its "public capacity," so that it was liable

to the adjoining property owners for the damage sustained, without reference to whether its conduct was negligent or not. *Terrell v. Chesapeake & O. Ry. Co.*, 66 S. E. 55, 57, 110 Va. 340, 32 L. R. A. (N. S.) 371 (quoting *Townsend v. Norfolk Ry. & Light Co.*, 52 S. E. 970, 105 Va. 22, 4 L. R. A. [N. S.] 87, 115 Am. St. Rep. 842, 8 Ann. Cas. 558).

**PUBLIC CARRIER**

A "public common carrier" of passengers is distinguished from private carriers by the franchises conferred upon it, and the obligations, restrictions, and liabilities with which it is charged, all flowing from considerations of public policy. It must carry all alike and for a reasonable compensation, furnish reasonable accommodations, must continually operate its line and submit to reasonable regulations. It is justly held to the highest degree of care and skill. *Indianapolis Traction & Terminal Co. v. Lawson*, 143 Fed. 834, 837, 74 C. C. A. 630, 5 L. R. A. (N. S.) 721, 6 Ann. Cas. 666.

**PUBLIC CHARGE****Prisoner**

The provision of the statute for the deportation of aliens "likely to become a public charge" is not limited to likelihood to become a pauper, but extends to likelihood to become periodically inmates of prisons as a result of crime. *United States ex rel. Freeman v. Williams*, 175 Fed. 274, 275.

**PUBLIC CHARITY**

See Buildings Used for Public Charity; Purely Public Charity.

See, also, Charity.

"A 'public charity,' whether incorporated or not, is but a trustee, and is bound to apply its funds in the furtherance of the charity and not otherwise." And so a student, injured by leaping from a burning dormitory, cannot maintain a cause of action against the educational institution of which the building was a part, on the ground of its negligence in failing to supply fire escapes, where all the property belonging to the institution was placed with it in trust for public charity. *Abston v. Waldon Academy*, 102 S. W. 351, 354, 118 Tenn. 24, 11 L. R. A. (N. S.) 1179 (quoting and adopting definition in *Fire Ins. Patrol v. Boyd*, 15 Atl. 553, 120 Pa. 624, 1 L. R. A. 417, 6 Am. St. Rep. 745).

The character of an institution as a "public charity" is not affected by charging those able to pay for use of its rooms. *Jensen v. Maine Eye & Ear Infirmary*, 78 Atl. 898, 899, 107 Me. 408, 33 L. R. A. (N. S.) 141.

A gift to a town toward the erection of a building for the sick and poor, those without homes, constituted a "public charity." *Bowden v. Brown*, 86 N. E. 351, 352, 200 Mass. 269, 128 Am. St. Rep. 419 (citing and adopt-

ing *Richardson v. Mullery*, 86 N. E. 319, 200 Mass. 247).

Where the main, if not exclusive, purpose is to relieve persons interested in the fund of a volunteer fire department, a "public charity" is not created. The distinctive characteristics of a public charity are that its funds are derived from gifts and devises, and not from fees, dues, and assessments, and that it is not confined to privileged individuals but is open to the indefinite public. *Hopkins v. Crossley*, 101 N. W. 822, 823, 138 Mich. 561 (citing *Bangor v. Rising Virtue Lodge No. 10, Free and Accepted Masons*, 73 Me. 428, 40 Am. Rep. 369).

#### Church

Congregational and Baptist Churches are public charitable societies within Laws 1895, c. 66, which exempts from taxation property of such societies devoted to public charity. *Carter v. Eaton*, 78 Atl. 643, 645, 75 N. H. 560.

"Public charity" is a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burden of government. A religious corporation, incorporated under the act providing for the incorporation of Methodist Episcopal Churches and administering a charitable trust not created by the grantor of its property, is liable for the negligence of its agents. *Bruce v. Central Methodist Episcopal Church*, 110 N. W. 951, 147 Mich. 230, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150.

#### Education

A will devised a house to the trustee, and provided that it should be kept open, free of charge, to visitors wishing to see the collection of household antiquities, though no public meetings or large crowds should be admitted therein, and that the garden attached should be used for cultivating flowers, etc., useful in the study of botany, and the ground should be kept open for use by the public and by students of botany in public or private schools. The will also provided for the employment of an instructor in botany, to encourage its study in the town, and that the lectures therein should be free, subject to certain necessary conditions. The house is a good example of the architecture of the Revolutionary period, and would be valuable and interesting as a museum, and the grounds could be used as a small public park. Held, that the gift of the house and grounds was for educational purposes, so as to constitute a "public charity," notwithstanding the motive in making it was to establish a perpetual memorial to testator's family. *Richardson*

*v. Essex Institute*, 94 N. E. 262, 263, 208 Mass. 311, 21 Ann. Cas. 1158.

A gift for educational purposes does not cease to become a "public charity," because its benefits are enjoyed only by the residents of the town in which the charity is situated. *Richardson v. Essex Institute*, 94 N. E. 262, 263, 208 Mass. 311, 21 Ann. Cas. 1158.

Gifts for educational purposes are "public charities." A bequest to the pastor of a certain church, to be used by the pastor for the purpose of helping to establish a school for the education of Catholic boys and for helping to educate young men of the parish for the priesthood, and a gift to a corporation for the purpose of helping to educate poor Catholic children, are gifts to a "public charity," and are not invalid as too indefinite in the designation of beneficiaries. *McDonald v. Shaw*, 98 S. W. 952, 955, 81 Ark. 235.

As defined in *Troutman v. De Boissiere Odd Fellows' Orphans' Home & Industrial School Ass'n*, 71 Pac. 286, 66 Kan. 1, "a 'public charity' is a gift to a public object which the state itself, with public resources, should, or lawfully might, foster." "But it cannot be said that the court intended to decide that every public charity must be such as the state may maintain by public taxation. The real point decided was that in the trust there being considered the beneficiaries were limited to such an extent that the gift could not be regarded as a public charity." A bequest in trust to the trustees of an educational institution, to be held by them as a permanent fund for the higher education of young men, to be selected by such trustees, for the Christian ministry, creates an educational trust, which is a "public charity." *Trustees of Washburn College v. O'Hara*, 90 Pac. 234, 236, 75 Kan. 700.

#### Fire insurance patrol

The Fire Insurance Patrol of the City of New Orleans is not a public charitable association and is responsible in damages for the negligence of its servants in driving its wagon into a truck of the fire department, though both may have the same rights of way in the streets. *Rady v. Fire Ins. Patrol of New Orleans*, 52 South. 491, 492, 126 La. 273, 139 Am. St. Rep. 511.

#### Home

A corporation was incorporated under Pub. St. 1882, c. 115, to provide a home for working girls at moderate cost. Its officers serve without compensation, and the funds to buy an equity in real estate, to equip a hospital, and to furnish parlors were the gifts of friends. Working girls are furnished a homelike place in which to live at prices for board, washing, and lodging, as cheap as or cheaper than could be elsewhere obtained by them under similar surroundings as to respectability and incentives to the proper con-

duct of life. A matron and resident nurse, paid by the corporation, are in constant attendance, while free medical attendance is furnished by physicians serving on the hospital staff without pay. A library, with weekly entertainments and lectures during the winter, are provided. Held, that the corporation is a "public charity." *Thornton v. Franklin Square House*, 86 N. E. 909, 910, 200 Mass. 465, 22 L. R. A. (N. S.) 486.

### Hospital

A hospital is not the less of a public character within Hurd's Rev. St. 1905, p. 261, c. 23, making it lawful for a county to contribute to the support of any public nonsectarian hospital located within its limits, by the fact that those patients received by it who are able to pay are required to do so, or that it receives contributions from outside sources, so long as all the money it receives is devoted to the general purposes of charity, and none of it goes to the benefit of any private individual or corporation organized for profit. *Fordham v. Thompson*, 144 Ill. App. 342, 347.

A corporation conducted a hospital, and its only source of income was from donations and receipts from patients who were able to pay for treatment received. It received all patients who applied, and gave free accommodations to all patients unable to pay, and the treatment of free cases was the same as that of pay patients, except that the free cases were accommodated in wards instead of in private rooms. Any regular medical practitioner was privileged to send patients to the hospital and treat them there, and the institution made no profits. Held, that the institution was within Hurd's Rev. St. 1905, c. 120, § 2, exempting from taxation "all property of institutions of public charity." *German Hospital of Chicago v. Board of Review of Cook County*, 84 N. E. 215, 216, 233 Ill. 246.

A corporation maintaining a hospital and dispensary, a school of medicine and training school for nurses, which charges no tuition fee except for the postgraduate course in medicine, and then only sufficient in amount to pay the cost of maintenance, and which receives all persons within its capacity presenting themselves for treatment, regardless of whether they are able to pay the cost of their keeping and treatment, and charging those only who are able to pay, is an "institution of public charity," within the statute exempting the property of such institutions from taxation. *Board of Review of Cook County v. Chicago Polyclinic*, 84 N. E. 220, 221, 233 Ill. 268.

Within the statute exempting from taxation all property of institutions of public charity, when actually and exclusively used for such charitable purposes, and not used with a view to profit, is a hospital of an order of Sisters organized not for pecuniary

profit, but for conducting hospitals and training schools for nurses—the women who become members of the corporation conveying all their property to it, and binding themselves to engage in caring for sick and injured patients in its hospitals for the remainder of their lives, for which they receive nothing but their board, clothing, and a room in which to live; the corporation and hospital being controlled by a board selected from among the Sisters; all sick or injured, not having contagious diseases, who seek admission to the hospital, being received and cared for, without reference to creed, race, or financial condition, except that those able to pay have the more desirable rooms; all money received from every source being used in maintaining, extending, and improving the hospital; and those admitted to the training school being given only their support for their services; and this, though only a small per cent. of the patients received are charity patients, all such who apply being received, and though only physicians who subscribe to and are governed by the principles of medical ethics promulgated by the American Medical Association are permitted to practice in the hospital, it not being conducted for the purpose of benefiting the physicians of that class. *Sisters of Third Order of St. Francis v. Board of Review of Peoria County*, 83 N. E. 272-274, 231 Ill. 317.

### Mass

A testamentary gift for masses for the repose of the souls of persons named and of the testator, to be said according to directions as to time and place of persons named, is not a "private trust" within St. 1898, § 2081, defining the purposes for which trusts may be created but is a "public charity." In re *Kavanaugh's Estate*, 126 N. W. 672, 674, 143 Wis. 90, 28 L. R. A. (N. S.) 470.

### Orphan asylum

A testamentary trust to establish and maintain an orphan's asylum for the maintenance and education of the orphan children under 17 years of age of members of a secret society is a "public charity," and valid, within Ky. St. § 317 (Russell's St. § 2300), relating to gifts to charity. *Green's Adm'rs v. Fidelity Trust Co. of Louisville*, 120 S. W. 283, 285, 134 Ky. 311, 20 Ann. Cas. 861.

### Public park

A gift of a public park constitutes a "public charity." *Richardson v. Essex Institute*, 94 N. E. 262, 264, 208 Mass. 311, 21 Ann. Cas. 1158.

## PUBLIC CONCERN

The term "matters of public concern," within Rev. Code 1905, § 6751, declaring that the Supreme Court shall exercise its original jurisdiction only in cases of strictly public concern, as involves questions affecting the sovereign rights of the state or its franchises or privileges, is not a matter capable



of an exact definition, but each case must be governed by its own facts. A question involving the construction of a law to determine whether the Governor shall appoint or the people elect a judicial officer involves the question whether a law of a public nature, and necessarily affecting the state at large, is properly construed as contemplating immediate action by the Governor in making an appointment or a delay in filling an office until an election is had and the Supreme Court has jurisdiction on a private relator's appeal to it. *State v. Burr*, 113 N. W. 705, 707, 16 N. D. 581.

### PUBLIC CONVENIENCE

See, also, Public Service Facilities and Conveniences.

A clause in the Constitution and an act passed by the First Legislature after adoption of the Constitution relating to the same subject, like statutes in pari materia, are to be construed together, and Act May 20, 1908 (Laws 1908, c. 18), impliedly construing public "facilities" or public "conveniences," as used in Const. art. 9, § 18, giving the Corporation Commission power to prescribe and enforce rules requiring transportation companies to establish such public facilities and conveniences as may be reasonable and just, to include a union passenger depot, is entitled to great weight. *Missouri, O. & G. Ry. Co. v. State*, 119 Pac. 117, 119, 29 Okl. 640.

### PUBLIC CONVEYANCE

#### Automobile

A clause in an accident insurance policy, giving double indemnity if injuries are received while riding as a passenger in a "public conveyance" propelled by gasoline, covers injuries received while riding in an automobile hired from a taximeter cab company, engaged in hiring automobiles for public use, and driven by a chauffeur of the company. *Primrose v. Casualty Co. of America*, 81 Atl. 212, 213, 232 Pa. 210, 37 L. R. A. (N. S.) 618.

#### Street car

Rev. St. 1899, § 2864, provides that whenever any person shall die from the negligence of any officer, agent, or employé whilst running or managing any locomotive, "car," or train of cars, etc., or of any driver of any "public conveyance" whilst in charge of the same as driver, the master, or he who owns such railroad, locomotive, car, or other public conveyance at the time, shall forfeit for every person or passenger so dying the sum of \$5,000. This was amended by the act of 1905, which specifically mentioned street cars. Held that, irrespective of the act of 1905, said section applied to street railroads. The "public conveyance" mentioned in the statute may be composed of steam engines and cars. The cars may be propelled by horse power, by electricity, or by steam.

The conveyance may be a coach, propelled by horse power, or it may be an automobile. The words of the statute, "whilst running, conducting, or managing any locomotive, 'car,' or train of cars," are to be construed as though the statute read "whilst running, conducting, or managing any car," or "whilst running, conducting, or managing any train of cars." This construction of the statute makes it obvious that a street car is included in the term "public conveyance." *Higgins v. St. Louis & S. R. Co.*, 95 S. W. 863, 865, 197 Mo. 300.

### PUBLIC CORPORATION

See Public Improvement Corporation; Public Quasi Corporation; Public Service Corporation; Quasi Public Corporation.

As municipal corporation, see Municipal Corporation.

A "public corporation" is one created for political purposes, with political powers, to be exercised for purposes connected with the public good, in the administration of civil government, and is an instrument of the government, subject to control of the Legislature, the term being synonymous with "municipal corporation" or "political corporation." *Phillips v. City of Baltimore*, 72 Atl. 902, 905, 110 Md. 431, 25 L. R. A. (N. S.) 711 (quoting 6 Words and Phrases, p. 5781).

A "public corporation" is one having for its object the administration of a portion of the powers of government, delegated to it for that purpose. Such are municipal corporations. *Hammond v. Clark*, 71 S. E. 479, 487, 136 Ga. 313, 38 L. R. A. (N. S.) 77.

"Public corporations" are synonymous with "municipal corporations." *Phillips v. Mayor, etc., of Baltimore*, 72 Atl. 902, 905, 110 Md. 431, 25 L. R. A. (N. S.) 711 (citing 6 Words and Phrases, p. 5781).

"Public corporations" are created for public purposes, and the property controlled by them is devoted to the objects for which they are created. The corporations have no private beneficial interest either in the franchises granted or the property controlled. *Trustees of Carrick Academy v. Clark*, 80 S. W. 64, 67, 112 Tenn. 483.

Every county is a body corporate or "public corporation" created by the state as a means of exercising a portion of the state's political power by local administration, on which are imposed a part of the sovereign authority and duty to insure domestic tranquility and promote the general welfare within the territorial limit to which they are assigned. They are bodies corporate and may sue and be sued in courts of record. *Chambers County v. Lee County*, 55 Ala. 534, 537.

#### Legislative control

"Public corporations" are but parts of the machinery employed in carrying on the

affairs of the state, and they are subject to be changed, modified, or destroyed, as the exigencies of the public may demand. \* \* \* The Legislature has supreme power over them, and may divide, alter, enlarge, or abolish them, as, in the legislative judgment, the public welfare may require," subject to the provisions of the national and state Constitutions. *Charlstran v. Board of Education of Township High School Dist. No. 13*, 91 N. E. 712, 714, 244 Ill. 470; *City of Columbus v. Union Pac. R. Co.*, 137 Fed. 869, 873, 70 C. C. A. 207.

Counties are "public corporations" or quasi corporations created by the state as a means of exercising its political power with the aid of local administrations, so as to insure domestic tranquillity and promote the general welfare. They are subject to the control and direction of the Legislature in which chiefly the sovereignty of the state is represented and exercised. *Marengo County v. Coleman*, 55 Ala. 605, 607.

#### Public purpose

The class of corporations denominated "public" is founded for public purposes and generally has for its object the government of a portion of the state and is, therefore, endowed with a portion of political powers. *Rhodes v. Love*, 69 S. E. 436, 437, 153 N. C. 468.

#### As person

See Person.

#### Agricultural society

An agricultural association, incorporated under St. 1880, p. 62, c. 69, dividing the state into agricultural districts, authorizing a certain number of persons within such a district to organize such an association, its real estate to be used for the purpose of holding exhibitions of the live stock and products of the district, with the view to the improvement of all industries in the same, providing for a district board of agriculture, to be appointed by the Governor, and to qualify by oath, and declaring such an association, when formed, to be a state institution, and that such board shall have exclusive control and management of the association for and in the name of the state, is a "public corporation" created for the local administration of a part of the affairs of the state. *People ex rel. Post v. San Joaquin Valley Agricultural Ass'n*, 91 Pac. 740, 744, 151 Cal. 797.

#### Armory

Civ. Code, § 2856, defines "public corporations" as those formed or organized for the government of a portion of the state. A corporation incorporated for the purpose of erecting an armory building is not a public corporation. *Arrison v. Company D*, North Dakota National Guard, 98 N. W. 83, 84, 12 N. D. 554, 1 Ann. Cas. 368.

#### Bank

The state bank and its branches, being the exclusive property of the state, are "public corporations." *Branch Bank of State at Mobile v. Collins*, 7 Ala. 95, 101 (citing *Aug. & A. Corp.* 23; *Trustees of University of Alabama v. Winston* [Ala.] 5 Stew. & P. 17).

#### Drainage district

A drainage district is a "public corporation." The Attorney General may file an information, on behalf of the people, questioning the exercise of corporate powers by a drainage district. Lapse of time does not bar a proceeding in the nature of quo warranto by the Attorney General to question the exercise of corporated powers by a drainage district, as the public are not barred either by the laches or acquiescence of individuals, unless it appears that the proceeding is solely in the interest of the relators. *People ex rel. Cullen v. Anderson*, 87 N. E. 1019, 1021, 239 Ill. 266 (citing *Payson v. People ex rel. Parsons*, 51 N. E. 588, 175 Ill. 267; *People v. Gary*, 196 Ill. 310, 63 N. E. 745; *People ex rel. Misner v. Harker*, 64 N. E. 253, 197 Ill. 409; *People v. Burns*, 72 N. E. 374, 212 Ill. 227; *Soule v. People*, 69 N. E. 22, 205 Ill. 618).

While drainage districts are not strictly municipal corporations, they are "public corporations" organized for a special and limited purpose, and the rules of law governing the dissolution of municipal corporations must be held to apply to them. *People ex rel. Gauven v. Niebruegge*, 91 N. E. 115, 117, 244 Ill. 82.

A drainage district is a "public corporation," and not a private one, and the county court administers its entire affairs. *State ex rel. Applegate v. Taylor*, 123 S. W. 892, 913, 224 Mo. 393; *State ex rel. Compton v. Chariton Drainage Dist. No. 1*, 90 S. W. 722, 724, 192 Mo. 517.

A drainage district is a "public corporation," being a political subdivision of the state, which exercises prescribed governmental functions. *Squaw Creek Drainage Dist. No. 1 v. Turney*, 138 S. W. 12, 15, 235 Mo. 80.

#### Fire insurance company

Fire insurance companies are not "public or quasi public bodies." *McCarter v. Firemen's Ins. Co.*, 61 Atl. 705, 706, 70 N. J. Eq. 291.

#### Hospital

A "public hospital" may be defined in general as an institution owned by the public and devoted chiefly to public uses and purposes. A hospital created and endowed by the government for general charity is a "public corporation." *Hogan v. Hospital Co.*, 59 S. E. 944, 945, 63 W. Va. 84.

#### Railroad company

A railroad company as a common carrier is a "public institution" only in a qualified

sense. *Atlanta Terminal Co. v. American Baggage & Transfer Co.*, 54 S. E. 711, 714, 125 Ga. 677. See, also, *Mannington v. Hocking Val. R. Co.*, 183 Fed. 133, 135.

#### Reclamation district

A reclamation district is a public, as distinguished from a private, corporation, acting as a state agency invested with limited powers, but it is not a municipal corporation possessing in any degree general powers of government, though, within the limits of the authority granted to it, it exercises public functions. *Metcalf v. Merritt*, 111 Pac. 505, 14 Cal. App. 244.

#### University or college

The colleges or universities founded and incorporated by the state to take and expend the aid of the national government to instruction in agriculture and mechanic arts have usually been considered "public corporations"; and the same is true, as a rule, of state universities or other institutions of learning established by the state and controlled by it. Hence the *Wyoming Agricultural College*, created and incorporated by Act Jan. 10, 1891 (Acts 1890-91, p. 373, c. 92), making the same subject to state visitation, was a public corporation, whose charter did not constitute a charter which the state was prohibited from impairing by a subsequent act repealing the statute under which it was organized. *State ex rel. Wyoming Agricultural College v. Irvine*, 84 Pac. 90-102, 14 Wyo. 318.

"The Regents of the University of Idaho," created a corporation by the laws of the territory and the Constitution of the state, is a "public corporation" and an agency of the state, and as such is not subject to garnishment in the absence of a statute clearly evincing the purpose of the Legislature to subject public corporations to such process; and the general provision that any "person" may be garnished is not sufficient for that purpose, although the word "person" is expressly defined by the statutes as including a corporation; such provisions being generally construed as restricted to private or business corporations. *Moscow Hardware Co. v. Colson*, 158 Fed. 199-201.

#### Water district

The Augusta water district created a body politic and corporate by Private and Special Laws 1903, c. 334, for the purpose of supplying the inhabitants of the district and of enumerated towns and cities with water, is a "public municipal corporation," and by virtue of Rev. St. c. 9, § 6, its property appropriated to public use is exempt from municipal taxation. *Augusta v. Augusta Water Dist.*, 63 Atl. 663, 664, 101 Me. 148.

#### PUBLIC DANCING ACADEMY

Laws 1909, c. 400, defining a "public dancing academy" as any room in which

dancing is taught for compensation, and requiring public dancing academies to be licensed, is general in its terms, and affects adults and minors, and is invalid because it arbitrarily selects places where dancing is taught and classifies them, but leaves unaffected rooms where public dancing is indulged in without the aid of an instructor, and it cannot be sustained on the ground that it protects minors instructed at dancing academies. *People ex rel. Duryea v. Wilber*, 90 N. E. 1140, 1142, 198 N. Y. 1, 27 L. R. A. (N. S.) 357, 19 Ann. Cas. 626.

#### PUBLIC DECENCY

See *Openly Outrage Public Decency*.

#### PUBLIC DETECTIVE

A special agent of the state department to detect violations of the liquor tax law is a "public and official detective," as distinguished from a private detective. The court should not direct the jury that special agents must not in any sense be treated as detectives, nor that, as a matter of law, the testimony of special agents is entitled to the same weight as that of other disinterested witnesses. The relation of the special agents to the case and their interest therein, if any, should be left for the consideration of the jury. *Cullinan v. Furthman*, 79 N. E. 989, 990, 187 N. Y. 160.

#### PUBLIC DIVERSION

See, also, *Public Amusement*.

The term "public diversion," as used in Gen. St. 1902, § 1370, making it a penal offense to be present at any concert of music, dancing, or other public diversion on Sunday, includes shows or entertainments. *State v. Ryan*, 69 Atl. 536, 537, 80 Conn. 582.

#### PUBLIC DIVISION

As ward, see *Ward*.

#### PUBLIC DOCUMENT

See, also, *Public Record*.

Pamphlets issued by the Department of Agriculture, published under the direction of Congress, provided for by Appropriation Act April 23, 1904, c. 1486, 33 Stat. 294, and by Joint Resolutions of the Senate and House of Representatives, April 27, 1904, 33 Stat. 590, relating to drainage investigations by federal officers and applying to a system of drainage in question, and printed by the government printing office, in 1905, under authority of the Office of Experiment Stations of Irrigation and Drainage Investigations, were admissible as "public documents," under Code Civ. Proc. § 528, defining public documents to be all those publications and maps printed by order of the legislative assembly or Congress, or either house thereof, and declaring that all such documents shall be admissible in evidence.

In re Yankton-Clay County Drainage Ditch, 137 N. W. 608, 611, 30 S. D. 79.

Under Rev. Laws, § 1795, providing for the deposit of ballots and election returns in the office of the clerk of county commissioners, and declaring that ballots so deposited shall not be subject to the inspection of any one except in cases of contested elections, and then only by the judge or body before whom the election is contested, ballots and election returns duly deposited are public documents within section 5409, providing that a public document in the custody of a public officer may be admitted in evidence by the certificate of the custodian thereof that it is genuine and authentic. State ex rel. Springmeyer v. Baker, 126 Pac. 345, 347, 35 Nev. 1.

Under V. S. 305, providing that the State Auditor shall require all bills presented to him for allowance to be fully itemized and accompanied as far as possible with vouchers which shall be kept in his office, bills against the state and vouchers accompanying the same, on being filed in the auditor's office, become "documents of a public nature," and may be proved by copy without production of the original. Clement v. Graham, 63 Atl. 146, 152, 78 Vt. 290.

#### Letter

A letter of the commissioner of the General Land Office with reference to lands within the limits of a railroad grant is a "public document," of which the courts will take judicial notice. Southern Pac. R. Co. v. Lipman, 83 Pac. 445, 450, 148 Cal. 480.

#### Prescription

Prescriptions of physicians under which a druggist sold intoxicating liquor, which he is required to preserve by statute, are quasi public documents, and the constitutional privilege is not violated by compelling a druggist, indicted for unlawfully selling liquor, to produce them in court to be used as evidence against him. State v. Davis, 69 S. E. 639, 68 W. Va. 142, 32 L. R. A. (N. S.) 501, Ann. Cas. 1912A, 996.

#### Report

Under Ky. St. §§ 2725, 2739, requiring the inspector of mines to keep a record of inspections, and that a certified copy shall be admissible in evidence in any court, etc., reports of the inspection of mines are official "public documents," and a properly certified copy thereof is admissible in evidence. Henderson Min. & Mfg. Co. v. Nicholson (Ky.) 126 S. W. 139, 141.

#### PUBLIC DOMAIN

See, also, Public Land.

"Public domain" is defined by Webster to be the territory belonging to a state or general government; public lands. This is the general signification of the words according to the approved usage of the lan-

guage. The idea of "public domain" excludes that of private ownership. State v. Cunningham, 90 Pac. 755, 756, 35 Mont. 547.

"The term 'public domain,' in its broadest sense, comprehends all lands and waters in the possession or ownership of the United States, and including lands owned by the several states, as distinguished from lands possessed by private individuals or corporations." Winters v. United States, 143 Fed. 740, 748, 74 C. C. A. 666 (quoting Kinney, Irrigation, § 124).

#### PUBLIC DUTY

See, also, Public Service.

The furnishing of electric light and energy to private consumers is not a "public duty or function," within the meaning of such term as used in a city ordinance prescribing the formalities for the adoption of ordinances providing for the lighting of streets or public places, etc., the construction and operation of street railroads, etc., or purporting to award a contract covering the performance or discharge of any public duty or function. Such a business may properly be called private as contradistinguished from a municipal or public duty or function, and also in the sense that it is conducted for private gain. Strohmeier v. Consumers' Electric Co., 35 South. 723, 724, 111 La. 506.

A driver of a city cart, engaged in hauling trash and dirt for the city, is not engaged in a "public or governmental duty," which is a duty given by the state to a city as a part of the state's sovereignty, to be exercised by the city for the benefit of the public living within and without the corporate limits, but is engaged in a "private or corporate duty," and for his negligence the city is liable. City of Pass Christian v. Fernandez, 56 South. 329, 100 Miss. 76, 39 L. R. A. (N. S.) 649.

#### PUBLIC ELECTION

##### Primary election

A primary election for nomination of county officers is a "public election," and any conduct on the part of the managers thereof which interferes with the freedom or purity thereof is punishable at common law. State v. Cole, 72 S. E. 221, 223, 156 N. C. 618.

#### PUBLIC ELEVATOR

An elevator in which the grain of different owners is kept entirely separate, but in which the grain of the same owner delivered at different times is mixed together, except where he directs otherwise, is not a "public elevator," within the meaning of a statute providing "that all elevators or warehouses located in this state in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which the

grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved, and doing business for a compensation, are hereby declared public warehouses." *State ex rel. Dawson v. Atchison, T. & S. F. Ry. Co.*, 125 P. 98, 101, 87 Kan. 348.

### PUBLIC EMPLOYMENT

See Quasi Public Employment.

### PUBLIC ENEMY

"The common-law liability of a common carrier, as an insurer of goods carried, did not extend to losses caused by the acts of 'public enemies'; and the term 'enemies' was understood to mean the public enemies of the country of the carrier, and not of the owner of the goods, and did not include thieves, robbers, or those engaged in mobs, riots, or insurrections." *Hutchinson v. United States Exp. Co.*, 59 S. E. 949, 951, 63 W. Va. 128, 14 L. R. A. (N. S.) 393 (quoting *Moore, Com. Carr.* 225).

The term "public enemy," under the rule that a carrier is liable for the loss of goods except by act of God or the public enemy, means enemy of the country, and does not include mobs. *Pittsburg, C., C. & St. L. Ry. Co. v. City of Chicago*, 89 N. E. 1022, 1025, 242 Ill. 178, 44 L. R. A. (N. S.) 358, 134 Am. St. Rep. 316.

### PUBLIC EXHIBITION

See, also, Public Show.

An entertainment provided by the management of a restaurant, consisting in dancing, singing, etc., does not constitute a "public exhibition," within Greater New York Charter (Laws 1897, c. 378) §§ 1472, 1473, 1474, which make it a misdemeanor to conduct a public exhibition without a license, where the entertainment constitutes a gratuitous contribution by the management to the guests' entertainment. *People v. Martin*, 137 N. Y. Supp. 677, 678.

An exhibition or an amusement is public when the public are invited and admitted to it upon complying with the terms of admission. The most usual condition is the payment of a small sum of money, but the imposition of other terms not prohibitive, but reasonable in themselves, and appropriate to the peculiar kind of exhibition, does not necessarily annul the public feature. Under Rev. Laws, c. 102, § 172, providing for the licensing of public amusements and exhibitions, a "public exhibition" is one where the public generally are admitted for the purpose of witnessing the exhibition in the same manner as to theater or other places of public amusement; and the fact that persons buying tickets were compelled to sign applications to become members of an alleged club giving the exhibition is immaterial. *McCabe v. Whitman*, 73 N. E. 534, 535, 187 Mass. 484.

### PUBLIC FACILITIES

See, also, Public Service Facilities and Conveniences.

A clause in the Constitution and an act passed by the First Legislature after adoption of the Constitution relating to the same subject, like statutes in pari materia, are to be construed together, and Act May 20, 1908 (Laws 1908, c. 18), impliedly construing public "facilities" or public "conveniences," as used in Const. art. 9, § 18, giving the Corporation Commission power to prescribe and enforce rules requiring transportation companies to establish such public facilities and conveniences as may be reasonable and just, to include a union passenger depot, is entitled to great weight. *Missouri, O. & G. Ry. Co. v. State*, 119 Pac. 117, 119, 29 Okl. 640.

### PUBLIC FRANCHISE

#### Street

A public street is a "public franchise," and is not such property as a corporation may take for its own use under the general power of eminent domain. It is a franchise which cannot be violated, except by express legislative authority. In re South Western State Normal School, 26 Pa. Super. Ct. 99, 104.

### PUBLIC FUNDS

See, also, Money of the City; Public Money.

The power of a city to grade streets or lay sewers or water pipes at the cost of abutting property is not strictly a governmental function, and in the exercise of the power it acts in its proprietary character, and the money collected from the abutting property owners is not "money of the city" within its charter, for it is only money raised by the operation of a general law that becomes money of the city, or "public funds," and subject to the charter provision as to the deposit thereof. *City of Seattle v. Stirrat*, 104 Pac. 834, 836, 55 Wash. 560, 24 L. R. A. (N. S.) 1275.

*Kirby's Dig.* § 1990, makes it unlawful for any county officer having custody or possession of public funds, by virtue of his office, to use such funds for his own purpose or to lend them to a third person, etc. Section 1994 provides that in prosecutions under the act it shall not be necessary for the indictment to describe particularly the kind or denomination, date or number of the funds, but it may describe them generally. Section 1993 defines "public funds," as used in the act, to mean "all lawful money of the United States, and all state, county, city, town or school warrants or bonds, or other paper, having a money value, belonging to the state, or to any county, city, incorporated town or school district therein." Held, that an indictment under the act for embezzlement, charging that, by virtue of his office as county treasurer, accused had in his possession a

stated amount in gold, silver, and United States currency, a more particular description to the grand jury unknown, such money being the property of A. county, and that, having in his possession such money and public funds, he embezzled and converted a certain amount thereof to his own use, and in a second count charging accused with being, by virtue of his office, a receiver of public funds of the county, and with having in his possession the aforesaid sum of money, personal property of A. county, describing it as in the first count, and designating it as public funds of the county of A., and that, having resigned as treasurer and the county court having stated his account and directed him to pay to his successor in office a specified sum, found due on his settlement, feloniously and fraudulently converted such amount to his own use and benefit, sufficiently described the public funds alleged to have been embezzled. *Ireland v. State*, 136 S. W. 947, 951, 99 Ark. 32.

### PUBLIC GARAGE

A person conducting a public automobile repair shop, and also storing the automobiles of his customers without charge, but with the expectation of doing their repair work when needed, is liable to the tax imposed by Laws 1910, c. 96, on each "public garage," since he is the owner of a depot for the storage and repairing of automobiles for the use of the public, and it is immaterial whether the garage is run in connection with, and forms a part of, the repair shop, or whether the repair shop is an incident to the garage. *Lawrence v. Middleton (Miss.)* 60 South. 130, 131.

### PUBLIC GATHERING

A barbecue on the 4th of July, at which people are assembled to the number of 400 or 500, is a "public gathering," within the meaning of Pen. Code 1895, § 342, which declares it to be a misdemeanor for one not an arresting officer in the discharge of his duties, or a member of his posse, to carry about his person a deadly weapon to any public gathering, except at militia muster grounds. *Wynne v. State*, 51 S. E. 636, 637, 123 Ga. 566.

### PUBLIC GOOD

In Roseburg City Charter, c. 5, § 34, authorizing the city "to license and regulate all such callings, trades and employments as the public good may require," the words "public good" are sufficiently broad to include the raising of revenue if, in the judgment of the city council, revenue is needed. *Abraham v. City of Roseburg*, 105 Pac. 401, 402, 55 Or. 359, Ann. Cas. 1912A, 597.

### PUBLIC GRANT

"A grant conferring state title to land has a technical meaning, under Virginia and West Virginia law. A 'public grant,' not a private one, means an instrument by which

the state, as sovereign, passes to an individual title to land before vested in the state. 'A public grant is the mode and act of creating in an individual title to land which had previously belonged to the government.' A tax deed is not a 'grant,' under the second classification of persons entitled to transfer of state title in article 13, § 3, of the Constitution." *State v. Harman*, 50 S. E. 828, 833, 57 W. Va. 447 (citing 1 Bouv. Law Dict. 721; 2 Minor, Inst. 985).

### PUBLIC GROUNDS

The words "public ground," when used upon a plat of ground, establishes an unrestricted dedication of public use. *Morrow v. Highland Grove Traction Co.*, 69 Atl. 41, 43, 219 Pa. 619, 123 Am. St. Rep. 677 (quoting *Commonwealth v. Connellsville Borough*, 50 Atl. 825, 201 Pa. 154).

#### School lands

Laws 1873, p. 398, provides for the formation of corporations, and authorizes corporations organized to operate railroads, etc., to condemn land and appropriate portions of public highways or "public grounds." Held, that a corporation had no authority to condemn state school lands; they not being "public grounds," within the meaning of the statute. *State ex rel. Attorney General v. Superior Court of Chelan County*, 78 Pac. 1011, 1012, 36 Wash. 381.

### PUBLIC HATRED

A publication charging that plaintiff's daughter attempted to become the master of her household, and that this quality was inherited from plaintiff, who had her husband in abject subjection, was actionable under the statute defining libel as a defamation in writing tending to expose one to public hatred, "public hatred" being public or general dislike or antipathy, and "hatred" meaning to have little regard for or to despise, and the conduct attributed to plaintiff is such as to bring a woman into general disrepute and ridicule. *McDavid v. Houston Chronicle Printing Co. (Tex.)* 146 S. W. 252, 259.

### PUBLIC HIGHWAY

See Highway.

### PUBLIC HOSPITAL

As public charity, see Public Charity.

As public corporation, see Public Corporation.

### PUBLIC HOTEL

Defendant was the keeper of a house for the entertainment of transient lodgers. In the due and regular course of his business, he let rooms to any one who applied and paid therefor certain stipulated prices, without special contract, for a single night or such longer period as they might desire, and the persons so hiring the rooms customarily inscribed their names and addresses in a



register kept in the office for that purpose, which office was in the charge of clerks and open at all hours of the day and night for the reception of guests. There was not maintained at or in connection with the house any facilities for supplying guests with food. Held, that the house was a "public hotel," rendering defendant liable as keeper thereof, for money stolen from a guest while in his room. *Nelson v. Johnson*, 116 N. W. 828, 829, 104 Minn. 440, 17 L. R. A. (N. S.) 1259.

## PUBLIC HOUSE

### Boarding house

The word "public," in the phrase "public boarding house," does not expand the term "boarding house" so as to make it nominative of a class of buildings not used as dwellings. In a boarding house the guest is under an express contract at a fixed rate for a certain period of time. Where a municipal water contract provided specified rates for service to dwellings, and defendant water company refused to furnish certain boarding houses at such rates, a plea alleging that such houses were "public boarding houses" did not show that they were the less boarding houses, nor exclude them from the class of buildings known as dwellings within the contract. Mayor, etc., of City of Birmingham *v. Birmingham Waterworks Co.*, 44 So. 581, 582, 152 Ala. 306.

A "public house" is for the entertainment of all who come lawfully and who pay regularly. It is not the same as a boarding house, which is for the accommodation only of those accepted as guests by the proprietor, and therefore is as much a private house as if there were no boarders. *Huffman v. State*, 92 S. W. 419, 49 Tex. Cr. R. 319 (quoting and adopting definition in *Commonwealth v. Cuncannon* [Pa.] 3 Brewst. 347).

### Jail

A jail house, in the sense that it is built and owned by the public, is a "public house," but this is not the sense which determines its character as to whether it is within Code 1896, § 4792, prohibiting gaming at a public house and specifying certain houses as public. Though a house may be built and owned by the public, it may nevertheless be private. A "public house" is one which is commonly open to the public, either for business, pleasure, religious worship, the gratification of curiosity, or the like. A jail, when subjected to this test, is not generally a "public house." Under Code 1896, § 4792, prohibiting gaming at a "public house," and specifying certain houses as public, any other houses except those specifically named are not per se "public houses," but may become such by force of circumstances, and whether they are public or not in a given instance is for the jury. *Lewis v. State*, 37 South. 99, 100, 140 Ala. 123.

## PUBLIC IMPROVEMENT

See Pertaining to Public Improvements. See, also, Local Improvement; Public Work; Street Improvement.

The construction and maintenance of bridges is a "public improvement" within Priv. Laws 1909, c. 204, requiring the submission to a popular vote of the question of the issuance of bonds by the town of Warsaw for sewerage and drainage systems and other public improvements. *Town of Warsaw v. Malone*, 75 S. E. 1011, 1012, 159 N. C. 573.

## PUBLIC IMPROVEMENT CORPORATION

### Waterworks company

A corporation furnishing water to the inhabitants of a town, and to the town for municipal purposes, including service to fire plugs, and occupying the streets of the town with its conduits, though the corporation has not been given the right of eminent domain, or any other right usually accorded to quasi public corporations, is a "corporation for public improvement," within the statute providing that the act authorizing the appointment of a receiver of an insolvent corporation shall not apply to a corporation for public improvement. *Thoroughgood v. Georgetown Water Co.*, 77 Atl. 720, 722, 9 Del. Ch. 84.

## PUBLIC INDECENCY

See Notorious Public Indecency.

## PUBLIC INSTITUTION

See, also, Public Corporation.

"Public institutions" are those which are created and exist by law or public authority, while "private institutions" are those which are created or established by private individuals for their own private purposes. Some public benefits or rights may result from the institutions of private individuals or associations. So, also, some private or individual rights may arise from public institutions. The only sensible distinction between public and private institutions is to be found in the authority by which, and the purpose for which, they are created and exist. Because, therefore, a corporation may fall under the denomination of private corporations, in the artificial distinction between public and private corporations, it is none the less a public or political institution. *Mannington v. Hocking Val. Ry. Co.*, 183 Fed. 133, 153 (quoting *Toledo Bank v. Bond*, 1 Ohio St. 623, 643).

### Medical college

The Medical College of Georgia is not a "public institution" of the state because designated by law as a branch of the University of Georgia, and hence is liable for the unlawful and unauthorized mutilation of the remains of a patient who died at the hospital

conducted by it, whether compensation for the board and treatment of such patient was received or not. *Medical College of Georgia v. Rushing*, 57 S. E. 1083, 1084, 1085, 1 Ga. App. 468.

### PUBLIC INTEREST

See, also, *Public Use (In Eminent Domain)*.

Under Rem. & Bal. Code, § 925, which provides that, in condemnation proceedings, whether the use is a public one, and whether the public interest requires the prosecution of the enterprise and what lands are necessary therefor are matters for the determination of the court, it cannot be objected to a proposed condemnation for power plant purposes that another plan would produce more power, where the proposed plan would produce an adequate supply, as "public interest" is measured by the "public use," in the absence of the presentation of any issue between the two plans by a proposal to adopt the more effective one. *State ex rel. Weyerhaeuser Lumber Co. v. Superior Court for Snohomish County*, 127 Pac. 591, 593, 71 Wash. 84.

A business is "affected with a public interest," where the one engaged in it is acting under a franchise, or has a virtual monopoly in it, or where from the nature of the business the one carrying it on is necessarily intrusted with the property or money of his customers, or where the business has been conducted in such manner that the public have adapted their business to the methods used; but the fact that a license is required does not make the business a public employment. *People v. Steele*, 83 N. E. 236, 238, 231 Ill. 340, 14 L. R. A. (N. S.) 861, 121 Am. St. Rep. 321; *City of Chicago v. Powers*, 83 N. E. 240, 231 Ill. 560.

### PUBLIC LAND

Claim to, see *Claim*.

Contest of claims to public lands, see *Contest*.

Entry on public lands, see *Enter—Entry On Public Lands*.

Improvement on public land, see *Improvement*.

Vacant public land, see *Vacant Land*.

See, also, *Pre-emption*; *Public Domain*; *School Land*.

The words "public land" have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made. *Northern Lumber Co. v. O'Brien*, 139 Fed. 614, 617, 71 C. C. A. 598 (citing *Bardon v. Northern Pacific R. Co.*,

12 Sup. Ct. 856, 145 U. S. 535, 36 L. Ed. 806; *Wilcox v. Jackson ex dem. McConnell*, 13 Pet. 498, 513, 10 L. Ed. 264; *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 741, 745, 23 L. Ed. 634; *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769; *Doolan v. Carr*, 8 Sup. Ct. 1228, 125 U. S. 618, 630, 31 L. Ed. 844; *Cameron v. United States*, 13 Sup. Ct. 595, 148 U. S. 301, 309, 37 L. Ed. 459; *Mann v. Tacoma Land Co.*, 14 Sup. Ct. 820, 153 U. S. 273, 284, 38 L. Ed. 714; *Barker v. Harvey*, 21 Sup. Ct. 690, 181 U. S. 481, 490, 45 L. Ed. 963; *Scott v. Carew*, 25 Sup. Ct. 193, 196 U. S. 100, 109, 49 L. Ed. 403; *Id.*, 27 Sup. Ct. 249, 251, 204 U. S. 190, 51 L. Ed. 438; *United States v. Grand Rapids & I. R. Co.*, 154 Fed. 131, 136 (citing *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 746, 749, 23 L. Ed. 634; *Williams v. Baker*, 17 Wall. 144, 21 L. Ed. 561; *Newhall v. Sanger*, 92 U. S. 761, 763, 23 L. Ed. 769; *Northern Pacific R. R. Co. v. Musser-Sauntry Land, Logging & Mfg. Co.*, 18 Sup. Ct. 205, 168 U. S. 609, 42 L. Ed. 596; *United States v. Southern Pacific R. Co.*, 13 Sup. Ct. 152, 146 U. S. 570, 36 L. Ed. 1091; *Northern Lumber Co. v. O'Brien*, 139 Fed. 614, 71 C. C. A. 598; *Id.*, 27 Sup. Ct. 249, 204 U. S. 190, 51 L. Ed. 438); *Stearns v. United States*, 152 Fed. 900, 901, 903, 82 C. C. A. 48; *Winters v. United States*, 143 Fed. 740, 748, 74 C. C. A. 666 (quoting *Kinney, Irrigation*, § 124); *Scott v. Carew*, 25 Sup. Ct. 193, 197, 196 U. S. 100, 49 L. Ed. 403 (quoting and adopting the definition in *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769); *Morrow v. Warner Valley Stock Co.*, 101 Pac. 171, 182, 56 Or. 312 (quoting *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769); *United States v. Chicago, M. & St. P. Ry. Co.*, 148 Fed. 884, 893 (quoting *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769).

The words "public lands," used in connection with entries in the land offices of the United States, if nothing be said to the contrary, relate to lands of the United States which are subject to disposition in some form under the public land laws, and not to those which are set apart and used for some special public purpose, such as post office sites, military reservations, and the like. *Stearns v. United States*, 152 Fed. 900, 903, 82 C. C. A. 48 (citing *Barker v. Harvey*, 21 Sup. Ct. 690, 181 U. S. 481, 490, 45 L. Ed. 963; *Northern Lumber Co. v. O'Brien*, 71 C. C. A. 598, 139 Fed. 614).

The rule that the words "public lands" mean such land as is subject to sale or disposition under general laws, and not such as is reserved for any purpose, though no exception thereof is made, does not conflict with the doctrine that, where it clearly appears from the statute that the term is intended to include lands theretofore reserved for a specific purpose, such intention will prevail, under the rule that a statute is to be interpreted according to the plain intention of the Leg-

islature. *Union Pac. Ry. Co. v. Karges*, 169 Fed. 459, 462.

The words "public land" do not include land which are held under a live homestead entry; consequently a grant of public lands to a railroad company cannot embrace lands held under any such entry, though the entry was relinquished prior to the filing of the map of definite location and survey. *United States v. Oregon & C. R. Co.*, 143 Fed. 765, 771, 75 C. C. A. 66. See, also, *Union Pac. R. Co. v. Harris*, 91 Pac. 68, 69, 76 Kan. 255 (citing 6 Words and Phrases, p. 5793; *Burlington, K. & S. W. R. Co. v. Johnson*, 16 Pac. 125, 38 Kan. 142, 150; *Hastings & D. R. Co. v. Whitney*, 10 Sup. Ct. 112, 132 U. S. 357, 33 L. Ed. 363; *United States v. Union P. Ry. Co.*, 61 Fed. 149; *United States v. Turner*, 54 Fed. 228; *Whitney v. Taylor*, 15 Sup. Ct. 793, 158 U. S. 85, 39 L. Ed. 906; *Northern Lumber Co. v. O'Brien*, 27 Sup. Ct. 249, 204 U. S. 190, 51 L. Ed. 438, affirming the same case in 139 Fed. 614, 71 C. C. A. 598).

The term "public lands," as used in Act Cong. July 1, 1862, § 2, 12 Stat. 489, c. 120, giving to certain railroad companies a right of way through the public lands, does not include a tract of land owned by the United States, but lawfully occupied by a settler who filed a declaratory statement claiming the right to it, under the pre-emption law. *Union Pac. R. Co. v. Harris*, 91 Pac. 68, 70, 76 Kan. 25; *Union Pac. R. Co. v. Harris*, 30 Sup. Ct. 138, 139, 215 U. S. 386, 54 L. Ed. 246.

The words "public lands" describe "such lands belonging to the United States as are subject to sale or disposal under general laws." Where an indictment for conspiracy to deprive the government of land by reason of a fraudulent homestead entry alleged that the lands sought to be acquired were public lands, and that defendants had conspired to defraud the United States out of a portion of such land, it was not demurrable for failure to alleged other facts showing that the land was in fact public land or subject to homestead entry. *United States v. McKinley*, 126 Fed. 242 (citing *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769).

The words "public lands" are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results. *United States v. Blendaur*, 128 Fed. 910, 913, 63 C. C. A. 636.

The term "public lands," when used in a grant, is to be regarded as excluding land included within prior grants. *Brandon v. Ard*, 87 Pac. 366, 370, 74 Kan. 424, 118 Am. St. Rep. 321.

An embankment built out in a lake, with earth from the bottom of the lake, to serve as a public levee, and still serving as such, is not subject to entry and sale as public land, though the bed of the lake belongs to the state. *State ex rel. Turner v. Blanchard*, 41 South. 363, 364, 117 La. 91.

Lands owned by the province of Quebec and known as "crown lands" correspond to what is known in this country as "public lands." *Myers v. United States*, 140 Fed. 648, 649.

#### Reserved land

The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. Congressional grants of public lands are confined to those; the title of which is complete in the United States. The mere selection and filing of lists of land selected by agents of the state as swamp lands, under the swamp land grant of September 28, 1850 (9 Stat. 519, c. 84), which had been made and filed in the Interior Department for approval subsequent to the passage of Act March 3, 1857, c. 117, 11 Stat. 251, which approved all such selections previously made, did not operate to segregate such lands from the public lands of the United States nor prevent their passing under the railroad grant, as within an exception of "lands reserved by the United States for any purpose whatever." *United States v. Chicago, M. & St. P. Ry. Co.*, 148 Fed. 884, 895 (citing *Leavenworth, L. & G. R. Co. v. United States*, 92 U. S. 733, 23 L. Ed. 634; *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769).

By Act June 8, 1872, c. 354, 17 Stat. 339, as amended by Act March 3, 1877, c. 126, 19 Stat. 405, defendant the Denver & Rio Grande Railway Company was granted right of way over the public lands, and the right to take timber, stone, etc., from such lands adjacent to its several projected lines one of which extended through the then existing Ute Indian reservation, which covered a tract 125 by 200 miles in extent in southwest Colorado, and had been set apart by treaty for the exclusive use of the Indians, but with a reservation of the right by proclamation of the President to appropriate right of way for the construction through the reservation of any railroad authorized by law. Such a proclamation was issued on behalf of the defendant in 1880, and it thereafter constructed its lines through the reservation. Prior to such construction Congress had also ratified an agreement with the Indians by which their rights in the reservation were extinguished, except as to allotments in severalty. Held, that the words "public lands," as used in the grant, must be construed as including lands within the reservation, and that the act gave defendant the right to take the timber and other materials from such lands.

*United States v. Denver & R. G. R. Co.*, 190 Fed. 825, 847.

Lands in the Delaware Diminished Indian Reservation which had been assigned in severalty under the treaty of May 30, 1860, must be deemed included in the term "public lands," as used in the act of July 1, 1862, granting a right of way to the Leavenworth, Pawnee & Western Railroad Company through the public lands, in view of the provision of that act that the United States should extinguish as rapidly as might be the Indian titles to all lands required for the right of way, and of the action of the Land Department in so interpreting the statute. *Kindred v. Union Pac. R. Co.*, 32 Sup. Ct. 780, 781, 225 U. S. 582, 56 L. Ed. 1216.

Lands in an Indian reservation are not "public lands," within Rev. St. § 2448, providing that, where patents for public lands are issued pursuant to any law of the United States to a person who dies before the date of the patent, the title shall become vested in his heirs; nor are patents issued to Indian allottees of reservation lands issued pursuant to a law of the United States within such section. *Meeker v. Kaelin*, 173 Fed. 216, 220.

Public lands withdrawn from entry under Reclamation Act June 17, 1902, c. 1093, § 3, 32 Stat. 388, as lands susceptible of irrigation from the contemplated works, but which remain subject to homestead entry under specified conditions, and upon which such entries have been made by entrymen who are in possession but have not yet fulfilled the conditions to entitle them to patents, are still "public lands" within the meaning of Act March 3, 1875, c. 152, 18 Stat. 482, granting to railroads right of way through public lands of the United States, and a railroad company by complying with the terms of that act may acquire right of way through such lands subject to the possessory rights of the entrymen, which rights in the right of way it must also acquire by contract under Rev. St. § 2288, as amended by Act March 3, 1891, c. 561, 26 Stat. 1097, and Act March 3, 1905, c. 1424, 33 Stat. 991, which authorizes any homestead settler to transfer right of way through his claim by warranty against his own acts, or by condemnation. *United States v. Minidoka & S. W. R. Co.*, 190 Fed. 491, 494, 111 C. C. A. 323. See, also, *United States v. Minidoka & S. W. R. Co.*, 176 Fed. 762, 766.

Lands withdrawn under Act Cong. June 17, 1902, known as the reclamation act (Act June 17, 1902, c. 1093), for purposes of irrigation under an irrigation system constructed by the government, which lands are subject to homestead entry under act of Congress, are public lands within Act Cong. March 3, 1875, known as the railroad right of way act (Act March 3, 1875, c. 152), giving railroads, which have complied with cer-

tain conditions, rights of way over the public lands of the United States, and such lands withdrawn are subject to railroad rights of way of any railroad company complying with the act of 1875. *Minidoka & S. W. R. Co. v. Weymouth*, 113 Pac. 455, 456, 19 Idaho, 234.

#### **Tideland**

Rev. St. 1895, arts. 3498a, 3498j, declaring that "public school, university, asylum and public lands" shall be open to purchase by any person having the right to purchase, etc., do not give any one the right to purchase lands under water at ordinary high tide and uncovered at low tide. The words "public lands," though meaning different lands from the school, university, or asylum lands, did not include soil lying below the line of ordinary high tide. *De Meritt v. Robison*, 116 S. W. 796, 797, 102 Tex. 358.

#### **PUBLIC LANDING**

A "public landing" is a place on a river or other navigable water for loading or unloading goods or for the reception and delivery of passengers. *State ex rel. Roland v. Dreyer*, 129 S. W. 904, 912, 229 Mo. 201.

"A 'public landing' is dedicated to the public use and is held in trust for the public the same as a street. It cannot be devoted to any use inconsistent with the use of the public." *Chicago, R. I. & P. Ry. Co. v. People ex rel. Dalley*, 78 N. E. 790, 793, 222 Ill. 427.

#### **PUBLIC LAW**

See General Law.

#### **PUBLIC LETTING**

##### **Of contract**

To constitute a public letting of a contract to do certain work, it is sufficient that it be open to all—notorious; that reasonable public notice be given; and that the public have the equal privilege of bidding and becoming contractors. It is not necessary that the publicity shall be of that nature which attends sales at public outcry. *Eppes v. Mississippi, G. & T. R. Co.*, 35 Ala. 33, 61.

#### **PUBLIC LIGHTING SYSTEM**

As internal improvement, see Internal Improvement.

#### **PUBLIC MERCHANT**

##### **Married woman**

A married woman "is a 'public merchant' if she carries on a public trade," but she is not a public merchant merely because she passively permits her brothers to operate a store, under the name of "Estate of E. Barousse," in which she has inherited an interest, and is therefore not separately bound for the debts incurred in the operation of this store. *Horton v. Haralson*, 58 South. 858, 860, 130 La. 1003.

**PUBLIC MILL**

Gen. St. 1901, §§ 4085-4092, relating to "public mills," and providing for the regulation of the same, does not apply to mills used merely for the purpose of manufacturing flour and feed for sale, and such mills are not made public mills by that act. *Howard Mills Co. v. Schwartz Lumber & Coal Co.*, 95 Pac. 559, 561, 77 Kan. 599, 18 L. R. A. (N. S.) 356.

**PUBLIC MONEY**

See Appropriation of Public Money; Embezzlement of Public Moneys; Gift of Public Money.

See, also, Public Funds.

The term "public money," in the federal statutes relating to the embezzlement of public money, or money or property of the United States does not include fees and emoluments received by the clerk of a federal district court, and the duty of such clerk to pay over to the United States the surplus fees and emoluments of his office, which his half-yearly return or the audit thereof shows to exist over and above the compensation and allowances authorized by law to be retained by him, is not governed by the statute. *United States v. Mason*, 31 Sup. Ct. 28, 34, 218 U. S. 517, 54 L. Ed. 1133.

By "public money," as used in Const. art. 3, § 51, depriving the Legislature of power to make or authorize any grant of public money to any municipal corporation, the framers of the Constitution most probably meant moneys received by officers of the state, and belonging to the state, derived in the ordinary processes of taxation, and in other ways permissible under the Constitution. It seems that the provision of the fee bill, requiring the officer collecting fees to pay part thereof, in a certain contingency only, to the county treasurer, can in no reasonable sense be said to be a grant of public money to a municipal corporation. *Tarrant County v. Butler*, 80 S. W. 656, 659, 35 Tex. Civ. App. 421.

Code Civ. Proc. § 572, provides that, when it appears by a pleading or the examination of a party that he holds money or other property which is the subject of the litigation as trustee for another party, the court may order the same, upon motion, to be deposited in court upon such conditions as may be just. Section 573 provides that, whenever money is paid into court, the same must be delivered to the clerk, who shall deposit the same with the county treasurer to be held in a distinct fund, subject to the order of the court, and for the safe-keeping of the same the treasurer shall be liable on his official bond. Held that, where money was paid to the clerk of the court without a preliminary order of the court directing such deposit, such money when paid to the county treasurer became public money within Pen. Code, § 426, where the court thereafter found

that a deposit had been made, and adjudged that the party for whose benefit it was made was entitled thereto, and hence the county treasurer was liable on his official bond for the amount of such deposit. *Agoure v. Peck*, 121 Pac. 706, 708, 17 Cal. App. 759.

Laws 1905, p. 2059, c. 729, § 307, providing that; after receiving mortgage tax moneys from the recording officers of the counties, the county treasurers shall transmit one half to the State Treasurer, and hold the other half subject to the order of the board of supervisors, though appropriating half of such tax money to the counties, does so before it reaches the state treasury, so as to bear the impress of state money, and so is not within Const. art. 3, § 20, requiring the assent of two-thirds of each branch of the Legislature to a bill appropriating "public money" for local purposes. *People ex rel. Eisman v. Ronner*, 95 N. Y. Supp. 518, 519, 48 Misc. Rep. 436.

Moneys paid into the county treasury in proceedings for the location of a county ditch in conformity with Rev. St. § 4447 et seq., are not "funds of the county" nor "public moneys in the hands of the county treasurer belonging to the county" within Rev. St. § 1277, and where one has contracted for the construction of a county ditch and has been fully paid by county warrants issued by the county auditor when the work was but partially performed, the prosecuting attorney is not authorized by section 1277 to recover back such public moneys from the contractor which were received by him in excess of the work actually performed. *Loe v. State ex rel. Platt*, 91 N. E. 982, 984, 82 Ohio St. 73.

**PUBLIC NAVIGABLE WATER**

See Navigable.

**PUBLIC NECESSITY****In eminent domain**

The word "necessity," in connection with condemnation proceedings, does not mean an absolute, but only a reasonable, necessity such as would combine the greatest benefit to the public with the least inconvenience and expense to the condemning party and property owner consistent with such benefit, although it does not include the taking of land which may merely render the employment of the improvement more convenient or less expensive or for a necessity which is merely colorable. The word "necessity," in such instance, must be construed to mean expedient, reasonably convenient, or useful to the public, and cannot be limited to the absolute physical necessity. *Warden v. Madisonville, H. & E. R. Co.*, 108 S. W. 880, 881, 128 Ky. 563 (quoting 15 Cyc. p. 632; *Aurora & G. Ry. Co. v. Harvey*, 53 N. E. 331, 178 Ill. 477). See, also, *Charleston Natural Gas Co. v. Low*, 44 S. E. 410, 412, 52 W. Va. 662

(citing *McCulloch v. Maryland*, 4 Wheat. [17 U. S.] 414, 4 L. Ed. 579).

Under the rule that property may be taken for the public "necessity," the word "necessity" is not to be used in too limited a sense; it means a want, an exigency, an expediency, for the interest or safety of the state. *Gilmer v. Lime Point*, 18 Cal. 229, 250.

Acts 1899, pp. 250-252, c. 142, §§ 1-7, authorizing taxing districts and cities to condemn land beyond their corporate limits for parks and parkways, is not invalid as authorizing condemnation of land for a mere public convenience, as distinguished from a "public necessity" or "public use." *City of Memphis v. Hastings*, 86 S. W. 609, 612, 113 Tenn. 142, 69 L. R. A. 750.

Where an operator of a mine maintaining a spur track from the mine to a railroad needed the land of another to reduce grades and curves in the track, and thereby eliminate dangers to operatives, and also needed the land of another for terminal facilities to avoid an extraordinary outlay, a "necessity" existed within Ky. St. 1909, § 815 (Russell's St. § 5352), authorizing the condemnation of such land as may be necessary for the spur tracks; a "necessity" within the statute being a convenience substantially advancing the public interest by making the road safer or better. *Greasy Creek Mineral Co. v. Ely Jellico Coal Co.*, 116 S. W. 1189-1191, 132 Ky. 692.

#### PUBLIC OR COMMON NUISANCE

A "common nuisance" is a "public nuisance." *Palestine Bldg. Ass'n v. Minor* (Ky.) 86 S. W. 695, 696; *State ex rel. Thompson v. Coler*, 89 Pac. 693, 694, 75 Kan. 424.

"A 'common nuisance' (that is, a 'public nuisance') in its nature is continuing. It is an encroachment on the rights of the public. The acts constituting it may or may not in themselves be offenses under the law of the land, or they may be such that they are partly offenses and partly are not, and yet such as to be impossible of segregation." Where a private park, in a residence portion, was a rendezvous for boisterous, dissolute, and drunken people who disturbed the sleep of neighboring residents, it was a common nuisance. *Palestine Bldg. Ass'n v. Minor* (Ky.) 86 S. W. 695, 696.

"Common 'nuisances' are a species of offense against the public order and economical regimen of the state." *State v. De Wolfe*, 93 N. W. 746, 67 Neb. 321 (quoting and adopting the definition in 3 Greenl. Ev. 184).

A common or "public nuisance" is one that affects the people at large, and is a violation of a public right, either by a direct encroachment on the public property or by doing some act which tends to the common injury, or by omitting to do, in the discharge of a legal duty, that which the common

good requires. *City of Owensboro v. Hope* (Ky.) 110 S. W. 272, 274.

"A 'public nuisance' is such an inconvenience or troublesome offense as annoys the whole community in general and not merely some particular person. It produces no special injury to one more than to another of the people." *State ex rel. Thompson v. Coler*, 89 Pac. 693, 694, 75 Kan. 424 (quoting 2 Bouv. Law Dict.).

Anything which is an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life and property by an entire community or neighborhood or any considerable number of persons, is a "public nuisance." *Acme Fertilizer Co. v. State*, 72 N. E. 1037, 1038, 34 Ind. App. 346, 107 Am. St. Rep. 190 (quoting and adopting definition in *State v. Ohio Oil Co.*, 49 N. E. 809, 150 Ind. 21, 37, 47 L. R. A. 627).

A "public nuisance," strictly speaking, arises out of the violation of public rights, and as a general rule results in no more special injury to one person than to another. Such a nuisance always arises from unlawful acts. Consequently that which is lawful cannot be regarded as a "public nuisance." Therefore, if the Legislature, by a statute which it is competent for that body to pass, authorizes an act which, in the absence of the statute, would otherwise constitute a public nuisance, such act is thereby made lawful and cannot be considered in a legal sense as a nuisance, so far as the public is concerned. *Sopher v. State*, 81 N. E. 913, 915, 169 Ind. 177, 14 L. R. A. (N. S.) 172, 14 Ann. Cas. 27 (citing *Wood*, Nuis. § 1; *Leigh v. Westervelt* [N. Y.] 2 Duer, 618; *Williams v. New York Cent. R. Co.* [N. Y.] 18 Barb. 222; *Neaderhouser v. State*, 28 Ind. 257).

A "public or common nuisance" is that which affects the public and constitutes an annoyance to all; a thing which in its nature or its consequences is a nuisance, an injury or a damage to all persons who come within the sphere of its operation, though in greater or less degree. It is public when it affects the rights enjoyed by citizens as a part of the public, as the right of navigating a river, or traveling on a public highway, etc. *People v. Transit Development Co.*, 115 N. Y. Supp. 297, 301, 131 App. Div. 174.

A "nuisance" may be both "public" and private in its character. In so far as it is public, the person who suffers a peculiar damage therefrom has a right of action. There are three things which one who sued on account of a public nuisance must show, in addition to the existence thereof, before he can recover: (1) A particular, or, more exactly speaking, a peculiar, injury to himself beyond that which is suffered by the rest of the public. (2) The injury to him must, according to some courts, be direct, and not merely consequential. (3) It must



be of a substantial character, not fleeting or evanescent. One who has sustained damage peculiar to himself from a common nuisance has a cause of action against the person creating or maintaining it, although a like injury has been sustained by numerous other persons. *Czarnecki v. Bolen-Darnall Coal Co.*, 120 S. W. 376, 377, 91 Ark. 58 (quoting and adopting definition in 3 Joyce, *Dam.* § 2151).

A "public nuisance" is an offense against the public order and economy of the state, by unlawfully doing any act or omitting to perform any duty which the common good, public decency or morals, or the public right to life, health, and the use of property, requires, and which at the same time annoys, injures, renders insecure, or obstructs the rights or property of the whole community, or any considerable number of persons. *Weeks-Thorn Paper Co. v. Glenside Woolen Mills*, 118 N. Y. Supp. 1027, 1031, 64 Misc. Rep. 205.

The doctrine that a private citizen can only recover damages by reason of a public nuisance by showing some injury peculiar to himself, and differing in kind and degree from that suffered by the public generally, applies only to that class of nuisances which are, in strictness, public nuisances, without more; i. e., an unlawful interference with a public right, a right enjoyed by the general public, as in case of user of a public highway. But the doctrine does not obtain where the nuisance, though public from its extent and placing, by its very existence involves the invasion of the personal and private rights of individuals. *McManus v. Southern Ry. Co.*, 64 S. E. 766, 768, 150 N. C. 655.

A common or public nuisance is that which affects the people and is a violation of a public right, either by a direct encroachment on public property, by the doing of some act which tends to a common injury, or by the omission of that which it is the duty of a person to do; such nuisances being founded upon wrongs arising from the unreasonable, unwarrantable, or unlawful use of property, or from improper, indecent, or unlawful conduct, working an obstruction or injury to the public, and producing material annoyance, inconvenience, or discomfort founded upon a wrong. *Incorporated Town of Lonoke v. Chicago, R. I. & P. R. Co.*, 123 S. W. 395, 398, 92 Ark. 546 (quoting and adopting *Bohan v. Port Jervis Gas Light Co.*, 25 N. E. 246, 122 N. Y. 18-32, 9 L. R. A. 711).

At common law acts done in violation of law, or which are against good morals, constitute public nuisances. A nuisance is public if it affects the community at large, or if it affects a place where the public have a right to and do go, such as a park, street, or alley, and which nuisance necessarily annoys, offends, or injures those who come within the scope of its influence. *State v.*

*Rabinowitz*, 118 Pac. 1040, 1042, 85 Kan. 841, 39 L. R. A. (N. S.) 187.

"A 'public or common nuisance' is an offense against the public order and economy of the state by unlawfully doing any act or by omitting to perform any duty which the common good, public decency, or morals, or the public right to life, health, and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons, even though the extent of the annoyance, injury, or damage may be unequal or may vary in its effect upon individuals. Another factor in defining a nuisance is that consideration should be given to the places where the public have the legal right to go or congregate, or where they are likely to come within the sphere of its influence." Within such definition, an arena erected for the purpose of conducting a bullfight, and in which one is carried on, is a "public nuisance." *State ex rel. Attorney General v. Canty*, 105 S. W. 1078, 1080, 207 Mo. 439 (quoting Joyce, *Nuis.* § 5, and citing 1 Wood, *Nuis.* § 68; *Reaves v. Territory*, 74 Pac. 951, 13 Okl. 396; *Commonwealth v. McGovern*, 75 S. W. 261, 116 Ky. 212, 66 L. R. A. 280).

A "public nuisance" may arise in two classes of cases. Where the right invaded by the offender is a common and public right, one which belongs to every citizen, such, for instance, as the right to use a highway or park or navigable waters, the plaintiff must show that he had received an injury distinct in kind from that received by the rest of the public. The private injury in this class of cases is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution. Where the public nuisance consists of the use of private property so as to annoy a large number of persons in the enjoyment of their health and property, the injury to each is special and actionable. *Roessler & Hasslacher Chemical Co. v. Doyle*, 64 Atl. 156, 157, 158, 73 N. J. Law, 521.

Dancing and drinking, accompanied by swearing, drunkenness, making loud noises, and otherwise misbehaving, constitute a "common nuisance," indictable as a public offense. *Commonwealth v. Cincinnati, N. O. & T. P. R. Co.*, 112 S. W. 613, 614, 139 Ky. 429, 18 L. R. A. (N. S.) 699, Ann. Cas. 1912B, 427.

"Lotteries for money are, by statute (*Crimes Act, Rev. § 51*), 'common and public nuisances.' \* \* \*" *State v. Lovell*, 39 N. J. Law, 463, 464.

"Any place of public resort, in which illegal practices are habitually carried on, is a 'public nuisance,'" including a place kept in order that the public may resort thereto

and engage in the unlawful practice of betting on horse races. *State v. Dimant*, 62 Atl. 286, 287, 73 N. J. Law, 131.

As regards the offense of maintaining a public nuisance, a place kept and held out as one for women to resort to have unlawful abortions committed is such a nuisance within Pen. Law (Consol. Laws 1909, c. 40) § 1530, defining the same. *People v. Curtis*, 136 N. Y. Supp. 582, 583, 152 App. Div. 372.

The injury or damage resulting to one landowner from one unauthorized or illegal assertion by another landowner of a right to the exclusive possession of public lands is an injury suffered in common with all members of the public, whose stock graze in the vicinity of such public lands, and, if a nuisance, is a "public nuisance," which cannot be enjoined by the individual landowner, unless he shows some special injury peculiar to himself, differing in kind, and not merely in extent and degree, from the general injury to the public. *Anthony Wilkinson Live Stock Co. v. McIlquham*, 83 Pac. 364, 367, 14 Wyo. 209, 3 L. R. A. (N. S.) 733.

Where it is alleged that certain parties, in violation of Wilson's Rev. & Ann. St. c. 83, had entered into a pool and combination to create a monopoly in the business of buying and selling lumber, grain, etc., and were thereby enabled to and were charging unjust and exorbitant prices for such commodities, such acts constitute a "public nuisance," and the parties thereto may be restrained as provided by Wilson's Rev. & Ann. St. 1903, § 4440, at the suit of the county attorney. *Territory v. Long Bell Lumber Co.*, 99 Pac. 911, 917, 22 Okl. 890.

A city's discharge of sewage into a river, so that the sewage was carried undiluted and deposited on plaintiff's riparian land, two miles below, producing noxious and unhealthy gases, constituted, not only a "public nuisance," but an actionable wrong, for which such riparian owner was entitled to recover. *Platt Bros. & Co. v. City of Waterbury*, 67 Atl. 508, 509, 80 Conn. 179, 125 Am. St. Rep. 111 (citing *Nolan v. City of New Britain*, 38 Atl. 703, 69 Conn. 668, 678).

A house of ill fame, or bawdyhouse, is a "public nuisance." Where the nuisance, though public, produces a special or particular injury to an individual, he may proceed in a court of equity for an injunction, and also for damages. *Tedescki v. Berger*, 43 South. 960, 961, 150 Ala. 649, 11 L. R. A. (N. S.) 1060 (citing *Wood, Nuis.* [3d Ed.] p. 49, § 29; *Ex parte Birchfield*, 52 Ala. 377; 1 Wood, Nuis. p. 50, § 30; *Givens v. Van Studdiford*, 4 Mo. App. 499, 503, 505; *Id.*, 72 Mo. 129; *Marsan v. French*, 61 Tex. 173, 48 Am. Rep. 272; *Ahern v. Steele*, 22 N. E. 193, 115 N. Y. 203, 5 L. R. A. 449, 450, 12 Am. St. Rep. 773; *Cahn v. State*, 20 South. 380, 110 Ala. 56, 59; 1 High., Inj. [3d Ed.] § 782; 2

*Wood, Nuis.* [3d Ed.] pp. 1201, 1202, § 819; *Id.* p. 1160, § 792; *Whaley v. Wilson*, 20 South. 922, 112 Ala. 627, 631; *English v. Progress Electric Light & Motor Co.*, 10 South. 134, 95 Ala. 264; *Hundley v. Harrison et al.*, 26 South. 294, 123 Ala. 292, 298; *Ogletree v. McQuaggs et al.*, 67 Ala. 580, 585, 42 Am. Rep. 112).

Keeping a house for the purpose of practicing there the vocation of an abortionist constitutes a "public nuisance," defined by Pen. Code, § 385, to be a crime against the order and economy of the state, consisting of unlawfully doing an act which (1) annoys, injures, or endangers the comfort, repose, health, or safety of any considerable number of persons, or (2) offends public decency; section 294 making abortion a crime of a higher character. *People v. Hoffman*, 103 N. Y. Supp. 1000, 1002, 118 App. Div. 862.

The repeated and persistent sale and delivery of intoxicating liquors on the streets and alleys of a city is a common nuisance which may be enjoined under Code Civ. Proc. § 265 (Gen. St. 1909, § 5859), authorizing an injunction in the name of the state against the keeping and maintaining of a common nuisance. *State v. Rabinowitz*, 118 Pac. 1040, 1043, 85 Kan. 841, 39 L. R. A. (N. S.) 187.

Neither the sale of intoxicating liquor nor the keeping of a place where such liquors were sold as a beverage, if conducted in an orderly manner, constituted a "public nuisance" at common law, and therefore the offense of keeping a place where intoxicating liquors are sold cannot be prosecuted under the statute against public nuisances. *Sopher v. State*, 81 N. E. 913, 915, 169 Ind. 177, 14 L. R. A. (N. S.) 172, 14 Ann. Cas. 27 (citing *Commonwealth v. McDonough*, 13 Allen [95 Mass.] 581; *Welsh v. State*, 25 N. E. 883, 126 Ind. 71, 9 L. R. A. 664; *State v. Bertheol* [Ind.] 6 Blackf. 474, 39 Am. Dec. 442; *State v. Mullikin* [Ind.] 8 Blackf. 260; 1 Hawk. P. C. [Curw. Ed.] p. 714; 2 Cooley, Bl. Comm. [4th Ed.] p. 168; 1 Bish. Cr. Law [7th Ed.] § 505; Bish. St. Crimes [3d Ed.] §§ 984, 985). The illegal sale of intoxicating liquors is a "public nuisance," affecting the whole community, and may be abated by process issued in the name of the state. *Dispensary Com'rs of Lee County v. Hooper*, 56 S. E. 997, 998, 128 Ga. 99. But the unlawful sale of intoxicating liquors does not per se constitute the place where such liquors are sold a "public nuisance." The character of the place must depend upon the special facts, which must be specifically averred and proved. *Territory v. Robertson*, 92 Pac. 144, 146, 19 Okl. 149. See, also, *State v. Tabler*, 72 N. E. 1039, 1040, 34 Ind. App. 393, 107 Am. St. Rep. 256.

Under 1 Ballinger's Ann. Codes & St. § 3085, making it a "public nuisance" to maintain a place where intoxicating liquors are unlawfully kept for sale, a complaint alleg-

ing that defendant was occupying a building as a place in which intoxicating liquors were kept for the purpose of selling contrary to law, and that such use of the premises constituted a nuisance which it sought to abate, is not demurrable on the ground that it does not allege that the place is not maintained by defendant as a druggist, as that is a defensive matter. *Kirkland v. Ferry*, 88 Pac. 1123, 1124, 45 Wash. 663.

Under Gen. St. Kan. c. 101, § 39, providing that "all places where intoxicating liquors are manufactured, sold, bartered, or given away in violation of any provisions of this act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter, or delivery, in violation of this act, are hereby declared to be 'common nuisances,'" it is not necessary under a nuisance count, to prove any sales, but it is sufficient to show a mere keeping of intoxicating liquors for sale or a keeping of a place where persons are permitted to resort for the purpose of drinking intoxicating liquors. *State v. Lord*, 55 Pac. 503, 504, 505, 8 Kan. App. 257.

By Rev. St. c. 22, § 1, providing that "all places used \* \* \* for the illegal sale or keeping of intoxicating liquors, and all houses, shops or places where intoxicating liquors are sold for tippling purposes, and all places of resort where intoxicating liquors are kept, sold, given away, drunk or dispensed in any manner not provided for by law, are 'common nuisances,'" the Legislature obviously intended to declare all places "common nuisances" whenever they should commonly and habitually be used for the illegal sale or keeping of intoxicating liquors, and also whenever commonly and habitually used as places of resort where such liquors are "given away, drunk or dispensed in any manner not provided for by law." *State v. Kaplesky*, 73 Atl. 830, 832, 105 Me. 127, 23 L. R. A. (N. S.) 737 (citing *State v. McIntosh*, 57 Atl. 83, 98 Me. 397; *State v. Stanley*, 24 Atl. 983, 84 Me. 555).

An information charging that defendant corporation unlawfully erected and maintains a public nuisance, to the injury of the citizens, by erecting near the dwelling houses of divers citizens in a specified county a certain rendering plant, and that it did wrongfully create and suffer to escape therefrom divers noisome and poisonous smells, so that the air for a great distance was impregnated thereby, to the injury to the health and property of many persons residing in the neighborhood, sufficiently charged a "public nuisance," as defined by Burns' Ann. St. 1901, § 2154. And where the information charged the erection and maintenance of a rendering plant, and the carrying on of the business of manufacturing products from the bodies of dead animals, it sufficiently charged that the build-

ing was used or maintained "for the exercise of a trade, employment, or business," within Burns' Ann. St. 1901, § 2154, defining a "public nuisance." The facts so alleged were sufficient to charge a public nuisance at common law. *Acme Fertilizer Co. v. State*, 72 N. E. 1037, 1038, 34 Ind. App. 346, 107 Am. St. Rep. 190.

Under Burns' Ann. St. 1901, § 2154, providing that whoever unlawfully diverts any stream of water from its natural course or state, to the injury of others, shall be fined, etc., persons who maintain paper factories on the banks of a creek, and discharge chemicals into the creek, destroying the fish in it, polluting it and connecting streams, and rendering their water unfit for stock, are guilty of maintaining a "public nuisance." *West Muncie Strawboard Co. v. Slack*, 72 N. E. 879, 880, 164 Ind. 21.

The term "public nuisance," as used in Burns' Ann. St. 1908, § 2440, prescribing punishment for maintaining such places, has a well-defined legal meaning and sufficiently designates the class of prohibited acts; and a nuisance is public if it annoys such part of the public as necessarily comes in contact with it. *Keefer v. State*, 92 N. E. 656, 657, 174 Ind. 588; *State v. Tabler*, 72 N. E. 1039, 1040, 34 Ind. App. 393, 107 Am. St. Rep. 256. In a prosecution under this statute, it is necessary to look to the common law to determine whether the act complained of is a "public nuisance." *Sopher v. State*, 81 N. E. 913, 915, 169 Ind. 177, 14 L. R. A. (N. S.) 172, 14 Ann. Cas. 27.

Wilson's St. 1903, § 2340, declares that "public nuisance" is a crime against the order and economy of the territory, and consists in unlawfully doing any act or omitting to perform any duty required by the public good, which act or omission either: First, annoys or injures the comfort, repose, health or safety of any considerable number of persons; or, second, offends public decency." *Reaves v. Territory*, 74 Pac. 951, 952, 13 Okl. 396.

Acts become criminal within Penal Law, § 1530, defining a "public nuisance" as the unlawful doing of an act which annoys, injures, or endangers the comfort, repose, health, or safety of any considerable number of persons, when a considerable number of persons are "annoyed" by them. *People v. Bink*, 135 N. Y. Supp. 733, 734, 151 App. Div. 271.

Penal Law, § 1530, providing that a "public nuisance" consists in unlawfully doing an act or omitting to perform a duty, which act or omission annoys, injures, or endangers any considerable number of persons, refers to duties such as are directed by statute. *People v. Harris*, 134 N. Y. Supp. 409, 415, 74 Misc. Rep. 353.

Under Civ. Code, § 3480, defining a "public nuisance" as one affecting an entire com-

munity or neighborhood, etc., although the extent of damage inflicted on individuals may be unequal, and section 3493, authorizing a private person to sue for a public nuisance, if it is specially injurious to him, a private person cannot sue for damages sustained by a public nuisance, unless he suffers, not only a special injury, but one different in kind, and not simply in degree, from that suffered by the public in general. *Donahue v. Stockton Gas & Electric Co.*, 92 Pac. 196, 198, 6 Cal. App. 276.

"Public nuisance" is defined by Civ. Code, § 3479, as one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the nuisance or damage inflicted upon individuals may be unequal; thus construction of a street railroad track away from the center of the street, and on one side thereof, so as to be within about four feet of the sidewalk, in violation of the railroad company's franchise, was a public nuisance which an abutting property owner could not have abated, in the absence of proof that his injury was different in kind from that suffered by the public at large. *Reynolds v. Presidio & F. R. Co.*, 81 Pac. 1118, 1 Cal. App. 229.

#### Number of persons affected

Under Revised Code (section 3657), "A 'public nuisance' is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." *Stricker v. Hillis*, 99 Pac. 831, 832, 15 Idaho, 709.

A "public nuisance" is that which annoys such part of the public as necessarily come in contact with it; such as result from the violation of public rights and producing no especial injury to one more than another of the public. *Russell v. State*, 69 N. E. 482, 484, 32 Ind. App. 243.

"A 'public nuisance' is one that injures the citizens generally, who may be so circumstanced as to come within its influence. The test as to whether a nuisance is a 'public nuisance' or not is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights." *State ex rel. Thompson v. Coler*, 89 Pac. 693, 694, 75 Kan. 424 (quoting 6 Words and Phrases, p. 5804).

As applied to "public nuisances," the term "public" does not mean all the people, nor most of the people, nor very many of the people of a place, but so many of them as contradistinguishes them from a few. *United States v. Luce*, 141 Fed. 385, 392.

One threatening to commit repeated trespasses and to use offensive language addressed to another does not threaten to create a nuisance within Civ. Code, § 3480, defining a

"public nuisance" as one affecting at the same time an entire community or a neighborhood or any considerable number of persons, etc. *Randall v. Freed*, 97 Pac. 669, 671, 154 Cal. 299.

A "public nuisance" is one which affects at the same time any considerable number of persons, although the extent of the nuisance or injury inflicted upon the individuals may be unequal. Civ. Code, § 2394. *Town of Colton v. South Dakota Cent. Land Co.*, 126 N. W. 507, 508, 25 S. D. 309, 28 L. R. A. (N. S.) 122.

#### Obstruction or encroachment on highway

A permanent obstruction in a street or highway, interfering with the convenience of the public, or imperiling the safety of the traveler, is within the definition of a "public nuisance." *Frank v. Village of Warsaw*, 101 N. Y. Supp. 938, 943, 116 App. Div. 618.

Though streets and alleys of a city are public highways and an encroachment on them substantially interfering with the public use is a "public nuisance," to constitute a public nuisance, there must be a substantial interference with or obstruction of the public right. *Leitchfield Mercantile Co. v. Commonwealth*, 136 S. W. 639, 641, 143 Ky. 162.

The obstruction of a public street is a "public nuisance." *Robbins v. White*, 42 South. 841, 844, 52 Fla. 613.

The occupation of a portion of a main street by a platform and shed 60 feet long, 35 feet wide, and 20 feet high, on which platform are large farm scales, a cornsheller operated by steam, and other machinery, which machinery raises dust and is noisy when operated, and annoys the public, and is likely to frighten horses, is a "public nuisance." *State ex rel. Detienne v. City of Vandalla*, 94 S. W. 1009, 1011, 119 Mo. App. 406.

Any encroachment on a street or an obstruction therein, on or above the surface, of a permanent nature, not including ornamental or shade trees in the sidewalk of streets devoted chiefly to residences, or the structures of public service companies when the latter are authorized by proper authorities, which endangers or interferes with the use of the street by the public, constitutes a "public nuisance." *McHarge v. M. M. Newcomer & Co.*, 100 S. W. 700, 703, 117 Tenn. 595, 9 L. R. A. (N. S.) 298 (citing *Elliott, Roads & St.* §§ 613, 690, 693, 695; *Dill. Mun. Corp.* §§ 586, 587, 730, 1032; *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222; *Van O'Linda v. Lothrop*, 21 Pick. [38 Mass.] 292, 32 Am. Dec. 261; *Raymond v. Kiseberg*, 54 N. W. 612, 84 Wis. 302, 19 L. R. A. 643; *Sikes v. Town of Manchester*, 12 N. W. 755, 59 Iowa, 65; *City of Ft. Wayne v. De Witt*, 47 Ind. 391; *Welsh v. Wilson*, 4 N. E. 633, 101 N. Y. 254, 54 Am. Rep. 698; *Callanan v. Gilman*, 14 N. E. 264,

107 N. Y. 360, 1 Am. St. Rep. 831; State v. Edens, 85 N. C. 526; State v. Stroud [Tenn.] 52 S. W. 697).

By the express provisions of the California Civ. Code, §§ 3479, 3480, and Pen. Code, § 370, anything unlawfully obstructing the free passage or use in the customary manner of a public highway is a "public nuisance." People v. McCue, 88 Pac. 899, 900, 150 Cal. 195; Brown v. Rea, 88 Pac. 713, 714, 150 Cal. 171 (citing *Aram v. Schallenberger*, 41 Cal. 449; *Bigley v. Nunan*, 53 Cal. 403; *Hogan v. Central Pac. R. Co.*, 11 Pac. 876, 71 Cal. 87).

By the express provisions of Rev. Code, § 3657, a "public nuisance" is one which affects at the same time an entire community or neighborhood or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal, and by section 3656 any unlawful obstruction of the clear passage or use, in the customary manner, of a highway is a nuisance. To authorize a private person to bring a suit to abate a public nuisance, he must allege and show that he will be specially injured in a different way from the general public, or deprived of the free use of his own property. *Stricker v. Hillis*, 99 Pac. 831, 832, 15 Idaho, 709.

Rev. Laws 1905, § 4987, defining a "public nuisance" as a crime as against the order and economy of the state, and making it consist in unlawfully doing an act or omitting to perform a duty which "shall unlawfully interfere with, obstruct, or tend to obstruct, or render dangerous for passengers, a lake, navigable river, bay, stream, canal, or basin," discloses, in connection with other legislation, an intention to keep the navigable waters of the state free from obstruction, whenever possible. *Minnesota Canal & Power Co. v. Pratt*, 112 N. W. 395, 400, 101 Minn. 197, 11 L. R. A. (N. S.) 105.

Whether an automobile speed contest on a public highway authorized by the municipality was as conducted a nuisance within Pen. Code, § 385, subsec. 4, defining a "public nuisance" as the doing of an act which in any way renders a considerable number of persons insecure in life, etc., held under the facts for the jury. *Johnson v. City of New York*, 78 N. E. 715, 719, 186 N. Y. 139, 116 Am. St. Rep. 545, 9 Ann. Cas. 824; *Johnson v. City of New York*, 96 N. Y. Supp. 754, 756, 109 App. Div. 821.

#### **Private nuisance distinguished**

See Private Nuisance.

#### **PUBLIC OFFENSE**

Any act which is denounced as unlawful and made punishable by fine is a "public offense." Under Cr. Code Prac. § 36, which authorizes a peace officer to make an arrest without a warrant, where a public offense is

committed in his presence, a peace officer coming within the designation of section 26, designating, as peace officers, sheriffs, constables, etc., has the right to make an arrest without a warrant for a violation of Ky. St. 1903, § 1303, prohibiting the sale of liquors on Sunday, committed in his presence. *Commonwealth ex rel. Barth v. McCann*, 94 S. W. 645, 646, 123 Ky. 247.

Laws 1907, p. 196, c. 131, to define and prohibit unfair competition and discrimination, etc., provides (section 3) "that any person, firm or corporation violating the provisions of section 1 of the act, shall upon conviction thereof be fined." Held, that it sufficiently prohibits the acts set out in section 1 to state an offense under Pen. Code, § 3, providing that a "crime" or "public offense" is an act or omission forbidden by law, and to which is annexed, upon conviction, a fine, though the law nowhere expressly "forbids" the act. *State v. Central Lumber Co.*, 123 N. W. 504, 508, 24 S. D. 136, 42 L. R. A. (N. S.) 804.

#### **PUBLIC OFFICE**

See Office.

See, also, Public Agency.

#### **PUBLIC OFFICER**

See Officer; Public Detective.

#### **PUBLIC OFFICIAL PROCEEDINGS**

There is no practical difference in the meaning of "public official proceedings" and "proceedings authorized by law" as applied to privileged communications, and an investigation by a Senate committee of charges against one, appointed to office by the President and whose appointment has been sent to the Senate for confirmation, falls within the meaning of the latter term as used in *Wilson's Rev. & Ann. St. 1903*, § 2239. *Tuohy v. Halsell*, 128 Pac. 126, 127, 35 Okl. 61, 43 L. R. A. (N. S.) 323.

#### **PUBLIC PARK**

As public charity, see Public Charity.

As public place, see Public Place.

As public utility, see Public Utility.

See, also, Public Square.

A "public park" has been defined as a piece of ground inclosed for purposes of pleasure, exercise, amusement, or ornament. *Fifth Avenue Coach Co. v. City of New York*, 111 N. Y. Supp. 759, 763, 58 Misc. Rep. 401, (quoting definition in *Tompkins v. Pallas*, 95 N. Y. Supp. 875, 47 Misc. Rep. 309).

#### **PUBLIC PIER**

A "public pier" is subject to the ordinary uses of a public way, which in populous towns is a street. *Borough of Seabright v. Allgor*, 56 Atl. 287, 288, 69 N. J. Law, 641.

**PUBLIC PLACE**

Place of public accommodation or amusement, see Other.

See, also, Public Resort.

"Any place which for the time is made public by the assemblage of people is a 'public place' within the meaning of the act against gaming." *Ferrell v. City of Opelika*, 39 South. 249, 251, 144 Ala. 135 (citing *Campbell v. State*, 17 Ala. 369; *Smith v. State*, 52 Ala. 384; *Jacobson v. State*, 55 Ala. 151).

The term "public place," as used in the statutes relating to gambling, as a general rule includes any place which for the time being is made public by the assemblage of people who go there with or without invitation and without restraint. *Roberts v. State*, 60 S. E. 1082, 1085, 4 Ga. App. 207.

In Act Gen. Assem. March 26, 1909 (25 Del. Laws, c. 247), prohibiting disorderly conduct in public places, held that the term "public place" was not limited to places where people publicly congregated, but included all places not within a city or town which were not private. *Lofland v. State* (Del.) 83 Atl. 1033, 1034.

The phrase "public place," as used in the general prohibition law (Laws 1907, p. 81), forbidding the keeping or furnishing of intoxicating liquor at any public place, includes any place which from its public character members of the general public frequent, or where they may be expected to congregate at any time as a matter of common right, or a place at which, even though privately owned or controlled, a number of persons have assembled through common usage or by general or indiscriminate invitation, express or implied. It excludes those places which, though publicly owned, are devoted to a private use and are not open to the public; also those places privately owned or controlled from which the indiscriminate public is generally excluded, notwithstanding that at a particular time a number of persons may have congregated there, if the congregation is the result of special invitation for that occasion alone. *Tooke v. State*, 61 S. E. 917, 922, 4 Ga. App. 495.

The term "public place," as used in St. 1898, § 1130, providing for the posting of tax sale notices in at least four public places in the county, was used in its ordinary common sense to designate a place where the public resorts, so that the exposure of the document was likely to give notice. *Bauchier v. Hammer*, 123 N. W. 132, 134, 140 Wis. 648.

"Public places," as applied to the requirements of posting notices, in highway proceedings, at public places, are those places that afford the most publicity, without regard to the title of the owner of the property. *Whittingham v. Hopkins*, 54 Atl. 250, 69 N. J. Law, 189 (citing *State v. Schanck*, 9 N. J. Law, 107).

"A public place" under the express provision of Pen. Code 1895, art. 335, within the meaning of preceding articles, is any public road, street, or alley of a town or city or an inn, tavern, store, grocery, or workshop or place at which people are assembled or commonly resort for the purpose of business, amusement, or recreation or other lawful purpose. *King v. Brown*, 94 S. W. 328, 329, 100 Tex. 109.

**As in view of public**

On a prosecution for playing at a game of cards at a "public place," it was error to charge that, if the place was within 75 yards from a certain public road and could be seen therefrom, it was a "public place"; the question being whether the parties, who were playing, could be seen from the highway. *Brannon v. State* (Ala.) 39 South. 983.

**Boarding house**

A boarding house is not an inn and is not per se a "public place." Therefore, where a building had ceased to be used as a boarding house and was used as a private residence or lodging place at the time that certain games in question were played therein, it was not per se a public place within Code 1896, § 4792, prohibiting gaming at a public place. *Winston v. State*, 41 South. 174, 145 Ala. 91 (citing *Foster v. State*, 4 South. 833, 84 Ala. 51).

A boarding house is not per se a "public place," and, not being named as such in a statute punishing the use of obscene, vulgar, and indecent language in public places, an information charging the use of such language, "in a public place, to wit, in a boarding house," does not charge an offense, but the facts making it a public place must be alleged. *Huffman v. State*, 92 S. W. 419, 49 Tex. Cr. R. 319.

**Highway, road, street, or turnpike**

Rev. Codes, § 3396, providing that special assessments for municipal improvements shall be paid by the entire improvement district, each lot or parcel of land within the district to be assessed for that part of the whole cost which its area bears to the area of the district exclusive of the streets, alleys, and public places, does not exclude property, such as school property, devoted exclusively to the public use; for, under the principle of ejusdem generis, the words "public places" mean such public places as alleys and streets. *City of Kalispell v. School Dist. No. 5 of Flathead County*, 122 Pac. 742, 745, 45 Mont. 221, Ann. Cas. 1913D, 1101.

That one who displayed a pistol in a road dedicated to public use owned the fee in the road did not prevent his conviction under Pen. Code 1895, art. 334, imposing a fine upon one who goes into or near a public place and rudely displays any pistol or deadly weapon in a manner calculated to disturb the inhabitants, and section 335, providing

that a "public place," within the meaning of the preceding article, is any public road, street, or alley, etc., or place in which people are assembled. *Jones v. State*, 130 S. W. 1001, 60 Tex. Cr. R. 56.

A turnpike is a "public place" within P. L. 1906, p. 644, providing for taxation of franchises of street railway corporations occupying public places. A trolley line upon land which has been dedicated as a street, but which dedication has not been accepted by the public authorities, is not upon a "public place," within P. L. 1906, p. 644, providing for taxation of franchises of street railway corporations occupying public places. *Atlantic & S. Ry. Co. v. State Board of Assessors*, 77 Atl. 609, 80 N. J. Law, 83.

#### Same—Street corner

Street corners are not necessarily "public places," within Rev. St. 1898, § 1130, which requires the county or city treasurer, four weeks prior to the sale of land for taxes, to post copies of a notice of sale and statement of the lands in at least four public places in such county. "It is a matter of common knowledge that a conspicuous place at many street corners in cities are comparatively obscure and secret places, and to post a notice of tax sale in a conspicuous place at such corners would most likely fail to attract observation and meet the public view." *Shepherd v. Kahle*, 97 N. W. 506, 507, 120 Wis. 57.

#### Jury room

A reply by accused to the district attorney, while testifying before a grand jury, "It is none of your damn business," etc., did not constitute swearing and cursing in a "public place." *Morrison v. State*, 118 S. W. 541, 56 Tex. Cr. R. 20.

#### Mill

A gristmill was a "public place" within St. 1834, c. 129, § 14, requiring that notices of school district meetings be posted on the district schoolhouse and one other public place within the limits of said district. *Fletcher v. Inhabitants of Lincolnville*, 20 Me. 439, 442.

#### Office

An office, which is used as a public office for the transaction of business with the general public and according to the custom of the business is kept open during business hours, such as an insurance office, cannot at the option of the proprietor be temporarily closed during business hours for the purpose of engaging in a game of cards and so cease to be a "public place" or house and become a private office. *Gomprecht v. State*, 37 S. W. 734, 36 Tex. Cr. R. 434, 436.

#### Private dwelling

Pen. Code 1895, art. 333, provides for the punishment of persons who fight together in a public place, and article 335 defines a

"public place" as "any public road, street or alley of a town or city, or any inn, tavern, store, grocery or workshop, or place at which people are assembled, or to which people commonly resort for purposes of business, amusement, recreation or other lawful purpose." Held, that a private residence may become a "public place," within the statute, by throwing it open to the public generally for a single entertainment, and persons who engage in a fight during such entertainment may be prosecuted under the statute. *Austin v. State*, 124 S. W. 639, 57 Tex. Cr. R. 611.

A mere gathering of invited guests at an entertainment at a private residence would not make it a "public place," within the gaming laws. Where those who were at an entertainment at a private residence, where accused was claimed to have been drunk, were there by invitation of the owner, who had had only two such entertainments within eight months, the place was not a "public place," so as to sustain a conviction for being drunk in a public place. *Pugh v. State*, 117 S. W. 817, 818, 55 Tex. Cr. R. 462, 131 Am. St. Rep. 822.

#### Public library

The erection by a city on a square dedicated by it as "a public place forever for the enjoyment of the community in general," of a public library for the use of the same public, is not only not inconsistent with the purpose for which the park was dedicated, but is in aid and furtherance of its enjoyment by the public, but the building can be used for strictly library purposes only; so that, while rooms therein may be provided as a meeting place for the board of library directors, they cannot be provided for the board of education. *Spire v. City of Los Angeles*, 87 Pac. 1026, 1028, 150 Cal. 64, 11 Ann. Cas. 465.

#### Public park

The Condemnation Law (Laws 1890, p. 266, c. 95), prescribing the manner of proceeding in condemnation proceedings, and repealing prior acts in reference thereto, except such "acts \* \* \* as prescribe a method of procedure for the condemnation of real property for public use as a highway or street, avenue or public place in an incorporated city," does not repeal the provisions of Laws 1888, p. 256, c. 193, authorizing the city of Rochester to acquire by condemnation land for public parks, which prescribe the method of procedure in such cases, a park being a "public place" within the meaning of the exception in the repealing clause. *In re City of Rochester*, 92 N. Y. Supp. 405, 408, 102 App. Div. 181.

Where a statute creating a public park declared that the tracts of land taken for park purposes should be "public places," an addition to the park afterwards made was also a public place, and hence an agreement of retainer whereby an attorney was engaged

to take all lawful proceedings to obtain compensation for lands, etc., proposed to be taken for the opening of streets, avenues, and "public places," embraced proceedings to condemn land for an addition to the park. In re Robbins, 82 N. E. 501, 502, 189 N. Y. 422.

#### Room

The private operating room of a practicing dentist *prima facie* is not a public place of business, within the general prohibition law (Laws 1907, p. 81), making it unlawful to sell, etc., at any place of business, or keep at any other public place, intoxicants; the term "place of business" meaning a place where the public generally are expressly or impliedly invited for the purpose of transacting business with the owner, and the term "public place" including a place which for the time being is made public by the attending of people who go there with or without invitation and without restraint. Cantrell v. State, 70 S. E. 96, 97, 8 Ga. App. 725.

A private bedroom may become a "public place," within the gaming statute, prohibiting gaming at a public place, if it is open to different persons at different times indiscriminately, who may resort to it for gaming without special invitation from the owner. Thrasher v. State, 53 South. 256, 257, 168 Ala. 130.

#### Schoolhouse

A schoolhouse, where people are assembled for religious worship, is a "public place," within Pen. Code 1911, art. 204, punishing any person found in a state of intoxication in any public place. January v. State (Tex.) 146 S. W. 555, 557.

#### Store

On a trial for indecent exposure, where the exposure was made in the store of accused, in the presence of a 15 year old girl, and in the front part of the store there were plate glass windows about three feet above the sidewalk, and double doors made largely of glass opening from the store into the street, the store was as a matter of law a "public place." State v. Goldstein, 62 Atl. 1006, 1007, 72 N. J. Law, 336.

#### Tent

A tent into which any and all persons could come whenever they desired, and did come, without invitation or knocking, day or night, was a "public place," within the statute against gaming. Tatum v. State, 47 South. 339, 156 Ala. 144.

#### Tree

An elm tree near a schoolhouse in a county, previously designated as one of the "public places" for posting notices by a prior town meeting, and used for some time prior to the posting of the notice in question, and covered with notices, is a "public place" in the usual acceptance of the term. Lutgen v. Board of Com'rs of Stearns County, 110 N. W. 1, 99 Minn. 499.

#### Yard

A place in a private yard, completely shut out of view from the public highway, was not a "public place," within the law relating to gaming in public places. That the place at which a game of cards was played was in the yard of a boarding house, in the absence of evidence that any other game had ever been played there, did not make it a public one. Walker v. State, 41 South. 176, 147 Ala. 699 (citing Graham v. State, 16 South. 934, 105 Ala. 130; Foster v. State, 4 South. 833, 84 Ala. 451; 5 Mayfield's Dig. p. 481, § 23).

### PUBLIC POLICY

"Public policy" means the public good, everything that tends clearly to undermine that sense of security for individual rights, whether of personal liberty or private property, which any citizen ought to feel, is against "public policy." Maryland Trust Co. v. National Mechanics' Bank, 63 Atl. 70, 79, 102 Md. 608 (quoting Goodyear v. Brown, 26 Atl. 665, 155 Pa. 514, 20 L. R. A. 838, 35 Am. St. Rep. 903).

"Public policy," with respect to the administration of the law, is that rule of law which declares that no one can lawfully do that which tends to injure the public or is detrimental to the public good. Russell v. Courier Printing & Publishing Co., 95 Pac. 936, 938, 43 Colo. 321; Baltimore Humane Impartial Soc., Aged Women's & Aged Men's Homes, v. Pierce, 60 Atl. 277, 279, 100 Md. 520, 70 L. R. A. 485 (quoting and adopting the definition in Boston & A. R. Co. v. Mercantile Trust & Deposit Co., 34 Atl. 778, 785, 82 Md. 535).

"The very meaning of 'public policy' is the interest of others than the parties, and that interest is not to be at the mercy of the defendant alone." Beasley v. Texas & P. R. Co., 24 Sup. Ct. 164, 166, 191 U. S. 492, 498, 48 L. Ed. 274.

The "public policy" of the government is not limited to such matters as are universally considered as injurious to the public interests, but any acts reasonably tending to have that effect may be prohibited by statute, and thereupon they are against public policy. United States v. Musgrave, 160 Fed. 700, 702.

"Public policy" is a variable quality, but the principles to be applied have always remained unchanged and unchangeable, and public policy is one variable in so far as the habits, capacities, and opportunities of the public have become varied and complex. Public policy often changes as the laws change, and therefore new applications of old principles are required. Whatever tends to injustice or oppression, restraint of liberty, restraint of legal right, whatever tends to the obstruction of justice, a violation of a statute, or the obstruction or perversion of



the administration of the law as to executive, legislative, or other official action, whenever embodied in and made the subject of a contract, the contract is void as against public policy. *Union Cent. Life Ins. Co. v. Spinks*, 83 S. W. 615, 617, 119 Ky. 261, 69 L. R. A. 264, 7 Ann. Cas. 913 (quoting and adopting definition in *Brooks v. Cooper*, 26 Atl. 978, 50 N. J. Eq. 761, 21 L. R. A. 617, 35 Am. St. Rep. 793).

"Public policy" is that principle of the law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good. Contracts are said to be against public policy when they tend to injure the state or the public. *Lawson v. Cobban*, 99 P. 128, 129, 38 Mont. 138.

"Public policy" is a vague expression. Story in his work on Contracts says: "It has never been defined by the courts, but has been left free of definition in the same manner as fraud. It may be safely said, however, that wherever any contract conflicts with the morals of the times and contravenes any established interests of society, it is void as being against 'public policy.'" *McGuffin v. Coyles & Guss*, 85 Pac. 954, 961, 16 Okl. 648, 6 L. R. A. (N. S.) 524 (quoting and adopting definition in *Holladay v. Patterson*, 5 Or. 177). See, also, *Victor v. Louise Cotton Mills*, 61 S. E. 648, 651, 148 N. C. 107, 16 L. R. A. (N. S.) 1020, 16 Ann. Cas. 291; *Union Cent. Life Ins. Co. v. Spinks*, 83 S. W. 615, 617, 119 Ky. 261, 6 L. R. A. 264, 7 Ann. Cas. 913; *Wenninger v. Mitchell*, 122 S. W. 1130, 1133, 139 Mo. App. 420.

"Public policy" is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce and the usages of trade, that it is difficult to determine its limits with any degree of exactness. It has never been defined by the courts, but has been left loose and free of definition in the same manner as fraud. This rule may, however, be safely laid down: That whenever any contract conflicts with the morals of the time, and contravenes any established interest of society, it is void as being against "public policy." In a contract whereby attorneys were to receive in compensation for services in litigation for the recovery of land one-half the land, a provision whereby the client agreed not to compromise without the consent of her attorneys was not void as contrary to "public policy." *Lipscomb v. Adams*, 91 S. W. 1046, 1048, 193 Mo. 530, 112 Am. St. Rep. 500 (quoting and adopting definition in Story, Cont. § 546).

"There is no precise definition of 'public policy,' and consequently no absolute rule by which a contract can be measured or tested to determine whether or not it is contrary to public policy. Each case, as it arises, must be judged and determined according to its own peculiar circumstances.

The policy of the state or of the nation is to be found in its constitution and its statutes, and, when cases arise concerning matters upon which they are silent, then in its judicial decisions and the constant practice of the government officials courts will not look to other sources to determine the public policy of a state." A contract binding a physician to furnish medical attention to a patient for life for a specified consideration is not void as contrary to public policy as furnishing an incentive to the commission of crime. *Zelgler v. Illinois Trust & Sav. Bank*, 91 N. E. 1041, 1045, 245 Ill. 180, 28 L. R. A. (N. S.) 1112, 19 Ann. Cas. 127.

That "public policy" which will render a contract mala in se for its opposition thereto embraces all acts or contracts which tend clearly to endanger the public health, the public morals, confidence in the purity or the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or private property, which every citizen has a right to feel. A contract between a layman and a lawyer, by which the former undertakes and agrees, in consideration of a division of the fees received by the latter, to hunt up and bring to the attorney persons having causes of action against railroad companies for personal injuries, is contrary to public policy and void. *Holland v. Sheehan*, 122 N. W. 1, 2, 3, 108 Minn. 362, 23 L. R. A. (N. S.) 510, 17 Ann. Cas. 687.

"Lord Brougham defined 'public policy' as that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, which may be termed the policy of the law, or public policy in relation to the administration of the law." Lord Chief Justice Wilmot said: "It is the duty of all courts of justice to keep their eye steadily upon the interests of the public, even in the administration of commutative justice, and when they find an action is founded upon a claim injurious to the public, and which has a bad tendency, to give it no countenance or assistance in foro civili." Thus, where plaintiff contracted with defendants to procure legislative action for the sole purpose of depreciating the market value of the securities of a certain corporation, with a provision that any profit arising from speculating in such securities by selling them short and covering at an anticipated decline should be divided between the parties, such contract is void as against public policy. *Veazey v. Allen*, 86 N. E. 103, 105, 173 N. Y. 359, 62 L. R. A. 362.

A contract is not void as against public policy unless it is injurious to the interests of the public, or contravenes some established interest of society, and the public policy of a state or nation should be deter-

mined by its Constitution, laws, and judicial proceedings, and courts should hold themselves bound to the observance of extreme caution when called upon to declare a transaction void on the ground of public policy and prejudice to the public interest. *Atlantic Coast Line R. Co. v. Beazley*, 45 South. 761, 785, 788, 54 Fla. 311. See, also, *Warren v. Bouvier*, 124 N. Y. Supp. 641, 644, 68 Misc. Rep. 159.

"Public policy" \* \* \* is an uncertain, indefinite term, and when judges come to apply the doctrine they must take care that they do not trespass upon the right to make contracts as parties see proper, so long as they do not violate some principle or policy of law." A contract executed on entrance into an old men's home, whereby any property which the inmate may receive in the future is to become the property of the home, is unenforceable, as against "public policy." *Baltimore Humane Impartial Soc. & Aged Women's & Aged Men's Homes v. Pierce*, 60 Atl. 277, 279, 100 Md. 520, 70 L. R. A. 485.

The public policy of this state is necessarily confined to the regulation of its own affairs and transactions occurring within its sovereignty. No state can be said to have a public policy as to the administration of justice, or as to the service of quasi public agencies, or as to contracts made with respect thereto, transpiring wholly abroad. The public policy of a state can no more have extraterritorial effect than can a statute of the state. *Cleveland, C., C. & St. L. Ry. Co. v. Druien*, 80 S. W. 778, 780, 118 Ky. 237, 66 L. R. A. 275, 4 Ann. Cas. 1102.

#### **As governed by Constitution, laws, or judicial decisions**

By "public policy" is intended the policy of the state, as evidenced by its Constitution and statutes, and the provisions of the common law as evidenced by the decisions of its courts. *Glover v. Baker*, 83 Atl. 916, 932, 76 N. H. 393.

"The 'public policy' of the government is to be found in the Constitution and the laws, and the course of administration and decision." *St. Louis Min. & Mill. Co. v. Montana Min. Co.*, 19 Sup. Ct. 61, 63, 171 U. S. 650, 655, 43 L. Ed. 320.

"It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of 'public policy,' unless it clearly appear that they contravene public right or the public welfare." *Baltimore & O. S. W. R. Co. v. Voigt*, 20 Sup. Ct. 385, 387, 176 U. S. 498, 505, 44 L. Ed. 560.

The "public policy" of the state is to be determined in large measure from its Constitution, legislation, judicial decisions, and the practice of the executive department, and, when the Legislature has acted on a subject on which it has power to legislate, public policy is what the statute indicates. *People ex rel. Healy v. Shedd*, 89 N. E. 332, 334, 241 Ill. 155; *Moorshead v. United Rys. Co. of St. Louis*, 96 S. W. 261, 271, 203 Mo. 121.

The "public policy" of a state is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts and in the constant practice of government officials. *Perry v. United States School Furniture Co.*, 83 N. E. 444, 447, 232 Ill. 101 (quoting *Harding v. American Glucose Co.*, 55 N. E. 577, 599, 182 Ill. 551, 616, 64 L. R. A. 738, 74 Am. St. Rep. 189).

"The 'public policy' of the nation or state must be determined by its Constitution, laws, and judicial decisions." *Southern Ry. Co. v. Blunt & Ward*, 155 Fed. 496, 497 (citing *U. S. v. Trans-Missouri Freight Ass'n*, 58 Fed. 69, 7 C. C. A. 15, 24 L. R. A. 73; *Swann v. Swann*, 21 Fed. 299; *Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry. Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; s. c., 20 Sup. Ct. 33, 175 U. S. 91, 44 L. Ed. 84).

"Public Policy" is that principle or policy of the law which prevents one from doing that which is injurious to the public or against the public good, and is a question of law, and not of fact, the public interest, and not the interest of individuals alone, being considered in determining what is public policy, and when the question is not controlled by the federal Constitution or laws, or by general principle of law, it is determined by the Constitution and statutes of the several states or the declarations of their highest courts. *McClanahan v. Breeding*, 88 N. E. 695, 697, 172 Ind. 457.

"Public policy" on a given subject is determined either by the Constitution itself or by statutes passed within constitutional limitations, and in the absence of such constitutional or statutory determination by decisions of the courts; and hence a constitutional statute cannot be contrary to public policy, since it is public policy. *Borgnis v. Falk Co.*, 133 N. W. 209, 216, 147 Wis. 327, 37 L. R. A. (N. S.) 489.

"By 'public policy' is intended the policy of the state as evidenced by its laws. When the issue is its policy in respect to any question, the only matters which can be considered are its Constitution and statutes and the provisions of the common law as evidenced by the decisions of the courts, for the common law, modified by the Constitution and the statutes of the state, is the law of the state." *Spead v. Tomlinson*, 59 Atl.

376, 397, 73 N. H. 46, 68 L. R. A. 432 (citing *Vidal v. Girard*, 2 How. 127, 197, 11 L. Ed. 205; *People v. Hawkins*, 51 N. E. 257, 157 N. Y. 1, 12, 42 L. R. A. 490, 68 Am. St. Rep. 736; *Consumers' Oil Co. v. Nunnemaker*, 41 N. E. 1048, 142 Ind. 564, 51 Am. St. Rep. 193, 196).

The "public policy" of a state which renders contracts void is found in its statutes and in the decisions of its courts and in the constant practice of government officials; but the court may not declare a contract void as contrary to public policy, except in cases free from doubt, since contracts between parties capable of contracting are presumptively legal and enforceable unless the contract itself discloses its illegality. *Burley Tobacco Society v. Gillaspay* (Ind.) 100 N. E. 89, 92.

The term "public policy" is not limited to matters which are expressly forbidden by statute for reasons of public policy, but extends to matters, though not expressly stated, which are within the reason declared by the statute. *People v. Collins*, 99 Pac. 1109, 1110, 9 Cal. App. 622.

The "public policy" of New Jersey is the creature not of the courts but of the legislature; the courts have nothing to do with forming it, and can only recognize it like any other matter of public law. *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 71 Atl. 153, 174, 74 N. J. Eq. 457.

A statute not repugnant to the Constitution cannot be held void by the courts as contrary to "public policy." What is and what is not "public policy" must be determined by the written and the unwritten law, giving precedence to the former where the two are in conflict. While contracts may be void as being contrary to the policy of the law, statutes are never said to be contrary to "public policy" in any other sense than contrary to constitutional policy. As was said by Baron Parke, in *Egerton v. Brownlow*, 4 H. L. Cas. 122, 123: "It is the province of the statesman and not of the lawyer to discuss, and of the Legislature to determine, what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law, to declare public policy as he finds it in the unwritten and written law. Public policy is a proper ground for a decision only in the sense of the policy of the law, not in the sense of mere judicial notions as to what is best for the public good. An act [speaking of an act *inter partes*] is properly said to be illegal when it is contrary to the principles of established law." *Julien v. Model Building, Loan & Invest. Co.*, 92 N. W. 561, 565, 116 Wis. 79, 61 L. R. A. 668.

The "public policy" of a state varies from time to time, and is not to be measured

by the private convictions or notions of the individual judge, but by referring to legislative enactments and, in their absence, to the decisions of the courts. *Picket Pub. Co. v. Board of Com'rs of Carbon County*, 92 Pac. 524, 525, 36 Mont. 188, 13 L. R. A. (N. S.) 1115, 122 Am. St. Rep. 352, 12 Ann. Cas. 986.

The "public policy" of a state is to be gathered from its public history, the trend of its laws, and the conduct and practice of its public officials, in the administration of its laws and the transaction of its public business. *Pike v. State Board of Land Com'rs*, 113 Pac. 447, 453, 19 Idaho, 268, Ann. Cas. 1912B, 1344.

The public policy the court is concerned with in determining whether a contract is void is that evidenced by the Constitution, the statutes, or definite principles of customary law, developed by the course of judicial decision, and the court should not declare a contract void on such a ground, except in a case free from doubt. *Couch v. Hutchinson*, 57 South. 75, 76, 2 Ala. App. 444.

The "public policy" of a state is the law of that state as found in its Constitution, its statutory enactments, and its judicial records. And when such policy, touching a particular subject, has been declared by statute, it is limited by such statute, and the courts have no authority to say that the Legislature should have made it of wider application. Thus where the Legislature has provided, in plain and peremptory language, that a husband shall inherit from his deceased wife, the court, on the ground of public policy, cannot disinherit him because he feloniously killed his wife to acquire her property. *McAllister v. Fair*, 84 Pac. 112, 114, 72 Kan. 533, 3 L. R. A. (N. S.) 726, 115 Am. St. Rep. 233, 7 Ann. Cas. 973.

A provision in a life policy to the effect that no suit shall be maintained thereon, unless begun within one year from the death of the insured, is void, as in contravention of "public policy"; the statute prescribing a period of 15 years for actions on such contracts. The "public policy" of the state means the law of the state, whether found in the Constitution or statutes, or the judicial records. *Union Cent. Life Ins. Co. v. Spinks*, 83 S. W. 615, 617, 119 Ky. 261, 69 L. R. A. 264, 7 Ann. Cas. 913 (quoting *People v. Hawkins*, 51 N. E. 257, 157 N. Y. 12, 42 L. R. A. 490, 68 Am. St. Rep. 736).

The courts must look to the Constitution and the statutes to determine the public policy of the state on a given subject, hence the words "public policy," as used in section 1 of the Anti-Trust Act of June 10, 1908 (Laws 1907-08, c. 83, art. 1), are interpreted to mean the law of the state whether found in the Constitution or the statutes. A constitutional statute cannot be contrary to pub-

lic policy, since it is public policy. *State v. Coyle*, 122 Pac. 243, 254, 7 Okl. Cr. 50.

The "public policy" of the government is to be found in its statutes, and, when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but, when the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate, "public policy" in such a case is what the statute enacts. If the law prohibit any contract or combination in restraint of trade or commerce, a contract or combination made in violation of such law is void, whatever may have been theretofore decided by the courts to have been the "public policy" of the country on that subject. *Logan & Bryan v. Postal Telegraph & Cable Co.*, 157 Fed. 570, 587 (quoting and adopting the definition in *United States v. Trans-Missouri Freight Association*, 17 Sup. Ct. 540, 166 U. S. 290, 340, 41 L. Ed. 1007).

Acts 1904, p. 870, c. 508, providing for the holding of primary elections and requiring the candidates to pay a fee, to be used in defraying the expenses of holding the election, is not void as contrary to public policy, because public policy, without having its foundation in the Constitution, cannot restrain the legislative authority of the General Assembly. *Kenneweg v. Alleghany County Com'rs*, 62 Atl. 249, 251, 102 Md. 119.

### PUBLIC POWER

The powers delegated to a municipal corporation by the Legislature, authorizing it to regulate wharves, and to charge and collect wharfage for their use, are "public or legislative powers" and incapable of delegation or of surrender by the municipality. A municipality cannot therefore surrender the powers by leasing the exclusive use and control of its wharves for any period of time, without express statutory authority so to do. *Oliver v. Inhabitants of City of Burlington*, 67 Atl. 43, 75 N. J. Law, 227.

Municipalities have two classes of powers, the one political, public, in exercise of which they govern their people and act as delegates of the state, the other private, in exercise of which they act for advantage of their inhabitants and themselves. *City of Winona v. Botzet*, 169 Fed. 321, 322, 94 C. C. A. 563, 23 L. R. A. (N. S.) 204.

### PUBLIC PROPERTY

"Public property" may be defined as that which is dedicated to the public use and over which the state exercises control and dominion. *Hartman v. Tresise*, 84 Pac. 685, 690, 36 Colo. 146, 4 L. R. A. (N. S.) 872.

"Public property" is what belongs to the government—federal, state, or municipal. *State ex rel. Louisiana Imp. Co. v. Board of Assessors*, 36 South. 91, 97, 111 La. 982.

The words "public property," as used in Pol. Code 1895, § 762, which exempts from taxation all public property, includes a building and a stock of liquors owned by a municipal corporation and operated by it as a dispensary; and this is so though the town had no legal authority to maintain and operate a dispensary. *Walden v. Town of Whigham*, 48 S. E. 159, 120 Ga. 646.

The phrase "public property used for public purposes," as used in a constitutional provision empowering the Legislature to exempt public property used for public purposes from taxation, authorizes the exemption of property owned by a city necessary to the exercise of governmental duties; but not property held and used by a city for mere money-making purposes, or for the comfort of its citizens. Bonds of a lighting company given to the city in consideration for the sale of its lighting plant to the company, the income of which is used by the city for the lighting of its streets, are not such public property. *Board of Councilmen of City of Frankfort v. Commonwealth (Ky.)* 82 S. W. 1008, 1009.

Roads and bridges do not constitute "public property" owned by the county within the meaning of a statute providing for the adjustment of liabilities on division. The cost and not the actual value of the public property remaining in original county must be accounted for without taking into consideration any depreciation or appreciation in the value of such property. The record books remaining in the various county offices of the original county are "public property" owned by it, and the cost thereof is properly debited to such county. *State v. Amundson*, 135 N. W. 1117, 1118, 1119, 23 N. D. 238.

Clothing furnished to a soldier by the United States under a clothing allowance does not become his private property which he has a right to dispose of while in the service, but is "public property" within section 35 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1095), which makes it a criminal offense to knowingly purchase or receive in pledge from any soldier "any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier \* \* \* under a clothing allowance or otherwise, such soldier \* \* \* not having the lawful right to pledge or sell the same." *Ontai v. United States*, 188 Fed. 310, 311, 110 C. C. A. 288.

A levee constructed by the trustees of a reclamation district on a right of way procured for that purpose is a part of the works which the trustees of the district are authorized to take materials for and construct for the purpose of reclaiming and keeping reclaimed the land within the district, under Pol. Code, § 3454, and is "public property acquired by the agents of the state for state

purposes." *Reclamation Dist. No. 551 v. Superior Court of Sacramento County*, 90 Pac. 545, 546, 151 Cal. 263.

A city waterworks system is of a governmental and public nature, and is exempt from taxation under Const. § 170, providing that there shall be exempt from taxation "public property" used for public purposes. *Commonwealth v. City of Covington*, 107 S. W. 231, 128 Ky. 36, 14 L. R. A. (N. S.) 1214. See, also, *Bell v. City of Louisville (Ky.)* 106 S. W. 862.

#### As property

See Property.

### PUBLIC PROSECUTION

Const. art. 4, § 1, created the office of Attorney General requiring him to perform such duties as should be prescribed by the Constitution and by law, and by Rev. St. 1908, § 6168, he was required to appear for the state, prosecute and defend all actions and proceedings, civil and criminal, in which the state should be a party or interested, when required to do so by the Governor or General Assembly. By Laws 1891, pp. 240-242, the courts were invested with the same power and jurisdiction to try prosecutions on information as they had been authorized to do by indictment, section 2 providing that all informations should be filed in term time in the court having jurisdiction of the offense by the district attorney of the proper county as informant, and his name should be subscribed thereto either by himself or by his deputy. Section 4 prescribed a form of information in which the district attorney appeared as the charging officer, and section 5 declares that all provisions of law applicable to prosecutions on indictments, to writs and process therein, and the issuing of service thereof, to motions, pleadings, trials, and punishments, or to the passing or execution of any sentence, and to all proceedings in cases of indictment, whether in court of original or appellate jurisdiction, shall apply to informations and to all prosecutions and proceedings thereon. Held, that the words "district attorney," as used in such act, should be construed as synonymous with "public prosecutor," and hence the Attorney General has authority to charge by information in the name of the people the commission of a felony and to prosecute the proceedings in the district court. *People v. Gibson*, 125 Pac. 531, 535, 53 Colo. 231.

### PUBLIC PURPOSE

The phrase "used for public purposes," in a constitutional provision empowering the Legislature to exempt public property used for public purposes from taxation, means the same as the words "used for governmental purposes." *Board of Councilmen of City of Frankfort v. Commonwealth (Ky.)* 82 S. W. 1008, 1009.

Where nonnegotiable bonds, acquired by a city as a part of the consideration for the sale of a gas plant, are held by the city solely for the purpose of devoting the income to paying the expenses of lighting the streets, they are used for "public purposes," within Const. §§ 170, 171, providing that public property used for "public purposes" shall be exempt from taxation and that taxes shall be levied and collected for "public purposes." *Board of Councilmen of City of Frankfort v. Commonwealth (Ky.)* 94 S. W. 648, 650.

A statute, enacted for the declared purpose of promoting the public welfare by a gratuity of \$125 to each veteran of the Civil War, to be paid to every person not a conscript or a substitute, and who has not received a bounty from the commonwealth, or any city or town therein, who served in the army or navy to the credit of the commonwealth, and who was honorably discharged from such service, with the declared intention that the gift shall not be a bounty or payment for services rendered, but a testimonial for meritorious service, is within the taxing power of the Legislature, as the appropriation of money for a "public purpose." In re Opinion of the Justices, 98 N. E. 338, 339, 211 Mass. 608.

A tax levied by the Legislature is for a public purpose, so as to render it constitutional, where it is for the support of government, or for any of the recognized objects of government, or if its proceeds will directly promote the welfare of the community in equal measure. *Beach v. Bradstreet*, 82 Atl. 1030, 1032, 85 Conn. 344, Ann. Cas. 1913B, 946.

The issuance of county bonds to aid in the establishment of a training school for teachers in accordance with the provisions of chapter 820, p. 1165, Acts 1907, and carried out by Acts 1907, p. 733, c. 493, is for a "public purpose," and not violative of the Constitution, as not within the scope and purpose of a municipal corporation. *Cox v. Commissioners of Pitt County*, 60 S. E. 516, 517, 146 N. C. 584, 16 L. R. A. (N. S.) 253.

Tax levied to raise a fund to provide industrial insurance and benefits to injured employes engaged in the extrahazardous occupation of coal mining is for a "public purpose," notwithstanding the act operates to the direct benefit of the injured employe or his dependents, and not directly to the public generally. *Cunningham v. Northwestern Imp. Co.*, 119 Pac. 554, 562, 44 Mont. 180.

Under Const. pt. 2, c. 1, § 1, art. 4, providing that the taxes imposed by the general court are to be disposed of for the public service in the defense of the government of the commonwealth and the protection of its subjects, and chapter 2, § 1, arts. 7, 10, and articles 4, 5, of the amendments, providing for the control and organization of the mi-

militia, and in view of Const. U. S. art. 1, § 8, giving Congress power to raise money to maintain the militia, the maintenance of the militia is a "public purpose," for which taxes may be imposed. *Hodgdon v. City of Haverhill*, 79 N. E. 830, 831, 193 Mass. 406 (citing *City of Lowell v. Oliver*, 8 Allen [90 Mass.] 247).

The appropriation under the act of February 20, 1904 (Acts 1904, p. 33, c. 7), of \$15,000 annually to a private corporation organized under the laws of the state for purely charitable purposes, and conducted solely to seek out destitute children and provide for them homes, and where they will be under supervision of the institution during their minority, is for a "public purpose," within Const. § 171, providing that taxes shall be levied for public purposes only. *Hager v. Kentucky Children's Home Soc.*, 83 S. W. 605, 607, 119 Ky. 235, 67 L. R. A. 815.

Under the revised tax law of 1903 (P. L. 1903, p. 395, § 3, par. 2), which exempts "the property of the United States and of the state of New Jersey, and of the respective counties, school districts and taxing districts when used for 'public purposes,'" property used by a city for the purpose of maintaining and operating a public water supply system established under statutory authority is exempt from taxation. *Perth Amboy v. Barker*, 65 Atl. 201, 202, 74 N. J. Law, 127.

Where the rents received by a city for its wharf property leased to various persons for operation of such business establishments as receive materials and ship manufactured products by boat are turned into the sinking fund for payment of interest and principal of the bonded indebtedness, after policing, lighting, and repairing the property, the property is used for public purposes within Const. § 170. *Commonwealth v. City of Louisville* (Ky.) 119 S. W. 161.

A strip of land owned, though never used, by a railroad company, but leased by it to, and occupied by the loading platforms of, a mill company, is not devoted to a "public purpose," so as to be exempt from condemnation for the track of another railroad company, though it adds to the convenience of the mill company in loading its products on the cars of the railroad company owning the strip when switched onto the track of the mill company; it being the use to which the property is applied, and not its ownership, which marks the use as public or private, and the test of whether the use is public being whether the property is impressed with a trust in favor of the public, so that its use is not of grace, but of right, which cannot be defeated at the owner's will. *State ex rel. Milwaukee Terminal R. Co. v. Superior Court for King County*, 103 Pac. 469, 473, 54 Wash. 365.

## PUBLIC QUASI CORPORATION

See, also, Quasi Public Corporation.

"'Public quasi corporations' are defined as subdivisions of the state's territory, such as counties, townships, school districts and the like, which are created by the Legislature for public purposes and without regard to the wishes of the inhabitants." They are, in essence, local branches of the state government, though clothed in a corporate form in order that they may better perform the duties imposed upon them. *Smith v. Board of Trustees of Robersonville Graded School*, 53 S. E. 524, 527, 141 N. C. 143, 8 Ann. Cas. 529 (quoting and adopting *Abbott on Municipal Corporations*, § 8; and citing and adopting *Smith, Mod. Law Mun. Corp.* §§ 8, 9; *Beach, Pub. Corp.* § 3; *Dillon, Mun. Corp.* §§ 23, 24, 25).

## PUBLIC RECORD

As property, see Property.

See, also, Public Document.

A "public record" is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. *Robison v. Fishback*, 93 N. E. 666, 669, 175 Ind. 132, Ann. Cas. 1913B, 1271.

A record of a hospital made by a junior assistant surgeon, connected with the hospital, showing that at a time specified therein a doctor removed to the hospital a person whose name and address were entered in the record, is not a "public record" kept by a public officer in the discharge of his duties. *Kemp v. Metropolitan St. R. Co.*, 88 N. Y. Supp. 1, 2, 94 App. Div. 322.

*Burns' Ann. St.* 1908, § 9590, provides that the advisory board of a township shall keep a record of its proceedings in a separate book to be furnished by the township trustee, and kept as a part of the records of the township, and remain in the custody of the chairman of the board; that the board shall elect one of its members secretary, who shall record the proceedings thereof at any meeting in full, under the direction of the board, which shall be signed before the board adjourns. Held, that the record of such board is a public record in which the proceedings of the board are required to be fully recorded, and is open to inspection to all persons doing business with the township. *First Nat. Bank of Loogootee v. Van Buren School Tp. of Daviess County*, 93 N. E. 863, 865, 47 Ind. App. 79.

The charter of the city and county of San Francisco, which requires the treasurer to keep the account belonging to each fund separate, and which requires the bond and warrant clerk of the police court to account for and pay to the treasurer all moneys received as bail, requires the treasurer to re-

celve, and, on proper order pay out, ball money, and he must keep a separate and distinct account of such receipts and disbursements, and, where the accounts are kept in a ledger, the ledger is a "public record" within Pen. Code, §§ 113, 114, and falsification of an entry in the ledger is an offense under the statute. *People v. Tomalty*, 111 Pac. 513, 516, 14 Cal. App. 224.

A mechanics' lien claim sufficiently signed to entitle it to be filed, and filed, is admissible in evidence as a "public record" under Code Civ. Proc. § 1894. *D. I. Nofziger Lumber Co. v. Solomon*, 110 Pac. 474, 476, 13 Cal. App. 621.

Where a statute requiring pawnbrokers to furnish weekly records of their transactions makes no provision for the filing of the records, such records are not papers received for filing within the general statute providing that "public records" shall mean any paper, etc., which any officer or employé of a city, etc., has received or is required to receive for filing. *Round v. Police Com'r for City of Boston*, 83 N. E. 412, 197 Mass. 218.

There being no statute requiring a county treasurer to keep a record of certificates of redemption of land from tax sales, such records, kept by the treasurer at his own volition, though at public expense, were not "public records," open to inspection of the public as a matter of right. *State ex rel. Cook v. Reed*, 79 Pac. 306, 307, 36 Wash. 638.

Rev. Laws, c. 35, § 5, providing that, in construing the provisions of that chapter and other statutes, the words "public records" shall mean any written or printed book, any map or plan of any city, etc., does not make the documents therein described public documents, and a note book in the office of the city engineer of a city, made by an assistant in the office, and showing the placing of a stone fixing the center of a street, is not a public document, and is not admissible in evidence as a public document. *Allen v. Kidd*, 84 N. E. 122, 123, 197 Mass. 256.

## PUBLIC RESORT

See, also, Public Place.

A private house may become a "place of public resort" when frequented by many persons under suspicious circumstances. *State v. Pratt*, 34 Vt. 323, 325.

Where intoxicating liquors are kept in a dwelling house and sales are made therein, it may properly be regarded as a shop or place of public resort within Laws 1907, p. 363, c. 173, § 8, providing that no warrant shall be issued to search a private residence occupied as such unless it or some part of it is used as a store, shop, hotel, or boarding house, or unless such residence is a place of public resort. *State v. Madison*, 122 N. W. 647, 650, 23 S. D. 584.

## PUBLIC REVENUE

As revenue, see Revenue.

## PUBLIC ROAD

See Traveled Public Road.

The test as to whether or not a road is a public road is not simply how many people actually use it, but how many may have a free and unrestricted right in common to use it. If it is free and common to all citizens, then, no matter whether it is or is not of great length, or whether it leads to or from a village, city, or hamlet, or whether it is much or little used, it is a "public road." *Heninger v. Peery*, 47 S. E. 1013, 1014, 102 Va. 896 (quoting Elliott, *Roads & S.* §§ 11, 192).

The term "public highway," as used in Acts 1905, p. 114, forbidding appearance on the "public road" in an intoxicated condition, is not synonymous with "public road." *Johnson v. State*, 58 S. E. 265, 267, 1 Ga. App. 195.

A road used, worked, and occupied as a public road by a county court is a "public road," within Code 1906, c. 43, §§ 31, 53. *Burke v. Jackson County Court*, 73 S. E. 304, 305, 70 W. Va. 174.

A "public road" within the meaning of the blow post law is a thoroughfare which is used by the public as a matter of right, or a highway having its origin in a legislative act, or ordered by court, or existing by dedication or prescription. *Southern Ry. Co. v. Combs*, 53 S. E. 508, 511, 124 Ga. 1004.

"Public road," as used in Civ. Code 1895, § 2222, requiring railroads to blow the whistle and reduce speed after reaching a point 400 yards from a public road crossing, is not confined to a road laid out and established by county authorities by regular proceedings, but includes as well highways which came into existence by legislative action, by proceedings of the county authorities, by dedication, or by prescription. *McCoy v. Central of Ga. Ry. Co.*, 62 S. E. 297, 298, 131 Ga. 378.

Proof that a road was commonly and largely used by the general public for a number of years, without more, will not support an allegation that it was a "public" highway or a "public" road. *Johnson v. State*, 58 S. E. 265, 267, 1 Ga. App. 195.

The term "public roads" is commonly understood and recognized to apply exclusively to rural highways, and not to that portion of a highway lying within the limits of a city or village. As used in a statute providing that, in counties under township organization, the expense of building, maintaining, and repairing bridges on public roads over streams shall be borne exclusively by the counties within which such bridges are located, the term "public roads" has such

meaning. *Central City v. Marquis*, 106 N. W. 221, 222, 75 Neb. 233 (citing *Nebraska Tel. Co. v. Western Independent Long Distance Tel. Co.*, 68 Neb. 772, 95 N. W. 18).

Under Rev. St. 1887, § 851, as amended by Sess. Laws 1893, p. 12, defining roads to be roads laid out and recorded by order of the county commissioners and roads used for five years, provided the latter shall have been worked and kept up at public expense or located and recorded by order of the county commissioners, roads used for five years that have been worked and kept up at public expense are public roads, whether recorded or not. *Meservey v. Gulliford*, 93 Pac. 780, 782, 14 Idaho, 133.

#### Public bridge

A public bridge is a part of the "public road" on which it is located. *Pickens County v. Greene County*, 54 South. 998, 999, 171 Ala. 377.

#### Street or alley

Drainage Act May 29, 1879, § 55, authorizing the assessment of benefits for drains against "any public or corporate road or railroad," and apportioning to the county, state or free turnpike road, to the township, if a township road, to the company, if a corporate road or railroad, such portions of the "cost" thereof as to individuals, and providing that, in case such assessment is made in any "township," the commissioners of highways shall cause the same to be levied in the manner provided by Act June 23, 1883, §§ 13, 14, 15, 16, does not confer on a drainage district the power to assess benefits to public streets without the consent of the city. *City of Joliet v. Spring Creek Drainage Dist.*, 78 N. E. 836, 843, 222 Ill. 441.

Const. art. 7, § 28, grants to the county courts the exclusive original jurisdiction in all matters relating to roads and the disbursement of moneys for county purposes, and in other cases necessary to the internal improvement and local concerns of the county; and Const. Amend. 5, adopted January 13, 1899, gives the county court power to levy a road tax of not exceeding three mills, if the majority of the qualified electors of the county shall have voted therefor at a general election preceding such levy, but makes no provision who shall receive or expend the amount collected, except that it shall be used in the respective counties only to make and repair public roads. Const. art. 12, § 3, empowers the Legislature to pass laws for the organization of towns and cities, and Kirby's Dig. § 5458, grants to municipal councils the power to lay out, improve, and repair streets within their corporate limits. Act approved May 30, 1911 (Sp. & Priv. Acts 1911, p. 1003), requires two-fifths of the road tax collected on property within the city of Texarkana to be used on roads and bridges outside of the

city limits according to discretion of the county judge, and the remaining three-fifths to be used exclusively for streets and highways within the city limits, and that the collector of Miller county pay three-fifths of such fund to the city treasury, and section 2 of the act extends its provisions to the tax collected in such city for 1910. Held, in an action to compel the collector to pay into the city treasury three-fifths of the road tax collected for 1910 on the property within the city, that the streets of the city were "public roads of the county" of which the city was a component part, although "streets" did not include roads, and that, in view of the powers of towns and cities, the act apportioning the road tax between the city and the county was not in conflict with the grant of exclusive original jurisdiction to county courts in all matters relating to roads. *Sanderson v. City of Texarkana*, 146 S. W. 105, 107, 103 Ark. 529.

#### Turnpike

2 Gen. St. 1895, p. 2202, § 12, authorizes water companies created thereunder to lay their pipes beneath such public streets, roads, etc., as they deem necessary, free of charge by any person or municipality, provided they do not unnecessarily interfere with public travel, etc., and that the consent of the corporate authorities of any town through which the pipes shall be laid, be obtained. Held, that a turnpike road which was established upon an ancient public highway, which was delivered to the turnpike company for maintenance and control under the toll system, was a "public road," within section 12. *Gloucester Turnpike Co. v. American Pipe Co.*, 78 Atl. 708, 709, 77 N. J. Eq. 471.

#### PUBLIC SALE

A "public sale" is a sale in pursuance of a notice, by auction or public outcry. *Robins v. Bellas* (Pa.) 4 Watts, 255, 258.

There is a "public sale" in bankruptcy where all persons are permitted to bid, where bids are not held open, except with the bidder's consent, and where notice inviting bids is publicly given. In re *Nevada-Utah Mines & Smelters Corporation*, 198 Fed. 497, 498.

#### PUBLIC SALE OR USE (In Patent Law)

See Public Use (In Patent Law).

#### PUBLIC SCHOOL

See Free Public School.

As place of worship, see Place of Worship.

The schools referred to in Rev. Laws, c. 42, §§ 1, 2, requiring cities and towns to maintain certain schools, are open under proper regulations to all children of the city or town, as provided by chapter 44, § 8; and all children between the ages of 7 and 14 are obliged to attend such schools, unless they receive equivalent instruction outside of



them, as provided by chapter 44, §§ 1, 2. Held, that Rev. Laws, c. 112, § 72, providing that street railway companies shall transport pupils of the "public schools" at half fare, while traveling to and from the school-houses in which they attend school, referred to those schools mentioned in chapter 42, §§ 1, 2, which are a part of the system of compulsory education for children, and did not include other schools maintained at public expense, such as industrial schools, nautical schools, evening schools, etc., authorized by sections 10, 11, 12, 15, and 16. *Commonwealth v. Connecticut Valley St. Ry. Co.*, 82 N. E. 19, 20, 196 Mass. 309.

The term "public schools," as used in Const. art. 3, § 25, as amended under the joint resolution proposed by the Legislature in 1899, and adopted at the general election in 1900, authorizing special legislation as to a university or the public schools, could not be construed to mean the public free schools, as used in Const. art. 12, § 1, but must be held to refer to the other public institutions of learning existing in the state at the time of the adoption of the joint resolution proposing such amendment. *State ex rel. Moodle v. Bryan*, 39 South. 929, 958, 50 Fla. 293 (citing *Cooke v. School Dist. No. 12*, 21 Pac. 496, 719, 12 Colo. 453, 456; *St. Joseph's Church v. Assessors of Taxes of Providence*, 12 R. I. 19, 34 Am. Rep. 597; *Merrick v. Inhabitants of Amherst*, 12 Allen [94 Mass.] 500, text 508; *Jenkins v. Inhabitants of Andover*, 103 Mass. 94, 97; *Gordon v. Cornes*, 47 N. Y. 608, 616; *People v. Crissey*, 45 Hun [N. Y.] 19, 21; *Collins v. Henderson*, 11 Bush [74 Ky.] 74, text 82 et seq.; *Roach v. Board of President and Directors of the St. Louis Public Schools*, 77 Mo. 484, 487).

The Corporation Commission ordered: "That the defendant (appellant), the Oklahoma Railway Company, furnish to children under the age of fifteen years, going to or from St. Joseph's Parochial School, as pupils therein, tickets at the rate of two and one-half cents each in quantities of twenty tickets at one time. Such tickets to be used only in going to and returning from said school, to be honored for continuous passage and transfer on connecting lines over any other tracks of said defendant within the corporate limits of Oklahoma City. That such book of tickets shall not be limited to use on any particular day, but may be used any day on which the school may be in session." Section 7 of the ordinance granting the franchise under which the appellant operates its line of street railway provides: "Tickets for the use of school children shall be furnished good for one continuous passage, in quantities of not less than twenty rides at the rate of two and one-half cents each, under any reasonable regulations which the company may impose to prevent the abuse of such privilege or the use of such tickets by others than children under fifteen

years of age in actual attendance on the public schools of said city." Held, that "public schools of said city" include the public schools of said city whether maintained by the public by taxation or by private agencies for the public by private benevolence. *Oklahoma Ry. Co. v. St. Joseph's Parochial School*, 127 Pac. 1087-1089, 33 Okl. 755.

#### Evening school

Under Const. art. 9, § 6, providing that the public school system shall include primary and grammar schools and such high schools, evening schools, commercial schools, and technical schools as may be established by the Legislature or by municipal or district authority, the words "evening school" were merely intended to obviate doubt as to the power to provide for schools holding evening sessions, so that the section did not prevent the conduct of an evening high school as a part of the "public school system." *Board of Education of City and County of San Francisco v. Hyatt*, 93 Pac. 117, 118, 152 Cal. 515.

#### High school

High schools may be properly included within the term "public schools." *Board of Education of City and County of San Francisco v. Hyatt*, 93 Pac. 117, 119, 152 Cal. 515.

#### University

The term "public schools," as used in Const. art. 13, § 5, providing that the supervision of instruction in the public schools shall be vested in a board of education, does not include in its meaning the University of Oklahoma. *Regents of University of Oklahoma v. Board of Education*, 95 Pac. 429, 432, 20 Okl. 809; *Elsberry v. Seay*, 3 South. 804, 83 Ala. 614; *Jenkins v. Inhabitants of Andover*, 103 Mass. 94.

### PUBLIC SECURITIES

Bonds issued by a municipal corporation in pursuance of an act of the Legislature, approved April 17, 1908 (Laws 1907-08, c. 10, art. 1), the provisions of which are to be found in article 5, c. 14, Comp. Laws 1909, to raise revenue or funds with which to make street improvements in a city, which are to be paid by special assessments levied against the property benefited by the improvements, are not "public securities or bonds," within the meaning of section 2 of an act of the Legislature, approved March 24, 1910 (Laws 1910, c. 94), entitled "An act for the protection, validation and sale of bond issues of the state, counties, townships and municipalities and all other political organizations and subdivisions of the state of Oklahoma"; and such bonds are not required to be examined and certified to by the Attorney General as ex officio bond commissioner. *City of Lawton v. West*, 126 Pac. 574, 575, 33 Okl. 395.

**PUBLIC SERVICE**

See, also, Public Business; Public Duty.

**Water supply**

Water companies are corporations performing services of a public nature quite as much as common carriers and are within the Florida Constitution giving the Legislature full power to correct abuses and prevent injurious discrimination and excessive charges by persons and corporations engaged as common carriers or in transporting persons or property or in performing other services of a "public" nature. *Tampa Waterworks Co. v. City of Tampa*, 26 Sup. Ct. 23, 24, 199 U. S. 241, 50 L. Ed. 170.

**PUBLIC SERVICE COMMISSION**

As court, see Court (Of Justice).

**PUBLIC SERVICE CORPORATION**

As defined by the Oklahoma Constitution, the term "public service corporation" includes "all transportation and transmission companies, all gas, electric light, heat and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any right of way, street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public." *Shawnee Gas & Electric Co. v. State ex rel. Shawnee City Waterworks*, 122 Pac. 222, 228, 31 Okl. 505.

**Electric company**

An electric company, organized under the transportation law of New York, was engaged in transmitting and selling electricity for light and power to private consumers and street railway lines in a number of towns and villages, for which it had franchises. It also kept electrical supplies in store, which it sold chiefly to its consumers of electricity. It did not generate electricity, and had no plant for so doing, but purchased the same from other corporations, although it owned its own transmission lines and stations. Held, that it was a "public service corporation," and not principally, if at all, engaged in trading or mercantile pursuits, within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797, and was not subject to adjudication as an involuntary bankrupt. In re Hudson River Electric Power Co., 173 Fed. 934, 946.

**Gas company**

A company having the right, whether exclusive or not, to supply the citizens of a city with gas for light and fuel, is a public service corporation, and must serve all alike. *Vanderberg v. Kansas City, Mo., Gas Co.*, 105 S. W. 17, 19, 126 Mo. App. 600.

**Railroad or street railway company**

A street railway corporation is a public service corporation, and owes duties to the

general public which it cannot breach except under penalty of ouster from its franchise. *Johnson v. United Rys. Co. of St. Louis*, 127 S. W. 63, 70, 227 Mo. 423.

Const. art. 12, § 153, defines the term "public service corporation" as including "all transportation and transmission companies, all gas, electric, heat, and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public." A railway and light company, though a public service corporation, stands on the footing of an individual as respects its power house, so that it being a nuisance, the company is liable for the injury. *Townsend v. Norfolk Ry. & Light Co.*, 52 S. E. 970, 971, 105 Va. 22, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, 8 Ann. Cas. 558. And the same is true of a railroad company. *Terrill v. Chesapeake & O. R. Co.*, 66 S. E. 55, 57, 110 Va. 340, 32 L. R. A. (N. S.) 371.

**Telegraph company**

A "public service company" is one engaged in a business of such nature as to clearly distinguish it from those purely private persons and corporations who may conduct their own business in their own way. All such corporations must observe certain rules of dealing with the public on account of the interest which the public has in the manner in which their business is conducted as well as on account of the special franchise enjoyed by them. These rules and the corresponding duties which are implied from the nature of the calling are not always declared by specific statute, but are frequently enforced by the courts as a part of the general law or of the common law. A telegraph company is a private corporation performing a public duty, and it is immaterial whether it be regarded as a common carrier, a bailee, or a person engaged in business sui generis. One of the great requirements which the government demands of these public service corporations is the duty to act impartially with all. They are under obligation to extend the facilities to all persons on equal terms who are willing to comply with their reasonable regulations and to make such compensation as is exacted for others in like circumstances. *Dunn v. Western Union Telegraph Co.*, 59 S. E. 189, 190, 2 Ga. App. 845 (quoting and adopting *Jones, Tel. & Tel. Co.* § 236).

**Telephone company**

A telephone company is a "public service corporation," required to transmit messages, if within its power to do so, with authority to prescribe reasonable rules and charges for conducting the business. *McDaniel v. Faubush Telephone Co. (Ky.)* 106 S. W. 825, 826.

**PUBLIC SERVICE FACILITIES AND CONVENIENCES**

See, also, Public Convenience; Public Facilities.

The quoted phrase in Const. art. 9, § 18, relating to the duties of the Corporation Commission, and providing that it shall from time to time require transportation companies to maintain all "such public service facilities and conveniences as may be reasonable and just," means everything incident to the general, prompt, safe, and impartial performance of the duties to the public at large imposed by the state, in the proper exercise of its police power, on transportation companies. The Constitution does not require transportation or transmission companies at their own expense to provide such equal facilities and conveniences between private persons or corporations as to overcome or equalize disadvantages caused by dissimilarity of location. *Chicago, R. I. & P. Ry. Co. v. State*, 99 Pac. 901, 905, 23 Okl. 94.

**PUBLIC SEWER**

A "public sewer" is not necessarily one to accommodate a whole city, but is one which serves the public, and not an individual, and which connects with and receives the discharges from district sewers and the surface water which falls on the street near to or under which they run. *Southworth v. City of Glasgow*, 132 S. W. 1168, 1174, 232 Mo. 108, Ann. Cas. 1912B, 1267.

**PUBLIC SHOW**

See, also, Public Exhibition.

A moving picture show is not a "public show" within the meaning of those words as used in Pen. Code, § 265, prohibiting all shooting, hunting, fishing, playing, horse racing, gaming, or other public sports, exercises, or shows on Sunday. *People v. Hemleb*, 111 N. Y. Supp. 690, 691, 127 App. Div. 356; *William Fox Amusement Co. v. McClellan*, 114 N. Y. Supp. 594, 598, 62 Misc. Rep. 100; *Edwards v. McClellan*, 118 N. Y. Supp. 181. Contra, see *Gale v. Bingham*, 110 N. Y. Supp. 12, 13.

**PUBLIC SPORT**

A public sport, game, show, or entertainment is one held out and given to the public. *People v. Poole*, 89 N. Y. Supp. 773, 774, 44 Misc. Rep. 118.

"Private sports" are those which are engaged in for the entertainment and pleasure of those who participate, but "public sports" are those which are engaged in for the entertainment and pleasure of the public. *Cheeves v. State*, 114 Pac. 1125, 1126, 5 Okl. Cr. 361.

Relator was committed by a city magistrate on a charge of violating Pen. Code, § 265, prohibiting all "public sport, exercise, or shows" on the first day of the week, by ex-

hibiting moving pictures. The return on habeas corpus showed that the act consisted in exhibiting pictures illustrating lectures delivered at the same time on the story of Joseph and his brethren and also an illustrated lecture on the lumber industry in California. Held, that the exhibition did not constitute "public sport, exercise, or show," within the intention of the Code. *People v. Finn*, 110 N. Y. Supp. 22, 23, 57 Misc. Rep. 659.

**PUBLIC SQUARE**

See, also, Public Park.

The term "public square" signifies in law that certain property has been dedicated to public use. The public square of a county is of a public nature and held for governmental purposes. *People ex rel. Whittock v. Willison*, 86 N. E. 1094, 1096, 237 Ill. 584.

A "public square" is a widening of the street or the reservation of a plot of ground at intersections of streets for the purpose of beautifying the town or providing a breathing space in its center, or where the people are most likely to congregate. A borough has no power, under a statute authorizing it to hold such real estate as the purposes of the borough shall require and empowering it to regulate streets and common grounds and to make such other regulations as may be necessary for the health and cleanliness of the borough, to contract to lease from a private owner an inclosed pleasure park within the borough in order to derive a revenue therefrom by subletting or charging the public for admission, and, if the borough enters into possession of the park under such agreement, no recovery can be had from it as for the use and occupation of the same. *Bloomsburg Land Imp. Co. v. Borough of Bloomsburg*, 64 Atl. 602, 604, 215 Pa. 452.

**PUBLIC STREET**

See Street.

**PUBLIC TAX**

The covenant of a perpetual leaseholder with his municipal lessor to pay the public taxes which shall become due on the land embraces municipal taxes whenever they can thereafter be lawfully assessed on the land or the improvements which are part of the land, although when the lease was made the municipality had no power of taxation. *J. W. Perry Co. v. City of Norfolk*, 31 Sup. Ct. 465, 467, 220 U. S. 472, 55 L. Ed. 548.

**PUBLIC THINGS**

See Things Public.

**PUBLIC TRACK**

Where a railway switch, though used largely by one person, is open to all persons for shipping purposes, it is a "public track," and its presence in a public street does not constitute a nuisance per se. "The public or private character of a track or way de-

depends upon the right of the public generally to its use, and not upon the extent of the exercise of that right. If such right is confined to a limited number only, it is a private use and a private track, although such persons may use it an equal or unequal number of times each, while, if it is available to all the public who desire to use it for shipping purposes, it is a public use, although some one or more of the public may use it more frequently than others." *Wolfard v. Fisher*, 87 Pac. 530, 48 Or. 479, 7 L. R. A. (N. S.) 991 (citing *Phillips v. Watson*, 18 N. W. 650, 63 Iowa, 33; *Elliott, R. R.* [3d Ed.] § 961; *Bridal Veil Lumber Co. v. Johnson*, 46 Pac. 790, 30 Or. 210, 34 L. R. A. 368, 60 Am. St. Rep. 818; *Towns v. Klamath County*, 58 Pac. 604, 33 Or. 233).

## PUBLIC TRAFFIC

### Sale

The phrase "public traffic," in *Wilson's Rev. & Ann. St. 1903*, §§ 1960-1970, prohibiting "public traffic" on the Sabbath, and declaring that all manner of public selling, or offering or exposing for sale publicly, of any commodities on the Sabbath, is prohibited, etc., includes the sale of an animal, and the making and execution of a note for the price thereof, and a debt created for the sale of an animal cannot be enforced unless there is such a subsequent recognition of the indebtedness on a secular day as will amount to an acknowledgment of indebtedness, and a promise at that time, either express or implied, to pay. *A. Helm & Son v. Briley*, 87 Pac. 595, 596, 17 Okl. 314 (citing *Van Hoven v. Irish*, 10 Fed. 13; *Adams v. Gay*, 19 Vt. 358; *Harrison v. Colton*, 31 Iowa, 16; *Saginaw, T. & H. R. Co. v. Chapell*, 22 N. W. 278, 56 Mich. 190; *Wilson v. Milligan*, 75 Mo. 41; *Banks v. Werts*, 13 Ind. 203; *Clough v. Davis*, 9 N. H. 500; *King v. Fleming*, 72 Ill. 21, 22 Am. Rep. 131).

## PUBLIC TRIAL

The word "public," as used in the Constitution guaranteeing to all persons accused of crime a public trial, is there used in opposition to "secret." The constitutional requirement is fairly observed, if, without partiality or favoritism, a reasonable portion of the public is suffered to attend, notwithstanding that those persons whose presence would be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether. The exclusion by the court of all persons other than those interested in the case, where, from the character of the charge and nature of the evidence, public morality would be injuriously affected, does not violate the constitutional right to a public trial. *Robertson v. State*, 60 South. 118, 119, 64 Fla. 437.

The term "public," in its enlarged sense, takes in the entire community, the whole

body politic, so that a "public trial" means one which is not limited or restricted to any particular class of the community, but is open to the free observation of all. This does not impose upon the authorities a duty to provide so large a place for public trials as would accommodate every member of the community at the same time. "It is also requisite that the trial be public. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials, because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused, that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triors keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether." An order made by the court of common pleas during the trial of an indictment for a felony, to the effect that in view of the testimony expected to be given by witnesses next to be called the court would continue the trial during the taking of the testimony in the small courtroom, that the sheriff should admit no one to said room except the jury, defendant's counsel, members of the bar, and newspaper men, and one other person, a witness for defendant, exceeds the power of the court in the premises, and its enforcement is a denial to defendant of his constitutional right to a "public trial." *State v. Hensley*, 79 N. E. 462, 463, 75 Ohio St. 255, 9 L. R. A. (N. S.) 277, 116 Am. St. Rep. 734, 9 Ann. Cas. 108. But the making of an order excluding all persons from the courtroom until the argument, except officers of the court, witnesses and persons whom the several parties to the action may request to remain, does not deprive defendant of a public trial within the statutory and constitutional provisions. *State v. Nyhus*, 124 N. W. 71, 73, 19 N. D. 326, 27 L. R. A. (N. S.) 487.

The requirement in Const. § 11, guaranteeing a public trial, does not mean that all of the public who desire to be present may do so, or that the trial judge may not without favor or discrimination limit the spectators to the capacity of the room in which the

trial is had, and the court's action in stationing policemen at convenient places and in limiting admission to the courtroom, to prevent overcrowding, without discriminating against accused or his friends, is not ground for reversal of a conviction. *Wendling v. Commonwealth*, 137 S. W. 205, 211, 143 Ky. 587.

"Public trial" means trial by jury, perhaps including the rendition of judgment; but, if the accused is convicted and sentenced the trial is over. *State v. Pioneer Press Co.*, 110 N. W. 867, 869, 100 Minn. 173, 9 L. R. A. (N. S.) 480, 117 Am. St. Rep. 684, 10 Ann. Cas. 351.

### PUBLIC TRUST

Office as, see Office.

A "public trust" is one in which the public at large, or some undetermined portion of it, have a direct interest or property right, or in which the beneficiaries cannot be ascertained with certainty. *Holman v. Renaud*, 125 S. W. 843, 845, 141 Mo. App. 399. The term is synonymous with "charity." *MacKenzie v. Trustees of Presbytery of Jersey City*, 61 Atl. 1027, 1033, 67 N. J. Eq. 652, 3 L. R. A. (N. S.) 227.

### PUBLIC USE

See Damage for Public Use; Opened and Dedicated to Public Use; Prior Public Use; Reserved for Public Use.

More necessary public use, see More.

Other public use, see Other.

A "public user" of land dedicated for a street is a use by the public of the neighborhood. *Board of Com'rs of Town of Keyport v. Freehold & A. H. R. Co.*, 65 Atl. 1035, 1036, 74 N. J. Law, 480 (citing *Wood v. Hurd*, 34 N. J. Law, 87, 91).

A dedication to a public use may be limited actually to the inhabitants of a small locality; but the use must be in common and on the same terms, however few the number who avail themselves thereof, and a "public use," whether for all men or a class, is one not confined to privileged persons. *People ex rel. Scott v. Ricketts*, 94 N. E. 71, 72, 248 Ill. 428.

A city owning land dedicated to it for a public landing, executed a lease of a part thereof to an individual for a private purpose. Thereafter it granted to a railroad the right to construct railroad tracks and terminal facilities on such part. Held, that the occupation of the land with railroad tracks and terminal facilities was not a "public use," terminating the prior lease, but necessarily excluded the public from that part of the land, so that the company was not entitled, because thereof, to dispossess the lessee without compensation. *Union R. Co. v. Chickasaw Cooperage Co.*, 95 S. W. 171, 177, 116 Tenn. 594.

"The expressions 'public interest' and 'public use' are not synonymous. The establishment of furnaces, mills, and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote in a general sense the public welfare, but they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings." Expending money in caring for streets which are so narrow that the village cannot accept them as streets is not a "public use" of money. *Smith v. Smythe*, 90 N. E. 1121, 1123, 197 N. Y. 457, 35 L. R. A. (N. S.) 524 (citing *In re Niagara Falls & W. R. Co.*, 15 N. E. 429, 432, 108 N. Y. 375, 385).

A water company contracted to furnish a town with water for public uses, etc. Held, that the term "public use" meant uses such as benefited all the inhabitants, as distinguished from those that benefited individuals as a class and did not include mechanical purposes or manufacturing purposes. *Mayor, etc., of Town of Boonton v. Boonton Water Co.*, 61 Atl. 390, 393, 69 N. J. Eq. 23.

A contract by a water company to furnish a town with water "for domestic purposes, the extinguishment of fires and other lawful uses," and also "for public and domestic uses and purposes of the inhabitants" of the town, did not authorize the corporation to furnish water for the purpose of creating any power for mechanical purposes either by the means of the creation of steam or for the propelling of any water motor to the prejudice of the town for domestic and fire uses. *Boonton v. United Water Supply Co.*, 64 Atl. 1064, 1065, 70 N. J. Eq. 692.

It is understood by the term "public use" as applied to a street that the primary intention and idea of the use of the street was for travel—moving from place to place in any way that does not interfere with the use of the street for travel in any other way. The manner or mode of travel is not restricted to those known or in use at the time of the dedication, but may be those modes of travel that are the result of modern invention. The construction and operation of a telephone line on a street is not a proper street use. *Cosgriff v. Tri-State Telephone & Telegraph Co.*, 107 N. W. 525, 526, 15 N. D. 210, 5 L. R. A. (N. S.) 1142.

There is a distinction in the meaning of the term "public use," as employed in the law of eminent domain, and in that of taxation. The furnishing water by a municipality to its inhabitants for domestic purposes, in consideration of a compensation which even yields an incidental profit to the municipality, is a "public use" within the meaning of that term as used with reference to exemptions from taxation. *Stiles v. Newport*, 56 Atl. 662, 665, 76 Vt. 154.

Money raised by a city on bonds to invest in railroad bonds is for a "public use" within the meaning of the Constitution. *Town of Bennington v. Park*, 50 Vt. 178, 193, 194.

Water appropriated for sale, rental, or distribution is a "public use" subject to the regulation and control of the state. *Cozzens v. North Fork Ditch Co.*, 84 Pac. 342, 347, 2 Cal. App. 404 (citing Const. art. 14, § 1).

A petition for a writ of mandate to compel a water company to furnish plaintiff with a supply of water, averring that one of the purposes for which defendant was incorporated and in which it has been since its incorporation and is now engaged is to distribute water for compensation to the residents of L., that the petitioner is, and has been for more than 10 years, a resident of L. and a freeholder thereof, and during that time defendant has supplied him with water upon his premises, and that it has a sufficient quantity of water to supply him, sufficiently shows that defendant is in the control of a "public use," within Const. art. 14, providing that the "use of all water now appropriated or that may hereafter be appropriated for sale, rental, or distribution is hereby declared to be a public use," and that plaintiff is a beneficiary of that use. *Mahoney v. American Land & Water Co.*, 83 Pac. 267, 268, 2 Cal. App. 185.

The right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not, and a water company having water appropriated under Const. 1879, Art. 14, § 1, for sale, rental, or distribution, the use of which is thereby declared to be a "public use," cannot confer any preferential right on one consumer over another to the use of any part of the water. But it would not be in derogation of the Constitution for a water company in possession of a limited amount of water so appropriated to fix the limits of the territory to the irrigation of which it shall be devoted, and agree to supply the water first to the lands therein, and to supply only the surplus to outsiders. *Leavitt v. Lassen Irr. Co.*, 106 Pac. 404, 407, 157 Cal. 82, 29 L. R. A. (N. S.) 213 (quoting and adopting definition in *Hildreth v. Montecito Creek Water Co.*, 72 Pac. 395, 139 Cal. 32).

The obligation of a corporation organized to sell and distribute water to furnish water is created by Const. Cal. art. 14, § 1, declaring that the use of water, appropriated for sale or distribution shall be a "public use" and subject to regulation in the manner prescribed by law, and does not arise under St. 1885, p. 95, c. 115, requiring a corpora-

tion appropriating water for sale or distribution to furnish water to the extent of the actual supply, and providing that any corporation neglecting so to do shall be liable in damages to the extent of the actual injury sustained. *Lowe v. Yolo County Consol. Water Co.*, 96 Pac. 379, 380, 8 Cal. App. 167.

The term "public use" has been defined to be a use or right of use on the part of the public, or some limited portion of it, and it has also been defined as a public benefit, utility, or advantage. To constitute a public use under the first definition, it is necessary that the public should in some way use or be entitled to use or enjoy the property taken, while, according to the second definition, the use is a public one where the property taken is so employed as to inure in any way to the public benefit or advantage. But whatever definition is adopted, a convention hall to be owned, controlled, and used exclusively by a city to accommodate public gatherings of the people of the city and for such other public uses as may be designated by the mayor and city council is a "public use" and a public utility within Const. art. 10, § 27, authorizing any municipality by a majority of the qualified property taxpaying voters thereof, to become indebted for the purpose of purchasing or constructing public utilities. *State ex rel. Manhattan Const. Co. v. Barnes*, 97 Pac. 997, 998, 22 Okl. 191.

#### **PUBLIC USE (In Eminent Domain)**

To constitute a "public use," the public must be concerned in the use, and it must be public in fact. *Cloth v. Chicago, R. I. & P. R. Co.*, 132 S. W. 1005, 1006, 97 Ark. 86, Ann. Cas. 1912C, 1115.

A "public use" must be either a use by the public or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state. *Healy Lumber Co. v. Morris*, 74 Pac. 681, 685, 33 Wash. 490, 63 L. R. A. 820, 99 Am. St. Rep. 964; *Riley v. Charleston Union Station Co.*, 51 S. E. 485, 496, 71 S. C. 457, 110 Am. St. Rep. 579 (quoting and adopting definition in *Healy Lumber Co. v. Morris*, 74 Pac. 681, 33 Wash. 490, 63 L. R. A. 820, 99 Am. St. Rep. 964). See, also, *Matthews v. Belfast Mfg. Co.*, 77 Pac. 1046, 1047, 35 Wash. 662.

The term "public use," as employed in a constitutional provision that no person's property shall be taken, damaged or destroyed, or applied to public use without adequate compensation being made, etc., is not that use which either the Legislature or the courts may deem a public benefit or advantage, but means the same as "use by the public," and is synonymous with the employment or application by the public of the thing taken. It means that, though property is vested in private individuals or cor-

porations, the public yet retains certain definite rights to the use or employment of the property. *Borden v. Trespalacios Rice & Irrigation Co.* (Tex.) 82 S. W. 461, 465.

A "public use," justifying the taking of private property against the will of the owner, implies a possession, occupation, or enjoyment of the property taken by the public at large, or by public agencies. That only is a public use where the government is supplying its own needs, or is furnishing facilities for its citizens as a matter of public necessity or convenience, which on account of their peculiar character, it is proper, useful, and needful for the government to provide. *Brown v. Gerald*, 61 Atl. 785, 788, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526. See, also, *Arnsperger v. Crawford*, 61 Atl. 413, 415, 101 Md. 247, 70 L. R. A. 497.

"The 'public use' implies possession, occupation, and enjoyment of the land by the public at large or by public agencies, and due protection of the rights of private property will preclude the government from seizing it in the hands of the owner and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter is devoted." *Riley v. Charleston Union Station Co.*, 51 S. E. 485, 496, 71 S. C. 457, 110 Am. St. Rep. 579 (quoting and adopting definition in *Cooley*, Const. Lim. 654). See, also, *Cozad v. Kanawha Hardwood Co.*, 51 S. E. 932, 936, 139 N. C. 283, 1 L. R. A. (N. S.) 969, 111 Am. St. Rep. 779 (quoting and adopting definition in *Cooley*, Const. Lim. 652).

The test whether a use is "public" or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid or denied or withdrawn by the owner. It has also been said that speaking in strictness private property can only be said to have been taken for public use when it has been so appropriated that the public have certain well-defined rights to that use secured, as the right to use the public highway, the public ferry, the railroad, and the like; but, when it is so appropriated that the public have no right to those uses secured, it is difficult to perceive how such an appropriation can be denominated a public use. "Public use" implies a possession, occupation, and enjoyment of the land by the public at large or by public agency, and the due protection of the rights of private property will preclude the government from seizing it and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter may devote it. A petition for leave to erect a dam on a creek for the purpose of securing power to operate a public cider mill and the machinery of a certain public telephone exchange then on land owned by petitioner did

not show that the purpose for which the property was sought to be taken was for a public use. *Dice v. Sherman*, 59 S. E. 388, 107 Va. 424 (quoting and adopting definition in *Fallsburg Power & Mfg. Co. v. Alexander*, 43 S. E. 194, 101 Va. 98, 61 L. R. A. 129, 99 Am. St. Rep. 855).

A use, to be "public," must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the state, independent of the rights of the private owner of the property appropriated to the use. The use of property cannot be said to be public if it can be gainsaid, denied, or withdrawn by the owner. The public interest must dominate the private gain. *Hench v. Pritt*, 57 S. E. 808, 810, 62 W. Va. 270, 125 Am. St. Rep. 966 (citing *Fallsburg v. Alexander*, 43 S. E. 194, 101 Va. 98, 61 L. R. A. 129, 99 Am. St. Rep. 855).

The existence of the power to take private property for public use by eminent domain excludes the idea that it might be taken for private use or under semblance of public use, and immediately or ultimately conveyed to private uses, and land cannot be taken under such power because the public will be incidentally benefited by the use to which private persons will put the land, so long as the public has no right of control, and a city could not vacate a highway to make it possible for several railroad companies to convert it into an exchange yard for the handling of the product of a large industry in the city, though the city would be thereby indirectly benefited together with individual property in the city because of the increased facility with which the product of the industry could be handled; such vacation of the highway being for a private use. *City of Gary v. Much* (Ind.) 94 N. E. 583, 587 (quoting 6 Words and Phrases, pp. 5827, 5828).

The use of property to obtain the possible income or profit that might inure to a city from its ownership and control would not be a public use, and a city cannot take property for such a purpose. In re Opinion of the Justices, 91 N. E. 405, 406, 204 Mass. 607, 27 L. R. A. (N. S.) 483.

That the use of property sought to be condemned may bring about private profit, does not prevent the use from being a public one. *Spratt v. Helena Power Transmission Co.*, 94 Pac. 631, 634, 37 Mont. 60.

The term "public use," as used in the rule governing the right to condemn property already devoted to a public use, is employed in the sense in which it is used in the law of eminent domain, and it may be that the meaning of the term varies according to its application. *Rutland Ry., Light & Power Co. v. Clarendon Power Co.*, 83 Atl. 332, 334, 86 Vt. 45, 44 L. R. A. (N. S.) 1204.

**Benefit or good of public**

There is no fixed rule as to what is a "public use." It has been held that by "public use" is meant a use by the public or its agencies; that is, the public must have the right to the actual use in some way of the property appropriated. The better rule is that "public use" is the taking of property for a use that will promote the public interest and which use tends to develop the great natural resources of the commonwealth. Const. art. 3, § 15, declares that the use of all water and the right of way over the lands of others for ditches and sites for reservoirs shall be held to be a public use, and Code Civ. Proc. § 2211, as amended by Sess. Laws 1899, p. 135, in defining public uses enumerate sites for reservoirs necessary for collecting water and electric power lines. Held, that the flooding of land by a dam erected for the purpose of supplying electric power to mines and smelters and to the public generally and for supplying water for irrigation purposes was a "public use" authorizing condemnation of such land. *Helena Power Transmission Co. v. Spratt*, 88 Pac. 773, 774, 775, 35 Mont. 108, 8 L. R. A. (N. S.) 567, 10 Ann. Cas. 1055 (citing *Aldridge v. Tuscumbia, C. & D. R. Co.* [Ala.] 2 Stew. & P. 199, 23 Am. Dec. 307; *Todd v. Austin*, 34 Conn. 78; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *Bradley v. New York & N. H. R. Co.*, 21 Conn. 294; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 446; *Talbot v. Hudson*, 16 Gray [82 Mass.] 417; *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Boston & Roxbury Mill Corp. v. Newman*, 12 Pick. [29 Mass.] 467, 23 Am. Dec. 622; *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 394, 728, 23 Am. Dec. 756).

"The term 'public use' is a flexible one. It varies and expands with the growing needs of a more complex social order. \* \* \* It may be said at the present time that anything which will satisfy a reasonable public demand for public facilities for travel or for transportation or transmission of intelligence or commodities and of the general public, under reasonable regulations, and which have a definite and fixed use, independent of the will of the parties in whom the title is vested, would be a public use." A terminal railroad, the purpose of which is to switch cars from one road to another, receive freight on the line of its road, and give bills of lading over its own and other roads, to any part of the world, and which by its charter is obligated to do a general railroad business, both as to freight and passengers, "is intended to subserve a 'public use.'" *Collier v. Union R. Co.*, 83 S. W. 155, 162, 113 Tenn. 96 (citing *Ryan v. Louisville & N. Terminal Co.*, 50 S. W. 744, 102 Tenn. 111, 45 L. R. A. 308; *Mills, Em. Dom.* § 11; *Stewart v. Great Northern Ry. Co.*, 68 N. W. 208, 65 Minn. 515, 33 L. R. A. 427).

"The definition of 'public use' must be such as to give it a degree of elasticity capable of meeting new conditions and improvements and the ever-increasing needs of society. \* \* \* In determining whether or not a use is public, the physical conditions of the country, the needs of a community, the character of the benefit which a projected improvement may confer upon a locality, and the necessities for such improvement in the development of the resources of the state, are to be taken into consideration." A condemnation of a right of way for a tunnel, under Laws 1891, p. 98, § 3 (3 Mills' Ann. St. Rev. Supp. § 616), authorizing any corporation formed for the purpose of constructing a tunnel to acquire any necessary real estate under the eminent domain act, is a condemnation for a "public use," where the tunnel is to be used for draining mines, and for the transportation of waste and ore, for such proprietors as desire to avail themselves of the facilities offered. *Tanner v. Treasury Tunnel, Mining & Reduction Co.*, 83 Pac. 464, 465, 35 Colo. 593, 4 L. R. A. (N. S.) 106.

The term "public use," as used in Const. art. 1, § 14, providing that private property may be taken for "public use," means public usefulness and productive of general benefit. The term is a flexible one, and necessarily has been of constant growth as new uses have developed. If the taking is necessary to the complete development of the material resources of the state, it is for a "public use." The lumbering interest of the state cannot be completely developed without the exercise of the power of eminent domain. *Potlatch Lumber Co. v. Peterson*, 88 Pac. 426, 432, 12 Idaho, 769, 118 Am. St. Rep. 233 (citing 6 Words and Phrases, p. 5828; *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221).

Revisal 1905, §§ 1571-1577, confer on electric light companies the power to condemn property for the erection of poles and other appropriate purposes on making just compensation therefor. Defendant was incorporated to distribute electricity for the operation of street railways, and to supply electricity for any purpose whatever. Held, that condemnation by defendant of a right of way across plaintiffs' land for the erection of its electric light poles, etc., was for a public use, and therefore authorized. *Wissler v. Yaddin River Power Co.*, 74 S. E. 460, 158 N. C. 465.

Under Laws 1901, p. 679, c. 195, § 5, authorizing a corporation formed under the general law for manufacturing and selling electricity for lighting, transportation, and business purposes to hold and to purchase lands necessary to carry out its purposes, a corporation empowered to generate electricity, to sell to those designing it for any use to which it is applicable, and furnishing power for the operation of electric railway lines and other authorized purposes, may



take private lands necessary for the construction of its lines, as such taking is a "public use." *Rockingham County Light & Power Co. v. Hobbs*, 58 Atl. 46, 47, 72 N. H. 531, 66 L. R. A. 581 (citing petition of Mt. Washington Road Co., 35 N. H. 134; *Proprietors of Piscataqua Bridge v. New Hampshire Bridge*, 7 N. H. 35; *Peirce v. Somersworth*, 10 N. H. 369; *Backus v. Lebanon*, 11 N. H. 19, 35 Am. Dec. 466; *Concord R. R. v. Greely*, 17 N. H. 47; *Northern R. R. v. Concord & C. R. R.*, 27 N. H. 183; *Crowell v. Londonderry*, 63 N. H. 42; *Evergreen Cemetery Ass'n v. Beecher*, 5 Atl. 353, 53 Conn. 551; *Orr v. Quimby*, 54 N. H. 590).

The construction of a dam in the Spokane river at Post Falls, and the raising of the dam so as to increase the height of the waters in Cœur d'Alene Lake for storage purposes to be used in the low-water season for power purposes in generating electrical current for lighting, heating, and power, is a public use within Const. art. 1, § 14, declaring the necessary use of lands for construction of reservoirs or storage basins for irrigation or for rights of way for construction of canals, ditches, flumes, etc., or any useful, beneficial, or necessary purpose shall be a public use, and Rev. Codes, § 5210, authorizing condemnation of lands for necessary use in constructing lines to be used in transmitting electrical current for power, lighting, heating, or other purposes, though part of such power may be used in another state. *Washington Water Power Co. v. Waters*, 115 Pac. 682, 684, 19 Idaho, 595.

Manufacturing, generating, selling, distributing, and supplying electricity for power for manufacturing or mechanical purposes is not a "public use" for which private property may be taken against the will of the owner. *Brown v. Gerald*, 61 Atl. 785, 789, 100 Me. 351, 109 Am. St. Rep. 526.

The furnishing of electricity for light and power, when exercised by a corporation having the power under its charter, to develop water power, construct dams, generate electricity, to be transmitted to various towns to be used by the public, may be a "public use" justifying the exercise of the power of eminent domain for the acquisition of the necessary rights and privileges in the real estate of individuals. *McMillan v. Noyes*, 72 Atl. 759, 761, 75 N. H. 258.

Furnishing light to a municipality is a "public use" and benefit, with regard to which the power of eminent domain may be exercised, even by a private corporation. In re *East Canada Creek Electric Light & Power Co.*, 99 N. Y. Supp. 109, 110, 49 Misc. Rep. 565 (citing *Matter of Burns*, 49 N. E. 246, 155 N. Y. 27; *Buffalo & N. Y. City R. R. Co. v. Brainard*, 9 N. Y. 100).

The taking of land for a right of way for a ditch and a flume to convey water used

in furnishing electricity to the public generally or to all persons within a county or elsewhere in the state for lighting, power, and heating purposes is a public use within Code Civ. Proc. Cal. § 1238, and Civ. Code, § 1001, authorizing the exercise of the right of eminent domain in behalf of certain public uses. *Shasta Power Co. v. Walker*, 149 Fed. 568. *Walker v. Shasta Power Co.*, 160 Fed. 856, 859, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725.

It is for the public interest that a railroad company condemn the few shares of stock of another railroad company, which it does not own, where extensive improvements of the other company's connecting road are necessary, the means or credit for which it does not, but the condemning company does, possess. *New York, N. H. & H. R. Co. v. Offield*, 59 Atl. 510, 511, 77 Conn. 417.

Priv. Laws 1901, p. 463, c. 168, empowering a majority of the stockholders of certain railways to consolidate with other companies, and providing for assessing and paying the value of the dissenting stock, is an exercise of the power of eminent domain and the property appropriated is taken for a "public use." *Spencer v. Seaboard Air Line Ry. Co.*, 49 S. E. 96, 103, 137 N. C. 107, 1 L. R. A. (N. S.) 604 (citing *Clark & M. on Priv. Corp.* 1051; *North Carolina & R. D. R. Co. v. Carolina Cent. R. Co.*, 83 N. C. 489).

#### **Convenience, necessity, or welfare of public**

A "public use" is defined as any use of anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities. *Mueller v. Supervisors of Town of Courtland*, 135 N. W. 996, 998, 117 Minn. 290.

#### **Duty to or right in public**

To constitute a "public use" within the meaning of the statutes relating to eminent domain, something more than a mere benefit to the public must flow from the contemplated improvement. The public must be to some extent entitled to use or enjoy the property not as a mere favor or by permission of the owner but by right. *Gaylord v. Sanitary Dist. of Chicago*, 68 N. E. 522, 524, 204 Ill. 576, 63 L. R. A. 582, 98 Am. St. Rep. 295.

The term "public use," within the rule as to taking private property for public use, means to be occupied and enjoyed by the public or for some use necessary to enable the public to command the services of citizens, or to enable the citizen to perform his duties to the public. It is not the number of people who use the property taken that constitutes the use of it a public one, nor does the fact that the benefits will be in a large measure local enter into the question. The fact that only a few persons, aside from the individual at whose instance it is sought to establish a tramway over private property, will have occasion to use it, does not

destroy its public use within the meaning of the Constitution. The controlling and decisive question is: Have the public the right to its use on the same terms as the person at whose instance it is established? If they have, it is a public use; if they have not, it is a private use. If the owner can exercise the same kind of dominion over it as he does over other property owned by him, if he can close it up, or prohibit all or any part of the public from its use, then it is clear that its establishment would be private and not public; nor is the fact that the public interest will be promoted by the contemplated improvement sufficient to authorize the taking, in the absence of the right on the part of the public to participate in the enjoyment of the property taken. *Chesapeake Stone Co. v. Moreland*, 104 S. W. 762, 765, 126 Ky. 656, 16 L. R. A. (N. S.) 479.

"The Supreme Court of California has spoken also with reference to the question of 'public use.' It says: 'The words "public use" here mean [referring to the Constitution] a use which concerns the whole community, as distinguished from a particular individual or a particular number of individuals. It is not necessary, however, that each and every individual member of society should have the same degree of interest in this use, or be personally or directly affected by it, in order to make it public. \* \* \* If the use for which the property is taken be to satisfy a great public want or public exigency, it is a "public use." \* \* \* It may be a use in which but a small portion of the public will be directly benefited, \* \* \* though it must be of such a character as that the general public may, if they choose, avail themselves of it.' *Gilmer v. Lime Point*, 18 Cal. 229, 251-253. These utterances have the especial sanction of other courts. In *Board of Health v. Van Hoesen*, supra, the court says: 'To justify the condemnation of lands for a private corporation not only must the purpose be one in which the public has an interest, but the state must have a voice in the manner in which the public may avail itself of that use. In *Gilmer v. Lime Point*, 18 Cal. 229, a "public use" is defined to be a use which concerns the whole community, as distinguished from a particular individual. The use which the public is to have of such property must be fixed and definite. The general public must have a right to a certain definite use of the private property, on terms and for charges fixed by law, and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice that the general prosperity of the community is promoted by the taking of private property from the owner, and transferring its title and control to a corporation, to be used by such corporation as its private property, uncontrolled by law as to its use. In other words, a use is private so long as the land is to remain under private

ownership and control, and no right to its use, or to direct its management, is conferred upon the public.' So it is said in *Gaylord v. Sanitary District of Chicago*, 68 N. E. 522, 204 Ill. 576, 63 L. R. A. 582, 98 Am. St. Rep. 235: 'It is also the settled doctrine of this court that, to constitute a "public use," something more than a mere benefit to the public must flow from the contemplated improvement. The public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right.' So, also, in *Sholl v. German Coal Company*, 10 N. E. 199, 118 Ill. 427, 59 Am. Rep. 379: 'If, from the nature of the business, and the way in which it is to be conducted, it is clear no obligations will be assumed to the public, or liability incurred, other than such as pertains to all strictly private enterprises, it may safely be concluded the use is private, and not public. It is also believed to be generally, if not universally, true that benefits resulting from a public use capable of individual appropriation are open to all alike upon the same terms and conditions.' And again, by a footnote to section 165, *Lewis on Eminent Domain*: 'The test whether a use is public or not is whether a public trust is imposed upon the property, whether the public has a legal right to the use, which cannot be gainsaid or denied or withdrawn by the owner.' " *Shasta Power Co. v. Walker*, 149 Fed. 568, 571.

A strip of land owned, though never used, by a railroad company, but leased by it to, and occupied by the loading platforms of, a mill company, is not devoted to a "public use" so as to be exempt from condemnation for the track of another railroad company, though it adds to the convenience of the mill company in loading its products on the cars of the railroad company owning the strip when switched onto the track of the mill company; it being the use to which the property is applied, and not its ownership, which marks the use as public or private, and the test of whether the use is public being whether the property is impressed with a trust in favor of the public so that its use is not of grace, but of right, which cannot be defeated at the owner's will. A use will not be classified as public, merely because it may economize the handling of the products of a patron of common carrier. The exemption from condemnation, if any, must rest upon the ground that the public interest would suffer by an appropriation of the property for the use of the relator for track purposes. It is the use to which the property is applied and not the ownership that marks such use as public or private. The true criterion by which to judge of the character of the use is whether the public may enjoy it by right or only by permission. The test is, not what the corporation owning the land may choose to do, but what under the law it must do. *State ex rel. Milwaukee Terminal*

*R. Co. v. Superior Court for King County*, 103 Pac. 469, 473, 54 Wash. 365 (quoting *Farmers' Market Co. v. Philadelphia & R. T. R. Co.*, 21 Atl. 990, 142 Pa. 587; citing *Diamond Jo Line Steamers v. City of Davenport*, 87 N. W. 400, 114 Iowa, 434, 54 L. R. A. 859; *In re New York, L. & W. R. Co.*, 1 N. E. 27, 99 N. Y. 12).

Where a railroad condemned land for public use and rented it to a wholesale grocery company, the use of the land by the grocery company was not a public use, for, while it might be a public benefit or public interest, no obligation rested upon the grocery company to conduct its business for the benefit of the public; the true criterion of a public use being whether the public may enjoy it by right or by permission only, and the terms "public interest" and "public use" not being synonymous. *Neitzel v. Spokane International Ry. Co.*, 117 Pac. 864, 869, 65 Wash. 100, 36 L. R. A. (N. S.) 522.

#### Extent of public benefited

It is not necessary to make a use public in the sense in which that term is used in condemnation proceedings, that the whole community or any large portion thereof may actually participate in it, but only that a right to its enjoyment exists in the general public; and, if a use is public in this sense, it does not lose this quality merely because of an incidental private advantage. *Sexauer v. Star Milling Co.*, 90 N. E. 474, 477, 173 Ind. 342, 26 L. R. A. (N. S.) 609.

It is not necessary that the whole community, or any considerable portion thereof, should directly enjoy or participate in the improvement to make a use public, but if the proposed improvement tends to enlarge the resources and promote the productive power of any considerable number of the community, the use is public; and hence the fact that the principal-consumer of the water of a water company, chartered under Act May 16, 1869 (P. L. 226), will be a railroad company, and that, from the nature of the country, few of the citizens can engage in commercial or manufacturing enterprises, is immaterial on the question of public use. *Jacobs v. Clearview Water Supply Co.*, 69 Atl. 870, 872, 220 Pa. 388, 21 L. R. A. (N. S.) 410 (quoting *Mills*, Em. Dom. § 12).

To constitute a "public use" authorizing the exercise of the right of eminent domain, it is not required that the entire community, or even a considerable portion of it, should directly participate in the benefits to be derived from the property taken. *Riche v. Bar Harbor Water Co.*, 75 Me. 91, 96, 97.

The "public use" which will authorize the taking of property under power of eminent domain need not be the use of the whole state or any considerable portion of it, but the use and benefit must be in common and not to particular individuals. Every "public use"

is in a measure local and benefits a particular section more than others, and this is true of railroads as well as highways. *Madera R. Co. v. Raymond Granite Co.*, 87 Pac. 27, 30, 31, 3 Cal. App. 668 (citing *County of Madera v. Raymond Granite Co.*, 72 Pac. 915, 139 Cal. 128; *Sherman v. Buick*, 32 Cal. 253, 91 Am. Dec. 577; *Lewis*, Em. Dom. § 161; *Lindsay Irrigation Co. v. Mehrtens*, 32 Pac. 802, 97 Cal. 676).

#### Judicial or legislative question

Whether a use is public or private is a question, not for the Legislature, but for the judiciary. *Arnsperger v. Crawford*, 61 Atl. 413, 415, 101 Md. 247, 70 L. R. A. 497.

Whether the contemplated use of property proposed to be taken by a private corporation is a public use is a question of law. *McMillan v. Noyes*, 72 Atl. 759, 761, 75 N. H. 258; *Rockingham County Light & Power Co. v. Hobbs*, 58 Atl. 46, 72 N. H. 531, 532, 66 L. R. A. 581.

Acts 30th Gen. Assem. p. 61, c. 68, § 1, authorizing the creation of drainage districts, and declaring that the drainage of surface waters from agricultural lands shall be considered a public benefit, does not authorize a taking of property for private use by declaring what constitutes a public use, and invading the right of the courts to determine whether in any particular case the drainage of agricultural lands is a public benefit; the act merely marking out a general field within which the drainage of lands shall be deemed a public benefit. *Sisson v. Board of Sup'rs of Buena Vista County*, 104 N. W. 454, 455, 128 Iowa, 442, 70 L. R. A. 440.

Laws 1895, c. 232 (Gen. St. 1902, § 8694), authorizing a railroad company, which has acquired more than three-fourths of the stock of another railroad company, and cannot agree with the holders of the outstanding stock for purchase thereof, to condemn it on a finding that it will be for the public interest, is within the power of the Legislature. *New York, N. H. & H. R. Co. v. Offield*, 59 Atl. 510, 511, 77 Conn. 417.

#### Private or public agency

That a corporation purposes to engage in a private use in addition to serving a public use does not deprive it of the right to exercise eminent domain for the public use. *Shasta Power Co. v. Walker*, 149 Fed. 568; *Walker v. Shasta Power Co.*, 160 Fed. 856, 860, 87 C. C. A. 660, 19 L. R. A. (N. S.) 725.

A corporation organized under Act Feb. 20, 1902 (23 St. at Large, p. 1168), for the erection of a union depot, with its connecting necessities, is a corporation organized for a "public use," so that the provision in such act authorizing it to condemn land is not unconstitutional. *Riley v. Charleston Union Station Co.*, 51 S. E. 485, 496, 71 S. C. 457, 110 Am. St. Rep. 579.

Under Const. art. 1, § 17, prohibiting grant of irrevocable and uncontrollable franchises, incorporation of a terminal railroad company under Act May 9, 1905 (Acts 29th Leg. c. 109) did not constitute a contract which could not be modified by subsequent legislation, as affecting the company's right to accept and rely on the subsequent amendment of the act in 1907 (Acts 30th Leg. c. 157), by acting under the amendment, so as to make the operation of the road a public use, entitling the company to exercise the right of eminent domain as a common carrier, within Const. art. 10, §§ 1, 2. *Houston Belt & Terminal R. Co. v. Hornberger* (Tex.) 143 S. W. 272, 277.

#### Public benefit synonymous

"Public use" is not synonymous with "public benefit." *Wisconsin River Imp. Co. v. Pier*, 118 N. W. 857, 862, 137 Wis. 325, 21 L. R. A. (N. S.) 538.

"The expressions 'public interest' and 'public use' are not synonymous. The establishment of furnaces, mills, and manufactures, the building of churches and hotels, and other similar enterprises, are more or less matters of public concern, and promote, in a general sense, the public welfare. But they lie without the domain of public uses for which private ownership may be displaced by compulsory proceedings." *Smith v. Smythe*, 90 N. E. 1121, 1123, 197 N. Y. 457, 35 L. R. A. (N. S.) 524 (quoting *In re Niagara Falls & W. R. Co.*, 15 N. E. 429, 432, 108 N. Y. 375, 385). And so where a railroad condemned land for public use and rented it to a wholesale grocery company, the use of the land by the grocery company was not a public use, for, while it might be a public benefit or public interest, no obligation rested upon the grocery company to conduct its business for the benefit of the public; the true criterion of a public use being whether the public may enjoy it by right or by permission only, and the terms "public interest" and "public use" not being synonymous. *Neitzel v. Spokane International Ry. Co.*, 117 Pac. 864, 65 Wash. 100, 36 L. R. A. (N. S.) 522.

#### Drainage

It is not necessary that the entire state should directly participate in the benefits of a drainage district to constitute it a "public use," within the constitutional requirement that property shall not be taken without the consent of the owner except for a public use. *Lee Wilson & Co. v. Wm. R. Compton Bond & Mortgage Co.*, 146 S. W. 110, 112, 103 Ark. 452.

The use of lands for the purpose of constructing thereon a ditch of a drainage district organized under the drainage and levee act of 1879 (Hurd's Rev. St. 1899, c. 42) is a "public use," within Eminent Domain Act, § 2 (Hurd's Rev. St. 1903, c. 47), and such

drainage district having the right under Const. 1870, art. 4, § 31, as amended November 28, 1878 (1 Starr & C. Ann. St. 1896, p. 138), and laws in pursuance thereof, to construct their ditches "across the land of others," it may avail itself of the provisions of the eminent domain act to obtain a right of way for a ditch. *Cleveland, C., C. & St. L. Ry. Co. v. Polecat Drainage Dist.*, 72 N. E. 684, 685, 213 Ill. 83.

Lands taken or damaged by a drainage district for its purposes are taken or damaged for a "public use." *Bradbury v. Vandalia Levee & Drainage Dist.*, 86 N. E. 163, 165, 236 Ill. 36, 10 L. R. A. (N. S.) 991, 15 Ann. Cas. 904.

It is competent for the Legislature to authorize the taking of private property for the drainage of agricultural lands, the taking being for a public use. *Sisson v. Board of Sup'rs of Buena Vista County*, 104 N. W. 454, 458, 128 Iowa, 442, 70 L. R. A. 440.

#### Electricity

Where the only present market of a power company for electric current is a town and its inhabitants, and its only present purpose is to supply electric light thereto, the use is a public one, so as to authorize the exercise of the power of eminent domain. *State ex rel. Weyerhaeuser Lumber Co. v. Superior Court for Snohomish County*, 127 Pac. 591, 593, 71 Wash. 84.

#### Fishing

"The reason of the case and the settled practice of free government must be our guides in determining what is or is not to be regarded as a public use, and that can only be considered such where the government is supplying its own needs or is furnishing facilities to its citizens in regard to those matters of public interest, convenience, and welfare which, on account of their peculiar character and the difficulty of making provisions for them otherwise, it is alike proper, useful, and needful for the government to provide." The right to fish in an inland lake in New Jersey cannot be separated from the ownership of the lake and taken under the power of eminent domain, because, first, the natural supply of fish therein is so small as to be incapable of meeting the public demand, and, second, the object of acquiring such a right is not use which implies utility, but mere sport or pastime. *Albright v. Sussex County Lake & Park Commission*, 57 Atl. 398, 400, 71 N. J. Law, 303, 309, 69 L. R. A. 768, 108 Am. St. Rep. 749, 2 Ann. Cas. 48 (quoting *Cooley*, Const. Lim. 553).

#### Highway or street

The taking of land by a county for the widening of a public highway is the taking of land for a "public use," within Code Civ. Proc. § 1238, subds. 3, 4, Pol. Code, § 2681, and County Government Act, § 25, subd. 4

(Gen. Laws 1903, p. 121), relating to the establishment and alteration of highways. *Mendocino County v. Peters*, 82 Pac. 1122, 1123, 2 Cal. App. 24.

Since streets in cities must of necessity be given over at times to the use of railways and transportation companies, and such use is itself a public one, an objection that a city desired to condemn land to widen a street to permit a railway company having a franchise thereon to double its tracks, and that the same was a private and not a public use, was unsustainable. *City of Tacoma v. Brown*, 125 Pac. 940, 941, 69 Wash. 538.

The use of property for a street or highway is necessarily public. "One of the oldest and commonest of uses for which private property has been appropriated is the establishment of public highways. An appropriation of private property for the establishment of such highways has been held uniformly to be for a 'public use.'" And the taking of property for a public street is for a "public use," though the street so established be in the form of a cul-de-sac on either side of property of the city. *State ex rel. Thomas v. Superior Court of Whatcom County*, 85 Pac. 258, 258, 42 Wash. 521 (citing *State ex rel. Schroeder v. Superior Court of Adams County*, 69 Pac. 368, 29 Wash. 1; *Chicago, R. I. & P. R. Co. v. Town of Lake*, 71 Ill. 333).

Laws 1893, p. 135, c. 62, empowering cities to condemn property for "public corporate uses," includes power to condemn streets and alleys to be used by the public, as well as property to be used by the corporation itself. *State ex rel. Jones v. Superior Court of Pierce County*, 87 Pac. 521, 522, 44 Wash. 476.

The laying out of a townway involves the taking of private property for public use, under statute authority, and all statute requirements must be fully and strictly complied with. In *re Conant*, 67 Atl. 564, 566, 102 Me. 477, 120 Am. St. Rep. 512 (citing *Leavitt v. Eastman*, 77 Me. 117).

"Public," as applied to the power to condemn land for public use, means everybody. A city council has no authority to establish a street for the use of a private individual, and, in a proceeding to condemn land for the extension of a street terminating at the boundary of an owner's land, evidence that the proceeding is for the use of an individual, and not for the purpose of establishing a street for public use, is admissible. In *re Twenty-first St.*, 96 S. W. 201, 205, 196 Mo. 498, 7 L. R. A. (N. S.) 639, 113 Am. St. Rep. 766.

A street railroad is a "public use," very valuable to the public. Statute law authorizes municipalities to allow the use of streets for such purpose. A city may acquire land for such purpose. *City of Bluefield v. Bailey*, 57 S. E. 805, 807, 62 W. Va. 304.

### Irrigation

Property is taken for "public use" when the taking is for use that will promote a public interest, and which use tends to develop the great natural resources of the commonwealth. The taking of property for the purpose of obtaining water for the irrigation of a farm and to render the same productive is a taking for a public use. *Nash v. Clark*, 75 Pac. 371, 373, 27 Utah, 158, 10 Am. St. Rep. 953, 1 Ann. Cas. 300.

Where an irrigation company which appropriated water from a river to irrigate a named county, organized subsidiary corporations for the purchase of the land in that territory, and transferred to them perpetual water rights for the irrigation of land owned by them, there was no dedication of the water right to public use; the essential feature of a public use being that it shall not be confined to privileged individuals, but open to the indefinite public, while in this case not every landowner could use water. *Thayer v. California Development Co.*, 128 Pac. 21, 24, 164 Cal. 117.

Property is taken for a "public use," as intended by the Constitution, only where there results to the public some definite right or use in the business or undertaking to which the property is devoted. Acts 1895, p. 21, c. 21 (Rev. St. 1895, tit. 60, c. 2), authorizes the organization of corporations for the construction of reservoirs, ditches, etc., and the furnishing of water "to all persons entitled to the same" for irrigation and other purposes, to make contracts for the sale of permanent water rights, to lease, to rent, and to otherwise dispose of water, and provides that all persons possessing land adjacent to any ditch shall have a right of water for any of the purposes mentioned at just prices, and that, if any shortage occurs, the distribution of water shall be pro rata. Held, that the purposes for which the act authorizes the taking of private property are "public purposes" in character. *Borden v. Trespacios Rice & Irrigation Co.*, 86 S. W. 11, 14, 98 Tex. 494, 107 Am. St. Rep. 640.

### Mills and manufacturing

The appropriation of land for the use of water mills for the public convenience is a "public use." *Newcomb v. Smith (Wis.)* 1 Chand. 71, 76; *Id. (Wis.)* 2 Pin. 131, 135. See, also, *Thien v. Voegtlander*, 3 Wis. 461, 465; *Pratt v. Brown*, 3 Wis. 603, 613.

### Mining

The construction and operation of roads and tramways for the development and working of mines is a public use, so that Rev. St. 1898, § 3588, as amended by Sess. Laws 1901, p. 19, c. 25, authorizing condemnation therefor, is constitutional. *Highland Boy Gold Min. Co. v. Strickley*, 78 Pac. 296, 297, 28 Utah, 215, 1 L. R. A. (N. S.) 976, 107 Am. St. Rep. 711, 3 Ann. Cas. 1110. See, also,

*Strickley v. Highland Boy Gold Min. Co.*, 26 Sup. Ct. 301, 302, 200 U. S. 527, 50 L. Ed. 581, 4 Ann. Cas. 1174.

Under the statutes of Montana, by which property taken for mining and milling ores is for a public use, and may be condemned by an individual or corporation for such use, where a bankrupt mining company had built an electric light and power plant for use in its business on the land of another, and the plant has come into possession of its trustee, on the filing of a petition by the owner of the land in the bankruptcy court to recover the land and the plant thereon, the trustee may defend on the ground that the taking was for a public use, and the court may permit him to retain the property for the estate, and may fix the compensation to be paid petitioner for the land. *Bear Gulch Placer Mining Co. v. Walsh*, 198 Fed. 351, 354.

Rev. St. Idaho 1887, § 5210, as amended by Act March 3, 1903 (7 Sess. Laws, p. 203), declaring that tunnels and other means of working mines are declared to be "public uses" within the statutes relating to eminent domain, and Act March 15, 1899 (5 Sess. Laws, p. 442), granting to any owner of ground with a tunnel located thereon the right to run the same through the claims of others on payment of all actual damages or injury done to the owner of the claims crossed by the tunnel, are not unconstitutional, as a deprivation of property without due process of law, in violation of the fourteenth amendment of the federal Constitution, in that the construction of a mining tunnel is in fact a private and not a "public use." *Ballie v. Larson*, 138 Fed. 177, 179 (citing Rev. St. 1887, § 5210, amended in 1903 by 7 Sess. Laws, p. 203).

#### Park

Acts 1899, pp. 250-252, c. 142, §§ 1-7, authorizing taxing districts and cities to condemn land beyond their corporate limits for parks and parkways, is not invalid as authorizing condemnation of land for a mere public convenience, as distinguished from a "public necessity" or "public use." *City of Memphis v. Hastings*, 86 S. W. 609, 612, 113 Tenn. 142, 69 L. R. A. 750.

A taking of land belonging to a corporation possessing the power of eminent domain by a railway company for a park at its terminal, attractive to pleasure seekers because of its scenic features, is not taking of land for a public use within Va. Code 1904, p. 576, c. 46a, § 1105e, subd. 52. *Great Falls Power Co. v. Great Falls & O. D. R. Co.*, 52 S. E. 172, 173, 174, 104 Va. 416.

#### Playground

Since the physical development of a child attending school cannot be had without a suitable place for recreation and exercise, the condemnation of land adjacent to a school building for an athletic and play

ground is a taking for public use. *State ex rel. School District No. 56 v. Superior Court for Chelan County*, 124 Pac. 484, 486, 69 Wash. 189.

#### Private road

The term "public use" means the same as "use by the public." The test whether the use is public or not is whether a public trust is imposed upon the property; whether the public has a legal right to the use, which cannot be gainsaid or denied or withdrawn at the pleasure of the owner. The expressions "public interest" and "public use" are not synonymous. "Public use" implies a possession, occupation, and enjoyment of the land by the public at large or by public agency. Code Pub. Gen. Laws, art. 25, §§ 100-121, declaring that any owner of land shall have a right to a road to or from his land to places of public worship, courthouses, etc., and may obtain a road or way by application in a certain manner, authorized the taking of private property for private use in violation of Const. art. 3, § 40, prohibiting the taking of private property for public use without compensation. *Arnsperger v. Crawford*, 61 Atl. 418, 415, 101 Md. 247, 70 L. R. A. 497 (citing *Lewis, Em. Dom.* § 165; *Mills, Em. Dom.* § 26; *Farmers' Market Co. v. Philadelphia R. & Terminal Co.*, 10 Pa. Co. Ct. R. 25; *Matter of Niagara Falls & W. Ry. Co.*, 15 N. E. 429, 108 N. Y. 375).

#### Railroad

A railroad use of land is a "public use." *Porter v. International Bridge Co.*, 93 N. E. 716, 718, 200 N. Y. 234, 21 Ann. Cas. 684.

The use of property reasonably necessary for the construction, maintenance, or operation of a railroad is a public use. *Northern Pac. Ry. Co. v. Kreszeszewski*, 115 N. W. 679, 680, 17 N. D. 203.

The condemnation of land for a right of way for a regularly organized and chartered railroad is a taking for a "public use." *Kansas City Interurban R. Co. v. Nelson*, 91 S. W. 1036, 1037, 193 Mo. 297.

The fact that the main business of a railroad is "freight business and a business in bulk does not make it the less a 'public use.'" *Collier v. Union R. Co.*, 88 S. W. 155, 162, 113 Tenn. 96.

The acquisition of a crossing by one railroad over another contemplates the taking of private property for "public use" under the law of eminent domain. *Wellsburg & S. L. R. Co. v. Panhandle Traction Co.*, 48 S. E. 746, 748, 56 W. Va. 18.

In view of Const. art. 12, § 3, relating to the taxation of mining property and article 15, §§ 5, 7, making railroads public highways, and all railroad companies public carriers, and in view of Rev. Codes, § 7331, authorizing the exercise of the right of eminent domain, for roads, tunnels, ditches, flumes,

pipes and dumping places for working mines, etc., a railroad built on the streets of a city for the cartage of materials to and from a mine is a public use. *Kipp v. Davis-Daly Copper Co.*, 110 Pac. 237, 240, 41 Mont. 509, 36 L. R. A. (N. S.) 666, 21 Ann. Cas. 1872.

A street railroad is a "public use," very valuable to the public. *City of Bluefield v. Bailey*, 57 S. E. 805, 807, 62 W. Va. 304.

#### Sewer

A sewerage system is a "public use" within a statute authorizing the exercise of the power of eminent domain by any incorporated city, town, or village for any and all public uses. *Village of Twin Falls v. Stubbs*, 96 Pac. 195, 196, 15 Idaho, 68.

#### Water supply

The supplying of pure water by a corporation to the inhabitants of a city, town, or village is a public use, within the law of eminent domain. *State ex rel. Shropshire v. Superior Court of Pacific County*, 99 Pac. 3, 5, 51 Wash. 386.

#### PUBLIC USE (In Patent Law)

See, also, On Sale (In Patent Law).

A single unrestricted sale by the inventor of his invention is a public sale, or puts it "on sale," within the meaning and intent of Rev. St. U. S. § 4886. And while a shop test of a machine may be sufficient to show a reduction to practice, especially in view of favorable results being obtained by a later actual test under the conditions of ordinary use for which the machine is intended, it does not necessarily remove the machine from the domain of experiment, so as to constitute a conditional sale a public sale, under the statute. *In re Mills*, 25 App. D. C. 377, 383.

Where the inventor of a cigar pocket for more than two years before applying for a patent therefor made and sold such pockets in the regular course of his business, such articles were in "public use" and "on sale," and defeated his right to a patent under Rev. St. § 4886, although they were not kept by him in stock, but were made up only on orders received; it being the custom of the trade to take such orders by sample. A device will be "on sale" and in "public use" if it is offered for sale, whether any specimen of it is actually sold or not. *Dittgen v. Racine Paper Goods Co.*, 181 Fed. 394, 398.

The use of a machine while it was being perfected, in a room from which the public and all others not engaged in its operation were excluded, changes and improvements being made from time to time, although extending back to more than two years before application was made for a patent, was an experimental and not a public use, and did not invalidate the patent granted therefor, and it is immaterial that the product of such ex-

perimental use was sold. *Penn Electrical & Mfg. Co. v. Conroy*, 150 Fed. 943, 946, 87 C. C. A. 149.

The mere exhibition of an experimentally constructed machine by the inventor to an audience, accompanied by an explanation of the invention, no charge being made, is not such a "public use" as will defeat his right to a patent applied for more than two years afterwards. *Victor Talking Mach. Co. v. American Graphophone Co.*, 140 Fed. 860, 865.

An experimental use becomes a "public use" within the federal statute, invalidating a patent if the invention therein described was in public use earlier than two years before the application was filed, when it extends further, either in time or in number of instances, than is reasonably required to test the invention. *National Phonograph Co. v. Lambert Co.*, 142 Fed. 164, 166, 73 C. C. A. 382 (quoting and adopting *Walk.*, Pat. [3d Ed.], § 94).

"By the provisions of the statutes, if the invention was in public use or on sale in this country with or without the consent of the inventor more than two years before his application was filed, the grant of a patent is barred. \* \* \* The bar of public use arises from use by the inventor himself or by others, but in either case it must be such as makes the invention accessible by some members of the public. Public use, however, does not mean a general adoption or use by the public as distinguished from a secret use. Exhibition of a design is a 'public use.' A single instance of public use by a single individual will operate as a bar. General and continuous use is unnecessary. The bar arises whether or not the inventor knows of or consents to the public use. To constitute public use the invention must have been complete. This does not mean, however, that the machine embodying it must have been perfect, but merely that it shall have been sufficiently perfect to be practically applied to its intended purpose. \* \* \* Use of the invention in secret, either by the inventor or his agents under an injunction of secrecy, is not a public use. But permitting another to use the invention without any injunction of secrecy is public use, although the use may have been concealed from others. Use of an invention in public, however, in its natural and intended way, is a public use, although from its nature it is concealed from the general view of the public." The use of a composition for lining pulp digesters in the practical lining of digesters for use in a number of different plants by persons to whom it had been disclosed without secrecy was a "public use," which, if continued for more than two years, would bar a patent whether such use was known to the inventor or not, unless the delay was for the purpose of perfecting the invention. *Hentschel v. Carthage Sulphite*

Pulp Co., 169 Fed. 114, 123, 124 (quoting and adopting definition in 30 Cyc. 865-867).

The manufacture of a machine upon an order for its construction, followed by its delivery and acceptance, constitutes a "sale" within the patent statute. *National Cash Register Co. v. American Cash Register Co.*, 178 Fed. 79, 83, 101 C. C. A. 569

## PUBLIC UTILITY

The term "public utility," wherever used in the Public Utilities Act (Chapter 238, Laws 1911), means "every corporation, company, individual, association of persons, their trustees, lessees or receivers" that may own, control, or manage, except for private use, any equipment, plant, generating machinery, or any part thereof in the operation of the business enterprises specified in section 8 of that act; and the term, as used in said act, nowhere means the physical equipment, plant, or machinery used in conducting any such business. *State ex rel. Marshall v. Wyandotte County Gas Co.*, 127 Pac. 639, 640, 88 Kan. 165.

For detail means, by section 1797m1, the person or persons, natural or artificial, in touch with the public in connection with public utility service, whether as owner, operator, manager, or controller, or private or quasi-public entity, is a public utility, the physical and other things in use, public utility property, and the subject of the service, —a utility—the term "public utility" being used to characterize the physical situation and condition as to immediate authority over it. *Calumet Service Co. v. City of Chilton*, 135 N. W. 131, 143, 148 Wis. 384.

That the owner of an office and manufacturing building sells to three neighbors surplus heat, light, and power, left after supplying his tenants, does not render the operation of the plant, which was intended to supply his own building only, a "public utility," within Laws 1907, c. 499, §§ 1797m—1 to 1797m—108, regulating public utilities. *Cawker v. Meyer*, 133 N. W. 157, 158, 147 Wis. 320, 37 L. R. A. (N. S.) 510.

### Extent of use by public

Whether a plant furnishing heat, light, or power is a "public utility," within Laws 1907, c. 499, §§ 1797m—1 to 1797m—108, regulating public utilities, does not necessarily depend upon the number of consumers; it being sufficient that the plant is devoted to the use of all the members of the public who may require it. *Cawker v. Meyer*, 133 N. W. 157, 159, 147 Wis. 320, 37 L. R. A. (N. S.) 510.

The general incorporation statute (St. 1898, §§ 1771-1791m) authorizes the forming of a corporation for certain enumerated purposes, among others, the furnishing of power. Laws 1907, p. 1130, c. 499, defines "public utility," as used in the act, to embrace every corporation that then or thereafter may

operate or control a plant or equipment for the production or furnishing of power to or for the public, and provides that every utility must furnish reasonably adequate service and facilities, and that the charge made for power furnished, etc., must be reasonable, prohibits unreasonable charges as unlawful, and authorizes the railroad commission to fix charges when found unreasonable, etc. Held, that the use of a company organized under the act of 1898 to furnish power is a public, and not a private, use. *Wisconsin River Imp. Co. v. Pler*, 118 N. W. 857, 861, 137 Wis. 325, 21 L. R. A. (N. S.) 538.

### Electricity

A corporation obtaining the franchise granted by Laws 1901, c. 462, authorizing certain persons and their assigns to build a dam across the Wisconsin river to obtain electric power, is a "public utility," within the public utilities act (St. 1898, §§ 1797m33, 1797m89, 1797m91, and 1797m92, as added by Laws 1907, c. 499), forbidding any public utility to charge a greater or less compensation for any service than is specified in filed schedules of rates, and prohibiting unjust discriminations; and a corporation contracting to supply power may not resort to any subterfuge, whereby a consumer may receive free current to a specified amount per year. *President and Trustees of Villages of Kilbourn City v. Southern Wisconsin Power Co.*, 135 N. W. 499, 503, 149 Wis. 168.

### Fire department

The erection and equipment of public fire stations and street cleaning equipment and machinery to be owned by a city are within the term "public utilities," as used in Const. art. 10, § 27, authorizing the issue of bonds for the purchase of public utilities. *Oklahoma City v. State*, 115 Pac. 1108, 1109, 28 Okl. 780.

A proposition attempting to refer to the qualified property tax paying voters of a city whether the city shall be allowed to become indebted for the purchase, construction, or repair of public utilities, as expressly permitted by Const. art. 10, § 27, must be stated in such specific language as to apprise the voters of the nature of the public utility the city wishes to purchase, construct, or repair, and the proposition as to whether a city should be authorized to issue bonds in a certain amount to raise means for its improvement of the fire department is too general; fire department improvements, while including many things that might be public utilities, also including many that are not. *Coleman v. Frame*, 109 Pac. 923, 929, 26 Okl. 193, 31 L. R. A. (N. S.) 556.

### Hall

A convention hall to be owned, controlled, and used exclusively by a city to accommodate public gatherings of the people, and for such other public uses as may be



designated by the mayor and council, is a "public utility" within the meaning of that term as used in Const. art. 10, § 27 (Bunn's Ed. § 293), authorizing incorporated cities or towns to become indebted for the purpose of purchasing or constructing public utilities. *State ex rel. Manhattan Const. Co. v. Barnes*, 97 Pac. 997, 998, 22 Okl. 191.

#### Public park

A public park is a "public utility" within Const. art. 10, § 27, authorizing a city by a majority vote to become indebted in a larger amount than that specified in section 26 to purchase or construct public utilities or repair the same. *City of Ardmore v. State ex rel. Best*, 104 Pac. 913, 916, 24 Okl. 862; *Barnes v. Hill*, 99 Pac. 927, 928, 23 Okl. 207.

#### Sewer

A sewer is a public utility within Const. art. 10, § 27, authorizing an incorporated city or town by a majority vote to become indebted in a larger amount than that specified in section 26 to purchase or construct public utilities. *State ex rel. Edwards v. Millar*, 96 Pac. 747, 753, 21 Okl. 448.

#### Street improvement

Street improvements do not constitute "public utilities" within Const. art. 10, § 27, providing that any incorporated city may, by a majority of the qualified property tax paying voters of such city, voting at an election to be held for that purpose, be allowed to become indebted in a larger amount than that specified in section 26 (relating to the limitation of municipal indebtedness) for purchasing or constructing public utilities, or for repairing them, to be owned exclusively by such city, since, while streets are directly under the charge and control of municipal authorities, such control is subject to the paramount authority of the state. *Coleman v. Frame*, 109 Pac. 928, 929, 26 Okl. 193, 31 L. R. A. (N. S.) 556; *Hooper v. State ex rel. Cline*, 110 Pac. 912, 26 Okl. 646; *Dingman v. City of Sapulpa*, 111 Pac. 319, 27 Okl. 116.

#### Street railroad

San Francisco Charter of 1907, art. 12, § 14, approved by the Legislature November 23, 1907 (St. Ex. Sess. 1907, p. 37), and previous charter provisions authorizing acquisition of "public utilities," includes municipally owned street railways; the term comprehending any utility employed in rendering quasi public service, such as waterworks, gasworks, telephone system, etc. *Platt v. City and County of San Francisco*, 110 Pac. 304, 306, 158 Cal. 74.

#### Switch track

A switch track which is part of a general railway system, and which may be used by any or all who have occasion to ship freight over it, and which is not designed for the exclusive use or convenience of any particular person or corporation, is, although from its location and surroundings only a

limited number of persons will have occasion to use it, a public utility. *Stockdale v. Rio Grande W. Ry. Co.*, 77 Pac. 849, 851, 28 Utah, 201.

#### Waterworks

Waterworks are "public utilities" subject to the exclusive control of the city in its governmental capacity for the convenience, health, and general welfare of the city. The city determines the amount of water mains, where to be laid, and the number and location of fire hydrants. Over these the individual has no control. In the exercise of this political power the city has discretion, with which the courts have no right to interfere. *Asher v. Hutchinson Water, etc., Co.*, 71 Pac. 813, 814, 66 Kan. 496, 61 L. R. A. 52.

#### PUBLIC VEHICLE

See Public Conveyance.

#### PUBLIC WAREHOUSE

A "public warehouse" is a place that is held out to the public as being one where any member of the public who is willing to pay the regular charges may store his goods and then sell or pledge them by transferring the receipt given him by the keeper or manager. *Security Warehousing Co. v. Hand*, 143 Fed. 32, 40, 74 C. C. A. 186.

Rev. St. 1899, § 7625, declares a "public warehouse" to be a building, elevator, or warehouse wherever state grain inspection may be established by the state board of railroad and warehouse commissioners and having a capacity of not less than 50,000 bushels for the purpose of storing grain of different owners for compensation. *State ex inf. Hadley v. Goffee*, 91 S. W. 486, 489, 192 Mo. 670.

#### PUBLIC WATERS

The term "public waters," as used in Sess. Laws 1903, p. 223, relating to the appropriation and division of the public waters, refers to all water running in natural channel streams, and the state may by proper application regulate the appropriation and use thereof. *Boise City Irrigation & Land Co. v. Stewart*, 77 Pac. 25, 27, 10 Idaho, 38.

By the adoption of our state Constitution, all of the unappropriated waters at that time were declared to be "public waters," and it matters not through or over whose land they flow. The Legislature has full authority to provide the method and procedure of appropriating such waters to a beneficial use by all persons and corporations. *Speer v. Stephenson*, 102 Pac. 365, 368, 16 Idaho, 707 (quoting and adopting Idaho Power & Transportation Co. v. Stephenson, 101 Pac. 821, 16 Idaho, 418; and citing and adopting Boise Irrigation & Land Co. v. Stewart, 77 Pac. 25, 321, 10 Idaho, 38).

A natural fresh-water pond containing 15 or more acres, though situated in the midst of and entirely surrounded by the land

of a private owner, is "public water," and the ownership in the land ceases at the water's edge or at high-water mark. *Dolbeer v. Suncock Waterworks Co.*, 58 Atl. 504, 506, 72 N. H. 562.

## PUBLIC WAY

As street, see Street.  
See, also, Public Track.

There are different kinds of public ways and different kinds of private ways, but all ways are included in the one or the other general classification, though some may partake of the nature of both, being maintained and operated for private gain and for use by the public. *Jones v. Venable*, 47 S. E. 549, 550, 120 Ga. 1, 1 Ann. Cas. 185.

The character of a "way," whether it is public or private, is determined by the extent of the right to use it, and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who may have occasion to exercise the right is very small. A road or way established under a statute authorizing a mineowner to establish ways from a railroad to his coal mine is a public way in the sense that the public may use and enjoy it in the way in which roads and highways are ordinarily used by it, and the mineowner who procured it to be established must use the special privileges which the act confers on him in such manner as not to destroy the right of the public or prevent its enjoyment. *Railroad Commission of Texas v. St. Louis Southwestern R. Co. of Texas*, 80 S. W. 102, 104, 35 Tex. Civ. App. 52 (citing *Phillips v. Watson*, 18 N. W. 659, 63 Iowa, 28).

If all the people have the right to use a way it is a "public way," though the number who have occasion to exercise the right is very small. *Wolford v. Fisher*, 87 Pac. 530, 48 Or. 479, 7 L. R. A. (N. S.) 991.

An alley of small dimensions actually used by only a limited number of persons, but which the public have a general right to use, may be regarded as a "public way." *Johnston v. Lonstorf*, 107 N. W. 459, 461, 128 Wis. 17 (quoting and adopting definition in *Elliott, Roads & S.* [2d Ed.] §§ 23, 24, 25).

Alleys are "public ways" under the control of municipal authorities. *Kansas City Southern R. Co. v. Boles*, 115 S. W. 375, 377, 88 Ark. 533. See, also, *City of Covington v. Schlosser*, 133 S. W. 987, 988, 141 Ky. 838 (quoting statutory definition).

"Whatever may be the dimensions of a way, if it be opened to the free use of the public, it is a highway; nor is its character determined by the number of persons who actually use it for passage. The right of the public to use the way, and not the size of the way or the number of persons who choose to exercise that right, determines its

character. An alley of small dimensions, actually used by only a limited number of persons, but which the public have a general right to use, may be regarded as a 'public way.' It is to be understood, of course, that the way cannot be deemed a public one so as to charge the local authorities with the duty of maintaining it, unless it has been legally established or accepted; but, if it is so established or accepted, it is to be considered one of the public ways, whatever may be its size or situation, provided it is suitable for any kind of travel by the public." *Tise v. Whitaker-Harvey Co.*, 57 S. E. 210, 211, 144 N. C. 507 (quoting and adopting the definition in *Elliott, Roads & S.* § 24). See, also, *State v. Hamilton*, 70 S. W. 619, 621, 109 Tenn. 276 (quoting *Elliott, Roads & S.* § 120).

Where in separating the grade of a street and a railroad, under the provisions of St. 1900, p. 471, c. 472, acting under an order of the city council authorizing the mayor to designate the streets which should be closed, and to fix the conditions under which they should remain closed, the mayor authorized the railroad company, which was required to perform the work, to close a part of the street, it nevertheless remained a "public way," which the city was charged with the primary duty of keeping "reasonably safe for the use of travelers," under Pub. St. 1882, c. 52, § 1. *Torphy v. Fall River*, 74 N. E. 465, 466, 188 Mass. 310.

The Brooklyn Bridge is a "public way" resting at each end upon land dedicated by a municipality under the laws of the state to a public purpose. *Town of Nahant v. United States*, 136 Fed. 273, 277, 70 C. C. A. 641, 69 L. R. A. 723.

## PUBLIC WELFARE

See Inimical to the Public Welfare.

## PUBLIC WHARF

A wharf in the harbor of a city, at the foot of a public street, built by a railway company under authority from the city, in addition to adequate terminal facilities, for the purpose of more conveniently procuring the transportation of freight beyond its own line by such carriers as it might select, is not a public wharf whose use can be demanded by a shipper, on payment of reasonable hire, for the purpose of employing vessels of his own selection for the further carriage of his goods. *Louisville & N. R. Co. v. West Coast Naval Stores Co.*, 25 Sup. Ct. 745-748, 198 U. S. 483, 49 L. Ed. 1135, 1137.

Act March 3, 1899, c. 429, § 460, 30 Stat. 1336, provides that any person maintaining public docks, wharves, and warehouses in Alaska shall first obtain a license and pay a license fee of \$100 per annum. By Act June 8, 1900, c. 786, § 29, 31 Stat. 330, 331, this provision was amended so as to impose a

license tax on public docks, wharves, and warehouses of 10 cents per ton on freight handled or stored. Defendant operated a lighterage business in Nome, consisting of an aerial tramway operated from towers anchored on permanent concrete foundations several hundred feet out to sea. Along this tramway cargoes were discharged from vessels by means of lighters; defendant contracting with each vessel for lighterage services at an agreed price per ton. Held, that such structure constituted a "public wharf," which defendant had no right to operate without payment of the fee. *John J. Sesnon Co. v. United States*, 182 Fed. 573, 576, 579, 105 C. C. A. 111.

A wharf constructed at the end of a street under authority given a city by Local Acts 1887, p. 805, Act No. 533, c. 14, § 3, to construct public wharves and to lease wharfing and landing privileges thereon, in such manner as to preserve the right of all persons to a free passage over the same with their baggage, is not subject to all the incidents of a highway, so as to prevent its use as a wharf as other wharves may be used. "There is no instance in which the term 'public wharf' has been used in our legislation to indicate anything analogous to a dedication to any public use like that of highways. Such a public right is unknown to the public law." *Kemp v. Stradley*, 97 N. W. 41, 42, 134 Mich. 676 (quoting *Horn v. People*, 26 Mich. 221).

## PUBLIC WORK

See Works of Improvement and Public Works.

See, also, Public Improvement.

The meaning of the words "public work," as used in Act Aug. 13, 1894, c. 260, 28 Stat. 278, giving a right of action to persons only supplying labor and materials for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building, or public work, is broader and more comprehensive than the dictionary meaning given to public works. "Public work" as used in the act is susceptible of application to any constructive work of a public character, and is not limited to fixed works. *United States, to Use of Standard Furniture Co., v. Henningsen*, 82 Pac. 171, 173, 40 Wash. 87.

### County jail

Under Hurd's Rev. St. 1908, c. 34, §§ 22, 24, 26, providing that each county shall be a body politic and corporate, with power to purchase and hold real estate necessary for the uses of the county, and requiring the county board to erect or otherwise provide, a suitable courthouse, jail, and other necessary county buildings, a county may condemn land for a county jail, under Eminent Domain Act (Hurd's Rev. St. 1908, c. 47) § 2, providing that, where the right to construct

or maintain any public work has been conferred on any corporate or municipal authority, public body, etc., the party authorized to construct the public work may proceed to condemn the land necessary; a county being a public municipal corporation, and a county jail being a "public work." *Mercer County v. Wolff*, 86 N. E. 708, 710, 237 Ill. 74.

### Garbage disposal

The term "public work," as used in a provision of a city charter prohibiting the assembly from directly contracting for any public work, or improvement or repairs thereon, or fixing the price or rate therefor, and prescribing the method by which such work or improvement, etc., shall be done, has no technical meaning, and includes every species and character of work done for the public and for which the taxpaying citizens are liable. It includes contracts for the removal and disposition of city garbage, which contract was let to a sanitary company, which disposed of the garbage by the method known as "reduction." *State v. Butler*, 77 S. W. 560, 568, 178 Mo. 272.

### Improvement of navigation

Dredging a channel in Boston Harbor is not a "public work of the United States" within the meaning of the act of August 1, 1892, forbidding a contractor upon any public work of the United States, under penalty of fine or imprisonment, to permit or require employes thereon to work more than eight hours each day. *Ellis v. United States*, 27 Sup. Ct. 600, 602, 206 U. S. 246, 51 L. Ed. 1047, 11 Ann. Cas. 589.

The widening or deepening of navigable streams, or the improvement of those which are not navigable, so that they may become so, and the construction or improvement of harbors, are public works conferring benefits on the public at large, the cost of which must be met by general taxation, and cannot be raised by special assessment on riparian property. *People ex rel. Deneen v. Economy Light & Power Co.*, 89 N. E. 760, 769, 241 Ill. 290.

### Lighting

The term "public works," used in the supplement to an act entitled "An act relating to regulating and providing for the government of cities" (P. L. 1905, p. 50), does not apply to a lighting contract. *Atlantic Gas & Water Co. v. Atlantic City*, 63 Atl. 997, 73 N. J. Law, 360.

### Sewer or street

"The municipality of Denver, though created by a constitutional amendment by a direct vote of the people, and having the power to frame its own charter, is just as much an agency of the state, for the purpose of government, as if it was organized under a general law passed by the General Assembly. The mode of its creation does not change the

nature of its relation to the state. Like cities and towns organized under the General Statutes, it is still a part of the state government. It is as much amenable to state control in all matters of a public, as distinguished from matters of a local, character, as are other municipalities." While the work of the city in building a sanitary sewer is local or "private," in that it affects, primarily, its own citizens, it is directly connected with the public health, and is a matter of concern to the people of the entire state. It is not municipal work of a private character, and hence is within 3 Mills' Ann. St. Rev. Supp. § 2801 a-c, restricting the hours of labor on work undertaken in behalf of the state toward any municipality, etc. *Keefe v. People*, 87 Pac. 791, 793, 37 Colo. 317, 8 L. R. A. (N. S.) 131 (citing and adopting *Atkin v. Kansas*, 24 Sup. Ct. 124, 191 U. S. 218, 48 L. Ed. 148; *Id.*, 87 Pac. 519, 64 Kan. 174, 97 Am. St. Rep. 343).

#### **Vessel or dredge**

A vessel building for the United States, the title to which passes to the government as fast as paid for, is a "public work" within the meaning of Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811, requiring a bond from the contractor for the protection of persons furnishing labor or materials for the construction of public works. *Title Guaranty & Trust Co. of Scranton, Pa., v. Crane Co.*, 31 Sup. Ct. 140, 141, 219 U. S. 24, 55 L. Ed. 72; *Same v. Puget Sound Engine Works*, 163 Fed. 168, 89 C. C. A. 618; *United States v. Perth Amboy Shipbuilding & Engineering Co.*, 137 Fed. 689, 893. But a contrary view has been expressed by the Supreme Court of Appeals of Virginia, which has decided that the words "public works," as used in this statute, relate to fixed improvements, such as fortifications, river, and harbor improvements, etc., and do not include a movable article, such as a seagoing dredge. *Penn Iron Co. v. William R. Trigg Co.*, 56 S. E. 329, 330, 106 Va. 557.

#### **PUBLIC WORSHIP**

See *House of Public Worship; Place of Public Worship*.

One who willfully disturbed a Sunday school was indictable at common law, and also under Revisal 1905, §§ 3704, 3706, prohibiting the disturbing of a meeting of people held for public worship, etc. *State v. Branner*, 63 S. E. 169, 171, 149 N. C. 559.

#### **PUBLIC WRITING**

A judicial record is a "public writing." *Hibernia Savings & Loan Soc. v. Boyd*, 100 Pac. 239, 242, 155 Cal. 193 (citing *Code Civ. Proc.* § 1894).

#### **PUBLIC WRONG**

"Public wrongs" are breaches and violations of public rights and duties which affect

the whole community, considered as a community. *United States v. Illinois Cent. R. Co.*, 156 Fed. 182, 185 (citing *Huntington v. Attrill*, 13 Sup. Ct. 228, 146 U. S. 668, 36 L. Ed. 1123).

A wrong of a nature which affects the rights and interests of people in almost every city and village in the state, as well as persons in the country, when committed by a public service corporation, is a public wrong, and an action to restrain the same by the state is within the jurisdiction of the Supreme Court. *State v. Pacific Express Co.*, 115 N. W. 619, 624, 80 Neb. 823.

#### **PUBLICLY EXECUTED**

A sentence that defendant be hanged "at the usual place of execution," which is fixed by Cr. Code 1902, § 660, within the county jail, or the inclosure thereof, is not a sentence "to be publicly executed." *State v. Anderson*, 67 S. E. 237, 238, 85 S. C. 229, 137 Am. St. Rep. 887.

#### **PUBLICLY PROFESS TO BE PHYSICIAN**

Code, § 2579, declares that any person shall be held as practicing medicine or to be a physician within the meaning of the chapter, prohibiting the practice of medicine without a certificate, "who shall publicly profess to cure or heal." One accused under the chapter of such offense claimed to discover and remove cause of disease so as to give nature a chance, to do which he professed to "stop the leaks in the nervous system, and repair the damages done," by "rest and dietetics." He announced himself as a graduate of a unique medical school and as "master mechanic of the human body" who would remove the cause if any organ was not working well, or if there was pressure on a nerve causing pain. He claimed his system gave a permanent cure in difficult diseases, and that he proved his system by getting good results among those who had tried other systems. Held, a public profession to cure and heal within the meaning of the section. The definition of the section also includes any one "who shall publicly profess to be a physician \* \* \* and assume the duties." Held, that publishing a card as "doctor of neurology and ophthalmology" was a public profession that he was a physician, and this, with the assumption of duties as such, came within the meaning of the section. *State v. Wilhite*, 109 N. W. 730, 731, 132 Iowa, 226, 11 Ann. Cas. 180.

#### **PUBLICATION**

See *Indecent Publications; Last Publication; Limited Publication; Privileged Publication; Restricted Publication. Anonymous publication, see Anonymous. Fifteen days' published notice, see Fifteen.*

Published four consecutive weeks, see Four.

#### In copyright law

Entering an original painting with the copyright reserved at an exhibition of the Royal Academy, whose by-laws prohibit copying, is not such a "publication" as defeats the right to take out a copyright in such painting. *American Tobacco Co. v. Werckmeister*, 28 Sup. Ct. 72, 77, 207 U. S. 284, 52 L. Ed. 208, 12 Ann. Cas. 595.

In its ordinary acceptation, the word "publication" means "the act of publishing a thing or making it public; offering to public notice; or rendering it accessible to public scrutiny." In copyright law, it is "the act of making public a book; that is, offering or communicating it to the public by sale or distribution of copies." Without undertaking to state the qualifications of this definition, as applied to certain incidents, by which the book might be exhibited by the author, prior to copyrighting it, without amounting to a publication, within the spirit of the statute, it is safe to say that the appearance of a pamphlet, after its delivery to plaintiff by the publisher, in a public hotel, subject to be seen and read by any person about so public a place, certainly was a "rendering it accessible to public scrutiny," and was likewise a "communicating it to the public by distribution of copies." *D'Ole v. Kansas City Star Co.*, 94 Fed. 840, 842.

#### In patent law

The sale of an article made under a secret process is a "publication" of the process, if and when one can by his own ingenuity ascertain therefrom the process by which it is made. *Hartman v. John D. Park & Sons Co.*, 145 Fed. 358, 378.

#### Of libel or slander

To constitute a "publication" of slander, it is essential that the defamation not only be heard, but be understood, by some third person. *Cameron v. Cameron*, 144 S. W. 171, 173, 162 Mo. App. 110.

To "publish" means to make publicly known, to proclaim to the public, so that an averment that defendants "did publish" the alleged libelous matter imported a communication to others, and it was not necessary to aver in detail the manner of the publication. *Morgan v. Black*, 63 S. E. 821, 822, 182 Ga. 67 (citing *Townsh. Sland. & L.* §§ 324, 325; *Wilcox v. Moon*, 22 Atl. 80, 63 Vt. 481; *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527; *Hamilton v. Lowery*, 71 N. E. 56, 33 Ind. App. 184); *Hamilton v. Lowery*, 71 N. E. 54, 56, 33 Ind. App. 184 (citing *Walstel v. Holman*, 2 Hall [N. Y.] 193, and quoting from *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527).

In pleading publication the name of the person or persons to whom the communication or publication was made need not be

given, and the word "published" imports that the words were spoken in the presence of some third person, but the complaint should allege with exactness the time when and the place where publication was made, unless the statute otherwise provides. *Perry v. Dozier*, 49 South. 909, 913, 161 Ala. 292.

The dictation of a libelous letter to a stenographer, who copies it on a typewriter, and the subsequent signing and mailing thereof, by the person dictating is a sufficient "publication" of the contents to support libel. *Ferdon v. Dickens*, 49 South. 888, 891, 161 Ala. 181.

A letter written to attorneys of another, relating to the business in hand, is not published, in the sense of the law of libel. *Dickinson v. Hathaway*, 48 South. 136, 137, 122 La. 644, 21 L. R. A. (N. S.) 33.

Where a person writes a defamatory letter, and sends it in a sealed envelope, through the United States mail, to the person defamed thereby, who receives it, and reads the contents thereof to a third person, such reading will not constitute a "publication" of the libel by the writer thereof for the purposes of a civil action. *Lyon v. Lash*, 88 Pac. 262, 74 Kan. 745, 11 Ann. Cas. 424.

A later patent was not in the prior art, so as to invalidate a patent in suit as a prior patent or "publication," although it was granted on an earlier application; but it may be proved by competent evidence that the later patentee was the original and first inventor by being the first to both conceive the invention and reduce it to practice, and such prior invention may be shown by his prior application, where there is no evidence to carry the invention of either patentee back of the date of his application, provided the invention of the patent in suit and of such application is the same. *Sundh Electric Co. v. Interborough Rapid Transit Co.*, 198 Fed. 94, 96, 117 C. C. A. 280.

#### Same—Single person

"Publication" in the law of libel relating to mercantile reports, is the preparation and delivery of the copy with the alleged libelous matter to some third person, and, to recover in such case, it is unnecessary to prove the issue and publication of numerous copies of the report, if, at a date prior to the suit, defendant prepared and delivered a copy to any firm, person, or corporation other than the plaintiffs themselves. *Minter v. Bradstreet Co.*, 73 S. W. 668, 676, 174 Mo. 444.

#### Of newspaper

The day a notice is printed is not the day of publication, but publication takes place when the notice is seen and read in the paper by the public, though it need not reach all the public at the same time; and publication will date from the day when the public begins to receive it from the pub-

lisher. *State ex rel. Doran v. Johnson* County Court, 122 S. W. 316, 317, 138 Mo. App. 427.

Under Rev. Laws, c. 13, § 1 (now St. 1909, c. 490, pt. 2, § 1), providing that "publication of any notice" shall mean the act of printing the notice for a successive number of weeks in a newspaper, etc., an advertisement of a tax sale must be published in English in a newspaper printed in English, and a publication in English of a notice in a French newspaper is insufficient. *Connors v. City of Lowell*, 95 N. E. 412, 415, 209 Mass. 111, Ann. Cas. 1912B, 627.

Laws 1909, p. 419, § 6, provides that the board of directors of education shall, before adopting text-books for use in public schools, advertise for bids in newspapers of general circulation published in the city or district. A large majority of the school districts have no paper published within their borders. Held, that this provision could not be construed as allowing the publication of an advertisement in a newspaper having a general circulation in, but not published in, the district, for a newspaper of "general circulation" need only circulate among all classes, and may be published in a place far distant from the district, and the provision requires the advertisement in a newspaper of general circulation published in the city or district; the word "published" clearly meaning the place where a newspaper is first issued or printed, and hence the section is invalid, as impossible to be obeyed. *Polzin v. Rand, McNally & Co.*, 95 N. E. 623, 627, 250 Ill. 561, Ann. Cas. 1912B, 471.

Under a statute requiring notice of tax sale to be published once in each week for four successive weeks prior to the sale, where the tax sale in 1903 took place on May 19th, and that in 1904 on May 17th, and the affidavit of publication in each case declared that the notice was "printed and published" in a designated newspaper once in each week for four successive weeks, commencing on April 15th, and terminating on May 6th, it showed a sufficient publication; the term "published" being used in the sense of the physical act of printing the notice in a published newspaper, and not to refer to the term of notice, the office of the word "printed" in that connection being only to emphasize such meaning. *Bauchier v. Hammer*, 123 N. W. 132, 133, 134, 140 Wis. 648.

*Kirby's Dig.* § 7085, provides that the county clerk shall cause the delinquent tax list to be published weekly for two weeks, between the second Monday in May and the second Monday in June, in some newspaper in the county, if any be published there. Section 7086 provides that the clerk shall record the list, and shall certify at the foot of the record in what newspaper the same was published, and the date of publication, and for what length of time the same was

published before the second Monday in June. Held, that the statement at the foot of the record of the delinquent tax list of Chicot county, signed by the clerk, "Given to the *Chicot Life* on the 17th day of May for publication," and "published in *Chicot County Life* for two issues, to wit, 21st of May and 28th day of May, 1901," was a sufficient certificate. The word "published" in the clerk's statement shows that the list was printed. *Cook v. Ziff Colored Masonic Lodge No. 119*, 96 S. W. 618, 620, 80 Ark. 31.

A return of execution, which states that the notice of sale was published in a newspaper "printed" in the county, shows a compliance with Rev. Laws, c. 178, § 28, requiring the officer to cause a notice of the time and place of sale to be published in a newspaper "published in the county in which the land lies;" the quoted phrase, construed as required by chapter 8, § 4, cl. 13, according to the common and approved usage of language, referring to a newspaper printed and issued within the county. *Blake v. Rogers*, 97 N. E. 68, 69, 210 Mass. 588.

Under Rev. St. 1899, § 3029, requiring publication of notice of a local option election in a newspaper published in the county, where the election was for that part of the county outside the county seat, a city containing over 2,500 inhabitants, publication in a paper published at the county seat and having general circulation in the county was sufficient; it being "published in the county" within the meaning of the statute. *State v. Morgan*, 128 S. W. 839, 841, 144 Mo. App. 35.

Where a newspaper is entered as second-class matter at a post office at a certain town, to be distributed in the town in the first instance, and mailed to a large number of subscribers, and first distributed, circulated, and sold in that town, though printed elsewhere, it is "published" in that town within Liquor Tax Law (Consol. Laws, c. 34) § 13, requiring publication of notice of submission of questions relating to local option. In *re Gainsway*, 123 N. Y. Supp. 966, 66 Misc. Rep. 521.

The "publication" of an appropriation ordinance adopted by the village of Morgan Park in a newspaper published weekly in the interest of Morgan Park, Blue Island, and the entire country along the Blue Island ridge, in Chicago, by an unincorporated company, and entered as second-class matter at the post office at Chicago, is not a publication within General Act for the Incorporation of Cities and Villages, art. 5, § 3 (*Hurd's Rev. St.* 1911, c. 24, § 64), providing that appropriation ordinances shall be published in a newspaper published in the city or village, since the place of publication of a newspaper is the place where it is first put into circulation or issued to be delivered by mail or otherwise to its subscribers, and the testi-

mony of a witness that the newspaper was published in Morgan Park, and was a paper of general circulation in the village and outside, does not show a publication in Morgan Park, where the witness understood that a paper is published in any community where it is generally circulated. *People ex rel. O'Connell v. Read*, 100 N. E. 230, 256 Ill. 408, Ann. Cas. 1913E, 293.

#### Of will

"Publication" is the act of testator whereby he manifests that it is his intention to give effect to the paper as his will, and any communication indicating that testator intends so to do by word, sign, motion, or conduct is a sufficient publication. In *re Ayers' Estate*, 120 N. W. 491, 492, 84 Neb. 16. See, also, *Danley v. Jefferson*, 114 N. W. 470, 471, 150 Mich. 590, 121 Am. St. Rep. 640, 13 Ann. Cas. 242.

"'Publication' of a will may be made by words or acts or signs which clearly and distinctly make known to the witnesses that what they are requested to subscribe to is the testator's will." *Vernon v. Vernon*, 81 Atl. 409, 410, 69 N. J. Eq. 759 (citing *Mundy v. Mundy*, 15 N. J. Eq. 290; *Swain v. Edmunds*, 53 N. J. Eq. 142, 82 Atl. 369).

The "publication" of a will, defined as the act of making it known, in the presence of witnesses, that the instrument to be executed is the will of testator, with the statu-

tory formalities, is not required in Michigan; but in the execution of a will the attesting witnesses, signing it at the request of testator, should be advised that the instrument to which they subscribe is the will of testator; and execution in substantial compliance with the statute is equivalent to "publication." In *re Kohn's Estate*, 137 N. W. 735, 737, 172 Mich. 342.

A testator did not make "publication" of a writing as his will, where one of the subscribing witnesses did not hear the will read, was not requested by any one to sign as a witness to the writing as a will, did not see the signature of the testator, and was not informed of the character of the paper until nearly two years later. In *re Noyes' Estate*, 105 Pac. 1013, 1017, 40 Mont. 178.

A testatrix may "publish" a will by assenting to a statement made in her presence. Such an assent may be made by some act or sign. If the scrivener declared, in the hearing of testatrix, that the paper was her will, and she had then signed it, publication might be inferred; but such publication cannot be inferred where the scrivener said, in the presence of the testatrix, that she had made her will and wanted two persons who had been called in to witness it, and testatrix made no sign of assent and did not sign the paper in their presence. *Manners v. Manners*, 66 Atl. 583, 584, 72 N. J. Eq. 854.

**PUBLISH**

See Printed and Published.

Fifteen days' published notice, see Fifteen.

Print as publish, see Print—Printing.

Published four consecutive weeks, see Four.

Utter and publish, see Utter.

See, also, Publication.

In Rev. Laws 1905, § 1453, providing that the state board of administration of farmers' institutes shall publish annually a "Farmers' Institute Annual," "publish" means to print, as well as to compile and distribute. *Syndicate Printing Co. v. Cashman*, 132 N. W. 915, 917, 115 Minn. 446.

The phrase "publish, sell, exchange, and deliver," in an indictment alleging that defendant did unlawfully "publish, sell, exchange, and deliver" a forged note, is synonymous with the words "sell, exchange, or deliver" in the statute declaring that every person who shall sell, exchange, or deliver a forged note, etc., shall be guilty of forgery; the word "publish" not changing or altering the nature of the offense charged. *Connella v. Territory*, 86 Pac. 72, 74, 16 Okl. 365.

**Express synonymous**

See Express.

**Utter synonymous**

See Utter.

**PUBLISHER****Foreman**

The foreman of the mechanical department of a newspaper or a typesetter is not a "printer" or "publisher," who is authorized by Mills' Ann. St. § 3884, to make proof of publication of a notice of tax sale; the quoted terms relating to one who has some title or proprietary interest in the plant. *Herr v. Graden*, 127 Pac. 319, 321, 22 Colo. App. 511.

**Mercantile agency**

To the ordinary man, the word "publishing" connotes the business of publishing, as prosecuted by those professedly engaged therein, by those who are ordinarily called "publishers"; that is, manufacturers and distributors of books, pamphlets, etc. An incorporated mercantile agency, whose business is to rate and report the credit seekers of the United States and Canada, to publish these ratings in the form of a book, and to furnish such book and also special reports at a special price to all mercantile agency users, is not engaged principally in publishing, and cannot be adjudged an involuntary bankrupt. *Zugualla v. International Mercantile Agency*, 142 Fed. 927, 930, 74 C. C. A. 97.

**As proprietor**

The fact that a person making an affidavit of publication of process in a newspaper signs himself "publisher," instead of "editor, proprietor, or manager," does not make

proof of publication defective, though the statute requires that the proof shall be made by the "editor, proprietor, or manager" of the newspaper; the word "publisher" being used in the sense of proprietor or manager. *Stuart v. Cole*, 92 S. W. 1040, 1042, 42 Tex. Civ. App. 478.

**PUEBLO**

"By the laws of Mexico, in force at the date of the acquisition of the country, 'pueblos' or towns were entitled, for their benefit and the benefit of their inhabitants, to the use of the lands constituting the site of such pueblos and towns, and of adjoining lands, within certain prescribed limits." *Townsend v. Greeley*, 72 U. S. (5 Wall.) 326, 336, 18 L. Ed. 547.

"Each 'pueblo' (under the Mexican law) was quasi a public corporation. By the scheme of the Mexican law it was treated as an entity or person having a right as such, and, by reason of its title to the four leagues of land, to the use of the water of the river on which it is situated, while as a political body it was vested with power, by ordinance, to provide for a distribution of the waters to those for whose benefit the right and power were conferred." *City of Los Angeles v. Los Angeles Farming & Milling Co.*, 93 Pac. 869, 871, 152 Cal. 645 (quoting from *Lux v. Haggin*, 4 Pac. 919, 10 Pac. 674, 69 Cal. 255).

**PUEBLO INDIANS**

As tribe, see Indian Tribe.

The "Pueblo Indians" of New Mexico are not wards of the government, nor are they in charge of an Indian superintendent or agent, nor are they Indians over whom the government, through its departments, exercise guardianship, within the meaning of Act Cong. Jan. 30, 1897, c. 109, 29 Stat. 506, 3 Fed. St. Ann. p. 384, penalizing the sale or gift of intoxicants to such Indians. *United States v. Mares*, 88 Pac. 1128, 1129, 14 N. M. 1.

**PUFFING**

As false representation, see False Representation.

**PULL**

To "pull" railroad cars means to haul them. *McGuire v. Quincy, O. & K. C. R. Co.*, 107 S. W. 411, 412, 128 Mo. App. 677.

The phrase "pull timber," as used in a logging contract, means to drag it from where it has been felled to the water on which it is to be floated to the sawmill. *Des Allemands Lumber Co. v. Morgan City Timber Co.*, 41 South. 332, 334, 117 La. 1.

**PULLED GOODS**

"Pulled goods" are chattels sold upon condition and retaken by the vendor for non-



compliance with the conditions of sale. *Levine v. D. Wolff & Co.*, 73 Atl. 73, 78 N. J. Law, 306, 138 Am. St. Rep. 617.

The expression "pumps pulled," used in the account of a collector for a pump company, means the pumps retaken in lieu of the purchase money. *Sharp v. State*, 67 S. E. 1124, 7 Ga. App. 749.

#### **PULLER**

See Ratchet Puller.

#### **PULLEY**

As shafting, see Shaft.

#### **PULP**

##### **PULP WOOD**

See Wood Pulp.

The term "pulp woods," in the Tariff Act, has no commercial signification differing from its ordinary meaning, and is employed as a short, comprehensive expression intended to cover pulp wood in all its forms, including such as has been subjected to the rossing process, whereby the bark, skin, and rough places are removed. It is not necessary that pulp woods shall be "round unmanufactured timber." *United States v. Pierce*, 147 Fed. 199-201, 77 C. C. A. 425.

#### **PUMPHOUSE**

As factory, see Factory.

#### **PUNCTUATION**

Under General Construction Law (Consol. Laws 1909, c. 22) § 21, providing that a folio is 100 words, counting as a word each figure, a "folio," in determining an allowance under Insanity Law (Consol. Laws 1909, c. 27) § 84, for taking and transcribing testimony, means words and figures, but not punctuation; the word "figure" being limited to numerals, which are letters or characters representing a number, and not including "punctuation," which is a pointing off or separating of one word from another by arbitrary marks. In *re Murtaugh*, 128 N. Y. Supp. 850, 851, 71 Misc. Rep. 513.

#### **PUNISH**

##### **PUNISHABLE**

In Rev. St. § 4596, as amended by Act Dec. 21, 1898, c. 28, § 19, 30 Stat. 760, providing that offenses by seamen shall be punishable as therein prescribed, the word "punishable" does not mean "must be punished," but "may be punished" as therein provided. *The Thrasher*, 173 Fed. 258, 262, 97 C. C. A. 424.

"Punishable," as used in Pen. Code, § 1232, providing that if one having been con-

victed of an offense, which would be "punishable" as a first conviction, by imprisonment in the penitentiary for more than five years, he is punishable by imprisonment for not less than ten years, means liable to punishment. And section 392 makes robbery punishable by not less than 1 year's imprisonment nor more than 20 years, so that under section 1232, if the maximum punishment for the subsequent offense, as a first offense, is more than 5 years, the punishment may not be less than 10 years, and hence one convicted of robbery and a prior offense may be imprisoned for 50 years. *State v. Paisley*, 92 Pac. 566, 570, 36 Mont. 237.

The word "punishable," in a statute stating that a crime is punishable by a designated penalty or term of years in the state prison, limits the penalty or term of years to the amount or term of years stated in the statute. *State v. Magoon*, 17 Atl. 729, 61 Vt. 45.

The word "punishable," as used in a statute declaring that a violation thereof shall be punishable by a fine of not more nor less than a designated amount, indicates that a crime is intended, and not a pecuniary penalty to be recovered by a civil action. In *re Jackson*, 14 Blatchf. 245, 13 Fed. Cas. 194-197.

#### **PUNISHMENT**

See Corporal Punishment; Cruel and Unusual Punishment; Infamous Punishment; Unusual Punishment.

"Punishment," as anciently regarded, was deemed largely compensatory; the natural and logical conception of a sentence for crime being that the punishment should be nicely graduated to the nature and circumstances of the offense. But the modern conception of "punishment" takes practically no account of compensation, but commits the offender to the charge of the officers of the state as a sort of penitential ward, to be restrained as far as necessary to protect the public from recurrent manifestations of his criminal tendencies, and, if possible, reformed, cured of his criminality, and finally released, a normal man and rehabilitated citizen. *State ex rel. Kelly v. Wolfer*, 138 N. W. 315, 318, 119 Minn. 368, 42 L. R. A. (N. S.) 978.

"Punishment" in a legal sense is any pain, penalty, suffering, or confinement inflicted upon a person by the authority of the law, and the judgment and sentence of a court for some crime or offense committed by him or for his omission of a duty enjoined by law. *State v. Pope*, 60 S. E. 234, 236, 79 S. C. 87.

"Punishment" is either the act of inflicting a penalty for an offense or the enduring of the penalty. Where one who had been convicted and sentenced for aiding illegal

voting at an election, by inducing a designated person to vote, appeared pursuant to a subpoena before a committing magistrate, and testified in reference to his crime and his efforts to procure various persons to vote at the election, he was not entitled to his discharge, under Pen. Code, § 41q, providing that any person testifying to offenses against the elective franchise shall not thereafter be liable to indictment, prosecution, or "punishment" for the offense with reference to which his testimony was given; the word "punishment," when construed, as required by section 11, according to its fair import, not meaning the enduring of penalty, but the act of inflicting a penalty, and referring to the act of fixing the penalty before such examination. *People ex rel. Hunt v. Lane*, 116 N. Y. Supp. 990, 992, 132 App. Div. 406 (citing Cent. Dict.).

The detention of a female minor in the House of the Good Shepherd under an ordinance relating to juvenile vagrants, and authorizing the detention of such persons until they reach a certain age, is not a "punishment," being designed for her good and welfare, to protect her against herself and from evil-minded parties surrounding her. *State ex rel. Caillouet v. Marmouget*, 35 South. 529, 533, 111 La. 225.

A commitment of a boy to the State Industrial School, in pursuance of Comp. St. 1907, c. 75, § 4840, providing that where a boy under 18 shall be found guilty of any crime except murder or manslaughter, the court may instead of entering judgment or sentencing the boy to the penitentiary, commit him to the State Industrial School, is not a "punishment," nor is the industrial school a prison, so as to require the imposition of a fine rather than the commitment, within the rule that, where one of two or more punishments may be imposed, the court should inflict the one which would be the less severe and result in the least disgrace. *Roberts v. State*, 118 N. W. 574, 576, 82 Neb. 651.

The words "mulct," "punishment," and "fine," as used in the decisions of the Supreme Court of Alabama in referring to the statutory action for death, given by Code Ala. 1896, § 27, are not used in the sense that is ordinarily attached to such words in the domain of criminal law, and therefore such statute is not a penal one, within the rule that one state will not enforce the penal laws of another state. *Whitlow v. Nashville, C. & St. L. R. Co.*, 84 S. W. 618, 620, 114 Tenn. 344, 68 L. R. A. 503 (citing *Southern Ry. Co. v. Bush*, 26 South. 173, 174, 122 Ala. 470, 488, 489).

In a prosecution for larceny, a verdict finding accused guilty as charged, and fixing his "penalty" at one year in the penitentiary, was not insufficient; the word "penalty" being synonymous with the word "punishment," and being evidently used with that meaning.

*Russell v. State*, 133 S. W. 188, 191, 97 Ark. 92.

#### As costs

See Cost.

#### Suspension

The suspension of a naval officer, charged with drunkenness and neglect of duty, from morning until evening of the same day, when he was restored to duty to give "time to investigate the case," is not such a punishment for the offense as precludes, under Navy Regulations 1865, par. 1205, further proceedings against him by court-martial, but must be deemed simply a temporary precaution for the preservation of good order and discipline. *Bishop v. United States*, 25 Sup. Ct. 440, 441, 197 U. S. 334, 49 L. Ed. 780.

#### Tax

A "tax" is not a "punishment." *Muir's Adm'r v. City of Bardstown*, 87 S. W. 1096, 1098, 120 Ky. 739.

## PUNITIVE

### PUNITIVE DAMAGES

Malice as justifying punitive damages, see Malice.

See, also, Exemplary Damages; Smart Money.

"Punitive damages" are damages allowed, not as a compensation, but as a punishment for a wrong, willfully and maliciously done. *Shields' Adm'rs v. Rowland*, 151 S. W. 408, 410, 151 Ky. 136.

"'Punitive damages' have now come to be generally, though not universally, regarded, not only a punishment for wrong, but as vindication of private right. This is the basis upon which they are now placed in this state." *Beaudrot v. Southern R. Co.*, 48 S. E. 106, 107, 69 S. C. 160.

Damages for aggravating circumstances in actions of tort, to deter the wrongdoer, or as compensation for wounded feelings, given by Civ. Code 1895, § 3906, are called "punitive damages." *Batson v. Higginbotham*, 68 S. E. 455, 457, 7 Ga. App. 835.

"Punitive damages" are awarded in addition to compensation as a punishment to the wrongdoer and as a warning to others, and they are allowed only where there are some features of aggravation, as where the wrong is done willfully and maliciously. *Carmichael v. Southern Bell Telephone & Telegraph Co.*, 72 S. E. 619, 620, 157 N. C. 21, 39 L. R. A. (N. S.) 65, Ann. Cas. 1913B, 1117.

"Punitive damages" are damages over and above such sum as will compensate the person for his actual loss, the imposition of which the law permits in proper cases at the discretion of the jury, not because the party injured is entitled to them as a matter of right, but as a punishment to the wrongdoer and to deter him and others in the same busi-

ness from such wrongdoing in the future. *Birmingham Waterworks Co. v. Kelley*, 56 South. 838, 841, 2 Ala. App. 629.

"Punitive damages" consist of such sum above the actual damages which plaintiff sustained as will punish defendant for the wrong and unwarranted act complained of. *Miller v. Rambo*, 64 Atl. 1053, 1054, 73 N. J. Law, 726.

"Punitive damages" do not depend on the injury inflicted or the legal wrong committed, and are allowed in excess of simple compensation as a punishment of the defendant for his wrongful conduct and with a view to prevent similar wrongs in the future. They are not allowed as a matter of course, but only where there are some features of aggravation, as where the wrong is done willfully and maliciously, or under circumstances of rudeness or oppression, or in a manner which evinces a wanton and reckless disregard of plaintiff's rights. Thus, where a trespass is committed deliberately, in a manner and under circumstances of aggravation and humiliation, showing a reckless and lawless disregard of plaintiff's rights, the law allows damages beyond the strict measure of compensation by way of punishment. *Ammons v. Southern Ry. Co.*, 52 S. E. 731, 732, 733, 140 N. C. 196 (citing *Champion v. Vincent*, 20 Tex. 811; *Joyce, Dam.* § 26).

"Punitive damages" may be recovered only in cases where the acts complained of are characterized by malice, fraud, oppression, or willful wrong, evincing a disregard of the rights of others." *Cumberland Telephone Co. v. Allen*, 42 South. 666, 667, 89 Miss. 832. See, also, *James McNeil & Bro. Co. v. Crucible Steel Co. of America*, 56 Atl. 1070, 1071, 207 Pa. 493.

A sum assessed by a jury additional to compensation for damages, by way of punishment for wrongdoing, is termed "smart money," or "exemplary," "vindictive," or "punitive" damages. *Farrow v. Hoffecker* (Del.) 79 Atl. 920, 7 Pennewill, 223; *Doerhoefer v. Shewmaker*, 97 S. W. 7, 10, 123 Ky. 646 (citing *Chiles v. Drake* [Ky.] 2 Metc. 146, 74 Am. Dec. 406).

"Punitive damages," being apart from compensation, are not recoverable as a matter of right. Their imposition is discretionary with the jury. This discretion is not an unbridled or arbitrary one, but a legal, sound, and honest discretion," to be exercised with due regard to attendant circumstances in the commission of the wrong complained of, its enormity, etc. And the enormity of the wrong is not to be determined alone by the consequences of the act, though these, in connection with the manner of its commission, whether or not intentionally done, or otherwise attended with circumstances of aggravation, may be accorded their due weight.

*Cox v. Birmingham Ry. Light & Power Co.*, 50 South. 975, 976, 163 Ala. 170.

While the damages to which a plaintiff may become entitled, in an action of tort, to the amount of his expenses in litigation, in addition to his actual damages, are in fact and in effect "compensatory damages" and not "punitive," they are in practice variously termed "exemplary," "punitive," "vindictive," or "smart money," and, in an action for personal injuries in which plaintiff was entitled to recover such additional damages, it was not error to refer to them as "exemplary." *Hull v. Douglass*, 64 Atl. 351, 353, 79 Conn. 266.

Exemplary or punitive damages are not recoverable from a telegraph company for breach of contract to promptly deliver messages. *Western Union Telegraph Co. v. Reeves*, 126 Pac. 216, 217, 34 Okl. 468.

#### As damages

See *Damage—Damages*.

#### PUNITIVE DEATH

The word "punitive," as used in Civ. Code 1895, § 2118, declaring that death by the hands of justice, either punitive or preventive, releases the insurer from the obligation of his contract, refers to death inflicted by an officer of the law in obedience to the commands of the law. Even though the killing by the husband of the paramour of the wife be under such circumstances that the law would class the act as justifiable homicide, such killing is not, at the hands of justice, either punitive or preventive. *Supreme Lodge Knights of Pythias v. Crenshaw*, 58 S. E. 628, 629, 129 Ga. 195, 13 L. R. A. (N. S.) 258, 121 Am. St. Rep. 216, 12 Ann. Cas. 307.

#### PUNITIVE JUDGMENT

A judgment finding defendants in a pending suit in equity guilty of contempt of its authority in violating an interlocutory injunction previously granted in a suit for the benefit of the complainant, and ordering the payment of specified fines, three-fourths of which when paid should go to the complainant "as compensation in part for the expenses incurred in prosecuting these contempt proceedings," is punitive instead of remedial, and reviewable on writ of error without awaiting a final decree in the suit in equity. *In re Merchants' Stock & Grain Co.*, 32 Sup. Ct. 339, 223 U. S. 639, 56 L. Ed. 584.

#### PUPIL

The word "pupils," by derivation and the definition of lexicographers, is properly applicable to children and youth. Students in colleges and professional schools are not called pupils; hence students attending a college or business institute are not properly within the correct construction of the term.

*Selectmen of Clinton v. Worcester Consol. St. Ry. Co.*, 85 N. E. 507, 512, 199 Mass. 279. Thus the word "pupils," as used in *Rev. Laws, c. 112, § 72*, requiring street railroads to transport the pupils of public schools at half rates, means children and youths attending the public schools, and does not include students in colleges and professional schools, nor young men or boys attending nautical or industrial schools, nor adults attending evening schools or evening high schools, nor children attending vacation schools. *Commonwealth v. Connecticut Valley St. Ry. Co.*, 82 N. E. 19, 21, 196 Mass. 309.

Where a municipal ordinance, when proposed by a street railway company, required it to sell tickets at reduced rates to "children going to and from school," but the council refused to incorporate this language, and substituted the phrase "pupils presenting a certificate of enrollment in some school," it was held that the word "pupils" was of much broader signification, and would embrace classes of young persons receiving instruction at more advanced institutions of learning, who would not be aptly described as "children going to and from school." In the broader sense it included the students of a business college. *Northrop v. City of Richmond*, 53 S. E. 962, 963, 105 Va. 335.

## PURCHASE

See Actual Purchase or Sale; Attempt to Purchase; Complete His Purchase; Indirect Purchase; Right to Purchase. Erect as authorizing purchase, see Erect.

The word "purchase" implies acquisition. *Marsh v. Lott*, 97 Pac. 163, 165, 8 Cal. App. 384.

The word "purchased" may mean a completed transaction, or it may mean a transaction still incomplete. *State v. Ware*, 58 Atl. 595, 596, 71 N. J. Law, 53.

"Purchase" includes every mode of acquisition known to law except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by act of the law. *Shulthis v. MacDougal*, 162 Fed. 331, 338 (citing 3 Washb. Real Prop. p. 4).

Under the act of 1885 (*Laws 1885, p. 229*), relative to the consolidation of railroad corporations, section 1, providing that any railroad company organized under the laws of this state operating in connection with their own lines any other railroads in this or any other state may purchase and hold in fee simple or otherwise, and use and enjoy the property rights and franchises of the companies owning such other roads, it is not necessary that the transaction should take the form of a technical sale, but it is sufficient if the contract or agreement merges the properties, franchises, and corporate rights of the merging company into the merger corporation, as a result of which one corpora-

tion disposes of its property and franchises and the other acquires them in a lawful manner, since "purchase" is not used in its popular and commercial meaning as equivalent to "buy," but in its enlarged and legal signification meaning the acquisition of real property by any voluntary act of the parties, as distinguished from title by descent which results from operation of law. *Chicago & E. I. R. Co. v. Doyle*, 100 N. E. 278, 280, 256 Ill. 514 (citing 7 Words and Phrases).

A parol donee of land stands on a parity with a parol purchaser; the word "purchase," at common law, being defined as the possession of lands which one has by his own act or agreement, and not by descent. *Bailey v. Henry*, 143 S. W. 1124, 1127, 125 Tenn. 390 (citing 7 Words and Phrases, p. 5853).

Real estate purchased with the proceeds of inherited property is held by "purchase"; the equity practice of following a fund through changes and transactions not obtaining in applying the statutes of descent. *In re Hullett's Estate*, 89 N. E. 509, 510, 46 Ind. App. 412.

The word "purchase," as used in an affidavit of defense in an action based on a book account for goods sold, averring that defendant never purchased or authorized the purchase of the property mentioned in the book of entries attached to the affidavit of demand, under a reasonable construction covers defendant's liability as purchaser, either express or implied, upon a book account for goods sold and delivered. *A. H. Davenport Co. v. Addicks (Del.)* 57 Atl. 532, 533, 5 Pennewill, 4.

As used in Civ. Code, §§ 286, 360, providing that a corporation may obtain title by purchase, the word "purchase" does not mean merely the acquisition of title from a voluntary grantor, by the payment of prices or other valuable consideration, but a corporation had power to acquire title by prescription. *Montecito Valley Water Co. v. Santa Barbara*, 77 Pac. 1113, 1118, 144 Cal. 578.

Technically speaking, a conveyance by deed as a gift is within the term "purchase," but *Cobbey's Ann. St. 1903, § 11,038*, providing that the qualified voters of a school district may at any annual or special meeting direct the "purchase" of an appropriate site and the "purchase" of a schoolhouse, prevents the expenditure of the school district funds, except on the authority of the voters, but the statute does not prevent the acquisition of title to a schoolhouse site when the same may be acquired without the expenditure of any of the school district funds. *McMahon v. School Dist. No. 66, of Antelope county*, 113 N. W. 1046, 1047, 80 Neb. 156.

Evidence, in an action by an ex-county treasurer against the county for commis-

sions, on the theory that a transaction by which, during his term, a judgment creditor of the county transferred the judgment to a bank, it paying him therefor, was a loan by the bank to the county and a payment of the judgment creditor by the county, so that such treasurer was entitled to commissions for receiving and disbursing the money, held sufficient to support a finding that the transaction was not a loan, but a "purchase" by the bank of the judgment. *Benefield v. Marion County*, 95 S. W. 713, 43 Tex. Civ. App. 245.

The charter of Lowell (St. 1896, p. 364, c. 415) created a department of supplies, with a chief elected annually, and section 3 requires all materials and supplies for the city to be purchased by the head of such department, subject to the mayor's approval, and provides that, so far as practicable, such purchases shall be made after public advertisement and under contract approved by the mayor. Section 6 provides that heads of departments shall have general charge of matters relating thereto, and shall execute all contracts, except for purchase of material and supplies; and section 7 forbids the city council, or any committee or member, from making contracts, purchasing material, etc., or expending public money, except to defray incidental expenses of the council. Held, that the provision relating to purchase of supplies and material in section 3 could not be construed so as to limit the word "purchase" to a purchase for money, the word "supplies" to articles of food, or the word "material" to that which the city has on hand for manufacture of other things, so that purchase of gravel, to be removed by the city and used on the streets and paid for by other filling deposited on the lot from which it was taken, was a purchase of material, which, under section 6, the superintendent of streets had no authority to make. *Bartlett v. City of Lowell*, 87 N. E. 195, 196, 201 Mass. 151.

Under a statute providing that real estate purchased on behalf of the state for taxes should not be entered in the land books without any deed, the word "purchased" is used in the legal sense of the term, and means a valid purchase for the state, and not merely an abortive, futile purchase. *Webb v. Ritter*, 54 S. E. 484, 491, 60 W. Va. 193.

In an action for an accounting, in which the issue was as to whether the defendant furnished the money to "purchase" property for the plaintiff, or purchased it for his own account, the complaint was not insufficient for alleging that the defendant purchased the property, thereby implying the payment of money, and negating the possibility of a debt, a fiduciary relation, or duty to render an accounting, as such expression also means the acquisition of property by a party's

own act, as distinguished from acquisition by act of law. *Semi-Tropic Spiritualists' Ass'n v. Johnson*, 126 Pac. 488, 489, 163 Cal. 639 (citing 7 Words and Phrases, 5853).

Under the decisions of the Supreme Court of Washington, land acquired under the homestead laws is acquired by "purchase" within the meaning of the community property law of the state and is therefore community property, and such rule is not in contravention of any provision of the homestead law. *Buchser v. Morss*, 196 Fed. 577, 578; *Id.*, 202 Fed. 854; *United States v. Beaty*, 198 Fed. 284, 286.

#### As maintain and operate

The phrase "purchasing or constructing," as used in Const. art. 10, § 12a, and Laws 1903, p. 93, authorizing certain cities with the assent of two-thirds of the voters thereof, voting at an election for the purpose, to become indebted in a larger amount than specified in Const. art. 10, § 12, not exceeding an additional 5 per cent. of the value of the taxable property, for the purpose of "purchasing or constructing" waterworks or electric light plants, to be owned exclusively by the city so purchasing or constructing the same, does not give cities the power to issue bonds for the purpose of maintaining and operating waterworks or electric light plants, for the power to maintain and operate waterworks and electric light plants is not necessarily incident to or implied in the power to purchase or construct waterworks or electric light plants, for the word "maintain" does not mean to provide or construct, but to keep up and preserve, and the word "operate" means to put into or continue in operation or activity. *State ex rel. City of Chillicothe v. Wilder*, 98 S. W. 465, 467, 200 Mo. 97.

#### Code

"The ceding of land by the state probably constituted a 'purchase' thereof by the United States, in the broad sense of that word." *United States v. Tucker*, 122 Fed. 518, 520 (citing *Bouv. Law Dict.*).

#### Condemnation

"The term 'purchase' includes the acquisition of title by condemnation, and must be so construed when the terms of the law recognize that mode of acquisition." *United States v. Inlots*, 26 Fed. Cas. 482, 487.

Under the provisions of Army Appropriation Act March 3, 1911, c. 209, 36 Stat. 1037, 1049, making an appropriation "for the purchase of land accessible to the horse-raising section of the state of Virginia for the assembling, grazing and training of horses purchased for the mounted service," such land may be acquired by condemnation, as authorized by Act Aug. 1, 1888, c. 728, 25 Stat. 357, "in every case in which \* \* \* any \* \* \* officer of the government has been or hereafter shall be authorized to procure real estate for the erection of a public build-

ing or for other public uses"; the word "purchase" being used in the appropriation act in a broad sense. *United States v. Beaty*, 198 Fed. 284, 286 (citing 7 Words and Phrases, p. 5853).

Act June 30, 1906, c. 3916, § 24, 34 Stat. 788, which authorizes the Secretary of the Treasury to rent buildings on sites "purchased" for public buildings until their removal becomes necessary, applies as well to property acquired by condemnation proceedings. *United States v. Whipple Hardware Co.*, 191 Fed. 945, 946, 112 C. C. A. 357.

The words "to purchase" in title to P. L. 1903, p. 736, c. 269, mean "to buy"; and hence does not embrace the right to condemn, though it is broad enough to embrace such right. *Griffith v. City of Trenton*, 69 A. 29, 30, 76 N. J. Law, 23.

The words "to purchase" may be construed as including the power to acquire by condemnation, yet generally in statutes, as well as by common use, the word "purchase" is employed to denote acquisition by contract between the parties without governmental interference. *Weeks v. Grace*, 80 N. E. 220, 222, 194 Mass. 296, 9 L. R. A. (N. S.) 1092, 10 Ann. Cas. 1077 (citing *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449).

#### Enter synonymous

Laws 1877, c. 15, § 8, relating to the disposition of state lands, provided that no person should be allowed to enter more than 240 acres; while Ann. Code 1892, § 2564, relating to the same subject, declares that one person may purchase as much as one quarter section of public lands in one year and no more, and that all lands acquired directly or indirectly by any person in contravention of section 2564 or 2565 escheat to the state. Held, that there was no substantial difference between such statute; the words "enter" and "purchase," used therein, being convertible terms, and the provision for "escheat" in section 2564 meaning nothing more than that the lands should be recovered or should be reclaimed, which would be implied, though not expressed, in the act of 1877. *Wisconsin Lumber Co. v. State*, 54 South. 247, 249, 97 Miss. 571.

#### Locate

The location of a placer mining claim by a United States mineral surveyor is within the prohibition of U. S. Rev. Stat. § 452, against the direct or indirect "purchase" by officers, clerks, and employés in the General Land Office of any of the public land. Such location is void and not merely voidable at the instance of the government. *Waskey v. Hammer*, 32 Sup. Ct. 187, 189, 223 U. S. 85, 56 L. Ed. 359.

#### Mortgage

An action to foreclose a mortgage is not an action in relation to property purchased,

located, or held in the county, within a statute providing that no corporation shall purchase, locate, or hold property in any county in the state without filing a certified copy of its articles of incorporation in the office of the clerk of the county within 60 days after the purchase or location, and that any corporation failing to comply therewith shall not maintain or defend an action or proceeding in relation to such property until it has so complied. *Anglo-Californian Bank v. Field*, 80 Pac. 1080, 1082, 146 Cal. 644.

#### Payment

"Money paid by an indorser to an indorsee is not for the benefit of the maker, but rather to protect the indorser's contract with the indorsee; and it operates as a 'purchase,' and not as a payment, so far as concerns the maker, and cannot be taken advantage of by him." On payment of a note by the indorser on the failure of the maker so to do, the indorser can recover the amount from the maker, though the note was not protested. *McGowan v. Hover*, 91 N. Y. Supp. 892, 893, 45 Misc. Rep. 138 (quoting and adopting the definition in 7 Cyc. 1021).

#### PURCHASE MONEY

See, also, Purchase Price.

The words "purchase money," as used in the rule that, in an action for breach of a covenant of warranty, the measure of damages is the "purchase money" and interest, include the actual consideration paid for the land, whether in money, property, or otherwise. *Taylor v. Allen*, 62 S. E. 291, 293, 131 Ga. 416.

The words "purchase money," in the provisions of the statute of frauds as to the sale of land, mean consideration to be paid for the land. *Kane v. Luckman*, 131 Fed. 609, 617 (citing *Devin v. Himer*, 29 Iowa, 297).

Within the statute of frauds as to personality (Code 1906, § 4779), there is a payment of the "purchase money," where the consideration is to be a credit on indebtedness and credit is actually entered. *Johnson v. Tabor*, 57 South. 365, 366, 101 Miss. 78 (citing *Devin v. Himer*, 29 Iowa, 297).

#### Loans for improvement

Money loaned by a vendor to vendee to improve the land purchased, pursuant to the terms of the sale, is not "purchase money" within the meaning of the statute which subjects a homestead to execution for the satisfaction of a decree foreclosing a vendor's lien. *Comp. St. 1911, c. 36, §§ 3, 4. City Savings Bank v. Thompson*, 136 N. W. 992, 993, 91 Neb. 628, 41 L. R. A. (N. S.) 89.

#### PURCHASE-MONEY MORTGAGE

A mortgage given for money borrowed at the time to pay the purchase price of the property mortgaged, whether or not the same identical money was used to make the pay-

ment, is in effect a "purchase money mortgage," and as such entitled to high rank, and the mortgagee's right to payment from the proceeds of the property when sold by the mortgagor's trustee in bankruptcy is not affected by the fact that he received an illegal preference from the bankrupt in an entirely separate transaction, the remedy of the trustee in such case being by a suit to recover the preference. In *re Franklin*, 151 Fed. 642, 647.

### PURCHASE PRICE

See, also, Purchase Money.

The exception of debts for the "purchase price" of property from homestead exemption, under Const. art. 245, does not include a debt resulting from a former sale of the property to defendant, where he was evicted by foreclosure of a prior mortgage, and afterwards acquired a new title to the property. *Heinss v. Henry*, 54 South. 24, 25, 127 La. 770.

St. 1903, § 4152, provides that when delinquent property is offered for sale, and no one will bid therefor the amount of taxes, charges due, and cost of sale, including the cost of advertising, the sheriff shall purchase for the state for the amount of tax due, and the commission thereon, and make return to the county clerk; that the owner may redeem within two years by paying the purchase money with interest at 30 per cent. per annum and 15 per cent. on the total amount of the purchase price, and the amount of the clerk's costs, if any; that in the redemption of land sold to the state the county clerk has authority to collect such delinquent taxes, interest, and penalties as are prescribed by law, and shall make a report thereof to the auditor; and that the total amount paid the state for redemption shall be paid into the state treasury, less 5 per cent. commission to the clerk. Held that, under such section, the delinquent sale must be not only for the taxes due thereon, but for the cost of advertising as well, and that, when the property is redeemed from the state, the "purchase price," with interest and penalties, includes the \$2 fee to the sheriff for advertising authorized by section 4151, which the clerk is bound to collect, and for which he is bound to account. *Commonwealth v. Smedley*, 139 S. W. 861, 863, 144 Ky. 694.

### PURCHASER

See *Bona Fide Purchaser*; *Innocent Purchaser*; *Mala Fide Purchaser*.

See, also, *Vendee*.

A contract by plaintiffs to purchase a lot for \$1,000, paying \$10 down, giving a chattel mortgage to secure \$90, and agreeing to pay \$10 a month thereafter until the purchase price should be paid, when a deed was to be made, does not constitute plaintiffs purchasers before compliance with the terms of the contract, within the meaning of an offer

of a prize, to be competed for by purchasers of lots, as a "purchaser" is one who acquires title otherwise than by descent, and generally refers to the acquisition of property for a valuable consideration. *Younkman v. Hillman*, 102 Pac. 773, 774, 53 Wash. 661.

As used in St. 1898, § 2108, which provides that when an absolute power of disposition is given to the owner of a life estate, such estate shall be changed into a fee absolute as to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power should not be executed or the land should not be sold for the satisfaction of debts, the word "purchasers" is not used in its technical sense, but means purchase for a valuable consideration. *Perkinson v. Clarke*, 116 N. W. 229, 232, 135 Wis. 584.

Laws 1910, c. 227, providing that a recording officer shall not accept for record any "conveyance of real estate" unless the residence of the purchaser shall be stated, does not apply to a certificate of discharge of a mortgage, since such an instrument does not create, transfer, mortgage, or assign any interest in real property, nor assign any mortgage, lease, or other conditional estate, nor is there any "purchaser," properly so called, and the register must accept for record a satisfaction piece, though it does not state the residence of the purchaser. *Blume v. Lundy*, 180 N. Y. Supp. 836.

### Assignee

A tender of payment of a certificate of sale under a special assessment to the "purchaser" under assignment of the certificate is insufficient, under *Hurd's Rev. St. 1905, c. 120, § 215*, making the receipt of the redemption money by any "purchaser" operate as a release of all claims to the property purchased at the sale, since the word "purchaser" in case of assignment of the certificate must be regarded as meaning "assignee." *Ambler v. Glos*, 86 N. E. 1113, 1114, 237 Ill. 637.

Where a "purchaser" of school lands assigns the certificate, and the assignment is brought to the knowledge of the county clerk, who enters it upon the records of his office, the assignee will thereafter be deemed the purchaser within *Gen. St. 1901, § 6356*, providing that notice of forfeiture must be issued to the purchaser, and notice of such proceedings must be served upon him as required by the statute. *Roll v. Nation*, 109 Pac. 392, 393, 82 Kan. 675.

### Assignee of mortgage

A subsequent assignee of a chattel mortgage as well as a subsequent mortgagee is a "purchaser," within *Code 1897, § 2906*, providing that no unrecorded mortgage of personal property, where the possession is retained by the mortgagor, is valid against existing creditors or subsequent purchasers.

Central Trust Co. of Illinois v. Stepanek, 115 N. W. 891, 893, 138 Iowa, 131, 15 L. R. A. (N. S.) 1025, 128 Am. St. Rep. 175.

#### Condemnation petitioner

A petitioner for condemnation is not in any sense a "purchaser" or creditor within the purview of the registration statutes. Atlanta, K. & N. Ry. Co. v. Southern Ry. Co., 131 Fed. 657, 666, 66 C. C. A. 601.

#### Creditor

Where defendant received payment of her debt from a bankrupt otherwise than by descent, she was a "purchaser," within the provision of Bankrupt Act, declaring that a preferential transfer to any one not a "purchaser in good faith and for a present, fair consideration" will be void. Wright v. Sampster, 152 Fed. 196, 199 (citing McCartee v. Orphan Asylum Soc., 9 Cow. [N. Y.] 437, 18 Am. Dec. 516).

#### Devisee

The word "purchaser" in the section of the Code providing that, as against a purchaser from a nonresident alien, the survivor shall not be entitled to a distributive share in the estate of deceased, if at the time of the purchase the survivor was also a nonresident alien, does not include a devisee, but is limited to a purchaser for a consideration. In re Kennedy's Estate, 135 N. W. 53, 55, 154 Iowa, 460.

A devisee is a "purchaser" within Real Property Law, § 208 (Laws 1896, p. 593, c. 547), requiring conveyances of freehold estates to be attested in order to be effectual as against subsequent purchasers. Clark v. Strong, 93 N. Y. Supp. 514, 516, 105 App. Div. 179.

#### Mortgagee

The word "purchaser," as used in a statute declaring unrecorded chattel mortgages to be void as against creditors and bona fide purchasers for value, includes a mortgagee for value. Eason v. Garrison & Kelly, 82 S. W. 800, 801, 36 Tex. Civ. App. 574.

The mortgagee of a conditional vendee of personal property is not a "purchaser" within Comp. St. 1907, § 3659, and cannot by his mortgage acquire any rights superior to the conditional vendee, though the contract of conditional sale is not filed as required by said section. Racine-Sattley Co. v. Meinen, 114 N. W. 602, 604, 79 Neb. 33.

Under the express provisions of Rev. St. Wis. 1898, § 2242, a mortgage is embraced in the word "conveyance," and a mortgagee is included in the word "purchaser," as those terms are used in section 2241, declaring an unrecorded conveyance void as against a subsequent purchaser, whose conveyance is placed on record first. Allison v. Manzke, 94 N. W. 659, 661, 118 Wis. 11.

A holder of a trust deed of personalty, to  
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be subsequently acquired by the grantor, is regarded in equity as a "purchaser," within the recording statutes; and a decree of sale, treating the equitable lien created by the trust deed as having been perfected in equity by specific execution of the contract to give a lien, passes the legal title to the property as against the trust deed grantor's vendor. Triumph Electric Co. v. Empire Furniture Co., 73 S. E. 325-327, 70 W. Va. 164.

#### As owner

See Owner.

#### Purchase by administrator at his own sale

An administrator did not, by entering into an agreement with his brother that the latter should bid in the land at the administrator's sale, become a "purchaser," within the inhibition of section 5346, Snyder's Comp. Laws. Turner v. Turner, 125 Pac. 730, 734, 34 Okl. 284.

Where a mortgagee sells land of decedent under a power of sale, and purchases it for the benefit of decedent's administrator, the transaction is not a "purchase by the administrator at his own sale," but in view of the administrator's trust in the personalty for the benefit of the heirs, and his duty to pay the mortgage and prevent the sale if the personalty had been sufficient, such purchase, even if for a fair price, made in good faith, except where the administrator has an interest in the land when sold, will be regarded, in equity, as for the common benefit of all the heirs who, within a reasonable time, elect to avail themselves of such purchase. Randolph v. Vails (Ala.) 60 South. 159, 162.

#### Purchaser at judicial sale

A buyer at a bankrupt sale of a stock of goods, including goods delivered to and kept by the bankrupt as a part of the stock, under a conditional contract of sale not recorded as required by Code 1907, § 3394, is a "purchaser," within the statute, and acquires title as against the original seller, where he buys without notice, actual or constructive, of the conditional sale. F. A. Ames Co. v. Slocomb Mercantile Co., 51 South. 994, 995, 166 Ala. 99.

As used in Code 1876, § 2468, providing that after confirmation of a sale of land made under authority of the probate court, when the "purchaser" has paid the whole of the purchase money, on his application, or that of the executor or administrator, the court must order a conveyance to be made to such "purchaser," the word "purchaser" means the original vendee or buyer, who acquired by bid, at an authorized sale, an estate in the land sold. It does not include a sub-purchaser, or one who holds under him by transfer, sale, or release. Anderson's Adm'r v. Bradley, 66 Ala. 263, 265.



**As representative**

See Legal Representative; Representative.

**School land purchaser**

A contract by a husband for the purchase of state school land is a community obligation through which the wife acquires a half interest in the land, and she, as well as the husband, is a "purchaser" within the statute, and, in determining whether the land has been settled on and occupied in accordance with the law, the joint acts of the husband and wife must be considered. *Ericksen v. McWhorter* (Tex.) 132 S. W. 847, 848; *Leaverton v. Robison*, 120 S. W. 169, 170, 102 Tex. 516.

**Tax sale purchaser**

The assignee of a tax sale certificate bid in by the county for delinquent taxes, who takes out a compromise tax deed, is a "purchaser" at tax sale. *Nesbit v. Bearman*, 109 Pac. 1085, 83 Kan. 122.

The word "purchaser" in St. 1898, § 1178, requiring that the purchaser at a tax sale be named in the tax deed, means one who has made a completed purchase, and not a mere bidder, who has forfeited his bid by failing to pay for the tax certificate, and who never obtained a delivery of the certificate. *Herbst v. Land & Loan Co.*, 115 N. W. 119, 120, 134 Wis. 502.

The word "purchaser" in Revenue Act July 23, 1868 (Acts 1868, p. 281) § 72, and in Acts 1883, p. 275, § 152, authorizing the purchaser under an invalid tax sale to recover the taxes assessed against the land for which it was sold and taxes subsequently paid up to the time of adjudication of invalidity, does not limit such right to the person actually purchasing at the sale, but extends to his subsequent grantees. *Caruthers v. Greer*, 122 S. W. 629, 630, 92 Ark. 167.

One who became the substitute for the bidder at a tax sale was the "purchaser" of the property, within Rev. Laws, c. 13, § 44, though not within section 43, providing that the collector shall execute and deliver to the purchaser a deed of the land sold at a tax sale, etc. *Spring v. City of Cambridge*, 85 N. E. 160, 162, 199 Mass. 1.

Under Rev. St. 1895, art. 5187, providing that the owner may within two years after the sale redeem "by paying or tendering to the purchaser, his heirs or legal representatives, double the amount paid for the land," payment may be made to the purchaser, although he had transferred his interest, and the owners had notice of such transfer, as the word "purchaser," as used in the statute, applies only to one who purchases at the tax sale, such statutes being liberally construed in favor of the owner, and such right is not affected by a judgment in an action by the owners against the original purchas-

ers in which the right to redeem was conferred on the owners by payment or tender of the amount due the purchasers or those holding under them. *Turner v. Smith*, 119 S. W. 922, 925, 56 Tex. Civ. App. 1.

Laws 1901, p. 220, c. 165, amending Rev. Codes 1899, § 1269, relating to the rights of purchasers at tax sales, and requiring that such purchasers shall take possession or procure deeds within six years from the date of the sale, or within one year after the act took effect, if the sale had been made more than five years before the passage of the act, has no application to sales to the state or county, where the rights of the latter had not been assigned. It cannot be pretended that the Legislature had any such intention, and, although the state or county might be termed a "purchaser" at a tax sale, it is too clear for argument that the word "purchaser," as used in section 1269, as amended, refers only to private persons or corporations holding tax sale certificates. *Scott & Barrett Mercantile Co. v. Nelson County*, 104 N. W. 528, 529, 14 N. D. 407.

**Trustee in bankruptcy**

A bankrupt's trustee is not a "purchaser," and the transfer to him by operation of law of mortgaged personal property does not extinguish the right of creditors to assert the invalidity of the mortgage, for nonfiling, as to the mortgagee and his assignee. In *re Beede*, 138 Fed. 441, 454.

**Wife**

Marriage is a valuable consideration, and a married woman is regarded as a "purchaser" for a valuable consideration of all property which accrues to her by virtue of her marriage. *Staser v. Gaar, Scott & Co.*, 79 N. E. 404, 405, 168 Ind. 131 (citing *Derry v. Derry*, 74 Ind. 560; *Richardson v. Schultz*, 98 Ind. 429).

**PURCHASER FOR A VALUABLE CONSIDERATION**

Where a person in good faith obtained a stock of hardware in bulk, from an individual as his own property, for a valuable consideration, while the stock in fact belonged to a corporation of which the individual was a member, the transfer not being by the owner, there was no sale, and the would-be buyer is not a purchaser for a valuable consideration who would be protected against the owner's creditors, under Comp. Laws, § 9537, providing that provisions of the statutes, invalidating conveyances and contracts made with intent to hinder, delay, or defraud other persons of their lawful claims, shall not affect the title of a purchaser for a valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor. *Pierson & Hough Co. v. Noret*, 117 N. W. 644, 645, 154 Mich. 267.

**Lessee**

A lessee in possession of a mining claim in Alaska under an agreement to work the same continuously, and pay over to the lessor a percentage of the minerals extracted, is a "purchaser for a valuable consideration," within the meaning of the Act of June 6, 1900, tit. 3, § 98, providing that every unrecorded conveyance of real property shall be void against any subsequent innocent purchaser, in good faith and for a valuable consideration, of the same real property or any portion thereof, whose conveyance shall be first duly recorded. *Waskey v. Chambers*, 32 Sup. Ct. 597, 598, 224 U. S. 564, 56 L. Ed. 885, Ann. Cas. 1913D, 998.

**Mortgagee**

A mortgage taken to secure a debt contemporaneously contracted constitutes the mortgagee a "purchaser for a valuable consideration," who will be protected in equity against outstanding claims or incumbrances of which he had no notice. *Atlanta Nat. Building & Loan Ass'n v. Gilmer*, 128 Fed. 293, 296.

**PURCHASER FOR VALUE**

A person paying \$10 for a quitclaim deed "of the right, title, and interest" of the grantor to property worth \$20,000, with full notice that his grantor disclaimed having title, was not a "purchaser for value" as the term is used in the registration laws. *Abernathy v. South & W. Ry. Co.*, 63 S. E. 180, 184, 150 N. C. 97.

One is not an innocent purchaser of land for value, where he does not pay value within the legal meaning of that term. *Tinnin v. Brown*, 53 South. 780, 782, 98 Miss. 378, Ann. Cas. 1913A, 1081.

The mortgagee in a mortgage given merely to secure antecedent debts is not "a purchaser for value," within the meaning of clause "e" in section 70 of federal Bankr. Act July 1, 1898, c. 541, 30 Stat. 566, or for "a valuable consideration," within the meaning of section 64 of the New Jersey corporation act (P. L. 1896, p. 298). *Empire State Trust Co. v. Trustees of Wm. F. Fisher & Co.*, 60 Atl. 940, 941, 67 N. J. Eq. 602, 3 Ann. Cas. 393.

Where, after the assignment of a mortgage had been recorded, a purchaser from the mortgagor paid the debt to the assignor, which executed a release, a subsequent purchaser from the person who paid the mortgage was charged with notice that the assignor had no power to execute the release, and hence was not a "purchaser for value," free from incumbrances. *Cornish v. Wolverton*, 81 Pac. 4, 10, 11, 32 Mont. 456, 108 Am. St. Rep. 598.

An indorsee before maturity in part payment of a pre-existing debt who credits the note thereon is a "purchaser for value" in due

course. *Second Nat. Bank of Monmouth, Ill. v. Snoqualmie Trust Co.*, 120 N. W. 182, 184, 88 Neb. 645.

To constitute one a "purchaser for value and without notice" from a fraudulent grantor, it must be shown that the purchaser paid a valuable consideration for the property, that at the time of the payment he had no notice of any outstanding equity or the fraudulent intent of the grantor, and that he acted in good faith, and a consideration secured to be paid is not sufficient. *Bennett v. Bennett*, 81 Pac. 632, 639, 15 Okl. 286, 70 L. R. A. 864.

**PURCHASER IN DUE COURSE OF BUSINESS**

See Due Course of Business.

**PURCHASER IN GOOD FAITH**

See Good Faith.

**PURCHASER WITHOUT NOTICE**

Bona fide purchaser synonymous, see Bona Fide Purchaser.

A "purchaser without notice," within Code 1907, § 3386, providing that transfers of personalty to secure debts, etc., are inoperative against "purchasers without notice" until recorded, etc., means a bona fide purchaser without notice. *Hickey v. McDonald Bros.*, 48 South. 1031, 1032, 160 Ala. 300.

One who has knowledge of facts sufficient to put him on inquiry as to the existence of an unrecorded deed is not a "purchaser without notice," within the protection of the registry act (Code 1907, § 3383). *Gamble v. Black Warrior Coal Co.*, 55 South. 190, 191, 172 Ala. 669.

**PURE**

See Ordinarily Pure; Perfectly Pure.

The term "pure" means free from extraneous matter; separate from matter of another kind; free from mixture; unmixed. *Levy v. Uri*, 81 App. D. C. 441, 445.

The word "pure," in Agricultural Law (Laws 1893, p. 667, c. 338, § 5052) to prevent injury to health by penalizing the manufacture of vinegar which is not made from pure apple juice, means not only free from any foreign substance, but free from any defiling or objectionable mixture. *People v. J. Heinz Co.*, 86 N. Y. Supp. 141, 143, 90 App. Div. 408.

**PURE ACCIDENT**

"A casualty cannot be classed as a 'pure accident,' for which no one is to blame, merely because it would happen infrequently, if the danger of its occurrence was present to the mind of the party who was charged with the duty of taking care to avert the casualty, or if by reasonable prudence he could have known there was danger of its occurrence." *Rogers v. Meyerson Printing Co.*, 78 S. W. 79, 82, 103 Mo. App. 683.

Where a thing happens so often as to become a well-known fact and a matter of common knowledge, it can hardly be called a "pure accident." Where a pedestrian on a sidewalk was injured by pieces of glass falling from the globe of an electric light which was struck and broken by the pole of an electric car slipping from the wire, the slipping of the pole was not a "pure accident," it appearing that the trolley poles jumped the wire from time to time from various causes. *Nelson v. Narragansett Electric Lighting Co.*, 58 Atl. 802, 803, 26 R. I. 258, 67 L. R. A. 116, 106 Am. St. Rep. 711.

#### PURE ALCOHOL

"Pure alcohol," as used in Local Option Act (Laws 1909, p. 14) § 15, authorizing the sale of pure alcohol for medicinal purposes, upon the written application of the purchaser in form prescribed, consists of 92.3 per cent. by weight of absolute ethyl alcohol, and about 7.7 per cent. by weight of water. *State v. Osmers*, 120 Pac. 165, 168, 21 Idaho, 18.

#### PURE AND WHOLESOME

A contract requiring the party contracted with to furnish "pure and wholesome water" required the water to be furnished to be reasonably pure and wholesome, whether it was required to be perfectly pure or not. *Meridian Waterworks Co. v. City of Meridian*, 37 South. 927, 928, 85 Miss. 515.

#### PURE ANTHRACITE COAL

If "free burning anthracite" will meet the government test for anthracite, a notice for bids for furnishing a city's school board "pure" anthracite coal, that "will meet the government test" for anthracite coal, is sufficiently definite, without stating that "free burning anthracite" will be received; "pure," in such connection, meaning "separate from all heterogeneous or extraneous matter," and not being synonymous with "true" or "hard." *Maloney v. Maddever*, 136 N. Y. Supp. 498, 500, 77 Misc. Rep. 340.

#### PURE PEPPER

Where boxes labeled "Pure Pepper," and containing a combination of ground black pepper and ground long pepper, were shipped in interstate commerce, and there was evidence that "pure pepper," in the trade and according to its ordinary usage, meant nothing but black pepper, the combination was subject to forfeiture for misbranding. *United States v. Seventy-Five Boxes of Alleged Pepper*, 198 Fed. 934, 936.

#### PURE RYE WHISKY

"Pure rye whisky" is a whisky which is made solely from malted rye, and the term will not apply to whisky that is only 50 per cent. of real rye whisky. *Levy v. Uri*, 31 App. D. C. 441, 445.

#### PURELY

The word "purely," as used in Rev. St. 1906, § 2732, cl. 6, exempting from taxation buildings belonging to institutions of "purely" public charity, etc., like the word "exclusively," as used in preceding clauses of such section, expresses a kindred limitation, or rather exclusion, in that it means free from mixture or combination, and, as applied to a parish house, the charity must be unalloyed with other purposes and objects. *Waterson v. Halliday*, 82 N. E. 962, 968, 77 Ohio St. 150, 11 'Ann. Cas. 1096.

#### PURELY PUBLIC CHARITY

As used in the constitutional provision, exempting "purely public charities" from taxation, the word "purely" describes the quality of the charity rather than the means by which it is administered, and means that it should be wholly altruistic in the end to be attained, and that no private or selfish interest should be fostered under the guise of charity, but it was never meant that, because a charity was limited by its terms to objects belonging to a certain sect, or fraternal order, or color, or class, it was a private, and not a public, charity. *Green's Adm'rs v. Fidelity Trust Co. of Louisville*, 120 S. W. 283, 286, 134 Ky. 311, 20 Ann. Cas. 861 (quoting with approval from *Widows' and Orphans' Home of Odd Fellows v. Commonwealth*, 103 S. W. 354, 126 Ky. 386, 16 L. R. A. [N. S.] 829).

#### Cemetery

Funds of a cemetery company derived from sale of lots are not exempt from taxation under provisions exempting from taxation places of burial not held for private or corporate profit, and institutions of "purely public charity." *Commonwealth v. Lexington Cemetery*, 70 S. W. 280, 281, 114 Ky. 165.

#### Home

A corporation, whose sole object is to provide a suitable home for the destitute widows and orphans of deceased members of a certain secret society of the state, is an "institution of purely public charity," within the meaning of Const. § 170, and its property is exempt from taxation. *Widows' and Orphans' Home of Odd Fellows of Kentucky v. Commonwealth*, 103 S. W. 354-356, 126 Ky. 386, 16 L. R. A. (N. S.) 829.

That the benefits of a home for the support of widows and orphans are confined to those of members of a particular secret society does not deprive it of the character of a "purely public charity," within the meaning of a constitutional tax exemption. A Masonic home, using its entire property for the support and care of aged and indigent members of its order, and of another order and their dependent widows and children, without payment, and with educational and religious opportunities, is a pure charity, within the constitutional exemption from

taxation of all property used exclusively for charitable purposes. *Kansas Masonic Home v. Board of Com'rs of Sedgwick County*, 106 Pac. 1082, 1085, 81 Kan. 859, 26 L. R. A. (N. S.) 702 (quoting and adopting definition in *Widows' and Orphans' Home of Odd Fellows v. Commonwealth*, 103 S. W. 354, 126 Ky. 386, 16 L. R. A. [N. S.] 829).

### Religious purposes

A trust fund devoted to the propagation of the principles of primitive Christianity, as taught by the Christian Church, is not a "purely public charity," within the meaning of Const. § 170, exempting such charities from taxation. *Commonwealth v. Thomas*, 83 S. W. 572, 119 Ky. 208, 6 L. R. A. (N. S.) 320.

### School

Buildings erected by a church for use as dormitories in connection with a school where women and girls are taught at a nominal tuition, if they are able to pay, and, if not, are given their education, and the deficit in conducting the institution is contributed by charitable people, are exempt from taxation under Const. § 170, which provides that institutions of "purely public charity and institutions of education," not used or employed for gain, shall be exempt from taxation. *Morgan v. Presbyterian Church of the United States of America (Ky.)* 101 S. W. 838.

## PURPORT

The "purport" of a written instrument is its meaning. *Early v. Early*, 54 S. E. 827, 829, 75 S. C. 15.

In *Hurd's Rev. St. 1905*, p. 1036, c. 51, § 10, providing that the printed statute books of the United States and of the several states and territories "purporting" to be printed under the authority of said United States, any state or territory, shall be evidence in courts of this state, the word "purporting" means what appears on the face of the instrument. It means the apparent, and not the legal, import. Here the title page expressly stated that the statutes offered in evidence were published with the authority of the state of Iowa. This was all that the law requires. *McCraney v. Glos*, 78 N. E. 921, 923, 222 Ill. 628.

### Tenor distinguished

Where an indictment for uttering a forged note contained the words "tenor, purport, and effect" in referring to the instrument forged, the word "tenor" imported an exact copy of the note, while the words "purport and effect" only meant the substance of the instrument, and were surplusage, being included in the word "tenor," and not in conflict therewith. *Teague v. State*, 110 S. W. 224, 86 Ark. 126.

## PURPOSE

See Canning Purposes; Cemetery Purposes; City Purpose; Club Purpose; Corporate Purpose; Corporation for Municipal Purposes; County Purpose; Domestic Purposes; For All Purposes; For Beverage Purposes; For Other Purposes; For the Purpose of; General Purpose; Immoral Purpose; Irrigation Purposes; Judicial Purposes; Lawful Purpose; Legitimate Purpose; Manufacturing Purpose; Market Purpose; Military Purpose; Municipal Purposes; Necessary Purposes; Private Purpose; Public Purpose; Railroad Purposes; Religious Purposes; Saloon Purposes; School Purpose; State Purpose; Street Railroad Purposes; Temporary Purpose; Trade Purpose; Unauthorized Purpose; University Purposes; Unlawful Purpose; Village Purpose; Water Furnished for Manufacturing Purposes.

All other purposes, see All Other.

Any other purpose, see Any Other.

Charitable purpose, see Charity.

Other purposes, see Other.

"Purpose" is something placed before the mind as an aim or desideratum. *Sawter v. Shoenthal*, 80 Atl. 101, 81 N. J. Law, 197.

The word "purposes" is equivalent to object, and no distinction between the two terms can be drawn, in construing a constitutional provision, requiring the object of an act to be stated in its title. *Sawter v. Shoenthal*, 83 Atl. 1004, 83 N. J. Law, 499.

The word "purpose" means that which a person sets before himself as an object to be reached; the end or aim to which the view is directed in any plan, matter, or execution. *Ex parte McCoy*, 101 Pac. 419, 425, 10 Cal. App. 116 (citing 7 Words and Phrases, pp. 5865, 5866).

Act March 17, 1911, § 7, part of the act (Rev. Laws, §§ 4486-4494) creating the state bureau, and the office of commissioner of industry, agriculture, and irrigation, and defining its objects and purposes, does not by section 7, appropriating \$25,000 to carry out "the purposes of this act," and providing that all disbursements from it shall be on certificate of the commissioner, approved by the state board of examiners, indicate that such appropriation includes the salary of the commissioner, which section 6 fixes and declares payable in equal monthly installments by the state treasurer on warrants drawn by the state controller; Const. art. 5, § 21, expressly excluding salaries of officers "fixed by law" from the claims against the state which the board of examiners shall pass on, and "purposes" indicating something to be accomplished rather than an existing fact, so that the bureau and office of commissioner were but means for the subsequent accom-

plishment of the purposes of the act. *State ex rel. Norcross v. Eggers*, 128 Pac. 986, 988, 35 Nev. 250 (citing Words and Phrases).

The words "willfully," "unlawfully," "feloniously," and "maliciously" import only that criminal intent which is the necessary part of every felony, or other crime, but they do not necessarily include the specific "purpose" to do the act which is an element of the crime charged. Whether the indictment is on a statute or at common law, it is a rule universal and without exception that every intent, like everything else, which the law makes an element of the offense must be alleged, for otherwise no *prima facie* case appears. *Newby v. State*, 105 N. W. 1099, 1100, 75 Neb. 83.

Act of April 3, 1902 (P. L. p. 284) which was adopted by Atlantic City as its charter, provides in section 105 that it shall be lawful for the city council to issue bonds, the proceeds of which may be used for the making of any of the improvements authorized by this act and for any other lawful purposes, provided that in every instance the issue of bonds shall be authorized by ordinance, and the purpose for which the bonds are to be used shall be expressed therein, and the proceeds shall be used for no other purposes; whenever bonds are used to provide funds for any of the purposes authorized by this act, any part of the costs and expenses of which is authorized to be assessed upon the property benefited, the assessments for benefits shall be exclusively apportioned, etc. Held, that the words "purposes authorized by this act" refer back to the words "purposes of making any of the improvements authorized by this act, and for other lawful purposes," and do not limit the power of the city council to the issuance of bonds for charter purposes. *Fishblatt v. Atlantic City*, 73 Atl. 125, 127, 75 N. J. Law, 134.

### PURPOSELY

"To do an act 'purposely' is to do it designedly, intentionally, with a will." *Reed v. State*, 106 N. W. 649, 652, 75 Neb. 509.

The word "purposely," in the statute making it murder in the first degree for any person to purposely and in his deliberate and premeditated malice kill another, means an act done with a purpose or intent of doing that act. *State v. Lindgrind*, 74 Pac. 565, 566, 33 Wash. 440.

The use of the word "purposely," in defining second degree murder, implies the existence of an intention to cause death. It follows that drunkenness may reduce a homicide from murder to manslaughter, if it is so extreme as to prevent the existence of an intention to kill. *State v. Rumble*, 105 Pac. 1, 3, 81 Kan. 16, 25 L. R. A. (N. S.) 376 (citing *State v. Young*, 40 Pac. 659, 55 Kan. 349, 355; 21 Cyc. p. 712, note 50).

The word "purposely," as used in *Burns' Ann. St. 1901*, § 2073, which provides that it shall be unlawful for any person over the age of 10 years, with or without malice, purposely to point or aim any pistol or other firearm, either empty or loaded, towards any other person, means "intentionally or designedly." An indictment charging involuntary manslaughter because of the killing of deceased by accused while he was violating the section by pointing and aiming a firearm at deceased is insufficient for failing to employ the word "purposely," or any other word of equivalent import, in describing the conduct of accused. *Eaton v. State*, 70 N. E. 814, 815, 162 Ind. 554.

In an action upon a life insurance policy, the use of the word "purposely," in an allegation in the complaint that defendant "purposely" concealed from plaintiff the contents of the application of the insured, adds nothing to the charge that defendant concealed the contents of the application, "for to conceal means 'purposely' to keep from sight or discovery." *Gill v. Manhattan Life Ins. Co.*, 95 Pac. 89, 90, 11 Ariz. 232.

### PURPOSES OF SUIT

#### Admission for purposes of suit

An admission made at a former trial, "for the purposes of the suit," that defendant was a city of the fourth class was an admission of that fact throughout all the stages of the suit, and was binding on defendant at a retrial in another jurisdiction. *York v. City of Everton*, 116 S. W. 490, 491, 135 Mo. App. 607.

### PURPOSES OF TRADE

A person's picture is not used for "advertising purposes" or for "purposes of trade," within Civil Rights Law (Consol. Laws, c. 6) § 51, prohibiting the use of any person's picture or portrait without his written consent for advertising purposes, or for purposes of trade, so as to warrant an injunction against such use, unless it is used as part of an advertisement, nor is it used for the purposes of trade within the section when merely used for the dissemination of information, and not for commerce or traffic. *Jeffries v. New York Evening Journal Pub. Co.*, 124 N. Y. Supp. 780, 67 Misc. Rep. 570.

### PURPRESTURE

A "purpresture" is an invasion of the right of property in the soil, while the same remains in the King or the people. Trustees of Freeholders & Commonalty of Town of Brookhaven v. Smith, 80 N. E. 665, 673, 188 N. Y. 74, 9 L. R. A. (N. S.) 326, 11 Ann. Cas. 1 (quoting the definition in *People v. Vanderbilt*, 26 N. Y. 287).

A "purpresture," or more properly speaking "porpresture," exists when anything is

unjustly encroached upon, against the King, as in the royal demesnes, or in obstructing public ways, or in turning public waters from their right courses, or when any one has built an edifice in a city on the King's street. *City of Montpelier v. McMahon*, 81 Atl. 977, 979, 85 Vt. 275.

#### Encroachment on highway

"A permanent encroachment upon a public street for a private purpose is a 'purpresture,' and is in law a 'nuisance.'" *Lacey v. Oskaloosa*, 121 N. W. 542, 545, 143 Iowa, 704, 31 L. R. A. (N. S.) 853.

The erection of a suitable monument by a municipal corporation at a street intersection, so situated as not to interfere with the free and reasonable public use of the highway by the public, is not a "purpresture" or unlawful invasion of the public highway. *Wallace v. Village of Canandaigua*, 117 N. Y. Supp. 912, 913.

Where a connection between two buildings over a public alley has been erected without a legal permit from the city council, it is a "purpresture," which may or may not be a public nuisance, depending on whether the public is put to any inconvenience thereby. *Leitchfield Mercantile Co. v. Commonwealth*, 136 S. W. 639, 642, 143 Ky. 162.

#### Encroachment on navigable water

Every building or wharf erected upon lands without license, below high-water mark, is a "purpresture," and may, at the suit of the King, either be demolished, or be seized and rented for his benefit, if not a nuisance to navigation. *San Francisco Sav. Union v. R. G. R. Petroleum & Mining Co.*, 77 Pac. 823, 144 Cal. 134, 66 L. R. A. 242, 103 Am. St. Rep. 72, 1 Ann. Cas. 182; *Trustees of Freeholders & Commonalty of Town of Brookhaven v. Smith*, 80 N. E. 665, 673, 188 N. Y. 74, 9 L. R. A. (N. S.) 326, 11 Ann. Cas. 1 (citing *Shively v. Bowlby*, 14 Sup. Ct. 548, 152 U. S. 1, 38 L. Ed. 331).

Any erection on tidelands without license is deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a "purpresture," which he may remove at pleasure, whether it tend to obstruct navigation or otherwise. *Grays Harbor Boom Co. v. Lowndsdale*, 104 Pac. 267, 271, 54 Wash. 83 (quoting and adopting definition in *Weber v. State Harbor Com'rs*, 18 Wall. [85 U. S.] 65, 21 L. Ed. 798).

### PURSE

As ornament, see Ornament.

Chatelaine purses not dutiable as articles commonly known as Jewelry, see Articles within Tariff Act.

### PURSUANCE

See In Pursuance of.

### PURSUIT

See Mechanical Pursuit; Mining Pursuit.

#### PURSUIT OF HAPPINESS

See Life, Liberty, and Pursuit of Happiness.

The term "pursuit of happiness" is a very comprehensive expression which covers a broad field. Unquestionably it covers the idea of the acquisition of private property. *Nunnemacher v. State*, 108 N. W. 627, 629, 129 Wis. 190, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711.

The "right to procure happiness," as referring to a right guaranteed by the Constitution, means the right to pursue any lawful business or vocation in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give them their highest enjoyment. *In re Boyce*, 75 Pac. 1, 17, 27 Nev. 299, 65 L. R. A. 47, 1 Ann. Cas. 66 (dissenting opinion quoting *Butchers' Union Slaughter-House & Live-Stock Landing Co. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 4 Sup. Ct. 660, 111 U. S. 757, 28 L. Ed. 585).

#### PURSUIT OF OFFENDER

A deputy sheriff of one county, who goes into another county to arrest one charged with crime in the former county, after learning that such person is in the latter county, is not in "pursuit of an escaping offender," within Code 1906, § 1454, and has no more authority to arrest the offender, and no more right to carry a weapon, than any other citizen has. *Shirley v. State*, 57 South. 221, 100 Miss. 799, 38 L. R. A. (N. S.) 998.

### PURVIEW

"The meaning usually attached to this word 'purview' by writers on law seems to be the enacting part of a statute in contradistinction to the preamble, and we think the provision of the act repealing all acts or parts of acts coming within its purview should be understood as repealing all acts in relation to all cases which are provided for by the repealing act, and that the provisions of no act are thereby repealed in relation to cases not provided for by it." *State ex rel. Jett v. Ives*, 78 N. E. 225, 226, 167 Ind. 13 (quoting and adopting the definition in *Payne v. Conner*, 3 Bibb [6 Ky.] 180, and citing 7 Words and Phrases, p. 5870; 1 Lewis, Suth. Const. § 246). See, also, dissenting opinion of Judge Hobson, in *Murphy v. Louisville*, 71 S. W. 934, 935, 114 Ky. 762.

The "purview" of an act is the enacting part in contradistinction to the preamble. *Frank v. City of Decatur*, 92 N. E. 173, 174, 174 Ind. 388.

**PUSH CAR**

See Car.

**PUSHER**

As superintendent, see Superintendent.

**PUT****PUT IN CHARGE**

Receivers are "put in charge" of the property of a defendant, within the meaning of Bankr. Act July 1, 1898, c. 541, § 3a (4), 30 Stat. 546, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797, when the decree appointing them is entered, although they do not qualify nor take actual possession of the property until later, and the four-months period within which a petition in bankruptcy based on such appointment as an act of bankruptcy must be filed runs from the date of such decree. *In re Perry Aldrich Co.*, 165 Fed. 249, 252.

**PUT IN DEFAULT**

To "put in default" is a purely technical expression, meaning that the debtor is tardy in the fulfillment of his obligation, and that he is liable for the damages which the delay may occasion the creditor, where an obligation is limited as to the time of performance, putting in default is necessary only where the purpose of the creditor is to claim damages for the delay. *Murray v. Barnhart*, 42 South. 489, 493, 117 La. 1023.

**PUT IN ISSUE**

Under Const. art. 5, § 22, giving justices jurisdiction unless "the boundaries or title to any real property shall be called in question," and Rev. St. 1887, § 3852, providing that a justice shall not have jurisdiction where possession of real property "is put in issue," the phrases "called in question" and "put in issue" have the same meaning, and justices' courts have no jurisdiction of actions, where the boundaries or title to real estate are called in question. *Hammer v. Garrett*, 99 Pac. 124, 126, 15 Idaho, 657.

**PUT IN TRUST**

Testator provided that his property should be "put in a trust," and declared that the income should be equally divided between his brother, sister, and widow as long as the widow remained unmarried, and in case of her death or marriage her share should go to the brother and sister. Held to create a trust, to continue during the widowhood or life of the widow, and on her death or remarriage the corpus of the estate passed to testator's next of kin as intestate property. *Hiles v. Garrison*, 62 Atl. 805, 70 N. J. Eq. 605.

**PUT INTO EFFECT**

The phrase "put into effect," when used with reference to railroad rates, means to

charge and receive a certain rate when the article to which it belongs is transported; in other words, to give it practical operation. The phrase cannot be said to be indefinite and indeterminate in meaning. *State ex rel. Ellis v. Atlantic Coast Line R. Co.*, 37 South. 652, 656, 48 Fla. 114.

**PUT OFF**

An allegation, in an action for damages in being set down at a wrong station, that she was "put off the train," in connection with other allegation, meant that she got off the train in response to the conductor's invitation, and there was no material variance between the allegation and the proof. *Southern Ry. Co. v. Melton*, 47 South. 1008, 1010, 158 Ala. 404.

**PUT ON INTEREST**

The words "put on interest," "the interest of my property shall be paid annually," and "the principal shall go," etc., as used in a will, all relate, in their ordinary sense, to dealing with money, the value of the use of money measured by interest and securities, dischargeable by the payment of money, and not the rents and profits of real estate. *In re Benner's Will*, 113 N. W. 663, 664, 133 Wis. 325.

**PUT THROUGH**

"He has sworn to a damned lie, and I will put him through for it," implies a threatened legal prosecution for perjury, and is actionable. *Crone v. Angell*, 14 Mich. 340, 345.

**PUT TO EXPENSE**

Where, in an action for injuries, plaintiff alleged that he had been put to great expense for medical attendance and nursing, and for the purchase of drugs and medicine, to the amount of \$400, the words "put to expense" meant "had incurred or been compelled to incur expense," the word "expense" meaning not only the cost of contemplated services, and materials, but also the charges for such as have been performed or furnished, whether paid or not, and hence plaintiff was not limited to recovering "expenses paid," but was entitled to recover for expenses incurred. *Booker v. Southwest Missouri R. Co.*, 128 S. W. 1012, 1018, 144 Mo. App. 273.

**PUTTING IN FEAR**

"Intimidation," in the Georgia Penal Code definition of robbery, is synonymous with the "putting in fear," in the common-law definition thereof. If the fact be attended with such circumstances of terror, such threatening by words or gesture, as in common experience are likely to create an apprehension of danger, and induce a man to part with his property for the safety of his person, it is robbery. *Johnson v. State*, 57 S. E. 1056, 1 Ga. App. 729.

**PUTATIVE .****PUTATIVE CRIMINAL**

The term "putative criminals" has been defined to be all who have actually committed crime before the grand jury is sworn, or who are charged or suspected, or, being wholly innocent, are ignorant of the fact that they are suspected, as well as those who are charged with the crime during the sitting of the grand jury. *Lang v. New Jersey*, 28 Sup. Ct. 594, 595, 209 U. S. 467, 52 L. Ed. 894.

**PUTATIVE MARRIAGE**

A "putative marriage" is one which is in reality null, but which has been contracted in good faith by the two parties, or by one of them. *Walker v. Walker's Estate* (Tex.) 136 S. W. 1145, 1148.

**PUTLOG**

"Putlogs" are the timbers supporting the floor of a scaffold or staging. The injury to an employé by the falling of the staging is the result of negligence in the exercise of superintendency. *Solari v. Clark*, 72 N. E. 958, 187 Mass. 229, 68 L. R. A. 243. See, also, *Fisher v. Minegaux*, 63 Atl. 902, 73 N. J. Law, 424.

**PUTS**

"A 'put' is a privilege to deliver or not deliver grain or other commodity." Where plaintiff purchased from defendants certain puts, or an option to sell to defendants a certain quantity of grain at a fixed price within a limited time, and the evidence established that such contracts were merely speculative, and that the parties did not intend that any grain should be delivered or received, but that settlement should be made by payment of differences in the market price, the contract was in violation of Rev. St. 1899, § 2337, prohibiting all contracts for the sale of grain for future delivery where the intention was to settle by payment of differences, and section 2342, declaring that such contracts shall be considered gambling. *Lane v. Logan Grain Co.*, 79 S. W. 722, 724, 105 Mo. App. 215. See, also, *Zeller v. Leiter*, 99 N. Y. Supp. 624, 626, 627, 114 App. Div. 148 (citing *Pearce v. Foote*, 113 Ill. 228, 55 Am. Rep. 414).

"Puts and calls" are transactions in the form of written offers to contract for the purchase or sale of grain at a designated price, with an agreement to leave the offers open for acceptance until a specified hour for a paid consideration equal to one-tenth of a cent per bushel of grain. *Ware v. Pearsons*, 173 Fed. 878, 880, 98 C. C. A. 364.



## Q

## QR

See Se qr 24.

The letters "qr" are the recognized abbreviations for "quarter," as applied to weights and measures. *Bandow v. Wolven*, 107 N. W. 204, 206, 20 S. D. 445 (citing *Stand. Dict.*).

## QUACK

A physician who is utterly incompetent is usually termed a "quack." *Burk v. Foster*, 69 S. W. 1096, 1097, 114 Ky. 20, 59 L. R. A. 277, 1 Ann. Cas. 304.

## QUADROON

The "quadroon" is distinctly whiter than the mulatto. *State v. Treadaway*, 52 South. 500, 508, 126 La. 300, 139 Am. St. Rep. 514, 20 Ann. Cas. 1297.

## QUALIFY

## QUALIFICATION

All qualifications, see All.

Rev. St. 1895, art. 3784, prescribed the subjects in which applicants to practice medicine should be examined, and article 3785 that, when the board should be satisfied as to the qualifications of an applicant, they should grant him a certificate to that effect. Held, that the term "qualification of an applicant" as so used referred to the knowledge possessed by the applicant in the opinion of the board in the several subjects or branches of medical science specified in section 3784. *Board of Medical Examiners for State of Texas v. Taylor*, 120 S. W. 574, 576, 56 Tex. Civ. App. 291.

## Office

The word "qualification," in Const. art. 18, § 6, providing that the qualifications of the county superintendent shall be fixed by law, means educational equipment or attainment. *Bradfield v. Avery*, 102 Pac. 687, 689, 16 Idaho, 769, 23 L. R. A. (N. S.) 1228.

## Witness

The word "qualification," in an instruction that the jury is the judge of the weight of the evidence and the credibility of each witness, and, in deciding upon the weight of evidence, the jury may consider the qualification and interest of each witness, is not synonymous with the words "competent" and "competency," but clearly intends that the jury shall regard such qualities in witnesses to enable them to give due weight and credence to their testimony, and it is not for them to decide, and they could not have understood the instruction as to authorize them to pass upon the competency of the witnesses.

*Parkersburg Nat. Bank v. Hannaman*, 60 S. E. 242, 63 W. Va. 358 (citing and adopting *Railway Co. v. Whitehead*, 15 South. 890, 71 Miss. 451, 452).

## QUALIFIED

See Regularly Qualified.

The word "qualified," in Pen. Code 1895, § 958, declaring that if a person shall not be tried at the term at which his demand for trial is made, or the next term, and at both terms there were juries qualified to try him, he shall be discharged, relates to qualifications of the panel, rather than particular qualification of individuals. *Campbell v. State*, 65 S. E. 307, 308, 6 Ga. App. 539.

In Gen. Laws, c. 243, § 2, providing that either party in a civil action may, before the opening of the action to the jury, challenge any qualified jurors called for a trial of such cause, the word "qualified" refers only to those jurors who are not subject to challenge for cause in the case then for trial. *Stevens v. Union R. Co.*, 58 Atl. 492, 494, 26 R. I. 90, 66 L. R. A. 465.

In Const. § 121, as amended, providing who shall be a qualified elector, the word "qualified" neither adds to, nor detracts from, the meaning of the word "elector." It follows that the word "electors," as used in section 168, providing that all changes in the boundaries of organized counties shall be submitted to the electors at a general election, means all persons who are qualified to vote. *State v. Blaisdell*, 119 N. W. 360, 362, 18 N. D. 31.

Hill's Code, § 1084, provides that, when a will is proven, letters testamentary shall be issued to the persons named therein as executors, or to such of them as give notice of their trust and are qualified. Section 1108 prescribes that "the following persons are not qualified to act as executors or administrators: Nonresidents of this state; minors; judicial officers other than justices of the peace; persons of unsound mind or who have been convicted of a felony or a misdemeanor involving moral turpitude; or a married woman." It was held that all persons who are qualified and competent to serve were not disqualified, and, when nominated in the will, were entitled to have the letters testamentary issued to them. One who is not disqualified, or does not fall within one or the other exception of the statute, must then be qualified and entitled to the letters. *Holladay v. Holladay*, 19 Pac. 81, 83, 16 Or. 147.

## QUALIFIED CONSENT

A paper was circulated by a railroad company among property owners to obtain their consent for construction of an elevated

railroad in a street. An abutting owner signed it, after the words written in by him, "I am in favor of an elevated road over the middle of the street, but not on the walk." Held that, if this was a consent, it was a "qualified" and conditional one, which was not accepted; the company having built their structure onto the sidewalks. *Shaw v. New York Elevated R. Co.*, 79 N. E. 984, 986, 187 N. Y. 186.

### QUALIFIED ELECTOR

Under the express provisions of the election law (Laws 1896, c. 909, § 34), a "qualified elector" is a male citizen who is or will be on the day of election 21 years of age, who has been an inhabitant of the state for one year next preceding the election, and for the last four months a resident of the county, and for the last 30 days a resident of the election district in which he may offer his vote. In *re Sheridan*, 107 N. Y. Supp. 244, 246, 57 Misc. Rep. 42.

A "qualified elector" within the local option law (Pub. Acts 1889, No. 207, § 3, as amended by Pub. Acts 1899, No. 183), providing for petition for a local option election to be signed by one-third of the qualified electors of the county, as shown by the poll lists or returns and canvass of the last general election, is one who meets the requirements of Const. art. 7, § 1. *Rutledge v. Board of Sup'rs of Marquette County*, 124 N. W. 945, 946, 160 Mich. 22.

Laws 1907, c. 245, provides that upon petition of one-fifth of the qualified electors residing within territory sought to be annexed, the board of county commissioners, after due hearing, shall call an election on the question of the annexation in the territory to be annexed, which shall be conducted according to the general election laws and at which only qualified electors shall vote. The general election law (Rem. & Bal. Code, § 4798) provides that the board of county commissioners in each county shall divide their respective counties into election precincts, establish the boundaries thereof, and designate one voting place in each precinct. Held, that since under the general election law a voter would only be a "qualified elector" within the precinct in which he resided, there was no valid election for the annexation of territory to a city, where no polling places were established by the notice calling for the election in eight of the precincts of the county which were included within the territory to be annexed; the voters in such precincts not being qualified electors. *Wilton v. Pierce County*, 112 Pac. 386, 387, 61 Wash. 386.

#### As qualified voter

See Qualified Voters.

#### As registered voter

Under the local option act providing for the calling of an election to determine the

question on petition of not less than one-fourth of all the "qualified electors" of the county, a registered elector is a qualified elector although his name does not appear upon the poll lists. *Werstein v. Board of Sup'rs of Calhoun County*, 120 N. W. 354, 355, 156 Mich. 63.

The terms "legal voters" and "qualified electors" are interchangeable, but are not equivalent to registered voters, as used in Laws 1905, p. 41, providing for the calling of an election to determine whether the sale of intoxicating liquors shall be prohibited on petition of 10 per cent. of the registered voters. The phrase "legal voters" is a synonym for "registered voters," as used in the act. *Roesch v. Henry*, 103 Pac. 439, 440, 441, 54 Or. 230.

Laws 1911, c. 112, by section 2, confers power to create new counties upon county commissioners, and provides that the proceedings therefor shall be instituted by petition signed by at least one-half of the "qualified electors of the proposed new county" whose names appear on the official registration books used at the general election therein last preceding the presentation of the petition, and permits the board to take the petition as prima facie evidence of the jurisdictional facts or to hear evidence thereon. Sections 3 and 4 require the commissioners to designate the election precincts in the proposed new county, and to proclaim and hold an election therein. A petition showing all other jurisdictional facts contained 641 signatures, all of which the board found were of electors entitled to join in the petition, and that of the total of 1,411 registered voters on the register 143 did not, because of deaths, removal, etc., represent qualified electors, but held the petition insufficient because it was not signed by one-half of the total number of 1,411. Held, that the qualified electors of the proposed new county were those whose names were properly on the list, excluding those deceased, or disqualified by change of residence or other cause, and that, as the number of signatures remaining on the petition was more than one-half of the properly qualified electors, the petition was sufficient. *State ex rel. Bogy v. Board of Com'rs*, 117 Pac. 1062, 1064, 43 Mont. 533.

### Women

Women entitled to vote for school officers under Const. § 128, constitute a class separate from "qualified electors," as defined by section 121, and only possess a limited elective franchise. *Wagar v. Prendeville*, 130 N. W. 224, 225, 21 N. D. 245.

### QUALIFIED FEE

See, also, Base Fee; Determinable Fee.

An estate which may end on the happening of an event is usually called a "qualified fee." The estate taken by a church to contin-

ue in such organization as long as devoted to specified uses was such a fee. *North v. Graham*, 85 N. E. 267, 268, 235 Ill. 178, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189, 14 Ann. Cas. 434 (citing First Universalist Society of North Adams v. Boland, 29 N. E. 524, 155 Mass. 171, 15 L. R. A. 231).

"Whenever a fee is so qualified as to be made to determine, or liable to be determined, at the happening of some contingent event, or act, the fee is said to be 'qualified.' There are four classes of such fees, viz., fee upon condition, fee upon limitation, a conditional limitation, and a fee conditional at common law." Testator first devised to his wife and her heirs one-half of all his property to hold, use, and manage during her life, remainder to testator's son, if he survived her. Testator then devised to the son and his heirs the other half of the property to have, hold, use, and manage in his discretion "during his natural life," and, in case the wife survived the son, at his death the property so devised to him should belong to her. Held that, under Rev. St. 1879, § 4008, requiring all courts concerned in the execution of wills to have due regard to the directions of the will and the true intent of the testator, the will should be construed as giving to the widow and son each a freehold estate for the life of the one who might first die, with cross-determinable fees in remainder; the one to be enlarged into a fee simple in the survivor. *Tebow v. Dougherty*, 103 S. W. 985, 988, 205 Mo. 315 (quoting and adopting the definition in *Tiedeman*, Real Prop. p. 28, §§ 44, 271).

Under a patent to the Choctaw Nation, by which it conveyed and granted certain lands to said nation in fee simple to them and their descendants to inure to them while they shall exist as a nation and live on it, liable to no transfer or alienation except to the United States or with their consent, the estate conveyed is a "qualified fee." *Dukes v. McKenna*, 69 S. W. 832, 834, 4 Ind. T. 156.

A "qualified fee" is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end (quoting and adopting the definition in 2 Black. Com. 109). A deed which, in consideration of a sum paid by A. and K., a committee of a certain church society, "or their successors to that office for the time being," conveyed "unto the said A. and K." a certain tract, "to have and to hold the aforegranted premises to the said A. and K. and to their successors in office to their use and behoof forever," conveyed a fee simple and not a base or qualified fee which would terminate when the church society ceased to exist. *Hamlin v. Particular Baptist Meeting House*, 69 Atl. 315, 317, 103 Me. 343.

An "estate in fee" may not be an estate in fee simple, properly speaking, which is

a pure inheritance, free from any and every qualification or condition. Estates in fee are not thus restricted in their nature. Every estate which may pass to heirs general by descent, and continue forever, is a fee; the owner having the entire property in himself. Such an estate may be a pure fee simple; or it may be a "qualified fee." The latter is an estate which may continue forever, and is liable to be determined, without the aid of a conveyance, by some act or event circumscribing its continuance or extent, though the object on which it rests for perpetuity may be transitory or perishable; yet such an estate is deemed a fee, because, as is said, it has a possibility of enduring forever. A limitation to a man and his heirs, so long as A. shall have heirs of his body, or to a man and his heirs, tenants of the manor of Dale, or till the marriage of B. or so long as St. Paul's church shall stand, or a tree shall stand, are a few of the many instances given in the books of this species of fee. The material difference between a fee simple and other fees is "that the former estate will, the latter may, continue forever." *Waldron v. Gianini*, 6 Hill (N. Y.) 601, 604, 605 (citing 4 Kent's Comm. [5th Ed.] 5, 9; 2 Bl. Comm. 104, 106, 109; 1 Cruise's Dig. 68, §§ 42-80; 1 Prest. Est., 429-431); *Moss Point Lumber Co. v. Board of Sup'rs*, 42 South. 290, 314, 89 Miss. 448 (citing And. Law Dict.; 2 Bl. Comm. 109).

E. died in 1798, having by his last will and testament devised a farm to his son M., his heirs and assigns forever, and another farm to his son J., in like manner. The will contained this clause: "It is my will, and I do order and appoint, that if either of my sons should depart this life without lawful issue, his share or part shall go to the survivor." In 1801 the sheriff sold all the estate which M. then had in his share, by virtue of a fi. fa. against him; and J. died in 1813, leaving M. surviving. Held, that the estate devised to M. was a "qualified fee," which became a fee simple on the death of J., and belonged to W. *Waldron v. Gianini* (N. Y.) 6 Hill, 601, 604, 605 (citing 4 Kent, Comm. [5th Ed.] 5, 9; 2 Bl. Comm. 104, 106, 109; 1 Cruise's Dig. p. 68, §§ 42-86; 1 Prest. Est. 429-431).

#### QUALIFIED OWNERSHIP

"Qualified ownership" in property is not absolute ownership, which is perfect ownership without condition and without restriction or limitation. A testator by his will left his residuary estate in trust until the death or remarriage of his widow, on the happening of either of which events it was to be divided equally between his three sons. Until such times the income was to be collected by the trustees, and on a stated day each year, after deducting the cost of administration, divided equally between the widow and sons, share and share alike. The reversionary interest

of the sons in the corpus of the estate was not subject to tax under War Revenue Act June 13, 1898, c. 448, Schedule B, §§ 29, 30, 30 Stat. 464, 465, as amended by Act March 2, 1901, c. 806, §§ 10, 11, 31 Stat. 946, because such interests were not "absolutely vested in possession or enjoyment" prior to July 1, 1902, within the meaning of Act June 27, 1902, c. 1156, 32 Stat. 406, the widow being then living and unmarried, and for the further reason, as to the one-fourth part from which the widow received the income, the statute requires the tax to be deducted from the particular legacy or distributive share on account of which the same is charged, and the widow's interest is not subject to tax nor deduction on account of the same. *Shanley v. Herold*, 141 Fed. 423, 428.

### QUALIFIED PERSONS

By Bankr. Act July 1, 1898, c. 541, § 50, 30 Stat. 561, "any 'qualified person' may file a petition to be adjudged a voluntary bankrupt." Section 4a of the act (30 Stat. 547) provides that "any person who owes debts, except a corporation, shall be entitled to the benefit of this act as a voluntary bankrupt." "Qualified person" of the statute is therefore one other than a corporation who owes debts. *In re Little*, 137 Fed. 521, 522, 70 C. C. A. 105.

### QUALIFIED PRIVILEGE

See, also, *Qualifiedly Privileged*.

A "qualified privilege" extends to all communications made bona fide on any matter in which the party communicating has an interest, or in reference to which he owes a duty to a person having a corresponding interest or duty, and to cases where the duty is not a legal one, but is of a moral or social character of imperfect obligation. *De Van Rose v. Tholborn*, 134 S. W. 1093, 153 Mo. App. 408.

Where there is no express malice, statements, otherwise defamatory, made to a person with an interest in the person about whom they are made, may be privileged, but such privilege is a "qualified" one, in that it extends only to such statements as are made in the discharge of a legal or moral duty, and which he in good faith believes true. *Bingham v. Gaynor*, 96 N. E. 84, 85, 203 N. Y. 27; 126 N. Y. S. 353, 141 App. Div. 301.

Words sued on as being slanderous are uttered under "qualified privilege" where they are uttered under honest belief that the speaker is discharging a moral or social duty in speaking. Where defendant, on meeting plaintiff, stated to him that he should be careful how he spoke, that others had stated that he had committed perjury, and that defendant, as plaintiff's friend, had tried to stop the prosecution of plaintiff, and defendant alleged that such statement was made in the honest belief that he was performing a moral and social duty toward the plaintiff for his

benefit, the statement was privileged. *Hudnell v. Eureka Lumber Co.*, 45 S. E. 532, 533, 133 N. C. 169.

Letters written in due course of business by an insurance adjuster, addressed to insurers, to show their liability to contribute their pro rata share of the expenses incurred by the adjuster in securing an adjustment of the loss at a sum substantially less than the adjustment made by the addressees' adjuster, which refer to such adjuster as incompetent and unable to protect the interests of insurers, and state that his conduct as adjuster was reprehensible, unprofessional, and silly, are qualifiedly privileged, and do not go beyond the privilege, and do not by themselves indicate malice, in view of the fact that the writer, in making the adjustment, had been handicapped by the adjustment made by the addressees' adjuster, who had procured an adjustment for the addressees on the condition that insured would reimburse addressees, provided any other adjuster found a less loss acquiesced in by insured; a "qualified privilege" existing where the person making the communication complained of has an interest in the subject-matter, and the person to whom the communication is made has a corresponding interest, and the privilege extending to all such communications made bona fide. *Richardson v. Cooke*, 56 South. 318, 320, 129 La. 365.

### QUALIFIED TEACHER

Within Ballinger's Annotated Codes & St. § 2322, providing that no person shall be a qualified teacher who has not first received a certificate issued by the superintendent of public instruction, or who has not a state certificate, or life diploma from the state board of education, or who has not a temporary certificate or a special certificate granted by the county superintendent, a mere letter from a county superintendent, stating that an applicant's papers were sufficient to entitle him to a temporary certificate, and that such certificate would be granted on application as provided by statute, was not the equivalent of a temporary certificate, so as to make the applicant a "qualified teacher." *Kester v. School Dist. No. 34 of Walla Walla County*, 93 Pac. 907, 48 Wash. 486.

### QUALIFIED VOTERS

"Qualified voters," within the local option law, providing that a local option petition shall be signed by "qualified voters" who are qualified to vote for members of the Legislature, are those persons who have the qualifications specified by the Constitution and by Rev. St. 1899, § 6994, there being no special qualifications for persons entitled to vote for members of the Legislature. *State v. Foreman*, 97 S. W. 269, 270, 121 Mo. App. 502.

Const. art. 6, §§ 1, 3, 4, provide the qualifications of voters, and declare that every

person shall be able to read and write, unless registered under another clause, before being entitled "to register," as required by section 3, and that "before he shall be entitled to "vote" he shall have paid his poll tax for the previous year. Laws 1903, p. 290, c. 233, § 7, requires an order for a municipal election to determine whether saloons shall be licensed in lieu of a city dispensary on petition of one-third of the "registered voters" therein for the preceding municipal election, and section 9 declares that "any person entitled to vote for," etc., "shall have the right to vote at such election." Held, that "registered voters" did not include all persons whose names were on the permanent registration roll at the preceding municipal election, but only included those who had paid their poll tax as required and were entitled to vote. *Pace v. City of Raleigh*, 52 S. E. 277, 278, 282, 140 N. C. 65.

#### As persons actually voting

As used in Mississippi Constitution, providing for the issuance of bonds with the assent of two-thirds of the qualified voters of the county, given at an election lawfully held for the purpose, meant not those qualified and entitled to vote, but those qualified and actually voting; a voter in that connection being one who actually votes, and not one who, though qualified to vote, did not do so. *Treat v. De Jean*, 118 N. W. 709, 712, 22 S. D. 505 (quoting *Hawkins v. Board of Sup'rs of Carroll County*, 50 Miss. 761).

The words "qualified voters," as used in the constitutional provision requiring, for the adoption of a constitutional amendment, the assent of a certain portion of such voters at an election, must be taken to mean those qualified and actually voting. *Knight v. Shelton*, 134 Fed. 423, 431 (citing *Belknap v. City of Louisville*, 36 S. W. 1118, 99 Ky. 475, 34 L. R. A. 256, 59 Am. St. Rep. 478).

Act Cong. March 4, 1898, c. 35, and Act New Mexico March 16, 1907, authorizing municipal bonds, notwithstanding the limitations on municipal indebtedness, if two-thirds of the qualified voters, as defined, shall vote therefor, require a two-thirds of those actually voting only, and not two-thirds of all the voters of the municipality. *Fabro v. Town of Gallup*, 103 Pac. 271, 275, 15 N. M. 108.

#### As registered voters

Under Ky. St. 1909, § 2746, requiring officers in certain cities to be "qualified voters," one's eligibility is not affected by his failure to register. *Meffert v. Brown*, 116 S. W. 779, 132 Ky. 201.

Registration is necessary to qualification as a voter, so that, when a statute requires that a majority of the "qualified voters" should have cast their votes for a given proposition before it becomes the law, it means a majority of the registered voters. *Clark v. City of Statesville*, 52 S. E. 52, 54,

139 N. C. 490 (citing *Norment v. Charlotte*, 85 N. C. 387; *Southerland v. City of Goldsboro*, 1 S. E. 760, 96 N. C. 49; *Duke v. Brown*, 1 S. E. 873, 96 N. C. 127; *McDowell v. Massachusetts & S. Const. Co.*, 2 S. E. 351, 96 N. C. 514; *Wood v. Town of Oxford*, 2 S. E. 653, 97 N. C. 227).

The term "qualified voters," as used in Acts Wash. 1903, p. 393, § 186, relating to amendment of a city charter on petition of a certain proportion of qualified voters of the city, refers to those persons who are defined as qualified voters in Const. art. 6, § 1, and does not import that they should have been registered voters. Registration laws cannot be regarded as adding a new qualification to those voters for those prescribed by the Constitution, but are merely regulations prescribing the mode of exercising the right to vote. *Hindman v. Boyd*, 84 Pac. 609, 613, 42 Wash. 17.

The term "qualified voters," in Act Feb. 19, 1907, requiring the submission of the question of the issuance of bonds by a school district to the "qualified voters" thereof, and declaring that at the election only "qualified voters" residing in the district shall be allowed to vote, means the same as "qualified electors," and a qualified elector is one who presents to the managers of election his registration certificate and proof of payment of all taxes, including the poll tax, assessed against him and collectible during the previous year, and a registered elector is a qualified voter, though not liable to a poll tax nor to the payment of any taxes, because taxes had not been assessed against him. *McLaurin v. Tatum*, 67 S. E. 560, 562, 85 S. C. 444.

#### Women

The marshals provided for in each division of the city court of Kansas City, Kan., by Laws 1905, c. 193, are not city officers, and women are not "qualified voters" in the election of such officers. *Fee v. Richardson*, 107 Pac. 789, 82 Kan. 190.

#### QUALIFIEDLY PRIVILEGED

See, also, Qualified Privilege.

Privileged communications fall into two classes, those absolutely privileged, such as the opinions of judges, and others qualifiedly privileged, such as publications made to protect the rights of the one publishing. *Allen v. Earnest (Tex.)* 145 S. W. 1101, 1104.

Where defendant, in attempting to secure evidence as to the unchaste conduct of plaintiff, uttered words imputing a want of chastity on her part, to one having no interest in the case, but who, defendant hoped, would testify as to plaintiff's want of chastity, the communication was not "qualifiedly privileged," for a qualifiedly privileged communication is one made bona fide by a party having an interest to one having a cor-

responding interest, and in this case the prospective witness had no interest. *Vanloon v. Vanloon*, 140 S. W. 631, 636, 159 Mo. App. 255.

A communication is "qualifiedly privileged" when made in good faith upon any subject in which the communicant has an interest, or with reference to which he has a duty to one having a corresponding interest or duty; malice not being inferable in such case merely from the falsity of the communicated statements. A qualifiedly privileged communication is not actionable libel, in absence of malice. *Bohlinger v. Germania Life Ins. Co.*, 140 S. W. 257, 258, 100 Ark. 477, 36 L. R. A. (N. S.) 449, Ann. Cas. 1913C, 613.

## QUALITY

See Best Quality; Guaranty of Quality. Similar quality, see Similar.

In a bill of lading noting that the captain of the vessel was "not responsible for the weight nor quality nor for loose bales," the word "quality" meant no other than the commercial quality of the fiber shipped and could not be held to mean that the vessel should be relieved of any liability for a damaged condition of the fiber delivered, where it appeared that it was in good condition when shipped. *The La Kroma*, 138 Fed. 936, 938.

## QUALITY GUARANTEED

Where a contract for the sale of binder twine contained the words "quality guaranteed," such words should be construed to import a warranty that the twine was reasonably fit for the use for which binder twine is designed. *Union Selling Co. v. Jones*, 128 Fed. 672, 677, 63 C. C. A. 224.

## QUALITY OF ACT

An instruction on insanity, in a prosecution for homicide, that, if accused was sufficiently sane to know the nature and quality of his act, he was then legally responsible therefor, was not objectionable for failure to also require that he was sufficiently sane to know that his act in killing deceased was wrong; the term "nature of act" being defined to mean the attributes which constitute the thing and distinguish it from all others, while "quality of act" is the power to clearly and distinctly apprehend its nature, so that, if a person has sufficient mental power to fully appreciate and know what he is doing, he must necessarily know that the killing of a human being is wrong. *Montgomery v. State (Tex.)* 151 S. W. 813, 817.

## QUANTITY

See Paying Quantities; Reasonable Quantities.

In a statute providing for a homestead "consisting of any 'quantity of land' not exceeding 80 acres, and a dwelling house thereon, and its appurtenances," the term "quantity of land" does not necessarily mean one parcel or compact body of land, and therefore two separate ten-acre parcels of land touching only at the corners between which is a regular roadway, if owned, occupied, and cultivated as one farm, may constitute a homestead, although the residence and appurtenances are all located on one tract. *Brixius v. Reimringer*, 112 N. W. 273, 101 Minn. 347, 118 Am. St. Rep. 629.

## QUANTUM

### QUANTUM MERUIT

A claim against an estate for services performed at the request of deceased and with her knowledge, and alleging that they were worth a stated sum, is not a claim on an express contract, but is a claim on "quantum meruit," and is supported by proof of performance and value. *Boss's Estate v. Baehr*, 113 N. W. 433, 434, 133 Wis. 119.

In an action on an express contract, alleged to have been performed by the plaintiff, there can be no recovery on a "quantum meruit." *Wade v. Nelson*, 95 S. W. 956, 119 Mo. App. 278 (citing *Huston v. Tyler*, 36 S. W. 654, 41 S. W. 795, 140 Mo. 252; *McDonnell v. Stevinson*, 77 S. W. 766, 104 Mo. App. 193; *Eyerman v. Mount Sinai Cemetery Ass'n*, 61 Mo. 469; *Deatherage Lumber Co. v. Snyder*, 65 Mo. App. 568; *Squire v. Ferd Helm Brewing Co.*, 90 Mo. App. 462; *Cox v. Bowling*, 54 Mo. App. 289).

When a person employs another to do work for him, without any agreement as to his compensation, the law implies a promise from the employer to the workman that he will pay him for his services as much as he may deserve or merit. "There is no doubt but what a suit on 'quantum meruit' is a distinct cause of action from that of contract. \* \* \* It is the settled law of the state that in a suit on contract the plaintiff cannot recover on quantum meruit." A count of a petition, setting out a contract of employment on commission and alleging performance on plaintiff's part and breach by the defendant, whereby plaintiff was prevented from doing any business, and that plaintiff remained in defendant's service 4½ months, till defendant discharged him, and by reason of defendant's said acts lost 4½ months' time, of the value of \$650, and in the performance of said contract incurred \$50 expenses, is for breach of contract, and not quantum meruit. *McCormick v. United States Fidelity & Guaranty Co.*, 89 S. W. 905, 906, 907, 114 Mo. App. 460 (quoting and adopting definition in *Bouv. Law Dict.*).

## QUARANTINE

### Widow's right

"By the seventh section of the Magna Charta, the widow was allowed, under a right known as 'quarantine,' to remain in the mansion house 40 days after the death of her husband, during which time her dower was to be assigned, and during her continuance a reasonable support was allowed her out of the estate." *Casteel v. Potter*, 75 S. W. 597, 598, 178 Mo. 76.

Where a statute gives the widow the right to retain full possession of the dwelling house in which her husband most usually dwelt, together with the outhouses and plantation thereto belonging, free from molestation and rent until her dower is assigned, the right is called the "widow's quarantine." *Dewitt v. Shea*, 67 N. E. 761, 762, 203 Ill. 393, 96 Am. St. Rep. 311.

## QUARREL

Make quarrel, see *Make*.

## QUARRY

See *Undeveloped Granite Quarry*.

The term "coal bed" may be used in the sense of "quarry." *Hoysradt v. Delaware, L. & W. R. Co.*, 151 Fed. 321, 327, 330, 331.

"Pit" is synonymous with "quarry," signifying a large opening in the earth from which rock or ores are taken. *J. M. Guffey Petroleum Co. v. Murrell*, 53 South. 705, 711, 127 La. 466.

There is no inconsistency in a bill to rescind a sale of land for the purchaser's misrepresentations as to its value because it alleges than an "undeveloped granite 'quarry'" under the land is of great value; the phrase signifying a place from which granite may be taken. *Crompton v. Beedle*, 75 Atl. 331, 335, 83 Vt. 287, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912A, 399.

*Burns' Ann. St.* 1908, § 10,250, authorizing the valuation of real property on which there is a mine or quarry, owned by the same persons, at the price for which the property, including the mine or quarry, would sell at private, voluntary sale for cash, and, in case the mine or quarry is owned or leased by a person, other than the owner of the land, authorizing the valuation of the land and mine or quarry separately, does not authorize the assessment of hidden, undeveloped coal or other minerals underlying land; a "quarry" being an excavation for obtaining stone, slate, or limestone; and a "mine" being defined by section 8569 to include the workings in every shaft, slope, or drift which is used, or has been used, in the mining and removing of coal from and below the surface of the ground, and being also defined as a

pit or excavation from which metallic ores or other similar substances are taken by digging. *Board of Com'rs of Greene County v. Lattas Creek Coal Co. (Ind.)* 96 N. E. 633, 635.

The term "quarry" is not properly applicable to the comparatively slight excavation on land made primarily for purposes of construction thereon, and not primarily for the purpose of disposing of the rock, or stone, or other material taken out. As defined by the lexicographers, it is similar to a mine, in the sense that the material removed, be it mere rock, or stone, or valuable marble, is removed because of its value for some other purposes, and in the sense that it is not removed for the purpose of improving the property from which it is taken. It is distinguished from a mine in the fact that it is usually open at the top and front (see *Century and Standard Dictionaries*), and, in the ordinary acceptance of the term, in the character of the material extracted. Webster defines a "quarry" as "a place, cavern, or pit where stone is taken from the rock or ledge, or dug from the earth, for building or other purposes; a stone pit," and in *March's Dictionary* we find it defined as "a stone mine." In its proper significance this is what it really is. It is a place, generally open at top and front, from which rock or stone is extracted solely because of its value for use elsewhere, just as gold or other precious metals are removed from a mine; and "proper and usual excavations" made for construction purposes on the land to be improved do not fall within the term "quarry." *Ex parte Kelso*, 82 Pac. 241, 147 Cal. 609, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178.

## QUARRYING

As mining, see *Mining*.

## QUART

As to foxberries in barrels, with water added to act as a cushion, so as to prevent crushing, held that, in assessing the duty "per quart," provided in paragraph 262, *Tariff Act July 24, 1897*, c. 11, § 1, Schedule G, 30 Stat. 171, the dutiable quantity should be ascertained by the use of the dry quart and not the liquid quart. *United States v. Boak Fish Co.*, 146 Fed. 104-106.

## QUARTER

See *Southwest Quarter*.

The court will take judicial notice that a "quarter" as indicative of value means 25 cents. *Sims v. State*, 57 S. E. 1029, 1 Ga. App. 776.

### Fourth synonymous

The interlineation of the word "fourth" after the words "northeast" and over some other word—probably "quarter"—in the

descriptive part of a deed is not such an evident mark of suspicion as to authorize the court to exclude the deed from evidence; the words "quarter" and "fourth" being synonymous, and no other words being appropriate at the place. *Campbell v. Bates*, 39 South. 144, 146, 148 Ala. 338.

### QUARTERLY DURING HIS NATURAL LIFE

Where a testator by his will created a trust estate, the income thereof to be paid to one beneficiary "quarterly during his natural life," that term is a mere direction as to the time and manner of payment, and has no reference to the vesting of the beneficiary's interest, and hence the beneficiary's death before the first quarterly payment was due does not divest his right. *Union Safe Deposit & Trust Co. v. Dudley*, 72 Atl. 166, 172, 104 Me. 297.

### QUASH

See Motion to Quash.

According to 2 Abb. Law Dict. p. 364, "quash" means to annul, overthrow, or vacate, by judicial decision, and where a writ of *venire facias* was quashed it was as though it had never been issued and the court was without a jury present from which to make up a panel; the persons present who had been summoned under the writ being mere bystanders and no longer under the control of the court. *Hoback v. Commonwealth*, 52 S. E. 575, 576, 104 Va. 871.

The power to "quash" writs is limited to proceedings that are irregular, defective, or improper. *Bruner v. Finley*, 60 Atl. 488, 489, 490, 211 Pa. 74 (citing *Crawford v. Stewart*, 38 Pa. 34; *Steel v. Goodwin*, 6 Atl. 49, 113 Pa. 288).

### QUASI

"Quasi" is not a very definite term. It marks a resemblance and supposes a difference. *Barron v. City of Anniston*, 48 South. 58, 59, 157 Ala. 399.

### QUASI CONTRACT

See, also, Statutory Obligation.

A "quasi contract" is one where liability exists from implication of law arising from facts and circumstances, independent of agreement or presumed intention, based on the doctrine of unjust enrichment; the agreement being one defining the duty of the defendant, rather than his intention. *Board v. Highway Com'rs, Bloomington Tp., v. City of Bloomington*, 97 N. E. 280, 284, 253 Ill. 164, Ann. Cas. 1913A, 471.

A "quasi contract" arises where there is a legal duty to respond in money, which by legal fiction may be enforced as on an implied promise, but in such case there is no element of contract so called, but there is

only the duty to which the law affixes a legal obligation of performance, as in case of a promise between the parties. *Wojahn v. National Union Bank of Oshkosh*, 129 N. W. 1068, 1069, 1077, 144 Wis. 646.

"A statutory obligation which does not rest upon the consent of the parties is clearly quasi-contractual in its nature." A tax as an obligation or duty created by statute to pay money is quasi-contractual, although there may be difficulty as to the remedy for its enforcement in a given case. In re *United Button Co.*, 140 Fed. 495, 502 (quoting *Kee-ner*, *Quasi Cont.* p. 16).

Where there was no agreement between plaintiff and defendant that defendant was to return money advanced on the purchase price of real property if the negotiations failed, or at all, yet where equity and good conscience required him to do so, the law implied a promise on his part, and the obligation created or implied is termed a "quasi contract," a contract implied by law, or a constructive contract. *Schaeffer v. Miller*, 109 Pac. 970, 972, 41 Mont. 417, 137 Am. St. Rep. 746.

A trustee in bankruptcy may sue in assumpsit for the value of a preferential transfer of goods by the bankrupt to a creditor, who takes the goods impressed with the obligation created by the bankruptcy act to restore or pay on the trustee electing to sue; such obligation being a "quasi contract," which is a fiction of law adapted to enforce legal duties by actions of contract, where no proper contract, express or implied, exists. *Reber v. Ellis Bros.*, 185 Fed. 313, 314.

Where a contract for the construction of a public work for a city required the contractor to use a certain kind and quality of cement in the masonry and concrete work, but no particular quantity was specified, nor the price to be paid therefor, the contract having been let on a bid for the completed work, the fact that the contractor used an inferior and cheaper cement does not give the city, after paying for the work without knowledge of the substitution, a right of action ex quasi contractu or in repetition, under Rev. Civ. Code La. art. 2293 et seq., to recover the difference in the cost of the two kinds of cement or the profit made by the contractor by the substitution as money paid which was not due; but the remedy is by action on the contract, as provided for in articles 1930 and 2769, and the measure of recovery is the amount of damages sustained by the city by reason of its breach. *National Contracting Co. v. Sewerage & Water Board of New Orleans*, 141 Fed. 325, 329, 72 C. C. A. 478.

### QUASI CORPORATION

See Quasi Public Corporation.

The designation of certain corporations such as school districts, or road districts as



"quasi corporations," distinguishes them on the one hand from private corporations, aggregate, and on the other from municipal corporations, proper, such as cities or towns acting under charters or incorporating statutes and which are invested with more power and endowed with special functions relating to the particular or local interests. *Herald v. Board of Education*, 65 S. E. 102, 104, 65 W. Va. 765, 31 L. R. A. (N. S.) 588.

#### As agencies of state

"Quasi corporations" consist of counties, townships, school districts, highway districts, etc. They are governmental agencies, and it is, to say the least, doubtful if they are in any respect anything else, or have any rights that can be called private. They perform many functions, but these are for and about the business of the state, which has imposed upon them the responsibility and expense of maintaining highways, schools, drains, and bridges, etc. *Ex parte Corliss*, 114 N. W. 962, 989, 16 N. D. 470 (citing *Attorney General ex rel. Kies v. Lowrey*, 92 N. W. 289, 131 Mich. 639); *Whitehead v. Board of Education of City of Detroit*, 102 N. W. 1028, 1029, 139 Mich. 490 (quoting and adopting definition in *Attorney General ex rel. Kies v. Lowrey*, 92 N. W. 289, 131 Mich. 639).

#### Counties

Counties are commonly called "quasi corporations." *James v. Trustees of Wellston Tp.*, 90 Pac. 100, 105, 18 Okl. 56, 13 L. R. A. (N. S.) 1219, 11 Ann. Cas. 938 (citing *Helgal v. Wichita County*, 19 S. W. 562, 84 Tex. 392, 31 Am. St. Rep. 63).

"The counties of this state, like townships, are 'quasi corporations,' created solely for governmental purposes, and hold their property, not as private owners, but for the performance of their duties as public agencies." *State ex rel. Skillingstad v. Gunn*, 100 N. W. 97, 99, 92 Minn. 436.

Counties are "quasi corporations" formed to exercise purely governmental powers and, in the absence of an express statute to that effect, are not liable for damages either for the nonexercise of their powers or for their improper exercise by those charged with their execution. *Cassidy v. City of St. Joseph*, 152 S. W. 306, 309, 247 Mo. 197.

#### Municipal corporation

The term "municipal corporations" involves the idea of a voluntary association by the inhabitants of a particular territory, sanctioned by the power of the state for the purposes of local government. But the sovereign power may, without regard to any prior agreement or action on the part of the inhabitants of the territory involved, provide for the exercise of powers such as the election of local officers by the inhabitants, and these organizations, though public in character and partaking somewhat of the nature

of a corporation, are not strictly speaking corporations, but "quasi corporations." *Hanson v. City of Cresco*, 109 N. W. 1109-1111, 132 Iowa, 533.

#### Private bank

A private bank carried on by an individual is not a "quasi corporation" under the banking law. *In re Purl's Estate*, 125 S. W. 849, 853, 147 Mo. App. 105.

#### Reclamation district

While "reclamation districts" are sometimes called "quasi corporations," it would perhaps be more accurate to say that they are not corporations at all, but are so classed because of the many presumptions and rules which apply to corporations and have been made applicable to them. They are public agencies which will cease to exist when the policy of the state has changed so that they are no longer required or when there is no further function for them to perform. *Reclamation Dist. No. 70 v. Sherman*, 105 Pac. 277, 280, 11 Cal. App. 399 (citing *People ex rel. Van Loben Sels v. Reclamation District No. 551*, 48 Pac. 1016, 117 Cal. 114).

#### Road district

A road district is not a "quasi corporation." *Custer County Bank v. Custer County*, 100 N. W. 424, 426, 18 S. D. 274.

#### School district

A school district is a "quasi corporation" created pursuant to legislative enactment. It can exercise only those powers which are expressly conferred by statute or which arise therefrom by necessary implication. *A. G. Andrews Co. v. Delight Special School Dist.*, 128 S. W. 361, 362, 95 Ark. 26.

A school district is but a "quasi corporation," with limited powers, and can do only those things which the law expressly allows or implies. *Montpelier Sav. Bank & Trust Co. v. School Dist. No. 5*, 92 N. W. 439, 442, 115 Wis. 622; *Schmutz v. Special School Dist. of City of Little Rock*, 95 S. W. 438, 439, 78 Ark. 118 (citing *Memphis Trust Co. v. Board of Directors of St. Francis Levee Dist.*, 62 S. W. 902, 69 Ark. 284; 1 Dill. Mun. Corp. § 22).

#### Township

A township is clearly to be classed with "quasi corporations," and not with municipal corporations. *Hanson v. City of Cresco*, 109 N. W. 1109, 1112, 132 Iowa, 533.

Townships are merely "quasi corporations," not endowed with the full and plenary powers usually conferred either by charter or by general law upon municipal corporations proper, but only resembling the same in organization and functions. *Wilson v. Ulysses Tp. of Butler County*, 101 N. W. 986, 988, 72 Neb. 807, 9 Ann. Cas. 1153.

Townships are "quasi corporations" formed to exercise purely governmental powers, and, in the absence of an express statute to

that effect, are not liable for damages either for the nonexercise of their powers, or for their improper exercise by those charged with their execution. *Cassidy v. City of St. Joseph*, 152 S. W. 306, 309, 247 Mo. 197.

### QUASI CRIME

"Quasi crime" is an offense not constituting a crime or misdemeanor at law, but which is in the nature of a crime. It includes a class of offenses against the public which have not been declared crimes, but wrongs against the local or general public proper to be repressed or punished by forfeitures and penalties. *Pittsburgh, C. & St. L. Ry. Co. v. Ferrell*, 39 Ind. App. 515, 78 N. E. 988, 995, 80 N. E. 425 (citing *Bouv. Dict.* title "Quasi Crimes"); *Southern Ry. Co. v. McNeeley*, 88 N. E. 710, 712, 44 Ind. App. 126.

### QUASI CRIMINAL

A prosecution for a violation of a municipal ordinance, designed for the protection of the public morals, the preservation of the public peace, the security of the person or property, is a "quasi criminal proceeding." *Bray v. State*, 37 South. 250, 253, 140 Ala. 172.

### QUASI CRIMINAL CONTEMPT

There is a difference between a "quasi criminal contempt" and a civil contempt. A judgment for criminal contempt is not only unnecessary, but positively unwarranted unless there has been a willful disobedience of the court's order. A party may be guilty of both a criminal contempt and a civil contempt, or may be guilty of the one and not the other. A criminal contempt, actual or constructive, or, as Blackstone says, "direct or circumstantial," partakes of the quality of an offense against the state, whereas a civil contempt under the statute is such disobedience of an order of a court of competent jurisdiction, entered for the benefit or advantage of a party to a civil action, as works a loss or injury to the litigant. The one is quasi criminal and the other is a civil wrong; the one is absolved by a fine payable to the state or imprisonment, and the other, by reparation to the other party litigant. Under Ballinger's Ann. Codes & St. § 5807 (Pierce's Code, § 1476), providing that, if any loss or injury to a party in an action prejudicial to his rights therein have been caused by the "contempt," the court may give judgment that the party aggrieved recover of the defendant a sum sufficient to indemnify him, it is not necessary that the contempt be a criminal contempt for which a fine could be adjudged. *State ex rel. Nicomen Boom Co. v. North Shore Boom & Driving Co.*, 107 Pac. 196, 198, 55 Wash. 1.

### QUASI EASEMENT

The owner of an entire tract of land or of two or more adjoining parcels may so employ a part thereof as to create a seeming servitude in favor of another portion to which

the use becomes appurtenant. Such use is tantamount to an easement at will, so long as the unity of ownership continues, and is described as a "quasi easement." *German Savings & Loan Society v. Gordon*, 102 Pac. 736, 738, 54 Or. 147, 26 L. R. A. (N. S.) 331.

There are two classes of easements—"quasi easements," which are existing conditions in the land retained, the continuance of which should be so clearly beneficial to the land conveyed that they would be presumed to be intended, and easements by implied grant where the grantor's conveyance describing the land by a street, passageway, or existing park at the time belonging to the grantor vests an easement of right of way, light and air in the grantee by estoppel. Quasi easements must be such as are apparent in the sense of being indicated by objects which are necessarily seen, or which would be ordinarily observable by persons familiar with the premises. *Brown v. Dickey*, 75 Atl. 382, 384, 106 Me. 97.

### QUASI EMPLOYÉ

Where defendant railroad company was rightfully using the tracks of plaintiff's employer, another railroad company, the plaintiff is not a "quasi employé" of defendant company, within Act April 4, 1868, providing that, when any person shall be injured while employed about the premises of a railroad company of which he is not an employé, the right of action shall be such only as would exist if he were an employé. *Hunt v. Philadelphia & R. Ry. Co.*, 76 Atl. 13, 227 Pa. 290.

### QUASI ESTOPPEL

The term "quasi estoppel" has been applied to certain legal bars which are in some respects analogous to estoppel in pais, and which have the same practical operation as an estoppel in pais, but which nevertheless differ from that form of estoppel in essential particulars. The term includes the doctrine of election, the principle which precludes a party from asserting to another's disadvantage a right inconsistent with a position previously taken by him, and certain forms of waiver. *Humes Const. Co. v. Philadelphia Casualty Co.*, 79 Atl. 1, 3, 32 R. I. 246, Ann. Cas. 1912D, 906.

### QUASI GUARDIAN

"The term 'quasi guardian' or guardian de son tort has been applied to persons who, without legal appointment or qualification, assume the functions of a guardian by exercising control over the person, or estate, or both, of a minor. He is subject to all the responsibilities that attach to a legally constituted guardian or trustee. If he takes advantage of the confidence reposed, or of the means afforded him by such relation, by buying up outstanding debts of the estate, for instance, at an under rate, and using them with or without the sanction of a judicial proceed-

ing to acquire in his own name the valuable lands of the infant wards, he is guilty of fraud and breach of trust entitling the infants to the interposition of a court of equity. He who arrogates to himself functions of a guardian will be held to stricter account in chancery than a regularly appointed guardian. So the agent or husband of an administratrix who assumes control and management of the estate, and uses the trust funds for his private purposes, makes himself liable to the infants as a trustee *de son tort*." *Zeideman v. Molasky*, 94 S. W. 754, 756, 118 Mo. App. 106 (quoting and adopting the definition in *Woerner, Am. Law Guard.* 1897, p. 76; citing *Grimes v. Wilson* [Ind.] 4 Blackf. 331; *Hanna v. Spott's Heirs*, 5 B. Mon. [44 Ky.] 362, 43 Am. Dec. 132; *Johnson v. Smith's Adm'r*, 27 Mo. 591).

### QUASI IN REM

That class of actions having some of the characteristics of an action strictly in personam and some of the characteristics of an action strictly in rem are known as actions "quasi in rem," and a court of equity may acquire jurisdiction of a suit to establish rights in personal property in the custody of a person in this state as against a nonresident, as such a suit would be one "quasi in rem"; a decree in personam not being necessary to transfer the legal title to complainant. The essential elements of an action "quasi in rem" are a res located within the territorial limits of the state in such a way that the state can exercise absolute power to control and dispose of it, a course of judicial procedure, the object of which is to subject the res to the power of the state directly by judgment or decree, which is entered as distinguished from a course of procedure which only disposes of the res by compelling a party to control or dispose of the res, and a course of judicial procedure on its face directed sufficiently towards the res so as to disclose this res to the defendant when reasonably notified of the action. The jurisdiction in such actions is based on the power of the sovereign state to exercise control over all objects to which that power can be directly applied, and the necessity of the court to control all property within its territorial limits. Hence, an action by a home corporation against a foreign corporation not engaged in business in this state, and without any office, agent, or place of business in the state, to establish title to treasury shares of the capital stock of complainant, which defendant claims to own absolutely, but which complainant alleges were held by defendant's testator in his lifetime as security for the payment of a sum of money, is an action quasi in rem, although complainant asks for a transfer of the shares of stock, and no receiver has been appointed to take possession of the res, and is within the jurisdiction of the Court of Chancery, and defendant, having been duly notified of the suit by

the statutory publication of notice and actual service of notice of the suit, and of the order requiring it to appear and plead on or before a time stated, will be bound by the decree, if it refrains from appearing, so far as the same relates to the status of the stock. *Amparo Mining Co. v. Fidelity Trust Co.*, 71 Atl. 605, 607, 74 N. J. Eq. 197.

A suit quasi in rem arises where the suit is against the person in respect of the res, where, for example, it has for its object partition or the sale or other disposition of defendant's property within the jurisdiction to satisfy plaintiff's demand by enforcing a lien upon it. In such a suit personal service within the jurisdiction or appearance is not necessary. The decree can, however, extend only to the property in controversy. Defendant's interest is alone sought to be effected, and he must be cited to appear, and the judgment is conclusive only between the parties. *Hill v. Henry*, 57 Atl. 554, 555, 66 N. J. Eq. 150.

Though a proceeding is not strictly "in rem," still where the purpose of the proceeding is not to establish an infinite personal liability against any defendant, but is merely to affect the interest of the defendant in specific real property within the state, which has at the outset of the proceeding been brought within the control of the court, it is a proceeding "quasi in rem" within the contemplation of the act of June 1906, relating to the establishment and quieting of title to real estate in case of the loss or destruction of public records by fire, flood, or earthquake, and providing that one claiming an estate in real estate may bring an action "in rem" against all the world. *Title & Document Restoration Co. v. Kerrigan*, 88 Pac. 356, 359, 150 Cal. 289, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199.

"It was early sought to classify all judicial proceedings and all judgments as in personam or in rem; but the courts and text-writers have encountered extreme difficulty in attempting to formulate satisfactory definitions of these terms. A proceeding in personam is one, in form as well as in substance, between the parties claiming the right, and that it is so inter partes appears from the record itself. The judgment in such a proceeding binds the judgment debtor to some sort of personal ability. Such a judgment debtor is not a passive party, but must be eminently active in the performance of any decree which may be made against him. 'A judgment in rem I understand to be an adjudication pronounced upon the status of some particular subject-matter by a tribunal having competent authority for that purpose. A judgment in rem is founded on a proceeding instituted, not against the person, as such, but against or upon the thing or subject-matter itself, whose state or condition is to be determined. It is a proceeding to de-

termine the state, or condition of the thing itself; and the judgment is a solemn declaration upon the status of the thing, and it ipso facto renders it what it declares it to be. There is, however, a large class of cases which are not strictly actions in rem, but are frequently spoken of as actions quasi in rem, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of nonresidents is attached and held for the discharge of debts due by them to citizens of the state, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff are in a general way thus designated. But they differ, among other things, from actions which are strictly in rem, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties." *Gassert v. Strong*, 98 Pac. 497, 501, 38 Mont. 18.

#### QUASI JUDICIAL

See, also, Judicial Power.

There is nothing sacred or inflexible in the meaning of the terms "judicial" or "quasi judicial" functions as applied to condemnation proceedings and the like. In their generally understood and accepted meaning they do not ascribe to lay public officers or bodies the judicial functions of courts of justice, but for want of more accurate terms they simply distinguish acts which are presumed to be the product of judgment based upon evidence, either oral or visual or both, as distinguished from those purely ministerial duties which can only be properly performed in one particular way. *People ex rel. Schau v. McWilliams*, 77 N. E. 785, 789, 185 N. Y. 92 (dissenting opinion).

Quasi judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed "quasi judicial." *Bair v. Struck*, 74 Pac. 69, 71, 29 Mont. 45, 63 L. R. A. 481 (citing *Mechem*, Pub. Off. § 637; *Bish. Non-Cont. Law*, §§ 785, 786); *People ex rel. School Dist. No. 5 in Mineral County v. Van Horn*, 77 Pac. 978, 982, 20 Colo. App. 215 (quoting with approval *Bish. Non-Cont. Law*, §§ 785, 786).

A "quasi judicial duty" is one lying in the judgment or discretion of an officer other than a judicial officer. The functions of the board of liquidation of the city debt of the

city of New Orleans are not strictly judicial, nor, on the other hand, ministerial, but are quasi judicial. When an officer is charged with looking into and acting upon facts not in a way which it specifically directs but after a discretion in its nature judicial, the function is termed "quasi judicial." An act is judicial when it requires the exercise of judgment or discretion by one or more persons or by a corporate body when acting as public officers in an official character in a manner which seems to them just and equitable. *State ex rel. Board of Liquidation of City Debt v. Briede*, 41 South. 487, 489, 117 La. 183 (citing *Bish. Cont. § 785*; *Throop*, Pub. Off. § 533; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *People v. Board of Supervisors of Schenectady County* [N. Y.] 35 Barb. 414).

Under Act March 3, 1899, known as the "State Medical Law," the state board of medical examiners, in the examination of applicants for a license to practice medicine and surgery, are required to exercise judgment and discretion in granting or refusing a license to such applicant, and in so doing exercises "quasi judicial functions." *Raaf v. State Board of Medical Examiners*, 84 Pac. 33, 36, 11 Idaho, 707.

A moderator of an elector's meeting is a "quasi judicial" officer. *Blake v. Brothers*, 66 Atl. 501, 79 Conn. 676, 11 L. R. A. (N. S.) 501.

#### QUASI OFFICE

A man who has received a plurality of the votes of his party at a primary election holds a recognized legal position which may be called, in default of a better term, a "quasi office," namely, that of a nominated candidate. *State ex rel. Gulon v. Miles*, 109 S. W. 595, 609, 210 Mo. 127 (citing *State ex rel. Rinder v. Goff*, 109 N. W. 628, 129 Wis. 668, 9 L. R. A. [N. S.] 916).

Where a person has been elected as a party candidate at a primary election and has received a certificate thereof, he is the holder of a "quasi office" of which he cannot be deprived by subsequent canvass of the vote, or other act of the board of canvassers. *State ex rel. Rinder v. Goff*, 109 N. W. 628, 632, 129 Wis. 668, 9 L. R. A. (N. S.) 916.

#### QUASI PARTNERSHIP

Where plaintiff advanced money to another to be used solely in carrying on of a specified business under the latter's name, the venture to continue five years, and plaintiff to be paid one-fourth of the net profits, and provision being made that, upon the death of the other, or the expiration of the stipulated period, the amount advanced, or so much thereof as should remain in the business, must be paid back to plaintiff, with a proportionate share of profits, plaintiff and the other stood towards each other in a "quasi part-

nership" or "joint adventure" relation. *Kirkwood v. Smith*, 95 N. Y. Supp. 926, 929, 47 Misc. Rep. 301.

### QUASI PUBLIC CORPORATION

See, also, Public Quasi Corporation.

A "quasi public corporation" is one engaged in a business affected with a public interest. *McCarter v. Firemen's Ins. Co.*, 73 Atl. 80, 82, 74 N. J. Eq. 372, 29 L. R. A. (N. S.) 1194, 135 Am. St. Rep. 708, 18 Ann. Cas. 1048.

A school district is a corporation of "quasi municipal" character, and though its territorial limits may be actually coterminous with those of a city, the identity of the school district as a corporate entity is not lost or merged in that of the city. *Los Angeles City School Dist. v. Longden*, 83 Pac. 246, 247, 148 Cal. 380.

A school district is a body corporate by statute, and is a "quasi public corporation," which can exercise only those powers expressly conferred upon it or arising by necessary implication. *First Nat. Bank of Waldron v. Whisenhunt*, 127 S. W. 968, 969, 94 Ark. 583.

School districts are "public quasi corporations" included in the term "municipal corporations" as used in Const. art. 7, § 7. *Smith v. Board of Trustees of Robersonville Graded School*, 53 S. E. 524, 529, 141 N. C. 143, 8 Ann. Cas. 529.

A school district is not a municipal corporation, but is a "quasi public corporation," devoted to the single purpose of building schoolhouses, furnishing the same, hiring teachers, levying taxes to support schools, incurring debts, and issuing bonds to further the purposes of taxation. *State ex rel. Carrollton School Dist. v. Gordon*, 133 S. W. 44, 51, 231 Mo. 547.

School districts are "quasi public corporations," and they raise funds for school purposes by the exercise of the taxing power of the territory. They are simply the agencies of the higher power. On behalf of the territory they cause taxes to be levied out of which schoolhouses are constructed, and such acts when performed by a school district are part of the general exercise of sovereignty which the territory exercises over its entire domain; and it cannot say, after the exercise of such power, that the property and rights so acquired belong to the district independent of the territory. School districts do not own a school building and grounds in the sense that it may sell or exchange or dispose of it except for the purpose of renewing or bettering the school facilities of the district, and for the same reason a county acting through its board of county commissioners, having erected a school building as provided in the separate school act of March 8, 1901, cannot sell or exchange or dispose of it as mere county property. *School Dist.*

*No. 71, Oklahoma County, v. Overholser*, 87 Pac. 665, 667, 17 Okl. 147 (quoting and adopting definition in Board of Education of City of Kingfisher v. Board of Com'rs of Kingfisher County, 78 Pac. 458, 14 Okl. 333).

A common carrier possessing the power of eminent domain is a "quasi public corporation." *Kakeldy v. Columbia & P. S. R. Co.*, 80 Pac. 205, 206, 37 Wash. 675.

Companies organized to distribute to cities and inhabitants thereof water or natural gas are universally recognized as being "quasi public corporations." *Quinby v. Consumers' Gas Trust Co.*, 140 Fed. 362, 364.

A waterworks company is a "quasi public corporation." It must supply water to all who apply therefor and offer to pay the rates. Waterworks companies are required to supply water impartially to all consumers, and they cannot act capriciously, or discriminate against any one who is able to pay for the water supplied. *Wiemer v. Louisville Water Co.*, 130 Fed. 251, 252 (quoting 3 Cook, Corp. § 931).

A corporation exercising a public franchise to supply light to the community, and enjoying public rights in the streets of a municipality, derived from the commonwealth through action of the board of aldermen of the city pursuant to authority from the Legislature, is a "quasi public corporation," and owes duties to the public and must exercise the franchise for the benefit of the public, with a reasonable regard for the rights of individuals who desire to be served, and without discrimination between them; and it cannot relieve itself from such duty so long as it retains its charter. *Weld v. Board of Gas & Electric Light Com'rs*, 84 N. E. 101, 102, 197 Mass. 556.

"A telephone company is a 'public quasi corporation' when it serves the public." A city council cannot prevent the lessee of a stall in the public market from employing telephonic service, provided the rights of others are not affected and legitimate ordinances of the municipality are not disregarded. *Swayze v. City of Monroe*, 40 South. 926, 928, 116 La. 643.

A corporation organized for the purpose of establishing and maintaining a public telephone system, for the purpose of furnishing telephone connection between its subscribers, is a quasi public corporation. Its business is of a public character. It depends upon the public for its support, and the public depends upon it for its accommodations. Such a corporation has such powers only as are expressly or impliedly granted by the statute under which it is organized. A quasi public corporation cannot disable itself for the performance of its functions by the sale and transfer of its property without legislative authority. *Cumberland Telephone & Telegraph Co. v. City of Evansville*, 127 Fed. 187, 190.

A railroad company chartered by authority of law is a "quasi public corporation," and the public have an interest in the location of its lines of road and depots. In the discharge of this duty, the company should recognize it as a paramount duty to establish and maintain its depots at such points and in such manner as to best subserve the public necessities and convenience. A contract which provides that for a consideration the location of a railroad depot by a railroad company shall be at a certain point, without regard to the right of the people or the public convenience, is contrary to public policy. *Enid Right of Way & Townsite Co. v. Lile*, 82 Pac. 810, 15 Okl. 328.

A railroad company chartered by authority of law is a "quasi public corporation," and the public have an interest in the location of the lines of road and depots. In the discharge of this duty the railroad company should recognize it as a paramount duty to establish and maintain depots at such points and in such manner to best subserve the public necessities and conveniences. A note made payable to a director or officer of a railroad company on condition that a railroad is to be built to a certain point by a certain time is void as against public policy. *McGuffin v. Coyle & Guss*, 85 Pac. 954, 959, 16 Okl. 648, 6 L. R. A. (N. S.) 524.

"Railroad companies are 'quasi public corporations,' created for the purpose of exercising the functions and performing the duties of common carriers. These duties are defined by law, and in accepting their charters they necessarily take with them all the duties and liabilities annexed, and they are required to supply to the extent of their resources adequate facilities for the transportation of all business offered and to deal fairly and impartially with their patrons." *Louisville & N. R. Co. v. Central Stockyards Co.*, 97 S. W. 778, 788, 133 Ky. 148 (quoting *Louisville & N. R. Co. v. Pittsburg & K. Coal Co.*, 64 S. W. 969, 111 Ky. 960, 55 L. R. A. 601, 98 Am. St. Rep. 447).

A railroad company is only a "quasi public corporation," and as such it must not only take into consideration the public welfare, but the private welfare of its shareholders as well in the location and construction of its line of road. A donation to its assets which enables it to build a contemplated line immediately, and a consideration in part of its immediate construction, or which enables it to build its line on a route which it might not otherwise be able to build, could not be held to be void on the ground of public policy. *Piper v. Choctaw Northern Townsite & Improvement Co.*, 85 Pac. 965, 967, 16 Okl. 436.

"A railroad company is a 'quasi public corporation.'" Its duties with reference to carrying freight and passengers are subjects

of legislative regulation and control. It is properly held to the highest degree of care for the safety of the lives and property thus intrusted to it, commensurate with the business in which it is engaged. Hence, since the rights of the public are involved and the safety of public travel demands a clear track and places upon the railroad company the duty to provide such a track, one who constantly rides upon the rails of the railroad company's track by means of a bicycle, and thereby menaces the safety of public travel, may be perpetually enjoined therefrom at the instance of the railroad company. *Atchison, T. & S. F. R. Co. v. Spaulding*, 77 Pac. 106, 107, 69 Kan. 431, 66 L. R. A. 587, 107 Am. St. Rep. 175, 2 Ann. Cas. 546 (citing *St. Joseph & D. C. R. Co. v. Ryan*, 11 Kan. 603, 15 Am. Rep. 357; *State v. Dodge City, M. & T. Ry. Co.*, 36 Pac. 747, 53 Kan. 378, 42 Am. St. Rep. 295).

A railroad is a "quasi public corporation" in which the public is interested. It holds a franchise from the state and must operate its road or forfeit its franchises. Though the decisions are not in harmony on the question, the best considered cases hold that its right of way cannot be sold on execution or for a street assessment. *Southern California Ry. Co. v. Workman*, 79 Pac. 586, 587, 146 Cal. 80, 2 Ann. Cas. 583.

Since a railroad company is a "quasi public corporation," the property of the railroad is private property and cannot be taken for private use, and therefore Act 1905 (24 St. at Large, p. 956), providing that railroad companies shall build side tracks connecting industrial enterprises with their main lines for the delivery and receipt of freight, the cost thereof to be paid by the enterprises and repaid by the companies in annual installments of 20 per cent. of the freight collected, is violative of Const. U. S. Amend. art. 14, and Const. art. 1, §§ 5, 17, as authorizing the taking of private property for private use. *Mays v. Seaboard Air Line R.*, 56 S. E. 30, 34, 75 S. C. 455 (citing *Moore v. Columbia & G. R. Co.*, 16 S. E. 781, 38 S. C. 1).

#### QUASI PUBLIC EMPLOYMENT

A telegraph company engaged in transmitting and delivering messages is engaged in a "quasi public employment," carried on for the accommodation of the community with a view to the general benefit, and under Rev. Laws, c. 122, § 9, it may not refuse to receive a proper message, for whose transmission payment has been tendered. *Vermilye v. Postal Telegraph Cable Co. of Massachusetts*, 91 N. E. 904, 905, 205 Mass. 598, 30 L. R. A. (N. S.) 472.

#### QUAY

See, also, *Pier*.

The word "quay" (quat) includes a levee on the bank of a river and the shore between

the exterior of the levee and the water. *De Armas v. Mayor, etc., of New Orleans*, 5 La. 182, 215.

A "quay" is a vacant space between the first row of buildings and the water's edge used for the reception of goods and merchandise imported or to be exported. In the Civil Code of Louisiana it is said to be common property to the use of which all the inhabitants of the city, and even strangers, are entitled in common, such as the streets and public walks. The term is well understood in all commercial countries, and, while there may be some difference of opinion as to its definition, there can be little or none in regard to its popular and commercial signification. It designates a space of ground appropriated to the public use, such use as the convenience of commerce requires. *New Orleans v. United States*, 10 Pet. [35 U. S.] 662, 715, 9 L. Ed. 573.

## QUESTION

See Drawn in Question; Federal Question; Hypothetical Question; Intricate Question; Judicial Question; Jurisdictional Question; Leading Question; Political Question.

Any question, see Any.

The word "question" does not necessarily mean an interrogative inquiry. As stated in *Bouvier's Law Dict.*, it may be a proposition, as "something in controversy, or which may be the subject of a controversy." In *re Merow*, 99 N. Y. Supp. 9, 20, 112 App. Div. 562.

## QUESTION IN DIFFERENCE

There was no "question in difference" between a justice of the peace who had issued a search warrant against L. which had been delivered to the sheriff, who had taken no steps to serve it, and L., which could be the subject of an action so as to authorize a submission by them of the question whether the justice had jurisdiction to receive and file the affidavit for the warrant and to issue the same under Code Civ. Proc. § 1138, providing that the parties to a "question in difference" which might be the subject of a civil action may, without action, agree on a case containing the facts on which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. In *re De Lucca*, 79 Pac. 853, 854, 146 Cal. 110.

## QUESTION OF ENGINEERING

The rule that, as long as there is no latent danger in the construction or maintenance of appliances, a servant assumes the risk of injury from the obvious character of such appliances, has no application between carrier and passenger; and hence, in an ac-

tion against a railroad by a passenger for injuries in a baggage room, that the construction of the baggage room was a "question of engineering," meaning a question of judgment in the construction of the appliance, was not a defense; it being the duty of defendant to have the room reasonably safe. *Bates v. Chicago, M. & St. P. Ry. Co.*, 122 N. W. 745, 747, 140 Wis. 235, 133 Am. St. Rep. 1069.

## QUESTION OF FACT

When undisputed facts require the exercise of reason and judgment so that one reasonable mind may infer that a controlling fact exists and another that it does not exist, there is a "question of fact" as affecting the Court of Appeals' jurisdiction of an appeal from the Appellate Division. *Hirsch v. Jones*, 83 N. E. 786, 787, 191 N. Y. 195.

## QUI TAM ACTION

When a portion of the penalty went to the person or persons informing, and a portion to the sovereign, the common-law action to recover a penalty was styled a "qui tam action." *Williams v. Wells Fargo & Co. Express*, 177 Fed. 352, 355, 101 C. C. A. 328, 35 L. R. A. (N. S.) 1034, 21 Ann. Cas. 699.

A "qui tam action" is "an action brought by an informer under a statute which establishes a penalty for the commission or omission of a certain act and provides that the same shall be recoverable in a civil action, part of the penalty to go to any person who will bring such an action and the remainder to the state or some other institution. It is called a 'qui tam action' because the plaintiff states that he sues as well for the state as for himself." *State ex rel. Rodes v. Warner*, 94 S. W. 962, 965, 197 Mo. 650 (quoting *Black's Law Dict. tit. "Qui Tam"*).

A prosecution brought under P. L. 1880, p. 218, § 13, prohibiting cruelty to animals, with a penalty collectible in an action of debt, in fact followed the procedure prescribed by section 16, P. L. 1880, p. 223, which provides that an offender may be taken before the nearest district court or justice of the peace, who may fine him not to exceed \$100. Section 15, P. L. 1880, p. 222, provides that one half of the fines and penalties collected under the act shall be paid to the informer, and the other half to the Society for the Prevention of Cruelty to Animals. P. L. 1902, p. 500, declares that no justice of the peace resident in any city where there is a district court shall exercise any civil jurisdiction. Held that, as the penalty recoverable was payable in part to the informer, the action was a "qui tam action," and as such a "civil action," of which the justice had no jurisdiction. *New Jersey Soc. for Prevention of Cruelty to Animals v. Russ*, 83 Atl. 961, 962, 83 N. J. Law, 450.

**QUIA TIMET**

See Bill Quia Timet.

**QUICK****QUICK ACTION TRIPLE VALVE**

"The devices belonging to the class known as 'quick action triple valves' are used in connection with the ordinary automatic brake systems on railways. Their special and peculiar utility consists in their adaptation for use in effecting the application of the brakes for making emergency stops." *Westinghouse Air Brake Co. v. Christensen Engineering Co.*, 128 Fed. 437, 438, 63 C. C. A. 179.

**QUICK ANSWER**

Plaintiff sold to defendant a quantity of goods warranted to be of good quality. Defendant, on receiving the goods, inspected them, and on Saturday after 5 p. m. notified plaintiff by wire that the goods were not as represented, but that they would be accepted if the price would be reduced a specified sum, and requested a "quick answer." Plaintiff wired its bank to accept the proposed reduction. The bank did not notify defendant of the message until the following Monday morning, and defendant then wired plaintiff that he would not take the goods. Held, that defendant's offer to take the goods notwithstanding the breach of warranty was not accepted, so as to become a binding contract. *Edgeworth v. Talerico* (Tex.) 95 S. W. 677, 678.

**QUICK ASSETS**

Where a corporation credit statement recited that the present mortgages did not cover any of the "quick assets" of the company, amounting to \$635,165.35 in cash, merchandise, accounts receivable, etc., which, together with equities in real estate and machinery of \$104,775.01, made the total assets \$829,940.36, the term "quick assets" was used merely to distinguish liquid assets from those permanently invested in the business, like real estate and machinery, and included amounts charged against officers for return of part of salaries paid them in a previous year, in accordance with the agreement of employment. *In re American Knit Goods Mfg. Co.*, 173 Fed. 480, 483, 97 C. C. A. 486.

**QUICK CHILD**

Child as including, see Child—Children (In Criminal Law).

**QUIESCENCE**

As acquiescence, see Acquiescence.

**QUIET****QUIET ENJOYMENT**

See Covenant for Quiet Enjoyment.

**QUIET HOUSE**

A "quiet, orderly house," or place for the sale of liquors, within the condition of a bond providing that a liquor dealer shall maintain such a place, is one in which no music, loud or boisterous talking, yelling, or indecent, vulgar language is allowed, used, or practiced, or any other noise calculated to disturb or annoy any person residing or doing business in that vicinity. *Adams v. State* (Tex.) 146 S. W. 1086, 1088.

**QUIRT**

A "quirt" is a rawhide whip plated with two thongs of buffalo hide. *Miller v. Meche*, 35 South. 491, 492, 111 La. 143 (quoting Webster, Dict.).

**QUIT**

The word "quit" is a contraction of the word "acquit," meaning to discharge. *Sherman v. Sherman*, 122 N. W. 439, 443, 23 S. D. 486.

**QUITCLAIM**

"Quitclaim" means in law to release a claim to by deed without covenants of warranty against adverse and paramount titles. *Bannard v. Duncan*, 112 N. W. 353, 355, 79 Neb. 189, 126 Am. St. Rep. 661 (quoting and adopting definition in Webster, Dict.).

The words "remise," "release," and "quitclaim" each mean to discharge. An agreement between the owners of land and a railroad company stated that, in consideration of a certain sum paid, the owners "do hereby discharge and forever release" the railroad company from all damages and claims whatsoever on account of the taking, etc., of the land, had the effect of a formal quitclaim deed, the operative words of which are "remise, release, and forever quitclaim," and served to discharge and release the railroad company from all claims of ownership and title to the lands, constituting the transaction a grant of real property, which as thoroughly divested the grantors of their title as a warranty deed with full covenants of title. *Sherman v. Sherman*, 122 N. W. 439, 443, 23 S. D. 486.

Where a deed recites that, in consideration of a specified sum paid by the grantee to the grantor, the grantor has sold, conveyed, and by the deed sells and conveys to the grantee, property described, and binds the grantor to deed, "quitclaim, assign, sell and transfer" the premises to the grantee, the use of the word "quitclaim" therein does not show that this is a "quitclaim deed" in the strict sense of that species of conveyance, the other language indicating an intention that the deed is more than a quitclaim deed, and conveys the premises of the grantee, who is entitled to the protection of a bona fide purchaser, where he paid the purchase mon-



ey without notice of the claim of a third person. *Allen v. Anderson & Anderson (Tex.)* 96 S. W. 54, 55.

### QUITCLAIM DEED

See Good and Sufficient Quitclaim Deed.

A "quitclaim deed" is defined as "a deed in the nature of a release, containing words of release and grant. It conveys such interest as the grantor may have, without covenants of title." A deed in which the granting clause states the grantors "do convey, grant, remise, release and quitclaim all their right, title, estate, interest, property, and equity in and to the" real estate described, is a "quitclaim deed," and is not within the statute providing that a covenant against incumbrances will be implied from the word "grant," and that after-acquired title of the grantor passes to the grantee, and hence title acquired by the assignment to the grantors of a certificate of sale under a mortgage in force at the date of the deed does not pass to the grantee. *State v. Kemmerer*, 84 N. W. 771, 773, 14 S. D. 169 (quoting and adopting definition in *And. Law Dict.*).

Under an agreement to convey by "quitclaim deed," the vendor is under no obligation to do more than quitclaim his interest in the land and is not required to give a good title. *McNellis v. Hilkowski*, 107 N. W. 965, 98 Minn. 127.

A deed with a habendum clause "to have and to hold the above-described premises" and with a general warranty of all the said premises with a description of the land "herein conveyed" was not a "quitclaim deed," but conveyed the land and not a mere chance of title. *Merriman v. Blalack*, 122 S. W. 403, 409, 57 Tex. Civ. App. 270.

"In form, a 'quitclaim deed' is like the common-law release, a derivative or secondary common-law form. In substance, it is similar to an original common-law deed creating an estate, and not requiring for its operation any estate in possession or otherwise in the grantee. In effect, it transfers to the grantee whatever interest the grantor has in the property described, be it a fee, chattel interest, a mere license, or nothing at all. A quitclaim deed operates as a release only of such interest as the grantor has or as may be specifically named, and it does not operate as an estoppel on the grantee, so as to preclude him from denying that he received any estate thereby or from setting up rights under superior titles. *Bryan v. Eason*, 61 S. E. 73, 74, 147 N. C. 284.

There is no difference in their operative force between a conveyance in the form of release and quitclaim and one in the form of a grant, bargain, or sale. Under a statute providing that a "quitclaim deed" may be substantially the same as a warranty deed with the word "quitclaim" inserted in connection with the words "do hereby grant,

bargain, sell and convey" as follows, "do hereby quitclaim, grant, bargain, sell and convey," and by omitting the words "and warrant the title to the same," providing that a quitclaim deed made in substantial compliance with the provisions of the act shall convey all the right, title, and interest of the maker, deed by which the parties of the first part "remised, released, and quitclaimed" and by these presents do for themselves, their heirs, executors, administrators, and assigns, remise, release, and forever quitclaim unto the other party, his heirs and assigns, all their right, title, estate, claim, and demand, both at law and in equity, all and in the property described, was valid, being a substantial compliance with the act. *Mosler v. Momson*, 74 Pac. 905, 906, 13 Okl. 41.

### As conveyance

See Conveyance.

### QUITE VIOLENT

The unexpected jarring of a passenger car, variously described as "swift," "quite violent," "terrible," "awful," "very severe," and "unexpected," as the train was passing over a cross-over switch used during the repair of one of the railroad company's bridges, which resulted in a passenger, who was standing near the open door of a car, being thrown from the car and injured, did not constitute negligence on the part of the carrier. *Foley v. Boston & M. R. R.*, 79 N. E. 765, 766, 193 Mass. 332, 7 L. R. A. (N. S.) 1076.

### QUO WARRANTO

See Information in the Nature of Quo Warranto.

The "writ of quo warranto" is a common-law process which became obsolete in England before the Revolution. This was a civil proceeding and issued out of chancery as a right in favor of the crown and against defendant. *Meehan v. Bachelder*, 59 Atl. 620, 73 N. H. 113, 6 Ann. Cas. 462.

"Quo warranto" is in the nature of a direct proceeding, in which the title to an office, as evidenced by the record, is assailed. *Daniels v. Newbold*, 100 N. W. 1119, 1120, 125 Iowa, 193.

"Quo warranto" is the appropriate remedy by which to test the title to office in a private corporation. *Hankins v. Newell*, 66 Atl. 929, 930, 75 N. J. Law, 26.

"Quo warranto" is the proper legal proceeding to determine the right to an office or franchise, or to oust the defendant therefrom if his title is found to be defective, or if his franchise has been forfeited or has expired. *State ex rel. Juny v. Louisiana, B. G. & A. Gravel Road Co.*, 86 S. W. 170, 172, 187 Mo. 439.

The purpose of a "quo warranto" at common law and in the territory of New Mexico

is to oust the respondent from an office which he is alleged to hold unlawfully, and not to install the relator or any person into such office. *Albright v. Territory*, 79 Pac. 719, 722, 13 N. M. 64, 11 Ann. Cas. 1165.

The purpose of the remedy by "quo warranto" is the recovery of an office or to oust from office the occupant. The occupant who already has the office and is in possession needs no such relief, and his sole remedy against unwarranted intrusion or interference is by injunction until the adverse claimant shall establish his title to the office in a court of law. *Callaghan v. Irvin*, 90 S. W. 335, 337, 40 Tex. Civ. App. 453.

"Quo warranto" is the remedy or proceeding where the state inquires into the legality of the claim which a party asserts to an office or franchise, and to oust him from its enjoyment if the claim be not well founded, or to have the same declared forfeited and recover it, if, having once been rightfully possessed and enjoyed, it has become forfeited for misuser or nonuser. *Moody v. Lowrimore*, 86 S. W. 400, 402, 74 Ark. 421 (quoting and adopting the definition in 2 Spell. Extr. Rem. § 1765).

"Quo warranto" is the proper method of determining disputed questions of title to public office, yet a mere groundless assumption of an election on the part of a person claiming title to public office, and the apparent exercise of the functions of the office de facto, will not deter the court, as a preliminary question, from examining the uncontroverted facts before it for the purpose of determining who has prima facie title, notwithstanding the person claiming the adverse title may not be a party to the proceeding. *Matney v. King*, 93 Pac. 737, 745, 20 Okl. 22.

"Quo warranto" had its origin in the theory that all special privileges (franchises) which are conferred upon an individual or corporation, and do not belong to the citizens of the county generally as a matter of common right, are the gift or grant of the king. When therefore it was claimed that such special privilege had been usurped without gift or grant thereof from the sovereign, or where the privilege so conferred was alleged to have been abused or the conditions thereof had not been observed, a writ was issued at the suit of the crown requiring the party charged with the usurpation to appear and show by what warrant or authority he assumed to exercise the privilege thus challenged. The use of the writ in this form was superseded by what was termed 'proceedings in the nature of quo warranto.' \* \* \* Both quo warranto and proceedings in the nature of quo warranto partook of the character of criminal proceedings." Code, tit. 21, c. 9, avoids the use of the words "quo warranto" or "proceedings in the nature of quo warranto." Its effect is to secure the essential purpose formerly effected by such proceed-

ings, i. e., the vindication of public rights and public interests against usurpation by invoking the ordinary powers of the court and conforming to the ordinary rules of procedure, subject only to the modification expressly mentioned therein. *State ex rel. Fullerton v. Des Moines City Ry. Co.*, 109 N. W. 867, 870, 135 Iowa, 604.

"The words 'quo warranto,' as used in Const. art 3, § 3, giving the Supreme Court original jurisdiction of quo warranto proceedings, are used as if their meaning were a matter of common understanding, and there must have existed at the time the Constitution was adopted a body of knowledge in which the terms were concurrent and to which resort may be had to ascertain their signification. \* \* \* When the Constitution was adopted, various notions were entertained respecting some of the essential common-law features of jurisdiction in quo warranto. By some courts it was held that all the virtues of the ancient prerogative writ of right, the writ of quo warranto, still persisted, while it was contended by others that proceedings of that nature had been entirely superseded by informations in the nature of quo warranto; and it was the opinion of many that the naming of one remedy differentiated it from the other. \* \* \* In framing the Constitution, the purpose appears to have been to confer jurisdiction broadly, and language was chosen which avoided the consequences of this diversity of opinion, and authorized all the relief which at common law could be given by a quo warranto proceeding of any kind. \* \* \* Such was the interpretation placed upon the Constitution by the Legislature of 1868, which in regulating the procedure authorized a civil action in any case in which a remedy might formerly have been obtained either by the writ of quo warranto or by an information in the nature of quo warranto. Hence the court possesses all the jurisdiction which the common law afforded in quo warranto in any form. \* \* \* The writ was of a civil nature. The information in the nature of quo warranto was originally criminal in form and purpose, the object of the proceeding being not merely to oust, but to fine, the usurper. \* \* \* In the progress of time, the fine fell to a nominal amount and its imposition was ultimately discontinued in England, though the practice still prevails in some of the American states. \* \* \* Therefore, through a gradual process of evolution, the procedure by information became essentially civil in character." *State ex rel. Jackson v. Anheuser-Busch Brewing Ass'n*, 90 Pac. 777, 778, 78 Kan. 184 (citing *State v. Foster*, 3 Pac. 534, 32 Kan. 14).

#### As civil proceeding

Quo warranto is a civil action to redress a public wrong or enforce a public right. *State ex rel. Attorney General v. Norcross*,

112 N. W. 40, 43, 132 Wis. 534, 122 Am. St. Rep. 998.

Under Code 1896, § 3428, "quo warranto" is a civil action, and the complaint must allege the act or omission complained of concisely and clearly, and if faulty in that respect it is demurrable. *State ex rel. Goodgame v. Matthews*, 45 South. 307, 153 Ala. 646.

#### As information in nature of quo warranto

The term "quo warranto," used in Gen. St. 1878, c. 63, § 1, relating to informations in the nature of quo warranto, must be deemed to refer to "an information in the nature of quo warranto" as existing at the common law. *State ex rel. Young v. Village of Kent*, 104 N. W. 948, 953, 96 Minn. 255, 1 L. R. A. (N. S.) 826, 6 Ann. Cas. 905.

The modern proceeding in "quo warranto," known as the information in the nature of a writ of quo warranto, was originally a criminal proceeding; the common-law writ of quo warranto having become obsolete long before the American Revolution. Hence under a state statute authorizing the issuance of writs of quo warranto, the court may issue informations in the nature of writs of quo warranto. *Meehan v. Bachelder*, 59 Atl. 620, 73 N. H. 113, 6 Ann. Cas. 462.

"Quo warranto," as used in Const. Mo. art. 6, § 3, providing that the Supreme Court shall have power to issue writs of "quo warranto," was intended to convey in abbreviated form the meaning that phrase had for so long a prior period, and so continually used to mean "information in the nature of quo warranto, etc."; the writ having fallen into disuse in England and the proceeding having been conducted by information. *State ex inf. Hadley v. Standard Oil Co.*, 116 S. W. 902, 1008, 218 Mo. 1.

The constitutional provision giving the Supreme Court original jurisdiction of "writs of quo warranto" does not confine such jurisdiction to a quo warranto proceeding proper, but extends the same to proceedings by information in the nature of quo warranto; the words "writ of quo warranto" being used in the Constitution as the legal equivalent and synonym of "information in the nature of quo warranto," which is the modern substitute for the ancient writ of quo warranto. *State ex inf. Hadley v. Standard Oil Co.*, 116 S. W. 902, 1008, 218 Mo. 1.

#### Information in the nature of quo warranto distinguished

The ancient writ of "quo warranto" was in the nature of a writ of right, invocable by the king against persons claiming or usurping an office or liberty, to inquire by what authority they asserted right thereto, and the judgment was conclusive even as against the crown, while a proceeding by "information in

the nature of quo warranto" is properly a criminal prosecution instituted not only to fine the usurper, but to oust him from the office, franchise, or liberty. *State v. Sengstacken*, 122 Pac. 292, 295, 61 Or. 455.

## QUORUM

Majority of quorum, see Majority.

A "quorum" is a majority of an aggregate body of men in absence of express provision to the contrary. *Gumaer v. Cripple Creek Tunnel, Transp. & Min. Co.*, 90 Pac. 81, 84, 85, 40 Colo. 1, 122 Am. St. Rep. 1024, 13 Ann. Cas. 781.

"Of assemblages of political parties regularly called, those who actually assemble constitute a 'quorum.'" *Walling v. Landson*, 97 Pac. 396, 410, 15 Idaho, 282.

Where an act constituting the board of police commissioners did not define how many should constitute a "quorum," the usual parliamentary rule should apply, and three of the four members thereof will constitute a "quorum." *McManus v. Board of Police Com'rs of City of Newark*, 62 Atl. 997, 998, 73 N. J. Law, 307.

Under Const. art. 5, § 11, providing that when the Supreme Court, Court of Criminal Appeals, Court of Civil Appeals, or any member of either, shall be disqualified to hear any case, the same shall be certified to the Governor, who shall commission the requisite number of persons for the determination of the case, etc., the disqualification of one of the judges of the Court of Criminal Appeals does not require the appointment of a special judge; but the remaining judges who are qualified, being a quorum, may determine the case. The question of the number of judges necessary to authorize the transaction of business by a court is as a general rule to be determined from the Constitution or statutory provisions creating and regulating courts, and as a general rule a majority of the members of a court is a "quorum" for the transaction of business and the decision of cases. *Long v. State*, 127 S. W. 551, 557, 59 Tex. Cr. R. 103, Ann. Cas. 1912A, 1244.

Pub. Acts 1903, No. 232, § 10, provides that a majority of the directors of every manufacturing or mercantile corporation convened according to the by-laws shall constitute a quorum for the transaction of business, and the stockholders holding a majority of the stock at any meeting shall be capable of transacting the business of that meeting, except as herein otherwise provided, and that at all meetings of such stockholders each share shall be entitled to one vote; stockholders being permitted to vote in person or proxy. Held that, in order to constitute a statutory quorum to hold a lawful meeting of stockholders for the transaction of business, a majority of all the stock must be represented in person or by proxy. *Hill v. Town*, 138

N. W. 334, 336, 172 Mich. 508, 42 L. R. A. (N. S.) 799.

## QUOTATION

See Continuous Quotations.

### QUOTATION OF PRICES

"A 'quotation of prices' is not an offer to sell in the sense that a complete contract will arise out of the mere acceptance of the rate offered or the giving of an order for merchandise in accordance with the proposed terms. It requires the acceptance by the one naming the price of the order so made to complete the transaction. Until thus com-

pleted, there is no mutuality of obligation." Buckberg v. Washburn-Crosby Co., 92 S. W. 733, 734, 115 Mo. App. 701.

## QUOTIENT VERDICT

A "quotient verdict"—that is, a verdict based upon the average judgment of all the jurors—is not illegal, where it does not affirmatively appear that there was an agreement beforehand to abide by the average of the amounts the jurors were in favor of awarding; the presumption of law being that no such arrangement was made. State ex rel. Senter v. Cowell, 102 S. W. 573, 574, 125 Mo. App. 348.

## R

**R. L. D.**

The abbreviation "R. L. D.," as used in the blanks and reports of the United States revenue service, means "retail liquor dealer." *State v. Nippert*, 86 Pac. 478, 479, 74 Kan. 371.

The courts will take judicial notice that the abbreviations "R. L. D.," as used in the records of the collector of internal revenue, mean "Retail Liquor Dealer." *Billingsley v. State*, 113 Pac. 241, 243, 4 Okl. Cr. 597.

**R. M. L. D.**

Courts take judicial notice that the initials "R. M. L. D.," used in the records of the internal revenue office to designate the business for which a permit has been issued, mean "retail malt liquor dealer." *City of Topeka v. Stevenson*, 99 Pac. 589, 79 Kan. 394, 131 Am. St. Rep. 297, 17 Ann. Cas. 491.

**RACE**

See Colored Race; Mill Race.

Separation of as within police power, see Police Power.

The term "race" primarily means an ethnical stock; a great division of mankind having in common certain distinguishing physical peculiarities, constituting a comprehensive class appearing to be derived from a distinct primitive source. A second definition is a tribal or national stock; a division or subdivision of one of the great racial stocks of mankind, distinguished by minor peculiarities. The word "race" connotes descent. In *re Halladjian*, 174 Fed. 834, 837.

An actual and not a feigned trial of speed is necessary to constitute a "race." *Lockman v. Cobb*, 91 S. W. 546, 550, 77 Ark. 279 (citing and adopting *Webb v. Fulchire*, 25 N. C. 485, 40 Am. Dec. 419).

Sess. Acts 1905, p. 185, c. 82, is entitled "A bill to be entitled 'An act to prohibit gambling on races.'" Section 1 provides that it shall be unlawful to gamble upon the result of any trial or contest of skill or power of endurance of man or beast. Section 2 is not confined to the matter of betting or wagering on races, but extends to every bet or wager, whatever may be the subject thereof. Held, that the word "races," as used in the title, embraces only contests of progression, including speed and endurance, and that the subject-matter of the act is not within the title, as required by Const. art. 2, § 17, which provides that no bill shall become a law which embraces more than one subject, that subject to be expressed in the title. *State v. Hayes*, 93 S. W. 98, 99, 116 Tenn. 40.

**RACER**

A "racer" is the name applied to carriers used for delivering the strands of leather to be braided in a whiplash-braiding machine. *Mesick v. Hassler*, 134 Fed. 395.

**RADIATION**

A contract for the installation of a heating plant in a residence, stipulating that the boiler and radiators shall be of sufficient capacity to heat the building, requires the installation of a boiler and radiators which, when constructed and joined together, will produce the results promised; "radiation" referring to the heating capacity of the radiators when connected with the boiler. *Cooper v. Scott Co.*, 120 N. W. 631, 633, 143 Iowa, 744.

**RADIUS**

Under a rule of a telegraph company providing that messages will be delivered free within "a radius" of one-half mile from the office, a straight line is meant, without regard to distance by the nearest traveled route. *George v. State*, 84 S. W. 1057, 1058, 47 Tex. Cr. R. 545.

**RAFFLE**

A "raffle" is a game of perfect chance in which every participant is equal with every other in the proportion of his risk and prospective gain, and the price is a common fund or that which is purchased by a common fund. *Risien v. State*, 71 S. W. 974, 975, 44 Tex. Cr. R. 413 (citing *Stearnes v. State*, 21 Tex. 692).

**RAFT**

See Sack Raft.

**RAFTAGE**

"Raftage" is the expense of floating and running logs to market. *Moss Point Lumber Co. v. Thompson*, 35 South. 828, 83 Miss. 499.

**RAGS**

Clippings of woolen material, produced in the process of making up garments, are "rags," within both the popular and the commercial signification of the term. *United States v. Pearson & Emmott*, 131 Fed. 571, 572; *Id.*, 137 Fed. 1021, 70 C. C. A. 306.

The provision for "rags" in paragraph 648, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201, includes coarse pieces of jute bagging which are in their condition as torn from cotton bales, and are not sufficiently large and otherwise suitable for other use than as mere rags in stuffing and as

paper stock. *Train-Smith Co. v. United States*, 140 Fed. 113.

Selected pieces of second-hand jute bagging, intended for patching the covering of cotton bales, are not "bagging for cotton, gunny cloth, and similar fabrics, suitable for covering cotton," under *Tariff Act July 24, 1897*, c. 11, § 1, *Schedule J*, par. 344, 30 Stat. 181, nor "rags," under section 2, *Free List*, par. 648, 30 Stat. 201, but are dutiable as "waste" under section 1, *Schedule N*, par. 463, 30 Stat. 194. *United States v. Davies*, 160 Fed. 456, 457, 87 C. C. A. 672.

## RAIL

The term "rails," as used in *Const. art. 13, § 10*, relating to taxation of railroad companies, means simply the rails in place on the roadbed constituting the superstructure of the railroad. *San Francisco & S. J. V. Ry. Co. v. City of Stockton*, 84 Pac. 771, 774, 149 Cal. 83.

The word "rails" in *Const. art. 13, § 10*, providing that the franchise, roadway, roadbed, rails, and rolling stock of railroads operating in more than one county shall be assessed by the State Board of Equalization, does not include spur tracks and switches, though on the actual roadway. *Atchison, T. & S. F. Ry. Co. v. Los Angeles County*, 111 Pac. 250, 251, 158 Cal. 437.

Steel rails, which are new, but by reason of defects are depreciated in value, but which have not lost their character or identity as "rails," are not within the provision in paragraph 122, *Schedule C*, § 1, *Tariff Act July 24, 1897*, 30 Stat. 159, c. 11, for "scrap steel \* \* \* fit only to be remanufactured," but are dutiable as "rails" under paragraph 130, 30 Stat. 160, even though they may be intended to be used as scrap iron. *Illinois Cent. R. Co. v. McCall*, 147 Fed. 925.

The word "rail" ordinarily means a strip of timber or metal generally used for wheels to run on, and as used in a contract to deliver to defendant piles "f. o. b. cars at N. & S. rail" could not be construed to mean an established railroad siding in absence of evidence showing that that meaning was intended, so that, in an action on the contract, parol evidence was admissible that the meaning of the word was determined by the parties by defendant on plaintiff's demand, designating the place of delivery, at which place plaintiff delivered the piles. *Willis v. Jarrett Const. Co.*, 67 S. E. 265, 267, 152 N. C. 100.

## RAILING

The word "railing" in a statute authorizing actions against towns for injuries by defects in a bridge, culvert, etc., or dangerous embankments and defective railings, means a railing necessary to guard travelers

from going over dangerous embankments, and not railings used as handrails, and a pedestrian injured while using steps leading from a sidewalk to a crosswalk over a street, by reason of slipping on the ice on steps, cannot recover because of the absence of a handrail. *Wentworth v. Town of Pittsfield*, 62 Atl. 218, 219, 73 N. H. 358.

## RAILROAD—RAILWAY

See *Belt Railroad*; *Branch Railroad*; *City Railway*; *Connecting Railroad*; *Continuous Railroad*; *Interurban Railroad*; *Lateral Railroad*; *Line of Railroad*; *Margin of Railroad*; *One Railroad*; *Over Whole Line of Railroad*; *Parallel Railroads*; *Part of Railroad*; *Practical Railroad Operatives*; *Proprietor of Railroad*; *Scenic Railway*; *Single Railroad*; *Steam Railroad*; *Street Surface Railroad*; *Suburban Railroad*; *Surface Railroad*; *Tram Railroad*; *Trunk Railway*; *Value of Railroad*.

Any business connected with said railway, see *Any*.

Any other railroad, see *Any Other*.

Any railroad, see *Any*.

Complete railroad, see *Complete—Completion*.

Connecting branch of railroad, see *Connecting Branch*.

Control of railroad, see *Control*.

Employed on railroad, see *Employed*.

Engaged in operation of railroad, see *Engaged*.

Extension of railroad, see *Extension*.

Facilities of railroads, see *Facilities*.

Improvement of railroad, see *Improvement*.

Location of railroad, see *Location*.

Operating railroad, see *Operate*.

Owner of railroad, see *Owner*.

Plant of railroad, see *Plant*.

System of railroad, see *System*.

Use of railroad, see *Use—Used*.

A "railroad" is an entity; its being is created by a charter granted by the commonwealth, declaring it a public highway for the conveyance of passengers and the transportations of freight; it acts as a body; its tracks are all owned and used by the corporate entity; and its stockholders receive their dividends from the net proceeds of its entire traffic. *Pennsylvania R. Co. v. Philadelphia County*, 68 Atl. 676, 686, 220 Pa. 100, 15 L. R. A. (N. S.) 108.

A "railroad," including in that term the tracks, platforms, instrumentalities, and equipment furnished by its owners to carry freight and passengers, is a vast machine, and it is at the same time a place for the servants of the company to work. *Canadian Northern Ry. Co. v. Walker*, 172 Fed. 346, 350, 97 C. C. A. 44, 24 L. R. A. (N. S.) 1020.

The term "railroad," as used in a municipal charter provision providing for the regulation of the construction of railroads and street railways "through the municipality," indicates the common carrier of passengers and freight. *Gill v. City of Lake Charles*, 48 South. 440, 442, 122 La. 1019.

A corporation which carries freight, although not a common carrier, is a "railroad" under the direct provisions of Rev. St. Mo. 1909, § 3214, if the physical equipment is that of a railroad. *Mound City Transfer Ry. Co. v. Wabash R. Co.*, 133 S. W. 611, 615, 154 Mo. App. 156.

"The fact that passengers may rarely, if ever, pass over a line, does not deprive it of its character as a 'railroad.'" *Collier v. Union Ry. Co.*, 83 S. W. 155, 162, 113 Tenn. 96.

The word "railway" or "railroad," when not qualified by the word "street" or other expression of similar import, has special reference to what are sometimes denominated commercial railroads. *McLeod v. Chicago & N. W. R. Co.*, 101 N. W. 77, 80, 125 Iowa, 270.

The words "railroad" and "railway" have identically the same meaning, and the use of the word "railway" in one phrase, and "railroad" in another, in referring to a corporation in an affidavit of illegality filed by the security, was not a substantial and material change in the name of the corporation. *Paramore v. Alexander*, 64 S. E. 660, 662, 132 Ga. 642.

The terms "railroad" and "railway," as used in the statutes of Montana relating to railroad corporations, are synonymous terms and refer to those engaged in the general passenger and freight traffic of the state. The provision that a judgment against any railway corporation for any injury to person or property shall be a lien superior to that of any mortgage relates exclusively to steam railroads or railways of commerce, and has no application to street railroads. *Daily Bank & Trust Co. v. Great Falls St. Ry. Co.*, 80 Pac. 252, 254, 32 Mont. 298.

"'Railway' and 'railroad' are synonymous, and in all ordinary circumstances are to be treated as without distinction, and when either of them is used in a statute, and the context requires that a particular kind of road is intended, that kind will be held to be the subject of the statutory provision; but if the context contains no such indication, and either of the words are used in describing the subject-matter, the statute will be applicable to every species of road embraced within the general sense of the word used." *Riggs v. St. Francois County Ry. Co.*, 96 S. W. 707, 708, 120 Mo. App. 335 (quoting and adopting the rule laid down in *Gyger v. Philadelphia City P. Ry. Co.*, 20 Atl. 399, 136 Pa. 104).

In an action against a railroad company for breach of a shipping contract made with a company with which it was alleged defendant had consolidated, an allegation that the contract was made with the K. "Railroad" Company, and that the consolidation was between defendant and the K. "Railway" Company, did not allege that the contract was made with a different corporation from that with which defendant consolidated, the words "railroad" and "railway" being descriptive of the corporation, and synonymous. *Black v. St. Louis & S. F. R. Co.*, 85 S. W. 96, 97, 110 Mo. App. 198.

In the absence of evidence of another corporation of a similar name, the jury may infer that defendant, named in the caption of the complaint as "Mobile Light & Railroad Company, a corporation," was, as alleged, operating the street car in the city of M. that killed plaintiff's mule, from his testimony that he had a mule killed on a certain street in such city, that the railroad track runs on such street, that it was the track of the "Mobile Light & Railway," and that "they" operated cars down that street; the words "railroad" and "railway" being practically synonymous. *Mobile Light & R. Co. v. Mackay*, 48 South. 509, 158 Ala. 51.

Ky. St. 1903, § 842a, provides that interurban electric railroad companies authorized to construct a railroad 10 or more miles in length incorporated under the laws of the commonwealth shall have the same rights, powers, and privileges as are now granted to or conferred upon railroad companies. Section 835 et seq. permit condemnation of land by any company authorized to construct a railroad which shall be unable to contract with the owner of any land necessary for its use. A railroad corporation was organized to construct and operate a line of railway not exceeding 10 miles long from the city of Covington to the town of Erlanger, and such points beyond as might thereafter be determined upon, to be operated by electricity or other improved methods of rapid transit. Held, that the term "railroad," as used in section 835, has the same meaning as "railway," and that the company had the same right to condemn private property for a right of way that a steam railroad would have, especially since under its charter it might use steam. *Devon v. Cincinnati, C. & E. Ry. Co.*, 109 S. W. 361, 363, 128 Ky. 768.

The term "railroad," as used in Acts 1899, c. 4700, prohibiting any "railroad" from making unjust discrimination in its rates, or charges, of toll, or compensation for transporting passengers or freight, upon its tracks, or any of the branches thereof, or upon any "railroad" within the state which it has the right, license, or permission to use, operate, or control, includes all the road in use by any corporation, receiver, trustee, or any other person operating the railroad, whether oper-

ated under a contract, agreement, lease, or otherwise. *State ex rel. Railroad Commissioners v. Seaboard Air Line Ry.*, 37 South. 314, 319, 48 Fla. 129.

In discussing the liability of railroads for violation of the Interstate Commerce Act by unjust discriminations, the court says: "In the absence of such special circumstances, we are not aware of any principle or ground on which one of the common carriers would incur liability on account of the exaction of illegal charges by other common carriers over the through route during a period when the former carrier was not co-operating with the others. Section 1, in defining the word 'railroad' as employed in the act, certainly does not countenance such an idea of liability. It provides that the term 'railroad' so far as used in this act shall include \* \* \* all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease." *Western New York & P. R. Co. v. Penn Refining Co., Limited, of Oil City, Pa.*, 137 Fed. 343, 356, 70 C. C. A. 23.

Intrastate railroads and employes wholly engaged in local business were not affected by the provisions of Act March 4, 1907, c. 2939, § 2, making it "unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employé subject to this act to be or remain on duty" for a longer period than that prescribed, since such carriers and employes are defined in section 1 as those who are engaged in the transportation of passengers or property by railroad in the District of Columbia or the territories, or in interstate or foreign commerce, although that section further defines "railroad" as including all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any carrier operating a railroad by contract, agreement, or lease, and "employes" as meaning persons actually engaged in, or connected with, the movement of any train. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 31 Sup. Ct. 621, 624, 221 U. S. 612, 55 L. Ed. 878.

In general use the word "railroad" is understood to signify a road constructed of cross-ties on which iron rails are placed and dedicated to public use under the general law regulating public highways, but as used in a deed to a corporation organized under a statute providing for the creation of corporations except for railroad purposes, and which recites that the corporation contemplates building a "tram or railroad," and which grants to it a right of way on which to locate its "road, depot, stationhouses," etc., may well be construed as a private road such as the improvement company was authorized to construct with iron rails. *Beasley v. Aberdeen & R. R. Co.*, 59 S. E. 60, 62, 145 N. C. 272.

The phrase "railway," when used in connection with a patent for a pleasure car moved by an independent means of locomotion, may not necessarily include a vehicle traveling on a pair of fixed rails, but it does denote that the vehicle travels in a predetermined course rigidly controlled to that course independently of the will of the occupant. A bicycle following a groove, and not controlled by the sides, is a railway within the meaning of the patent laws. *Frazer v. Rohr*, 180 Fed. 773, 774.

Where a corporation owned and operated standard gauge railroad tracks in connection with its factory, renting a locomotive to handle cars in its yards, such tracks constituted a "railroad" within *Sayles' Ann. Civ. St.* 1897, art. 4560f, making a corporation operating a "railroad" liable for damages sustained by an employé while operating the cars, etc., by reason of the negligence of a fellow servant. *Cunningham v. Neal*, 109 S. W. 455, 456, 49 Tex. Civ. App. 613.

Code, § 2071, makes every railroad company liable for damages to employes by the management of the engineers of other employes, when such wrongs are in any manner connected with the use and operation of any railway about which they shall be employed. Plaintiff was a machinist's helper in the machine shop of defendant railroad company where engines were brought for repairs, his duty being to block the wheels of an engine when placed over the draw pit in the shop and to remove such blocks when the engine was to be moved. After one set of wheels had been put on an engine and it was about to be moved by another engine, in order to put on the second pair of drivers, plaintiff attempted to brush a chock from under the wheel of the dead engine, when the other engine started without warning and crushed his hand. The operating department of the railroad had no control over the machine shops, which were used only for repairing disabled equipment which had been withdrawn from service, and not merely for temporary repairs and cleaning, as were the roundhouses. Held, that the statute referred to the physical "use and operation" of the railroad in transportation, and the rails on the shop floor did not constitute a "railway," nor was the movement of the repaired engine by the other engine done in the "use and operation" of the railway, within the meaning of the statute, so that the company was not liable for the negligence of the engineer in starting the live engine. *Slaats v. Chicago, M. & St. P. Ry. Co.*, 129 N. W. 63, 64, 149 Iowa, 735, 47 L. R. A. (N. S.) 129, Ann. Cas. 1912D, 642.

Michigan Railroad Commission Act (Pub. Acts 1909, No. 300) § 7a, declaring that nothing in the act shall require any railroad to give the use of its tracks or terminal facilities to another railroad engaged in like business, and Pub. Acts 1911, No. 139, adding to



section 7, subd. d, requiring railroads to transport car load freight consigned locally between points in the same city or town from a junction or transfer point or intersection with another railroad, to team tracks or other sidings of any line operated by the delivering carrier, etc., were consistent with each other, so that the latter subdivision was not in conflict with the former, as requiring a carrier to submit its terminal facilities to the use of another railroad. *Grand Trunk Ry. Co. of Canada v. Michigan Railroad Commission*, 198 Fed. 1009, 1022.

#### **Bridges and ferries**

A corporation organized under the Michigan statute "providing for the incorporation of railroads," whose business was to build and own a bridge used solely for railroad purposes, and which has always reported to the Railroad Commissioner and paid taxes as a railroad company is a "railroad," within the provisions of Act No. 173, Acts Mich. 1901, providing for the taxation of the property of railroad companies. *Sault Ste. Marie Bridge Co. v. Powers*, 138 Fed. 262, 263 (citing *Pittsburgh, C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co.*, 9 Sup. Ct. 770, 131 U. S. 371-389, 33 L. Ed. 137).

The act of Congress regulating commerce (1 Supp. Rev. St. 529), defining the term "railroad" as including all bridges and ferries used or operated in connection with any railroad, applies to a ferry operated in connection with a railroad, for the transportation of passengers between New York City and points in New Jersey, and elsewhere, and prevents regulation of rates of ferriage by the state. *New York Cent. & H. R. R. Co. v. Board of Chosen Freeholders*, 65 Atl. 860, 864, 74 N. J. Law, 367.

There is no legal requirement that a railroad shall be of any particular length, nor is it essential that it should own rolling stock. A ferry company operated in connection therewith a number of tracks over which steam cars were drawn to and from the ferry; such tracks being the only ones over which cars could pass to the ferry and be carried over the river to other tracks. The tracks were also used for storage, for loading and unloading, and for regular traffic and switching purposes. Held that the tracks constituted a railroad within the statute providing for the assessment and taxation of railroads. *State ex rel. Hammer v. Wiggins Ferry Co.*, 106 S. W. 1005, 1010, 208 Mo. 622.

Intrastate railroads and employes wholly engaged in local business were not affected by the provisions of Act March 4, 1907, c. 2939, § 2, making it "unlawful for any common carrier, its officers or agents, subject to this act, to require or permit any employe subject to this act to be or remain on duty" for a longer period than that prescribed, since such carriers and employes are defined

in section 1 as those who are engaged in the transportation of passengers or property by railroad in the District of Columbia or the territories, or in interstate or foreign commerce, although that section further defines "railroad" as including all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any carrier operating a railroad by contract, agreement, or lease, and "employes" as meaning persons actually engaged in, or connected with, the movement of any train. *Baltimore & O. R. Co. v. Interstate Commerce Commission*, 31 Sup. Ct. 621, 624, 221 U. S. 612, 55 L. Ed. 878.

An interstate bridge corporation owning in an adjoining state a terminal railroad operated in connection with the bridge is within the term "railroad" as used in the statute providing for the assessment of railroad property by the State Board of Tax Commissioners. *City of Jeffersonville v. Louisville & J. Bridge Co.*, 83 N. E. 337, 341, 169 Ind. 645.

#### **Cut**

The railroad cut is as much a part of the railroad structure as is the fill. They are both necessary to produce a level track, and it is the duty of the railroad company to see that the cut is in safe condition as well as the fill. *Fisher's Adm'r v. Chesapeake & O. Ry. Co.*, 52 S. E. 373, 374, 104 Va. 635, 2 L. R. A. (N. S.) 954.

#### **Depots and other buildings**

The word "road," as used in Gen. St. 1894, § 2692, requiring every railroad company in this state to fence its road, and imposing a liability for all damages resulting from a failure of compliance therewith, held to apply to the repair shops and side tracks if practicable to be fenced. *Mattes v. Great Northern R. Co.*, 104 N. W. 234, 235, 95 Minn. 386.

The word "railroad," as ordinarily understood, includes many kinds of property, real and personal, and cannot be confined to the track or the land necessary to lay the track on, and land acquired for depot facilities and so used may be deemed within the meaning of the word. *Bostwick v. Florida Cent. & W. R. Co.*, 56 South. 290, 292, 61 Fla. 850 (citing *Knevals v. Florida Cent. & P. R. Co.*, 66 Fed. 224, 13 C. C. A. 410).

#### **Electric railroad**

Code 1907, § 5473, providing that the engineer or other person having control of the running of a locomotive on any "railroad" shall blow the whistle or ring the bell in certain designated situations, does not apply to interurban railroads operated by electricity. *Birmingham Ry., Light & Power Co. v. Ozburn*, 56 South. 599, 600, 4 Ala. App. 399.

Laws 1905, c. 97, providing for the appropriation of land for railroad purposes, and declaring in section 13 that the court may

regulate the place and manner of making connections and crossings, applies to electric railroads, whether incorporated under the statute authorizing the incorporation of railroads or not, as well as to steam railroads; they being railroads within the meaning of the act. *Atchison, T. & S. F. Ry. Co. v. Citizens' Traction & Power Co.*, 113 P. 810, 811, 16 N. M. 154. ¶

The words "railroad" and "railroad company," as used in section 1, c. 142, Laws of 1877, and in amended section 1, c. 183, Laws of 1887, do not mean "street railway," "electric street railway," or an interurban company such as is described in the petition in this case. *O'Malley v. Board of Com'rs of Riley County*, 121 Pac. 1108, 1110, 86 Kan. 752, Ann. Cas. 1913C, 578.

The word "railroad" does not include street railroads, and an interurban road is regarded as a street railroad. An interurban railroad for the operation of cars by electricity and by the tractive friction resulting from their own weight is not within the act of April 25, 1901 (97 Ohio Laws, p. 546), "to provide how railroad and highway crossings may be constructed." *Com'rs of Ross County v. Scioto Valley Traction Co.*, 80 N. E. 176, 177, 75 Ohio St. 548.

A municipal corporation has no authority to compel an interurban or street railroad company to light its bridge or railroad within the limits of such corporation. Section 1536—176, Revised Statutes 1908, applies only to steam railroads. *Ohio Electric Ry. Co. v. Village of Ottawa*, 97 N. E. 835, 85 Ohio St. 229.

Code, § 2072, requiring a bell and a steam whistle to be placed on each locomotive engine operated on any railway, and the whistle to be sounded 60 rods before a highway crossing is reached, and the bell to be rung from that time continuously till the crossing is passed, is made applicable to electric interurban railways by Acts 29th Gen. Assem. c. 81, § 2 (Code Supp. § 2033b), providing that the word "railway," as used in the Code, shall apply to and include all interurban railways, so that an interurban railway failing to give the signals required by section 2072 is guilty of negligence per se. *Swisher v. Interurban Ry. Co.*, 130 N. W. 404, 405, 151 Iowa, 384.

Railroad Commission Law (Laws 1907, p. 70, c. 53, § 11), makes the term "railroad" as used therein include all corporations which operate by electric power any interurban railroad, etc. Section 28 authorizes the Railroad Commission, upon complaint of any municipality that fares are unreasonable, or discriminatory, to investigate and order just and reasonable fares, upon finding that those complained of are unreasonable or unjustly discriminatory. Section 48 makes it unlawful to charge smaller compensation to persons furnishing part of the facilities than to other

persons. Section 49 makes the giving of an unreasonable preference, or the subjecting of any person to an unreasonable prejudice, an unjust discrimination. Section 59 requires the act to be liberally construed to attain the public welfare and substantial justice between passengers and railroads. Section 61 makes the duties of railroads the same as at common law, and the remedies against them the same, except where otherwise provided, and makes the provisions of the act cumulative. Held, in view of section 61, that the Railroad Commission could correct charges made by an electric railroad company which were unjustly discriminatory as to a locality, upon complaint of a town, independent of Laws 1909, p. 158, c. 97, making the provisions of the railroad commission law applicable to any locality. *Portland Ry., Light & Power Co. v. Railroad Commission*, 105 Pac. 709, 711, 56 Or. 468.

#### Elevated railway

Rev. Laws 1902, c. 106, § 71, cl. 3, which first appeared in St. 1887, p. 899, c. 270, gives a right of action to an employé injured through the negligence of any person in the service of the employer who has charge or control of a railroad train. The Revised Laws, enacted 10 years after railroad corporations were authorized to use electric power, described, in chapter 111, § 1, a railroad as a railroad or railway of the class usually operated by steam power. St. 1908, p. 370, c. 420, changes said clause 3 by adding to it the term "elevated railway," as distinguished from the term "railroad," and makes the clause applicable to a train on an elevated railway. Held, that the latter statute was not declaratory of the existing law, but amendatory, imposing on elevated railway companies a new burden, and that prior to the passage of such statute an elevated electric railway was not a "railroad," within the meaning of said clause. *McGilvery v. Boston Elevated Ry. Co.*, 86 N. E. 893, 895, 200 Mass. 551.

#### Logging railroad

The word "railroad," as used in *Sayles' Ann. Civ. St.* 1897, art. 4560h, prescribing what railroad employes are fellow servants with each other, includes a logging railroad operated by a corporation solely to carry its own lumber from the woods to its sawmill. *Keystone Mills Co. v. Chambers (Tex.)* 118 S. W. 178.

The word "railroad," as used in *Revisal* 1905, § 2646, depriving any railroad operating in the state of the defense of assumption of risk as to any defect in the machinery, ways, or appliances of the company, means any road operated by steam or electricity on rails, and hence includes logging railroads and street railroads. *Hemphill v. Buck Creek Lumber Co.*, 54 S. E. 420, 421, 141 N. C. 487.

The word "railroad," as used in *Sayles' Ann. Civ. St.* 1897, art. 4560f, making every corporation operating a railroad liable for

damages to its servants by negligence of other servants, is used in the same sense as in article 3017, making the proprietor of any railroad liable for death caused by its negligence, and does not relate only to such railroads as are common carriers, but includes a logging railroad operated by a corporation solely for the purpose of carrying its own lumber from the woods to its sawmill, and from thence to a nearby railroad station. *Lodwick Lumber Co. v. Taylor*, 87 S. W. 358, 359, 360, 39 Tex. Civ. App. 302.

Laws 1901, c. 27, declares that all suits against railroad corporations or any receiver operating any railway in the state for personal injuries resulting in death or otherwise, shall be brought either in the county in which the injury occurred or in the county in which the plaintiff resided at the time of the injury. Held, that the word "railroad," in such act, was not limited to a commercial railroad, but included a tram road operated as appurtenant to a sawmill by receivers of the sawmill corporation, so that an action for injuries to a brakeman thereon was triable in the county where plaintiff resided and where the injury occurred, though the principal office of the receivers and corporation was in another county. *Receivers of Kirby Lumber Co. v. Lloyd*, 124 S. W. 903, 103 Tex. 153.

Though owned by a limited company, and having for its primary and principal function the carrying of logs to a saw mill, a railroad which runs regular trains for freight and passengers, with a fixed schedule of charges, is entitled to the exemption accorded by article 230 of the Constitution to "any railroad, or part of such railroad," constructed within certain specified dates. Defendant's contention which was overruled was that the "railroad" meant by said article 230 was the same as meant by article 272—a common and public carrier organized and operated by a duly chartered railroad company endowed with all the rights and bound to the public by all the responsibilities of such carriers. *Amos Kent Lumber & Brick Co. v. Tax Assessor of Parish of St. Helena*, 38 South. 587, 588, 114 La. 862.

Denial by the Supreme Court of a writ of error to review a decision of the Court of Civil Appeals, adjudging that a logging road of a lumber company is a "railroad" within Rev. St. 1895, art. 3017, authorizing an action for wrongful death caused by the negligence of any railroad, is a decision of the Supreme Court that such road is a railroad, and the decision is conclusive on the Court of Civil Appeals on a subsequent appeal, and the court will not certify the question to the Supreme Court. *Rice & Lyon v. Lewis (Tex.)* 125 S. W. 961, 963.

A company chartered with the power of eminent domain, and authorized to construct railways, etc., for the transportation of passengers and freight, including logs, lumber, timber, etc., though its chief purpose was to

exploit certain timber land and market the timber thereon, was a "railroad," and subject to the fellow-servant act (Priv. Laws 1897, p. 83, c. 56), and hence such company and the trustee in charge and control were responsible for actionable negligence in the operation of the road under a lease and in the exercise of the franchise. *Wright v. Caney River Ry. Co.*, 66 S. W. 588, 589, 151 N. C. 529, 19 Ann. Cas. 384.

Pub. Acts 1909, No. 300, as amended by Pub. Acts 1911, No. 139, creating the Railroad Commission, defining the term "common carrier" as one operating as a common carrier any railroad, spurs, terminal facilities necessary in the transportation of persons or property, and defining the term "railroad" as meaning all railroads, provided that the act shall not apply to any logging or other private railroad not doing business as a common carrier, and conferring on the Commission jurisdiction over side tracks and branches, in so far as the same are used by common carriers, includes branch roads built by railroads for lumbermen. *Detroit & M. Ry. Co. v. Michigan R. Commission*, 137 N. W. 329, 332, 171 Mich. 335.

A logging railroad which is standard gauged, steel railed, connected by switch with another railroad, operated by steam engines and standard gauged cars, and has branches extending for convenience into the woods, over which the same engines and cars are used, which branches are sometimes taken up and relaid elsewhere, is a railroad within Revisal 1905, § 2018, relative to the liability of railroad companies for labor performed in constructing a railroad for a contractor, although in 1872, when that section was first enacted, there were no logging railroads in existence, since legislative enactments, in general and comprehensive terms, prospective in operation apply alike to all persons, subjects and business within their general scope coming into existence subsequent to their passage. *Carter v. Coharie Lumber Co.*, 75 S. E. 1074, 1075, 160 N. C. 8.

#### **As highway or road**

See Highway; Road.

#### **Operation of trains required**

A "railroad" has been defined as a road or way on which iron rails are laid for wheels to run on for the conveyance of heavy loads and vehicles. Such a track is a "railroad" independently of the use made of the track in the hauling of cars over it. *United States v. Union Stock Yards Co. of Omaha*, 161 Fed. 919, 923 (citing *Dinsmore v. Racine & M. R. Co.*, 12 Wis. 649; *Lake Superior & M. R. Co. v. United States*, 93 U. S. 442, 23 L. Ed. 965).

#### **Power plant**

Pub. St. 1901, c. 55, § 6, provides that the real estate of a railroad, not used in its ordinary business, shall be taxed in the town where situated. Chapter 64, § 1, provides

for the taxation by the state of the road, rolling stock, and equipment of railroad corporations. Held, that a power plant of a railroad company, used to generate power for the operation of the railroad, is not a part of its "road," and is not used in the ordinary business of the railroad, and hence is taxable in the town where situated, especially as chapter 55, § 6, when originally enacted as Laws of 1844, c. 141, § 1, only provided for the exemption from local taxation of the real estate of railroads on which a part of the capital stock has been expended, so as to entitle the town where it was situated to a portion of the state tax, as provided in Rev. St. 1843, c. 39, §§ 4, 5. *Boston & M. R. R. v. City of Franklin*, 84 Atl. 44, 45, 76 N. H. 459.

#### **All property included**

The law treats a "railroad" and its appurtenances as one entire thing. *St. Louis Southwestern Ry. Co. v. Grayson*, 78 S. W. 777, 779, 72 Ark. 119.

As used in Rev. St. 1883, c. 6, § 42, as amended by Pub. Laws 1901, p. 160, c. 145, relating to taxation, the word "railroad" comprehends the equipment, roadbed, sites of depots and warehouses and other real estate, and the words "line or system" cannot be disconnected from it, and mean in this connection a railroad operated as a part of a line or system extending beyond the state. *State v. Canadian Pac. R. Co.*, 60 Atl. 901, 902, 100 Me. 202.

In common and accepted usage the meaning of the term "railways" and "railroads" has been extended to include not only the permanent way, but everything necessary to its operation, including the stations, warehouses, roundhouses, locomotive, and car shops, and also all other property of the operating company. Under Code, § 1994, providing that a railroad corporation may take land otherwise than by consent of the owner to the extent of a strip 100 feet in width, a strip along a 100-foot right of way, purchased by the railroad to protect the right of way from snow, was a part of the railroad, within section 2022, requiring a railroad to construct an adequate crossing on demand of one owning land on both sides of the road. *Mattice v. Chicago Great Western Ry. Co.*, 107 N. W. 949, 950, 130 Iowa, 749 (citing Cent. Dict.; *Gibbs v. Drew*, 16 Fla. 147, 26 Am. Rep. 700; *United States Trust Co. v. Atlantic & P. R. Co.*, 47 Pac. 725, 8 N. M. 673; *Atchison, T. & S. F. Ry. Co. v. Kansas City, M. & O. Ry. Co.*, 70 Pac. 939, 67 Kan. 569; *State ex rel. New Haven & D. R. Co. v. Railroad Commissioners*, 15 Atl. 756, 56 Conn. 308; *Miller v. Rutland & W. R. Co.*, 36 Vt. 452; *State Treasurer v. Somerville & M. R. Co.*, 28 N. J. Law, 21; *United States v. Denver & R. G. R. Co.*, 14 Sup. Ct. 11, 150 U. S. 1, 37 L. Ed. 975).

#### **As property**

See Personal Property.

#### **As public use**

See Public Use (In Eminent Domain).

#### **As railroad company**

Under Const. art. 9, § 8, prohibiting the granting of a license to a foreign corporation to build a railroad within the state, and providing that where a "railroad" is partly within the state the owners or projectors must incorporate in the state, the term "railroad" does not mean railroad corporation, but refers to the property fairly falling within the term "railroad," including track, rolling stock, station houses, and generally such property as is usual, incident, or necessary to the operation of a railroad, doubtless including all franchises when conferred. *Carolina, C. & O. R. Co. v. McCown*, 66 S. E. 418, 423, 84 S. C. 318 (citing 7 Words and Phrases, pp. 5900, 5901).

The word "railroads," in Greater New York City Charter, Laws 1901, c. 466, § 242, as amended by Laws 1905, c. 629, § 14, conferring on the board of estimate and apportionment the exclusive power to grant franchises or rights, or make contracts providing for the occupation of any of the streets for "railroads" for the transportation of persons or property, means public service corporations for the transportation of persons and possibly of property, and the board has no authority to grant to the owners of a department store the right to construct and operate a spur track in the street to connect its store with a street railway, to be used exclusively for the transportation of its goods. *Hatfield v. Straus*, 82 N. E. 172, 176, 189 N. Y. 208.

Kirby's Dig. § 6732, provides that the term "railroad" or "railroad corporation," shall be deemed to mean all corporations owning or operating any railroad in the state. Section 6743 provides that any railroad existing under the laws of any other state may buy or lease, or otherwise acquire, any railroad within the state, with all the rights thereto pertaining. Section 6757 provides that, if a railway company of another state shall lease a railroad, such part of the road as shall be within the state shall be subject to all regulations relative to railroads in the state, and section 6758 provides that a corporation of another state, being the lessee of a railroad in the state, shall be liable for a violation of any of the laws in the state, and liable to be sued therefor. Held, that a foreign corporation, which is the lessee of a railroad in the state, is liable, under the statute requiring railroads to erect stock gaps, where the road passes through inclosed land. *St. Louis & S. F. R. Co. v. Hale*, 100 S. W. 1148, 82 Ark. 175.

**Side tracks and branch lines**

"The term 'railroad' includes all side tracks necessary or convenient for the transaction of the company's business." *Roby v. State*, 107 N. W. 766, 767, 76 Neb. 450 (citing *Rock Creek Tp. v. Strong*, 96 U. S. 271, 24 L. Ed. 815; *Black v. Philadelphia & R. R. Co.*, 58 Pa. 249; *Town of Mason v. Ohio River R. Co.*, 41 S. E. 418, 51 W. Va. 183; *State ex rel. Murphy v. Stone*, 25 S. W. 211, 119 Mo. 668).

The word "road," as used in *Gen. St. Minn.* 1894, § 2692, requiring every railroad company in this state to fence its road, and imposing a liability for all damages resulting from a failure of compliance therewith, held to apply to the repair shops and side tracks if practicable to be fenced. *Mattes v. Great Northern Ry. Co.*, 104 N. W. 234, 235, 95 Minn. 386.

Civ. Code, § 465, subd. 4, provides that a railroad should have power to lay out its road not exceeding nine rods wide, and to construct and maintain the same with a single track and with such appendages and adjuncts as might be necessary for its convenient use, and subdivision 5 authorized the construction of the "road" along any street so as not to unnecessarily impair its usefulness or injure its franchise, etc. Held, that the word "road" was not used in subdivision 5 in connection with "appendages and adjuncts" as in subdivision 4, and therefore should be construed only to include the railroad's single or double track, as the case might be, and hence the city had no power to grant a railroad company the right to lay a third track in a street for any purpose. *City of Los Angeles v. Southern Pac. R. Co.*, 108 P. 65, 68, 157 Cal. 363.

Under a statute defining a "railroad" as "all the road in use by any corporation," a railroad transporting a car load of freight for a short distance, as a mile, using a switch engine for motive power, is as much a common carrier as if the road extended a long distance. *State ex rel. Railroad Com'rs v. Atlantic Coast Line R. Co.*, 52 South. 4, 10, 59 Fla. 612 (quoting the definition in *Missouri Pac. Ry. Co. v. Wichita Wholesale Grocery Co.*, 40 Pac. 899, 55 Kan. 525).

Where a private switch leading to a mill was used by defendant railroad company in transporting cars in interstate commerce to and from the mill, as they were consigned, with the railroad's own engines and crews, such track constituted a "railroad" and a part of defendant's line to which the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531), was applicable. *Gray v. Louisville & N. R. Co.*, 197 Fed. 874, 876.

Comp. Laws 1897, § 6234, authorizing a railroad company to construct its "road" upon or across a highway, relates to its main line tracks and necessary side tracks in

transporting passengers and freight, and does not authorize the construction of additional tracks, occupying about 200 feet of the highway, for yard purposes, without the consent of the highway commissioners. *Highway Com'r of Ecorse Tp. v. Wabash R. Co.*, 111 N. W. 1090, 1091, 148 Mich. 436.

**Street railroad**

The term "railroad" is a generic term under which street railroads fall as a species, unless by the text of the law in which the former term is used it appears that the intention was not to include in it the latter kind of railroads. *Shreveport Traction Co. v. Kansas City, S. & G. Ry. Co.*, 44 South. 457, 462, 119 La. 759.

"A 'railway' is a way which is made for the movement of cars, or something of that character, upon tracks that are laid down either on the street or somewhere else. They are not propelled as ordinary vehicles, such as wagons and carriages, are on the highways generally, but require for their operation that tracks be expressly formed to be moved upon, and a street railway is of that character." *Minneapolis St. Ry. Co. v. City of Minneapolis*, 155 Fed. 989, 995.

While the word "railroad" is ordinarily held not to include a street railway, this is not an arbitrary and inflexible rule and where street railways are within the spirit and purpose of a law, although not expressly named, they have been regarded as covered by the general term "railroad." *Kansas City, O. B. & E. R. Co. v. Board of R. Com'rs*, 84 Pac. 755, 73 Kan. 168 (citing 7 Words and Phrases, pp. 5904, 5907).

The term "railroad," when used in statutes, may or may not embrace a street railroad; its meaning in each case depending upon the connection in which it is used. *Westerman v. Supreme Lodge Knights of Pythias*, 94 S. W. 470, 488, 196 Mo. 670, 5 L. R. A. (N. S.) 1114 (quoting *Sams v. St. Louis & M. R. Co.*, 73 S. W. 686, 174 Mo. 53, 61 L. R. A. 475); *Riggs v. St. Francois County Ry. Co.*, 96 S. W. 707, 708, 120 Mo. App. 335 (quoting and adopting statement in *Sams v. St. Louis & M. R. Co.*, 73 S. W. 686, 174 Mo. 53, 61 L. R. A. 475).

The word "railroad," as used in *Revisal 1905*, § 2646, depriving any railroad operating in the state of the defense of assumption of risk as to any defect in the machinery, ways, or appliances of the company, means any road operated by steam or electricity on rails, and hence includes logging railroads and street railroads. *Hemphill v. Buck Creek Lumber Co.*, 54 S. E. 420, 421, 141 N. C. 487.

The word "railroad" does not include street railroads, and an interurban road is regarded as a street railroad. An interurban railroad for the operation of cars by electricity and by the tractive friction resulting from

their own weight is not within the act of April 25, 1901 (97 Ohio Laws, p. 546), "to provide how railroad and highway crossings may be constructed." *Com'rs of Ross County v. Scioto Valley Traction Co.*, 80 N. E. 176, 177, 75 Ohio St. 548.

A street railroad is not a "railroad," within Gen. St. 1901, § 2098, making it an offense to willfully injure any locomotive, car, or other machinery in use upon any railroad within the state. *State v. Cain*, 70 Pac. 443, 444, 69 Kan. 186.

Where a company organized under the general railroad law built a road in the streets of a city, as organized by an ordinance thereof, to carry freight from manufacturing not otherwise accessible by steam railroads, and the road was operated as a steam railroad in connection with the road of the lessee, it was subject to taxation as a "railroad" and not as a street railway. *City of Detroit v. Detroit Manufacturers' R. R.*, 113 N. W. 365, 366, 149 Mich. 530.

The words "railroad" and "railroad company," as used in section 1, c. 142, Laws 1877, and in amended section 1, c. 183, Laws 1887, do not mean "street railway," "electric street railway," or an interurban company such as is described in the petition in this case. *O'Malley v. Board of Com'rs of Riley County*, 121 Pac. 1108, 1110, 86 Kan. 752, Ann. Cas. 1913C, 576.

The Century Dictionary defines a "street railway" as a railroad constructed upon the surface of a public street in towns and cities, and Am. & Eng. Ency. of Law states that "the distinctive and essential features of a 'street railway,' as distinguished from other railroads, are the location of the road upon the surface of streets and highways, its mode of operation, and its use for the carriage of passengers." In re *Minneapolis & St. P. Suburban Ry. Co.*, 112 N. W. 13, 16, 101 Minn. 132.

The word "railroad," as used in law, is broad enough to include street railroads, and many cases have arisen where the courts have held that the word does in its signification include such. Each case is to be determined upon its own facts, having in view the circumstances, the context, the presumed intention of the lawmakers, and the general policy of the state in regard to the particular matter. *San Francisco & S. M. Electric R. Co. v. Scott*, 75 Pac. 575, 576, 142 Cal. 222 (citing *Ferguson v. Sherman*, 47 Pac. 1023, 116 Cal. 169, 176, 37 L. R. A. 622).

The provision of the Virginia Constitution abolishing the doctrine of fellow servants, so far as it affects the liability of the master for injuries to a servant, etc., as to every employé of a railroad company, affects only railroads proper or "commercial railroads," and does not apply to street car companies. *Norfolk, etc., Traction Co. v. Ellington's*

*Adm'r*, 61 S. E. 779, 780, 783, 108 Va. 245, 17 L. R. A. (N. S.) 117.

A municipal corporation has no authority to compel an interurban or street railroad company to light its bridge or railroad within the limits of such corporation. Section 1536—176, Rev. St. 1908, applies only to steam railroads. *Ohio Electric Ry. Co. v. Village of Ottawa*, 97 N. E. 835, 85 Ohio St. 229.

An electric street railway doing an interstate business in the carriage of passengers, although incorporated under the street railroad statutes of a state, and not authorized to carry freight, nor vested with the right of eminent domain, is a "railroad," within Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379, as amended by Act June 29, 1906, c. 3591, 34 Stat. 584. *Omaha & C. B. St. Ry. Co. v. Interstate Commerce Commission*, 191 Fed. 40—48.

Gen. St. 1902, § 4140, provides that, if any person shall have a claim for services rendered in the construction of any railroad or any of its appurtenances, etc., such claim shall be a lien on said railroad, etc. Held, that a street railway is a "railroad" on the property of which a lien may be enforced, though Gen. St. 1902, § 1, provides that the phrase "railroad company," as used in the statutes, shall in general be construed to mean a corporation operating a railroad by steam power, and though other statutes dealing with railroads refer to steam railroad companies as "railroad companies," and street railroad companies as "street railway companies." *Egan v. Cheshire St. Ry. Co.*, 61 Atl. 950, 951, 78 Conn. 291.

There is a well-defined distinction between the definition of the words "railroad" and "street railway." The one is a word of general and extended meaning, applying to all roads incorporated under the general law, and has always been held to impose an additional servitude upon a public way for which abutting owners are entitled to compensation. The other is local in its signification, referring to transportation of a character entirely different from that of a general railroad, and has been held to add no burden as an additional servitude. *Ecorse Tp. v. Jackson, A. A. & D. Ry.*, 117 N. W. 89, 91, 153 Mich. 393.

Civ. Code, § 291, providing that the articles of incorporation of any "railroad" must state the kind of road intended to be constructed, the places from and to which it is intended to be run, its estimated length, and that 10 per cent. of the capital stock subscribed has been paid in; section 293 providing that such a proposed corporation before filing articles must have subscribed to its capital stock \$1,000 for each mile of contemplated work; section 294 providing that before the articles are filed there must have been paid for the benefit of the corporation,

10 per cent. of the amount subscribed; and section 295 providing that before the Secretary of State issues to such a corporation a certificate of filing of articles of incorporation, there must be filed in his office an affidavit that the required amount of stock has been subscribed, and 10 per cent. thereof paid in—have no application to street railroads corporations. *Huntington v. Curry*, 112 Pac. 583, 584, 14 Cal. App. 468.

"The Constitution, statutes, and decisions of this state recognize that the word 'railroad' is generic, and includes street railroads, narrow gauge roads, horse car companies, dummy lines, and street railroads operated by electricity. Whether a particular statute applies to any one of these various forms of railroads is to be determined from the language of the statute, from the context, or from the intent of the lawmakers." Civ. Code 1895, § 2234, providing that "all engine drivers and conductors must cause the trains which they respectively drive and conduct to come to a full stop within 50 feet of the place of crossing," where the tracks of separate and independent railroads cross each other, does not apply to a street railway, so as to compel it to stop its cars before crossing a steam railroad track. *Georgia Ry. & Electric Co. v. Joiner*, 48 S. E. 336, 337, 120 Ga. 905 (quoting *Savannah T. & I. of H. Ry. v. Williams*, 43 S. E. 751, 117 Ga. 414, 61 L. R. A. 249).

Technically a "railroad" is a way or road on which rails are laid for wheels to run on for the conveyance of heavy loads and vehicles. The term is generic, and embraces all species of road constructed by corporations of a quasi public character. Whether a road is a railroad depends on the mode of construction and chartered use and not on the motive power; it being declared in the original act for the incorporation of railroads (1 Rev. St. 1852, p. 409, c. 83; section 5153, cl. 8, Burns' Ann. St. 1901) that they should have power to convey persons and property by steam, animal, or any mechanical power or any combination of them. Act May 12, 1869 (Laws 1869, p. 92, c. 44), was entitled an act to authorize aid to the construction of "railroads" by counties and towns, etc. Act March 9, 1903 (Acts 1903, p. 233, c. 134), provided that wherever the word "railroad" occurred in either section of the act of 1869 or any section of any subsequent act amendatory or supplemental to the act of 1869 the same should extend to every kind of street railroad, suburban street railroad, or interurban street railroad by whatever power its vehicles were transported. *Held*, that the word "railroad" in the act of 1869 was not limited to steam railroads, so that the act of 1903 was not objectionable as not germane to the title of the act of 1869. *McCleary v. Babcock*, 82 N. E. 453, 456, 169 Ind. 228.

"Railroads now exist in great variety as regards motors and motive power, the size and style of cars and coaches, and methods of operation and construction. It is probable that these variations will be multiplied in the coming years. It is doubtful whether any permanent and satisfactory classification can now be made. There has been a general concurrence, however, in embracing all railroads in two divisions or classes: (1) Commercial railroads, and (2) street railroads. Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another or between one place and another. So far they have not been successfully operated, to any extent at least, except by steam. They are usually not constructed upon the public streets or highways, except for short distances. Street railroads embrace all such as are constructed and operated in the public streets for the purpose of conveying passengers, with their ordinary hand luggage, from one point to another on the street." *Wilder v. Aurora, De Kalb & R. Electric Traction Co.*, 75 N. E. 194, 206, 216 Ill. 493 (quoting and adopting definition in *Lewis, Em. Dom.* vol. 1, § 110a).

While street railways are not specifically mentioned under either title of Gen. St. Minn. 1866, c. 34, relating to the formation of corporations, title 1 providing generally for corporations which are or may be authorized to exercise the power of eminent domain, and specifying certain public service corporations, such as those formed for the construction of railways, canals, and works of like character, and title 2, providing for all other corporations for pecuniary profit, all those specified therein being for the conducting of purely private enterprises, the nature of their business is such as to render them quasi public corporations, which might properly be authorized to exercise the power of eminent domain, and to bring them within the generic term "railways," and hence a street railroad company organized under said chapter came within the provisions of and derived its powers from title 1, having the right as therein provided to fix the term of its corporate existence at 50 years. *Minneapolis St. Ry. Co. v. City of Minneapolis*, 155 Fed. 989, 995.

Fellow Servant Act (Pub. Laws 1909, No. 104), abolishing the defense of fellow servant in actions for injuries to railroad employes, is entitled "An act to prescribe the liability of common carrier railroad companies to their employes," and section 1 of the act makes it applicable to every common carrier railroad company in the state. *Held* that, since street railroads are common carriers, the word "railroad" was sufficiently broad to include street railroads, and that the act was therefore not limited to commercial railroads, but included street railroads as well. *Arends v. Grand Rapids Ry. Co.*, 138 N. W. 195, 196, 172 Mich. 448.

**As limited to street railroads**

The tax law (Laws 1881, c. 293), defining the terms, "land," "real estate," and "real property" as including "all surface, underground or elevated railroads," and the value of all franchises to construct or operate railroads, in, under, above or through streets, is not limited to street surface railroads only, but includes long distance surface steam railroads, and hence a franchise granted by the state to a steam surface railroad for its road in, under, above, or through streets is property, and a special franchise, and taxable. *People ex rel. New York Cent. & H. R. R. Co. v. Woodbury*, 133 N. Y. Supp. 135, 139, 74 Misc. Rep. 130, 145.

**As structure**

See Permanent Structure.

**As track**

The word "railway," as used in a complaint in an action for a wrongful killing of an engineer, alleging that the said "railway" from which the engine intestate was operating was derailed, was defective, may be construed as synonymous with track, and was sufficiently specific as to defects. *E. E. Jackson Lumber Co. v. Cunningham*, 37 South. 445, 447, 141 Ala. 206.

A petition in an action against a carrier which alleges negligence of servants in charge of the "railroad, train, and roadbed" alleges that the track was defective, though the word "roadbed" does not include track and ties, since the word "railroad" is broad enough to include the roadbed and the superstructure including crossties, rails, and fastenings. *Skiles v. St. Louis, I. M. & S. Ry. Co.*, 108 S. W. 1082, 1084, 130 Mo. App. 162.

**Tramways in mines**

A tramway laid in the slope of a mine upon which tram cars operated by electric motors on tracks having switches and run in carrying ore from the bottom of the slope or mine to the top where the cars are dumped, is a "railway" within the meaning of the employer's liability act (Code 1907, § 3910, subd. 5), which makes the master liable for injuries to a servant caused by the negligence of any servant in charge of any car, train, etc., on a "railway." *Woodward Iron Co. v. Lewis*, 54 South. 566, 570, 171 Ala. 233.

The operation of a tramway upon which small cars were operated by gravity, except for a short distance, where cables were sometimes used to haul dirt from the pits to plaintiff's brick-making machinery, did not constitute the operation of a "railroad," within an application for an employer's liability policy which stated that assured did not operate a railroad on its premises. *South Knoxville Brick Co. v. Empire State Surety Co.*, 150 S. W. 92, 93, 126 Tenn. 402, Ann. Cas. 1913E, 107.

**Viaduct**

Where a corporation was granted the right to "build a railroad," it had power to build a viaduct across certain streets in a city on which to lay its tracks, the effect of which was to change the crossing from a grade crossing to an elevated one. *Bubbenzer v. Philadelphia, B. & W. R. Co. (Del.)* 61 Atl. 270, 273.

**RAILROAD BONDS**

As property, see Property.

**RAILROAD BRIDGE**

A "railroad bridge" means a viaduct constructed for the exclusive use of railroad transportation. *Diebold v. Kentucky Traction Co.*, 77 S. W. 674, 676, 117 Ky. 146, 63 L. R. A. 637, 111 Am. St. Rep. 230, 4 Ann. Cas. 445 (citing *Louisville & P. R. Co. v. Louisville City Ry. Co.*, 2 Duv. [63 Ky.] 175).

**RAILROAD BUSINESS**

See Gross Earnings.

Money received by a railroad company for services of its employes in loading cars for lumbermen constitutes money received from "railroad business," and cannot be distinguished on the ground that the services were performed for the mere accommodation of shippers; the railroad being authorized by its charter to load property received for transportation, and the proceeds from such work being therefore subject to gross earnings taxation. *State v. Minnesota & I. Ry. Co.*, 118 N. W. 679, 681, 106 Minn. 176, 16 Ann. Cas. 426.

**RAILROAD CAR**

As commerce, see Commerce.

As house, see House.

As property, see Property.

Pinching a railroad car, see Pinching.

One who breaks and enters a freight car resting on timbers on railroad ground after the removal of the trucks, and occupied by section hands as a lodging place, and who commits larceny therein, violates Code, § 4791, punishing the burglary of any office, shop, store, warehouse, railroad car, or any building in which goods are kept, though the structure is not a "railroad car" as alleged, but is a building within the statute. *State v. Anderson*, 135 N. W. 405, 154 Iowa, 701.

**RAILROAD CATTLE GAP OR GUARD**

A "railroad cattle gap or guard" is a contrivance to restrain cattle. In a sense it is a fence, but the construction of the gap or guard itself is not limited in its dangerous quality as is a fence. To be at all effective and serviceable, it cannot be a barrier erected perpendicular to the surface of the ground, and rising above it, but must, in order to answer the purpose in view, be so constructed that its appearance of dangerousness will, under ordinary circumstances, deter cattle



from attempting to pass over it; and, in so ordering the gap or guard, a really dangerous contrivance may be properly installed without, in the event of injury to cattle attempting to cross it, rendering the railway company liable, if the fact of its want of safety for that purpose is the proximate cause of the injury. *Carrollton Short Line Ry. Co. v. Lipsey*, 43 South. 836, 837, 150 Ala. 570.

### RAILROAD COMPANY

See *Commercial Railroad Company*;  
*Street Railway Company*.

As common carrier, see *Common Carrier*.

As private corporation, see *Private Corporation*.

As public corporation, see *Public Corporation*.

As public service corporation, see *Public Service Corporation*.

As quasi public corporation, see *Quasi Public Corporation*.

As telegraph company, see *Telegraph Company*.

Every railroad company, see *Every*.

"Railroad companies," as they exist in this country, are corporations in which private capital is embarked in a public occupation, that of common carriage. These corporations possess, therefore, a dual nature, having in trust, on the one hand, the financial interests of their stockholders, and, on the other, the convenience and safety of the traveling public. *Shelton v. Erie R. Co.*, 66 Atl. 403, 405, 73 N. J. Law, 558, 9 L. R. A. (N. S.) 727, 118 Am. St. Rep. 704, 9 Ann. Cas. 883.

A corporation engaged as a common carrier by rail in the channels of interstate commerce is a "railroad company," within the terms of the Hepburn Act of February 29, 1906, prohibiting such companies from transporting, in interstate commerce, commodities with which they are associated or in which they are interested. *United States v. Delaware & H. Co.*, 29 Sup. Ct. 527, 540, 213 U. S. 366, 53 L. Ed. 836.

"A railroad company" is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line, the next carrier on the route beyond. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law im-

poses no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. This is the doctrine of this court, although a different rule of liability is adopted in England and in some of the states." *McGuire v. Great Northern Ry. Co.*, 153 Fed. 434, 438 (quoting and adopting definition in *Myrick v. Michigan Cent. Ry. Co.*, 1 Sup. Ct. 425, 107 U. S. 102, 27 L. Ed. 325, and citing *Pennsylvania Ry. Co. v. Jones*, 15 Sup. Ct. 136, 155 U. S. 333, 39 L. Ed. 176; *Peterson v. Chicago, R. I. & P. Ry. Co.*, 45 N. W. 573, 80 Iowa, 92; *Root v. Great Western Ry. Co.*, 45 N. Y. 527; *Ortt v. Minneapolis & St. L. Ry. Co.*, 31 N. W. 519, 36 Minn. 398).

A "company" incorporated for the purpose of building and operating a railroad three miles in length, for the carrying of goods and passengers, is a "railroad company," although it selects the name of "terminal company." *Bridwell v. Gate City Terminal Co.*, 56 S. E. 624, 626, 127 Ga. 520, 10 L. R. A. (N. S.) 909.

The terms "railway company" and "railroad company" are interchangeable, and, in proceedings before the board of commissioners of a county for an order directing the levy of a tax voted by a township in aid of a railway company, the objection that the appropriation was voted in aid of a railroad company may be met by proof that the railway company was entitled to avail itself of the appropriation. *Davis v. Hert*, 90 N. E. 634, 636, 46 Ind. App. 242.

The words "railroad companies" and "railway companies," as used in the statutes of Pennsylvania, are synonymous, and apply to both steam and street railways, unless the context clearly shows a different intent. *City of Philadelphia v. Philadelphia Traction Co.*, 55 Atl. 762, 763, 206 Pa. 35.

Under Gen. St. 1901, § 5997, defining the term "railroad company," and declaring that, as used in the railroad commissioners law, it means a company whose road is operated by steam, the statute forbids such term being construed to include a company owning a road operated only by electricity, except where such intention may be expressly manifested. *Kansas City, O. B. & Electric R. Co. v. Board of Railroad Com'rs*, 84 Pac. 755, 756, 73 Kan. 168.

The words "railroad" and "railroad company," as used in section 1, c. 142, Laws of 1877, and in amended section 1, c. 183, Laws of 1887, do not mean "street railway," "electric street railway," or an interurban company such as is described in the petition in this case. *O'Malley v. Board of Com'rs of Riley County*, 121 Pac. 1108, 1110, 86 Kan. 752, Ann. Cas. 1913C, 576.

Under the express terms of Gen. St. 1902, § 1, the term "railroad company" includes "all corporations, trustees, receivers,

or other persons that lay out, construct, maintain, or operate a railroad operated by steam power, unless such meaning would be repugnant to the context or to the manifest intention of the General Assembly." "A 'street railway company' is a kind of 'railroad company,' but it does not follow that it is affected by every statute concerning railroad companies. That is a question to be determined in each case by a study of the whole body of legislation bearing upon the question." *Stafford Springs St. Ry. Co. v. Middle River Mfg. Co.*, 66 Atl. 775, 777, 80 Conn. 37.

The term "railroad company," as used in St. 1898, § 1816, as amended by Laws 1907, c. 254, withdrawing the defenses of assumed risk and acts of fellow servants in actions against railroads for injuries to servants, and defining "railroad company" to embrace any company managing, maintaining, operating, or in possession of a railroad, does not include interurban railroads operated by electricity, but refers entirely to ordinary steam driven commercial railroads. *Jones v. Milwaukee Electric Ry. & Light Co.*, 133 N. W. 636, 638, 147 Wis. 427.

That there can be a railway company which does nothing but construct the road, and a railway company which does nothing but operate the constructed road, cannot be doubted. It is not essential to the idea of a railroad company that it should both construct and operate a railway. A corporation organized for the purpose of constructing railroads generally, and not for the building of any particular railroad, or the operation of any railroad, is a railroad corporation, within the statutes exempting stockholders in railroad companies from liability beyond the amount of their stock. *First Nat. Bank of Davenport v. Davies*, 43 Iowa, 424, 433, 434 (citing and adopting *McKellar v. Stout*, 14 Iowa, 359).

Const. art. 12, § 162 (Code 1904, p. cclix), abolishing the doctrine of fellow servant so far as it affects the liability of the master for injuries to his servant, etc., as to every employé of a "railroad company," etc., affects only railroads proper or commercial railroads, and does not apply to street car companies. *Norfolk & Portsmouth Traction Co. v. Ellington's Adm'r*, 61 S. E. 779, 782, 108 Va. 245, 17 L. R. A. (N. S.) 117.

The headlight law (Act Aug. 17, 1908; Laws 1908, p. 50) requires a railroad company to equip and maintain every locomotive running on its main line after dark with a good and sufficient headlight, which shall consume not less than 300 watts at the arc, with a reflector not less than 23 inches in diameter, and to keep such headlight in good condition, and provides that any railroad company violating the act shall be liable to indictment and punishment. Held, that the

term "railroad company," as used, includes natural persons as well as corporations. *Atlantic Coast Line R. Co. v. State*, 69 S. E. 725, 729, 135 Ga. 545, 32 L. R. A. (N. S.) 20.

A company engaged in phosphate mining, and, as an incident thereto, operating trolley engines and cars to haul the phosphate, is not a "railroad company" within Gen. St. 1906, §§ 3148, 3149, 3150, modifying the common-law rules regulating the liability of employers for injuries to employes as applied to a railroad company. *Taylor v. Prairie Pebble Phosphate Co.*, 54 South. 904, 61 Fla. 455.

A stockyards company owning stockyards and doing what is known as a terminal business, having switch tracks encircling its yards and connecting therewith and with trunk line railroads so that all cars of stock in and out of its yards must pass over its tracks, which it alone operates with its own engines and crews, which issues no bills of lading and receives no part of the freight paid the trunk line railroads, but charges a fixed price per car for all cars moved from the connection therewith to its yards or to packing houses, is a "railroad company" and a common carrier of freight for hire with the rights, duties, and obligations of a common carrier for hire, and subject to the provisions of Twenty-Eight Hour Law June 29, 1906, c. 3594, 34 Stat. 607, where it participates in the carriage of an interstate shipment. *United States v. St. Joseph Stockyards Co.*, 181 Fed. 625, 626.

The Supreme Court of North Carolina having decided that the fellow-servant act of that state, providing that "any servant or employé of any railroad company" injured through the negligence of any other servant, employé, or agent of the company may maintain an action therefor against the company, applies to a manufacturing corporation which owns and operates a spur track on its ground as incidental to its main business, with respect to servants employed in such service such construction of the statute is binding on the federal courts. *United States Leather Co. v. Howell*, 151 Fed. 444, 446, 80 C. C. A. 674.

Gen. St. 1902, § 4140, provides that, if any person shall have a claim for services rendered in the construction of any railroad or any of its appurtenances, such claim shall be a lien on said railroad, etc. Held, that a street railway is a "railroad," on the property of which a lien may be enforced, though Gen. St. 1902, § 1, provides that the phrase "railroad company," as used in the statutes, shall in general be construed to mean a corporation operating a railroad by steam power, and though other statutes dealing with railroads refer to steam railroad companies as "railroad companies," and street railroad companies as "street railway companies." *Egan v. Cheshire St. Ry. Co.*, 61 Atl. 950, 951, 78 Conn. 291.

Code 1907, § 5476, making a "railroad company" liable for damages to persons and property resulting from negligence or a failure to comply with statutory requirements, and providing that, when any person or property is injured by the locomotive or cars of any railroad, the burden is on the railroad company to show compliance with the statutory requirements and absence of negligence, does not apply to electric street railroads. *Appel v. Selma St. & Suburban Ry. Co. (Ala.)* 59 South. 164, 168.

#### RAILROAD CONTRACTOR

As laborer, see Laborer.

#### RAILROAD CORPORATION

See Street Railroad Corporation.

As domestic corporation, see Domestic Corporation.

As railroad, see Railroad—Railway.

As resident, see Resident.

When a statute speaks of any "railroad corporation," it has reference to a railroad corporation existing or operating in the state. *McDermon v. Southern Pac. Co.*, 122 Fed. 669, 678.

Railroad Law (Laws 1892, p. 1390, c. 676, § 32), providing that every "railroad corporation" shall maintain cattle guards at road crossings, applies to a street surface railroad company incorporated under article 1 of the act (page 1382). *Evans v. Utica & Mohawk Valley Ry. Co.*, 89 N. Y. Supp. 1089, 1090, 44 Misc. Rep. 345.

Const. art. 11, § 5, forbidding a "railroad corporation" issuing any bonds except for money, labor, or property actually received and applied to the purposes for which such corporation was created, does not apply to street railway corporations not engaged in general railroad business. *State ex rel. Tyrrell v. Lincoln Traction Co.*, 134 N. W. 278, 281, 90 Neb. 535.

The term "railway corporation" means those steam railroads which constitute a class well defined, and hence a statute making an employer liable for the injury or death of an employé injured or killed by reason of the negligence of any person who has charge of any signal, switch, locomotive engine, or train on a railroad, does not apply to street railway companies. *Conover v. Public Service Ry. Co.*, 78 Atl. 187, 188, 80 N. J. Law, 681 (citing *Newark v. Merchants' Ins. Co.*, 26 Atl. 137, 55 N. J. Law, 146).

The term "railroad corporation," as used in General Railroad Act, Laws 1890, p. 1083, c. 565, § 4, includes elevated railroads; and such railroads have power to acquire land necessary for their maintenance and accommodation. *Manhattan Ry. Co. v. Astor*, 107 N. Y. Supp. 666, 667, 56 Misc. Rep. 353.

An interurban electric railway company, incorporated under Rev. St. 1890, c. 12, art.

3, § 1187, and authorized to operate a street railway for public conveyance of passengers, mail, and express, is a "railroad corporation," within article 2, § 1105, requiring every railroad corporation incorporated in the state under such article, or any railroad corporation running or operating any railroad in the state, to erect and maintain lawful fences on the sides of its road passing through cultivated fields, and, until such fences are constructed, making it liable for double damages for stock killed on its road. *Riggs v. St. Francois County Ry. Co.*, 96 S. W. 707, 708, 709, 120 Mo. App. 335.

The term "railway corporation," in a statute providing that a railway corporation shall be liable for damages sustained by an employé without contributory negligence on his part, caused by the negligence of certain employés, is a general one, including all persons engaged in operating railways, individual and corporate, and hence the statute does not violate the federal Constitution, prohibiting the states from denying to any person the equal protection of the laws. *Lewis v. Northern Pac. Ry. Co.*, 92 Pac. 469, 473, 36 Mont. 207.

A corporation chartered to maintain a lumber business, with power to operate saw-mills, tramroads, etc., which operates a railroad as an incident to the lumber business, is not a "railroad corporation" within Gen. Laws 1901, p. 31, c. 27. *Receivers of Kirby Lumber Co. v. McLendon*, 120 S. W. 227, 228, 56 Tex. Civ. App. 279.

A company engaged in mining only, which uses in its operations a system of railway tracks of standard gauge aggregating in length some three miles, is operating a "railroad," within the meaning of Rev. Laws 1905, § 2042, abolishing the fellow-servant rule as to railroad corporations. *Cook v. Modern Brotherhood of America*, 131 N. W. 334, 335, 114 Minn. 299.

A construction company, with the usual powers of a construction company, and authorized to own, but not to operate, a railroad, is not a "railroad corporation" proper, so as to fall within the wording of Const. 1890, § 193, partially abrogating the fellow servant rule as to employés of "any railroad corporation." *Bradford Construction Co. v. Heflin*, 42 South. 174, 175, 88 Miss. 314, 12 L. R. A. (N. S.) 1040, 8 Ann. Cas. 1077.

A manufacturing company maintaining in its yards a number of tracks and a switch engine for its use in shifting freight cars is not a "railroad corporation operating a railroad or part of a railroad in this state," within 93 Ohio Laws, p. 342, requiring every railroad corporation operating a railroad or part of a railroad in this state to block its frogs, though by the law of Ohio (Rev. St. § 3866) a manufacturing company may construct a railroad when such purpose is stat-

ed in its articles of incorporation, and with respect to it is made subject to the general railroad laws of the state. *Taggart v. Republic Iron & Steel Co.*, 141 Fed. 910, 911, 73 C. C. A. 144.

A corporation authorized by its articles to construct and operate a railroad as a common carrier, its primary purpose being to connect the business enterprises of an outskirt of a city with the terminals of a railroad company in the city proper, and to carry freight in car load lots between such points, and which has complied with *Pierce's Code*, §§ 7053, 7054 (*Ballinger's Ann. Codes & St. §§ 4250, 4251*), prescribing the manner of executing articles of incorporation of railroads, and the condition precedent for condemning lands, that the whole amount of its capital stock be subscribed, and the good faith of which is evidenced by the money it has expended and the equipment it has under contract, is a "railroad corporation" within the eminent domain statute; the test not being length of road, or that it shall use its own rolling stock, but that it shall be acting in good faith, and that its road shall serve a public purpose. *State v. Superior Court of King County (Wash.)* 103 Pac. 469, 471.

#### Statutory definitions

Rev. St. 1899, § 1163, defines the term "railroad corporation" to mean all corporations, companies, or individuals owning or operating, or which may hereafter own or operate, any railroad in this state. *State ex inf. Attorney General v. Terminal R. Ass'n of St. Louis*, 81 S. W. 395, 402, 182 Mo. 284.

*Kirby's Dig.* § 6732, declares that the term "railroad" or "railroad corporation" shall mean all corporations operating any railroad in this state, whether as owner or lessee, mortgagee, trustee, receiver, or assignee. Hence a railroad company running a through train over the line of another company passing through the state is subject to section 6068, providing that an action against a railroad company may be brought in any county through or into which the road upon which the cause of action arose passes. *Chicago, R. I. & P. R. Co. v. Jaber*, 107 S. W. 1170, 1171, 85 Ark. 232.

*Kirby's Dig.* § 6732, provides that the term "railroad" or "railroad corporation" shall be deemed to mean all corporations owning or operating any railroad in the state. Section 6743 provides that any railroad existing under the laws of any other state may buy or lease, or otherwise acquire, any railroad within the state, with all the rights thereto pertaining. Section 6757 provides that, if a railway company of another state shall lease a railroad, such part of the road as shall be within the state shall be subject to all regulations relative to railroads in the state, and section 6758 provides that a corpora-

tion of another state, being the lessee of a railroad in the state, shall be liable for a violation of any of the laws in the state, and liable to be sued therefor. Held, that a foreign corporation, which is the lessee of a railroad in the state, is liable, under the statute requiring railroads to erect stock gaps, where the road passes through inclosed land. *St. Louis & S. F. R. Co. v. Hale*, 100 S. W. 1148, 82 Ark. 175.

Rev. St. 1898, § 1816, which is a part of chapter 87, concerning railroads, makes every railroad company liable for damages sustained by employes, caused by the negligence of other employes. Other provisions of the chapter relate exclusively to "railroad corporations" doing the usual business of a public or commercial railroad. Thus provision is made for equality of transportation rates, for the furnishing of cars on demand, for the maintenance of guards and fences, and for subservience to regulations for the shipment of grain, carrying of live stock, etc. The power of exercising the right of eminent domain is also given to railroads included within the purview of the chapter. Section 1861 defines the phrase "railroad corporation" as embracing any company, corporation, or person managing or operating a railroad, whether as owner, contractor, mortgagee, assignee, or receiver. Held, that section 1816, notwithstanding section 1861, embraces within its provisions only railroads engaged in a general railroad business for the carriage of passengers and freight, and has no application to a private railroad operated in connection with a logging and lumber business. *McKivergan v. Alexander & Edgar Lumber Co.*, 102 N. W. 332, 333, 124 Wis. 60.

Under Rev. St. 1899, § 1163 (*Ann. St. 1906*, p. 988), providing that the term "railroad corporation" shall mean all corporations owning or operating any railroad, a corporation organized under Rev. St. 1869, §§ 2768-2807, providing for the incorporation of manufacturing and business companies, and empowered by its charters to operate terminal lines of railroad in connection with its stockyards and packing houses, and maintaining a number of miles of railroad and terminals and engines, and employes to operate the same, is a railroad corporation, within Rev. St. 1899, § 2873 (*Ann. St. 1906*, p. 1655), providing that every railroad corporation shall be liable for damages sustained by any servant while engaged in operating such railroad by reason of the negligence of any other servant. *Penney v. St. Joseph Stockyards Co.*, 111 S. W. 79, 83, 212 Mo. 309.

#### RAILROAD CROSSING

As private way, see *Private Way*.

As warning, see *Warning—Warned*.

A "railroad crossing," such as is referred to in Civ. Code 1895, § 2222, is the crossing by a railroad of a public highway, not only used, but maintained, as such by the proper authorities having the same in charge. The evidence must show the road to be a public highway, before there is proof of a road crossing. *Atlantic Coast Line R. Co. v. Bunn*, 58 S. E. 538, 2 Ga. App. 305 (citing *Johnson v. State*, 58 S. E. 265, 1 Ga. App. 195).

Where a road leads from the public road across a railroad to a house, and is used only by the owner and by the tenant of a neighbor, it is a private way, and the railroad is not required to keep the "crossing" over such private way in repair, under Civ. Code 1902, § 2183, providing that a railroad crossing a highway shall protect its rails, so as to procure a safe passage across the road. *Moragne v. Charleston & W. C. Ry. Co.*, 58 S. E. 150, 151, 77 S. C. 437.

Within the meaning of Rev. St. 1905, p. 1578, § 8, providing that "at all of the railroad crossings of highways and streets in this state the several railroad corporations in this state shall construct and maintain said crossings and the approaches thereto within their respective rights of way," "railroad crossing" means that portion comprising the track or roadbed, "the approaches thereto," that portion extending from the track on each side thereof back so far as may be necessary, so that at all times the crossing shall be safe. The words do not necessarily include the entire width of railroads' rights of way. *Cass County v. Chicago, P. & St. L. Ry. Co.*, 130 Ill. App. 346, 349.

#### **RAILROAD CUT**

As part of railroad structure, see Railroad—Railway.

#### **RAILROAD DEPOT**

See Station.

#### **RAILROAD ENGAGED IN INTERSTATE COMMERCE**

The reference, in the Federal Safety Appliance Act, to any "railroad engaged in interstate commerce" is made to the national interstate highway alone, used in interstate commerce, and by no system of reasoning can this reference be properly held to apply to an intrastate highway. *United States v. Southern Ry. Co.*, 164 Fed. 347, 352.

#### **RAILROAD EQUIPMENT**

Personal Property Law N. Y. (Consol. Laws, c. 41) § 61, provides that, whenever any railroad equipment and rolling stock shall be sold, leased, or loaned under a contract which provides that the title shall remain in the vendor, lessor, or bailor until the price is paid, such contract shall be invalid as to any subsequent judgment credi-

tor of or purchaser from such vendee, lessee, or bailee for a valuable consideration without notice, unless the contract is in writing, fully acknowledged, and recorded in the book in which real estate mortgages are recorded in the office of the county clerk or register of the county in which is located the principal office or place of business of the vendee, lessee, or bailee, unless there is plainly marked on both sides of the locomotive or car the name of the vendor, lessor, or bailor, followed by the words "lessor," "bailor," or "vendor," as the case may be. Held, that the words "railroad equipment" and "rolling stock," as used in such section, were equivalent to the words "rolling stock used on a railroad," and since the term "railroad" signifies a common carrier or association engaged in hauling passengers and freight for hire, excluding logging roads, construction roads, etc., such section had no application to locomotives only fit for use on temporary construction railroads, used in connection with work of internal improvement, and hence conditional sales of such locomotives were valid as against the trustee in bankruptcy of the conditional vendee, though not recorded. *In re Ferguson Contracting Co.*, 183 Fed. 880, 882.

#### **RAILROAD HAZARD**

A "railroad hazard" may exist, within Rev. Laws 1905, § 2042, when the work engaged in is so intimately connected with the movement of engines and trains as to render it more dangerous for that reason. *Hanson v. Northern Pac. Ry. Co.*, 121 N. W. 607, 608, 108 Minn. 94, 22 L. R. A. (N. S.) 968.

Plaintiff, a bridge carpenter, was engaged with other workmen in constructing a railroad track over low ground. Piles were driven, and a trestle built, on which were laid the ties and rails. For the purpose of driving the piles, a pile driver car was used, and as the trestle work progressed the car was moved forward for the purpose of driving the next row of piles, and when that was accomplished the car moved back so that the work of placing the caps on the piles, stringers, ties, and rails could be carried on. Plaintiff was injured by the negligent movement of the car. Held that, conceding that plaintiff and the employé in charge of the car were fellow servants, the work in which they were engaged constituted a "railroad hazard," rendering the railroad liable for the injury sustained. *Johnson v. Great Northern Ry. Co.*, 116 N. W. 936, 104 Minn. 444, 18 L. R. A. (N. S.) 477.

#### **RAILROAD MAIL CLERK**

As passenger, see Passenger.

#### **RAILROAD MORTGAGE**

"Railroad mortgages," so called, are as a rule trust deeds securing a large number of bonds distributed over a wide extent of country, and, in many cases among the peo-

ple in many countries, the owners in the aggregate, numbering up into the thousands. Chicago & N. W. Ry. Co. v. State, 108 N. W. 557, 582, 128 Wis. 553.

### RAILROAD POSTAL CLERK

As officer, see Officer.

### RAILROAD PROPERTY

As private property, see Private Property.

As real estate, see Real Property.

Const. 1891, § 182, declares that nothing in the Constitution shall prevent the General Assembly from providing by law how railroads and railroad property shall be assessed, and how taxes thereon shall be collected. Held that, where a bridge was owned and used by a railroad company, it constituted "railroad property" within such section, though it was also used for the accommodation of teams, street cars, and foot passengers. Board of Equalization of Campbell County v. Louisville & N. R. Co. (Ky.) 109 S. W. 303, 304.

Under Acts 1884 (P. L. p. 142), as amended, providing for the taxation of railroads, "railroad property" is divided into four distinct classes: (1) The main stem, consisting of the roadbed, not exceeding 100 feet in width, with its rails, ties, depot buildings; (2) other real property; (3) tangible personal property; and (4) the franchise. Jersey City v. State Board of Assessors, 68 Atl. 227, 228, 74 N. J. Law, 720.

A company organized under Comp. Laws 1897, c. 167, built a railroad in the streets of a city, as authorized by an ordinance thereof, to carry freight from manufactories not otherwise accessible by steam railroads. The railroad was operated as a steam railroad, and was leased to a steam railroad, which used it in connection with its own road. Held, that the railroad was "railroad property," within Pub. Acts 1901, p. 245, No. 173, as amended by Pub. Acts 1903, p. 57, No. 45, providing for the taxation of railroad property, and was not subject to local taxation, at least unless the ordinance imposed as a condition a liability for such taxes. City of Detroit v. Detroit Manufacturers' R. R., 113 N. W. 365, 366, 149 Mich. 530.

### RAILROAD PURPOSES

See Street Railway Purposes.

Used for railroad purposes, see Used.

Where a deed conveyed land as a donation to a railroad company "for railroad purposes only," the grantor could not obtain a cancellation of the conveyance on the ground that it was understood that defendant would use the land in connection with a main line through the town where the land was situated, but that it had only built a branch. Mo-

bile, J. & K. C. R. Co. v. Kamper, 41 South. 513, 514, 88 Miss. 817.

### RAILROAD RECEIVERS

See Receiver.

### RAILROAD RIGHT OF WAY

See Right of Way.

### RAILROAD STATION

See Depot; Station.

As point, see Point.

### RAILROAD TICKET

As property, see Property.

A passenger ticket is mere evidence of a contract. Kirby v. Union Pac. Ry. Co., 119 Pac. 1042, 1053, 51 Colo. 509, Ann. Cas. 1913B, 461.

A railroad ticket, though not yet stamped or delivered to a passenger, is a "railroad ticket," and also within the term "any goods or chattels," within L. O. L. § 1947, providing that any one stealing any goods or chattels or any railroad passenger ticket or other evidence of the right of a passenger to transportation should be guilty of larceny, although the stealing of railroad tickets was not larceny at common law. State v. Wilson, 127 Pac. 980, 981, 63 Or. 344.

The "tickets" of a carrier, whether for transfer or for original passage, may well be called the carrier's written direction by one agent to another agent concerning the particular transportation in hand, and if the direction be contrary to the contract, and expulsion follows as a consequence, the carrier must be answerable for all proximate damages ensuing therefrom, just as any other principal is liable for the injurious result of misdirection to his agent. Indianapolis St. Ry. Co. v. Wilson, 66 N. E. 950, 953, 161 Ind. 153, 100 Am. St. Rep. 261 (quoting and adopting definition in O'Rourke v. Citizens' Street Ry. Co., 52 S. W. 872, 103 Tenn. 124, 46 L. R. A. 614, 76 Am. St. Rep. 639).

"A 'ticket' is evidence of a contract to carry and the right of passage, but the contract itself is implied by law, except in so far as it is expressed in the ticket. Upon the theory that it is not itself the written contract, parol evidence has been held admissible to prove the terms of the contract in fact entered into between the company and the passenger, or the representations made by the agent at the time the ticket was purchased as to stop-over privileges or the like. But the terms of the contract or certain conditions and limitations which enter into and form part of the contract are frequently written on the face of the ticket, and, where such is the case, we think the better rule is that a passenger has no right to rely upon the representations of an agent or conductor which are contrary to its express limitations and conditions." Rolfs v. Atchison, T. & S. F. R. Co., 71 Pac. 526, 528, 66 Kan. 272.

A "railroad ticket" is not a contract expressing all the conditions and limitations usually contained in a written agreement, but is more in the nature of a receipt given by the railroad company, as evidence that the passenger has paid his fare for certain kind of passage on the proper train, as limited and regulated by its rules. A "railroad ticket," it is said according to general accepted doctrine, is a voucher, token, or receipt, rather than a contract, attached for convenience to show that the passenger has paid his fare from the place named therein as the place of departure to that named therein as the place of destination. It is evidence of a contract to carry and the right to passage implied by law, excepting in so far as expressed in the ticket. *Ames v. Southern Pac. Co.*, 75 Pac. 310, 313, 141 Cal. 728, 99 Am. St. Rep. 98.

"An 'ordinary passage ticket' is not a written contract, though it may be so drawn and signed to become such, and where it embodies in explicit terms an undertaking which the carrier assumes toward the person named therein. Excluding tickets of this kind, it is to be observed that a passage ticket is a mere token or voucher furnished by the carrier to the passenger upon the payment by him of fare." In the absence of evidence to the contrary, railroad tickets are not deemed to be contracts in writing, and no presumption arises, from the purchase of a ticket, that the ordinary duties of a carrier imposed by law are modified in the ticket. "A 'ticket' cannot be said to be either the contract or contain the contract. The settled opinion is that it is a mere receipt taken or voucher adopted, for convenience, to show that the passenger has paid his fare from one place to another. A contract for transportation may therefore be proved independently of the terms of the ticket." *McCollum v. Southern Pac. Co.*, 88 Pac. 663, 666, 31 Utah, 494 (citing *Logan v. Hannibal & St. J. Ry. Co.*, 77 Mo. 663, and quoting and adopting definition in 3 Thomp. Neg. § 2581).

#### RAILROAD TORPEDO

As dangerous agency, see *Dangerous Agency*.

#### RAILROAD TRACK

See *Private Railroad Track*; *Street Railroad Track*.

As structure, see *Structure*.

See, also, *Public Track*; *Skeleton Track*.

Land adjacent to a street railroad's right of way, used only for a plan for generating electrical power used in the propulsion of its cars, is "railroad track," within the meaning of the law, and assessable as such. *People v. Terre Haute & W. Ry. Co.*, 100 N. E. 173, 256 Ill. 591.

A railroad approach, consisting of elevated tracks, embankment, and viaduct, con-

structed on land purchased by a railroad company for a right of way, and used exclusively as a railroad track, for railroad purposes, to connect the main tracks of the railroad with a bridge across a navigable river, constitutes a "railroad track," within the meaning of the provisions of the revenue law of 1872 (*Hurd's Rev. St.* 1903, c. 120, §§ 40-52, 109), dividing real estate belonging to railroad companies into two classes for the purposes of taxation; the first consisting of railroad track in which is included the right of way, and superstructure of main, side, or second track, and turnouts, and requiring the first class to be assessed by the State Board of Equalization, and not by the county assessor. *People ex rel. Roche v. Illinois Cent. R. Co.*, 74 N. E. 116-119, 215 Ill. 177.

#### Embankment

A "railroad track" is not merely the rails and ties upon which cars are run, but is the road, course, and way, and includes all that enters into and composes such road, course, and way, such as the embankment upon which the rails and ties are laid, etc. *Bird v. Common Council of City of Detroit*, 111 N. W. 860, 878, 148 Mich. 71 (quoting and adopting definition in *Webst. Dict.*; *Gates v. Chicago, St. P. & K. C. Ry. Co.*, 48 N. W. 1040, 82 Iowa, 518).

#### Right of way

The phrase "railroad track" is quite commonly used to denote the right of way of a railroad, and often means the same as "roadway," as used in P. S. 4327, relating to adverse possession of lands of a railroad company within its roadway. *Bacon v. Boston & M. R. R.*, 76 Atl. 128, 132, 83 Vt. 421.

#### Spur track

A city ordinance providing that "no street car shall stop on any street crossing or on any 'railroad tracks,' but shall come to a full stop before crossing any 'railroad track,'" is comprehensive enough to include any "railroad track," whether main line or spur. *Galveston, H. & S. A. Ry. Co. v. Vollrath*, 89 S. W. 279, 283, 40 Tex. Civ. App. 46.

#### RAILROAD TRAIN

Under the rule that a statute will be liberally construed to effect the purposes of its enactment, Civ. Code, § 1970, as amended, providing that an employer shall be liable for injury to an employé from the neglect of a coemployé engaged in another department or employed upon another machine, railroad train, switch signal point, locomotive engine, or other appliance, applies to employés on interurban cars, and this would be true though "railroad train" were the only descriptive term used. *Patton v. Los Angeles Pacific Co.*, 123 Pac. 613, 614, 18 Cal. App. 522.

#### RAILROAD YARD

See *Freightyard*.

As right of way, see *Right of Way*.

A "railroad yard," as a matter of fact, is a place where cars and trains are deposited and switched from one track to another, and trains are made up, and it consists of the various tracks, switches, and other facilities used for such purposes, the actual limits and boundaries of which may, or may not, be well known to the employes who use it. *Atlantic Coast Line R. Co. v. Mallard*, 44 South. 366, 371, 54 Fla. 143.

#### RAILROAD YARD FOREMAN

As workman, see Workman.

#### RAILWAY FISHPLATES

Old fishplates, which are so worn as to have lost their usefulness for railway purposes and are suitable for use only as scrap steel, are not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 130, 30 Stat. 160, as "railway fishplates," but under paragraph 122, 30 Stat. 159, as "scrap steel" \* \* \* fit only to be remanufactured." *R. L. Ginsburg & Sons v. United States*, 147 Fed. 531, 532 (citing *Downing v. United States*, 122 Fed. 445, 58 C. C. A. 427; *Dwight v. Merritt*, 11 Sup. Ct. 768, 140 U. S. 213, 35 L. Ed. 450).

#### RAILWAY FREIGHT BRAKEMAN OR SWITCHMAN

The by-laws of a fraternal benefit association, made a part of its certificates, provided that railway freight brakemen and switchmen should be ineligible to beneficial membership. The succeeding section provided that a person should be held to be engaged in such occupation when the duties incident to his employment require him to perform any of the duties belonging or pertaining to such occupation. Held, that all prohibited occupations are enumerated in the first section, the subsequent section being intended to prevent an invasion of the prohibition by insured engaging in an occupation the duties incident to which are substantially the same as those incident to an expressly prohibited occupation, and a certificate holder in the service of a mining company, which used in its mining operation a system of railroad tracks of standard gauge, aggregating some three miles in length, his employment being that of mining brakeman on trains used for shipping purposes, his duty being to spot the stripping cars when being loaded in the open pit mine and when unloaded at the dump, was not a "railway freight brakeman or switchman" within the by-laws. *Cook v. Modern Brotherhood of America*, 131 N. W. 334, 336, 114 Minn. 299.

#### RAILWAY SPINE

"Medical science treats of a condition currently denominated 'railway spine,' or, in a more technical sense, 'traumatic neurosis.' It is latterly denied by strong authority that any such a malady exists as a concussion of the spine or spinal cord which term

is also often used as a synonym for railway spine, but that the symptoms which were supposed to indicate a concussion of the spine are but indications of a concussion of the brain, which may involve a psychic as well as a physical injury, one or both. Such a condition as traumatic neurosis may, it is said, result from actual lesion of the vertebral column, accompanied by immediate and definite signs of such lesion; but it may also result according to medical science, from a nervous shock or sudden fright, involving a psychical condition as well as a nervous derangement and impairment, where there are no outward physical or objective signs or indications of physical lesion of any character. \* \* \* Unlike the question first discussed, railway spine, or traumatic neurosis, is not a sequence or result that follows as of course, or may, within reasonable inference, from a bruise on the leg, a wrench or sprain of the back, or contusion of the muscles and nerves. Such an affliction or malady may or may not result or spring from injuries of that nature, dependent upon the seriousness or severity of the injuries and it is not, therefore, necessarily consequent. But it may arise from another and entirely distinct source; that is, from a concussion, followed by a shock of such proportions as vitally to affect and impair the nervous system, or a sudden fright, producing psychic or mental traumatism ('trauma' meaning a wound, and is generally used as synonymous with 'injury'), which may lead to a multitude of derangements and suffering, and this without lesion of the nerves or contusion apparent objectively." *Maynard v. Oregon R. Co.*, 72 Pac. 590, 592, 593, 43 Or. 63.

#### RAINFALL

See Ordinary Rainfall.

#### RAINY DAYS

A provision of a charter party, excluding "rainy days" from the lay days for loading, will be construed to exclude only days when by reason of rain the loading cannot be conveniently prosecuted; but it is the right of either party to insist on the exclusion of such days, and the charterer may do so though the loading in fact proceeded. *Schwaner v. Kerr*, 170 Fed. 92, 98.

#### RAISE

See Money Raised.

Where defendant's testator delivered in escrow a promissory note to be given to plaintiff church if \$10,000 additional be raised within the year, the term "raised" requires the money to be actually paid to the church or bona fide subscribed. *St. Paul's Episcopal Church v. Fields*, 72 Atl. 145, 149, 81 Conn. 670.



"Raising money" contemplates a sale of property for money, or a borrowing on engagements to pay in the future. As used in a statute providing for the removal of a county seat, the cost as to the county to be allowed by orders on the county treasury, provided that the "amount is on hand or can be raised by said county without increasing the present tax rate," it must have had reference to payments out of revenue of subsequent years, arising without any increase of the tax rate. *Hand v. Stapleton*, 37 South. 362, 364, 140 Ala. 555.

Where the signatures to notes are genuine, but the amount of the check has been "raised," it is a kind of forgery known as "raising a check." *Crocker-Woolworth Nat. Bank v. Nevada Bank*, 73 Pac. 456, 459, 139 Cal. 564, 63 L. R. A. 245, 96 Am. St. Rep. 169.

#### Increase not implied

"It is clear to our minds that increase of revenue is not implied in the language to raise revenue. The transitive verb 'to raise,' in this connection, means to bring together; to collect; to levy; to get together for use or service, as to raise money. Webster's Dictionary." Senate Bill No. 245 (Sess. Laws 1907-08, p. 729, c. 81, art. 9), entitled "An act for the discovery of property not listed for taxation, providing for its assessment and the collection of taxes thereon," is not a "bill for raising revenue," such as must originate in the House of Representatives, under section 33, art. 5 (Bunn's Ed. § 106), of the Constitution. *Anderson v. Ritterbusch*, 98 Pac. 1002, 1006, 22 Okl. 761.

#### RAISE MONEY BY TAXES OR ASSESSMENT

Village Law (Laws 1897, p. 377, c. 414, as amended by Laws 1906, p. 984, c. 404, § 1) § 41, subd. 2, permits women possessing the qualifications to vote for village officers, except that of sex, who own property assessed at the preceding assessment, to vote upon a proposition to "raise money by taxes or assessment." General Municipal Law (Consol. Laws, c. 24) § 6, provides that a "funded debt" shall not be created by a municipal corporation, unless by a resolution passed by a two-thirds vote of the council adopting it, or on submission to the taxpayers of the village when required by law. A proposition was submitted to the voters of defendant village to issue village bonds to establish a waterworks system, to be paid by the annual levy and collection of taxes. Held that the bonds would be a "funded debt," within section 6, which included all municipal indebtedness evidenced by a bond, the principal of which was payable after the current fiscal year, with periodical payments of interest, when provision for payment was made by future taxation, and the proposition to issue them was one to "raise money by taxes or assessment," within the village law, so that

women were entitled to vote thereon, and the election was void. *Gould v. Village of Seneca Falls*, 118 N. Y. Supp. 648, 649.

#### RAKE-OFF

Where a trusted employé entered into an unlawful combination with one purchasing goods from the manufacturer against the interest of the employer, the employé receiving a dividend therefor, such dividend is in common parlance called a "rake-off." *Nord v. Gray*, 82 N. W. 1082, 1083, 80 Minn. 143.

#### RAMIE SILVER

Dutiable as cotton silver, see Cotton Silver.

#### RANGE

"The dictionaries define the word 'range' as that which may be traversed or ranged over, especially a region of country in which cattle may wander and pasture." *State v. Cunningham*, 90 Pac. 755, 756, 35 Mont. 547.

The word "range," as used by ranchmen, signifies sparsely populated and uninclosed prairie, over which stock growers have been allowed to let cattle, horses, and other animals owned by them or in their charge roam and feed without restraint. By common consent, persons residing in such country have usually claimed as their range certain portions of this prairie lying contiguous to the home ranch. *Miller v. Lewis*, 97 N. W. 364, 365, 17 S. D. 448.

St. 1898, § 1647, declares that the discovery of a "crevice or range," containing ores or minerals, shall entitle the discoverer to the ores or minerals appertaining thereto, subject to the rent due the landlord, before as well as after the ores or minerals are separated from the freehold. Held, that the words "crevice or range," as so used, had a local significance, limiting the word "range" by its associated word, "crevice," defined to be a mineral-bearing vein; the word "range" not being used as commonly understood to designate a large stretch of country carrying with some continuity, or at intervals, ore deposits belonging generally to the same geological stratum. *St. Anthony Min. & Mill. Co. v. Shaffra*, 120 N. W. 238, 239, 138 Wis. 507.

Under Kirby's Dig. § 1898, which provides that a person taking certain animals running at large in the range or woods, and which are not designated by brands or ear-marks, shall not be guilty of larceny, but simply liable to the owner for the value of such animals, a cow, though not under the physical restraint of a halter or inclosure, which was, upon being turned out in the woods during the day to feed, accustomed to return to its home at night, did not run at

large and, though unmarked, it was a subject of larceny; "range" meaning a sparsely populated and uninclosed tract of land over which stock and cattle are permitted to roam and feed without restraint, "in the woods" referring to uninclosed and unpopulated woodland, and "running at large" being applicable to animals which roam and feed at will, and which are not under the control and direction of any one. *Jefferies v. State*, 144 S. W. 514, 515, 102 Ark. 373.

## RANK

Under Chicago Civil Service rule 2, § 4, providing that the grades shall be based upon compensation, and rule 7, § 1, providing that promotions shall be from grade to grade, except as otherwise provided, "in the same line or character of work," upon competitive examinations, promotions must be made upward from the grade next below, in the same line of employment, "rank," for the purpose of promotions, not being determined by salary only; and hence though ward superintendents are in the fifth grade, and the assistant superintendent of streets in charge of street and alley cleaning in the tenth, a higher grade, ward superintendents are eligible for such assistant superintendency, being next below in the same line of employment. *People ex rel. Williams v. Errant*, 82 N. E. 271, 273, 229 Ill. 56.

## RAPE

See Assault with Intent to Commit Rape; Attempt to Commit Rape  
See, also, Against Her Will; Carnal Knowledge; Force; Forcibly; Forcibly Ravishing; Ravish.

"Rape" is derived from rapuit, meaning to "snatch," to "seize"; but rapuit, while essential in an indictment for rape, does not take the place of the "carnaliter cognovit," as it does not necessarily mean carnal knowledge, much less carnal knowledge against the will of the female. *Beard v. State*, 97 S. W. 667, 668, 670, 79 Ark. 293, 9 Ann. Cas. 409.

"Rape" is the carnal knowledge of a woman by force and against her will. *State v. Colombo*, 75 Atl. 616, 618, 1 Boyce, 96; *State v. Williams* (Del.) 80 Atl. 1004, 1006.

"Rape" is carnal knowledge of a woman, above the age of 10 years, by force and against her will. *State v. Honey*, 80 Atl. 240, 2 Boyce, 324; *State v. Truitt* (Del.) 62 Atl. 790, 791, 5 Pennewill, 466.

"Rape" is the carnal knowledge of a woman against her will, and force, or putting her in great fear, is an essential element, whether the crime is committed on a female over or under the age of consent. *State v. Sigerella* (Del.) 82 Atl. 31, 32, 7 Pennewill, 311; *Sigerella v. State* (Del.) 74 Atl. 1081, 1 Boyce, 157.

"Rape" is not a continuous offense, but each act of intercourse constitutes a distinct offense. *Jamison v. State*, 94 S. W. 675, 676, 117 Tenn. 58.

One who by force and against the consent of a female has sexual intercourse with her is guilty of rape. *Harris v. State*, 56 South. 55, 2 Ala. App. 116.

Rape at common law is the carnal knowledge of a female, forcibly and without her consent. *Payne v. Commonwealth* (Ky.) 110 S. W. 311, 312.

Lord Coke says: "'Rape' is felony by the common law declared by Parliament for the unlawful and carnal knowledge and abuse of any woman above the age of 10 years against her will, or of a woman child under the age of 10 years with her will or against her will, and the offender shall not have the benefit of clergy." Lord Hale defines the crime as follows: "'Rape' is the carnal knowledge of any woman above the age of 10 years against her will, and of a woman child under the age of 10 years with or against her will." The only difference between statutory and common-law rape upon a female child under the age of consent is that by the statutes the age of consent has been raised from 10 to 18 years. While an information charged rape with force, yet, if it contained all the material allegations necessary to charge the crime of rape upon a female child under the statute, the words charging force may be disregarded as surplusage. *Baxter v. State*, 115 N. W. 534, 535, 80 Neb. 840 (citing Bish. St. Crimes, § 488; 3 Co. Inst. 60; *Hubert v. State*, 106 N. W. 774, 74 Neb. 220).

"Rape" is the carnal knowledge of a female forcibly and against her will. And an assault is an unlawful attempt, coupled with present ability, to commit a violent injury upon the person of another. An assault with intent to rape includes every ingredient of the crime of rape, except the actual accomplishment of that crime. The proof must show, beyond a reasonable doubt, the unlawful attempt which constitutes an assault with an intention to have carnal knowledge of the female forcibly and against her will. There must be an intention to use such force as may be necessary to accomplish the object. If there was at any time such an intent, the fact that defendant afterwards abandoned his purpose would not relieve him from liability. The evidence for the prosecution tended to prove an aggravated assault and most outrageous conduct on the part of the defendant, well deserving of suitable punishment; but it did not show any attempt to do the act which would have been rape, nor any present intention to do it. *Franey v. People*, 71 N. E. 443, 444, 210 Ill. 206.

"'Rape' is carnal knowledge of a female forcibly and against her will. To indulge

the excitement of animal passion in any other manner than with sexual intercourse, no matter how indecent, loathsome, or immoral the act may be, would in no view of the case constitute rape." *Smalls v. State*, 65 S. E. 295, 296, 6 Ga. App. 502.

An information, charging that "defendant unlawfully, violently and feloniously did make an assault in and upon" the prosecutrix, and her, the prosecutrix, "then and there unlawfully, forcibly, and against her will did ravish and carnally know," contains a sufficient charge of rape. *State v. Goodale*, 109 S. W. 9, 11, 210 Mo. 275.

In a prosecution for rape on a female under the age of consent, the court charged that the constituent elements of the offense were that accused, with or without the consent of the female, and without the use of force, threats, or fraud, had carnal knowledge of her, that she was under the age of 15 years and was not his wife, and that the proof must show beyond reasonable doubt that the sexual organ of the female was penetrated by the male organ of accused, and charged that if the jury believed beyond a reasonable doubt that accused did, as charged in the indictment, at the time and place alleged, have carnal knowledge of prosecutrix, and that she was under the age of 15 years, he should be found guilty, and if they did not so believe he should be acquitted. After instructing with reference to the penalty to be assessed in the event he were found guilty, the court further charged that if the jury believe that accused did not have carnal knowledge of prosecutrix on or about the date and at the place alleged, or if they had a reasonable doubt thereof, accused should be acquitted, and that accused is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt. Held, that the charge was not improper, as authorizing a conviction if prosecutrix was over 15 years old at the time, or if there was a reasonable doubt that she was under 15 years old. *Banton v. State*, 109 S. W. 159, 160, 53 Tex. Cr. R. 167.

#### Statutory definitions

Pen. Code 1895, art. 634, provides that "'rape' is constituted by the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud." *Cotton v. State*, 105 S. W. 185, 187, 52 Tex. Cr. R. 55.

According to Rev. St. 1899, § 1837, "rape" consists in forcibly ravishing any woman of the age of 14 years or upward. To "ravish" a woman is to have carnal connection with her forcibly, and without her consent, or against her consent. *State v. Welch*, 89 S. W. 945, 947, 191 Mo. 179, 4 Ann. Cas. 681.

Ballinger's Ann. Codes & St. (Wash.) § 7062, defines "rape" as follows: "A person shall be deemed guilty of 'rape' who: (1) Shall by force and against her will ravish

and carnally know any female of the age of 18 years or more. (2) Shall by deceit, deception, imposition, or fraud induce a female to submit to sexual intercourse. (3) Shall carnally know any female child under the age of 18 years." *State v. Roller*, 71 Pac. 718, 720, 30 Wash. 692.

As expressly defined by Bal. Codes & St. § 7062, one commits "rape" who forcibly, and against the will of a female 18 or more years old, ravishes and carnally knows her, or who carnally knows any female child under 18 years of age. *State v. Adams*, 83 Pac. 1108, 41 Wash. 552.

An information charging that defendant feloniously assaulted one named, a female child under 18, and feloniously ravished and carnally knew and abused her, does not charge more than one offense, but falls squarely within 2 Ballinger's Ann. Codes & St. § 7062 (3), making the carnal knowledge of a female child under 18 "rape." *State v. Priest*, 72 Pac. 1024, 1025, 32 Wash. 74.

On a prosecution for an assault with intent to rape a female under 14 years of age, an instruction defining "rape" as carnally and unlawfully knowing a female child under 14 years was not erroneous; it conforming to Rev. St. 1899, § 1837, defining "rape." *State v. Riseling*, 85 S. W. 372, 373, 186 Mo. 521.

To constitute "rape," carnal knowledge is essential, while any defilement of the person would be sufficient to constitute the offense denounced by Code, § 4756, defining rape to be the ravishment and carnal knowledge of any female of the age of 15 years or more by force and against her will. *State v. Hromadko*, 99 N. W. 560, 561, 123 Iowa, 665.

Under Code 1883, § 1101, defining "rape" as "ravishing and carnally knowing any female of the age of 10 years or more, forcibly and against her will," an indictment failing to charge that the act was done "forcibly" and "against her will" is fatally defective. *State v. Marsh*, 43 S. E. 828, 829, 132 N. C. 1000, 67 L. R. A. 179.

Where the court charged in the language of Rev. Laws 1905, § 4926, that "'rape' is an act of sexual intercourse with a female not the wife of the perpetrator and against her will and without her consent," failure to charge in the language of the remainder of the section was fully supplied by a further charge that: "In order that an act of sexual intercourse constitute rape, there must be force and violence on the part of the man, and there must be actual resistance and opposition on the part of the woman to the full extent of her ability under the circumstances, until the sexual act is accomplished. Her resistance must be proportionate to the occasion and to the strength and opportunities

of the woman." *State v. Zempel*, 115 N. W. 275, 276, 103 Minn. 428.

Cr. Code, § 11, provides that, if any person shall have carnal knowledge of his daughter or sister forcibly and against her will, he shall be deemed guilty of rape, etc. Section 12 declares that if any person shall have forcible carnal knowledge of any woman or female child other than a daughter or sister, or if any male person of the age of 18 years or upwards shall carnally know and abuse any female child under the age of 18 years with her consent, unless such female child is over 15 years of age and previously unchaste, every such person shall be deemed guilty of rape. Held, that these sections prescribe three classes of crimes, each of which is totally distinct from the other two. *Hubert v. State*, 104 N. W. 276, 277, 74 Neb. 220.

Rev. St. 1887, § 6765, as amended, defines "rape" as follows: "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: First, where the female is under the age of 18 years; second, where she is incapable, through lunacy or any other unsoundness of mind, whether temporary or permanent, of giving legal consent; third, where she resists, but her resistance is overcome by force or violence; fourth, where she is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution, or by any intoxicating narcotic, or anæsthetic substance administered by or with the privity of the accused; fifth, where she is at the time unconscious of the nature of the act, and this is known to the accused; sixth, where she submits under a belief that the person committing the act is her husband, and the belief is induced by artifice, pretense, or concealment practiced by the accused, with intent to induce such belief." *State v. Simes*, 85 Pac. 914, 12 Idaho, 310, 9 Ann. Cas. 1216.

An information for statutory "rape" charged that defendant, on the person of the prosecutrix, a female under 18, to wit, the age of 16, did forcibly and feloniously make an assault and did then and there forcibly and feloniously ravish and carnally know her. Held, that the words "forcibly" and "ravish" were surplusage, and that the information sufficiently charged statutory rape. *McQuary v. People*, 110 Pac. 210, 212, 48 Colo. 214, 21 Ann. Cas. 560.

Hurd's Rev. St. 1911, c. 38, § 237, defining rape as the carnal knowledge of a female, forcibly and against her will, and providing that every male of the age of 17 years and upwards, who shall have carnal knowledge of any female under the age of 16 years, and not his wife, shall be guilty of rape, provided that every male person under the age of 16 years and upwards, who shall have carnal knowledge of a female, forcibly and against

her will, shall be guilty of rape, changes the common-law rule that the carnal knowledge of a female, forcibly and against her will, by a male 14 years of age or upwards is rape, and introduces the new element that, where a male, who is 17 years old or upwards, has intercourse with a female under 16, who is not his wife, without force and by her consent, he is guilty of rape, and raises the age at which a male may be guilty of rape from 14 years at common law to 16 years; and no one under the age of 16 years can commit the crime. *People v. Stowers*, 98 N. E. 986, 987, 254 Ill. 588.

Under Shannon's Code, §§ 7077, 7080, 7083, providing that the statement of facts constituting the offense shall be in ordinary language, etc., an indictment, alleging that accused on a designated date did have carnal knowledge of a designated female, forcibly and against her will, charges "rape," defined by section 6451 as the carnal knowledge of a woman forcibly and against her will, though it does not charge that accused "ravished" the female; the word "ravish" implying no more than that the act was done forcibly and against the will of the female. *Palmer v. State*, 118 S. W. 1022, 1029, 121 Tenn. 465.

Under an information which charges that the defendant "did commit the crime of rape in the first degree as follows, to wit, that at said time and place said defendant, A., in and upon B., violently and feloniously did make an assault, and her, the said defendant, then and there violently, by force, overcoming her resistance and against her will, feloniously did ravish and carnally know, and did then and there have sexual intercourse, and she, the said B., did then and there make resistance against the aforesaid acts of said defendant, and said resistance was by the defendant overcome by force, she, the said B., being then and there a female, and not then and there the wife of said defendant," a verdict of guilty of rape in the second degree, or of assault with intent to commit rape, may be returned; and such an information will sustain such a verdict even though section 8890 of the Codes of 1905 classifies the various ways in which the crime may be committed, and provides that rape in the first degree exists where the female "resists, but her resistance is overcome by force or violence," and that the crime of rape in the second degree exists where "she is prevented from resisting by threats of immediate and great bodily harm accompanied by apparent power of execution." *State v. Bancroft*, 137 N. W. 37, 38, 23 N. D. 442.

Under Pen. Code 1911, art. 1063, defining "rape" as the carnal knowledge of a female person under the age of 15 years other than the wife of the person, with or without her consent, and article 1008, defining "assault" as any unlawful violence on the person of another with intent to injure him and that

any attempt to commit a battery or any threatening gesture showing an immediate intention coupled with an ability to commit a battery, an assault to rape a child under 15 may be committed without force, and proof that accused lay in wait for prosecutrix, a child under 15, as she was going to school, and after making an indecent proposal to her chased her until she outran him, was sufficient to sustain a conviction of assault with intent to rape. *Gage v. State* (Tex.) 151 S. W. 565, 567.

#### **Adultery distinguished**

See Adultery.

#### **Age of prosecutrix**

Rev. Code 1852, as amended to 1893, p. 924, c. 127, § 10, making every person committing rape or carnally knowing and abusing a female child under the age of seven years guilty of felony, is not impliedly repealed by 18 Del. Laws, p. 951, c. 686, as amended by 20 Del. Laws, p. 192, c. 127, punishing the harboring or using a male or female under the age of 18 years for the purpose of sexual intercourse, and a man who has sexual intercourse with a female over the age of seven and under the age of 18 by force and against her will may be prosecuted for rape or for using a female for the purpose of sexual intercourse. *Sigerella v. State*, 74 Atl. 1081, 1082, 1 Boyce, 157.

#### **Assault and battery included**

The word "rape" implies an assault. *State v. Sullivan*, 84 S. W. 105, 109, 110 Mo. App. 75.

"Rape," as defined by Rev. St. 1899, § 4964, punishing one having carnal knowledge of a woman forcibly and against her will, or of a woman under the age of 18 years either with or without her consent, includes assault as defined by section 4957, punishing one who, having the present ability to do so, attempts to commit a violent injury on the person of another, and where a woman over the age of 18 years, not under duress, and mentally competent, consents to sexual intercourse, there is no assault, but carnal knowledge of a female under the statutory age is conclusively presumed to have been committed with force and against her consent, and her acts constitute no defense to a charge of rape. *Ross v. State*, 93 Pac. 299, 303, 16 Wyo. 285.

#### **Consent**

Carnal knowledge of a female under the age of consent is rape, whether committed with or without her consent. *Cromeans v. State*, 129 S. W. 1129, 1131, 59 Tex. Cr. R. 611.

Sexual intercourse with a female less than 18 years of age constitutes "rape," as defined by section 2016, Gen. St. 1901, whether it is accomplished by force or with consent. *State v. Hansford*, 106 Pac. 738, 739, 81 Kan. 300.

An act of sexual intercourse must necessarily be either with or without the consent of the female. If it is accomplished forcibly and without her consent, the act is "rape." *Whidby v. State*, 49 S. E. 811, 121 Ga. 588.

An act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under the age of 16 years, is "rape in the second degree," whether such act is accomplished by force or with consent. *Myers v. State*, 119 Pac. 136, 137, 6 Okl. Cr. 389.

An act of sexual intercourse accomplished with a female, not the wife of the perpetrator, over the age of 14 years and under the age of 16 years, is rape in the second degree, whether such act is accomplished by means of force or violence sufficient to overcome any resistance she might make or with her consent. *Wines v. State*, 124 Pac. 466, 470, 7 Okl. Cr. 450.

"Rape" is the having of unlawful carnal knowledge by a man of a woman, forcibly, and against her will. The carnal abuse of children is an offense in the nature of "rape," wherein the want of consent is not an element. A female child under the statutory age is conclusively presumed to be incapable of consenting to sexual intercourse, or, in other words, her consent is no defense. *State v. Mehovich*, 43 South. 660, 663, 118 La. 1013 (quoting and adopting definition in *Bish. New Cr. Law*, 2, §§ 1112, 1113; *Elliott, Evid.* 4, § 3095).

The phrase "with her consent," as used in Rev. St. 1892, § 6816, providing that "whoever has carnal knowledge of a female person, forcibly and against her will, or, being 18 years of age, carnally knows and abuses a female person under 16 years of age, with her consent, is guilty of 'rape,'" does not define an essential element of the crime charged. So on the trial of an indictment under Rev. St. 1892, § 6816, for carnally knowing and abusing a female person under the age of 16 years, with her consent, the evidence having established the carnal knowledge and the alleged ages of the parties, evidence tending to show that the act was committed without consent does not constitute a fatal variance. *State v. Carl*, 73 N. E. 463, 464, 71 Ohio St. 259.

Under *Mills' Ann. St.* § 1211, declaring that every male person over a certain age who shall have carnal knowledge of a female under a certain age, with or without her consent shall be guilty of rape, and section 1215, punishing an assault with intent to commit rape, an information charging an assault with intent to rape a female under the age of consent need not allege that the assault was made with the intent to carnally know the female forcibly and against her will; for, in rape of a female under the age of consent, force on the part of the accused and want of consent on part of the female are immaterial. *Gibbs v. People*, 85 Pac. 425, 36 Colo. 452.

**Fear**

While to constitute rape the act must be committed by force and against the will of the female, if she is rendered insensible through fright, or ceases resistance under fear of death or great bodily harm, the consummated act is rape. *Loescher v. State*, 125 N. W. 459, 460, 142 Wis. 260.

"Rape" is carnal knowledge of a female, forcibly and against her will, and where threats of personal violence are made to overcome her will, and she believes her person is in great danger from such threats, and is induced thereby to submit to the will of the person making such threats, and he has sexual connection with her under such circumstances, then the law considers such carnal knowledge as having been forcibly had and against the will of the female. *State v. Miller*, 90 S. W. 767, 770, 191 Mo. 587.

"In criminal law, 'rape' is the act of having carnal knowledge of a woman against her will or without her conscious permission, or where her permission has been extorted by force or fear of immediate bodily harm" (quoting and adopting definition in *Rapalje & Lawrence's Law Dictionary*, and citing *Gore v. State*, 46 S. E. 671, 119 Ga. 418, 100 Am. St. Rep. 182). "The law requires that the unlawful carnal knowledge shall be against her will. She must resist, and her resistance must not be a mere pretense, but must be in good faith. She must not consent. If she consents before the act, it will not be rape. But, as to this consent, we may observe that it must be a consent not controlled and dominated by fear. \* \* \* A consent induced by fear of bodily harm or personal violence is no consent, and though a man lay no hands on a woman, yet if, by an array of physical force, he so overpowers her mind that she dare not resist, he is guilty of rape by having the unlawful intercourse" (quoting and adopting definition in *Bailey v. Commonwealth*, 82 Va. 107, 3 Am. St. Rep. 87, and citing discussion of *Blackburn* in 13 *Crim. Law Mag.* 503 et seq., and *People v. Dohering*, 59 N. Y. 374, 17 Am. Rep. 349). Hence, under *Pen. Code* 1895, § 93, defining the crime of rape as the carnal knowledge of a female forcibly and against her will, force is an element of the crime, and it may be exerted, not only by physical violence, but by threats of serious bodily harm which overpowers the female and causes her to yield against her will. *Vanderford v. State*, 55 S. E. 1025, 1027, 126 Ga. 753.

**As felony**

See *Felony*.

**Force**

The derivation of the word "rape" indicates the use of force and violence. *Hubert v. State*, 106 N. W. 774, 775, 74 Neb. 220.

"Rape" is the carnal knowledge of a woman by force and against her will; force,

either actual or presumptive, being an indispensable element. *State v. Brown* (Del.) 83 Atl. 1083, 1084.

"Rape" is the carnal knowledge of a woman, forcibly and against her will, the force overcoming her resistance being an indispensable element of the offense, unless she is an idiot or is subdued by fraud, or is overcome by drugs or drinks, or their equivalent; and acquiescence obtained through duress, or by putting a woman in fear, is sufficient force. *Herndon v. State*, 56 South. 85, 87, 2 Ala. App. 118.

The law recognizes no intermediate degree of force in the accomplishment of an illegal act of sexual intercourse which is sufficient to accomplish the act contrary to the consent of the female, and yet not constitute the crime of "rape." *Whidby v. State*, 49 S. E. 811, 121 Ga. 588.

Under *Rev. Codes*, § 8336, defining "rape" as sexual intercourse with a female, not the wife of the perpetrator, where she resists, but her resistance is overcome by violence or force, the gist of the offense is force; and if there is consent, although reluctant and accompanied by verbal protests and refusals, at any time during the intercourse, the act is not accomplished by force, and is not rape. *State v. Needy*, 117 Pac. 102, 43 Mont. 442.

Upon proof in a prosecution for "rape" of penetration of a female of the age of consent, the burden is on the prosecution to prove force or fear, but the law implies force from connection without consent. *State v. Sigerella* (Del.) 82 Atl. 31, 32, 7 Pennewill, 311; *Sigerella v. State* (Del.) 74 Atl. 1081, 1 Boyce, 157.

*Burns' Ann. St. Supp.* 1905, § 1995, declares that whoever perpetrates an assault or an assault and battery on any human being, with intent to commit a felony, shall, on conviction, be imprisoned, etc.; and section 2004 declares that whoever unlawfully has carnal knowledge of a woman forcibly against her will or of a female child under 14 years of age is guilty of "rape." Held, that force, actual or constructive, is an essential element of assault to "rape" committed on a female over 14 years of age. *Rahke v. State*, 81 N. E. 584, 585, 168 Ind. 615.

The mere carnal knowledge of a female child under the age of consent is "rape," whether the act be committed with or without force, or with or without consent, and the nature of the crime, or the proof required or permitted to sustain it, is not changed by the fact that the information charges the unlawful act to have been committed by force. *State v. Fetterly*, 74 Pac. 810, 811, 33 Wash. 599.

"Rape" is the carnal knowledge of a female forcibly and against her will, and it is uniformly held that one who carnally knows a woman while she is in a state of stupefaction

is guilty of rape. Her power of resistance may be removed without physical force or violence, and, where it is so removed, carnal knowledge is rape. Only such force as is necessary to overcome woman's resistance is required, and the degree of force required, depends upon the circumstances of each case. A very little force would be required to overcome the resistance of a woman who is recovering from the effects of chloroform, while a great deal might be required to remove the resistance of a robust and active woman. One who administers chloroform to a woman for a lawful purpose, and afterwards formed the design and purpose to have sexual intercourse with her while she was under the influence of chloroform and while she was in such a condition from the effects of the chloroform that she was unable to remonstrate or resist, and that while harboring such intention he undertook to have sexual intercourse with her, he was guilty of an assault with intent to commit rape, although the assault was one without violence, and although he desisted before accomplishing his purpose. *Harlan v. People*, 76 Pac. 792, 794, 32 Colo. 397.

The force necessary to constitute rape may be either actual or presumptive; but, if carnal penetration of a female of the age of consent is relied on, the state must prove beyond a reasonable doubt that the penetration was consummated by force and against her will, or by putting her in fear and terror. *State v. Colombo*, 75 Atl. 616, 618, 1 Boyce, 96.

In a prosecution for rape, where the indictment alleged assault by force, threats and fraud, and the proof excluded any question of fraud, and presented mainly an assault to rape by force, a charge that rape is the carnal knowledge of a woman without her consent, obtained by force, threats, or fraud, or the carnal knowledge of a woman so mentally diseased as to have no will to oppose the act, or the carnal knowledge of a female under the age of 15 years, while including matters having no relation to the offense charged in the indictment or the evidence adduced, was not prejudicial, where the court correctly charged as to what constituted rape by force and instructed that the facts must exist which show an assault by accused upon the injured female, coupled with an intention to commit rape by force, that there must be the use by accused of unlawful violence, that accused's intent must be shown to have been to accomplish his purpose by force and against the female's will, and that the assault must have been accompanied by the specific intent to rape, to have carnal knowledge of the woman without her consent, by force, and by means sufficient to overcome all resistance within her power and accomplish his purpose at all hazards. *Rallsback v. State*, 110 S. W. 916, 917, 53 Tex. Cr. R. 542.

#### **Forcible defilement distinguished**

See Forcible Defilement.

#### **Fornication distinguished**

See Fornication.

#### **Incest distinguished**

The distinctive feature of the crime of incest is the relationship of the parties, while in "statutory rape" the youthfulness of the female is the distinctive ingredient and evidence necessary to convict of incest would be insufficient to convict for statutory rape, and hence though the crimes are committed by the same act, they are independent. *State v. Learned*, 85 Pac. 293, 294, 73 Kan. 328.

Under Rev. St. § 7019, declaring it to be incest where persons nearer of kin by consanguinity or affinity than cousins, having knowledge of the relationship, commit adultery or fornication together, a father may be convicted of incest with his daughter under 14 years of age, though his offense may also be rape, under Rev. St. § 6816. *Straub v. State*, 27 Ohio Cir. Ct. R. 50, 52.

#### **As infamous crime**

See Infamous Crime.

#### **Legal status of prosecutrix**

*Wilson's Rev. & Ann. St.* 1903, § 2251, defines "rape" as an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, and an indictment for "rape" must aver that the female on whom the crime was committed was not the wife of the accused. *Smythe v. State*, 101 Pac. 611, 616, 2 Okl. Cr. 286, 139 Am. St. Rep. 918 (citing *Young v. Territory*, 58 Pac. 724, 8 Okl. 525; *Parker v. Territory*, 59 Pac. 9, 9 Okl. 109).

An indictment under the clause of the statute, declaring that every male person of the age of 17 years and upwards, who shall have carnal knowledge of any female under the age of 16 years, and not his wife, either with or without her consent, shall be guilty of "rape," must aver that the female was not the wife of accused. *People v. Stowers*, 98 N. E. 986, 987, 254 Ill. 588.

Under Pen. Code, § 261, defining "rape" as an act of sexual intercourse accomplished with a female not the wife of the perpetrator, etc., an information for an assault with intent to rape, failing to charge that prosecutrix was not defendant's wife, was fatally defective, nor was the omission cured by the allegation that defendant committed the assault with intent to feloniously ravish and carnally know, which only described the manner in which the intercourse was sought to be accomplished. *People v. Everett*, 101 Pac. 528, 529, 10 Cal. App. 12.

Pen. Code, § 261, defines "rape" as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator where she resists but her resistance is overcome by force or violence." Held, that an indictment under such section, failing to charge that prosecutrix was not defendant's

wife, was fatally defective, nor was the omission cured by the allegation that defendant "violently did 'ravish' and carnally know" prosecutrix, as those words only described the manner by which the intercourse was accomplished. *People v. Miles*, 101 Pac. 525, 526, 9 Cal. App. 312.

#### **Mental capacity of prosecutrix**

"Rape" is the carnal knowledge of a female forcibly and against her will. Pen. Code 1895, § 93. It is the act of having carnal knowledge by a man of a woman forcibly and against her will, or without her conscious permission, or where permission has been extorted by force or fear of immediate bodily harm. 13 Cr. Law Mag. 503. A man, having sexual intercourse with an imbecile female, mentally incapable of intelligently expressing any assent or dissent, or of exercising any judgment in the matter, is guilty of rape, although he uses no more force than is necessary to accomplish the carnal act, and although the woman offers no resistance. *Gore v. State*, 46 S. E. 671, 672, 674, 119 Ga. 418, 100 Am. St. Rep. 182.

Under Snyder's Comp. Laws 1906, § 2353, providing that rape is an act of sexual intercourse with a female, not the wife of the perpetrator, either (3) where she is incapable through lunacy or any other unsoundness of mind of giving legal consent, or (4) where she resists, but her resistance is overcome by force and violence, an indictment charging that the defendant by means of force and violence, overcoming the resistance of prosecutrix, who was incapable through lunacy and other unsoundness of mind of giving legal consent, etc., sufficiently charges the crime as defined in the third subdivision of the section; the allegation of force and violence and want of consent being immaterial and mere surplusage. *Adams v. State*, 114 Pac. 347, 348, 5 Okl. Cr. 847.

#### **Penetration**

Under Pen. Code, § 261, par. 1, defining "rape" as sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 16 years, it is essential to conviction that sexual penetration be proved, or that facts be proved from which it may be inferred. *People v. Howard*, 76 Pac. 1116, 1117, 143 Cal. 316.

#### **Physical capacity**

The crime of "rape" involves physical capacity to commit the offense. Hence, in a prosecution of persons between the ages of 7 and 14, for rape or an attempt to commit rape, the burden is upon the state to show the mental and physical competency of the defendant. In the absence of such proof, the presumption of incompetency must prevail. *State v. Flisk*, 108 N. W. 485, 486, 15 N. D. 589, 11 Ann. Cas. 1061.

#### **Resistance**

"Rape" is an act of sexual intercourse accomplished with a female not the wife of

the perpetrator, where she resists, but her resistance is overcome by force and violence. *Harmon v. Territory*, 79 Pac. 765, 770, 15 Okl. 147.

To constitute "rape," the will of the female must be overcome by force, and intercourse had entirely against her will, and, if she consents in the least during any part of the act, there is not such an opposing will as the law requires. *State v. Whimpey*, 118 N. W. 281, 282, 140 Iowa, 199.

Kirby's Dig. § 2005, defines "rape" as "the carnal knowledge of a female forcibly and against her will." The fact that the act was committed against the will of the female is an essential element of the crime, and must be charged in the indictment. *Beard v. State*, 95 S. W. 995, 997, 79 Ark. 293, 9 Ann. Cas. 409.

"Rape," as used in the statute defining the offense, means sexual intercourse with a female over the designated age by force, without her consent and against her will. Voluntary submission by the woman while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of rape. If the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had been theretofore employed, there is no rape. *Devoy v. State*, 99 N. W. 455, 456, 122 Wis. 148 (quoting *Connors v. State*, 2 N. W. 1143, 47 Wis. 523).

## **RAPID**

### **RAPID TRANSIT**

A term "rapid transit," which antedates Rapid Transit Acts 1875, suggests the desire of the public for swift transportation impeded as little and as seldom as may be, necessitating the elimination of unnecessary stops and the continuance of a rate of high speed, and making it incumbent on the passenger that he cause no unnecessary hindrance thereto. *Baron v. New York City Ry. Co.*, 102 N. Y. Supp. 746, 749, 52 Misc. Rep. 581 (dissenting opinion of McClain, J.).

### **RAPIDLY**

The word "rapidly" is to be construed in the light of the circumstances of the particular situation, and a car is running rapidly, if, while running at its usual speed, it attempts to pass a wagon in the middle of a block, so close to the track as to threaten a collision, without reducing speed. *Vessels v. Metropolitan St. Ry. Co.*, 108 S. W. 578, 580, 129 Mo. App. 708.

## **RAPPER**

The word "rapper," in criminal circles, means the complaining witness. *People v. Madden*, 105 N. Y. Supp. 554, 556, 120 App. Div. 338.



**RAPUIT**

"Rapuit," at common law, did not necessarily mean carnal knowledge, even much less carnal knowledge against the will of the female. *Beard v. State*, 97 S. W. 667, 671, 79 Ark. 293, 9 Ann. Cas. 409 (citing *Hale P. C.* pp. 628-634; 3 Coke, Inst. 60).

**RASCAL**

See *Damn Rascal*.

**RASH****RASHLY, RECKLESSLY, OR WANTONLY**

An instruction, in an action involving willful negligence, that the phrase "rashly, recklessly, or wantonly" meant something more than mere inadvertence, or inattentiveness, or want of ordinary care, and meant an indifference to obvious consequences and the rights of others, or whether an injury would result or not, and that the wrongful conduct must indicate such a disregard of consequences as to evince little short of actual intent to inflict injury, a willingness to perpetrate injury or to take known chances of doing so, and must constitute the equivalent, so far as consequences are concerned, of actual intent and willingness to perpetrate injury, was correct. *Barlow v. Foster*, 136 N. W. 822, 827, 149 Wis. 613.

**RATCHET PULLER**

A "ratchet puller" is a borer or drillor of holes for the reception of charges of dynamite to be exploded in the process of mining ore. *Northern Ala. Coal, Iron & R. Co. v. Beachman*, 37 South. 227, 140 Ala. 422.

**RATE**

See *At the Rate of*; *Continuous Mileage Rate*; *Contract Rate*; *Double-Line Rates*; *Established Rate*; *Flat Rate*; *Frontage Rate*; *Greater Rate*; *Joint Rate*; *Legal Rate*; *Maximum Rate*; *Payable at the Rate of \$50 Per Month*; *Prevailing Rate of Wages*; *Reasonable Rate*; *Rebiling Rate*; *Reduced Rate*; *Single-Line Rates*; *Standard Schedule Rate*; *Tariff Rate*; *Unlawful Rate*; *Usual Short Rate*; *Voluntary Rate Reduction*.

Increase of rate of fare, see *Increase*.

Rates in force, see *In Force*.

See, also, *Rebate*.

The word "rate," as used in Interstate Commerce Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847, means the net amount the carrier receives from the shipper and retains, and any device by which such amount is reduced below the rate given in the published schedule is one for the giving of a rebate. *United*

*States v. Chicago & A. Ry. Co.*, 148 Fed. 646, 647.

The word "rate," in a constitutional provision requiring the Legislature to provide law for uniform and equal rate of assessment and taxation, is used in a somewhat different sense when applied to the assessment from that when applied to taxation. The term "rate" may apply either to the percentage of taxation or to the value of property, and is used in the constitutional provision in each sense, and the former sense to the taxation, and in the later sense to the assessment. Equality in the rate of assessment means proportional valuation, relative, not absolute, equality, while equality in the "rate" of taxation means that the percentage shall be the same, or absolutely equal. *Lake County v. Schroder*, 81 Pac. 942, 944, 47 Or. 136.

*Brooklyn School Board By-Laws*, § 329, provides that the salaries of teachers and clerks in the high schools shall be at the same "rate" as paid April 1, 1899, in accordance with a progressive schedule giving an annual increase of \$100, in force April 1, 1899. *Laws 1900*, p. 1607, c. 751, § 4, provides for the salary of high school teachers, fixing them specifically the same as in the schedule referred to, and in all cases providing for an annual increment of \$110. Held, that the word "rate," as used in the by-law, was not intended to mean a fixed amount, but a progressive salary; and hence the by-law did not make the rates recited in the schedule fixed and unchangeable. *Holmes v. Board of Education of City of New York*, 120 N. Y. Supp. 284, 287.

**As including demurrage**

The provisions of the Interstate Commerce Act Feb. 4, 1887, c. 104, §§ 1, 3, 24 Stat. 379, requiring rates for the transportation and for the "receiving, delivering, storage or handling" of property by an interstate carrier to be reasonable, and prohibiting discrimination, are sufficiently broad to cover demurrage charges. *Michie v. New York, N. H. & H. R. Co.*, 151 Fed. 694, 695.

**As valuation**

In U. S. Comp. St. 1901, § 5219, providing that the taxation of national bank stock shall not be at a greater rate than shall be assessed on other moneyed capital in the hands of individual citizens, etc., the term "rate" has relation to the assessment as a whole, and does not signify the mere percentage or levy upon any valuation adopted. *Ankeny v. Blakley*, 74 Pac. 485, 488, 44 Or. 78.

As used in U. S. Rev. St. § 5219, declaring that shares of national banks may be taxed by state authority at a "rate" not greater than is assessed on other money or capital in the hands of individual citizens of the state, "rate" does not mean the tax rate imposed on other property alone, but implies

that the assessment, the rate of assessment, and the valuation must all be taken together when considering the question whether an act imposing a tax on bank shares operated as a discrimination. *People ex rel. Bridgeport Sav. Bank v. Feltner*, 105 N. Y. Supp. 993, 996, 120 App. Div. 838.

### RATABLE DISTRIBUTION

A "ratable distribution" is one which is made at proportionate rates. *State ex rel. Carroll v. Corning State Sav. Bank*, 103 N. W. 97, 99, 127 Iowa, 198.

### RATED CAPACITY

The term "rated capacity," as used in a contract guarantying payment for a heating plant which provided that the company furnishing the same should in no way be held responsible, except as to the rated capacity of the boiler, referred, not to the efficiency of the boiler to satisfactorily warm the house, but merely to its theoretical capacity according to the customary way of rating such articles by dealers to the trade. *United States Heater Co. v. Jenss*, 107 N. W. 293, 294, 128 Wis. 162.

### RATIFY

To "ratify" means to confirm or approve of, and ratification may be signified by acts of omission as well as of commission. *Colb v. Simon*, 97 N. W. 276, 280, 119 Wis. 597, 100 Am. St. Rep. 909.

The highest lexicographic authority exists for the interchangeable use of the terms "approve" and "ratify." *Baker v. Hammett*, 100 Pac. 1114, 1116, 23 Okl. 480.

To "ratify" a fraudulent contract means something more than merely standing on the contract, or affirming it; meaning an "affirmance" of the contract after full knowledge of the fraud, intention to abide by the contract notwithstanding, and a waiver of all claim for damages. *Potts v. Lambie*, 121 N. Y. Supp. 384, 385, 65 Misc. Rep. 334.

Const. art. 20, § 1, requiring "a majority of the electors" to ratify an amendment to the Constitution, requires a majority of the electors to adopt an amendment, and not merely a majority of those actually voting thereon; the word "electors" meaning as defined by article 6, § 2, those entitled to vote, and the word "ratify" meaning to affirm. *State ex rel. Blair v. Brooks*, 99 Pac. 874, 875, 17 Wyo. 344, 22 L. R. A. (N. S.) 478.

In Rev. Laws, c. 25, § 31, providing that a town, by the action of its selectmen, "ratified" by a majority of its voters present and voting thereon at a town meeting, may purchase the works of a water company, the word "ratified" means that, when the selectmen issue the warrant, they are supposed to have taken appropriate precedent action, otherwise there is no proposal of purchase in existence which can be made the subject of

ratification, and which, by the ratifying act, thereupon becomes an existing contract. *Revere Water Co. v. Inhabitants of Town of Winthrop*, 78 N. E. 497, 501, 192 Mass. 455.

### RATIFICATION

See, also, Confirmation.

A "ratification" is defined to be a "confirmation of a previous act done either by the party himself or by another. It is the confirmation of a voidable act." *Russell v. Erie R. Co.*, 59 Atl. 150, 153, 70 N. J. Law, 808, 67 L. R. A. 433, 1 Ann. Cas. 672.

Where the rights of third parties are not involved, "ratification" of an unauthorized act is predicated upon an actual and existing purpose to approve the act, and depends upon the fact, and not upon appearances. *Manning v. Heidelberg*, 138 N. Y. Supp. 750, 754, 153 App. Div. 790.

"Ratification" means confirmation. To ratify is to give sanction and validity to something done without authority. The underlying principle on which liability by "ratification" attaches is that he who has commanded is legally responsible for the direct results and for the natural and probable consequences of his conduct, and that it is immaterial whether that command was given before or after the conduct. *Steffens v. Nelson*, 102 N. W. 871, 872, 94 Minn. 365 (quoting in part definition in *Evans, Prin. & Ag. [Bedford's Ed.]* 90).

"A 'ratification' may be defined to be an acceptance or an adoption of an act performed by another as agent or representative in particular confirmation of what has been done without original authority." A municipal corporation may ratify the unauthorized acts and contracts of its officers which are within the scope of the corporate powers. The principle as to ratification is the same with corporations as with individuals. *Dougherty v. City of Excelsior Springs*, 85 S. W. 112, 113, 110 Mo. App. 623 (citing *Dill. Corp. § 463*).

"Ratification" is "the adoption of a previously formed contract, notwithstanding a vice which rendered it relatively void. By the very nature of the act of ratification, confirmation, or affirmance, the party confirming becomes a party to the contract. He that was not bound becomes bound by it and entitled to all the benefits of it." "'Ratification,' like prior authority, by agreement rests on assent. The assent of the agent is already given by his assuming to act. The assent of the third party is already given by his entering into the contract. The assent of the principal is therefore all that is required to make the contract binding on him on the third person. Much the same considerations govern the doctrine of assent in ratification as govern the assent of an acceptance of an offer." *Memphis St. Ry. Co. v. Roe*, 102 S. W. 343, 348, 118 Tenn. 601 (quoting

and adopting the definitions in *Huffcut*, Ag. p. 46, and *Herman on Estoppel*, § 1029).

"The gist of a ratification is the deliberate admission by the proper authority of a liability to pay for that for which it may lawfully contract.' If one says, 'I will pay A. or B., to one or the other of whom I admit I am liable, as the court may adjudge,' this is as much a ratification, a formal acknowledgment, of a liability to pay as if he said, 'I promise to pay A.,' or 'I promise to pay B.'" *Borough of East Newark v. New York & N. J. Water Supply Co.*, 57 Atl. 1051, 1055, 87 N. J. Eq. 265.

"Ratification" is the election by a person, and the expression of such election in words or conduct, to accept an act or contract previously done or entered into in his behalf by another who had at the time no authority to do the act or make the contract on his behalf. If the acts have been performed or contracts made without his authority on his behalf, he has, when he obtains knowledge thereof, an election either to accept or repudiate them. If he accepts them, his acceptance is a "ratification" of the previously unauthorized acts or conduct and makes them as binding on him from the time they are performed as if originally authorized. *Gallup v. Liberty County*, 122 S. W. 291, 296, 57 Tex. Civ. App. 175.

"Ratification" is equivalent to original authority. It validates what would otherwise be an invalid act, and attaches to it those incidents and consequences it would have had if previously authorized. *Beagles v. Robertson*, 115 S. W. 1042, 1049, 135 Mo. App. 306.

"Ratification" of the act of another is equivalent to an original grant of authority. The situation of the parties is the same as if the plaintiff had induced the contract in the first instance through an agent duly appointed for the purpose. Proof of ratification includes proof of agency and authority and may be made under a pleading charging the ratified act to be that of the principal. *Aultman Threshing & Engine Co. v. Knoll*, 79 Pac. 1074, 1077, 71 Kan. 109.

"Ratification" is a form of authorization, and ratification by a principal of an unauthorized act of an agent has a retroactive efficacy and is equivalent to an original authority; and hence an allegation that there was no authorization is an allegation of the absence of the authorization in any form, whether previously or subsequently given. *Mutual Life Ins. Co. of New York v. Grannis*, 107 N. Y. Supp. 926, 927, 57 Misc. Rep. 174.

"A 'ratification,' when fairly made, will have the same effect as an original authority, as to agent and principal, not only in regard to the agent himself, but in regard to third persons. \* \* \* In short, the act

is treated throughout as if it were originally authorized by the principal, for the ratification relates back to the time of the inception of the transaction, and has a complete retroactive efficacy." *Sims v. State* (Tex.) 87 S. W. 689, 691 (quoting and approving *Story*, Ag.).

"Ratification," as applied to the act of municipal authorities ratifying an act of a committee, is equivalent to previous authority, and makes such act become the act of the municipality. *Dorsey v. Town of Henderson*, 62 S. E. 547, 548, 148 N. C. 423.

"Ratification" operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. The intervening rights of third persons cannot be defeated by the ratification. Facts showing that the maker of certain notes, and after his death his executrix, paid to another, with the consent and knowledge of the indorsee, one of such notes, and also paid two others to the same person, which neither the indorsee nor his executrix ever afterwards claimed, but treated, to all intents and purposes, as paid, and that his executrix, on receiving payment of interest on the remaining notes, gave a receipt in full to date, are sufficient to show such knowledge of an acquiescence in the payment of the two notes as to constitute a ratification of the act of the person receiving payment thereof, binding on the indorsee and his successors in interest. *Platt v. Schmitt*, 94 N. W. 345, 347, 348, 117 Wis. 489 (quoting and adopting definition in *Cook v. Tullis*, 18 Wall [85 U. S.] 338, 21 L. Ed. 933).

"Any conduct by the principal which would lead a reasonable man to conclude that the principal is manifesting an intent to be bound by the agent's contract will be deemed a 'ratification.' \* \* \* Where the attorneys for plaintiff, in an action for personal injuries, effected a settlement with defendant by misleading defendant by a power of attorney forged by the attorneys, and on learning of the facts plaintiff in the action instituted criminal proceedings against the attorneys to force them to pay over the money obtained from defendant by them or suffer the penalty for the crime, the indictment in the criminal prosecution charging that defendant had obtained the money in full satisfaction of the suit, and that it was the property of prosecutor, in a subsequent action for the injuries, the facts showed a ratification of the settlement, precluding recovery. *Memphis St. Ry. Co. v. Roe*, 102 S. W. 343, 348, 118 Tenn. 601 (quoting and adopting definition in *Huffcut*, Ag. p. 47).

"'Ratification' is in general the adoption of a previously formed contract, notwithstanding a view that rendered it relatively

void; and, by the very nature of the act of ratification, confirmation, or affirmation, \* \* \* the party confirming becomes bound by it, and entitled to all the proper benefits of it. \* \* \* If it be merely against conscience, then, if the party, being fully informed of all the circumstances of it and of the objection to it (in his own words, 'with his eyes open'), voluntarily confirms it, he thereby bars himself of that relief, which he might otherwise have." Where, by purchasing a brick machine under a written contract providing that after the machine had been operated for three days, the buyer might accept or return it, and where after such trial, although it did not work successfully, the buyer retained it and gave his notes therefor, and some months afterward, and after the notes had matured they were renewed by the buyer making a cash payment, and the machine was retained several months longer, there was a "ratification" of the sale, though the machine never did work successfully. *Schagun v. Scott Mfg. Co.*, 162 Fed. 209, 219, 89 C. C. A. 189.

"To ratify is to give validity to the act of another. A 'ratification' is equivalent to previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given." The purchasers of a stock of goods insisted, as a condition precedent to their purchase, that the seller deposit in a bank a sum of money sufficient to pay his commercial creditors, which was done; and thereafter a creditor, who was not a commercial creditor, sued the seller and garnished the deposit, whereupon the commercial creditors interpleaded, claiming the fund. Held, that the proceeding in interpleader was a ratification of the conduct of the purchasers, and brought the interpleaders into the same situation as if the contract had originally been made for their benefit between the seller and an authorized agent of the interpleaders. *Alexander v. Wade*, 80 S. W. 19, 21, 106 Mo. App. 141 (quoting and adopting definition in *McCracken v. City of San Francisco*, 16 Cal. 591).

#### Acquiescence not synonymous

"Ratification" and "acquiescence" are not synonymous. The latter term is but evidence to be considered in determining the existence of the former. It is only when silence or acquiescence becomes the basis or authority on which another parts with something valuable or incurs a liability that the doctrine applies. The doctrine is that in such case the party is estopped to assert the truth because its assertion would work a fraud on him whose conduct had been influenced thereby. To "acquiesce" is to forbear opposition or complaint, while to "ratify" is to make valid or to confirm. We may acquiesce in an act without approving it. *Austin v. Jones*, 41 South. 408, 411, 148 Ala. 659.

#### Contract in ratifier's behalf

"Ratification" signifies the adoption by the principal of that which has been done in his behalf, and the agent or assumed agent must have acted as agent, and not as principal. *Linn v. Alameda Min. & Mill. Co.*, 104 Pac. 668, 669, 17 Idaho, 45.

"Ratification," as it relates to the law of agency, is the express or implied adoption of the acts of another, for whom the other assumes to be acting, but without authority; so that, where a contract under seal purports to be that of the person executing it, ratification of it by another does not make it his contract. *Stanton v. Granger*, 109 N. Y. Supp. 134, 137, 125 App. Div. 174.

"Ratification," as it relates to the law of agency, is the express or implied adoption of the acts of another by one for whom the other assumed to be acting, but without authority. The doctrine properly applies only to cases where one has assumed to act as agent for another, and then a subsequent ratification is equivalent to original authority. *Minder & Jorgenson Land Co. v. Brustuen*, 124 N. W. 723, 727, 24 S. D. 537 (citing and quoting *Hamlin v. Sears*, 82 N. Y. 327).

"Ratification," as it relates to the law of agency, is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority." The act must be done by the agent on account of some principal, not on his own account or on account of some third person. A contract made by a person in his own name and on his own behalf cannot be made the contract of another as principal by an attempted ratification of the act as that of an agent. In *re Roanoke Furnace Co.*, 166 Fed. 944, 953.

"Ratification" is an agreement to adopt an act performed by another for us." Where a grantee obtained a conveyance by falsely representing to the grantor that he was the agent of a third person, and the conveyance was made to the grantee in his own name for his own benefit, and the purchase price was paid by his own money, the third person was not entitled to the benefit of the conveyance on the ground that he had a right to and did ratify the purchase. *Virginia Pocahontas Coal Co. v. Lambert*, 58 S. E. 561, 562, 107 Va. 368, 122 Am. St. Rep. 860, 13 Ann. Cas. 277.

#### Estoppel in pais distinguished

A "ratification" of the unauthorized act of an agent or of a stranger who claims to act as such is a confirmation of the act which must be found in the intention of the principal, either expressed or implied. The distinction between "ratification" and "estoppel in pais" being that, in the former case, the party is bound because of his intention, assent, or ratification in fact, while in the latter, he is bound notwithstanding there was no such intention, because, unless the law

treated him as legally bound, the other party would be prejudiced and defrauded by his conduct. Where a stockbroker's customer, dealing through an instructed employé, received monthly accounts from February to October, which he did not protest, because he did not want to injure the employé, who had been guilty of fraud to his injury, and with knowledge of all the facts, admitted his indebtedness and promised to pay it, he thereby ratified the account, so that the broker could recover thereon. *Stiebel v. Haigney*, 119 N. Y. Supp. 455, 458, 134 App. Div. 516.

#### Formality

"Ratification" is equivalent to original authority and nothing more, and, where the statute requires the original authority to be in writing, it would, on principle, require the ratification to be made with equal ceremony. *Brandon v. Pritchett*, 55 S. E. 241, 245, 126 Ga. 286, 7 Ann. Cas. 1093 (quoting and adopting the definition in *Long v. Poth*, 37 N. Y. Supp. 672, 16 Misc. Rep. 85, and citing *Haydock v. Stow*, 40 N. Y. 370, 371; *Whitlock v. Washburn*, 17 N. Y. Supp. 60, 62 Hun, 374; *Stetson v. Patten*, 2 Me. [2 Greenl.] 360, 11 Am. Dec. 111; *McDowell v. Simpson* [Pa.] 3 Watts, 129, 27 Am. Dec. 338; *Parrish v. Koons* [Pa.] 1 Pars. Eq. Cas. 95; *Videau v. Griffin*, 21 Cal. 389).

#### Knowledge

"Ratification" presumes the existence of knowledge of all the facts, and one not informed of the whole transaction is not in a position to ratify the same. *Miller v. Ahrens*, 163 Fed. 870, 877 (quoting 7 Words and Phrases, p. 5930).

"In order to constitute a 'ratification,' there must be an acceptance of the result of the act with an intent to ratify and with full knowledge of all the circumstances." *Russell v. Erie R. Co.*, 59 Atl. 150, 153, 70 N. J. Law, 808, 67 L. R. A. 433, 1 Ann. Cas. 672.

"Ratification" involves knowledge of the facts, on the part of the person ratifying at the time when the ratification is made; but, if an agent exceeds his authority, the principal cannot ratify in part and repudiate in part. He must adopt either the whole or none. *Dolvin v. American Harrow Co.*, 54 S. E. 706, 709, 125 Ga. 699, 28 L. R. A. (N. S.) 785.

The "ratification" of the acts of an agent by his principal will not be inferred until the principal has full knowledge of the breach of duty on the part of the agent and with such knowledge remains inactive. *Belcher v. Manchester Bldg. & Loan Ass'n*, 67 Atl. 399, 401, 74 N. J. Law, 833 (citing *Gulick v. Grover*, 33 N. J. Law, 463, 471, 97 Am. Dec. 728; *Dowden v. Cryder*, 26 Atl. 941, 55 N. J. Law, 329).

"'Ratification' cannot take place without full knowledge of all the material facts."

Where a person assumes to act as agent in making a contract, and the person with whom such contract is made proceeds to a performance of the same under protest from the principal, and during such performance is advised and notified by the principal that such person is not in his employ, and that no one had authority to employ him, and that he does not desire or need his services, the mere fact that, after the cessation of such labor, the principal pays to such person an amount which he deems such service is worth will not alone amount to a ratification of the contract made by the person assuming to act as such agent, and will not support an action based upon such contract, upon the ground that the contract was ratified. *Findlay v. Hildenbrand*, 105 Pac. 790, 793, 17 Idaho, 403, 28 L. R. A. (N. S.) 400 (citing 31 Cyc. p. 1253; *Bohart v. Oberne*, 13 Pac. 388, 36 Kan. 284; *Brown v. Rouse*, 38 Pac. 507, 104 Cal. 672; 1 Clark & S. Ag. § 106).

The failure of a creditor to demand and collect, with promptness, the money due to her upon certain matured shares in a mutual building and loan association does not warrant an inference of "ratification" of the act of another in drawing and using the money, while she is without full knowledge of the facts and circumstances of the case. *Ryle v. Manchester Bldg. & Loan Ass'n*, 67 Atl. 87, 89, 74 N. J. Law, 840 (citing *Gulick v. Grover*, 33 N. J. Law, 463, 471, 97 Am. Dec. 728; *Titus v. Cairo & Fulton R. R. Co.*, 46 N. J. Law, 393).

If an agent, having unwritten authority to make leases of real property, executes a lease for more than three years, the knowledge of his principal that the tenant is in possession and paying rent is not sufficient to work either "ratification" or estoppel. If an agent, having unwritten authority to make leases of real property, executes a lease for more than three years, "ratification" or estoppel will not be inferred against his principal from knowledge that the tenant was making trade improvements, unless the improvements of which he had notice were such as indicated possession under a lease beyond the agent's authority. *Clement v. Young-McShea Amusement Co.*, 67 Atl. 82, 85, 70 N. J. Eq. 677, 118 Am. St. Rep. 747.

"Ratification" implies a conscious and intended approval of the act done. It rests upon the actual and existing purpose to make such approval, and, to meet these requirements, it must be made with full knowledge of all the facts. Plaintiff opened an account with defendant stockbrokers, and arranged to have his transactions cared for by them during his absence on a vacation, and left with them sufficient collateral to protect his account. They made an unauthorized sale of certain of the securities, and immediately sent notice to him in the country, not stating the price, but indicating that there had been

a flurry in the market, that there had been failures, and that the sale was made "to protect your account, as this stock moves very fast." Plaintiff remained silent where he was for a week or 10 days, then started home, stopping a day and a half at an intermediate point, where he received notice of sale of other securities, and the next day went home, and repudiated the transactions. There was not a "ratification" of the first sale by his silence in the meantime; he not having known of the price at which the sale was made. *Burnham v. Lawson*, 103 N. Y. Supp. 482, 483, 118 App. Div. 389 (citing *Glenn v. Garth*, 133 N. Y. 18, 35, 30 N. E. 649, 31 N. E. 344).

To establish a "ratification" by a cestui que trust, the fact must not only be clearly proved, but it must be shown that the ratification was made with a full knowledge of all the material particulars and circumstances, and also, in a case like the present, that the cestui que trust was fully apprised of the effect of the acts ratified and of his or her legal rights in the matter. "Confirmation" and "ratification" imply, to legal minds, knowledge of a defect in the act to be confirmed and of the right to reject or ratify it. To render the act of "ratification" effective and conclusive, certain considerations are necessary. At the time of the supposed ratification, the principal must have been fully aware of every material circumstance of the transaction, the real value of the subject of the contract, and his act of ratification must have been an independent and substantive act, founded on complete information and perfect freedom of volition, and, in addition to this, the cestui que trust must not only have been acquainted with the fact, but apprised of the law; how those facts could be dealt with if brought before a court of equity. Where, after arriving at his majority, a ward executed a mortgage on his real estate to reimburse his guardian for moneys expended by the latter during the guardianship in excess of the income of the estate, though for the benefit of the ward, the execution of such mortgage did not constitute a ratification of the expenditures by the guardian; it appearing that the ward acted entirely on his guardian's advice in making the mortgage, and without any knowledge of his rights, under the express provisions of Ky. St. 1903, § 2034, exempting his real estate from liability for such expenditures. *Fidelity Trust Co. v. Butler* (Ky.) 91 S. W. 676, 681 (quoting and adopting *Adair v. Brimmer*, 74 N. Y. 539; *Hoffman Steam Coal Co. v. Cumberland Coal & Iron Co.*, 16 Md. 456, 77 Am. Dec. 320; and citing and adopting *Boyd v. Hawkins*, 17 N. C. 195; *Butler v. Haskell* [S. C.] 4 Desaus. 709; *Felder v. Harbison*, 20 S. W. 508, 93 Ky. 490).

#### Unauthorized act presupposed

"'Ratification' means the adoption of an unauthorized act; and acquiescence, al-

though it may not in itself be ratification, is nevertheless evidence of it." *Allen v. Corn Exchange Bank*, 84 N. Y. Supp. 1001, 1004, 87 App. Div. 335.

"'Ratification,' as it relates to the law of agency, is the express or implied adoption of the acts of another by one for whom the other assumes to be acting, but without authority; and this results as effectually to establish the duties, rights, and liabilities of an agency as if the acts ratified had been fully authorized in the beginning." *Larsen v. Thuringia American Ins. Co.*, 70 N. E. 31, 32, 208 Ill. 166.

#### Waiver not synonymous

"Ratification" and waiver are not synonymous. To approve is the gist of ratification, while to abandon or relinquish is the gist of waiver. *Holloway v. Darden*, 53 South. 187, 188, 168 Ala. 256 (citing 7 Words and Phrases, p. 5928 et seq.).

### RATIO

In the absence of express ratios in a legislative apportionment act, the "ratios" are the number of the inhabitants of the state divided by the number of senators fixed by the act, and the same number of inhabitants divided by the number of representatives fixed by the act. *State ex rel. Sullivan v. Schnitger*, 95 Pac. 698, 703, 16 Wyo. 479.

#### RATIO DECIDENDI

The principle established by a case is sometimes called its "ratio decidendi." *Kleybolte v. Block Mountain Timber Co.*, 66 S. E. 663, 664, 151 N. C. 635.

### RATIONAL

See Irrationality—Irrational.

The word "rational" has no legal or technical meaning, and is defined by Webster as having reason, faculty of reasoning, endowed with reason and understanding, agreeable to reason; not absurd, preposterous, extravagant, foolish, fanciful, or the like; judicious—as rational conduct; a rational man. An instruction on a will contest, defining soundness of mind of a testator to be sufficient mind and memory to know the natural objects of his bounty and his obligations to them, and "to take a rational survey of his property," and to dispose of that estate according to a fixed purpose of his own, was not erroneous, because not including the language that testator must have mind and memory sufficient "to know the character and value of his estate." *Bottom v. Bottom* (Ky.) 106 S. W. 216, 217.

A question to a witness as to whether a person was acting "rational" or "irrational" did not call for the opinion of the witness as to the mental sanity of the defendant, but for the result of his observations, at the various times he came in contact with the

defendant, as to his appearance in the respects suggested. "To say that a man acts 'rational' or 'irrational' is but to describe an outward manifestation drawn from observed facts. It is the last analysis, the ultimate fact deduced from evidentiary facts coming under observation, but so transitory and evanescent as to be like drunkenness; easy of detection and difficult of explanation." *People v. Manoogian*, 75 Pac. 177, 179, 141 Cal. 592.

#### As reasonable

An instruction that if the accused killed decedent in sudden passion, and not in defense against an attack "reasonably producing a rational fear" of death or serious injury, he should be found guilty of manslaughter was not erroneous in using the word "rational" rather than "reasonable," especially where a subsequent charge fully submitted the issue of self-defense. The word "rational," in the connection here used, is more favorable than the word "reasonable." A fear might be rational and not reasonable. *Christian v. State*, 79 S. W. 562, 563, 46 Tex. Cr. R. 47.

#### RATIONAL VOLITION

An instruction that recovery could be had of a railroad company for death of one injured by its negligence, who committed suicide during insanity caused by the accident, if he had not the power of rational volition, is misleading; the term "rational volition" being likely to be understood to mean volition attended by powers of reason, to consider and judge of the act in all its relations, moral as well as physical. *Daniels v. New York, N. H. & H. R. Co.*, 67 N. E. 424, 426, 183 Mass. 393, 62 L. R. A. 751.

#### RATTLER

A machine used to test bricks by the abrasion test is called a "rattler." *City of Chicago v. Singer*, 66 N. E. 874, 875, 202 Ill. 75.

#### RAVINE

As water course, see Water Course.

#### RAVISH

The word "ravish," used in an indictment for rape, means "to seize" or "to snatch by force." *State v. Peyton*, 125 S. W. 416, 417, 93 Ark. 406, 137 Am. St. Rep. 93.

The word "ravish" presupposes force, and is indispensable in a common-law indictment for rape, but is surplusage in an information charging assault with intent to rape a child under the age of consent. *Ross v. State*, 93 Pac. 299, 302, 16 Wyo. 285.

The word "ravishment," at common law, was equally as applicable to abduction as to

rape, and to males as females. *Beard v. State*, 97 S. W. 667, 671, 79 Ark. 293, 9 Ann. Cas. 409 (citing 1 Coke, 137; 3 Black. Com. 141; Steph. Dig. Cr. Law, 190, note 1).

An indictment charging that the accused feloniously and violently assaulted a female, and violently and against her will feloniously did ravish and carnally know, charges rape, the word "violently," being equivalent to the term "forcibly," or "by force," and the word "ravish" importing the employment of force. *State v. Rohn*, 119 N. W. 88, 90, 140 Iowa, 640.

Where an indictment charged that defendant made an assault on B., a female not his wife, under 15 years of age, with intent to ravish, it was not defective for failure to allege her want of consent and that he intended to commit rape by force, since the word "ravish" implies both force and want of consent. *Alexander v. State*, 127 S. W. 189, 190, 58 Tex. Cr. R. 621.

Pen. Code, § 261, defines rape as "an act of sexual intercourse accomplished with a female not the wife of the perpetrator where she resists but her resistance is overcome by force or violence." Held, that an indictment under such section, failing to charge that prosecutrix was not defendant's wife, was fatally defective, nor was the omission cured by the allegation that defendant "violently did 'ravish' and carnally know" prosecutrix, as those words only described the manner by which the intercourse was accomplished. *People v. Miles*, 101 Pac. 525, 526, 9 Cal. App. 312.

Under Shannon's Code, §§ 7077, 7080, 7083, providing that the statement of facts constituting the offense shall be in ordinary language, etc., an indictment, alleging that accused on a designated date did have carnal knowledge of a designated female, forcibly and against her will, charges rape, defined by section 6451 as the carnal knowledge of a woman forcibly and against her will, though it does not charge that accused "ravished" the female; the word "ravish" implying no more than that the act was done forcibly and against the will of the female. *Palmer v. State*, 118 S. W. 1022, 1029, 121 Tenn. 465.

#### As carnally know

The word "ravish," under the statute of Westminster II, means "having carnal knowledge of a woman by force." *Beard v. State*, 97 S. W. 667, 671, 79 Ark. 293, 9 Ann. Cas. 409.

According to Rev. St. 1899, § 1837, "rape" consists in forcibly ravishing any woman of the age of 14 years or upward. To "ravish" a woman is to have carnal connection with her forcibly, and without her consent, or against her consent. *State v. Welch*, 89 S. W. 945, 947, 191 Mo. 179, 4 Ann. Cas. 681.

## RAW

In a statute making a place where articles in a raw, unfinished, or incomplete state are converted into a new, improved, or different form a manufacturing establishment, the word "raw" is a relative term, and means not yet changed by some process of treatment or fabrication. The words "unfinished" and "incomplete" likewise refer to a state or condition not yet attained and mean not fully fashioned to meet some design. Factory Act (Laws 1903, c. 356) § 7, provides that an establishment wherein any natural products or other articles, in a raw, incomplete, or unfinished condition, are converted into a new improved or different form, is a manufacturing establishment, within the act. Held, that an establishment wherein railroad iron, old stoves, waste and scrap iron of every description, is cut into lengths, known as grade No. 1, grade No. 2 and busheling scrap, by machines known as alligator shears, operated by power, to meet standing specifications of mills which purchase the product, is a manufacturing establishment within the act. *Caspar v. Lewin*, 109 Pac. 657, 659, 82 Kan. 604.

An indictment under Rev. St. § 3279, which charges that the accused "unlawfully and knowingly did carry and deliver, to wit, 'raw material,' to a distillery," on which no sign was placed and kept as required by law, but which does not state that such distillery was one for the production of spirits, nor set forth the kind of raw material which was furnished, is insufficient, as not describing the offense with the particularity required. *Terry v. United States*, 120 Fed. 483, 486, 56 C. C. A. 633.

The term "raw prairie land," as used in a contract for the exchange of land in which one party describes his land as being "raw prairie land," means that the land was a treeless tract covered with coarse grass and fertile soil, in its natural or uncultivated state. *Gardner v. Mann*, 70 N. E. 417, 418, 36 Ind. App. 694.

Where a contract for the purchase of defendant's stock in plaintiff corporation provided that defendant should not concern himself in the manufacture of resistance wire, but might experiment in making such goods, and, if the results of such experiments should meet plaintiff's approval, plaintiff would manufacture the goods and pay for selling the same, and the profits thereon, after paying for the raw material, should be divided between the parties, the words "raw material" obviously mean the several articles of which the alloy is to be composed, and do not mean the billets or rods ready to be drawn into wires, which must be understood to be the "raw product" which defendant offers to furnish. *Driver-Harris Wire Co. v. Driver*, 62 Atl. 461, 463, 70 N. J. Eq. 34.

Raw tussah silk, in the same condition as when reeled from cocoons, except that it has been transferred from the large reels on which it was taken from the cocoons to smaller reels, the result of this process not being any change in the condition of the silk other than to adapt the skeins thus produced to American spinning machines, is held not to be dutiable as "silk partially manufactured from cocoons," under paragraph 384, Tariff Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 185, but to be free of duty under paragraph 660, as "silk, raw, or as reeled from the cocoon, but not \* \* \* advanced in any way" (chapter 11, § 2, Free List, 30 Stat. 201). *United States v. Stewart*, 133 Fed. 811.

In construing the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 660, 30 Stat. 201, for "silk, raw, or as reeled from the cocoon, but not \* \* \* advanced in manufacture in any way," held: (1) That the provision does not cover any form of raw silk advanced beyond the condition of skeins; (2) that silk known as "singles" or "silk on tubes," which has been wound from the skeins onto tubes, the effect of this process being to advance the silk a stage in preparation for its ultimate use, has been "advanced in manufacture"; and (3) that silk in this form is not free of duty under this provision, but dutiable under paragraph 384 (section 1, Schedule L, of said act, 30 Stat. 185), as "silk \* \* \* not further advanced or manufactured than carded or combed silk." *Klots v. United States*, 139 Fed. 606, 607, 71 C. C. A. 590.

Where "raw silk" has been re-reeled from skeins upon cops or tubes, thus permitting the operation of doubling or twisting to be omitted in the process of finishing the silk, and thus bringing the article one step nearer the condition of finished silk, held, that this removes the article from the provision in paragraph 660, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201, for raw silk not "advanced in manufacture in any way," and brings it within the provision in paragraph 384 of said act (chapter 11, § 1, Schedule L, 30 Stat. 185), for "silk partially manufactured from cocoons, \* \* \* and not further advanced or manufactured than carded or combed silk." *United States v. Klotz*, 133 Fed. 808, 809.

## RAY

See X-Ray.

## REACH

The remedy given to a judgment creditor by Act Pa. July 12, 1842 (P. L. 339), by the arrest and imprisonment of the defendant on a showing of fraudulent removal or concealment of his property, is one "to reach the property of a judgment debtor," within the



meaning of Rev. St. § 916, and under said section is available in the federal courts. *Ex parte Crawford*, 154 Fed. 769, 770, 83 C. C. A. 474 (citing *Curtis v. Feste*, 6 Fed. Cas. 1004; *Commonwealth v. O'Hara* [Pa.] 6 Phila. 402).

## READ

### READ IN FULL

See In Full.

## READY

To be "ready" to purchase is to be completely prepared as for immediate use or for present requirement. *McDermott v. Mahoney*, 115 N. W. 32, 40, 139 Iowa, 292 (quoting and adopting definition in Cent. Dict.).

"Ability to purchase property" means "ready" to do so, which, according to Webster, is "equipped or supplied with what is needed for some act or event." *Colburn v. Seymour*, 76 Pac. 1058, 1060, 32 Colo. 430, 2 Ann. Cas. 182.

In a prosecution for assault charged to have been committed by one as principal and by two others as aiders and abettors, the jury were instructed that if they found one of the defendants actually assaulted the prosecuting witness with intent to kill him, or do him great bodily harm, and further found that the other defendants were present, aiding, abetting, encouraging, or ready, if necessary, to aid, assist, or encourage the defendant actually making the assault, then such defendants so present and ready to aid and abet therein might be found guilty with the one actually making the assault. Held, that the word "ready" conveys substantially the same meaning as the phrase ordinarily used, "for the purpose and with the intent to aid and assist if necessary," as the word "ready" is defined as "prepared in mind or disposition, not reluctant, willing, free, inclined, disposed." *State v. Ostman*, 126 S. W. 961, 964, 147 Mo. App. 422.

### Ready for distribution

An estate is "ready to be distributed," within Code Civ. Proc. § 2743, when its resources have been gathered and marshaled so that their extent and nature are known and its expenses and obligations have been ascertained, and it is not necessary that it should be wholly reduced to money. In *re Snedeker*, 114 N. Y. Supp. 936, 937, 61 Misc. Rep. 216.

### Ready for loading

A sailing ship was ready to load on the date required by her charter, except that she had taken in mud ballast which would require to be removed before one of the hatches could be used. Ballast of some kind was necessary to stiffen the ship and render her seaworthy after removal of her prior cargo, and the master had applied to the charterers to

know the character of her next cargo, but had not been informed, and had put in the mud ballast temporarily. Held, that the same being necessary, its presence did not prevent her from being "ready for loading" nor entitle the charterers to cancel. *Ruprecht v. Delacamp*, 165 Fed. 381, 382.

The steamship *Eva* was chartered to carry a cargo of coal to be loaded at Philadelphia; the charter party providing for "customary steamer dispatch loading, steamer to take turn with other steamers loading coal." By the rules of the Greenwich coal pier, where she was to load, each vessel was required to register when "ready" to load, and was loaded in turn, unless she failed to dock when her berth was ready, in which case she lost her place and must re-register. The *Eva* registered, and her master was told by the charterer's agent that she could not be loaded for about a week. She then went to a shipyard to have some changes made in her bulkheads, which, however, were not necessary for her coal cargo, and could be suspended at any time on notice, and she could have reached the coal dock within an hour. When her turn for loading was reached, she was not notified; but another vessel was given her place, apparently at the instance of the charterer, and she was delayed for several days. Held, that she was "ready," within the meaning of the rules, and hence the charterer was liable for demurrage for the time she was delayed. *Bull v. United States Shipping Co.*, 173 Fed. 46, 49, 97 C. C. A. 364.

### Ready for occupancy

Premises leased consisted of a store, basement, and conservatory, to be used for selling flowers, and were part of the lessor's building; and the lease recited that the building was in process of construction, and intended to be of the general character shown in certain plans, and provided that, in case the premises should be "ready for occupancy" at the beginning of the term, possession should be delivered as soon as completed, and that rent should be computed only from the time the premises should be ready for occupancy. Held, that the phrase "ready for occupancy" did not mean fitted by the lessor with fixtures, rendering it ready for the lessee's business. *Gerry v. Siebrecht*, 88 N. Y. Supp. 1034, 1035.

Where the lease of a building for a moving picture show provided that the lessees should furnish all fixtures needed by them in their business, and that they should make all necessary alterations, and that rent should commence when the premises were "ready for occupancy," it was proper to admit parol evidence to show that it was agreed prior to the written lease that the lessors should put a certain addition on the building, but should not place any front thereon; the front being one of the fixtures, and to be put up by the les-

sees. The term "ready for occupancy" which is not exactly defined by the law, meant that the lessors should put the premises in such a condition that the lessees could take possession and install the fixtures and appliances peculiar to the moving picture show. As the lease did not particularly state what was required to render the premises ready for occupancy, parol evidence must be admitted to show that fact. *Murphy v. Schwaner*, 80 Atl. 295, 297, 84 Conn. 420.

#### Ready to discharge

A charter party of a ship to carry a cargo of coal from New Castle, Australia, to San Francisco, there to be discharged "as customary, in such customary berth as consignees shall direct," lay days to commence when the vessel was "ready to discharge," on written notice by the master, gave the consignee the right to designate any customary place for discharging, and the ship did not reach her destination, and was not ready to discharge, so as to be entitled to give the notice, until she was in the berth assigned; and where the master was promptly notified on arrival in port that the cargo had been sold to a fuel company and was to be discharged at its bunkers, which were customary places for discharging coal, a delay of 42 working days while awaiting her turn to discharge at such bunkers, which was required by the custom of the port, was at her own risk, and did not entitle her to recover demurrage, the delay being without fault of the charterer, but caused by a congestion of coal vessels in the port at the particular time. *Anderson v. J. J. Moore & Co.*, 179 Fed. 68, 70, 102 C. C. A. 362.

While under the modern rule, which gives the charterer of a vessel for the carriage of coal, ore, grain, or other like commodities, for which special facilities for loading and discharging are in general use, the option to select the berth at which the vessel shall load or discharge within reasonable limitations, and which subjects her to the necessary delay in awaiting her return without demurrage, the customary charter provisions that lay days shall commence when the vessel is "ready to unload and discharge" and "written notice is given" have no effect, except from the time the vessel reaches the precise berth where she is ordered; but a provision in a coal charter that the time for discharging should commence when the vessel was ready to unload and written notice given, "whether in berth or not," was evidently intended to relieve the vessel from the burden of such rule, and the clause must be given effect in accordance with its plainly expressed meaning, and the lay days for discharging commenced when the vessel gave notice that she was ready to unload and was ready, whether at her designated berth or not. *W. K. Niver Coal Co. v. Cheronea S. S. Co.*, 142

F. 402, 408, 78 C. C. A. 502, 5 L. R. A. (N. S.) 126.

### REAL

The use of the word "apparent," in a charge that no one is justified in taking the life of another, unless the necessity for doing so is apparent, as the only means, etc., held objectionable on account of the dual meaning of the term; it being synonymous with actual or "real." *State v. Jones*, 60 Atl. 396, 397, 71 N. J. Law, 543.

### REAL ACTION

"Real actions" at common law were those by which all disputes concerning corporeal hereditaments were decided. *Brown v. Martin*, 73 S. E. 495, 497, 137 Ga. 338, 39 L. R. A. (N. S.) 16 (quoting and adopting the definition in Will's Gould, Pleading, 6).

### REAL AND SUBSTANTIAL DISPUTE

A contention by importers that the treasury regulations respecting the polariscopic test for sugar assumed to add something to the dutiable standard prescribed by Tariff Act, and that the Secretary of the Treasury thus exercised legislative power confided by the Constitution solely to Congress, does not constitute a "real and substantial dispute" or controversy concerning the construction or application of the federal Constitution within the meaning of Act March 3, 1891, c. 517, § 5, so as to sustain a direct appeal from a federal Circuit Court to the Supreme Court. *American Sugar Refining Co. of New York v. United States*, 29 Sup. Ct. 89, 91, 211 U. S. 155, 53 L. Ed. 129.

### REAL CHATTELS

See Chattels Real.

### REAL DANGER

"Real danger" is danger such as is manifest to the physical senses. *Byers v. Territory*, 100 Pac. 261, 267, 1 Okl. Cr. 677.

### REAL ESTATE

See Real Property.

### REAL ESTATE BROKER

As regular real estate business, see Regular Real Estate Business.

A "real estate broker," strictly speaking, is but a middleman whose office it is to bring the principals together, with the understanding that they are to negotiate with each other, and trade upon such terms as may be mutually satisfactory. *Handley v. Shaffer* (Ala.) 59 South. 236, 290; *Shannon v. Lee* (Ala.) 60 South. 99, 100.

"A 'real estate broker or agent' is one who negotiates the sale of real property. His business, generally speaking, is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind the principal by

signing a contract of sale." *Brown v. Gilpin*, 90 Pac. 267, 270, 75 Kan. 773 (quoting and adopting definition in *McCullough v. Hitchcock*, 42 Atl. 81, 71 Conn. 401); *Larson v. O'Hara*, 107 N. W. 821, 822, 98 Minn. 71, 116 Am. St. Rep. 342, 8 Ann. Cas. 849 (quoting and adopting definition in *McCullough v. Hitchcock*, 42 Atl. 81, 71 Conn. 401).

### REAL ESTATE BUSINESS

See Regular Real Estate Business.

### REAL ESTATE DEALER

As mercantile pursuit, see Mercantile.

### REAL LACE

The distinction between "real lace" and imitation lace is that the former is made by hand and the latter upon machines. The provision in Tariff Act for articles of lace and of imitation lace does not include women's collars and cuffs, composed of braids sewn together by hand, and ornamented with threads and other materials. *D. S. Hesse & Bro. v. United States*, 154 Fed. 171, 172 (citing *Kleeberg v. United States*, 72 Fed. 252, 254; *Sidenberg v. Robertson*, 41 Fed. 763).

### REAL OR PERSONAL PROPERTY

Any real or personal property, see Any.

### REAL OWNER

One to show that he is the "real owner," and therefore authorized under Code 1892, § 500, to maintain a bill to remove clouds from his title, must allege and show that he has a perfect legal or equitable title. *Jones v. Rogers*, 38 South. 742, 744, 85 Miss. 802.

The phrase "real owner," as used in the statement of the rule that Rev. St. c. 84, § 146, providing that an assignee of a chose in action, not negotiable, may sue in his own name, means that the real owner may meet his adversary face to face on the record, is not employed in the sense that the real owner need be the sole beneficial owner. He may be the owner of a part interest only and trustee for the balance, or trustee for the whole; the phrase "real owner" being used as contradistinguished from colorable assignee, one made an assignee solely for the purpose of bringing an action. *Coombs v. Harford*, 59 Atl. 529, 531, 99 Me. 426.

### REAL PARTY IN INTEREST

The test of whether one is the real party in suit is, does he satisfy the call for the person who has the right to control and receive the fruits of the litigation? The rule is stated in a recent ably written work thus: "The real party in interest, within the meaning of this provision of the Code, is the person who will be entitled to the benefits of the action if successful; one who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal, formal, or technical interest

in or connection with it." *Gross v. Heckert*, 97 N. W. 952, 954, 120 Wis. 314.

Under Civ. Code Prac. § 18, providing that every action must be prosecuted in the name of the "real party in interest," section 19 providing that an action by the assignee of a chose in action is without prejudice to any discount, set-off, or defense allowed, and if the assignment be not authorized by statute the assignor must be made a party, and section 21 providing that a personal representative, guardian, curator, committee, trustee of an express trust, or a person with whom or in whose name a contract is made may bring an action without joining with him the person for whose benefit it is prosecuted, a shipper of hogs which had been injured while being carried by a railroad company, who, after the carriage began, sold his interest in the hogs, is not the real party in interest, and so cannot appeal from a judgment denying a recovery in favor of himself and the purchaser against the railroad company. *Lampkin v. Mobile & O. R. Co.*, 142 S. W. 1037, 1038, 146 Ky. 514.

The courts will determine who is the "real party in interest" in an action, by reference, not merely to the name in which the action is brought, but to the facts as they appear of record. *Eastern State Hospital v. Graves' Committee*, 52 S. E. 837, 838, 105 Va. 151, 3 L. R. A. (N. S.) 746, 8 Ann. Cas. 701.

The holders of bonds illegally issued by a school district stand in the place of the original purchasers of the bonds, and may maintain a suit in their name as the "real party in interest" to recover from the proceeds of the property purchased by the proceeds of the sale of the bonds the amount due them. *Board of Trustees of Fordsville v. Postel*, 88 S. W. 1065, 1067, 121 Ky. 67, 123 Am. St. Rep. 184.

Where a contract shows its clear intent and purpose to be a direct and substantial benefit to third parties, and not merely that third parties might be benefited by it, or that third parties are indirectly or incidentally benefited by it, the third parties, who are directly and substantially benefited by the performance of the contract, may maintain an action for its breach under the statute as the "real parties in interest." *Woodbury v. Tampa Water Works Co.*, 49 South. 556, 560, 57 Fla. 243, 249, 21 L. R. A. (N. S.) 1034.

Under Code Civ. Proc. § 449, permitting actions in the name of the "real party in interest," a publisher of a periodical owned by an unincorporated association having thousands of members could sue for printing an advertisement under a contract in the form of a written authority on a printed blank addressed to "the publishers" of such periodical. *Eilert v. Gordon*, 121 N. Y. Supp. 604.

"The 'real party in interest' is the party who is to be benefited by the judgment in the case." Code Civ. Proc. § 367, requires actions

to be brought by the real party in interest, in order to protect a defendant from loss by future suits; and hence plaintiff may not bring an action for property, the title of which has previously vested in his trustee in bankruptcy, where a judgment either for or against plaintiff would not bar a subsequent suit by such trustee for the same cause of action. *Simpson v. Miller*, 94 Pac. 252, 255, 7 Cal. App. 248 (quoting definition in *Bliss*, Code Pl. § 45).

In an action for sawing lumber, the evidence showed that the contract therefor was made by plaintiff and defendant, and that no third person was known as having any interest therein. A third person testified that he was interested in the job because he owned the engine operating the mill sawing the timber and for which he should receive one-half of the proceeds and furnish one-half of the expense, but stated that nothing was said about his being entitled to any part of plaintiff's recovery. Plaintiff testified that he had no partner in the work. Held not to show as a matter of law that plaintiff and the third person were partners in the work, or that the third person was a real party in interest within *Burns' Ann. St.* 1908, § 251, and the court, submitting to the jury the issue whether the third person was interested in the contract, properly refused to grant a new trial on that ground. *Delphos Hoop Co. v. Smith*, 95 N. E. 309, 310, 176 Ind. 29.

A party to be "interested" in an action need not be one who may gain or lose something therein. The word has a broad meaning, and includes all those who, as parties, have some control over the action, whether they will be personally affected thereby or not. Thus an administrator, a trustee, or an executor is a real party in interest when he is bringing or defending a suit for the estate which he represents. Such a party brings or defends the suit, employs counsel, and is directly responsible for going on with the litigation. *Atchison, T. & S. F. Ry. Co. v. Phillips*, 176 Fed. 663, 668, 100 C. C. A. 215.

#### Agent

An agent to whom a deed, absolute in form, was executed as security for a debt to the principal was not a necessary party to an action to have the deed declared a mortgage and foreclosed, under Code Civ. Proc. § 367, providing that every action must be prosecuted in the name of the "real party in interest." *Churchill v. Woodworth*, 84 Pac. 155, 156, 148 Cal. 669, 113 Am. St. Rep. 324.

#### Assignee

An assignee of a note given to a building and loan association by a member was the "real party in interest" within the statute requiring actions to be brought in the name of the real party in interest, even though by such assignment it did not become the owner of the note. *Leon v. Citizens' Building & Loan Ass'n*, 127 Pac. 721, 722, 14 Ariz. 294.

The assignee or pledgee of a negotiable bond is the "real party in interest," within the meaning of *Mills' Ann. Code*, § 3, and may maintain suit upon the same in his own name, irrespective of the nature of his title, or the consideration paid by him for the transfer. *Board of Com'rs of Lake County v. Schradsky*, 71 Pac. 1104, 1105, 31 Colo. 178.

Under *Mills' Ann. Code*, § 3, requiring every action to be brought in the name of the "real party in interest," the assignee of a grantee's claim against his grantor for taxes which the latter should have paid could sue the grantor thereon in his own name. *Rambo v. Armstrong*, 100 Pac. 586, 588, 45 Colo. 124.

Under Code 1907, § 2489, providing that actions on contracts for the payment of money must be prosecuted in the name of the party really interested, an action for breach by a vendor of his contract to erect a building on the premises sold need not be brought in the name of the real owner of the contract, but may be brought by the purchaser, though he has assigned the contract. *Bohanan v. Thomas*, 49 South. 308, 309, 159 Ala. 410.

Where executors by a written assignment transferred a note payable to testator, the assignee was the "real party in interest" and entitled to maintain an action on the note, though one of the executors testified that the estate was still interested in the note, and that, if a recovery should be had, it would inure to the benefit of the estate. The plaintiff may be the "real party in interest" if he have the legal title either by written transfer or delivery, whatever may be the equities between him and his assignor. To be entitled to sue, the plaintiff must have the right of possession, and ordinarily the legal title. The ownership may be as equitable trustee; it may have been acquired without adequate consideration, but must be sufficient to protect the defendant upon a recovery against him from a subsequent action by the assignor. *Huck v. Kraus*, 99 N. Y. Supp. 490, 491, 50 Misc. Rep. 528 (citing *Sheridan v. Mayor, etc., of City of New York*, 68 N. Y. 30; *Hays v. Hathorn*, 74 N. Y. 486, 490).

As used in Code Civ. Proc. § 449, requiring the "real party in interest" to sue in his own name, means the person solely interested in the recovery, so that, where a judgment against an administrator was assigned to plaintiff, he thereby became the real party in interest and was required to bring the proceedings for the enforcement thereof in his own name. *Bamberger v. American Surety Co. of New York*, 96 N. Y. Supp. 665, 666, 109 App. Div. 917.

#### Executor

In an action against a conservator for fraudulently selling land of her ward, afterward deceased, brought by the ward's residuary legatees, one of whom was also her exec-

utor, plaintiffs were named in the suit as individuals, but the complaint averred the probate of the ward's will and the qualification of said plaintiff as her executor. There was no demurrer on the ground that the executor had no right of action individually; the only objection being taken orally on final argument. Held that, in view of Gen. St. 1902, § 621, authorizing the court to determine the controversy as between the parties before it where it can do so without prejudice to the rights of others, and where other parties are necessary to a complete determination to order them to be brought in, section 622, providing that no action shall be defeated by nonjoinder of parties, and that new parties may be added at any time, and section 623, providing that, where an action has been commenced in the name of the wrong plaintiff, the court may allow another to be substituted or added as plaintiff, the trial court was warranted in disposing of the case upon its merits, and regarding the executor as a party of the record, both as an executor and individually, as he, being one of the residuary legatees, was a real party in interest within Rules of Court, Practice Book 1908, p. 238, § 128, and, if defendant had desired that he be made a party in his representative capacity, she could have moved to that effect. Appeal of Dunn, 70 Atl. 703, 705, 81 Conn. 127.

#### Partner

In actions prosecuted by copartnership, the "real parties in interest" are the individuals composing the copartnership, and the action is properly brought in their name and not in the name of the firm. *Edmonson v. Loran Carriage & Harness Co.*, 130 S. W. 64, 66, 149 Mo. App. 128 (citing *Conrades v. Spink*, 38 Mo. App. 309; *Mitchell v. Rallton*, 45 Mo. App. 282; *Orr v. How*, 55 Mo. 328).

#### Pledgor

That one had pledged a special tax bill sued on by him as collateral security for a note for a less sum, there being no default in the payment of the note, did not prevent him from suing to enforce the bill, under Rev. Stat. 1899, § 540, requiring actions to be prosecuted in the name of the "real party in interest"; the "real party in interest" being the party who is to be benefited or injured by the judgment in the case, and the phrase, as used in the statute, meaning the person who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal, formal, or technical interest in it or connected with it. *Dickey v. Porter*, 101 S. W. 586, 593, 203 Mo. 1.

#### Receiving carrier

The delivering carrier was not a necessary party to an action by the initial carrier against the consignor to recover a part of the freight charges which its agent by mistake failed to collect, where the delivering carrier was only the agent for the receiving carrier;

the receiving carrier being the "real party in interest" within Kirby's Dig. § 5999. *St. Louis Southwestern Ry. Co. v. Gramling*, 133 S. W. 1129, 1130, 97 Ark. 353.

#### State

The state is the "real party in interest," in a suit when the relief sought is that which inures to it alone, or when the action will have the effect of depriving the state of funds or property in its possession. That the state has a governmental interest in the welfare of its citizens in enforcing the legal orders of its officers, made for the benefit of the public at large, does not make the state a party in interest to the litigation, since the interest which will render a state the "real party in interest" must be its interest as an artificial person, as distinguished from that of a government for the benefit of its citizens. That the state voluntarily assumes the defense in the cause or litigation does not make it the "real party in interest," as this is simply an incidental matter and does not determine its relation to the suit. *Western Union Tel. Co. v. Andrews*, 154 Fed. 95, 106.

#### Trustee

The holder of the legal title to property is the "real party in interest" within Mills' Ann. Code, § 3, requiring actions to be brought in the name of the real party in interest, and one holding the legal title to property as trustee may sue to enjoin injuries to it without alleging the beneficiary's name or the nature of the trust, even if the averment as to holding it in trust could not be disregarded as surplusage, as it could be. *Koch v. Story*, 107 Pac. 1093, 1095, 47 Colo. 335.

#### REAL POSSESSION

See, also, Actual Possession.

Under Code Prac. art. 49, plaintiff cannot maintain a possessory action unless he has had real and actual possession of the property at the instant the disturbance occurred, and mere legal or civil possession is not sufficient, and there can be no real possession unless there is a corporeal detention and use of the thing according to its nature and destination. *Albert Hanson Lumber Co. v. Baldwin Lumber Co.*, 52 South. 537, 538, 126 La. 347.

#### REAL PROPERTY

See Agreement for Sale of Real Estate; Rural Real Estate; Secured on My Real Estate; Urban Real Estate.

Any specific real estate, see Any.

Improvement of real estate, see Improvement.

Interest in real property, see Interest (In property).

Involving real estate, see Involve.

List of with broker, see List.

See, also, Suit for the Recovery of Real Property.

"The term 'real estate' is very comprehensive and signifies the quantity of interest which a person has, from absolute ownership down to naked possession. It is the possession of the lands which renders them valuable, and the quantity of interest is determined by the duration and extent of the right therein. 'Real estate' therefore includes every possible interest in lands except a mere chattel interest." *Jones v. State*, 70 N. E. 952, 954, 70 Ohio St. 36, 1 Ann. Cas. 618 (quoting and adopting definition in *Jackson ex dem. Cary v. Parker* [N. Y.] 9 Cow. 73, 81).

"'Real property' is land, and, generally, whatever is erected or growing upon or affixed to land." *State v. Wolf* (Del.) 66 Atl. 739, 740, 6 Pennewill, 323.

"Real property," within the condemnation law, includes any right, interest, or easement therein or appurtenance thereto. *New York Cent. & H. R. R. Co. v. Mathews*, 129 N. Y. Supp. 828, 830, 144 App. Div. 732.

The words "real estate" in the taxing statutes do not include land or appurtenances necessary to the exercise of a franchise of a public corporation. *Conoy Tp. Sup'rs v. York Haven Electric Power Plant Co.*, 71 Atl. 207, 208, 222 Pa. 319.

The term "real estate" in Const. art. 8, § 10, limiting municipal indebtedness to a specified per cent. of the assessed valuation of the real estate of the municipality, subject to taxation, as it appeared by the assessment rolls of the municipality, comprehends all property which the statute makes taxable as real estate, and the assessment rolls are conclusive on the subject. *Levy v. McClellan*, 89 N. E. 569, 571, 196 N. Y. 178.

Under Civ. Code Prac. § 492, subsec. 1, providing that no sale shall be ordered if forbidden by the trust deed, and section 493, subsec. 5, and Ky. St. § 4706 (Russell's St. § 4168), requiring the court ordering a sale of trust lands to retain control of the fund realized by the sale, until the same is invested in "real estate," and authorizing such investment, the court may order the sale of land in Kentucky conveyed to a trustee with power to sell and reinvest in any property in Kentucky, and may permit a reinvestment in real estate in a sister state. *Ridley v. Dedman*, 119 S. W. 756, 757, 134 Ky. 146.

The term "real estate," within the statute making "all of the real estate of the defendant" subject to a judgment against him, means a freehold, which is either an estate for life or in fee simple, and not a mere chattel interest in land, nor a simple contract right to perform conditions, aside from the payment of the purchase price and demand a conveyance of the title. *Bourn v. Robinson*, 107 S. W. 873, 876, 49 Tex. Civ. App. 157.

The words "real property" are coextensive with lands, tenements, and heredita-

ments. Under Ballinger's Ann. Codes & St. §§ 4333, 4334, providing that a railroad may appropriate "any land, real estate, or premises" for right of way, etc., such a corporation may appropriate the interest of parties in tidelands held under a contract from the state, and subject only to forfeiture for failure to pay the balance of the purchase price. *State ex rel. Trimble v. Superior Court of King County*, 72 Pac. 89, 92, 93, 31 Wash. 445, 66 L. R. A. 897 (quoting and adopting definition in *Fish v. Fowle*, 58 Cal. 373; citing and adopting *Calhoun v. Leary*, 32 Pac. 1070, 6 Wash. 17; *People ex rel. Heyneman v. Blake*, 19 Cal. 579, *Storey v. New York E. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146).

#### Statutory definition

Gen. St. 1901, § 7342, defines the word "land" and the phrases "real estate" and "real property" as including lands, tenements, and hereditaments and all rights thereto and interest therein, equitable as well as legal. *Clarke v. City of Lawrence*, 88 Pac. 735, 738, 75 Kan. 26.

According to Kirby's Digest, § 737, the term "real estate" is coextensive in meaning with lands, tenements, and hereditaments, and so embraces all chattels real. *Moore v. Sharpe*, 121 S. W. 341, 346, 91 Ark. 407, 23 L. R. A. (N. S.) 937.

Under the direct provisions of the Real Property Law (Laws 1896, p. 607, c. 547) § 240, the term "real estate" includes chattels real, except a lease for a term not exceeding three years. *Westchester Trust Co. v. Keliy*, 92 N. Y. Supp. 482, 102 App. Div. 464; *Westchester Trust Co. v. Hobby Bottling Co.*, 78 N. E. 1114, 185 N. Y. 577.

"Real property" for the purpose of taxation is defined by Rev. St. 1895, art. 5062, to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures, and improvements, or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging to or in any wise pertaining thereto. *State v. Galveston, H. & S. A. Ry. Co.*, 97 S. W. 71, 76, 100 Tex. 153.

*Burns' Ann. St. 1908*, § 2990, provides that the real and personal property of any person dying intestate shall descend to his or her children in equal proportions. Section 1353 declares that the phrase "real property" shall include lands, tenements, and hereditaments. *Held*, that the word "property," as used in section 2990, as applicable to lands, includes every species of title inchoate or complete, and embraces the rights which lie in contract, whether executory or executed. *Adams v. Merrill*, 85 N. E. 114, 118, 45 Ind. App. 315.

"Real estate" as used in the statutes relating to taxation means and includes the ownership or claim to or possession of or

right of possession to any land within the territory. *Copper Queen Consol. Min. Co. v. Territorial Board of Equalization*, 84 Pac. 511, 518, 9 Ariz. 383.

#### Bridge

Gen. St. 1902, §§ 2331 and 2332, providing for the taxation of bridge companies on their stock, less the amount of taxes paid on their real estate, "which shall be assessed and taxed in the town where located," uses the term "real estate" in the sense in which it is employed in section 2322, authorizing the taxation of real estate owned by private individuals, and hence does not authorize the taxation as real estate of a bridge structure. *Middletown & P. Bridge Co. v. Town of Middletown*, 59 Atl. 34, 35, 77 Conn. 314.

#### Buildings

Building as including, see Building.

A building is not necessarily part of the "real estate." *Marshall v. Moore*, 124 S. W. 585, 586, 146 Mo. App. 618.

An insurance policy upon a building used for a theater, stores, and offices, providing that, in the event of a fire, the insurer's liability should be measured by the loss of rent until the building was rebuilt or repaired, is a policy written upon "real property" within the meaning of Laws 1897, c. 142 (Gen. St. 1909, §§ 4260-4263), relating to description of the premises by a company insuring real property. *Amusement Syndicate Co. v. Prussian Nat. Ins. Co.*, 116 Pac. 620, 624, 85 Kan. 367.

A building on leased land, held under an unrecorded lease, is not "real estate," within Gen. Laws 1909, c. 57, § 2, providing that buildings on leased lands, the leases whereof are recorded, shall be deemed real estate for purposes of taxation. *Lindgren v. Doughty*, 80 Atl. 125, 126, 32 R. I. 524.

Under Pub. St. 1901, c. 61, § 21, providing that any separate interest in land and buildings standing on the land shall be taken to be real estate, an icehouse erected on leased land is taxable as "real estate" within chapter 60, § 13, providing for the foreclosure of tax lien on real estate by sale. *O'Donnell v. Town of Meredith*, 73 Atl. 32, 75 N. H. 272.

#### Chattel real

A lease for five years is a chattel real until the expiration of the term, and is therefore "real property" within Mortgage Tax Law, Laws 1906, p. 1448, c. 532, providing that such words shall include a conveyance or mortgage which can be recorded as such under the laws of the state. *People ex rel. Henry Elias Brewing Co. v. Gass*, 104 N. Y. Supp. 884, 885, 53 Misc. Rep. 363.

A lease for 99 years, not assignable except with the written consent of the lessor, is a chattel real and real property, within Real Property Law (Consol. Laws 1909, c. 50)

§§ 290, 291, defining the term "real property" as including chattels real, and providing for the recording of conveyances of real property, and an assignee of the lease with the lessor's consent is protected by the recording acts and acquires a valid title as against a prior assignee holding under an unrecorded assignment and of which he had no notice. *Merrill v. Hodgkins*, 134 N. Y. Supp. 166, 169.

#### Coal

"Coal underlying land in its natural deposit is 'real estate,' and any foreclosure or execution sale of it is subject to redemption to the same extent as a foreclosure or execution sale of any other 'real estate.'" *Traer v. Fowler*, 144 Fed. 810, 815, 75 C. C. A. 540.

Coal in place is "real estate" within the meaning of the statute giving the wife dower in all her husband's real estate of which he was seised in fee at any time during coverture. *Reynolds v. Whitescarver*, 66 S. E. 518, 519, 66 W. Va. 388.

Under Burns' Ann. St. 1908, § 10,143, defining "real property," for the purposes of taxation, as all land and all buildings and fixtures thereon and appurtenances thereto; section 10,256, providing for the valuation of land and the improvements and buildings thereon or affixed thereto at their full cash value, taking into consideration the fertility of the soil and proximity to market, with local advantages, upon actual view of the premises; section 10,257, exempting the owner of land occupied by a highway or railroad right of way from taxation thereof; and section 10,263, providing that the assessor's return book shall contain a description of each parcel of real estate listed, and the value of such separate parcel as determined by the assessor from actual view—hidden, undeveloped coal or other minerals are not subject to taxation. *Board of Com'rs of Greene County v. Lattas Creek Coal Co. (Ind.)* 96 N. E. 633, 636.

#### Crop

Crops immature and growing on real estate when the successful party in an action of ejectment is placed in possession of the premises are part of the "real estate," and, in the absence of proof showing any right of severance, belong to such successful party. *Harrod v. Burke*, 92 Pac. 1128, 1129, 76 Kan. 909, 123 Am. St. Rep. 179.

Where the tenant of a farm, on leaving the state, sold to plaintiffs the right to graze their stock on grass and stalks growing on the farm, plaintiffs to care for the leased premises during the tenant's absence, it did not convert the stalks and grass into "real estate," and hence the landlord, in turning out the stock and locking the gates of the premises, was guilty of a conversion of the stalks and grass, which were "personal property." *Ledy v. Carson*, 90 S. W. 754, 755, 115 Mo. App. 1.

**Equitable interest**

The equitable interest vested in a testatrix by virtue of her possession as mortgagee and purchaser under the execution sale before the time for redemption expired was "real estate," so as to pass under a devise of such. *Morgan v. Joslyn*, 97 N. W. 449, 450, 91 Minn. 60, 103 Am. St. Rep. 474.

An equitable interest of a purchaser of state school lands evidenced by a certificate of purchase is real estate subject to sale on execution, in view of Gen. St. 1909, § 9037, subd. 8, providing that the phrase "real estate" includes all rights thereto and interests therein equitable as well as legal. *Robertson v. Howard*, 109 Pac. 696, 699, 82 Kan. 588.

Under the statutes declaring that the word "land," and the phrases "real estate," and "real property," shall include lands, tenements, hereditaments, and all rights thereto and interests therein equitable as well as legal, and providing that lands not exempt by law shall be liable to be taken on execution, land held by an equitable title may be levied upon and sold by virtue of an execution. *Poole v. French*, 80 Pac. 997, 1000, 71 Kan. 391.

Under Gen. St. 1894, § 253, subd. 8, and section 6842, subd. 14, providing that the terms "lands" and "real estate" include lands, tenements, hereditaments and all rights thereto and interest therein, an owner of a right or interest in land legal or equitable may be properly spoken of as the owner of such land, so that under section 5425, providing that judgments when duly docketed become a lien on all real property of the debtor, the interest of a vendee under an executory contract for the sale of lands is bound by such a judgment and may be sold under an execution thereon. *Hook v. Northwest Thresher Co.*, 98 N. W. 463, 91 Minn. 482.

The vendee's right to specific performance of a contract to convey land is "lands" and "real estate" within the statute definition. Rev. St. § 4971, subd. 9. The lands, on the vendee's death, descend at once, by operation of law, to his children. Rev. St. § 2270, subd. 1. An administrator cannot sue to compel specific performance of a contract to convey land to his decedent, the price for which has been paid, where it does not appear that the administrator is in possession, or that the personal assets of the estate are insufficient to pay the debts. *Carpenter v. Fopper*, 68 N. W. 874, 94 Wis. 146.

**As estate**

See **Estate**.

**Estate for years, or leasehold**

A leasehold interest in land is "real estate" within Incorporation Act (Hurd's Rev. St. 1903, c. 32) §§ 1, 26, prohibiting the organization of corporations to hold real estate. *Imperial Bldg. Co. v. Chicago Open Board of Trade*, 87 N. E. 167, 169, 238 Ill. 100.

Within a statute providing that "real property," for the purpose of taxation, shall be construed to include the land itself and all rights and privileges thereto belonging, or in any wise appertaining, a leasehold is assessable as "real property." *Moeller v. Gormley*, 87 Pac. 507, 508, 44 Wash. 465 (citing and adopting *Reiley v. Anderson*, 73 Pac. 799, 33 Wash. 58; *Chicago Attachment Co. v. Davis Sewing Mach. Co.*, 31 N. E. 438, 142 Ill. 171, 15 L. R. A. 754; *Sanford v. Johnson*, 24 Minn. 172; *McKee v. Howe*, 31 Pac. 115, 17 Colo. 538).

The term "real property," as used in Code Civ. Proc. Cal. § 671, making a judgment a lien on all the "real property" of the judgment debtor not exempt from execution in the county, owned by him at the time, or any which he may afterwards acquire, does not include a leasehold estate acquired by the debtor under a lease executed subsequent to the judgment. *Summerville v. Stockton Milling Co.*, 76 Pac. 243, 246, 142 Cal. 529.

Under Civ. Code Alaska, § 181, which defines "real property" as including "all lands, tenements and hereditaments and rights thereto, and all interests therein, whether in fee simple or for the life of another," a lease of a mining claim for years conveys a chattel interest only and not an interest in the land, and is not a "conveyance," within the meaning of section 98, the recording of which will protect the lessee against a prior unrecorded deed; nor is such lessee an innocent purchaser in good faith for a valuable consideration within such section, where he is to work the same and pay the lessor a royalty. *Eadie v. Chambers*, 172 Fed. 73, 78, 96 C. C. A. 561, 24 L. R. A. (N. S.) 879, 18 Ann. Cas. 1096.

Under Ky. St. 1903, § 458, providing that "the words 'real estate,' or 'land' shall be construed to mean lands, tenements, and hereditaments and all rights thereto and interests therein other than a chattel interest; and the words 'personal estate' shall include chattels real, and other estate, such as, on the death of the owner intestate, would devolve on his personal representatives." A leasehold interest in a store building is "personal estate" rather than "real estate" or "land." *Combs Lumber Co. v. Ohinn* (Ky.) 90 S. W. 251.

The interest of a tenant of real estate under a lease for six years is property within Code Civil Proc. § 3358, relating to condemnation proceedings, and defining "real property" as any right, interest, or easement therein, and Code, § 1430, providing that the expression "real property" includes leasehold property, where the lessee is possessed of at least five years' unexpired term of the lease, and also of the buildings, if any, erected thereon. *Baker v. State*, 118 N. Y. Supp. 618, 620, 63 Misc. Rep. 549.



Laws 1901, p. 312, c. 128, making it a misdemeanor in certain cities to offer for sale any "real property" without written authority of the owner of the property, etc., does not apply to leases for a term exceeding three years. *Lovejoy v. Weil*, 95 N. Y. Supp. 552, 553, 48 Misc. Rep. 611.

The definition of "real estate" in Rev. St. 1899, § 936 (Ann. St. 1906, p. 850), concerning conveyances of real estate, declaring that the term "real estate" shall be coextensive in meaning with lands, tenements, and hereditaments, and shall embrace all chattels real, does not attempt to convert what was personal property at common law into real estate, but means only that a leasehold is to be assigned or conveyed by a quitclaim or warranty deed or mortgage as any other interest in land is to be conveyed, and, so construed, is in harmony with section 3415 (page 1949), declaring that no leases, estates, or interests, either of freehold or term of years, shall at any time be assigned, granted, or surrendered, unless by deed or note in writing. And the provisions in Rev. St. 1899, § 3172 (Ann. St. 1906, p. 1807), providing that every lease on lands for an unexpired term of three years or more shall be subject to execution and sale as real property, and section 3173, declaring that the term "real estate," as used in the chapter, shall include all estates and interests in lands, tenements, and hereditaments, merely mean that the sheriff in levying on and selling a leasehold, shall proceed as though he were selling land; the leasehold being considered as real property only for the purpose of levy and sale under execution. A provision in a will devising all testator's real estate to his wife and children in equal parts did not pass testator's interest in a leasehold for 20 years. *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 125 S. W. 486, 493, 225 Mo. 414, 20 Ann. Cas. 1072.

Estates less than a freehold are "real property," and, if taxable, the owners are properly assessed as owners of real property for the value thereof. An assessment of taxes against a lessee on account of his interest in land held under a so-called lease for 99 years, renewable to the lessee, his heirs and assigns forever, where the rent reserved is grossly disproportionate to the value of the land, is not invalid. *Ocean Grove Camp Meeting Ass'n v. Reeves*, 75 Atl. 782, 784, 79 N. J. Law, 334.

Under Hurd's Rev. St. 1905, c. 120, § 60, providing that where real estate which is exempt from taxation is leased to another whose property is not exempt, and the leasing of which does not make the real estate taxable, the leasehold estate shall be listed as lessee's property, a leasehold estate in a railroad company's right of way held by one whose property is taxable is subject to taxation as the lessee's property. And by the express provisions of the statute, when a lease-

hold estate in exempt property is taxable to the lessee, it must be taxed as real estate and not as personal property. *People v. International Salt Co.*, 84 N. E. 278, 279, 233 Ill. 223.

#### **Fishery**

"As a right of property, a fishery is 'real' and not personal property." *Hume v. Rogue River Packing Co.*, 92 Pac. 1065, 1068, 51 Or. 237, 31 L. R. A. (N. S.) 396, 131 Am. St. Rep. 732.

#### **Fixtures**

See *Fixtures*.

#### **Franchise**

See, also, *Special Franchise*.

A "franchise" does not involve an interest in land. *Consolidated Gas Co. of Baltimore v. Mayor, etc.*, of Baltimore, 61 Atl. 532, 534, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584.

The original Rapid Transit Law, Laws 1891, p. 3, c. 4, contemplated that a city having over 1,000,000 inhabitants, by its rapid transit commissioners, should establish routes, obtain the necessary consents, make plans and specifications for a subway, and sell to the highest bidder for the benefit of the city the privilege and franchise to construct and operate it. Laws 1894, p. 1896, c. 752, § 35, in amendment thereof, permitted a vote of the people to determine that the subway should be constructed for and at the city's expense, and provided that, if so constructed, it should remain the absolute property of the city, and be deemed a part of the public streets. Laws 1902, pp. 1610-1614, c. 584, permitted the contractor to assign his contract, with the commissioners' consent, for the construction and operation of the subway separately, and pursuant thereto the provision of the contract for operation of the subway was assigned. Tax Law, Laws 1896, p. 796, c. 908, § 2, subd. 3, as amended by Laws 1899, p. 1589, c. 712, provides that the term "real estate" shall include tangible property of a railroad and also the value of all franchises to construct and operate the same over, on, or under public streets. Subdivision 3 also exempts municipal corporations from special franchise taxes, and subdivision 4 exempts property of a municipal corporation held for public use. Laws 1894, p. 1884, c. 752, § 35, in amendment of the original Rapid Transit Law, Laws 1891, p. 3, c. 4, § 35, substantially re-enacted in Laws 1900, p. 1360, c. 616, § 4, exempts the operator of such subway from taxation in respect to his interest therein under the contract with the city for its operation, and in respect to the rolling stock and other equipment of the subway. Held, that the special franchise to operate the subway acquired under assignment of the contract, with the city is exempt from a special franchise tax by the exemption of the tax law of a municipality from a

special franchise tax; since, if the city had been given the power to operate the road, no special franchise tax could be imposed on it, and, as the city can only operate it through another, the operator for the city is also exempt, which exemption from a special franchise tax is not only confirmed by the rapid transit law, but that law also makes exempt the rolling stock and equipment. *People ex rel. Interborough Rapid Transit Co. v. State Board of Tax Com'rs*, 110 N. Y. Supp. 577, 579, 126 App. Div. 610.

Laws 1896, p. 796, c. 908, as amended by Laws 1899, p. 1589, c. 712, § 2, subd. 3, defines the terms "lands," "real property," and "real estate," as including, besides the tangible property enumerated, the value of all franchises, rights, authority, or permission to construct, maintain, or operate in, under, above, upon, or through any streets, highways, or public places, mains, pipes, etc. The term "real property" for the purposes of taxation seems to be limited to such intangible right or franchises as relate to public streets or highways and to exclude by inference such as relate to public waters. Under the statute taxable property of an electric light company situated in or under public waters, in connection with a special franchise, cannot be assessed by the commissioners of taxes in the city of New York, but is to be taxed only as a part of a special franchise assessment made by the state board of tax commissioners under section 47. *People ex rel. Edison Electric Illuminating Co. v. Commissioners of Taxes*, 110 N. Y. Supp. 833, 58 Misc. Rep. 249.

Under Tax Law (Consol. Laws, c. 60) § 2, subd. 3, defining the terms "land," "real estate," and "real property" to include land, underground railroads, including the valuation of franchises to construct and operate the same, and defining a "special franchise" to include the value of the tangible property of a corporation situated in or under or above any street, a corporation owning special franchises to operate an underground railroad under city streets owns special franchises subject to taxation, though only so small a part of the railroad is constructed and in operation as is insufficient to meet operating expenses, taxes, and interest, and the franchises, if possessing a value, are taxable, though they are not used. *People ex rel. Hudson & M. R. Co. v. State Board of Tax Com'rs*, 127 N. Y. Supp. 918, 925, 143 App. Div. 26.

The tax law (Laws 1881, c. 293), defining the terms, "land," "real estate," and "real property" as including "all surface, underground or elevated railroads," and the value of all franchises to construct or operate railroads, in, under, above or through streets, is not limited to street surface railroads only, but includes long distance surface steam railroads, and hence a franchise granted by the

state to a steam surface railroad for its road in, under, above, or through streets is property, and a special franchise, and taxable. *People ex rel. New York Cent. & H. R. R. Co. v. Woodbury*, 133 N. Y. Supp. 135, 139, 74 Misc. Rep. 130, 145.

#### As goods

See Goods.

#### Growing trees

Growing trees are a part of the "realty." *Heflin v. Bingham*, 56 Ala. 566, 574, 28 Am. Rep. 776.

Growing fruit trees are considered as part of the land. *Griffing Bros. Co. v. Winfield*, 43 South. 687, 691, 53 Fla. 589.

A contract of sale of timber allowing the purchaser 15 years to remove it is a "contract for the sale of real estate" within the statute of frauds (Rev. St. 1895, art. 2543, subd. 4), and must be in writing. *Adams v. Hughes (Tex.)* 140 S. W. 1163, 1168.

The growing timber on the premises at the testator's death was "real estate" owned by him, and he had an interest in so much of the soil as was necessary to sustain it. *Williams v. Jones*, 111 N. W. 505, 507, 131 Wis. 361.

A suit to enjoin defendant from interfering with plaintiff in his right to cut and remove standing timber does not involve title to or possession of real estate within Rev. St. 1909, § 1753, providing that suits for possession of real estate, or whereby title thereto may be affected, shall be brought in the county within which it is situate, and is properly brought in the county where the parties reside, though the land is situated in another county. *State ex rel. Cooper v. Goodrich*, 142 S. W. 300, 301, 238 Mo. 720.

Where a minor owned an undivided half interest in the timber growing on certain land, such timber constituted real estate, and was not subject to sale by the minor's guardian without a decree of the court, as provided by Ky. St. 1903, § 2034. *Ayer & Lord Tie Co. v. Witherspoon's Adm'r (Ky.)* 100 S. W. 259, 261.

Growing timber is a part of the "realty," and deeds and contracts concerning it are governed by the laws applicable to that kind of property. *Hawkins v. Goldsboro Lumber Co.*, 51 S. E. 852, 853, 139 N. C. 160.

Standing timber is a part of the "realty," and can be conveyed only by such an instrument as is sufficient to convey any other realty. *Tremaine v. Williams*, 56 S. E. 694, 695, 144 N. C. 114 (citing *Ward v. Gay*, 49 S. E. 884, 137 N. C. 399; *Drake v. Howell*, 45 S. E. 539, 133 N. C. 165; *Green v. North Carolina R. Co.*, 73 N. C. 524; *Mizell v. Burnett*, 49 N. C. 249, 69 Am. Dec. 744).

Standing timber is "realty," and a contract for the sale thereof affects realty.

*Midyette v. Grubbs*, 58 S. E. 795, 796, 145 N. C. 85, 13 L. R. A. (N. S.) 278.

Growing trees are part of the "realty," so that a contract of sale thereof must be in writing. *Childers v. Wm. H. Coleman Co.*, 118 S. W. 1018, 1021, 122 Tenn. 109.

#### Improvements

Under the statutory provisions declaring improvements to be "real estate," and that, upon sale of real estate for delinquent taxes, the owner has the right to retain possession until the expiration of the three years for redemption, improvements upon a mining claim become upon a sale thereof for taxes so associated with the realty as to constitute an incumbrance thereon within the meaning of C. L. § 2304, allowing the holder of an incumbrance to perform the annual labor so as to prevent relocation. *McVeigh v. Veig*, 117 Pac. 857, 859, 16 N. M. 453.

#### Homestead right

The homestead right of minors in land of their deceased father is "real estate" within Rev. St. 1899, § 3504, permitting the probate court to order the sale of a minor's real estate when the personal estate is insufficient for his maintenance, etc., and section 3510, permitting the court to order a sale of a ward's real estate when it would be for his benefit; the homestead being an estate in land. *Ancell v. Southern Illinois & M. Bridge Co.*, 122 S. W. 709, 711, 223 Mo. 209.

#### Incorporeal hereditaments

An easement is "real estate," so that a suit for damages for trespass to an easement to use a waterway over defendant's land to carry waters from an irrigation ditch, and for an injunction to restrain defendant from interfering with the waterway, involves title to "real estate" within Code Civ. Proc. § 1022, subd. 5, declaring that costs are allowed to plaintiff on a judgment in his favor in an action involving title to real estate, and plaintiff, on obtaining a judgment, is entitled to costs. *Hoyt v. Hart*, 87 Pac. 569, 572, 149 Cal. 722 (citing and adopting *Schmidt v. Klotz*, 62 Pac. 470, 130 Cal. 224; *Sierra Union Water & Mining Co. v. Wolf*, 77 Pac. 1038, 144 Cal. 430; *Gibson v. Hammang*, 78 Pac. 953, 145 Cal. 454; 11 Cyc. pp. 49, 50).

An easement is "real estate" and is embraced in the words "real property" in Code Civ. Proc. § 3252, providing that, where the action is brought to compel the determination of a claim to real property, the plaintiff, if a final judgment is rendered in his favor and he recovers costs, is entitled to recover, in addition to the costs prescribed in the last section, the following percentages, to be estimated upon the value of the property, the claim to which is determined. And so, in a case wherein an easement is claimed and its value found, the clerk should tax an item for an allowance under section 3262, prescribing the method of arriving at the allowance.

*Furniss v. Fogarty*, 117 N. Y. Supp. 385, 386, 63 Misc. Rep. 527 (citing *Slingerland v. International Contracting Co.*, 60 N. Y. Supp. 12, 43 App. Div. 215; 3 Kent's Com. 401, 419, 427; *Jones v. Metropolitan El. R. R.*, 59 N. Y. Super. 437, 14 N. Y. Supp. 632; *Saunders v. New York Cent. & H. R. R. Co.*, 38 N. E. 992, 144 N. Y. 75, 87, 26 L. R. A. 378, 43 Am. St. Rep. 729).

Under Code Civ. Proc. § 3343, subd. 20, declaring an action of ejectment to be an action to recover immediate possession of "real property," an owner may maintain ejectment against one who has taken possession of the space above the surface of the land to the extent of stretching wires across it. *Butler v. Frontier Telephone Co.*, 95 N. Y. Supp. 684, 686, 109 App. Div. 217; *Id.*, 79 N. E. 716, 718, 186 N. Y. 486, 11 L. R. A. (N. S.) 920, 116 Am. St. Rep. 563, 9 Ann. Cas. 858 (citing *Co. Litt. 4a*; 2 Blackstone's Comm. 18; 3 Kent's Com. [14th Ed.] 401; *Warvelle, Eject.* 34; *Crabb, Real Prop.*, 710; *Butler's Nisi Prius*, 99; *Jackson v. Buel* [N. Y.] 9 Johns. 298; *Woodhull v. Rosenthal*, 61 N. Y. 382, 389; *Patch v. Keeler*, 27 Vt. 252, 255; *Nichols v. Lewis*, 15 Conn. 137).

#### Lands synonymous

The word "land," as used in Va. Code 1904, § 1105f (3-6), authorizing the condemnation of lands or any interest or estate therein, includes easements, and other incorporeal hereditaments, and all rights thereto and interest therein, and is synonymous, with the terms "real estate" and "real property." *Swann v. Washington Southern R. Co.*, 61 S. E. 750, 751, 108 Va. 282 (quoting 2 Bouv. Law Dict. 306).

Under Code, § 785, requiring a city changing an established grade of a street to the injury of abutting property to pay the damages to the owner, and section 48 (8, 10), defining "real property" as including lands, tenements, hereditaments, and all rights thereto and interest therein, and the word "property" as including real property, a tenant for life or for years of a city lot is an "owner" to the extent of his interest, and may sue the city for injuries sustained by a change in the established grade of the street in front of the property. *Chiesa & Co. v. City of Des Moines* (Iowa) 138 N. W. 922, 924.

The terms "property sold," "real estate," "premises," and "land" are used interchangeably. The phrase "upon the property sold," in the statutory definition of a redemptioner as being one holding "a lien by judgment or mortgage upon the property sold," applies to the land or premises, as those words are commonly used. *North Dakota Horse & Cattle Co. v. Serungard*, 117 N. W. 453, 463, 17 N. D. 466, 29 L. R. A. (N. S.) 508, 138 Am. St. Rep. 717.

**Leasehold**

A leasehold interest is not real estate. *Townsend v. Boyd*, 66 Atl. 1099, 1101, 217 Pa. 386, 12 L. R. A. (N. S.) 1148.

An unexpired three-year lease on premises condemned was "personal property," and not "real estate," within the constitutional provision conferring appellate jurisdiction on the Supreme Court in cases involving title to real estate. *Springfield S. W. Ry. Co. v. Schweitzer*, 151 S. W. 128, 131, 246 Mo. 122.

Under Ballinger's Ann. Codes & St. § 1656 (Pierce's Code, § 8592), providing that real property for the purpose of taxation shall be construed to include the land itself, "and all rights and privileges thereto belonging," a leasehold should be assessed as real estate and not as personal property. *State v. Rourke*, 87 Pac. 507, 508, 44 Wash. 465 (citing *Reilly v. Anderson*, 73 Pac. 799, 33 Wash. 58; *Chicago Attachment Co. v. Davis Sewing Mach. Co.*, 31 N. E. 438, 142 Ill. 171, 15 L. R. A. 754; *Sanford v. Johnson*, 24 Minn. 172; *McKee v. Howe*, 31 Pac. 115, 17 Colo. 538).

**Life estate**

An oral contract, whereby defendant agreed to execute to plaintiff a written conveyance of her whole life estate in certain property, agreeing not to claim any right or interest therein, except to cut such firewood as she needed for her own use, plaintiff to pay her a certain sum per year for the land as long as she lived, was one for the sale of land, and void under Ky. St. 1903, § 458, providing that the words "real estate or land" shall be construed to mean any interest therein, other than a chattel interest, and section 470 (statute of frauds), providing that no action shall be brought to charge any person on any contract for the sale of real estate unless the contract is in writing. *Miller v. Hart*, 91 S. W. 698, 700, 122 Ky. 494.

Under Ky. St. 1909, § 458, providing that the words "real estate" or "land" shall be construed to mean any interest other than a chattel interest, and section 470, providing that no action shall be brought upon a contract relating to real estate unless in writing, a parol contract to board and care for the owner of a life estate in land in consideration of the use of the land is void, though board was furnished in reliance on the contract. *Hampton v. Glass* (Ky.) 116 S. W. 243, 244.

**Meteorite or aerolite**

A "meteorite" or "aerolite," though not buried in the earth, is nevertheless real estate, belonging to the owner of the land, and not personal property, in the absence of proof of severance. *Oregon Iron Co. v. Hughes*, 81 Pac. 572, 573, 47 Or. 313, 8 Ann. Cas. 556.

**Mining claim**

Unpatented lode mining claims are "real property," and as such are subject to the

lien of a judgment recovered against their owner when docketed pursuant to Laws Ariz. 1891, Act No. 50, § 4; the term being defined by a territorial statute in force when the judgment in question was rendered and docketed as coextensive with lands, tenements, and hereditaments. *Bradford v. Morrison*, 86 Pac. 6, 7, 10 Ariz. 214; *Id.*, 29 Sup. Ct. 349, 351, 212 U. S. 389, 53 L. Ed. 564 (quoting and adopting definitions in Ariz. St., pars. 2708, 2948).

Under Pol. Code, § 3617, defining the term "real estate" as including the possession of, claim to, ownership of, or right to, the possession of land, and all mines, minerals, and quarries in and under the land, all timber belonging to individuals or corporations growing or being on the lands of the United States, and all rights and privileges appertaining thereto, the possessory right to a mining claim is "real estate," and as such may be sold and transferred, and is subject to taxes like other property. *Bakersfield & Fresno Oil Co. v. Kern County*, 77 Pac. 892, 894, 144 Cal. 148 (quoting the definition in Pol. Code, § 3617).

**Mineral**

Minerals in the earth are part of the "real estate," and an instrument by which they are conveyed must be executed with the formalities of a conveyance of land. *Brooks v. Cook*, 38 South. 641, 643, 141 Ala. 499.

Minerals in the earth are "real estate," and when the owner of them has not the fee to the surface of such land they should be separately assessed and taxed. *Kansas Natural Gas Co. v. Board of Com'rs of Neosho County*, 89 Pac. 750, 752, 75 Kan. 335 (quoting *Mining Co. v. Board of Com'rs of Crawford County*, 80 Pac. 601, 71 Kan. 276).

**As money**

See Money.

**Oil and gas**

Oil before its extraction is a mineral and is a part of the "realty." *Swayne v. Lone Acre Oil Co.*, 86 S. W. 740, 742, 98 Tex. 597, 69 L. R. A. 986, 8 Ann. Cas. 1117; *Isom v. Rex Crude Oil Co.*, 82 Pac. 817, 318, 147 Cal. 659.

Petroleum oil and natural gas are minerals and in their place are "real estate" and part of the land. *Preston v. White*, 50 S. E. 236, 237, 57 W. Va. 278.

Petroleum oil is a mineral, and while it is in the earth it forms a part of the "realty"; and, when it reaches a well and is produced on the surface, it becomes personal property and belongs to the owner of the well. If it moves from place to place by percolation, or otherwise, it forms a part of the tract of land in which it tarries for the time being, and, if it moves to the next adjoining tract, it becomes a part and parcel of that tract, and it forms a part of the same tract, until it reaches a well and is raised to

the surface and then for the first time it becomes the subject of distinct ownership separate from the "realty." It becomes the property of and belongs to the person who reaches it by means of a well and severs it from the realty. *Nonamaker v. Amos*, 76 N. E. 949, 951, 73 Ohio St. 163, 4 L. R. A. (N. S.) 980, 112 Am. St. Rep. 708, 4 Ann. Cas. 170 (citing *Kelley v. Ohio Oil Co.*, 49 N. E. 399, 57 Ohio St. 317, 39 L. R. A. 765, 63 Am. St. Rep. 721; *Northwestern Ohio Natural Gas Co. v. Ullery*, 67 N. E. 494, 68 Ohio St. 259).

Rights of a company under a lease to take a stratum of oil or oil-bearing sand, and convert it to its own use, with the right to possession of the surface so far as necessary to enable it to bore for and extract the oil, constitute a claim to the possession of land, and hence are "real estate" within Pol. Code, § 3617, subd. 2, cl. 1, providing that the term "real estate," as used in connection with taxation, shall include a claim to the possession of land, so that they can be assessed separately from the ownership of the other parts of the land when held separately. *Graciosa Oil Co. v. Santa Barbara County*, 99 Pac. 483, 486, 155 Cal. 140, 20 L. R. A. (N. S.) 211.

#### Oyster bed

The right to plant and take oysters in a bed in front of land is nothing but a mere license or privilege, and is not "real estate" within the meaning of Code, § 550, providing that the owner of real estate may file a bill to remove a cloud from his title. *Catchot v. Zeigler*, 45 South. 707, 92 Miss. 191.

#### Pipe line

A pipe line permanently placed in the soil, in which the company has acquired an interest by deed, is "real estate," within the meaning of Tax Law, 1866, Revision p. 1150, § 62, defining "real estate" to include all lands, all water power thereon or appurtenant thereto, and all buildings or erections thereon or affixed to the same, trees and underwood growing thereon, and all mines, quarries, peat, and marl beds, and all fisheries. *State v. Berry*, 19 Atl. 605, 606, 52 N. J. Law, 308.

Wells, conduits, flumes, and pipe lines affixed and attached to the soil for the purposes of a water company are entitled to be taxed as real estate; Pol. Code, § 3617, providing that the term "real property" includes the possession of, claim to, ownership of, or right to the possession of land. *California Domestic Water Co. v. Los Angeles County*, 101 Pac. 547, 548, 10 Cal. App. 185.

#### As property

See Personal Property; Property.

#### Railway property

It has been uniformly held that the words "real estate" in a tax act will not be construed to include land necessary to the

franchises of a public corporation. Under Act April 2, 1858 (P. L. 385), providing that real property of corporations—the superstructure of the road and water stations alone excepted—shall be subject to taxation for city purposes, a power house for the manufacture of electricity, owned and used by a traction motor company operating street railways, is exempt from taxation. *City of Philadelphia v. Electric Traction Co.*, 57 Atl. 354, 355, 208 Pa. 157.

Rapid Transit Act (Laws 1891, c. 4) § 35, as amended by Laws 1900, c. 616, § 4, exempting the operator of subway roads from taxation as to the rolling stock and all other equipment, but not as to "real property," exempts machinery installed in permanent power houses to generate motive power, but not the power houses. *People ex rel. Interborough Rapid Transit Co. v. O'Donnel*, 95 N. E. 762, 764, 202 N. Y. 313.

Lien law (Laws 1897, p. 516, c. 418; Gen. Laws c. 49) § 2, makes "real property" include "real estate, lands, tenements and hereditaments corporeal and incorporeal, fixtures and all bridges and trestle work, and structures connected therewith, erected for the use of railroads. \* \* \*" Section 3 of the same law provides that a contractor, subcontractor, laborer, or materialman, who performs labor, or furnishes material for the improvement of "real property," shall have a lien. Held, that the term "real property" is not restricted in case of labor performed and material furnished to a railroad company to bridges and trestle work and the structures connected therewith erected for the use of railroads, but the term includes not only real estate, lands, tenements, and hereditaments, corporeal and incorporeal, and fixtures, but in addition thereto all bridges, trestle work, and structures connected therewith, for the use of railroads, as the Legislature, in specifically referring to bridges and trestle work and structures connected therewith for the use of railroads, intended to remove them from the realm of uncertain classification and place them unmistakably in the general category of "real property." *Schaghticoke Powder Co. v. Greenwich & J. Ry. Co.*, 76 N. E. 153, 156, 183 N. Y. 306, 2 L. R. A. (N. S.) 288, 111 Am. St. Rep. 751, 5 Ann. Cas. 443.

#### Railway roadbed

In view of prior judicial decisions and the construction of Act Jan. 4, 1859 (P. L. 828) § 3, relating to taxation of railroad property in the city of Pittsburgh, as shown by the fact that, for nearly 50 years after its passage, no attempt was made by the city to assess the rights of way of a railroad for taxation, the words "real estate," as used in such act, cannot be considered to include the rights of way. *Pennsylvania R. Co. v. City of Pittsburgh*, 70 Atl. 271, 273, 221 Pa. 80.

The roadbed of a public railroad is not "real estate" within the meaning of Act June 4, 1901 (P. L. 364), and is not subject to assessment for local taxation or municipal claims. *City of Philadelphia v. Fairhill R. Co.*, 41 Pa. Super. Ct. 245.

Acts 1895, p. 243, c. 123, § 1 (Burns' Ann. St. 1908, § 5123), provides that waterworks companies may condemn lands for the source of supplies, pumping stations, settling basins, filtering basins or tanks, storage reservoirs, supply mains, delivery reservoirs, tank or stand pipes, and delivery mains, and the necessary lines of pipe connecting them. Acts 1905, p. 398, c. 129, § 256 (Burns' Ann. St. 1908, § 8941), provides that any corporation engaged in the business of providing any city or town and its inhabitants with water, as provided for in the previous two sections, may condemn such real estate and rights of way as may be necessary for its business. Section 254, p. 396 (Burns' Ann. St. 1908, § 8939), authorizes a city or town to contract with any person or corporation to furnish it and its inhabitants with water, etc. Held, that the phrase "real estate and rights of way" means such only as may be reasonably necessary to such companies for construction and maintenance of its works, laying and maintenance of pipe lines, mains, and conduits, and for the erection and maintenance of poles, wires, and other proper structures and appliances, and not such ways of railway communication as might become expedient and desirable because of an unfavorable location of the power plant, voluntarily chosen, and hence a right of way for a stub switch connecting its plant with a railroad could not be condemned by such a company. *Kinney v. Citizens' Water & Light Co. of Greenwood*, 90 N. E. 129, 131, 173 Ind. 262, 263, L. R. A. (N. S.) 195.

#### Several tracts

Where property consisting of separate parcels situated in different counties was not originally held in common by all the co-tenants of the various parcels, or their predecessors in title, there was no such unity of title as authorized the joinder of all the parcels in one suit for partition under Code Civ. Proc. § 752, authorizing co-tenants in possession of "real property" to sue for a partition thereof; the words "real property" referring to such as to which such unity of title exists as authorizes a single action. *Middlecoff v. Cronise*, 100 Pac. 232, 235, 155 Cal. 185, 17 Ann. Cas. 1159.

#### Street

The words "real property," in Comp. Laws 1907, § 313x, providing that any city council may aid the building of railroads by granting real property not necessary for municipal or public purposes on such limitations as the council shall prescribe, etc., include the city streets of which the fee is in the

city. *Knight v. Thomas*, 101 Pac. 383, 384, 85 Utah, 470.

#### Telegraph or telephone property

Under Pol. Code, §§ 3617, 3663, defining "real estate" for taxable purposes as land including the improvements, except telegraph lines, which shall be assessed as personalty, and Bridgeford Act (St. 1897, p. 267, c. 189) § 39, providing that, on refusal of the directors to make the assessments in irrigation districts, the assessment made by the county assessor and the state board of equalization shall be the basis of assessment, an irrigation district cannot assess for revenue purpose the poles and wires of a telegraph company placed on the land of a railway company under a contract reserving such property as personalty. *Western Union Telegraph Co. v. Modesto Irr. Co.*, 87 Pac. 190, 192, 149 Cal. 662, 9 Ann. Cas. 1190.

Tax Law (Consol. Laws 1909, c. 60) § 2, subd. 3, defines land and real estate to include all bridges or telegraph lines, wires, poles, and appurtenances, and also all mains, pipes, and tanks laid or placed in any place for conducting electricity or any substance or product capable of transmission or conveyance therein. Held that, where a telephone company maintained a switchboard and appliances essential for its business in a building in a village on which it had a lease for 10 years, the switchboard, for the purposes of taxation, was properly regarded as "real property" and taxable in the village, though the company's main office was in another city. *People ex rel. Federal Telephone & Telegraph Co. v. Longwell*, 131 N. Y. Supp. 361, 363.

#### Tunnel

Hurd's Rev. St. 1903, c. 120, § 202, par. 12, declares that intangible property of corporations similar to telegraph and telephone companies shall be assessed by the state board of equalization, and that tangible property including real and personal property of such corporations shall be assessed by the board of local assessors. The statute defines "real property" for the purpose of taxation as not only the land itself with all things contained therein, but also all permanent fixtures of whatsoever kind and all rights and privileges belonging or in any way pertaining thereto, except as otherwise denominated by the act. Held, that the rights of certain telephone, telegraph, and tunnel companies to use tunnels constructed by them in the streets of Chicago authorizing the maintenance thereof for 30 years were assessable for taxation against such companies as "real property." *People ex rel. City of Chicago v. Upham*, 77 N. E. 931, 932, 221 Ill. 555 (citing *People ex rel. New York & H. R. R. Co. v. Commissioners of Taxes*, 4 N. E. 127, 101 N. Y. 322).

**Turnpike**

Where a turnpike company did not own the fee in the land on which its pike was constructed, but owned a continuing easement therein for the maintenance of the pike during the life of the company's franchise, such easement, together with the corporation's tangible property, consisting of bridges, culverts, ditches, prepared roadbeds, and structures on the soil, were taxable to it as "real property," under Laws 1896, p. 796, c. 908, § 2, subd. 3, as amended by Laws 1899, p. 1589, c. 712, providing that the term "real property" shall include not only the land itself, above and under water, but all buildings and other articles and structures, and superstructures erected upon or under the same, etc. In re President, etc., of Albany & B. Turnpike Road, 87 N. Y. Supp. 1104, 1107, 94 App. Div. 509.

**Water and ice**

The right conferred on a landowner by his contract with a water company to have water flow from its canal, through a lateral ditch, to his land, for its irrigation, for a term of years, is a servitude on the ditch and canal, and an appurtenance to the land, and so is "real property." Stanislaus Water Co. v. Bachman, 93 Pac. 858, 862, 152 Cal. 716, 15 L. R. A. (N. S.) 359.

"Water rights" are regarded as "real property," and therefore an agreement in respect thereto must be in writing, in order to comply with the statute of frauds. Bree v. Wheeler, 87 Pac. 255, 4 Cal. App. 109 (citing Code Civ. Proc. § 1971; Civ. Code, § 1624; Hayes v. Fine, 27 Pac. 772, 91 Cal. 391; Blankenship v. Whaley, 57 Pac. 79, 124 Cal. 304).

A right to use water for irrigation is deemed "real property," and is the subject of a grant, either with or without the land for which it was appropriated. Davis v. Randall, 99 Pac. 322, 324, 44 Colo. 488.

The right to the use of water for irrigation is real estate, and the proper method of conveying title thereto is by deed. Bates v. Hall, 98 Pac. 3, 4, 44 Colo. 360.

Under the Constitution and statutes of this state, a water right is "real property," and is an appurtenance to the land irrigated by the use of such water. Paddock v. Clark, 126 Pac. 1053, 1054, 22 Idaho, 498.

A water permit is not "real property" under Rev. Codes, § 3056. Speer v. Stephenson, 102 Pac. 365, 368, 16 Idaho, 707.

A water right is "real property" under the express provisions of Rev. Codes 1905, § 3056, and one who has actually diverted the water of a stream to a beneficial use is in actual possession of such property; such possession constituting actual notice to any person who subsequently applies to the state engineer for a permit to appropriate and di-

vert the water of the same stream. Nielson v. Parker, 115 Pac. 488, 490, 19 Idaho, 727.

A water right is real estate, and must be conveyed as real estate; and, where one has a valid water permit issued to him by the state engineer, he cannot convey the water right secured thereby by simply handing the permit to a would-be purchaser. Gard v. Thompson, 123 Pac. 497, 502, 21 Idaho, 485.

A "water right" is the legal right to the use of any unappropriated water of any natural stream, water course, or source of supply, and exists only in contemplation of law, and is for purposes of taxation "personal property," within Const. art. 12, § 17, and Pol. Code, 1895, §§ 16, 3680, defining "property" as including money, franchises, and other things capable of private ownership, and defining "real estate" as including the possession or ownership of land, mines, minerals, and quarries, and "improvements," as including all buildings, structures, etc., and "personal property" as including everything which is the subject of ownership, not included within real estate or improvements, so that under section 3716, providing that the personal property and franchises of water companies must be assessed in the district where the principal works are located, a water company owning a water right without the limits of a school district and conveying water by pipe lines into the district, where it is distributed to the inhabitants thereof, is properly assessed in the district; that being the place of business and principal works of the company. Helena Waterworks Co. v. Settles, 95 Pac. 838, 37 Mont. 237.

**REAL RIGHTS**

See Contracts Concerning Real Rights.

**REAL VALUE**

Act May 20, 1890 (Ky. St. 1903, § 3915), prohibiting trusts to regulate the price of any article or to limit the amount of any article, and Acts 1906, p. 429, c. 117, legalizing the pooling of farm products, when construed in connection with Const. § 198, requiring the Legislature to pass laws to prevent trusts, pools, etc., to depreciate any article below its "real value," or to enhance its cost above its real value, are not invalid because uncertain, for the standard fixed is "real value," which is "market value," at a sale under normal conditions, unaffected by any combination of producers or dealers whose object is to create an abnormal condition in the market, and is susceptible of proof by proof of preexisting facts. The court, in distinguishing this holding from a previous decision declaring a statute prohibiting railroads from charging "more than a just and reasonable rate of toll" unconstitutional, because of uncertainty in determining what would be a just and reasonable rate of toll, said: "There is a marked difference between the qualities of the 'real value' of an article, and 'reasonable compensation' for

a service. The latter may depend alone upon the opinion of the trier of the fact; the former is itself a fact susceptible of proof and exact ascertainment." *Commonwealth v. International Harvester Co.*, 115 S. W. 703, 711, 712, 131 Ky. 551, 133 Am. St. Rep. 256.

## REALIZE

There is no material difference between the words "apparent" and "reasonably apparent," as used in an instruction, in an action for injuries sustained in a railroad crossing accident, making the doctrine of discovered peril applicable if the employees on the engine saw the person injured on the track, and it was apparent, or reasonably apparent, that he would not get off, and the words "realized his peril." *Missouri, K. & T. Ry. Co. of Texas v. Reynolds* (Tex.) 115 S. W. 340, 343.

## REALTY

See Real Property.

## REALTY COMPANY

As trading corporation, see Trading Corporation.

## REAMING MACHINE

A "reaming machine" is a heavy, cumbersome device, which reams or enlarges bolt holes already drilled. *American Car & Foundry Co. v. Thornton*, 183 Fed. 114, 115, 105 C. C. A. 33.

## REASON

See By Reason of; Dethronement of Reason; Good and Lawful Reasons; Good Reason to Believe; If for any Reason; Sound Reason.

Any reason, see Any.

### Reason for appeal

The "reasons of appeal," in a patent appeal, are in the nature of the ordinary assignments of error in actions at law or in equity. *Horne v. Wende*, 29 App. D. C. 415, 422.

### Reason for dismissal

The term "reasons for dismissal," in Code Pub. Gen. Laws 1904, art. 77, § 53, authorizing the board of school trustees to remove teachers at their election, after notice in writing, giving, when required by the teacher, the reasons for dismissal, is not satisfied where the letter notifying the teacher states that the trustees believe it for the best interest of the school that her services be dispensed with, and is insufficient. *Underwood v. Board of County School Com'rs of Prince George's County*, 63 Atl. 221, 223, 103 Md. 181.

## REASONABLE

See If Reasonable.

"The Standard Dictionary gives a definition of 'reasonable' which includes five different meanings. The first is: 'Conformable to reason; such as is rational, fitting, or proper; sensible; as a reasonable view.'" *Houston & T. C. R. Co. v. Everett* (Tex.) 86 S. W. 17, 18.

An act is "reasonable" when it is conformable or agreeable to reason. A "reasonable act" signifies such an act as the law requires or permits. *McCarty v. Natural Carbonic Gas Co.*, 81 N. E. 549, 553, 189 N. Y. 40, 13 L. R. A. (N. S.) 465, 12 Ann. Cas. 840 (citing 1 Blackstone's Com. 70; 2 Bouv. [Rawle's Rev.] 828).

What is reasonable is not necessarily what is best, but what is fairly appropriate to the purpose under all the circumstances. The scope of the term "reasonable" as regards any situation must be measured, having regard to the fundamental principles of human liberty as understood at the time of the formation of the Constitution, adapting the same to modern conditions. *Bonnett v. Vallier*, 116 N. W. 885, 888, 136 Wis. 193, 17 L. R. A. (N. S.) 486, 128 Am. St. Rep. 1061.

The word "reasonable" is a term difficult of definition, and usually it must be considered with the facts of the particular controversy in determining its force and latitude. It is sometimes used to express that which is appropriate and necessary. It imports what is ordinary or usual under the circumstances of the case. *Rexroth v. Holloway*, 90 N. E. 87, 88, 45 Ind. App. 36.

In an action for personal injuries from a defective sidewalk, there was no error in refusing an instruction in which the word "reasonable" was defined to mean "in a reasonable manner; consistent with reason; in a moderate degree; tolerably." The definition seems to have been taken from the dictionaries, which are not always reliable when used in a court of law. It is true "tolerably" is treated by such authors or synonymous with "reasonable," but it is not always, if ever, so understood. As used by the people it does not mean "reasonable," but on the contrary to indicate an indifferent condition or state. The word "reasonable" was sufficient in itself for the purpose, and did not require definition. *York v. City of Everton*, 97 S. W. 604, 607, 121 Mo. App. 640.

In an action against a carrier for injuries to a passenger by the starting of a train while he was alighting, an instruction that it was the duty of the carrier to stop the train a sufficient time to permit passengers to leave the car with safety was properly modified by changing the word "sufficient" to "reasonable." A "sufficient" time, where the passenger acts with "reasonable" diligence, is but tantamount to giving the passenger a



reasonable opportunity to alight. *Barringer v. St. Louis, I. M. & S. R. Co.*, 85 S. W. 94, 95, 87 S. W. 814, 73 Ark. 548.

The word "reasonable" is generic, and difficult of adequate definition. As used in Greater New York Charter (Laws 1897, p. 500, c. 378) § 1406, relating to the power of certain judges to certify that it is reasonable that a charge of misdemeanor should be prosecuted by indictment, the word should be construed as equivalent to just, proper, fair, or equitable. *People v. Butts*, 105 N. Y. Supp. 677, 678, 121 App. Div. 226.

As used in the Greater New York charter providing that if, before the commencement of any trial in the Court of Special Sessions, certain judicial officers, including a judge authorized to hold a Court of General Sessions of the Peace for the county of New York, shall certify that it is reasonable that such charge shall be presented by indictment, the court of Special Sessions shall be divested of jurisdiction thereof, the word "reasonable" means "just, proper, fair, equitable." *People v. Rosenberg*, 112 N. Y. Supp. 316, 318, 59 Misc. Rep. 342.

The constitutional provision that duties and excises must be "reasonable" was not designed to give the judicial department the right to revise the decisions of the Legislature as to the policy and expediency of an excise. The court cannot declare a tax or excise illegal and void, as being unreasonable, unless it is unequal, or plainly and grossly oppressive, and contrary to common right. *Minot v. Winthrop*, 38 N. E. 512, 516, 162 Mass. 113, 26 L. R. A. 259 (quoting and adopting definition in *Connecticut Mut. Life Ins. Co. v. Commonwealth*, 133 Mass. 161, 163).

The word "reasonable" limits the police power, both as to subjects to be regulated and the character of the regulation, by express constitutional inhibition and the judgment of the judiciary as to what is within the realm of such subjects, and reasonable and fair doubts in all cases are sufficient to turn the scales in favor of legislative authority whenever it shall have been asserted. *State ex rel. Milwaukee Medicinal College v. Chittenden*, 107 N. W. 500, 517, 127 Wis. 468.

#### As just or honest

"Reasonable" means just, honest. *State v. Churchill*, 100 Pac. 309, 314, 52 Wash. 210.

The word "reasonable," as used in an instruction, means governed by reason; agreeable to reason; and its synonyms are just and honest. "Satisfactory" means relieving the mind of doubt or uncertainty, and enabling it to rest with confidence. "Probable" means capable of being proved; having more evidence for than against. And the instruction is erroneous, for accused's explanation of the possession of stolen property may or may not be reasonable, probable, satisfactory, or true, yet if in the minds of the jury

it creates a reasonable doubt of his guilt, he is entitled to an acquittal, and the burden is thrown on the prosecution to establish the falsity of it beyond a reasonable doubt. *State v. Trospen*, 109 Pac. 858, 859, 41 Mont. 442.

#### As rational

An instruction that if the accused killed decedent in sudden passion, and not in defense against an attack "reasonably producing a rational fear" of death or serious injury, he should be found guilty of manslaughter, was not erroneous in using the word "rational," rather than "reasonable," especially where a subsequent charge fully submitted the issue of self-defense. The word "rational," in the connection here used, is more favorable than the word "reasonable." A fear might be rational, and not reasonable. *Christian v. State*, 79 S. W. 562, 563, 46 Tex. Cr. R. 47.

#### Tolerably not synonymous

The dictionary definition of "reasonable" as synonymous with "tolerably" is not always reliable when the term is used in law. *York v. City of Everton*, 97 S. W. 604, 607, 121 Mo. App. 640.

### REASONABLE ACCOMMODATIONS

The word "reasonable," as used in Civ. Code 1902, § 2157, requiring every railroad to furnish "reasonable" accommodations for the convenience and safety of passengers, was intended to have a broad meaning, and signifies that the accommodations shall be reasonable, as distinguished from extreme luxury or scantiness—that is, sufficient for all reasonable purposes—and further conveys the meaning that reasonable efforts, considering all the circumstances, must be made to provide such sufficient accommodations. In an action by a passenger against a railroad company for injury, caused by the negligent and wanton breach of duty by the defendant to provide for the safety of its passengers, an instruction requiring the carrier to use "sufficient" accommodations, instead of "reasonable" accommodations, as required by statute, was not erroneous, where from another instruction given it was manifest that the court did not intend to convey to the jury by use of the word "sufficient" any meaning beyond that intended by "reasonable" as used in the statute, and in that connection read to the jury the section of the statute requiring railroad companies to furnish "reasonable" accommodations. *Anderson v. South Carolina & G. R. Co.*, 61 S. E. 1096, 1098, 81 S. C. 1.

### REASONABLE AMOUNT

Under a requirement that a health officer's salary shall be fixed at a reasonable amount, it was held that a "reasonable amount" meant an amount commensurate with the services, estimated from past experience and present conditions which he

would be required to perform during the year. *Butler County v. Gardner* (Ky.) 96 S. W. 582, 583 (citing *Center's Adm'r v. Breathitt County*, 90 S. W. 1054, 28 Ky. Law Rep. 1003).

**REASONABLE AND ORDINARY CARE**

"Reasonable and ordinary care" depends largely on the circumstances of each particular case, and is such care as a person of reasonable and ordinary prudence and skill would reasonably exercise under the same or similar circumstances. *Cousineau v. Muskegon Traction & Lighting Co.*, 108 N. W. 720, 722, 145 Mich. 314.

**REASONABLE AND WELL-GROUND-  
ED BELIEF**

The phrase a "reasonable and well-grounded belief," in an instruction that a homicide is justifiable by one without fault who is attacked by another, where the circumstances furnish reasonable ground for apprehending a design to take life, provided the belief is a reasonable and well-grounded belief, etc., means that accused actually and in good faith believed that he was then in danger, and that he had reason and cause for such belief. *Wells v. Territory*, 78 Pac. 124, 130, 14 Okl. 436.

**REASONABLE ATTORNEY'S FEE**

See, also, Reasonable Compensation.

The statute allowing a reasonable attorney's fee in an action on a fire policy means such a fee as would be reasonable to pay an attorney for prosecuting the action. *Merchants' Fire Ins. Co. v. McAdams*, 115 S. W. 175, 178, 88 Ark. 550.

**REASONABLE CARE**

See Reasonable Diligence and Care.

See, also, Reasonable Exertion.

The standard of "reasonable care" is that of the man of average foresight and prudence, and is to be determined by that which is usual and ordinary. *Sharpsburg Sand Co. v. Monongahela R. Consol. Coal & Coke Co.*, 145 Fed. 424, 426.

"Reasonable care" is such care as an ordinarily prudent person will usually exercise under like circumstances. *Cincinnati, N. O. & T. P. Ry. Co. v. McElroy*, 142 S. W. 1009, 1011, 146 Ky. 668; *Northern Alabama R. Co. v. Mansell*, 36 South. 459, 463, 138 Ala. 548 (citing *Holland v. Tennessee Coal, Iron & R. Co.*, 8 South. 524, 91 Ala. 444, 12 L. R. A. 232; *Dresser on Employers' Liability*, pp. 194, 195).

"Reasonable care" is the care which a prudent person would use in like agencies and under like circumstances. *Missouri, K. & T. R. Co. v. Webb*, 97 S. W. 1010, 1012, 8 Ind. T. 280.

"Reasonable care" is such care as may be reasonably expected of a person of ordi-

nary prudence under like circumstances. Reason to know a fact is such as would apprise a person of ordinary prudence of it." *Lewis v. Commonwealth*, 131 S. W. 517, 519, 140 Ky. 652.

"Reasonable care" is such care as a person of ordinary prudence would take under similar circumstances to avoid accidents, in view of the risks incurred. *Reiss v. Wilmington City Ry. Co.* (Del.) 67 Atl. 153, 154; *Smithers v. Wilmington City Ry. Co.* (Del.) 67 Atl. 167, 168, 6 Pennewill, 422.

"Reasonable or ordinary care" is such care as an ordinarily prudent person will usually use under circumstances the same or similar to those proven in a particular case. *West Kentucky Coal Co. v. Davis*, 128 S. W. 1074, 1077, 138 Ky. 667.

"Reasonable care" is that degree of care which an ordinarily prudent person would exercise taking into consideration the dangers to be apprehended and guarded against which a statute intended to obviate. *Richardson v. El Paso Consol. Gold Mining Co.*, 118 Pac. 982, 986, 51 Colo. 440.

"Reasonable care," as applied to the care to be used in respect to carpets by one who received them to be cleaned, was such care as an ordinarily prudent man would take under like circumstances with respect to his own property. *Bowen v. Isenberg Bros. Co.* (Del.) 67 Atl. 152, 153, 6 Pennewill, 230.

The "reasonable care" which an employer is obligated to use is that care which a man of ordinary prudence in the same line of business would be expected to exercise to secure his own safety were he doing the work. *Sterne v. Mariposa Commercial & Mining Co.*, 97 Pac. 66, 69, 153 Cal. 516 (citing *Westinghouse Electric & Mfg. Co. v. Helmlich*, 127 Fed. 94, 62 C. C. A. 92).

Whether an injured servant was guilty of contributory negligence depends upon whether he was exercising "reasonable care," which is such care as a person of ordinary prudence would exercise under the same conditions and circumstances. *Jenney Electric Mfg. Co. v. Flannery* (Ind.) 98 N. E. 424, 428.

In an action for injuries to an employee caused by the negligence of his employer, "reasonable care," as used in the instructions defining the obligations of the parties, is such care as a reasonably prudent man would exercise under like circumstances and conditions to those shown in the evidence. *Denver & R. G. R. Co. v. Norgate*, 141 Fed. 247, 259, 72 C. C. A. 365, 6 L. R. A. (N. S.) 981, 5 Ann. Cas. 448.

Plaintiff, who was working on defendant's building, was injured while riding on a freight elevator, owing to the same tipping to one side. There was a sign clearly visible, which stated that passengers were not allowed to ride on the elevator. It had been inspected and found in good condition a week

before the accident, and was found in good condition immediately after the accident, and plaintiff was told to get upon the elevator by a servant of defendant, who was an "oiler" and had no authority to give such directions. Held, that there was no absence of "reasonable care" on the part of defendant. *McGuirk v. Manhattan Life Ins. Co.*, 99 N. Y. Supp. 536, 537, 50 Misc. Rep. 590 (citing *Hubener v. Heide*, 76 N. Y. Supp. 758, 73 App. Div. 200).

#### As governed by circumstances

What is "reasonable care" largely depends on the peculiar circumstances of the given situation. *Feeney v. Wabash R. Co.*, 99 S. W. 477, 479, 123 Mo. App. 420.

"Reasonable care" is a relative term. What constitutes its exercise by a motorman in the middle of a block may be entirely inadequate at a street intersection. The necessity for its exercise by the motorman, however, is present over his entire route, but in varying degree, depending upon circumstances, and the absence or presence of peril to travelers in the street. *Solomon v. Buffalo R. Co.*, 89 N. Y. Supp. 99, 101, 96 App. Div. 487.

What constitutes "reasonable care" in a particular case depends on the circumstances, on the nature of the company's undertaking, on the confidence which it invites, and on the value and character of the deposit intrusted to its care. *Masonic Temple Safety Deposit Co. v. Langfelt*, 117 Ill. App. 652, 658.

The "reasonable care" which persons are bound to take, in order to avoid injury to others, is proportionate to the probability of injury that may arise to others. And where a person does what is more than ordinarily dangerous, he is bound to use more than ordinary care. *J. G. Christopher Co. v. Russell*, 58 South. 45, 47, 63 Fla. 191, Ann. Cas. 1913C, 564.

"Reasonable care" demands increased watchfulness and greater caution in proportion to the dangerous nature of the instrumentality employed; that is, "due care" means care which is reasonably commensurate with a known danger and the seriousness of the consequences which are liable to follow its omission. *Brown v. West Riverside Coal Co.*, 120 N. W. 732, 734, 143 Iowa, 662, 28 L. R. A. (N. S.) 1260.

"Reasonable care" is such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs under like circumstances. The term is a relative one and what under one set of circumstances would be due care would under other circumstances be negligence. *Raymond v. Portland R. Co.*, 62 Atl. 602, 604, 100 Me. 529, 3 L. R. A. (N. S.) 94.

The terms "reasonable care" and "ordinary care" are often used as convertible

terms and are generally so understood. Hence an instruction using the term "reasonable care" instead of "ordinary care" in explaining the quantum of care to be exercised by the employer to make rules and regulations for the protection of its employes did not tend to confuse and mislead the jury. *Texas & N. O. R. Co. v. Walker (Tex.)* 125 S. W. 99, 100, 106.

"Reasonable care" under existing circumstances is what a person has the right to require of another, and the degree of care required increases with any increase of the apparent danger involved in its absence, or with the increased power of control of one of the parties whose conduct is in question. *Gardner v. Boston Elevated Ry. Co.*, 90 N. E. 534, 535, 204 Mass. 213.

"Reasonable care," which a street car passenger is required to exercise in alighting from a car, is such care as a person of ordinary prudence would exercise under similar circumstances; such care being proportioned to the risk incurred. *Elliott v. Wilmington City Ry. Co. (Del.)* 73 Atl. 1040, 1042, 6 Pennewill, 570.

By "reasonable or ordinary care," which is the care the master is required to exercise toward his servant, is meant such care as a man of ordinary prudence would exercise under similar circumstances. *Zels v. St. Louis Brewing Ass'n*, 104 S. W. 99, 101, 205 Mo. 638.

A master is bound to use "reasonable care" in securing the employe a reasonably safe place to work and to be reasonably careful in warning the servant of any special and peculiar dangers incident to some particular locality concerning which the master is advised, or should be advised, if he has been reasonably careful; the word "reasonable" being one of no precise definition, but varying in signification with the circumstances of each particular case. *Co-operant Telephone Co. v. St. Clair*, 168 Fed. 645, 647, 94 C. C. A. 109.

"Reasonable care" is a relative term, to be determined by the surroundings of each case and the dangers to be apprehended and avoided. The construction of a platform may be such that a very high degree of care will be required in its construction and maintenance. \* \* \* There are depressions and steps in sidewalks which the law recognizes as not negligent and the risk of which the traveler must assume and guard against. We are not prepared to say that a hole six inches deep and containing a loose obstacle in its bottom would not constitute negligence even in a sidewalk. We think it evidently would constitute negligence when existing in a platform upon which passengers are invited to step when alighting from cars. A passenger has a right to assume that such platform is reasonably safe. He must alight with reasonable expedition. Others may alight before

him and partially obstruct his view. He may be holding his traveling bag or packages, which may also somewhat interfere with his vision. *Crowe v. Michigan Cent. R. Co.*, 106 N. W. 396, 397, 142 Mich. 692 (citing *St. Louis, I. M. & S. Ry. Co. v. Barnett*, 45 S. W. 550, 65 Ark. 255; *Johns v. Charlotte, C. & A. R. Co.*, 17 S. E. 698, 29 S. C. 162, 20 L. R. A. 520, 39 Am. St. Rep. 709).

"Reasonable and ordinary care," which in law have the same meaning, is the care which reasonable and prudent men use under like circumstances, and must be measured by the character, risk, and exposure of the business; and the degree required is higher where life or limb is endangered. Reasonable or ordinary care cannot be determined abstractly, for what would be such care in one case might be gross negligence in another, and therefore whether such care has been exercised depends upon, and can only be determined by, the facts in each particular case, and is generally a question of fact for the jury to determine. *Johnson v. Union Pac. Coal Co.*, 76 Pac. 1089, 1090, 28 Utah, 46, 67 L. R. A. 508 (citing *Cayzer v. Taylor* [Mass.] 10 Gray, 274, 69 Am. Dec. 817; *Nitro-Glycerine Case*, 15 Wall. 524, 538, 21 L. Ed. 206; *Boyle v. Union Pac. Ry. Co.*, 71 Pac. 988, 991, 25 Utah, 422, 430; *Shearman & Redfield*, Neg. § 195; *Bailey's Mast. Liab.* p. 101; *Titus v. Bradford, B. & K. R. Co.*, 20 Atl. 517, 518, 136 Pa. 618, 626, 20 Am. St. Rep. 944; *Dickert v. Salt Lake City Ry. Co.*, 59 Pac. 95, 20 Utah, 394).

Electric companies are bound to use "reasonable care" in the construction and maintenance of their lines and apparatus. This care varies with the risks to be apprehended from negligence. Where the wires carry strong and dangerous currents of electricity, and the result of negligence may be exposure to death or serious accident, a high degree of care is required. Under such circumstances "reasonable care" and a "high degree of diligence" may be deemed to be synonymous. *Gilbert v. Duluth General Electric Co.*, 100 N. W. 653, 655, 93 Minn. 99, 106 Am. St. Rep. 430.

The better doctrine is that care or the want of it is not to be measured arbitrarily according to fixed definitions as "slight care," "ordinary care," or "extraordinary care," or "slight negligence" or "gross negligence," although all these phrases are used somewhat loosely by courts and law writers, but it is to be measured by reasonableness, under all the circumstances of the particular inquiry. The only true measure is "reasonable care." And that expression has been declared by the courts in England and elsewhere to be synonymous with "ordinary care." "Reasonable care" is a relative term, and what is reasonable care in a given case depends upon many considerations. What would be reasonable care under some conditions would clearly be negligence in others. Reasonable care and

vigilance vary according to the exigencies which require vigilance and attention. They relate to the work to be done, to the instrumentalities to be used, to the dangers that may result from their use, to the varying duties owed by those who supply or use them. And in all cases "reasonable care" means such care as reasonable and prudent men used under like circumstances. *Caven v. Bodwell Granite Co.*, 59 Atl. 285, 287, 99 Me. 278 (citing *Fletcher v. Boston & M. R. R.* [Mass.] 1 Allen, 9, 79 Am. Dec. 695; *Bigelow v. Reed*, 51 Me. 325; *Palmer v. Penobscot Lumbering Ass'n*, 38 Atl. 108, 90 Me. 193; *Sawyer v. J. M. Arnold Shoe Co.*, 38 Atl. 333, 90 Me. 369; *Cayzer v. Taylor* [Mass.] 10 Gray, 274, 69 Am. Dec. 817; *Cunningham v. Hall* [Mass.] 4 Allen, 268; *Holly v. Boston Gaslight Co.* [Mass.] 8 Gray, 123, 69 Am. Dec. 233).

One operating an automobile and a pedestrian using the streets must exercise "reasonable care" to prevent accidents, and such care must be in proportion to the danger or the peculiar risks in each case. The operator of an automobile must use ordinary care in its operation and move it at a reasonable rate of speed and slow it up or stop, if need be, where danger is imminent; and greater caution is required at crossings and in the more thronged streets of a city than in the less obstructed streets in the open or suburban parts, and there is a like duty to exercise reasonable care on the part of the pedestrians. *Hannigan v. Wright* (Del.) 63 Atl. 224, 236, 5 Pennell, 537.

#### As high degree of care

The term "high degree of care," when used in an instruction which gave no standard of care, and thus deprived a comparison between "ordinary care," and a "high degree of care," held not to be the legal equivalent of "reasonable care." *Van Blarcom v. Central Ry. Co. of New Jersey*, 60 Atl. 182, 72 N. J. Law, 33.

An instruction that the law is well settled, and that "reasonable care" on the part of a common carrier towards its passengers is a high degree of care, is correct. *Camden & S. Ry. Co. v. Rice*, 137 Fed. 326, 327, 329, 69 C. C. A. 656.

#### Ordinary care and due care synonymous

Ordinary care means "reasonable care." *Hanley v. Ft. Dodge Light & Power Co.*, 107 N. W. 593, 594, 133 Iowa, 326.

"To use reasonable care" is equivalent to the expression "to use or exercise ordinary care." *International & G. N. R. Co. v. Trump*, 94 S. W. 903, 906, 42 Tex. Civ. App. 536.

"Ordinary care" and "reasonable care," as applied to the duty of a master to provide rules for the regulation of his activities, are, ordinarily, convertible terms. *Texas & N. O. R. Co. v. Walker* (Tex.) 125 S. W. 99, 106.

The phrase "reasonable care" has been declared by the courts of England to be synonymous with ordinary care. *Caven v. Bodwell Granite Co.*, 59 Atl. 285, 287, 99 Me. 278.

"Reasonable care" is only such care as a reasonably prudent person would use under the circumstances, and whether under given circumstances a person used reasonable care, or was guilty of contributory negligence, is generally left to the jury." *Watt v. Mishawaka Paper & Pulp Co. (Ind.)* 99 N. E. 1029.

An instruction that a telegraph company must use "reasonable care" in transmitting and delivering messages imposes no higher degree of care on the company than "ordinary care," as the two terms are synonymous. *Western Union Telegraph Co. v. Guinn (Tex.)* 130 S. W. 616, 618.

An instruction, in an action for negligent delay in transmission and delivery, on the measure of the telegraph company's duty in delivering, was not erroneous for requiring it to transmit in "due time (that is, such time as it would have been delivered by the exercise of reasonable care and diligence in getting it through and delivered)," on the ground that it was only required to use "ordinary care," in the absence of a request for a more specific charge; the terms "reasonable care" and "ordinary care" having substantially the same meaning. *Western Union Telegraph Co. v. Vance (Tex.)* 151 S. W. 904, 907 (citing 7 Words and Phrases, p. 5955).

Where the court in its charge used the terms "ordinary care," "reasonable diligence," and "reasonable care," it should, in an instruction defining ordinary care, have also told the jury that reasonable diligence or reasonable care is ordinary care. *Greene v. Louisville Ry. Co.*, 84 S. W. 1154, 1156, 119 Ky. 862, 27 Ky. Law Rep. 316, 7 Ann. Cas. 1126.

The use of the words "reasonable care," instead of "ordinary care," in an instruction in an action for injuries, is not such a defect as will invalidate a judgment for plaintiff. *Spaulding v. Metropolitan St. Ry. Co.*, 107 S. W. 1049, 1051, 129 Mo. App. 607.

The rule of law now generally recognized is that the legal measure of duty, except that made absolute by law, is better expressed by the phrase "due care," "reasonable care," or "ordinary care," used interchangeably. *Raymond v. Portland R. Co.*, 62 Atl. 602, 604, 100 Me. 529, 3 L. R. A. (N. S.) 94.

The terms "ordinary care" and "reasonable care" are, in law, practically synonymous. In their ordinary use in connection with the subject in hand, they are also substantially synonymous. Hence an instruction that, "if you believe from the evidence that at the time the accident occurred said stone was unsafe, dangerous, and liable to fall, and that the section foreman knew, or

by the exercise of a reasonable care and prudence in the inspection of the cut could have known," etc., is not erroneous, because the court used the words "reasonable care" instead of "ordinary care." *Louisville & N. R. Co. v. Pointer's Adm'r.*, 69 S. W. 1108, 1112, 113 Ky. 952.

#### Children

The term "ordinary or reasonable care," applied to the conduct of a child, means such care as may reasonably be expected of children of similar age, judgment, and experience under similar circumstances. *Rohloff v. Fair Haven & W. R. Co.*, 58 Atl. 5, 7, 76 Conn. 689.

#### Management of steamboat

"Reasonable care," when applied to the control and management of a steamboat in motion, embraces all the care which the particular circumstances of the place and occasion reasonably require, which will be increased or diminished according as the liability of danger and accident and injury to others is increased or diminished in the movement and management of the steamer. *Bowen v. Baltimore & Philadelphia Steamboat Co. (Del.)* 84 Atl. 1022, 1025.

#### Policemen

"Reasonable care," as applied to a policeman who in pursuing an escaping prisoner shoots him by the alleged accidental discharge of his pistol, is such care as may be reasonably expected of a person of ordinary prudence, and reason to know a fact is such as would apprise a person of ordinary prudence of it. *Lewis v. Commonwealth*, 131 S. W. 517, 519, 140 Ky. 652.

#### Street car motormen

The "reasonable care" which a motorman must use to avoid injuring a traveler on a street is the great care and foresight which a reasonable and competent motorman should use to avoid such an injury when the danger thereof was apparent to him. *Barry v. Burlington Ry. & Light Co.*, 93 N. W. 68, 69, 119 Iowa, 62.

#### REASONABLE CARE AND DILIGENCE

"Reasonable care and diligence" means such care and diligence as an ordinarily prudent and careful man would usually exercise under the same or similar circumstances. *Phippin v. Missouri Pac. R. Co.*, 93 S. W. 410, 413, 196 Mo. 321.

The Standard Dictionary defines "reasonable care and diligence" as such degree of attention and painstaking as is fitting and proper under the circumstances; such care and attention as a person of prudence would exercise. *Houston & T. O. R. Co. v. Everett (Tex.)* 86 S. W. 17, 18.

Under Civ. Code 1895, § 2266, requiring carriers of passengers to exercise extraordinary diligence to protect the lives of passen-

gers, the words "reasonable care and diligence," used in section 2321, declaring that a railroad company shall be liable for any damage done to persons by the running of locomotives, cars, etc., unless the railroad company shows that its agents have exercised all reasonable care and diligence, means extraordinary care and diligence. *Georgia Ry. & Electric Co. v. Gilleland*, 66 S. E. 944, 948, 183 Ga. 621.

Upon proof of injury to a passenger of a railroad company by the running of its locomotives, cars, or other machinery, or by any person in its employment, there is a presumption of the railroad company's negligence, under Civ. Code 1910, § 2780, providing that a railroad company shall be liable for damage to persons by the running of the locomotives, cars, or other machinery of such company, unless the company shall make it appear that their agents had exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company; and as such section must be construed with section 2714, providing that a carrier of passengers is bound to extraordinary diligence to protect its passengers, but is not liable for injuries to the person after having used such diligence, so that the phrase "reasonable care and diligence," in section 2780, must be deemed to mean "extraordinary" care and diligence, the presumption of negligence is not rebuttable by a showing that the railroad company exercised only ordinary care and diligence. *Douthitt v. Louisville & N. R. Co.*, 71 S. E. 470, 136 Ga. 351.

### REASONABLE CAUSE

Other reasonable cause, see Other.

By "reasonable or probable cause" is meant such evidence as would lead a reasonable person to believe that the accused has probably or likely committed the offense charged. In *re Squires*, 92 Pac. 754, 755, 13 Idaho, 624.

The term "reasonable cause," as used in Code, § 4007, authorizing discharge of a juror for reasonable cause, means such as will probably prevent a fair and impartial trial to the party challenging, or prevent the juror looking alone to the evidence for his verdict. *Williams v. Godfrey* (Tenn.) 1 Helsk. 299, 300.

"Reasonable cause," sufficient to justify seizure under the revenue laws, means probable cause; it imports a seizure under circumstances which warrant suspicion. *United States v. One Sorrel Horse*, 27 Fed. Cas. 315, 317, 22 Vt. 655.

"Reasonable cause" which will justify a wife or husband in quitting or abandoning each other, without constituting desertion within the statute relating thereto, is only that which will entitle the party to a di-

vorce. *Butler v. Butler*, 1 Pars. Eq. Cas. (Pa.) 329, 336.

In an action for malicious prosecution, the use in the charge of the term "reasonable cause" for "probable cause" was not error, the terms being practically synonymous, though it is better to use the latter term. *McCall v. Alexander*, 65 S. E. 1021, 1022, 84 S. C. 187.

A finding in an action for malicious prosecution based on defendant procuring the arrest of plaintiff on the ground that there was danger that he would leave the state to avoid examination of proceedings in aid of execution, that defendant had "reasonable cause" to believe there was danger that plaintiff was about to leave the state to avoid examination, is the same thing as probable cause to procure his arrest on that ground. *Bank of Miller v. Richmon*, 94 N. W. 998, 999, 68 Neb. 731.

There is a marked difference between "reasonable cause to believe" and "reasonable cause to suspect." *Third Nat. Bank of Columbus v. Poe*, 62 S. E. 826, 829, 5 Ga. App. 113.

On judgment for claimant of property seized by officers of the customs service for forfeiture, on the ground that it was fraudulently imported, a certificate of reasonable cause should be entered by the court as provided by Rev. St. § 970, although the verdict of the jury was clearly right, under the evidence, where it is affirmatively shown that the officers who instituted the proceedings acted in good faith and on reasonable ground of suspicion. The term "reasonable cause" does not differ in meaning from the term "probable cause" found in section 909, Rev. St. As stated in *Averill v. Smith*, 17 Wall. 82, 21 L. Ed. 613: "Proof of probable cause, if shown by the certificate of the District Court which rendered the decree discharging the property, is a good defense to an action of trespass brought by the claimant against the collector who made the executive seizure, provided it appears that judicial proceedings were instituted, and that the charge against the property was prosecuted to a final judicial determination. Where the respondent prevails in such an information, the court, says Mr. Parsons, gives to the prosecuting or seizing officers a certificate of probable cause, if in their judgment he had such cause for the seizure, and that, he says, protects the officer who made the seizure from prosecution for making the same; and he adds that the final decree of the court in a case of forfeiture regularly before the court is conclusive. \* \* \* Probable cause, he says, means less than evidence which would justify a condemnation, and the same author says, if the court before whom the cause is tried shall cause a certificate of entry to be made that there appeared to be a reason-

able cause of seizure, the seizing officer shall be protected from all costs, suits, and actions on account of the seizure and prosecution. Differences of opinion existed for a time as to the legal meaning of the term 'probable cause,' but it is settled that it imports circumstances which warrant suspicion, and that a doubt respecting the true construction of the law is as reasonable a cause of seizure as a doubt respecting the fact." *United States v. 83 Sacks of Wool and 5,974 Sheepskins*, 147 Fed. 747-749 (citing *Gelston v. Hoyt*, 3 Wheat. [16 U. S.] 246, 4 L. Ed. 881; *Locke v. United States*, 7 Cranch [11 U. S.] 339, 3 L. Ed. 364; *Munns v. De Nemours*, 17 Fed. Cas. 993).

The phrase "reasonable cause to believe," in Bankr. Act, § 60b, providing that, if one receiving a preference has "reasonable cause to believe" that it is intended to give one, it shall be voidable by the trustee, means such a knowledge of facts as to induce a reasonable belief of the debtor's insolvency, and it is not enough that a creditor has some cause to suspect the insolvency of his debtor. He may have grounds of suspicion that his debtor is failing, and yet have no cause for a belief of the fact. He may feel anxious about his claim and desire to secure it, and yet such belief as the statute requires be wanting. *Stevenson v. Milliken-Tomlinson Co.*, 59 Atl. 473, 475, 99 Me. 320.

Under Bankr. Act, § 60b, a creditor of an insolvent debtor, charged with receiving a preference within four months prior to the adjudication in bankruptcy, with knowledge of some fact or facts, at the time of receiving the preference, calculated to put a prudent man upon inquiry, which, if pursued, would lead to the belief that the debtor was insolvent, is within the rule of "reasonable cause to believe," although he may not have absolute knowledge of the ultimate fact. *Capital Nat. Bank v. Wilkerson*, 76 N. E. 258, 261, 262, 36 Ind. App. 550.

It is not necessary for the committing magistrate to be convinced beyond a reasonable doubt that one accused of crime is guilty thereof; but if from all of the evidence he has reasonable or probable cause to believe, and does believe, that the accused is guilty it is his duty to hold him for trial, since the words "reasonable and probable cause" as used in the statute are not equivalent to the phrase "beyond a reasonable doubt." *State v. Layman*, 125 Pac. 1042, 1043, 22 Idaho, 387.

"Reasonable cause to believe," in Bankr. Act, § 60b, covers substantially the same field as "notice" in determining whether a person is a bona fide purchaser of property. *Stern v. Paper*, 183 Fed. 228, 234.

Under Bankr. Act, § 60b, the "reasonable cause" must not be a guess or a mere suspicion of insolvency, but must consist of

such facts as would put an ordinarily prudent man upon inquiry. *Starbuck v. Gebo*, 96 N. Y. Supp. 781, 783, 48 Misc. Rep. 333.

Knowledge is not necessary, nor even belief, that it is intended to give a preference, but only "reasonable cause to believe," which is a very different thing. *Pratt v. Columbia Bank*, 157 Fed. 137, 139 (citing *Merchants' Nat. Bank v. Cook*, 95 U. S. 343, 24 L. Ed. 412).

The words "reasonable cause to believe" that one is insolvent, as used in the Bankruptcy Act in relation to preferences, have not the same meaning as the phrase "reasonable cause to suspect." It is not sufficient that the creditor has some cause to suspect the insolvency of the debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency in order to invalidate a security taken for a debt. *Gnitchel v. First Nat. Bank (N. J.)* 57 Atl. 508, 509.

A "reasonable cause to believe" that a debtor intended to give a preference to a creditor receiving a payment within four months of the bankruptcy of the debtor arises where the creditor had at the time of the payment knowledge of facts which would put an ordinarily prudent man on inquiry as to whether the debtor was then solvent and intended to make a preference, and if such inquiry, if made, would have probably disclosed to the creditor the fact of the debtor's insolvency and intention to make a preference. *Walker v. Tenison Bros. Saddlery Co. (Tex.)* 94 S. W. 166, 168.

"Reasonable or probable cause" warranting a commitment means such a state of facts as would lead a man of ordinary caution and prudence to believe and consciously entertain a strong suspicion that the person accused is guilty. There must be a probability that a crime has been committed by the person named in the commitment, and not only that a crime has been committed, but that it is one that has not become barred by the statute of limitations. *Ex parte Vice*, 89 Pac. 983, 985, 5 Cal. App. 153.

## REASONABLE CERTAINTY

See Reasonably Certain.

In all likelihood equivalent, see In All Likelihood.

Moral and reasonable certainty, see Moral Certainty.

Reasonable probability not synonymous, see Reasonable Probability.

"Reasonable certainty" is the quality of being established beyond a reasonable doubt, and "reasonable and moral certainty" may be said to be that degree of probability which exists with such strength as to justify human action upon it. *Austin v. State*, 64 S. E. 670, 6 Ga. App. 211.

"Reasonable certainty" as applied to the ascertainment of damages means reasonable probability. Where the losses claimed are contingent, speculative, or merely possible, they cannot be allowed. *Wilkinson v. Dunbar*, 62 S. E. 748, 750, 149 N. C. 20 (citing *Hale, Dam.*).

"There are no words plainer than 'reasonable doubt,' and none so exact to the idea meant." "Reasonable hypothesis," or "reasonable or moral certainty," may be logically the equivalent of "reasonable doubt"; but these expressions are not so easily understood by the ordinary lay mind. In every criminal case the presiding judge should charge the jury that, to authorize conviction, guilt must be proved "beyond a reasonable doubt," and, unless the evidence demands the verdict rendered, his failure to do so will be reversible error. *Norman v. State*, 74 S. E. 428, 10 Ga. App. 802.

"Certainty," as applied to the law of damages, means freedom from doubt, and as "reasonable certainty" and "reasonable probability" bear no resemblance to each other, plaintiff, in an action for personal injuries, while entitled to recover for such future suffering and injury as she proves to be reasonably probable, is not required to prove such future injuries and suffering by testimony reasonably certain or free from doubt. *Johnson v. Connecticut Co.*, 83 Atl. 530, 531, 85 Conn. 438.

To say that proof of the fact must be made reasonably certain is, by literal import of the words, tantamount to saying that the proof must be made beyond a reasonable doubt. This has been expressly held as to the phrase "moral certainty," which is equivalent to the words "reasonable certainty." A charge that if a passenger's sickness was not the result of her being put off the train, and that it was "reasonably certain" to have resulted from other causes, the carrier is not liable, is erroneous as requiring proof beyond reasonable doubt. *St. Louis, A. & T. B. Co. v. Burns*, 9 S. W. 467, 468, 71 Tex. 479, 481.

#### REASONABLE CHARGE

In determining what is a "reasonable" and what an oppressive charge, "ordinarily, that is a 'reasonable charge or system of charges' which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for. Then the interests of the owners of the property are to be considered. They are entitled to a rate of return if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of

the property, cannot be said to be unreasonable. \* \* \* The reasonableness of the charges must be determined with reference to the expenditure in obtaining the supply, and providing for a fund to maintain the plant in good order, and pay a fair profit upon the money invested by the owners, and that a rate which did no more than this was neither excessive nor unjust. \* \* \* The cost of the water to the company includes a fair return to the persons who furnished the capital for the construction of the plant, in addition to an allowance annually of a sum sufficient to keep the plant in good repair, and to pay any fixed charges and operating expenses. A rate of water rents that enables the company to realize no more than this is reasonable and just. Some towns are so situated as to make the procurement of an ample supply of water comparatively inexpensive. Some are so situated as to make the work both difficult and expensive. What would be an extortionate charge in the first case might be the very least at which the water could be afforded in the other." *Long Branch Commission v. Tintern Manor Water Co.*, 62 Atl. 474, 478, 70 N. J. Eq. 71 (quoting and adopting the definition in *Brymer v. Butler Water Co.*, 179 Pa. 231, 36 Atl. 249, 36 L. E. A. 290).

#### REASONABLE COMPENSATION

See, also, Reasonable Amount; Reasonable Price.

The term "reasonable compensation," as used in *Mills' Ann. St. § 2298*, providing that the county commissioner shall, on the application of the water consumers of any ditch or of the parties owning the same, fix a "reasonable compensation" for water, implies that something must be given for the service. *Board of Com'rs of Montezuma County v. Montezuma Water & Land Co.*, 89 Pac. 794, 796, 39 Colo. 166.

"Reasonable compensation," as used in *Rev. St. 1895, art. 253*, providing that, where a garnishee is discharged, the costs, including reasonable compensation to the garnishee, shall be taxed against plaintiff, includes a reasonable attorney's fee for services rendered to a garnishee in preparing and defending the garnishee's answer after it had been controverted. *Maury v. McDonald*, 118 S. W. 812, 817, 55 Tex. Civ. App. 50.

The term "reasonable compensation," in *St. 1898, § 4870*, providing that physicians and surgeons subpoenaed to perform a post mortem examination shall receive instead of witness fees such "reasonable compensation" as may be allowed by the county board of supervisors, provided that such additional compensation shall not be less than \$5 for each examination, contemplates that the physician or surgeon so subpoenaed shall be paid reasonable compensation for his services in lieu of witness fees, and the county board may



not fix the compensation for the services at an unreasonable amount, and a physician must be allowed a reasonable fee, and section 683, providing for an appeal to the circuit court from the disallowance in whole or in part of any claim by the county board, authorizes an appeal by a physician and review of a disallowance in whole or in part of his claim for services under section 4870. *Quigg v. Monroe County*, 113 N. W. 723, 725, 134 Wis. 122.

Under a statute authorizing the allowance of a "reasonable compensation" to the receiver of a bank, an allowance of \$7,500 to receiver for his services is a "reasonable compensation," where the assets of the bank amounted to \$2,783,590.30, consisting of loans on mortgages and other securities, and discounted paper, and in stock, bonds, and deposits upon which the receiver, during the year for which such sum was allowed, realized the sum of \$1,554,148.83 and disbursed to depositors the sum of \$1,406,515.31. *Special Bank Com'rs v. Franklin Inst. for Sav.*, 11 R. I. 557, 560.

**Real value distinguished**

See Real Value.

**REASONABLE COMPETITION**

The statutory provision which authorizes the Legislature to provide by law for the regulation, prohibition, or reasonable restraint of common carriers, partnerships, trusts, etc., so as to prevent them from making scarce articles of necessity, trade, or commerce, or from increasing unreasonably the cost thereof to the consumer or preventing "reasonable competition" in any calling, trade, or business, is aimed at combinations of capital to prevent them from making scarce articles of necessity and to prohibit anything which prevents "reasonable competition" in any calling or business. The section is not aimed at everything which restricts competition. Its purpose is not to abolish restraints of competition arising from the workings of the laws of trade, but only that whatever is done in trade must leave the field open to "reasonable competition." The indirect effects of fair competition by lessening the number who compete, or in some instances throwing all the trade in the hands of one man, are not outlawed as going beyond the limits of "reasonable competition." *Citizens' Light, Heat & Power Co. v. Montgomery Light & Water Power Co.*, 171 Fed. 553, 562.

**REASONABLE CONTROL**

Where plaintiff contracted to construct a steel tower complete and ship within 45 working days from the date of the contract, but was not to be responsible for "delays in transportation, strikes, fires, floods, storms, nor any other circumstance beyond its reasonable control," a delay occasioned by inability to get material was not "beyond its reason-

able control," within the contract, under the rule that the general limitation will include only causes similar to those specifically mentioned. *American Bridge Co. of New York v. Glenmore Distilleries Co. (Ky.)* 107 S. W. 279, 283.

**REASONABLE DANGER**

"Reasonable danger" is something to be judged of by an exercise of reason and judgment, an exercise upon facts which require a construction to render their meaning apparent. *Byers v. Territory*, 100 Pac. 261, 267, 1 Okl. Cr. 677.

**REASONABLE DEMAND**

See Just and Reasonable Demand.

**REASONABLE DILIGENCE**

See Reasonable Care and Diligence.

The words "reasonable diligence" have a meaning well understood by the average jurymen; they have no such technical meaning as to call for their definition when used in a charge. *Texas Midland R. R. v. Ritchey*, 108 S. W. 732, 734, 49 Tex. Civ. App. 409.

"Reasonable diligence" is such diligence as an ordinarily prudent man would exercise over his own affairs under like circumstances. *Haines v. Lake Shore & M. S. Ry. Co.*, 89 N. W. 349, 350, 129 Mich. 475.

"Reasonable diligence" means such diligence as a prudent man could exercise or employ in or about his own affairs. *Glassey v. Sligo Furnace Co.*, 96 S. W. 310, 312, 120 Mo. App. 24.

"Reasonable diligence" is such diligence as a man of ordinary care and prudence would take under the circumstances. *Gillespie v. Ashford*, 101 N. W. 649, 650, 125 Iowa, 729.

The words "ordinary care" embody the same degree of diligence as the words "ordinary and reasonable care and diligence," and have substantially the same significance. The words "ordinary" and "reasonable," descriptive of diligence, are synonymous, and are used interchangeably in statutes and by the courts. *Goodwyn v. Central of Georgia R. Co.*, 58 S. E. 688, 2 Ga. App. 470.

"Reasonable diligence required of city officers having charge of its public streets" means such diligence as like officers of like responsibilities usually and ordinarily employ in the discharge of their duties. *Pumoro v. City of Merrill*, 103 N. W. 464, 467, 125 Wis. 102.

In any business involving the personal safety and lives of others, nothing less than the most watchful care and the most active diligence constitutes "reasonable diligence." Anything short of that is negligence. *Stanley v. Steele*, 60 Atl. 640, 641, 77 Conn. 688, 69 L. R. A. 561, 2 Ann. Cas. 343.

"Reasonable diligence" of a master to guard against injuries to employees implies

such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a master ought to exercise. *Sandidge v. Atchison, T. & S. F. Ry. Co.*, 193 Fed. 867, 872, 113 C. C. A. 653.

"Reasonable diligence," as between employer and employé, implies such watchfulness, caution, and foresight as under all the circumstances of the particular service ought to be exercised by careful and prudent men. *Missouri, K. & T. R. Co. v. Willhoit*, 98 S. W. 341, 344, 6 Ind. T. 534.

"Reasonable diligence" to which a tug is obligated means very great diligence, in view of the nature of the service, and also in view of the fact that the tow is a stranger and the tug is at home. *Winslow v. Thompson*, 134 Fed. 546, 549, 67 C. C. A. 470.

Where the object of the operations contemplated by an oil and gas lease is to obtain a benefit or profit for both lessor and lessee, neither is, in the absence of a stipulation to that effect, the arbiter of the extent to which or the diligence with which the operations shall proceed; but both are bound by the standard of what, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both. An oil and gas lease contained a covenant, which was also made a condition, that the lessee would continue with "reasonable diligence" the work of development and production after the expiration of the period allowed for original exploration and development, if during that period oil and gas, one or both, were found in paying quantities. The lease covered two tracts, owned by the lessor, which were widely separated and embraced 232.50 acres. Both were within a recognized oil and gas field. These minerals were being produced in paying quantities from the lands surrounding each tract. Near the expiration of the period allowed for original exploration and development the lessee drilled a single well on one of the tracts, in which gas was found in paying quantity, and thereafter took and maintained the position that by drilling that well and paying the stipulated price for gas used therefrom it acquired the right to hold the lease indefinitely without further development. This situation continued for 14 months, when the lessor elected to terminate the lease for breach of the covenant and condition for the exercise of reasonable diligence. Held, that in these circumstances the prolonged failure of the lessee to continue the work of development and production, though due to a mistaken view of the obligations imposed by the lease, was a plain and substantial breach of the covenant and condition and entitled the lessor to terminate the lease. *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 802, 72 C. C. A. 213.

#### As ordinary care

Where the court in its charge used the terms "ordinary care," "reasonable diligence," and "reasonable care," it should in an instruction defining ordinary care, have also told the jury that reasonable diligence or reasonable care is ordinary care. *Greene v. Louisville Ry. Co.*, 84 S. W. 1154, 1156, 119 Ky. 862, 27 Ky. Law Rep. 316, 7 Ann. Cas. 1126.

#### REASONABLE DILIGENCE AND CARE

The exercise of "reasonable diligence and care" by a telegraph company, in sending and delivering a message, is the exercise of no greater care than the exercise of "ordinary care." *Western Union Telegraph Co. v. Gilliland (Tex.)* 130 S. W. 212, 215.

#### REASONABLE DISPATCH

Where an appraisalment in mortgage foreclosure sale was made on one day and a copy was not filed until the next day, there was nothing to show that the copy was not filed with "reasonable dispatch." *Wheldon v. Cornett*, 94 N. W. 626, 627, 4 Neb. (Unof.) 421

#### REASONABLE DOUBT

See, also, *Well Founded*.

The doctrine of "reasonable doubt" is a legal right almost as old as law itself. Its purpose is to shield the innocent, and not a cloak for the guilty. *United States v. Chisholm*, 153 Fed. 808, 815.

The guilt of accused must be established by evidence to the exclusion of a "reasonable doubt"; and, where the evidence taken as a whole creates only a suspicion of accused's guilt, there is nothing to submit to the jury. *Sprouse v. Commonwealth (Ky.)* 122 S. W. 134, 135.

The term "reasonable doubt" has no other or different meaning in law than in ordinary affairs of life. *People v. Barkas*, 99 N. E. 698, 702, 255 Ill. 516.

In a preliminary examination, the state is not required to establish the guilt of the accused "beyond a reasonable doubt." The phrase "reasonable or probable cause," as used in the statute relating to the holding of the accused for trial, is not equivalent to the phrase "beyond a reasonable doubt" as applied to the degree of proof on the trial. In *re Squires*, 92 Pac. 754, 755, 13 Idaho, 624.

It was proper to refuse a requested instruction that a reasonable doubt is that want of repose and confidence which an honest man has in the correctness of a conclusion which he is about to make, after giving the question his best thought. *Brown v. State*, 43 South. 194, 196, 150 Ala. 25.

An instruction defining "reasonable doubt" as a doubt which would exist when the judgment of a jury, after careful re-

view of all the evidence, finds itself unconvinced of the guilt of the prisoner, was correct; the word "convince" being used in the sense of an abiding conviction. *State v. Leo*, 77 Atl. 523, 525, 80 N. J. Law, 21.

The phrase, "although the fact may be in a degree surrounded by a doubt," embraced in a charge on circumstantial evidence, is improper as tending to confuse the meaning of "reasonable doubt." *State v. Marren*, 107 Pac. 993, 1001, 17 Idaho, 766.

Where the court charged that accused was presumed to be innocent until proven guilty, and that the presumption of innocence attended him through the case until the testimony tore it away, a further statement that "no man can be convicted of crime in this jurisdiction until his guilt is established beyond a reasonable doubt," and "a reasonable doubt is what the word implies; a doubt founded in reason; a doubt for which you can give a reason; a doubt growing out of the testimony in the case, or the lack of testimony; a doubt which would cause you to hesitate in the ordinary affairs of life," was not error. *People v. Davis*, 137 N. W. 61, 64, 171 Mich. 241.

The court instructed that it was the state's duty to establish accused's guilt beyond a reasonable doubt, such a doubt as honest men would have in their mind, honest jurors under oath after considering all the evidence, and if, after considering all the evidence, the jury had an honest doubt as to accused's guilt, he was entitled to the benefit of such doubt, and should be acquitted, but, if the jury had no such reasonable doubt, they should convict. Held, that such charge sufficiently defined the meaning of a reasonable doubt. *State v. Codrington*, 78 Atl. 743, 745, 80 N. J. Law, 496.

An instruction defining the term "reasonable doubt" in the language of the instruction given in *Barney v. State*, 49 Neb. 515, 68 N. W. 636, together with the additional sentence, "You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men," is not erroneous, though the instruction is not to be commended. *Lillie v. State*, 100 N. W. 316, 322, 72 Neb. 228.

An instruction that the meaning of "reasonable doubt" is that it is such a doubt from all the evidence that remains unsatisfied and unconvinced, after a full consideration of all the facts and circumstances of the case, was properly refused as not correctly defining "reasonable doubt." *Smith v. State*, 101 Pac. 848, 849, 17 Wyo. 481.

Where the court, in a prosecution for robbery, in charging the jury defined a "reasonable doubt" as "that state of the case which, after the entire comparison and consideration of all the evidence in the cause, leaves the minds of the jurors," etc., an objection to the instruction on the ground

that a "reasonable doubt" obviously is not a "state of the case," but rather a condition of the mind, is untenable. *People v. Lewandowski*, 77 Pac. 467, 470, 143 Cal. 574.

One on trial for a crime is not denied the benefit of a "reasonable doubt" by the instruction to the jury that there should be a verdict of guilty if a full and candid consideration of the evidence produces a conviction of guilt and satisfies the mind to a reasonable certainty, but that there should be an acquittal if the evidence establishes only strong probabilities of guilt. *State v. Allen*, 67 N. E. 1053, 1054, 68 Ohio St. 516.

A charge that "reasonable doubt" is not a mere possible doubt; that it must be founded upon reason and must grow out of the evidence in the case; that it is a doubt for which a reason can be assigned, and which leads one to entertain a conscientious belief that there is an absence of necessary proof of guilt; that it is an honest, fair doubt, raised, not from an outside source, but by the evidence given in open court, and which appeals to the sound judgment of the jury—is not erroneous, when considered with a further charge that it is presumed that defendant is innocent, that such presumption continues throughout the trial until satisfactory evidence of guilt is produced, that the burden of establishing guilt rests upon the people, and that the prosecution must prove defendant's guilt in all its elements. *People v. Hoffmann*, 105 N. W. 838, 839, 142 Mich. 531.

An instruction that every material allegation of an indictment must be proved beyond a "reasonable doubt" and to a "moral certainty"; that defendant is presumed to be innocent until, taking the evidence altogether, there remains no reasonable doubt as to his guilt; that mere probabilities or a mere preponderance of evidence against him would not satisfy the law; that before defendant could be found guilty his guilt must be established beyond reasonable doubt; that such doubt might arise from the evidence actually offered, or from a lack of evidence; that "the doubt, however, must be real, not chimerical or fanciful, not a doubt which is sought for, but one which arises naturally from the case, and which is not a doubt produced by undue sensibilities on the part of the jurors as to the consequence of their verdict"; that it was not necessary that defendant's guilt be established beyond all doubt; that the fact that the question of guilt or innocence is difficult of solution does not constitute a reasonable doubt if by a careful consideration that solution may be established according to law; that if, after a careful scrutiny of the whole case and a careful consideration of the evidence, and conscientious consideration of the law, there arises spontaneously and naturally, without being sought after, an uncertainty concern-

ing the guilt or innocence of defendant, which uncertainty is of the weight and quality that if interposed in any of the graver transactions of life would check the final judgment, causing the jury to pause and hesitate, then such uncertainty amounts to a reasonable doubt; that unless there was an abiding conviction of defendant's guilt he must be acquitted; that if proven guilty beyond a reasonable doubt he must be convicted even though doubts remained not amounting to reasonable doubts—while disapproved as being lengthy, is free from reversible error. *People v. Buettner*, 84 N. E. 218, 219, 220, 233 Ill. 272, 13 Ann. Cas. 235 (citing and adopting *Morello v. People*, 80 N. E. 903, 226 Ill. 388).

"A 'reasonable doubt' is not such a doubt as any man may start by questioning for the sake of a doubt; nor a doubt suggested or surmised without foundation in facts or testimony. It is such a doubt only as in a fair, reasonable effort to reach a conclusion upon the evidence, using the mind in the same manner as in other matters of importance, prevents the jury from coming to a conclusion in which their minds rest satisfied. If, so using the mind and considering all the evidence produced, it leads to a conclusion which satisfies the judgment and leaves upon the mind a settled conviction of the truth of the fact, it is the duty of the jury so to declare the fact by the verdict. It is possible always to question any conclusion derived from testimony, but such questioning is not what is a reasonable doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge." *Bridgeman v. United States*, 140 Fed. 577, 592, 72 C. C. A. 145.

#### Absolute certainty

A "reasonable doubt" does not mean an absolute certainty. *Parham v. State*, 42 South. 1, 6, 147 Ala. 57.

To give rise to a "reasonable doubt" the evidence need not amount to an absolute certainty. *United States v. Guthrie*, 171 Fed. 528, 532.

Proof beyond a "reasonable doubt" does not require that guilt be established with the absolute certainty of a mathematical demonstration. *State v. Brown* (Del.) 80 Atl. 146, 150, 2 Boyce, 405.

Proof beyond a "reasonable doubt" does not mean that the guilt of accused or any other fact shall be established with the absolute certainty of a mathematical demonstration, but the facts must be proved to a moral certainty. *State v. Blackburn* (Del.) 75 Atl. 536, 541, 7 Pennewill, 479.

A reasonable possibility of defendant's innocence is not a proper predicate for an acquittal, nor is the jury required to acquit, if one of them has a "reasonable doubt" of defendant's guilt, but defendant is entitled to acquittal if his conduct upon a reasonable hypothesis is consistent with his innocence. It is not necessary, in order to convict, to prove to an exact or mathematical certainty that defendant is guilty, but only that each juror believes him guilty beyond a reasonable doubt. *Howard v. State*, 44 South. 95, 96, 151 Ala. 22.

Proof beyond a "reasonable doubt" does not mean that the guilt of accused must be established with the absolute certainty of a mathematical demonstration, and it is sufficient that any disputed fact is established by that amount of competent evidence which will satisfy a fair and unprejudiced mind beyond a reasonable doubt; and the term does not mean a vague, speculative, or whimsical doubt, or a mere possible doubt, but a substantial doubt. *State v. Roberts* (Del.) 78 Atl. 305, 311, 2 Boyce, 140.

A charge that the law does not require absolute certainty, but is based rather upon the doctrine of reasonable probability, and if the evidence leaves in the jury's minds an abiding conviction of accused's guilt they would be convinced beyond a reasonable doubt, fairly stated the law of "reasonable doubt," and was not misleading, though the statement that the law of reasonable doubt is based upon the doctrine of reasonable probability is objectionable in law, and, if standing alone, would be prejudicial. *State v. Quinn*, 105 Pac. 818, 821, 56 Wash. 295.

A "reasonable doubt" is a doubt based on reason, and which is reasonable in view of all the evidence. It is not a whimsical, arbitrary, or purely speculative doubt, nor a mere conjecture or guess. If after an impartial comparison and consideration of the evidence jurors can candidly say that they are not satisfied of the defendant's guilt they have a "reasonable doubt"; but if, after such impartial comparison and consideration of all the evidence, they can truthfully say that they have a fixed conviction of the defendant's guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs, they have no reasonable doubt, and in that case should find a verdict of guilty. Absolute certainty is not required for such a verdict. Proof beyond a reasonable doubt as above defined is sufficient. *United States v. Giuliani*, 147 Fed. 594, 597.

"Proof beyond a 'reasonable doubt' does not mean that the guilt of the accused or any other fact shall be established with the absolute certainty of a mathematical demonstration. Matters of fact are required to be proved merely to a moral certainty. To require more in dealing with human conduct

and the ordinary affairs of life would be impracticable and therefore unreasonable. It is sufficient that any disputed fact relating to these shall be established by that amount of competent or appropriate evidence which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined. The only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a man of common sense and ordinary discretion, and so to convince him that he would act upon that conviction in matters of the highest concern and importance to his own interest. 'Reasonable doubt,' in the legal sense, therefore, does not mean a vague, speculative, or whimsical doubt or uncertainty, nor a merely possible doubt of the truth of the fact to be proved." *State v. Brinte* (Del.) 58 Atl. 258, 264, 4 Pennewill, 551.

#### Captious or imaginary doubt

"Reasonable doubt" is not a mere fanciful doubt. *State v. Bell* (Del.) 62 Atl. 147, 148, 149, 5 Pennewill, 192; *State v. Johns* (Del.) 65 Atl. 763, 764, 6 Pennewill, 174; *State v. Stewart* (Del.) 67 Atl. 786, 789, 6 Pennewill, 435; *State v. Tyre* (Del.) 67 Atl. 199, 205, 6 Pennewill, 343; *State v. Mills* (Del.) 69 Atl. 841, 6 Pennewill, 497; *State v. Borrelli* (Del.) 76 Atl. 605, 607, 1 Boyce, 349; *State v. Powell* (Del.) 76 Atl. 601, 602, 7 Pennewill, 2; *State v. Short* (Del.) 75 Atl. 787, 789, 7 Pennewill, 295; *State v. McCallister* (Del.) 76 Atl. 226, 230, 7 Pennewill, 301; *State v. Curdy* (Del.) 75 Atl. 868, 869, 1 Boyce, 208; *State v. Ryan* (Del.) 75 Atl. 869, 872, 1 Boyce, 223; *State v. De Luca* (Del.) 77 Atl. 742, 743, 2 Boyce, 158; *State v. Russo* (Del.) 77 Atl. 743, 747, 1 Boyce, 538; *State v. Brewington* (Del.) 78 Atl. 402, 404, 2 Boyce, 71; *State v. Honey* (Del.) 80 Atl. 240, 241, 2 Boyce, 324; *State v. Fitzsimmons* (Del.) 82 Atl. 598, 600; *State v. Powell* (Del.) 61 Atl. 966, 972, 5 Pennewill, 24; *State v. Brown* (Del.) 61 Atl. 1077, 1079, 5 Pennewill, 339; *State v. Truitt* (Del.) 62 Atl. 790, 792, 5 Pennewill, 466; *State v. Tilghman* (Del.) 63 Atl. 772, 774, 6 Pennewill, 54; *State v. Gam* (Del.) 74 Atl. 7, 8, 1 Boyce, 25; *State v. Uzzo* (Del.) 65 Atl. 775, 778, 6 Pennewill, 212; *State v. Miele* (Del.) 74 Atl. 8, 9, 11, 1 Boyce, 33; *State v. Primrose* (Del.) 77 Atl. 717, 720, 2 Boyce, 164; *State v. Fulman* (Del.) 74 Atl. 1, 7 Pennewill, 123; *State v. Lockwood* (Del.) 74 Atl. 2, 4, 1 Boyce, 28; *State v. Lee* (Del.) 74 Atl. 4, 6, 1 Boyce, 18; *State v. Hartnett* (Del.) 74 Atl. 82, 84, 7 Pennewill, 204; *Brantley v. State*, 65 S. E. 426, 133 Ga. 264; *United States v. Guthrie*, 171 Fed. 528, 532; *Bannen v. State*, 91 N. W. 107, 109, 115 Wis. 317.

"Reasonable doubt" is not a mere captious or imaginary doubt. *Bell v. State*, 98

S. W. 705, 707, 81 Ark. 16; *State v. Logan*, 85 Pac. 798, 799, 73 Kan. 730.

A "reasonable doubt" does not mean an imaginary doubt. *Furlow v. State*, 81 S. W. 232, 233, 72 Ark. 384.

"Reasonable doubt" does not mean a whimsical doubt. *State v. Roberts* (Del.) 78 Atl. 305, 311, 2 Boyce, 140; *State v. Brown*, 80 Atl. 146, 150, 2 Boyce, 403.

A "reasonable doubt" should not be a mere whim or surmise. *Commonwealth v. Campbell*, 31 Pa. Super. Ct. 9, 14.

A "reasonable doubt" is not a fanciful or imaginary doubt. *State v. Fagan* (Del.) 74 Atl. 692, 696, 1 Boyce, 45; *State v. Dlugozima* (Del.) 74 Atl. 1086, 1088, 7 Pennewill, 151; *State v. Luff* (Del.) 74 Atl. 1079, 1081, 1 Boyce, 152; *State v. Anderson* (Del.) 74 Atl. 1097, 1099, 1 Boyce, 135.

A "reasonable doubt" is not a trivial or fanciful doubt. *State v. Cephus* (Del.) 67 Atl. 150, 152, 6 Pennewill, 160; *State v. Wolf* (Del.) 66 Atl. 739, 742, 6 Pennewill, 323; *State v. Briscoe* (Del.) 67 Atl. 154, 157, 6 Pennewill, 401; *State v. Tyre* (Del.) 67 Atl. 199, 205, 6 Pennewill, 343; *State v. Fulman* (Del.) 74 Atl. 1, 7 Pennewill, 123.

"Reasonable doubt" does not mean a fanciful or whimsical doubt. *State v. Davenport* (Del.) 77 Atl. 967, 968, 2 Boyce, 12.

A "reasonable doubt" must not be a fanciful or visionary doubt. *State v. Fleetwood* (Del.) 65 Atl. 772, 774, 6 Pennewill, 153.

A "reasonable doubt" does not mean a fanciful or indefinable doubt. *State v. Rash* (Del.) 78 Atl. 405, 407, 2 Boyce, 77; *State v. Lockwood* (Del.) 74 Atl. 2, 3, 4, 1 Boyce, 28.

A "reasonable doubt" is not a mere imaginary, whimsical, or even possible doubt of the guilt of the accused. *State v. Emory* (Del.) 58 Atl. 1036, 1039, 5 Pennewill, 126; *State v. Wilson* (Del.) 62 Atl. 227, 231, 5 Pennewill, 77.

A "reasonable doubt" is not a mere conjectural doubt. *Flohr v. Territory*, 78 Pac. 565, 573, 14 Okl. 477.

A "reasonable doubt" is not a fanciful doubt or a doubt growing out of conjecture. *State v. Harmon* (Del.) 60 Atl. 866, 869, 4 Pennewill, 580.

By "reasonable doubt" is not meant a strained or whimsical conjecture. *United States v. Greene*, 146 Fed. 803, 824.

By "reasonable doubt" is not meant a mere caprice or conjecture or groundless possibility. *Turley v. State*, 104 N. W. 934, 938, 74 Neb. 471.

An instruction in a criminal case that "by the term 'reasonable doubt' is meant not a capricious doubt, but a substantial doubt—a doubt that you can give a reason for if the court called on you to give one—" held not

erroneous. *Marshall v. United States*, 197 Fed. 511, 512, 117 C. C. A. 65.

Proof to warrant a "reasonable doubt" should not be a mere conjecture, a fancy, a trivial supposition. *Parker v. State*, 59 S. E. 823, 825, 3 Ga. App. 336.

A "reasonable doubt" is not a whimsical, arbitrary, or purely speculative doubt, nor a mere conjecture or guess. *United States v. Giuliani*, 147 Fed. 594, 597.

"Reasonable doubt" in respect to the sufficiency of evidence in a criminal case does not mean a captious quibble suggested to evade the performance of an honest duty. *Saunders v. State*, 111 Pac. 965, 971, 4 Okl. Cr. 264, Ann. Cas. 1912B, 766.

A juror cannot create for himself a doubt and act on it. He cannot raise an artificial or captious doubt in order to acquit. *Parker v. State*, 59 S. E. 823, 825, 3 Ga. App. 336.

A "reasonable doubt" is not a mere imaginary, captious, or possible doubt, but a fair doubt based on reason and common sense. *People v. Burke*, 121 N. W. 282, 157 Mich. 108; *State v. Levy*, 75 Pac. 227, 230, 9 Idaho, 483.

A "reasonable doubt" is not any possible or imaginary doubt, because everything that depends upon human testimony is susceptible to some possible or imaginary doubt. To be convinced beyond a reasonable doubt is that state of the case which, after an entire consideration and comparison of all the testimony, leaves the minds of the jurors in that condition that they feel an abiding conviction to a moral certainty of the truth of the charge. *Snyder v. State*, 111 S. W. 465, 466, 86 Ark. 456.

The "reasonable doubt" of defendant's guilt, which, being entertained by the jury, should inure to his acquittal, is not a vague, fanciful, whimsical, or even possible doubt, but such a doubt as naturally arises out of the evidence, and may reasonably be entertained by men of ordinary intelligence, impartiality, and judgment, after a careful and conscientious consideration of all the evidence. *State v. Cole* (Del.) 78 Atl. 1025, 1026, 2 Boyce, 184.

By the term "reasonable doubt" is not meant every possible or fanciful doubt or conjecture that may suggest itself or be suggested to the mind. It is not a mere guess or surmise, because everything relating to human affairs and dependent upon moral evidence is open to some fanciful doubt or conjecture. A "reasonable doubt" is a doubt based upon reason, and growing out of the testimony and evidence in the case. A reasonable doubt is that state of the case, which, after an entire comparison and consideration of all the evidence, leaves the mind in that condition that jurors cannot say they

feel an abiding conviction, to a certainty, that the accused committed the offense. *People v. Yun Kee*, 96 Pac. 95, 96, 8 Cal. App. 82.

Accused is presumed to be innocent until his guilt is proved beyond a reasonable doubt; but a "reasonable doubt" does not mean a vague, speculative, or possible doubt, but such a substantial doubt as will remain in the minds of reasonable fair-minded men after a consideration of all the evidence. *State v. Brelawski* (Del.) 84 Atl. 950, 953.

A statement in an instruction on reasonable doubt that everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt, and that the "reasonable doubt" referred to was that state of the case, etc., did not render the instruction erroneous. *People v. Verduzco*, 110 Pac. 970, 972, 13 Cal. App. 789.

#### Concurrence of all jurors

If a "reasonable doubt" arises from a single jurymen, the other jurymen should come to the mind of that one. *Commonwealth v. Campbell*, 31 Pa. Super. Ct. 9, 15, 17.

In a prosecution for murder, the jury are not required to acquit the defendant if one of them has a "reasonable doubt" of his guilt. *Howard v. State*, 44 South. 95, 96, 151 Ala. 22.

An instruction on reasonable doubt was not erroneous because its concluding clause directed that, while each juror should decide for himself, it was his duty to consult with the other jurors with the view of reaching an agreement if they could without violence to their individual understanding of the evidence and instructions of the court, and that they should not hesitate to sacrifice their views or opinions of the case when convinced that they were erroneous, even though in so doing they deferred to the views or opinions of others. *People v. Verduzco*, 110 Pac. 970, 972, 13 Cal. App. 789.

#### As doubt arising from evidence

A "reasonable doubt" must be based on the evidence in the case. *Walker v. State*, 35 South. 1011, 1012, 1014, 139 Ala. 56.

A "reasonable doubt" is a doubt growing out of the testimony and evidence in the case. *People v. Yun Kee*, 96 Pac. 95, 96, 8 Cal. App. 82.

A "reasonable doubt" is a doubt of guilt arising upon consideration of all the evidence, facts, and circumstances presented at trial. *Dobbs v. State*, 115 Pac. 370, 373, 5 Okl. Cr. 475.

A "reasonable doubt" is a doubt derived from the evidence or lack of evidence in the case. *United States v. Post*, 128 Fed. 950, 957.

A "reasonable doubt" must arise from the evidence or lack of evidence in the case. *Cannon v. Territory*, 99 Pac. 622, 626, 1 Okl. Cr. 600.

A "reasonable doubt" may arise from want or lack of evidence, and need not be founded upon evidence in the case. *State v. Andrews*, 71 Atl. 109, 110, 77 N. J. Law, 108.

A "reasonable doubt" is a doubt growing out of the evidence, and such as would control reasonable men in the ordinary affairs of life. *State v. Coates* (Del.) 79 Atl. 213, 215, 2 *Boyce*, 424.

A "reasonable doubt" is a doubt arising out of the evidence, and the jury may not go outside of the evidence to hunt up doubts on which to acquit accused. *State v. Trapp*, 109 Pac. 1094, 1097, 56 Or. 588.

The jury are not to go beyond the evidence to hunt for doubt. A "reasonable doubt" must arise from a candid and impartial consideration and investigation of all the evidence in the case. *Flohr v. Territory*, 78 Pac. 565, 573, 14 Okl. 477.

"Reasonable doubt" beyond which guilt must be affirmatively proved to justify a conviction is a doubt of guilt reasonably arising from all the evidence or want of evidence in the case. *Baker v. State*, 97 N. W. 566, 568, 120 Wis. 135.

"Reasonable doubt" to which a defendant is entitled is not one raised by the juror's personal information from hearsay or otherwise, or from his bias or prejudice, but must grow out of and be founded upon the evidence adduced on the trial. *Commonwealth v. Di Silvestro*, 31 Pa. Super. Ct. 537, 555.

While a "doubt" arising out of evidence which will justify an acquittal in a criminal case is a mental operation for which it may often be very difficult and indeed impossible to assign any reason, yet it is not reversible error to define reasonable doubt as a doubt arising from the evidence or lack of evidence and for which some reason can be given. *Griggs v. United States*, 158 Fed. 572, 577, 85 C. C. A. 596.

An instruction that a "reasonable doubt" is one that is based upon some ground in the testimony or the want of testimony in the case, and that, if a juror has not a doubt of that gravity, he ought to convict, is proper. *O'Dell v. State*, 47 S. E. 577, 578, 120 Ga. 152.

The definition of a "reasonable doubt" by the court in charging the jury as "such a doubt as grows out of the testimony and leaves a reasonable mind wavering and unsettled" is probably too narrow and restricted. A reasonable doubt may arise, not only out of the testimony, but from the want of testimony, or it may be created by the statement of the defendant, or the manner and conduct of the witnesses in testifying, or the credibility of the witnesses, and other facts and circumstances connected with the case. *Governor v. State*, 63 S. E. 241, 244, 5 Ga. App. 357.

A charge that the state has the burden of proving every fact necessary to a conviction beyond a reasonable doubt, that the expression "reasonable doubt" means a doubt founded on some good reason, and must not arise from sympathetic feelings, but must arise from the evidence or lack of evidence, etc., correctly charges on "reasonable doubt." *State v. Harsted*, 119 Pac. 24, 26, 66 Wash. 158.

A "reasonable doubt" is a fair doubt growing out of the testimony in the case. It is not a mere imaginary, captious, or possible doubt, but a fair doubt based upon reason and common sense. It is such a doubt as may leave the minds of the jury, after a careful examination of all the evidence in the case, in that condition that they cannot say they have an abiding conviction of a moral certainty of the truth of the accusation. The proposition that a "reasonable doubt" must be an insurmountable doubt is not approved. *People v. Burke*, 121 N. W. 282, 284, 157 Mich. 108 (quoting with approval from *People v. Finley*, 38 Mich. 482, 483).

The term "reasonable doubt," as defined by text writers and decisions of courts of last resort, is a fair doubt growing out of the testimony in the case. It is not a mere imaginary, captious, or possible doubt, but a fair doubt, based upon reason and common sense. It would be possible to raise an imaginary or captious doubt in any case, no matter how strong, direct, and positive the evidence might be. For instance, a jury might imagine, in a case where two uncontradicted eye-witnesses to a crime testified to its commission, that such witnesses might be mistaken, and thus entertain a captious or imaginary doubt. But such a doubt is not a "reasonable doubt," within the legal definition of that phrase. *State v. Levy*, 75 Pac. 227, 230, 9 Idaho, 483 (citing 3 Rice, Ev. § 268).

To convict a person of an offense charged, it is incumbent upon the state to prove every material element of the crime to the satisfaction of the jury beyond a reasonable doubt. Such a doubt must be a reasonable one under all the circumstances of the case, and must grow out of the evidence. It must not be a fanciful doubt, a visionary, speculative, or sympathetic one, but such a doubt as upon careful and conscientious consideration of all the evidence the jury feels constrained to entertain. *State v. Fleetwood* (Del.) 65 Atl. 772, 774, 6 Pennewill, 153.

The "reasonable doubt" which entitles defendant in a criminal case to an acquittal is a doubt of guilt, reasonably arising from all the evidence in the case, and it must be such a doubt as the juror is able to give a reason for. A "reasonable doubt" is that state of a case which, after the entire comparison and consideration of all the evidence, leaves the mind of the juror in that condi-

tion that he cannot say and feel an abiding conviction to a moral certainty of the guilt of defendant as charged in the information. *State v. Grant*, 106 N. W. 97, 99, 26 S. D. 164, 11 Ann. Cas. 1017.

A "reasonable doubt" is one that grows out of the testimony or from the absence of testimony, and leaves a reasonable mind wavering and unsettled and not satisfied from the evidence. A juror cannot create for himself a doubt and act upon it. He cannot raise an artificial or captious doubt in order to acquit. The doubt should be real and honestly and fairly entertained after all reasonable efforts to find out the facts. The proof should be such as to control and decide the conduct of men in the highest and most important affairs of life, and not a mere conjecture, a fancy, a trivial supposition, a bare possibility of innocence. *Parker v. State*, 59 S. E. 823, 825, 3 Ga. App. 336.

A charge in a criminal case defining a "reasonable doubt," that "a doubt, to justify an acquittal, must be reasonable and arise from a candid and impartial consideration of all the evidence in the case," is not erroneous, as precluding a reasonable doubt arising from a want of evidence. *Moore v. State*, 111 Pac. 822, 824, 4 Okl. Cr. 212.

A prisoner in a criminal trial has no ground to complain of a charge as follows: "The presumption is that the defendant is innocent, and the presumption continues up until the moment that you are satisfied by the evidence beyond a reasonable doubt of his guilt. This reasonable doubt is such a doubt that fully arises from the evidence. It should not be a mere whim or surmise. There should be such a doubt as there is a reason for and which fully arises out of the evidence. \* \* \* We would say further that the doubt arises from all of the evidence, and if the doubt arises from a single jurymen the other eleven jurymen should come to the mind of that one. It of course takes twelve jurymen to arrive at the verdict." *Commonwealth v. Campbell*, 31 Pa. Super. Ct. 9, 15, 17.

An instruction that a "reasonable doubt" sufficient to justify an acquittal is a doubt arising from all the evidence or from a want of evidence, and that evidence is sufficient to remove a reasonable doubt when sufficient to convince the judgments of ordinarily prudent men of the truth of a proposition with such force that they would act upon that conviction without hesitation in their most important affairs when not compelled to act, was proper. *Weigand v. State*, 99 N. E. 999, 178 Ind. 623.

An instruction is correct which reads: "A 'reasonable doubt,' as used in these instructions, to justify an acquittal, must be a reasonable one arising from a candid and impartial investigation of all the evidence in the case. A doubt produced by an undue

sensibility in the mind of any juror in view of the consequences of his verdict is not a reasonable doubt, and the jury is not allowed to create sources of materials of doubt by resorting to trivial or fanciful suppositions and remote conjectures as to a possible state of facts differing from these established by the evidence. You are not at liberty to disbelieve as jurors, if from all the evidence you believe as men. Your oath imposes on you no obligation to doubt, where no doubt would exist if no oath had been administered. If, after a careful and impartial examination and consideration of all the evidence, in the case, you can say that you feel an abiding conviction of the guilt of the defendant, and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond a reasonable doubt." *Mays v. State*, 101 N. W. 979, 980, 72 Neb. 723.

To instruct the jury as follows: "By the term 'reasonable doubt,' as used in these instructions, is meant that state of the case which, after a full consideration of all the evidence, leaves your minds in that condition that you cannot say that you feel an abiding conviction of the guilt of the defendant. You should not go beyond the evidence to hunt for doubt, or entertain doubt from mere caprice or conjecture. Such doubt should arise only from a candid and impartial and honest consideration of all the evidence and the facts and circumstances presented upon the trial, and if, upon such consideration, doubt does so arise, and by reason of it you cannot say that you are satisfied to a moral certainty of the guilt of the defendant, you should return your verdict of not guilty"—will not warrant a reversal on the ground that it does not authorize the jury to find the defendant not guilty on account of the lack of evidence against him. *Dobbs v. State*, 115 Pac. 370, 373, 5 Okl. Cr. 475.

A charge that a "reasonable doubt" was such a doubt as arose from the evidence either from the want of evidence or conflict in the evidence was not error because the court failed to charge that such doubt might arise from the defendant's unsworn statement, in view of other charges that defendant had a right to make such statement which should be considered by the jury in connection with the sworn testimony and given such weight as the jurors thought it entitled to, that if the jury had a reasonable doubt of defendant's guilt they should acquit, and that they should take the state's theory, the evidence, the defendant's statement, view the whole field of evidence, and determine what the truth of the case was. *Harris v. State*, 70 S. E. 952, 953, 136 Ga. 107.

An instruction that "a reasonable doubt requires that there should be more than a mere possibility of the defendant's innocence. You must have, in order to justify acquittal,



a reasonable doubt of the defendant's guilt growing out of the unsatisfactory nature of the evidence against him. This doubt must be such a one as would induce a reasonable man to say, 'I am not satisfied that the defendant is guilty'—was erroneous, as the expression "the evidence against him" had a tendency to lead the jury to believe that they were to determine the question of reasonable doubt from a consideration of the state's evidence alone. *People v. Lee*, 93 N. E. 321, 323, 248 Ill. 64.

The court charged that reasonable doubt must be a rational doubt, fairly arising from the testimony and the circumstances surrounding the case; that the burden was on the state to satisfy the jury beyond a reasonable doubt of the existence of any fact and circumstance necessary to form a conclusion of defendant's guilt which must be affirmatively proven to a moral certainty; and that the presumption of innocence attends the accused from the beginning to the end of the trial, and prevails unless overcome by evidence sufficiently strong to convince and satisfy the jury beyond a reasonable doubt. Held, that such charge was not objectionable as depriving accused of the benefit of reasonable doubt arising from insufficiency or lack of evidence, in that the court in certain excerpts stated that a reasonable doubt which entitled accused to an acquittal was one arising from "all the evidence in the case." *Hedger v. State*, 128 N. W. 80, 90, 144 Wis. 279.

The court instructed that the term "reasonable doubt" meant a doubt having some good reason for it arising out of evidence in the case; such a doubt as the jury could find a reason for in the evidence, and, as applied to the evidence in criminal cases, meant an actual and substantial doubt growing out of the unsatisfactory nature of the evidence, and the entire evidence should be considered, and the jury should entertain only such doubts as arise from the evidence and are reasonable. Held, that objection to the charge that the doubt must arise out of the evidence, on the ground that it might arise from want of evidence, was hypercritical, it simply meaning that the jury could not go out of the record to hunt for a pretext to acquit, nor was the instruction that the jury could only act upon such doubt as they were able to find a reason for in the evidence objectionable, when properly construed, as the reason for a reasonable doubt could come from no other source. *People v. Del Cerro*, 100 Pac. 887, 890, 9 Cal. App. 764.

An instruction, on a trial for murder, that in whatever form the question of a reasonable doubt may be couched, and however it may be twisted by words, a reasonable doubt is no more than a reasonable doubt, and that in considering the case the jury were not to go beyond the evidence to hunt up a doubt, nor must they entertain such

doubts as were merely imaginary or conjectural; that a doubt, to justify an acquittal, must be reasonable and arise from an impartial investigation of the evidence; and that if, after considering all the evidence, the jury had a fixed conviction of the truth of the charge, they were satisfied beyond a reasonable doubt—was not erroneous. *Bluett v. State*, 44 South. 84, 87, 89, 151 Ala. 41.

Where the court had defined what was a "reasonable doubt," an addendum to the effect that the "reasonable doubt" of the law is one that grows out of the evidence was not subject to the criticism that it excluded the inference that such a doubt may arise from the want of evidence or the conflict in evidence. *Thomas v. State*, 59 S. E. 246, 248, 129 Ga. 419.

In a criminal prosecution, an instruction, defining a "reasonable doubt" as "not a mere imaginary or possible doubt, but a substantial doubt, based upon reason and common sense, and induced by the facts and circumstances attending the particular case and growing out of the testimony. It is such a doubt as will leave one's mind, after a careful examination of all the evidence, in such condition that he cannot say that he has an abiding conviction to a moral certainty of the defendant's guilt as charged"—is not subject to the objection that by it the jury were confined to a consideration of the evidence, whereas a reasonable doubt may arise from the lack of evidence. *State v. De Lea*, 93 Pac. 814, 816, 36 Mont. 531.

#### As not including every doubt

To give rise to a "reasonable doubt" justifying an acquittal, the evidence need not exclude all doubt. *United States v. Guthrie*, 171 Fed. 528, 532.

A request to charge in a criminal case, using the expression "all doubt," in place of "a reasonable doubt," was properly refused. *Gordon v. State*, 41 South. 847, 849, 147 Ala. 42.

"Reasonable doubt" is not any doubt which might cause any juror to hesitate to act in the most important business affairs of his own. *Nelms v. State*, 51 S. E. 588, 589, 123 Ga. 575.

The doubt as to accused's guilt that authorizes an acquittal must be a "reasonable one"; a mere doubt being insufficient. *Davis v. State*, 44 South. 561, 562, 152 Ala. 25.

A request to charge the jury to discharge defendant if they had a doubt of his guilt was objectionable for failure to require that the jury have a "reasonable doubt." *Green v. State*, 53 South. 284, 285, 168 Ala. 104.

It was proper to refuse a requested instruction that if, after subjecting the facts to the test of reason, there remained a doubt of guilt, the jury should acquit. *Brown v. State*, 43 South. 194, 196, 150 Ala. 25.

In a prosecution for homicide, instructions that the jury must construe every doubt in favor of the accused were properly refused; such duty being limited to "reasonable" doubts. *Thomas v. State*, 43 South. 371, 376, 150 Ala. 31.

Defendant's requested instruction that if the jury should be in doubt as to defendant's guilt he should be acquitted, and that all doubts should be resolved in his favor, was patently bad. *Kirby v. State*, 44 South. 38, 40, 42, 151 Ala. 66.

A requested instruction that if the evidence leaves in the mind of the jury any doubt as to the guilt of the defendant, or if after a fair consideration of the facts the guilt of the accused remains in doubt, they should acquit, ignored the question of reasonable doubt and was properly refused. *Prior v. Territory*, 89 Pac. 412, 11 Ariz. 169.

On a trial for murder in the first degree, a refusal to charge that, if the jury is in doubt as to what actually happened in the room where the homicide was committed, they must bring in a verdict of not guilty, is not ground for reversal, as the request included any doubt, however slight, which the jury might have as to what actually occurred, especially where the court has charged fully as to the right of the accused to the benefit of every reasonable doubt. *People v. Boggiano*, 72 N. E. 101, 102, 179 N. Y. 267.

#### **As excluding every hypothesis but guilt**

The rule that, to warrant conviction, the evidence must in every case be of such a character as to exclude every reasonable hypothesis of innocence, is but another way of saying that the defendants must be proved guilty beyond a "reasonable doubt." If a reasonable doubt exists, there must be a reasonable hypothesis of innocence; and where such hypothesis does not exist there can be no reasonable doubt. *Marrash v. United States*, 168 Fed. 225, 229, 93 C. C. A. 511.

In a murder trial, it was not fair to refuse to instruct that defendant could not be convicted unless the evidence against him excluded to a moral certainty every hypothesis or supposition but that of his guilt.—*Young v. State*, 43 South. 100, 101, 149 Ala. 16.

It was error to refuse to instruct that the jury should acquit defendant unless the evidence excluded every reasonable supposition but that of his guilt. *Griffin v. State*, 43 South. 197, 199, 150 Ala. 49.

A charge that the jury should acquit unless the evidence excludes every reasonable supposition but that of defendant's guilt was properly refused. *Bell v. State*, 37 South. 281-284, 140 Ala. 57.

An instruction that a "reasonable doubt" is one that excludes every reasonable hypothesis except that of guilt of the defendant,

and that when no other supposition will reasonably account for all of the conditions of the case can the conclusion of guilt be adopted, was properly refused. *Thayer v. State*, 35 South. 408, 408, 409, 138 Ala. 39 (citing *Yarbrough v. State*, 16 South. 758, 105 Ala. 45, 56).

It was proper to refuse a requested instruction that, before defendant could be convicted, the jury must be satisfied to a moral certainty, not only that the proof was consistent with his guilt, but wholly inconsistent with every other rational supposition, and that, unless the jury should be so convinced that each member would venture to act on the decision in matters of the highest importance to their own interest, they should acquit. *Brown v. State*, 43 South. 191, 196, 150 Ala. 25 (citing *Pitts v. State*, 37 South. 101, 140 Ala. 70).

Defendant's requested instruction that, if the jury are not satisfied beyond all "reasonable doubt" to a moral certainty, and to the exclusion of every other reasonable hypothesis but that of his guilt, they should acquit, and it is not necessary to raise a reasonable doubt that they should find from all the evidence a probability of his innocence, but such a doubt may arise even when there is no probability of his innocence in the testimony, and, if they have not an abiding conviction to a moral certainty of his guilt, it is their duty to acquit, should be given. *Baily v. State*, 53 South. 296, 299, 390, 168 Ala. 4.

An instruction that, to sustain a conviction, the state must introduce testimony so strong and convincing as to exclude every other reasonable hypothesis than that of the defendant's guilt, and must convince the jury beyond all reasonable doubt that he could not be innocent, or he must be acquitted, was properly refused, as leading the jury to believe that a higher degree of proof was required than that to satisfy belief beyond a reasonable doubt; and also as requiring the jury to convict defendant, if at all, on the state's testimony. *Rigsby v. State*, 44 South. 608, 610, 152 Ala. 9.

A charge that if the jury were not satisfied beyond a "reasonable doubt," to a moral certainty, and to the exclusion of every other reasonable hypothesis that the defendant was guilty they should find him not guilty, and that it is not necessary to raise a reasonable doubt that the jury should find from all the evidence a probability of defendant's innocence, but that such doubt may arise even when there is no probability of the innocence from the testimony, and that if the jury have not an abiding conviction to a moral certainty of his guilt it is their duty to acquit, and that they must find the defendant not guilty if the conduct of the defendant, upon a reasonable hypothesis, is consistent with his innocence, was properly refused. *Bell v. State*, 37 South. 281-284, 140 Ala. 57.

**As incapable of explanation**

The phrase "reasonable doubt" is self-explanatory, and simplicity would be rendered confusing and meaning obscure by any elaboration. *James v. State*, 57 S. E. 959, 960, 1 Ga. App. 779.

The meaning of the phrase "reasonable doubt" is obvious; and for the courts to attempt to explain it to the jury is to "gild refined gold," or add another ray unto the sunlight. *Barker v. State*, 57 S. E. 989, 990, 1 Ga. App. 236.

"There are no words plainer than 'reasonable doubt,' and none so exact to the idea meant." "Reasonable hypothesis," or "reasonable or moral certainty," may be logically the equivalent of "reasonable doubt"; but these expressions are not so easily understood by the ordinary lay mind. In every criminal case the presiding judge should charge the jury that, to authorize conviction, guilt must be proved "beyond a reasonable doubt," and, unless the evidence demands the verdict rendered, his failure to do so will be reversible error. *Norman v. State*, 74 S. E. 428, 10 Ga. App. 802.

Bishop says that there are no words plainer than "reasonable doubt" and none so exact to the idea meant, but, in respect to definitions, says, "we have not seen one which can safely be pronounced both helpful and accurate." Another authority says "that the words are of plain and unmistakable meaning and any definition on the part of the court tends only to confuse the jury and to render uncertain an expression, which, standing alone, is certain and intelligible." *State v. Blay*, 58 Atl. 794, 795, 77 Vt. 56 (citing *Blah. Cr. Proc.* § 1199).

It is difficult, if not impossible, to so define the term "reasonable doubt" as to satisfy a subtle and metaphysical mind, bent on the detection of some point, however attenuated, upon which to hang a criticism. *McCue v. Commonwealth*, 49 S. E. 623, 629, 103 Va. 870.

It is difficult to give a definition more easily comprehended by juries than the words themselves. They convey their own unmistakable meaning. Certainly the cumulative effect resulting from the reiteration of the same idea by the use of such words and phrases as "well-founded doubt," "substantial doubt," and others of like meaning, is well calculated to fritter away and destroy all benefit to be derived from this important rule of law. *Frazier v. State*, 100 S. W. 94, 103, 117 Tenn. 430.

The phrase "beyond a reasonable doubt," used in the statute in establishing the measure of proof necessary to warrant a conviction in a criminal case, is not a technical term, and needs no explanation from the courts in instructing juries. An instruction on this subject in the language of the statute is all that the court is required to give.

It is a dangerous thing for the courts to attempt to go further. *Douglas v. Territory*, 98 Pac. 1023, 1024, 1 Okl. Cr. 588 (quoting and adopting definition in *Price v. State*, 98 Pac. 447, 1 Okl. Cr. 358).

There have been many attempts to define and interpret the term "reasonable doubt," but it is apprehended that such attempts are futile, that the words are of plain and unmistakable meaning, and that any definition on the part of the court tends only to confuse the jury and to render uncertain an expression which standing alone is certain and intelligible. *Nelms v. State*, 51 S. E. 588, 589, 123 Ga. 575.

**May be raised by evidence of good character**

Evidence of previous good character as to the trait involved in the accusation may, in the absence of other evidence, raise a reasonable doubt, and entitle accused to an acquittal. *United States v. Wilson*, 176 Fed. 806, 810.

Evidence of good character is a species of circumstantial evidence to be considered the same as all other evidence, together with all the facts in the case; and, while it alone may cause a reasonable doubt, it does not necessarily do so. *People v. Fisher*, 120 N. Y. Supp. 659, 661, 136 App. Div. 57.

In a murder trial, an instruction that the fact that defendant is a man of good character may be sufficient to generate in the jury's minds a reasonable doubt of his guilt was properly refused. *Davis v. State*, 44 South. 561, 562, 152 Ala. 25.

A charge that if the defendant had proved a good character as a man of peace such good character may be sufficient to create or generate a reasonable doubt of his guilt, although no such doubt would have existed except but for such good character, was properly refused. *Bell v. State*, 37 South. 281-284, 140 Ala. 57.

While it is immaterial that accused has a good reputation, if he is proven guilty beyond a reasonable doubt, good reputation raises a presumption of innocence, weighty according to the circumstances of the case, and where there is evidence of good reputation, accused is not proven guilty beyond a reasonable doubt, unless the evidence is so conclusive of guilt as to overcome the improbability that one of good reputation would commit the offense; and hence the jury must consider the evidence of reputation, though they have no doubt of guilt. *People v. Blatt*, 121 N. Y. Supp. 507, 509, 136 App. Div. 717.

**As one sufficient to cause hesitation in important affairs**

The proof to warrant a "reasonable doubt" should be such as to control and decide the conduct of men in the highest and most important affairs of life. *Parker v. State*, 59 S. E. 823, 825, 3 Ga. App. 336.

A "reasonable doubt" is such a doubt as would cause a reasonable and prudent man to pause before acting in a matter of grave importance to himself. *Chandler v. State*, 105 Pac. 375, 378, 3 Okl. Cr. 254.

A "reasonable doubt" is such a doubt as would cause a reasonably prudent man to pause before acting in the highest affairs of life. *State v. Raice*, 123 N. W. 708, 710, 24 S. D. 111.

"Reasonable doubt" is not any doubt which might cause any juror to hesitate to act in the most important business affairs of his own. *Nelms v. State*, 51 S. E. 588, 589, 123 Ga. 575.

Guilt is proven beyond a "reasonable doubt" when all the evidence, impartially considered, impresses the judgment of ordinarily reasonable and prudent men with a conviction on which they would act without hesitation in the most important affairs of life. *Miller v. State*, 119 N. W. 850, 861, 139 Wis. 57.

If after an impartial comparison and consideration of all the evidence jurors can truthfully say that they have a fixed conviction of defendant's guilt such as they would be willing to act on in the more weighty and important matters relating to their own affairs, they have no "reasonable doubt," and in that case they should convict. *United States v. Giuliani*, 147 Fed. 594, 597.

A "reasonable doubt" must be such a doubt existing in the mind as, in his own affairs, would cause a reasonably prudent or careful man to pause or hesitate to act in grave or important affairs of life; and it must be a doubt for which a good reason exists, arising out of the testimony or the want of testimony. A reasonable doubt is not a mere possible doubt; it is that state of the case, which, after an entire comparison and consideration of all the evidence, leaves the mind in such a condition that it cannot be said that there is an abiding conviction to a moral certainty of the truth of the charge. The law does not require a demonstration—that is, such a degree of proof as, excluding the possibility of error, produces absolute certainty—because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind. *State v. Armstrong*, 73 Pac. 1022, 1026, 43 Or. 207.

A "reasonable doubt" which will justify an acquittal in a criminal case is such a doubt as would cause a reasonable and prudent man to pause or hesitate in the most important affairs and concerns of his life. An instruction that it is such a doubt as would "govern and control" a reasonably prudent man and "deter" him from acting in his most important affairs and concerns of life was erroneous as requiring an actual belief as distinguished from a doubt. An instruction that the jury should not go beyond

the evidence to hunt up doubts nor entertain merely chimerical doubts or matters of conjecture; but that a doubt, to justify acquittal, must be reasonable and arise either negatively or positively from a candid and impartial investigation of all the evidence; that unless the same kind of a doubt, interposed in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause, it was insufficient; and that if, after considering all the evidence, the jury had an abiding conviction of the truth of the charge, they would be satisfied beyond a reasonable doubt—was erroneous because the expression "the graver transactions of life" is not the legal equivalent of "the most important affairs of life," and also because it apparently assumed that the jury were to start their deliberations upon the basis that conviction was to be the result unless a reasonable doubt had been proved, thus requiring accused to assume the burden of establishing a reasonable doubt, instead of requiring the state to prove his guilt beyond a reasonable doubt. *McAllister v. State*, 88 N. W. 212, 214, 112 Wis. 496.

In an instruction wherein it is said, in speaking of the law as to reasonable doubt, that unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, "it is insufficient to cause a reasonable and prudent man to hesitate and pause," it is insufficient to authorize a verdict of not guilty, the interpolation of the words quoted did not, we apprehend, confuse the jury as to the main idea sought to be conveyed by the instruction, nor was it prejudicial to the accused. *Martin v. State*, 93 N. W. 161, 162, 67 Neb. 36.

An instruction, that proof is said to be "beyond a reasonable doubt" when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act without hesitation in their own important concerns of life, was not erroneous. *Frank v. State*, 68 N. W. 657, 660, 94 Wis. 211.

An instruction as to "reasonable doubt," which, after defining such doubt as an actual doubt which a juror is conscious of after reviewing in his mind the entire case, giving consideration to all the testimony, and one which he believes would cause a reasonable man in any matter of like importance to hesitate to act, denies the notion that any mere possibility is sufficient ground for such a doubt, and adds that, in the performance of jury service, jurors should decide controversies as they would any important question in their own affairs, is good as against a general exception. *Holt v. United States*, 31 Sup. Ct. 2, 6, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138.

It is difficult, if not impossible, to so define the term "reasonable doubt" as to sat-

isfy a subtle and metaphysical mind, bent upon the detection of some point, however attenuated, upon which to hang a criticism. But a requested instruction that "the court instructs the jury that by 'reasonable doubt' is meant such doubt as would cause a man of average prudence to hesitate about a matter of his own of like importance to himself as the case on trial is to the accused" is obviously inadequate, since it would be impossible for the jury to make any practical application of the proposition sought to be formulated in the instruction. There could be no case of importance to a man such as "the case on trial was to the accused" unless he himself stood upon his deliverance before a jury charged with a capital offense. *McCue v. Commonwealth*, 49 S. E. 623, 629, 103 Va. 870.

A "reasonable doubt" is not a mere possible doubt, but it is such a doubt as arises from such a candid consideration of all the evidence as will cause a reasonable man to pause in the graver transactions of life; and a juror is satisfied beyond a reasonable doubt, where, from a candid consideration of all the evidence, he has an abiding conviction of the truth of the charge. *Dempsey v. State*, 102 S. W. 704, 706, 83 Ark. 81.

It was proper to refuse a requested instruction that, before defendant could be convicted, the jury must be satisfied to a moral certainty, not only that the proof was consistent with his guilt, but wholly inconsistent with every other rational supposition, and that, unless the jury should be so convinced that each member would venture to act on the decision in matters of the highest importance to their own interest, they should acquit. *Brown v. State*, 43 South. 194, 150 Ala. 25 (citing *Pitts v. State*, 37 South. 101, 140 Ala. 70).

#### **As not arising from ingenuity of counsel or jury**

A "reasonable doubt" must be based upon the evidence in the case, and not upon the arguments of counsel to authorize an acquittal, and an instruction that a reasonable doubt is such as in the graver affairs of life would cause a prudent and reasonable man to pause and hesitate before acting upon the truth of the matter charged was properly refused. *Walker v. State*, 35 South. 1011, 1012, 1014, 139 Ala. 56.

#### **As requiring moral certainty**

The terms "reasonable doubt" and "moral certainty" may be used interchangeably. *Hendrix v. United States*, 101 Pac. 125, 130, 2 Okl. Cr. 240.

The expressions "beyond a reasonable doubt" and "to a moral certainty" are synonymous, and each simply means that the proof must be such as would satisfy the judgment and consciousness of the juror that the crime charged had been committed by the defendant and that no other reasonable con-

clusion was possible. *People v. Bonifacio*, 82 N. E. 1098, 1100, 190 N. Y. 150 (quoting and adopting definition in *Commonwealth v. Costley*, 118 Mass. 1, and citing *Hopt v. Utah*, 120 U. S. 430, 439, 7 Sup. Ct. 614, 30 L. Ed. 708).

The phrases "to a moral and reasonable certainty" and "beyond a reasonable doubt," as applied to the quality of proof in a case, are identical in meaning. "Reasonable and moral certainty" may be said to be that degree of probability which exists with such strength as to justify human action upon it. Whatever exists to a moral and reasonable certainty of necessity exists beyond a reasonable doubt. *Austin v. State*, 64 S. E. 670, 6 Ga. App. 211.

Proof beyond a "reasonable doubt" requires that the facts must be proved to a moral certainty. *State v. Blackburn* (Del.) 75 Atl. 536, 541, 7 Pennewill, 479.

If after considering all the testimony a juror is morally sure of defendant's guilt, he has no "reasonable doubt." *Chandler v. State*, 105 Pac. 375, 378, 3 Okl. Cr. 254.

A juror is understood to entertain a "reasonable doubt" when he has an abiding conviction of mind founded on the evidence to a moral certainty that the defendant is not guilty as charged. *State v. Paulsgrove*, 101 S. W. 27, 30, 203 Mo. 193.

"Reasonable doubt" means that state of mind of a juror, where, after having carefully considered all the evidence, he cannot say that he has an abiding conviction to a moral certainty of the guilt of the accused. *Davis v. State*, 36 South. 170, 172, 47 Fla. 26.

A "reasonable doubt" is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge. *Bridgeman v. United States*, 140 Fed. 577, 592, 72 C. C. A. 145; *State v. Grant*, 105 N. W. 97, 99, 20 S. D. 164, 11 Ann. Cas. 1017; *Frazier v. State*, 100 S. W. 94, 103, 117 Tenn. 430 (citing Chief Justice Shaw in *Commonwealth v. Webster*, 5 Cush. [59 Mass.] 295, 52 Am. Dec. 711); *Snyder v. State*, 111 S. W. 465, 468, 86 Ark. 456; *People v. Burke*, 121 N. W. 282, 284, 157 Mich. 108; *Vance v. Territory*, 105 Pac. 307, 311, 3 Okl. Cr. 208.

A "reasonable doubt" is that state of the case which, after full, fair, and impartial comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge; that is, to a certainty that convinces and directs the understanding and satisfies the reason and judgment of the jurors. But the doubt must arise from the evidence or lack of evidence in

the case. *Cannon v. Territory*, 99 Pac. 622, 626, 1 Okl. Cr. 600.

"Reasonable doubt" in respect of the sufficiency of evidence in a criminal case does not mean a possible doubt, a mere speculation, or a captious quibble suggested for the purpose of evading the performance of an honest duty, but means that state of mind which, after a fair comparison and consideration of all the evidence, both for the state and for accused, leaves the minds of the jury in that condition where they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge. *Saunders v. State*, 111 Pac. 965, 971, 4 Okl. Cr. 264, Ann. Cas. 1912B, 766.

The term "reasonable doubt" does not denote a mere possible doubt. "It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge." Consequently, it is erroneous to charge that by the term "reasonable doubt" is meant a doubt that has a reason for it, a doubt for which a reason can be given. *Abbott v. Territory*, 94 Pac. 179, 180, 20 Okl. 119, 16 L. R. A. (N. S.) 200, 129 Am. St. Rep. 818 (quoting and adopting *Commonwealth v. Webster*, 5 Cush. [Mass.] 295, 52 Am. Dec. 711).

An instruction was not objectionable because it used the words "morally certain" as equivalent to "beyond a reasonable doubt"; such terms being the legal equivalents of each other.—*State v. Wappenstein*, 121 Pac. 989, 998, 67 Wash. 502.

In a murder trial, it was not fair to refuse to instruct that defendant could not be convicted unless the evidence against him excluded to a moral certainty every hypothesis or supposition but that of his guilt.—*Young v. State*, 43 South. 100, 101, 149 Ala. 16.

It was not error to strike out the words quoted, in an instruction that the jury must be satisfied to a "moral certainty," beyond a reasonable doubt as to accused's guilt before they could convict, since the words stricken were synonymous with the phrase "beyond a reasonable doubt." *Stewart v. State*, 115 S. W. 374, 375, 88 Ark. 602 (citing *Commonwealth v. Costley*, 118 Mass. 1; *Jones v. State*, 14 South. 772, 100 Ala. 88; *Woodruff v. State*, 12 South. 653, 31 Fla. 320; *Carlton v. People*, 37 N. E. 244, 150 Ill. 181, 41 Am. St. Rep. 346).

An instruction to the jury that they must be satisfied to a "moral and reasonable certainty" is the same in effect as saying that they must be satisfied "beyond a reasonable doubt." *Warren v. Gay*, 51 S. E. 302, 303, 123 Ga. 243 (quoting and adopting definition in *Dwight v. Jones*, 42 S. E. 48, 115 Ga. 744).

An instruction defining reasonable doubt, that if "the jury are fully satisfied to a moral certainty" they are satisfied beyond a reasonable doubt, is not prejudicial because of the use of the word "fully." *Wheeler v. State*, 113 N. W. 253, 255, 79 Neb. 491.

A requested instruction that one of the correct definitions of beyond a "reasonable doubt" is to be wholly satisfied, or satisfied to a moral certainty, was properly refused as such instruction executed too high a degree of proof. *Thayer v. State*, 35 South. 406, 408, 409, 138 Ala. 39 (citing *Griffith v. State*, 8 South. 812, 90 Ala. 583).

It is error to instruct that, before the jury can convict, they must believe defendant guilty "beyond a moral certainty"; but it is error to refuse to charge that the jury must be satisfied "beyond all reasonable doubt and to a moral certainty" of defendant's guilt before they can convict. *Sykes v. State*, 44 South. 398, 399, 151 Ala. 80.

The refusal to charge the jury that, before they can convict, they must be satisfied to a moral certainty, not only that the proof is consistent with the guilt of the defendant, but that it is wholly inconsistent with every other rational conclusion, was not error. *Griffin v. State*, 43 South. 197, 199, 150 Ala. 49 (citing *Nevill v. State*, 32 South. 596, 133 Ala. 99).

It was proper to refuse a requested instruction that, before defendant could be convicted, the jury must be satisfied to a moral certainty, not only that the proof was consistent with his guilt, but wholly inconsistent with every other rational supposition, and that, unless the jury should be so convinced that each member would venture to act on the decision in matters of the highest importance to their own interest, they should acquit. *Brown v. State*, 43 South. 194, 196, 150 Ala. 25 (citing *Pitts v. State*, 37 South. 101, 140 Ala. 70).

The court having charged that by "reasonable doubt" is not meant a possibility of a doubt or a speculative imaginary, or forced doubt, but it must be a doubt naturally arising from the evidence, and, as the words themselves import, it must be a reasonable doubt, one conformable to reason, may refuse to add thereto that "if after a consideration of all the evidence submitted in the case both by the state and the defendant, including the statement of the defendant himself, you cannot say you have an abiding conviction to a moral certainty of the guilt of the defendant, it will be your duty to acquit." The necessity of proof beyond a reasonable doubt in order to convict sufficiently embraces the idea that a belief in innocence is not essential to an acquittal. *McDuffee v. State*, 46 South. 721, 724, 55 Fla. 125 (citing *Woodruff Case*, 12 South. 653, 31 Fla. 320).

In a prosecution for homicide, the state relied on evidence that the fatal shot was fired by accused, and also on a common understanding between accused and his brother to kill or injure deceased, while defendant claimed that his brother fired the shot, and that defendant did not participate in the difficulty. Held, that an instruction that, if there existed a reasonable doubt as to whether defendant shot and killed deceased, then the jury should find him not guilty unless they were convinced from the evidence to a moral certainty and beyond a reasonable doubt that he aided and abetted, or advised and encouraged the commission of the crime, etc., was correct. *People v. Verduzco*, 110 Pac. 970, 972, 13 Cal. App. 789.

An instruction that if the evidence did not establish the truth of the charge in the indictment beyond a "reasonable doubt" as to a moral certainty, to wit, a certainty that convinced and directed the jury's understanding and satisfied their reason and judgment, they must acquit, was properly refused as requiring too high a degree of proof. *Gordon v. State*, 41 South. 847, 849, 147 Ala. 42 (citing *Commonwealth v. Webster*, 59 Mass. [5 Cush.] 295, 320, 52 Am. Dec. 711; *Griffith v. State*, 8 South. 812, 90 Ala. 583, 588).

A charge that before the jury can convict they must find accused guilty beyond a reasonable doubt, and that a "reasonable doubt" is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge—that is, to a certainty that causes and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it—is ordinarily a sufficient admonition as to the separate individual duty of each juror. *State v. Smith*, 114 Pac. 1074, 84 Kan. 646.

Defendant's requested instruction that, if the jury are not satisfied beyond all reasonable doubt to a moral certainty, and to the exclusion of every other reasonable hypothesis but that of his guilt, they should acquit, and it is not necessary to raise a reasonable doubt that they should find from all the evidence a probability of his innocence, but such a doubt may arise even when there is no probability of his innocence in the testimony, and if they have not an abiding conviction to a moral certainty of his guilt, it is their duty to acquit, should be given. *Bally v. State*, 53 South. 296, 299, 390, 168 Ala. 4.

An instruction that a "reasonable doubt" is not a mere possible doubt, but a fair doubt, growing out of the evidence or lack of evidence, and exists when each juror is unable to say that he has an abiding conviction to a moral certainty of the truth of the charge,

etc., was not objectionable as in effect charging that such doubt exists only when all the jurors have a reasonable doubt. The fair and only meaning of the instruction is that a "reasonable doubt" exists only when each juror is unable to say that he has an abiding conviction to a moral certainty of the truth of the charge. "Each" as used in the instruction is a distributive adjective, and means "when the same thing is to be predicated of all the individuals considered distributively, or one by one." It denotes or refers to either one of the persons mentioned, or every one of any number separately considered. *State v. Thompson*, 87 Pac. 709, 712, 31 Utah, 228 (citing *Standard Dict.*; 3 Words and Phrases, p. 2299).

An instruction that the term "reasonable doubt" does not mean a "mere possible doubt, a conjectural doubt," nor "a doubt which is merely capricious," when read in connection with a preceding instruction that a reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty that defendant committed the offense, was entirely correct. *People v. Botkin*, 98 Pac. 861, 867, 9 Cal. App. 244.

To justify a conviction of crime, the evidence must establish the guilt of accused beyond all reasonable doubt, which is accomplished if, after consideration of all the evidence, the truth of the facts is shown to a reasonable and moral certainty and satisfies the judgment of those bound to act conscientiously on it. *State v. Samuels (Del.)* 67 Atl. 164, 166, 6 Pennewill, 36.

A "reasonable doubt" is that state of the case which, after a full comparison and consideration of all the evidence and circumstances of the case, leaves the minds of the jury in that condition that they cannot say that they feel an abiding conviction, amounting to a moral certainty, from the evidence of the case, that accused is guilty of the charge laid in the indictment. A "reasonable doubt" is not a mere possible or conjectural doubt and the jury are not to go beyond the evidence to hunt for doubt. A "reasonable doubt" must arise from a candid and impartial consideration and investigation of all the evidence in the case. *Flohr v. Territory*, 78 Pac. 565, 573, 14 Okl. 477.

A "reasonable doubt" is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case which, after full consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. *Flickinger v. United States*, 150 Fed. 1, 9, 79 C. C. A. 515.

"A 'reasonable doubt' is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. By 'reasonable doubt' is not meant a strained or whimsical conjecture, but an actual, sincere, mental hesitation caused either by insufficient evidence or by unsatisfactory evidence." *United States v. Greene*, 146 Fed. 803, 824.

A reasonable doubt is one growing out of all the circumstances of the case as disclosed by the evidence, such as would prevent reasonable and conscientious men from reaching a conclusion to a moral certainty, but not a fanciful doubt, or one growing out of conjecture, speculation, or sympathy. *State v. Harmon* (Del.) 60 Atl. 866, 869, 4 Pennell, 580.

A "reasonable doubt" is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after full consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say that they feel an abiding conviction, to a moral certainty, of the truth of the charge. Every person is presumed to be innocent until he is proved guilty. If, upon such proof, there is reasonable doubt remaining, the defendant is entitled to the benefit of it by acquittal. It is not sufficient to establish a probability, though a strong one, that the fact charged is more likely to be true than otherwise, but the evidence must establish the truth of the fact to a reasonable and moral certainty, a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it, and, in order to find the defendant guilty, the evidence must be such as to exclude every single reasonable hypothesis, except that of the guilt of the defendant. In other words, all of the facts proved must be consistent with, and point to, the guilt of the defendant, not only, but the facts must be inconsistent with her innocence. It matters not how clearly the circumstances point to guilt, still, if they are reasonably explainable on a theory which excludes guilt, then it cannot be said that the facts in the case are sufficient to satisfy the jury, beyond a reasonable doubt, of the guilt of the defendant, and in that event she should be acquitted. If, after consideration of the whole case, any one of the jury should entertain a reasonable doubt of the guilt of the defendant, it is the duty of such juror not to vote for a verdict of guilty, and if after a consideration of the whole case, fully, carefully, and honestly made after comparison, still one of the jury should entertain a reasonable doubt of the guilt of the defend-

ant, it would then be the duty of such juror not to vote for a verdict of guilty. *Chadwick v. United States*, 141 Fed. 225, 228, 72 C. C. A. 343.

An instruction that a "reasonable doubt" is not a mere captious or imaginary doubt, but a doubt voluntarily arising after a fair and impartial consideration of the evidence, and which leaves the minds of the jury in that condition that they do not feel an abiding conviction to a moral certainty of the letter of the charge, is sufficient, and an instruction that if the jury are satisfied beyond a reasonable doubt of defendant's guilt it is not necessary to be able to point out the particular evidence that convinces the jury is improper as having a tendency to convey the idea that the jury may convict without being able to say what it is that convinces them of guilt, and is prejudicial, especially in a case where the evidence consisted of a mass of circumstances having little or no tendency to connect accused with the crime, and where his connection with it was shown mainly by a confession proved by a witness of doubtful character. *Bell v. State*, 98 S. W. 705, 707, 81 Ark. 16.

#### As doubt not arising from oath

An instruction, on the subject of "reasonable doubt," that if the jury believe as men their oath imposes on them no obligation to doubt where no doubt would exist if no oath had been administered, was proper. *Perry v. People*, 87 Pac. 796, 797, 38 Colo. 23 (citing *Blashfield's Instructions to Jurors*, § 304).

An instruction on reasonable doubt is not to be condemned because it omitted the clause that the jury were not at liberty to disbelieve as jurors, if from all the evidence they believed as men and that their oath imposed on them no obligation to doubt, when no doubt would exist had no oath been administered. *Holmes v. State*, 118 N. W. 99, 101, 82 Neb. 406.

An instruction correctly defining "reasonable doubt" was not erroneous in that it charged that the jury were not at liberty to disbelieve as jurors, if they believed as men, that their oath imposed no obligation on them to doubt where no doubt would exist, if no oath had been administered, in that it relieved the jury from the obligation of their oath and permitted them to return a verdict of guilty, based on their belief as men that accused was guilty, without regard to the evidence. *McQueary v. People*, 110 Pac. 210, 214, 48 Colo. 214, 21 Ann. Cas. 560.

In defining the words "reasonable doubt," as used in the court's instructions, it is not error as a part of such definition to use the following language: "You are not at liberty to disbelieve as jurors, if from the evidence you believe as men. The oath which you have taken imposes upon you no obligation to doubt when no doubt would exist, if no oath



had been administered." *State v. Moon*, 117 Pac. 757, 760, 20 Idaho, 202, Ann. Cas. 1913A, 724.

An instruction on reasonable doubt that: "You are not at liberty to disbelieve as jurors if you believe as men; your oath imposes on you no obligation to doubt where no doubt would exist if no oath had been administered"—is erroneous, as it omits the essential element of the necessity for evidence on which to base a verdict, as a lack of evidence to prove guilt cannot be supplied by what the juror knows or believes, regardless of his oath. *Robinson v. State*, 106 Pac. 24, 27, 18 Wyo. 216.

**As not arising from obstinacy or sympathy**

A "reasonable doubt" must not be a sympathetic doubt. *State v. Fleetwood* (Del.) 65 Atl. 772, 774, 6 Pennewill, 153; *State v. Harmon* (Del.) 60 Atl. 866, 869, 4 Pennewill, 580; *State v. Harsted*, 119 Pac. 24, 26, 66 Wash. 158.

A "reasonable doubt" is not merely such a doubt as may be engendered by pity or sympathy for the accused. *United States v. Breese*, 131 Fed. 915, 917.

**As not a bare possibility**

A "reasonable doubt" is not a mere possible doubt. *State v. Truitt* (Del.) 62 Atl. 790, 792, 5 Pennewill, 466; *State v. Wilson* (Del.) 62 Atl. 227, 231, 5 Pennewill, 77; *State v. Mills* (Del.) 69 Atl. 841, 844, 6 Pennewill, 497; *State v. Underhill* (Del.) 69 Atl. 880, 883, 6 Pennewill, 491; *State v. Fulman* (Del.) 74 Atl. 1, 7 Pennewill, 123; *State v. Fagan* (Del.) 74 Atl. 692, 696, 1 Boyce, 45; *State v. Diugozima* (Del.) 74 Atl. 1086, 1088, 7 Pennewill, 151; *State v. Luff* (Del.) 74 Atl. 1079, 1081, 1 Boyce, 152; *State v. Anderson* (Del.) 74 Atl. 1097, 1099, 1 Boyce, 135; *State v. Russo* (Del.) 77 Atl. 743, 747, 1 Boyce, 538; *State v. Coverdale* (Del.) 77 Atl. 754, 756, 1 Boyce, 555; *State v. Roberts* (Del.) 78 Atl. 305, 311, 2 Boyce, 140; *State v. Effler* (Del.) 78 Atl. 411, 420, 2 Boyce, 92; *State v. Cole* (Del.) 78 Atl. 1025, 1026, 2 Boyce, 184; *State v. Holden* (Del.) 79 Atl. 215, 217, 2 Boyce, 429; *State v. Reese* (Del.) 79 Atl. 217, 222, 2 Boyce, 434; *State v. Brown* (Del.) 80 Atl. 146, 150, 2 Boyce, 405; *State v. Honey* (Del.) 80 Atl. 240, 241, 2 Boyce, 324; *State v. Williams* (Del.) 80 Atl. 1004, 1006; *State v. Lyons* (Del.) 80 Atl. 976, 978; *State v. Watson* (Del.) 82 Atl. 1086, 1088; *Holt v. United States*, 31 Sup. Ct. 2, 6, 218 U. S. 245, 54 L. Ed. 1021, 20 Ann. Cas. 1138, affirming judgment *United States v. Holt*, 168 Fed. 141; *United States v. Chisholm*, 153 Fed. 808, 816; *Flohr v. Territory*, 78 Pac. 565, 573, 14 Okl. 477; *Abbott v. Territory*, 94 Pac. 179, 180, 1 Okl. Cr. 1, 16 L. R. A. (N. S.) 260, 129 Am. St. Rep. 818; *Saunders v. State*, 111 Pac. 965, 971, 4 Okl. Cr. 264, Ann. Cas. 1912B, 766; *Pitts v. State*, 37 South. 101, 103, 105,

140 Ala. 70; *Wright v. State*, 42 South. 745, 746, 148 Ala. 596; *Gregory v. State*, 42 South. 829, 831, 148 Ala. 566; *Bluett v. State*, 44 South. 84, 87, 151 Ala. 41; *Dempsey v. State*, 102 S. W. 704, 706, 83 Ark. 81.

A "reasonable doubt" is not a mere possibility of innocence. *United States v. Guthrie*, 171 Fed. 528, 532; *State v. Raice*, 123 N. W. 708, 710, 24 S. D. 111; *Parker v. State*, 59 S. E. 823, 825, 3 Ga. App. 336; *State v. Brown*, 79 S. W. 1111, 1113, 181 Mo. 192; *State v. Miller*, 90 S. W. 767, 771, 191 Mo. 587; *State v. Bond*, 90 S. W. 830, 831, 191 Mo. 555; *State v. McCarver*, 92 S. W. 684, 687, 194 Mo. 717; *State v. Temple*, 92 S. W. 869, 873, 194 Mo. 237, 5 Ann. Cas. 954; *State v. Platner*, 93 S. W. 403, 405, 196 Mo. 128; *State v. Maupin*, 93 S. W. 379, 383, 196 Mo. 164; *State v. Spough*, 98 S. W. 55, 63, 200 Mo. 571; *Dobbs v. State*, 100 S. W. 946, 948, 949, 51 Tex. Cr. R. 113.

An instruction that a "reasonable doubt" is not a mere possibility of innocence is correct. *Territory v. Price*, 91 Pac. 733, 735, 14 N. M. 262 (citing *State v. Garrison*, 49 S. W. 508, 147 Mo. 548; *State v. Darrah*, 54 S. W. 226, 152 Mo. 522; *Earl v. People*, 73 Ill. 329; *Smith v. People*, 74 Ill. 144; *Blashfield, Inst. to Juries*, 847, 852).

A "reasonable doubt" is not a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. *Chadwick v. United States*, 141 Fed. 225, 228, 72 C. C. A. 343; *Flickinger v. United States*, 150 Fed. 1, 9, 79 C. C. A. 515; *Wright v. State*, 42 South. 745, 746, 148 Ala. 596.

In a prosecution for murder, a "reasonable possibility" of defendant's innocence is not a proper predicate for an acquittal. *Howard v. State*, 44 South. 95, 96, 151 Ala. 22.

In a prosecution for burglary, a charge that, if there is "reasonable possibility" of defendant's innocence, from the evidence, the jury should acquit, was properly refused. *Leonard v. State*, 43 South. 214, 216, 150 Ala. 89.

A "reasonable doubt" sufficient to entitle accused to an acquittal is not a mere possible doubt that is sought after in the evidence, or arises out of sympathy or ingenious suggestion not warranted by the evidence or lack of evidence, but such as naturally arises upon an impartial consideration of all the evidence. *United States v. Dexter*, 154 Fed. 890, 894.

It was not error to charge, at the state's request, that a "reasonable doubt" is not a mere possible doubt, because everything relating to human affairs and depending on mere evidence is open to some possible or imaginary doubt," though objectionable as argumentative. *Knight v. State*, 49 South.

764, 765, 160 Ala. 58 (citing *Pitts v. State*, 37 South. 101, 140 Ala. 70).

A statement in an instruction on "reasonable doubt" that everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt, and that the "reasonable doubt" referred to was that state of the case, etc., did not render the instruction erroneous. *People v. Verduzco*, 110 Pac. 970, 972, 18 Cal. App. 789.

A jury in a criminal case is required to decide the questions submitted to them from the strong probabilities of the case, and such probabilities need not be so strong as to exclude all possible doubt, but only sufficiently strong to exclude every reasonable doubt. *United States v. Wilson*, 176 Fed. 806, 809.

The following charge is not erroneous: "The defendant is presumed to be innocent until he is proven to be guilty beyond a reasonable doubt. He is entitled to every reasonable doubt arising from the evidence, and a reasonable doubt is one conformable to reason, a doubt which a reasonable man would entertain. It does not mean a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge." *Vasquez v. State*, 44 South. 739, 741, 54 Fla. 127, 127 Am. St. Rep. 129.

Since the prosecution is not required to establish guilt in a criminal case beyond the possibility of a doubt, an instruction defining "reasonable doubt" as a "serious, substantial doubt, and not a mere possibility of a doubt," and further stating that a reasonable doubt must not be based on a mere possibility that defendant may be innocent, since it may be possible that defendant is innocent and yet at the same time there may be no reasonable doubt but that he is guilty, was not erroneous. *People v. Lucas*, 91 N. E. 659, 664, 244 Ill. 603.

An instruction that the term "reasonable doubt" does not mean a "mere possible doubt, a conjectural doubt," nor "a doubt which is merely capricious," when read in connection with a preceding instruction that a reasonable doubt is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty that defendant committed the offense, was entirely correct. *People v. Botkin*, 98 Pac. 861, 867, 9 Cal. App. 244.

### Preponderance of evidence distinguished

In a criminal case, the burden is on the government to establish defendant's guilt beyond all "reasonable doubt" by full and satisfactory proof; a mere preponderance of evidence being insufficient. *United States v. Dexter*, 154 Fed. 890, 891.

### As probability of innocence

A charge that if the jury were not satisfied beyond a reasonable doubt, to a moral certainty, and to the exclusion of every other reasonable hypothesis that the defendant was guilty they should find him not guilty, and that it is not necessary to raise a reasonable doubt that the jury should find from all the evidence a probability of defendant's innocence, but that such doubt may arise even when there is no probability of the innocence from the testimony, and that if the jury have not an abiding conviction to a moral certainty of his guilt it is their duty to acquit, and that they must find the defendant not guilty if the conduct of the defendant, upon a reasonable hypothesis, is consistent with his innocence, was properly refused. *Bell v. State*, 37 South. 281-284, 140 Ala. 57.

In a criminal prosecution, a requested instruction that if, from the evidence, there was "a reasonable probability" of defendant's innocence, then that was a just foundation for a reasonable doubt, and would authorize an acquittal, was not erroneous because of the use of the word "reasonable" as qualifying the word "probability." *Mims v. State*, 37 South. 354, 141 Ala. 93.

"Reasonable doubt" is not equivalent to probability of innocence, and the former may exist though the latter does not. *Nordan v. State*, 39 South. 406, 411, 143 Ala. 13.

A request to charge that, if there was a probability of defendant's innocence, the jury should acquit him, was improperly refused. *Fleming v. State*, 43 South. 219, 221, 150 Ala. 19 (citing *Bones v. State*, 23 South. 138, 117 Ala. 138; *Whitaker v. State*, 17 South. 456, 106 Ala. 30; *Croft v. State*, 10 South. 517, 95 Ala. 3).

Defendant's requested instruction that, though there be no probability of his innocence, yet, if there is in the minds of the jury a reasonable doubt of his guilt, it is their duty to give him the benefit of the doubt, and acquit him, should be given. *Bailey v. State*, 53 South. 296, 298, 390, 168 Ala. 4.

A charge, in a prosecution for burglary of a railway car, that a probability that some person may have entered the car and taken the goods in question is sufficient to create a "reasonable doubt" of the defendant's guilt, was properly refused. *Leonard v. State*, 43 South. 214, 216, 150 Ala. 89.

A probability of innocence is the equivalent of a "reasonable doubt" of guilt. *San-*

ders. v. Davis, 44 South. 979, 983, 153 Ala. 375.

If there is a probability that accused is innocent, there is "reasonable doubt" as to his guilt. *Brown v. State*, 35 South. 82, 84, 46 Fla. 159.

A charge that the law does not require absolute certainty, but is based rather upon the doctrine of reasonable probability, and, if the evidence leaves in the jury's minds an abiding conviction of accused's guilt, they would be convinced beyond a reasonable doubt, fairly stated the law of reasonable doubt, and was not misleading, though the statement that the law of reasonable doubt is based upon the doctrine of reasonable probability is objectionable in law, and, if standing alone, would be prejudicial. *State v. Quinn*, 105 Pac. 818, 821, 56 Wash. 295.

#### As a real and substantial doubt

The term "reasonable doubt" means a substantial doubt. *State v. Roberts* (Del.) 78 Atl. 305, 311, 2 Boyce, 140.

A "reasonable doubt" is an actual and substantial doubt, and not a mere possibility or speculation. *Bluett v. State*, 44 South. 84, 87, 89, 151 Ala. 41; *Pitts v. State*, 37 South. 101, 103, 105, 140 Ala. 70.

A charge in a murder trial was correct which stated that the doubt that will justify the acquittal must be an actual and substantial, and not a mere possible, doubt. *Gregory v. State*, 42 South. 829, 831, 148 Ala. 566.

The doubt should be real and honestly and fairly entertained after all reasonable efforts to find out the facts. *Parker v. State*, 59 S. E. 823, 825, 3 Ga. App. 336.

A "reasonable doubt" is an actual, substantial doubt of guilt arising from the evidence or want of evidence. *Johnson v. State*, 130 N. W. 282, 284, 88 Neb. 565, Ann. Cas. 1912B, 965.

A "reasonable doubt" must be an actual and substantial doubt, arising out of the evidence which is consistent with sound reason. *United States v. Chisholm*, 153 Fed. 808, 816.

The term "reasonable doubt" means a substantial doubt arising from the evidence in the case, and not a mere possibility of innocence. *State v. Platner*, 93 S. W. 403, 405, 196 Mo. 128; *State v. Brown*, 79 S. W. 1111, 1113, 181 Mo. 192; *State v. Miller*, 90 S. W. 767, 771, 191 Mo. 587; *State v. Temple*, 92 S. W. 869, 873, 194 Mo. 237, 5 Ann. Cas. 954; *State v. McCarver*, 92 S. W. 684, 687, 104 Mo. 717; *State v. Maupin*, 93 S. W. 379, 383, 196 Mo. 164.

A "reasonable doubt" is not a mere fanciful, vague, speculative, or possible doubt, but a reasonable, substantial doubt, remaining in the minds of the jury after careful consideration of all the evidence, and such as reason-

able, fair-minded, and conscientious men would entertain under all the circumstances and facts of the case as shown by the evidence. *State v. Russo* (Del.) 77 Atl. 743, 747, 1 Boyce, 538; *State v. Uzzo* (Del.) 65 Atl. 775, 778, 6 Pennewill, 212; *State v. Underhill* (Del.) 69 Atl. 880, 883, 6 Pennewill, 491; *State v. Brown* (Del.) 61 Atl. 1077, 1079, 5 Pennewill, 538; *State v. Tilghman* (Del.) 63 Atl. 772, 774, 6 Pennewill, 54; *State v. Miele* (Del.) 74 Atl. 8, 9, 11, 1 Boyce, 33; *State v. Powell* (Del.) 61 Atl. 966, 972, 5 Pennewill, 24; *State v. Bell* (Del.) 62 Atl. 147, 148, 149, 5 Pennewill, 192; *State v. Johns* (Del.) 65 Atl. 763, 764, 6 Pennewill, 174.

A "reasonable doubt" of guilt, requiring acquittal, is not a vague, fanciful, or speculative doubt, but a substantial doubt, arising out of the case as presented, and such a doubt as reasonable, fair-minded, and honest men would entertain under all the facts and circumstances of the case. *State v. Borrelli* (Del.) 76 Atl. 605, 607, 1 Boyce, 349; *State v. Powell* (Del.) 76 Atl. 601, 602, 7 Pennewill, 2; *State v. Short* (Del.) 75 Atl. 787, 789, 7 Pennewill, 295; *State v. McCallister* (Del.) 76 Atl. 226, 230, 7 Pennewill, 301; *State v. Curdy* (Del.) 75 Atl. 868, 869, 1 Boyce, 208; *State v. Ryan* (Del.) 75 Atl. 869, 872, 1 Boyce, 223.

A "reasonable doubt," entitling accused to an acquittal, is not a mere fanciful, vague, or speculative doubt, but a reasonably substantial doubt, arising from the evidence and remaining after a careful consideration of the testimony, such as reasonable, fair-minded, and conscientious men would entertain under all the circumstances of the case. *State v. Lockwood* (Del.) 74 Atl. 2, 4, 1 Boyce, 28; *State v. Lee* (Del.) 74 Atl. 4, 6, 1 Boyce, 18; *State v. Gam* (Del.) 74 Atl. 7, 8, 1 Boyce, 25; *State v. Hartnett* (Del.) 74 Atl. 82, 84, 7 Pennewill, 204; *Brantley v. State*, 65 S. E. 426, 133 Ga. 264; *United States v. Guthrie*, 171 Fed. 528, 532; *State v. Stewart* (Del.) 67 Atl. 786, 789, 6 Pennewill, 435.

A "reasonable doubt" is not a vague, fanciful, imaginary, or even possible doubt, but such a substantial doubt as fair-minded, intelligent jurors may reasonably entertain after a careful consideration of all the evidence in the case before them. *State v. Fagan* (Del.) 74 Atl. 692, 696, 1 Boyce, 45; *State v. Dlugozima* (Del.) 74 Atl. 1086, 1088, 7 Pennewill, 151; *State v. Luff* (Del.) 74 Atl. 1079, 1081, 1 Boyce, 152; *State v. Anderson* (Del.) 74 Atl. 1097, 1099, 1 Boyce, 135.

A "reasonable doubt" of defendant's guilt is not a trivial, fanciful, or speculative one, or a mere possible doubt, but is such a substantial doubt as intelligent, fair-minded jurors may reasonably entertain after a careful consideration of all relevant evidence in the case. *State v. Cephus* (Del.) 67 Atl. 150, 152, 6 Pennewill, 160; *State v. Wolf* (Del.) 66 Atl. 739, 742, 6 Pennewill, 323; *State v. Briscoe* (Del.) 67 Atl. 154, 157, 6 Pennewill, 401; *State*

*v. Tyre* (Del.) 67 Atl. 199, 205, 6 Pennewill, 348.

A "reasonable doubt" is a substantial doubt based on the evidence, or want of evidence in the case, and not a bare possibility of defendant's innocence; such a doubt as would cause a reasonably prudent man to pause before acting in the highest affairs of life. *State v. Raice*, 123 N. W. 708, 710, 24 S. D. 111.

A "reasonable doubt," authorizing acquittal, does not mean a speculative or possible doubt, but a real and substantial doubt, which remains in the minds of reasonable men after carefully considering all the evidence. *State v. Effler* (Del.) 78 Atl. 411, 420, 2 Boyce, 92.

The "reasonable doubt" beyond which one accused of crime must be proved guilty is not a mere fanciful, vague, or speculative doubt, but such a substantial doubt as fair-minded men would entertain under all the facts in the case. *State v. Primrose* (Del.) 77 Atl. 717, 720, 2 Boyce, 164.

The term "reasonable doubt" means, not a vague, fanciful, or speculative doubt, but a substantial doubt, such as intelligent and impartial men might entertain after fully considering the evidence. *State v. Brewington* (Del.) 78 Atl. 402, 404, 2 Boyce, 71.

"Reasonable doubt" is not a mere possible doubt, but is a real and substantial doubt, founded in reason, and such as intelligent and impartial men would reasonably entertain upon a careful consideration of all the evidence in a case. *State v. Lyons* (Del.) 80 Atl. 976, 978.

"Reasonable doubt" is a substantial doubt, such as intelligent, reasonable, and impartial men may entertain, after due consideration of all the evidence, and is not a vague, speculative, or mere possible doubt. *State v. Watson* (Del.) 82 Atl. 1086, 1088.

By "reasonable doubt," in a criminal case, is not meant a vague, speculative, or mere possible doubt, but a real, substantial doubt, such as remains in the minds of the jury after a careful consideration of all the evidence. *State v. Coverdale* (Del.) 77 Atl. 754, 756, 1 Boyce, 555.

By "reasonable doubt" is not meant a speculative, fanciful, or even possible doubt, but a real, substantial doubt, such as will remain in the minds of the jury after a careful consideration of all the evidence in the case. *State v. Holden* (Del.) 79 Atl. 215, 217, 2 Boyce, 429.

The "reasonable doubt" of guilt must not be a mere fanciful, vague, indefinable, or speculative doubt, but a reasonable, substantial doubt, remaining in the minds of the jury after careful consideration of all the evidence. *State v. Lockwood* (Del.) 74 Atl. 2, 3, 4, 1 Boyce, 28.

"Reasonable doubt" on the part of a jury in a criminal case does not mean a vague, speculative, fanciful, or whimsical doubt, but a substantial doubt, remaining in the minds of the jury after a careful consideration of all the testimony in the case. *State v. Davenport* (Del.) 77 Atl. 967, 968, 2 Boyce, 12.

"Reasonable doubt" is not a vague, fanciful, or mere possible doubt, but is a real, substantial doubt, such as an intelligent, impartial, and conscientious man would entertain after a careful consideration of all the evidence. *State v. Honey* (Del.) 80 Atl. 240, 241, 2 Boyce, 324.

"Reasonable doubt" is not a vague, fanciful, or merely possible doubt, but such a substantial doubt as intelligent, reasonable, or impartial jurors may honestly and justly entertain after a careful examination and conscientious consideration of all the evidence. *State v. Mills* (Del.) 69 Atl. 841, 844, 6 Pennewill, 497.

A "reasonable doubt" is not a vague, fanciful, trivial, or mere possible doubt, but such a substantial doubt as intelligent, impartial, and conscientious jurors may reasonably entertain after a careful consideration of all the evidence in the case. *State v. Fulman* (Del.) 74 Atl. 1, 7 Pennewill, 123.

A "reasonable doubt" is not a whimsical, imaginary, or possible doubt, but a substantial doubt, such as intelligent men may reasonably entertain upon a careful and conscientious consideration of all the evidence. *State v. Emory* (Del.) 58 Atl. 1036, 1039, 5 Pennewill, 126.

A "reasonable doubt" within the meaning of the law "is not a vague, fanciful, or whimsical doubt, but a substantial doubt, naturally arising out of all the evidence in the case, and such a doubt as intelligent, impartial, and fair-minded jurors may reasonably entertain after a careful consideration of all the relevant evidence." *State v. Seeney* (Del.) 59 Atl. 48, 49, 5 Pennewill, 142.

"A 'reasonable doubt' is not a mere imaginary, whimsical, or even possible doubt of the guilt of the accused, but is such a real and substantial doubt as intelligent and impartial men may reasonably entertain upon a careful consideration of all the relevant facts proven in the case." *State v. Wilson* (Del.) 62 Atl. 227, 231, 5 Pennewill, 77.

A "reasonable doubt" of the guilt of accused should not be a vague, fanciful, or merely possible doubt, but such a real and substantial doubt as intelligent and impartial men may reasonably entertain upon a careful consideration of the evidence. *State v. Truitt* (Del.) 62 Atl. 790, 792, 5 Pennewill, 466.

"By a 'reasonable doubt' is meant an actual, substantial doubt, that arises and rests in the mind as testimony is heard and considered; that results after the exercise of

judgment and reason, when fairly and candidly applied to an investigation of the evidence." *United States v. Richards*, 149 Fed. 443, 454.

"Reasonable doubt," justifying acquittal, must be substantial, in view of all the evidence, and not a mere possibility of innocence. It must be a doubt arising out of the evidence, for which a reason can be given, and such as would exist in the mind of a reasonable man after free, full, and careful consideration of all the evidence, though the evidence need not exclude all doubt and amount to absolute certainty. *United States v. Guthrie*, 171 Fed. 528, 532.

By "reasonable doubt" is not meant a vague, speculative, or mere possible doubt, but a real, substantial doubt, that remains after a careful consideration of all the evidence, and such a doubt as reasonable, fair-minded, and conscientious men would entertain under all the facts and circumstances of the case. *State v. Williams* (Del.) 80 Atl. 1004, 1006.

"Reasonable doubt" is an honest, substantial doubt, actually existing in the minds of the jury, and arising either from the evidence favorable to the defendant or from a want of evidence on behalf of the government. It is not merely such a doubt as may be conjured up in the mind of one desirous of escaping the responsibility of decision, or such as may be engendered by pity or sympathy for the accused. *United States v. Breese*, 131 Fed. 915, 917.

A "reasonable doubt" is an actual, substantial doubt arising from the evidence or want of evidence in the case. By such term is not meant a mere caprice, conjecture, or groundless possibility. It is an actual, substantial doubt, based on a reason arising either from the evidence or want of evidence in the case, and sufficient to cause an ordinarily prudent man to hesitate and refuse to act in the most important affairs and concerns of life. The guilt of an accused person is proved beyond a reasonable doubt when, upon the entire comparison and consideration of all the evidence, the minds of the jurors are in that condition that they can say from the evidence they have an abiding conviction to a moral certainty of the truth of the charge. *Turley v. State*, 104 N. W. 934, 938, 74 Neb. 471.

A "reasonable doubt" to authorize an acquittal on that ground alone should be a substantial doubt of guilt, and not a mere possibility of defendant's innocence. An instruction that the law presumes defendant innocent until the state has proved his guilt beyond a reasonable doubt, and that unless the state has so proven his guilt he should be acquitted, but such a doubt should be a substantial doubt of guilt and not a mere possibility of innocence, sufficiently covered a re-

quest declaring a reasonable doubt to exist when the evidence does not satisfy the jury of the truth of the charge with such certainty that a prudent man would feel safe in acting on it in his own most important affairs and dearest personal interests. *State v. Bond*, 90 S. W. 830, 831, 191 Mo. 555.

Since the prosecution is not required to establish guilt in a criminal case beyond the possibility of a doubt, an instruction defining "reasonable doubt" as a "serious, substantial doubt, and not a mere possibility of a doubt," and further stating that a reasonable doubt must not be based on a mere possibility that defendant may be innocent, since it may be possible that defendant is innocent and yet at the same time there may be no reasonable doubt but that he is guilty, was not erroneous. *People v. Lucas*, 91 N. E. 659, 664, 244 Ill. 603.

A charge that a doubt to justify an acquittal must be reasonable, must be an actual and substantial doubt, not a mere possibility or speculation, and that a reasonable doubt is not a mere possible doubt, because most things relative to human affairs and depending on moral evidence are open to some possible or imaginary doubt is proper. *Wright v. State*, 42 South. 745, 746, 148 Ala. 596.

An instruction in a criminal case, requiring a "reasonable doubt" to be a "substantial and well-founded doubt," was erroneous. *Frazier v. State*, 100 S. W. 94, 102, 103, 117 Tenn. 430.

A "reasonable doubt" means a substantial well-founded doubt, arising from a candid and impartial consideration of all the evidence, or want of evidence. *State v. Wright* (Del.) 79 Atl. 399, 400, 2 Boyce, 393.

An instruction that "reasonable doubt" is a real substantial doubt existing after a fair consideration of the testimony, and such as would cause a reasonable and prudent man to pause before acting in a matter of grave importance to himself, and that if, after considering all the testimony, a juror is morally sure of the guilt of the defendant, then he has no reasonable doubt, is a correct definition of the term. *Chandler v. State*, 105 Pac. 375, 378, 3 Okl. Cr. 254.

An instruction that the "reasonable doubt" of the guilt of defendants which would warrant the jury in acquitting them on the ground of reasonable doubt of their guilt should be a substantial doubt of their guilt, upon a full and fair consideration of all the evidence, facts, and circumstances in the case, and not a mere possibility that they may be innocent, was not objectionable. *State v. Spough*, 98 S. W. 55, 63, 200 Mo. 571.

An instruction that a "reasonable doubt" of guilt of defendants or either of them to authorize an acquittal of them or either of them on the ground of such reasonable doubt of guilt must be a substantial doubt of the

guilt of the defendants or of the defendant as to whose guilt you have such reasonable doubt formed by you on a careful consideration of all the facts and circumstances proven in the case, and not a mere possibility of the innocence of the defendants or of that of either of them, was not obnoxious to the criticism that it was not unintelligible. *State v. Brooks*, 100 S. W. 416, 419, 202 Mo. 106.

#### As doubt influencing reasonable men

A "reasonable doubt" is such a doubt as reasonable, fair-minded, and conscientious men would entertain under all the facts and circumstances of the case. *State v. Powell* (Del.) 61 Atl. 966, 972, 5 Pennewill, 460; *State v. Brown* (Del.) 61 Atl. 1077, 1079, 5 Pennewill, 339; *State v. Bell* (Del.) 62 Atl. 147-149, 5 Pennewill, 192; *State v. Tilghman* (Del.) 63 Atl. 772, 774; *State v. Johns* (Del.) 65 Atl. 763, 764, 6 Pennewill, 174; *State v. Gam* (Del.) 74 Atl. 7, 8, 1 Boyce, 25; *State v. Uzzo* (Del.) 65 Atl. 775, 778, 6 Pennewill, 212; *State v. Miele* (Del.) 74 Atl. 8, 9, 11, 1 Boyce, 33; *State v. Stewart* (Del.) 67 Atl. 786, 789, 6 Pennewill, 435; *State v. Underhill* (Del.) 69 Atl. 880, 883, 6 Pennewill, 491; *State v. Borrelli* (Del.) 76 Atl. 605, 607, 1 Boyce, 349; *State v. Powell* (Del.) 76 Atl. 601, 602, 7 Pennewill, 2; *State v. Short* (Del.) 75 Atl. 787, 789, 7 Pennewill, 295; *State v. McCallister* (Del.) 76 Atl. 226, 230, 7 Pennewill, 301; *State v. Curdy* (Del.) 75 Atl. 868, 869, 1 Boyce, 208; *State v. Ryan* (Del.) 75 Atl. 869, 872, 1 Boyce, 223; *State v. Russo* (Del.) 77 Atl. 748, 747, 1 Boyce, 538; *State v. Williams* (Del.) 80 Atl. 1004, 1006; *State v. Lockwood* (Del.) 74 Atl. 2, 4, 1 Boyce, 28; *State v. Lee* (Del.) 74 Atl. 4, 6, 1 Boyce, 18; *State v. Hartnett* (Del.) 74 Atl. 82, 84, 7 Pennewill, 204; *Brantley v. State*, 65 S. E. 426, 133 Ga. 264; *United States v. Guthrie*, 171 Fed. 528, 532; *State v. Fitzsimmons* (Del.) 82 Atl. 598, 600.

A "reasonable doubt" is a doubt which a reasonable man may have. *United States v. Chisholm*, 153 Fed. 808, 816.

It is error to charge the jury that a "reasonable doubt" is "a doubt which would satisfy a reasonable man." *Vaughn v. State*, 41 South. 881, 52 Fla. 122 (citing *Hampton v. State*, 39 South. 421, 50 Fla. 55).

A "reasonable doubt" is such a doubt as would control reasonable men in the ordinary affairs of life. *State v. Coates* (Del.) 79 Atl. 213, 215, 2 Boyce, 424.

"Reasonable doubt" as to accused's guilt is such a doubt as would prevent reasonable men from reaching a conclusion to a moral certainty. *State v. Morahan* (Del.) 77 Atl. 488, 489, 7 Pennewill, 494.

A "reasonable doubt" means not a vague, fanciful, or indefinable doubt, but such doubt as reasoning men would have under all the circumstances of the case. *State v. Rash* (Del.) 78 Atl. 405, 407, 2 Boyce, 77.

An instruction that a "reasonable doubt" is such as in the graver affairs of life would cause a prudent and reasonable man to pause and hesitate before acting on the truth of the matter charged, was properly refused. *Walker v. State*, 35 South. 1011, 1012, 1014, 139 Ala. 56.

A "reasonable doubt" must be a doubt arising out of the evidence for which a reason can be given, and such as would exist in the mind of a reasonable man after free, full, and careful consideration of all the evidence, though the evidence does not exclude all doubt and amount to absolute certainty. *United States v. Guthrie*, 171 Fed. 528, 532.

By "reasonable doubt" is not meant a vague, speculative, or mere possible doubt, but such a doubt as a reasonable man would entertain under all the evidence. *State v. Reese* (Del.) 79 Atl. 217, 222, 2 Boyce, 434.

Proof beyond a "reasonable doubt" does not require that guilt be established with the absolute certainty of a mathematical demonstration, nor does it mean a vague, speculative, or whimsical doubt, nor a mere possible doubt, but such a doubt as an intelligent, reasonable, and impartial man may honestly entertain after a careful examination and conscientious consideration of all the evidence. *State v. Brown* (Del.) 80 Atl. 146, 150, 2 Boyce, 405.

A portion of a charge that: "The defendant is entitled to every 'reasonable doubt' arising from the evidence, or from the lack of evidence in the case; a 'reasonable doubt' being such a doubt as a reasonable man would entertain, not a mere possible or speculative doubt"—is not erroneous when taken with other portions of the charge that correctly state the law. *Sims v. State*, 44 South. 737, 738, 54 Fla. 100.

There was no error in the following charge defining "reasonable doubt": "It means the doubt of a reasonable man and juror, who is honestly in search after the truth of the case, and which doubt grows out of evidence, want of evidence, or circumstances in the case." The court having instructed the jury fully and correctly upon the law relative to the prisoner's statement, the omission to state that a reasonable doubt might arise from the statement was not prejudicial; nor is the charge subject to the criticism that the jurors were permitted to consider "circumstances in the case" not developed by the evidence. *Lewis v. State*, 74 S. E. 708, 11 Ga. App. 102.

#### As doubt founded on reason

A "reasonable doubt" is a doubt based on reason. *People v. Yun Kee*, 96 Pac. 95, 96, 8 Cal. App. 82.

A "reasonable doubt" should be such a doubt as there is reason for. *Commonwealth v. Campbell*, 31 Pa. Super. Ct. 9, 14.

A "reasonable doubt" means a doubt founded on some good reason. *State v. Harsted*, 119 Pac. 24, 26, 66 Wash. 158.

A "reasonable doubt" is a fair doubt based on reason and common sense. *People v. Burke*, 121 N. W. 282, 284, 157 Mich. 108; *State v. Levy*, 75 Pac. 227, 230, 9 Idaho, 483.

"Reasonable doubt" is one founded in reason and one for which a good reason can be given, and cannot be said to be a "painful anxiety." *State v. Ferguson*, 74 S. E. 502, 505, 91 S. C. 235.

A doubt, however honest, may be, and often is, very unreasonable. From the standpoint of a juror, in considering a case on the evidence, a doubt however honest is not "reasonable" unless based on reason and common sense as applied to such evidence. *Buel v. State*, 80 N. W. 78, 85, 104 Wis. 132.

"Reasonable doubt" is a doubt based upon reason, and growing out of the testimony and evidence in the case. It is erroneous to instruct the jury that a "reasonable doubt" is such a one that the jury should be able to assign a reason for the doubt. *People v. Manasse*, 94 Pac. 92, 94, 153 Cal. 10.

An instruction that by a "reasonable doubt" is not meant that the accused may possibly be innocent of the crime charged, but it means some actual doubt having some reason for it, is erroneous. *Burnett v. State*, 124 N. W. 927, 929, 86 Neb. 11.

It is not error to instruct that "reasonable doubt" means a doubt based upon reason for whose existence the juror could give a reason founded upon the evidence or a want of evidence in the trial of the case. *Mundy v. State*, 72 S. E. 300, 9 Ga. App. 835.

It is not error to include in an instruction defining "reasonable doubt" the statement that it is a doubt for which there is some good reason arising out of the evidence or the lack of evidence. *State v. Wolfey*, 89 Pac. 1046, 1048, 75 Kan. 406, 11 L. R. A. (N. S.) 87, 12 Ann. Cas. 412.

An instruction defining "reasonable doubt" to be a doubt that has a reason for it, and one for which a reason may be given, is erroneous, as the words "reasonable doubt" are used in their ordinary sense, and an instruction in the language of the statute is sufficient. *Gragg v. State*, 106 Pac. 350, 3 Okl. Cr. 409.

A "reasonable doubt" is a doubt based on reason, and which is reasonable in view of all the evidence. It is not a whimsical, arbitrary, or purely speculative doubt, nor a mere conjecture or guess. If after an impartial comparison and consideration of the evidence jurors can candidly say that they are not satisfied of the defendant's guilt they have a reasonable doubt, but if, after such impartial comparison and consideration of all the evidence they can truthfully say that they

have a fixed conviction of the defendant's guilt, such as they would be willing to act upon in the more weighty and important matters relating to their own affairs, they have no reasonable doubt, and in that case should find a verdict of guilty. Absolute certainty is not required for such a verdict. Proof beyond a reasonable doubt as above defined is sufficient. *United States v. Giuliani*, 147 Fed. 594, 597.

#### As doubt for which reasons could be given

A "reasonable doubt" must be a doubt arising out of the evidence for which a reason can be given. *United States v. Guthrie*, 171 Fed. 528, 532.

A "reasonable doubt" must be such as a juror is able to give a reason for. *State v. Grant*, 105 N. W. 97, 99, 20 S. D. 164, 11 Ann. Cas. 1017.

"Reasonable doubt" is one for which a good reason can be given. *State v. Ferguson*, 74 S. E. 502, 505, 91 S. C. 235.

It is proper to instruct that a "reasonable doubt" is one for which a reason can be given. *State v. Raice*, 123 N. W. 708, 710, 24 S. D. 111.

A "reasonable doubt" is not every doubt that may flit through the minds of the jury in considering a case, but is a doubt for which the jurors can give a reason if called on to do so. *United States v. Wilson*, 176 Fed. 806, 809.

A charge that a "reasonable doubt" is one for which a juror can give a reason, if called upon to do so, is defective. *Darden v. State*, 84 S. W. 507, 508, 73 Ark. 315.

A charge that a "reasonable doubt" is a doubt for which a reason can be given was properly refused. *Beil v. State*, 37 South. 281, 284, 140 Ala. 57.

In a prosecution for burglary, a charge that it is not necessary to a "reasonable doubt" that the jury should be able to give a reason therefor was properly refused, as argumentative. *Leonard v. State*, 43 South. 214, 216, 150 Ala. 89.

To instruct in a criminal case that "a reasonable doubt is such doubt as you are able to give a reason for" is erroneous, and might be so prejudicial as to require a reversal of the conviction. *Blue v. State*, 125 N. W. 136, 138, 86 Neb. 189.

It is error to instruct that a "reasonable doubt" is "a doubt for which the jury can give a reason." *Price v. State*, 98 Pac. 447, 457, 1 Okl. Cr. 353; *People v. Manasse*, 94 Pac. 92, 94, 153 Cal. 10.

A requested charge that a "reasonable doubt" is a doubt for which a reason can be given is misleading. *Mitchell v. State*, 37 South. 76, 77, 140 Ala. 118, 103 Am. St. Rep. 17 (citing *Avery v. State*, 27 South. 505, 124 Ala. 20).

In a prosecution for murder, an instruction that a "reasonable doubt" is a doubt for which a reason can be given is erroneous. *Smith v. State*, 39 South. 329, 334, 142 Ala. 14 (citing *Avery's Case*, 27 South. 505, 124 Ala. 20; *Cawley's Case*, 32 South. 227, 133 Ala. 128; *Bell's Case*, 37 South. 281, 140 Ala. 57).

An instruction defining "reasonable doubt" as a doubt that has a reason for it; "a doubt that you can give a reason for"—is reversible error. *Gibbons v. Territory*, 96 Pac. 466, 468, 1 Okl. Cr. 198.

An instruction defining "reasonable doubt" to be a doubt that has a reason for it, and one for which a reason may be given, is erroneous, as the words "reasonable doubt" are used in their ordinary sense, and an instruction in the language of the statute is sufficient. *Gragg v. State*, 106 Pac. 350, 3 Okl. Cr. 409.

An instruction that a reasonable doubt is a doubt for which a good reason can be given is not reversible error, when given in connection with other instructions intended to impress upon the jury the distinction between a reasonable doubt and a vague, imaginary doubt. *State v. Newman*, 101 N. W. 499, 500, 93 Minn. 393.

An instruction that a "reasonable doubt" is not a mere imaginary or captious doubt, but one for which a good and valid reason should be given, erroneously qualifies the definition of "reasonable doubt," in that it puts on accused the burden of furnishing to every juror a reason why he is satisfied of his guilt before there can be an acquittal. *Bennett v. State*, 128 S. W. 851, 854, 95 Ark. 100.

An instruction defining "reasonable doubt" as one arising out of the case either from the want, weakness, insufficiency, or conflict in testimony, and which leaves the mind of an honest juror wavering and in doubt as to defendant's guilt, a doubt which is not a mere conjecture, but one for which the jury can assign a reason, having heard the whole case, was not erroneous because characterizing such a doubt as one for which a reason can be assigned. *Jordan v. State*, 60 S. E. 1063, 1064, 130 Ga. 406.

A charge that a "reasonable doubt" is just such a doubt as its name implies, not a vague conjecture nor fanciful doubt, but such a doubt that the jury, as such, can give a reason for having, was not open to the objection that it was calculated to impress the jury that they must have a sufficient reason for doubting defendant's guilt, whereas the true rule is that, if the evidence leaves the mind wavering and unsettled, defendant should be given the benefit of such a doubt. *Arnold v. State*, 62 S. E. 806, 807, 131 Ga. 494.

An instruction that it makes no difference in what language the definition of a

"reasonable doubt" is clothed, but that when it is boiled down and brought to its last analysis it means no more or less than a doubt growing up out of all the evidence for which the jury can give a reason, as contradistinguished from a mere possibility, was not reversible error, although calculated to mislead and confuse the jury. *Hammond v. State*, 41 South. 761, 765, 147 Ala. 79 (citing *Caddell's Case*, 34 South. 191, 138 Ala. 9).

An instruction: "Now by 'reasonable doubt,' gentlemen of the jury, is not meant some mere possibility or imaginary doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt, and to remove all 'reasonable doubt' from the minds of jurors, and to warrant a conviction, the evidence must be such as to satisfy the minds and consciences of the jurors of the facts necessary to be established to constitute the offense to a reasonable and moral certainty, and so convince the jurors that they would venture to act upon that conviction in matters of the highest concern and importance to their own interests, and absolute certainty is not required if there be that amount and kind of evidence that will so convince the jury that they would venture to act upon that conviction in matters of the highest concern and importance to their own interests, there is sufficient evidence, under the law, to remove all reasonable doubt and to warrant a conviction, and that a more concise and perhaps a clearer definition can be formulated than that which is usually given as a 'reasonable doubt' is a doubt for which a good reason can be given"—is correct. *State v. Newman*, 101 N. W. 499, 500, 93 Minn. 393.

A "reasonable doubt" is a doubt which is reasonable in view of all of the evidence and such as arises upon an impartial comparison and consideration of all of it and prevents the jury from being able candidly and truthfully to say that they have an abiding conviction of defendant's guilt. An instruction that a reasonable ground of doubt is one which is reasonable from the evidence or want of evidence, and must be a ground of doubt for which a reason can be given, based on the evidence or want of evidence, was objectionable since a doubt arising out of the evidence is a mental operation for which it may be difficult or impossible to assign a reason. *Owens v. United States*, 130 Fed. 279, 283, 64 C. C. A. 525.

A doubt arising out of evidence is a mental operation for which it may often be very difficult and indeed impossible to assign any reason, and yet, if honestly entertained, by the jury, in a criminal case, must be acted upon; for they are only authorized to bring a verdict of guilty when satisfied and convinced beyond a reasonable doubt of the guilt of the accused. Such a doubt has been often and correctly defined as a doubt which is reasonable in view of all the evidence and



such as arises upon impartial comparison and consideration of all of it and prevents the jury from being able candidly and truthfully to say that they have an abiding conviction of the defendant's guilt. An instruction in a criminal case that by "reasonable doubt" is not meant any doubt or conjecture which may occur to your mind or may be imagined by you; but it is a doubt which must arise from the evidence or lack of evidence and for which some reason can be given, while objectionable as conveying the impression that the reason for the doubt must be one that can be expressed in words, and while not to be approved, is not reversible error. *Griggs v. United States*, 158 Fed. 572, 577, 85 C. C. A. 596 (quoting and adopting *Owens v. United States*, 130 Fed. 283, 64 C. C. A. 529).

#### As simple doubt

A "simple doubt," as contradistinguished from an "intricate" or "complicated" doubt, may be such a "reasonable doubt" as would require an acquittal; indeed, every reasonable doubt may be accurately said to be a simple doubt, and it is error to instruct a jury that it must not acquit if it has a simple doubt. *Hampton v. State*, 39 South. 421, 429, 50 Fla. 55.

#### As doubt spontaneously arising

A "reasonable doubt" is such as naturally arises upon an impartial consideration of all the evidence. *United States v. Dexter*, 154 Fed. 890, 894.

A "reasonable doubt" is one that naturally arises out of the evidence and may be reasonably entertained by men of ordinary intelligence, impartiality, and judgment after a careful and conscientious consideration of all the evidence. *State v. Wright* (Del.) 66 Atl. 364, 365, 6 Pennewill, 251; *State v. Cole* (Del.) 78 Atl. 1025, 1026, 2 Boyce, 184.

#### As state of uncertainty

A "reasonable doubt" is not a vague and uncertain doubt. *State v. Abbott*, 62 S. E. 693, 694, 64 W. Va. 411.

By "reasonable doubt" is meant an actual, sincere, mental hesitation caused by insufficient or unsatisfactory evidence. *United States v. Greene*, 146 Fed. 803, 824.

A "reasonable doubt" is that state of the case which, after an entire comparison and consideration of all the evidence, leaves the mind in that condition that a jury cannot say that they feel an abiding conviction to a certainty that accused committed the offense. *People v. Yun Kee*, 96 Pac. 95, 96, 8 Cal. App. 82.

An instruction, in a prosecution for murder, defining "reasonable doubt" as "such a doubt as will create in the mind a feeling of unrest or misgiving on the part of the jury, and which will not permit their minds to rest upon a verdict of guilty," was not prejudicial, especially where the undisputed

facts, including the statements of defendant, clearly show guilt. *Wilson v. State*, 70 S. W. 57, 58, 109 Tenn. 167.

#### As not vague or speculative

"Reasonable doubt" is not a mere speculation. *Pitts v. State*, 37 South. 101, 103, 105, 140 Ala. 70; *Wright v. State*, 42 South. 745, 746, 148 Ala. 596; *Bluet v. State*, 44 South. 84, 87, 89, 151 Ala. 41; *Saunders v. State*, 111 Pac. 965, 971, 4 Okl. Cr. 264, Ann. Cas. 1912B, 766.

"Reasonable doubt" is not a vague doubt. *State v. Mills* (Del.) 69 Atl. 841, 844, 6 Pennewill, 497; *State v. Cole* (Del.) 78 Atl. 1025, 1026, 2 Boyce, 184; *State v. Honey* (Del.) 80 Atl. 240, 241, 2 Boyce, 324.

A "reasonable doubt" is not a speculative doubt. *State v. Cephus* (Del.) 67 Atl. 150, 152, 6 Pennewill, 160; *State v. Wolf* (Del.) 66 Atl. 739, 742, 6 Pennewill, 323; *State v. Briscoe* (Del.) 67 Atl. 154, 157, 6 Pennewill, 401; *State v. Effler* (Del.) 78 Atl. 411, 420, 2 Boyce, 92; *State v. Fitzsimmons* (Del.) 82 Atl. 598, 600; *United States v. Giuliani*, 147 Fed. 594, 597; *United States v. Chisholm*, 163 Fed. 808, 816.

A "reasonable doubt" is not a fanciful or speculative doubt. *State v. Harmon* (Del.) 60 Atl. 866, 869, 4 Pennewill, 580; *State v. Fleetwood* (Del.) 65 Atl. 772, 774, 6 Pennewill, 153; *State v. Fitzsimmons* (Del.) 82 Atl. 598, 600.

"Reasonable doubt" is not a vague or speculative doubt. *State v. Underhill* (Del.) 69 Atl. 890, 883, 6 Pennewill, 491; *State v. Russo* (Del.) 77 Atl. 743, 747, 1 Boyce, 538; *State v. Davenport* (Del.) 77 Atl. 967, 968, 2 Boyce, 12; *State v. Roberts* (Del.) 78 Atl. 305, 311, 2 Boyce, 140; *State v. Holden* (Del.) 79 Atl. 215, 217, 2 Boyce, 429; *State v. Reese* (Del.) 79 Atl. 217, 222, 2 Boyce, 434; *State v. Brown* (Del.) 80 Atl. 146, 150, 2 Boyce, 405; *State v. Williams* (Del.) 80 Atl. 1004, 1006; *State v. Watson* (Del.) 82 Atl. 1086, 1088; *State v. Fulman* (Del.) 74 Atl. 1, 7 Pennewill, 123; *State v. Lockwood* (Del.) 74 Atl. 2, 4, 1 Boyce, 28; *State v. Lee* (Del.) 74 Atl. 4, 6, 1 Boyce, 18; *State v. Gam* (Del.) 74 Atl. 7, 8, 1 Boyce, 25; *State v. Hartnett* (Del.) 74 Atl. 82, 84, 7 Pennewill, 204; *Brantley v. State*, 65 S. E. 426, 133 Ga. 264; *United States v. Guthrie*, 171 Fed. 528, 532.

"Reasonable doubt" in a criminal cause does not mean a vague, speculative, or mere possible doubt, but such a doubt as reasonable, fair-minded, conscientious men would entertain after a careful consideration of all the evidence in the case. *Same v. Johnson* (Del.) 84 Atl. 1040, 1041; *State v. Brooks* (Del.) 84 Atl. 225, 229; *State v. Dryden* (Del.) 84 Atl. 1037, 1038; *State v. De Paolo* (Del.) 84 Atl. 213, 215.

A "reasonable doubt" is not a fanciful, vague, or speculative doubt. *State v. Powell* (Del.) 61 Atl. 966, 972, 5 Pennewill, 24; *State*

*v. Brown* (Del.) 61 Atl. 1077, 1079, 5 Pennewill, 389; *State v. Bell* (Del.) 62 Atl. 147-149, 5 Pennewill, 192; *State v. Tilghman* (Del.) 63 Atl. 772, 774, 6 Pennewill, 54; *State v. Johns* (Del.) 65 Atl. 763, 764, 6 Pennewill, 174; *State v. Gam* (Del.) 74 Atl. 7, 8, 1 Boyce, 25; *State v. Uzzo* (Del.) 65 Atl. 775, 778, 6 Pennewill, 212; *State v. Miele* (Del.) 74 Atl. 8, 9, 11, 1 Boyce, 33; *State v. Tyre* (Del.) 67 Atl. 199, 205, 6 Pennewill, 343; *State v. Stewart* (Del.) 67 Atl. 786, 789, 6 Pennewill, 435; *State v. Borrelli* (Del.) 76 Atl. 605, 607, 1 Boyce, 349; *State v. Powell* (Del.) 76 Atl. 601, 602, 7 Pennewill, 2; *State v. Short* (Del.) 75 Atl. 787, 789, 7 Pennewill, 295; *State v. McCallister* (Del.) 76 Atl. 228, 230; 7 Pennewill, 301; *State v. Curdy* (Del.) 75 Atl. 868, 869, 1 Boyce, 208; *State v. Ryan* (Del.) 75 Atl. 869, 872, 1 Boyce, 223; *State v. Primrose* (Del.) 77 Atl. 717, 720, 2 Boyce, 164; *State v. De Luca* (Del.) 77 Atl. 742, 743, 2 Boyce, 158; *State v. Coverdale* (Del.) 77 Atl. 754, 756, 1 Boyce, 555; *State v. Brewington* (Del.) 78 Atl. 402, 404, 2 Boyce, 71.

A "reasonable doubt" is not a vague or fanciful doubt. *State v. Truitt* (Del.) 62 Atl. 790, 792, 5 Pennewill, 466; *State v. Fulman* (Del.) 74 Atl. 1, 7 Pennewill, 123; *State v. Fagan* (Del.) 74 Atl. 692, 696, 1 Boyce, 45; *State v. Dlugozima* (Del.) 74 Atl. 1086, 1088, 7 Pennewill, 151; *State v. Luff* (Del.) 74 Atl. 1079, 1081, 1 Boyce, 152; *State v. Anderson* (Del.) 74 Atl. 1097, 1099, 1 Boyce, 135.

A "reasonable doubt" is not a vague, fanciful, or whimsical doubt. *State v. Sweeney* (Del.) 59 Atl. 48, 49, 5 Pennewill, 142.

A "reasonable doubt" does not mean a vague or indefinable doubt. *State v. Rash* (Del.) 78 Atl. 405, 407, 2 Boyce, 77.

A "reasonable doubt" is not a vague or uncertain doubt; and what the jury believe from the evidence as men they should believe as jurors. *State v. Abbott*, 62 S. E. 693, 694, 64 W. Va. 411.

A "reasonable doubt" must not be a mere fanciful, vague, indefinable, or speculative doubt. *State v. Lockwood* (Del.) 74 Atl. 2, 3, 4, 1 Boyce, 28.

By a "reasonable doubt" is not meant a vague, speculative, possible, or indefinable doubt, but it is a reasonable doubt growing out of the evidence and such a doubt as would control reasonable men in the ordinary affairs of life. *State v. Coates* (Del.) 79 Atl. 213, 215, 2 Boyce, 424.

"A mere fanciful or speculative doubt, such as a skeptical mind may suggest, does not amount to a 'reasonable doubt' within the meaning of the law. A doubt such as this—one that ignores a reasonable construction of the whole evidence, and proceeds upon mere speculation or suspicion—is unreasonable, and would acquit one proven guilty as easily as one not so proven, and so does not justify a verdict of not guilty."

*Bannen v. State*, 91 N. W. 107, 109, 115 Wis. 817 (citing and adopting *Emery v. State*, 78 N. W. 145, 101 Wis. 627, 650-655; *Butler v. State*, 78 N. W. 590, 102 Wis. 364, 368-372; *Buel v. State*, 80 N. W. 78, 104 Wis. 132, 151-153; *Murphy v. State*, 83 N. W. 1112, 108 Wis. 111, 119, 120).

#### As well-founded doubt

A "reasonable doubt" means a substantial well-founded doubt, arising from a candid and impartial consideration of all the evidence, or want of evidence. *State v. Wright* (Del.) 79 Atl. 399, 400, 2 Boyce, 396.

An instruction in a criminal case, requiring a "reasonable doubt" to be a "substantial and well-founded doubt," was erroneous. *Frazier v. State*, 100 S. W. 94, 102, 103, 117 Tenn. 430.

The term "well-founded doubt" means "reasonable doubt," and hence the refusal to give an instruction using the term "well-founded doubt" was not erroneous, where the same instruction was given, substituting the words "reasonable doubt" for the words "well-founded doubt." *Greagh v. State*, 43 South. 112, 114, 149 Ala. 8 (citing *Turner v. State*, 27 South. 272, 124 Ala. 59; *Stewart v. State*, 31 South. 944, 133 Ala. 109).

#### As doubt arising from the whole evidence

A "reasonable doubt" arises from all the evidence. *Commonwealth v. Campbell*, 31 Pa. Super. Ct. 9, 14.

In determining the question of "reasonable doubt," the jury must consider all the evidence, that given against accused as well as that in his favor. *People v. Lee*, 93 N. E. 321, 323, 248 Ill. 64.

Every material element of the offense charged must be proved by the state beyond a "reasonable doubt." *State v. Hartnett* (Del.) 74 Atl. 82, 84, 7 Pennewill, 204.

Since an accused is presumed to be innocent, until his guilt is proved beyond a "reasonable doubt," the jury must acquit if they have a reasonable doubt on any material element of the offense. *State v. Effier* (Del.) 78 Atl. 411, 420, 2 Boyce, 92.

To convict one of crime, it is incumbent on the state to prove beyond a "reasonable doubt" every material element thereof. *State v. Cephus* (Del.) 67 Atl. 150, 152, 6 Pennewill, 160; *State v. Briscoe* (Del.) 67 Atl. 154, 157, 6 Pennewill, 401.

Where the doctrine of "reasonable doubt" is applied in the charge of the whole case, it is not essential that it should in terms be applied to every feature of the case or fact raised by the testimony. *Edwards v. State*, 125 S. W. 894, 895, 58 Tex. Cr. R. 342.

Proof beyond a "reasonable doubt" of guilt is such evidence as establishes beyond a "reasonable doubt" every fact necessary

to constitute guilt, and unless the defendant has been so proved guilty the jury should find him not guilty. *Hoeker v. Commonwealth* (Ky.) 111 S. W. 676, 680.

While the law requires the guilt of accused to be proved beyond "reasonable doubt," it does not require that each fact which may aid the jury in reaching the conclusion of guilt shall be clearly proven, but that on the whole evidence the jury must be able to pronounce that guilt is proved to a moral certainty. *Pitts v. State*, 37 South. 101, 103, 105, 140 Ala. 70.

An instruction in a criminal prosecution is improper which requires proof beyond a "reasonable doubt" of every fact essential to establish guilt. *Olson v. People*, 125 Ill. App. 460, 463.

It was error to refuse to charge that, "if there is one single fact proven to the satisfaction of the jury which is inconsistent with defendant's guilt, this is sufficient to raise a 'reasonable doubt,' and the jury should acquit." *Simmons v. State*, 48 South. 606, 607, 158 Ala. 8.

A charge that if the jury were reasonably doubtful as to the proof in the case of any material allegation in the indictment they should acquit the defendant was properly refused. *Bell v. State*, 37 South. 281-284, 140 Ala. 57.

In a criminal prosecution, it was proper to refuse an instruction that, if the jury have a "reasonable doubt" as to any material facts in the case, they should find defendant not guilty. *Leonard v. State*, 43 South. 214, 216, 150 Ala. 89.

In a murder trial, it was not error to refuse an instruction that, if the jury, upon the whole evidence, should have "reasonable doubt" whether the defendant was guilty of the crime charged, they should acquit. *Young v. State*, 43 South. 100, 101, 149 Ala. 16.

In a prosecution for assault with intent to murder, it was error to refuse to instruct that, if the jury have a "reasonable doubt" of defendant's guilt arising out of any part of the evidence, they must not find him guilty. *Griffin v. State*, 43 South. 197, 199, 150 Ala. 49.

By the term "reasonable doubt," beyond which the state must prove its case in a criminal proceeding, a mere vague, fanciful, or speculative doubt is not meant, but a reasonable doubt remaining in the minds of the jury after a careful consideration of all the testimony. *State v. De Luca* (Del.) 77 Atl. 742, 743, 2 Boyce, 158.

It is not error to instruct that, if there is any evidence which raises a "reasonable doubt" as to the presence of defendant at the time and place where the crime is alleged to

have been committed, he should be acquitted. *State v. Davis*, 85 S. W. 354, 356, 186 Mo. 533.

Instructions that the jury must give accused the full benefit of all "reasonable doubts" arising from any part of the evidence were properly refused, as misleading the jury to give accused the benefit of doubts which were dissipated by other evidence, or which did not exist on a consideration of the whole evidence. *Thomas v. State*, 43 South. 371, 377, 150 Ala. 31.

In a prosecution for receiving stolen property, it was error to refuse to charge that if "the minds of the jury or of any jurymen is left in a state of 'reasonable doubt' and uncertainty, by the evidence or any part of the evidence, of defendant's guilt, then you cannot convict the defendant." *Boyd v. State*, 43 South. 204, 205, 150 Ala. 101.

A charge in a homicide case that if the jury found that accused was not guilty of murder in the first or second degree, but believed that he killed decedent, but without deliberation or malice, they should find him guilty of manslaughter, either voluntary or involuntary, "unless you should find that the defendant was of unsound mind," was erroneous, in that the quoted clause deprived accused of the benefit of any evidence introduced by him which merely created a "reasonable doubt" as to his sanity, when accused was entitled to an acquittal, if, under all the evidence, a "reasonable doubt" existed as to his sanity. *Pribble v. People*, 112 Pac. 220, 222, 49 Colo. 210.

An instruction in a criminal prosecution "that a 'reasonable doubt,' within the meaning of the law, does not mean an imaginary doubt, but it does mean that before you can convict you must have considered all the evidence in the case, giving to each witness such credit and their evidence such weight as in view of all the evidence in the case you may deem it entitled to, and if after hearing all the evidence in the case both for the state and the defendant your mind is left in an unsatisfactory condition with reference to the defendant's guilt or innocence, either from the contradictory evidence in the case or from any other cause, you must resolve that doubt in favor of the defendant and return a verdict of not guilty," is a correct statement of the law. *Furlow v. State*, 81 S. W. 232, 238, 72 Ark. 384.

An instruction that the defendant is entitled to the benefit of every reasonable doubt, and by a "reasonable doubt" is meant that "unless you have a firm and abiding conviction, to a moral certainty, of the truth of the charge, you must acquit the defendant"; that this benefit of a reasonable doubt is a substantial right of the defendant, and applies to the whole case, and also to each and every phase of the case, and, "if you have such reasonable doubt, you should find the

defendant not guilty," ~~was properly modified~~ by striking off the provision that such doubt applied to every phase of the case. *Mitchell v. State*, 83 S. W. 1050, 1051, 73 Ark. 291.

Guilt of crime cannot be established beyond a "reasonable doubt" unless every essential fact constituting the offense is established by that measure of proof, and an instruction on a trial for larceny that reasonable doubt does not mean that the jury should acquit accused because one or more material allegations of the indictment have not been established beyond a reasonable doubt, but it means that, if after a fair consideration of the case the jury have a reasonable doubt as to the guilt of accused, they should acquit him, is erroneous because authorizing a conviction, though the jury entertains a reasonable doubt on the issues whether the property had been stolen, or whether, if stolen, it was the property of prosecutor, or whether the taking was with a felonious intent. *State v. Kimes*, 124 N. W. 164, 165, 145 Iowa, 346.

An instruction that a "reasonable doubt" does not mean a reasonable doubt that any one point or proposition necessary for the state to establish has not been so established, but that it means a reasonable doubt of the guilt of accused after a careful consideration of the entire case, and authorizing a conviction if upon a careful consideration of the entire case the jury entertain any reasonable doubt of his guilt, is erroneous. *State v. Ottley*, 126 N. W. 334, 335, 147 Iowa, 329.

As every essential element of the crime must be established beyond a "reasonable doubt," the correct formula for the instructions should be, "if the jury are satisfied beyond a reasonable doubt that the facts are as testified," etc., and where by an inadvertence the trial judge uses the terms "if the jury believe the evidence," he must add "if the jury believe the evidence beyond a reasonable doubt," etc. *State v. Starnes*, 66 S. E. 347, 151 N. C. 724, 19 Ann. Cas. 448.

An instruction, in a prosecution for homicide, which, after stating the theory of the state, charged that, if the jury should find the contention of the state to be true, defendants would be guilty of murder in the first degree, and they should so find, was erroneous for failure to require that the jury must find every element necessary to constitute the offense of which they might convict to have been proven beyond a reasonable doubt. *Frazier v. State*, 100 S. W. 94, 102, 117 Tenn. 430.

In a prosecution for homicide, an instruction that defendant is presumed to be sane, and that the burden of proof is on him in the first instance to produce evidence of insanity at the time of the homicide sufficient notwithstanding all the evidence to the contrary to raise a reasonable doubt of his in-

sanity was erroneous, it not being necessary that accused should produce either evidence of insanity or evidence sufficient to raise a "reasonable doubt." And where the court also charged on the presumption of innocence, and, after defining reasonable doubt, required that the jury, in order to convict, should find the various elements of the several offenses to have been established beyond a "reasonable doubt," but nowhere expressly charged that it was the duty of the jury to acquit if they entertained a reasonable doubt of any of the phases of homicide submitted to them, the court should have given such instruction on a request therefor being submitted. *Duthey v. State*, 111 N. W. 222, 228, 131 Wis. 178, 10 L. R. A. (N. S.) 1032.

### REASONABLE EFFORT

A "reasonable effort" which a master is required to exercise to guard against injuries to a servant by the use of electricity is nothing short of the utmost effort to use every protection which is reasonably accessible to insulate its wires and keep them insulated. *Clonts v. Laclede Gaslight Co.*, 129 S. W. 238, 240, 144 Mo. App. 582 (citing *Geismann v. Missouri Edison Electric Co.*, 73 S. W. 654, 173 Mo. 654; *Winkelman v. Kansas City Electric Light Co.*, 85 S. W. 99, 110 Mo. App. 184; *Hovarka v. St. Louis Transit Co.*, 90 S. W. 1142, 191 Mo. 441; *Booker v. Southwest Missouri R. Co.*, 128 S. W. 1012, 144 Mo. App. 273).

### REASONABLE EXERTION

In an action for injuries to plaintiff by the alleged negligent operation of defendant's street roller, causing plaintiff's horse to become frightened and unmanageable, the use of the words "reasonable exertion on his part," in an instruction declaring that, if the engineer in charge of the roller, on seeing that plaintiff was being placed in a position of peril, by reasonable exertion on his part could have stopped or checked the puffing and noise of the roller and prevented plaintiff's horse from becoming unmanageable and running away, and prevented the injury, etc., should be construed to mean merely by the exercise of reasonable care. *Phelen v. Granite Bituminous Paving Co.*, 91 S. W. 440, 444, 115 Mo. App. 423.

### REASONABLE FACILITIES

While a railroad company is bound to furnish "reasonable facilities" for the accommodation of travel from a certain station, the term "reasonable facilities" is a relative one and must be determined by the facts surrounding the requirements of travel at the place named, and a railroad company cannot be required to stop a passenger train engaged in interstate commerce at a given point where eight passenger trains daily stop at that point. *St. Louis, I. M. & S. R. Co. v. State*, 107 S. W. 989, 991, 85 Ark. 284.

### REASONABLE FEAR

In a prosecution for homicide, an instruction that "if, at the time the deadly blow was inflicted, the person who inflicts has well-founded reasons to believe himself in imminent peril without having, by his fault, produced the exigency, then such killing will not be murder," is not subject to the objection that the words "has well-founded reason to believe" state the rule too strongly against the right of a person to kill as the result of "reasonable fear." *Long v. State*, 56 S. E. 444, 447, 127 Ga. 350 (citing *Doyal v. State*, 70 Ga. 134, 148, 149).

### REASONABLE GROUND

Under the national bankruptcy act, what constitutes "reasonable ground" that a preference is intended by the bankrupt must depend on facts and circumstances. *Whitwell v. Wright*, 120 N. Y. Supp. 1065, 1069, 136 App. Div. 246.

Under a chattel mortgage, which stipulates that whenever the mortgagee may deem himself insecure the debt shall become due and the property taken possession of, "reasonable grounds" for deeming the debt insecure are such facts and circumstances as would lead a reasonably prudent man acting in good faith to believe himself insecure under the circumstances. *Feller v. McKillip*, 81 S. W. 641, 643, 109 Mo. App. 61.

### REASONABLE GROUND OF SUSPICION

The words "not knowing" or "having no reasonable grounds to suspect," or "knew" or "know," or "had reasonable grounds to suspect," when used in an instruction in an action for injuries to a passenger while attempting to board a train in consequence of the starting of the train, relating to the knowledge or want of knowledge of the conductor in starting the train before the passenger had boarded it, are legal equivalents. *Choctaw, O. & G. R. Co. v. Hickey*, 99 S. W. 839, 842, 81 Ark. 579.

### REASONABLE GROUND TO BELIEVE

"Reasonable grounds to believe" a thing, are such grounds as would induce one of ordinary prudence to believe it under the circumstances. *Hovius v. Cincinnati, N. O. & T. P. R. Co. (Ky.)* 107 S. W. 214, 216.

An instruction that if deceased began the fight, and defendant had "reasonable grounds to believe," and did believe, that he was in imminent danger, and he shot to avert it, he was entitled to an acquittal, embraces the idea that, if there were such appearance of danger as to beget in defendant's mind a reasonable belief of actual danger, he was entitled to an acquittal, whether the appearances were real or not. *Rowsey v. Commonwealth*, 76 S. W. 409, 411, 116 Ky. 617.

### REASONABLE HOURS

The business hours of a corporation are "reasonable hours" in which to inspect its books, within the meaning of section 329, Rev. St. 1898, providing that the books of every corporation organized in this state shall at all reasonable hours be subject to the inspection of any bona fide stockholder of record. *Clawson v. Clayton*, 93 Pac. 729, 731, 33 Utah, 266.

### REASONABLE HYPOTHESIS

"There are no words plainer than 'reasonable doubt,' and none so exact to the idea meant." "Reasonable hypothesis," or "reasonable or moral certainty," may be logically the equivalent of "reasonable doubt"; but these expressions are not so easily understood by the ordinary lay mind. In every criminal case the presiding judge should charge the jury that, to authorize conviction, guilt must be proved "beyond a reasonable doubt," and, unless the evidence demands the verdict rendered, his failure to do so will be reversible error. *Norman v. State*, 74 S. E. 428, 10 Ga. App. 802.

### REASONABLE INQUIRY

Under Revisal 1905, § 2088, which declares that every register of deeds shall, on application, issue a marriage license, provided it shall appear to him probable that there is no legal impediment to such marriage, and that where either party to the proposed marriage is under 18 years no license shall be issued without the written consent of the parent, guardian, etc., and section 2090, which provides a penalty for issuing a license unlawfully, without "reasonable inquiry," the inquiry to be made is such as makes it probable that there is no legal objection to the marriage, and involves at least the idea that it should be made of some person known by him to be a reliable party, or, if unknown to him, information as to his reliability should be obtained from some person known by the officer to be reliable. *Joyner v. Harris*, 72 S. E. 970, 971, 157 N. C. 295.

The act of 1877, imposing a penalty for issuing a license for the marriage of a girl under 18 without the consent of her father, etc., and declaring that the register shall have power to make inquiry by examination of the witnesses under oath, does not render an inquiry under oath a prerequisite to a "reasonable inquiry." In an action against a register of deeds to recover the statutory penalty for issuing, without plaintiff's consent, a license for the marriage of his daughter under 18 years of age, the court correctly charged that it was the duty of the register, in issuing a marriage license, to make such inquiry for legal objections to the marriage and as to the age of the parties as a prudent business man, acting in the most important affairs of life, would make, and to exercise his duties in such respect carefully.

and conscientiously, and not as a mere matter of form, and that, if the defendant failed so to do, he did not make reasonable investigation. It was proper for the court to instruct the jury that if they found that the prospective groom told defendant that the girl was 18, that he had seen her age in the Bible, and that she had told him she was 18, and should find that defendant knew the witness well, and knew him to be a man of good character, and that he stated to defendant that the girl was 18, and that he lived just across the street from her family, and defendant honestly believed such statements, he made "reasonable inquiry." Where there is a conflict of evidence, the question of reasonable inquiry is for the jury. As stated in *Trolinger v. Borroughs*, 45 S. E. 662, 133 N. C. 312: "While we may not prescribe any rule for the guidance of the register, it would seem that 'reasonable inquiry' involves at least an inquiry made of, or information furnished by, some person known to the register to be reliable, or, if unknown, identified and approved by some reliable person known to the register. This is the rule upon which banks act in paying checks, and surely in the matter of such grave importance as issuing a marriage license the register should not be excused upon a less degree of care." *Furr v. Johnson*, 52 S. E. 664, 665, 140 N. C. 157 (citing *Joyner v. Roberts*, 19 S. E. 645, 114 N. C. 369; *Harcum v. Marsh*, 41 S. E. 6, 130 N. C. 154; *Agent v. Willis*, 32 S. E. 322, 124 N. C. 29).

#### REASONABLE KNOWLEDGE

Within the rule that condonation may be implied if the husband, after "reasonable knowledge" of his wife's infidelity, continues to live with her, "reasonable knowledge" may be said to have been had, when information of a fact is given by credible persons speaking of their own knowledge, particularly if the same facts are afterwards proved and they become instrumental in the proof. *Bordeaux v. Bordeaux*, 75 Pac. 524, 527, 30 Mont. 36.

#### REASONABLE LAWS AND REGULATIONS

See Under Reasonable Laws and Regulations.

#### REASONABLE MAN

Fears of a reasonable man, see Fear.

The words "reasonable man," within the rule that one attacked may resist by the use of such force as a reasonable man would use under the circumstances, means a man of ordinary reason. *Hoard v. State*, 95 S. W. 1002, 1003, 80 Ark. 87.

#### REASONABLE MEANS

A clause, in a policy against the accidental discharge of an automatic sprinkler, providing that insurer should not be liable for loss caused by assured's neglect to use

all "reasonable means" to preserve the property insured thereunder, referred to means to be used after the accidental discharge of the machine and had no reference to the care required to prevent the accident. *Werthelmer-Swartz Shoe Co. v. United States Casualty Co.*, 72 S. W. 635, 639, 172 Mo. 135, 61 L. R. A. 766, 95 Am. St. Rep. 500.

#### REASONABLE NOTICE

There is no definite rule as to what constitutes "reasonable notice" within the rule that such notice must be given to the guarantor of the amount advanced, and of demand for payment, without effect on the principal debtor. Hence the question of what constitutes "reasonable notice" in such cases is for the jury under the facts of each particular case. *Howe v. Nickels*, 22 Me. 175, 177.

When four secular days' notice of the time of taking a deposition were given, and it would take less than 24 hours, by the ordinary means of travel, to get from the place of notice to the place for taking the deposition, the notice was a "reasonable notice" within the requirement of Comp. Laws 1897, §§ 10, 136, and the deposition was admissible. *McCall Co. v. Jacobson*, 102 N. W. 969, 970, 139 Mich. 455.

Where lessor made written demand of lessee for possession of the premises before suing, and more than 40 days before making such written demand gave lessee notice that the premises had been sold and that he would require their possession, it was a "reasonable notice," within a requirement that, in case the premises should be sold during the term, lessee would give possession after "reasonable notice" of the sale. *Gambill v. Cooper*, 48 South. 691, 693, 159 Ala. 637.

Civil service rule 7 requires the civil service commission to give all persons whose applications are on record five days' notice to appear for examination. Rule 28, subd. 5, requires the commissioner to direct a competitive examination under the provisions of this rule, and to publish the same by notice to those eligible, giving the time, etc., of the examination, and subdivision 7 thereof provides that the examination shall be subject to the general provisions of rule 13, etc., subdivision 6 of which requires notice of an examination for making a new eligible list to be given to those whose names remain on the former eligible list which has expired. Held, that five days' notice required by rule 7 was applicable to examinations for promotions by virtue of the reference in rule 28 to rule 13, but, even if rule 7 was not applicable, rule 28, subd. 5, required that applicants be given at least reasonable notice of examination, and, construing the rule in the light of the previous practice of the local and state commission under similar rules, where relator was given notice at 7 p. m. on one day to appear for examination at 7 p. m. the next

day, he being on duty from 6 p. m., on the day of receiving notice to 5 p. m. the next day; was not a reasonable notice, and relator was entitled to have another opportunity for examination. *People v. Neville*, 109 N. Y. Supp. 640, 643, 58 Misc. Rep. 279.

### REASONABLE NUMBER

The question of what is a "reasonable number" of skins to test in ascertaining the quantity of wool thereon is one that is to be determined by the testimony of men qualified by experience and knowledge to pass upon that subject. Without such evidence, it will not be held to be self-evident that an estimate based on an examination of 8 out of 20,000 skins was inadequate. *United States v. J. B. Thomas & Co.*, 178 Fed. 602, 604.

### REASONABLE PLACE

A clause in a fire insurance policy, requiring the insured to produce for examination all books of account, etc., as often as required at such "reasonable place" as may be designated by the company or its representative, means a reasonable place in the locality where the insured's property was situated and the absence of the conditions rendering such place unreasonable. *Tucker v. Colonial Fire Ins. Co.*, 51 S. E. 86, 90, 58 W. Va. 30.

In a proceeding to condemn a railway right of way, an instruction that a crossing to be furnished by the company might necessarily be overhead or underground was properly refused, where the necessity of such kind of crossing was speculative; so, also, an instruction that the law requires a company, where one owns land on both sides of the right of way, to furnish him a crossing at such "point" as he may designate was properly refused, since the statute (Code, § 2022) uses the term "reasonable place" instead of "point"; as well as an instruction that damages should be assessed on the theory that the company would be compelled to furnish a crossing regardless of "expense," since under Code, § 2022, the company can only be required to locate it at a "reasonable place," and "expense" is an important consideration in determining the reasonableness of the place. *Klopp v. Chicago, M. & St. P. Ry. Co.*, 119 N. W. 373, 376, 142 Iowa, 474.

### REASONABLE PRICE

See Fair and Reasonable Price.

"In the absence of any contract for property or services, the law allows only a reasonable price or compensation; but what is a 'reasonable price' in any case will depend upon a variety of considerations, and is not a matter for legislative determination." *Munn v. Illinois*, 94 U. S. 113, 153, 24 L. Ed. 77 (Field, J., dissenting).

### REASONABLE PROBABILITY

The term "reasonable probability" is equivocal, and is not synonymous with rea-

sonable certainty. *Hallum v. Omro*, 99 N. W. 1051, 1053, 122 Wis. 387.

"Certainty," as applied to the law of damages, means freedom from doubt, and as "reasonable certainty" and "reasonable probability" bear no resemblance to each other, plaintiff, in an action for personal injuries, while entitled to recover for such future suffering and injury as she proves to be reasonably probable, is not required to prove such future injuries and suffering by testimony reasonably certain or free from doubt. *Johnson v. Connecticut Co.*, 83 Atl. 530, 531, 85 Conn. 438.

### REASONABLE PROVOCATION

"Legal," "lawful," "adequate," and "reasonable," when used as adjectives qualifying "provocation," are synonymous, and, as a general rule, with few exceptions, it takes an assault or personal violence to constitute this provocation." *State v. McKenzie*, 76 S. W. 1015, 1019, 177 Mo. 699 (quoting with approval from *State v. Bulling*, 15 S. W. 367, 16 S. W. 830, 105 Mo. 204).

In speaking of the provocation necessary to arouse the heat of passion, which would result in reducing the crime to manslaughter, "this court has held that 'lawful,' 'legal,' 'adequate,' and 'reasonable,' when used as adjectives qualifying 'provocation,' are synonyms; and as a general rule, with very few exceptions, it takes an assault or personal violence to constitute this provocation." *State v. Heath*, 121 S. W. 140, 154, 221 Mo. 565 (quoting and adopting definition in *State v. Bulling*, 15 S. W. 367, 16 S. W. 830, 105 Mo. 204).

### REASONABLE PRUDENCE

See Reasonably Prudent.

The terms "reasonable prudence," "ordinary care," and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be ordinary care in one case may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonably prudent men under a similar state of affairs. *Hainlin v. Budge*, 47 South. 825, 832, 56 Fla. 342 (quoting and adopting definitions in 7 Words and Phrases, p. 5976); *Swift & Co. v. Sandy*, 165 Fed. 622, 623, 92 C. C. A. 56; *Hone v. Mammoth Min. Co.*, 75 Pac. 381, 383, 27 Utah, 168; *Knoxville Traction Co. v. Brown*, 89 S. W. 319, 320, 115 Tenn. 323 (citing *Grand Trunk R. Co. v. Ives*, 12 Sup. Ct. 679, 144 U. S. 417, 36 L. Ed. 485); *Meng v. St. Louis & S. R. Co.*,

84 S. W. 213, 215, 108 Mo. App. 553 (citing Grand Trunk Ry. Co. v. Ives, 12 Sup. Ct. 679, 144 U. S. 417, 36 L. Ed. 485; Baltimore & O. Ry. Co. v. Griffith, 16 Sup. Ct. 105, 159 U. S. 603, 40 L. Ed. 274; Texas & P. R. Co. v. Gentry, 16 Sup. Ct. 1104, 163 U. S. 353, 41 L. Ed. 186; Warner v. Baltimore & O. R. Co., 18 Sup. Ct. 68, 168 U. S. 339, 42 L. Ed. 491; Washington & G. R. Co. v. McPade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235); Oklahoma Gas & Electric Co. v. Lukert, 84 Pac. 1076, 1084, 16 Okl. 397 (quoting and adopting definition in Grand Trunk R. Co. v. Ives, 12 Sup. Ct. 679, 682, 144 U. S. 408, 417, 36 L. Ed. 485); Birmingham Ry., Light & Power Co. v. Williams, 48 South. 93, 96, 158 Ala. 381 (citing Grand Trunk R. Co. v. Ives, 12 Sup. Ct. 679, 144 U. S. 408, 36 L. Ed. 485); Southern R. Co. v. McGowan, 43 Sou. h. 378, 382, 149 Ala. 440; Sans Bois Coal Co. v. Janeway, 99 Pac. 153, 156, 22 Okl. 425; Worth Bros. Co. v. Kallas, 162 Fed. 306, 308, 89 C. C. A. 186 (quoting with approval from Grand Trunk R. Co. v. Ives, 12 Sup. Ct. 679, 682, 144 U. S. 408, 417, 36 L. Ed. 485).

"Reasonable prudence" as applied to a master is such care as reasonable and prudent men use under similar circumstances in providing safe and suitable appliances and instrumentalities for the work to be done and in providing generally for the safety of the servant in the course of his employment; regard being had to the work and difficulties and dangers attending it. The term has a relative significance, and its definition must depend on the surrounding circumstances of the particular case, the determination of which, when a given state of facts is such that reasonable men may fairly differ upon the question of negligence, is for the jury. Fisher's Adm'r v. Chesapeake & O. Ry. Co., 52 S. E. 373, 374, 104 Va. 635, 2 L. R. A. (N. S.) 954 (citing Bertha Zinc Co. v. Martin's Adm'r, 22 S. E. 869, 93 Va. 804, 70 L. R. A. 999; Richlands Iron Co. v. Elkins, 17 S. E. 890, 90 Va. 261).

### REASONABLE QUANTITIES

The expression "reasonable quantities," in an instruction in a prosecution for violating the local option law, to the effect that, if the beverage sold was not intoxicating liquor "if drank in reasonable quantities," defendant should be acquitted, is not equivalent to saying "when drank in such quantities as may practically be drank." Hence the instruction was erroneous, because intoxicating liquor is defined to be any liquor intended for use as a beverage, or capable of being so used, which contains alcohol in such a proportion that it will produce intoxication when taken in such quantities as may be practically drank as an intoxicant. Murry v. State, 79 S. W. 568, 570, 46 Tex. Cr. R. 128.

### REASONABLE RATE

In determining what is a reasonable price to be charged for the services of a public corporation, the question must be considered, not only from the viewpoint of the corporation, but also from that of the public, and a "reasonable rate" cannot be ascertained solely from considering the bearing of the facts upon the profits of the corporation. The effect of the rate upon persons to whom services are rendered is as material in affecting the rate as its effect upon stockholders or bondholders, and a "reasonable rate" is one which is as fair as possible to all whose interests are involved. Salt River Valley Canal Co. v. Neilsen, 85 Pac. 117, 119, 10 Ariz. 9, 12 L. R. A. (N. S.) 711, 16 Ann. Cas. 796.

The word "reasonable," within Laws Wis. 1905, pp. 556, 559, c. 362, §§ 12, 14, requiring railroads to charge reasonable rates is used in its ordinary and usual acceptation, such that its antithesis is "unreasonable." Any rate which is not unreasonable is reasonable and permissible and whether any given rate is unreasonable is to be determined by a process similar to that pursued by the courts which, however, may be exercised by any one or by any official. The conclusion is reached by ascertaining the highest rate which can be considered reasonable. Only when an existing rate exceeds that is it unreasonable. Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission of Wisconsin, 116 N. W. 905, 914, 136 Wis. 146, 17 L. R. A. (N. S.) 821 (citing Madison, City of, v. Madison Gas & Electric Co., 108 N. W. 65, 129 Wis. 249, 8 L. R. A. [N. S.] 529, 9 Ann. Cas. 819).

The word "reasonable," in the statement of the principle that a water company should be entitled to charge reasonable rates, is a relative term, for what is reasonable depends upon many varying circumstances. An equivalent to the prevailing rate of interest might be reasonable and might not; "It might be too high or too low." It might be reasonable, owing to peculiar hazards or difficulties in one place to receive greater returns there than it would in another upon the same investment. Then, their reasonableness relates to both the company and the customer. Rates must be reasonable to both, and, if they cannot be to both, they must be to the customer. Brunswick & T. Water Dist. v. Maine Water Co., 59 Atl. 537, 540, 99 Me. 371 (citing San Diego Land & Town Co. v. Jasper, 23 Sup. Ct. 571, 189 U. S. 439, 47 L. Ed. 892; Stanislaus County v. San Joaquin, & K. River Canal & Irrig. Co., 24 Sup. Ct. 241, 192 U. S. 201, 48 L. Ed. 406).

Acts 1882, No. 36 (V. S. 3902-3904 [P. S. 4486-4488]), requiring railroads to give all persons "reasonable and equal terms, \* \* \* facilities and accommodations" for the transportation of freight, etc., must be construed in the light of Acts 1882, No. 37 (V. S. 3896),



authorizing a railroad corporation to establish rates, etc., and, when so done, it requires a railroad corporation to make rates reasonable and equal as required by the common law, and it is but declaratory of the common law defining the rights and obligations of carriers; the words "facilities and accommodations" relating to the incidents of transportation, the word "terms" signifying rates. *State v. Central Vermont Ry. Co.*, 71 Atl. 194, 196, 81 Vt. 463, 130 Am. St. Rep. 1065.

#### REASONABLE REGULATION

Under Const. Ala. 1901, § 239, which provides that "any \* \* \* corporation organized for the purpose \* \* \* shall have the right to construct and maintain lines of telegraph and telephone within this state, \* \* \* and the Legislature by law of uniform operation shall provide reasonable regulations to give full effect to this section," a foreign corporation which has constructed and is operating telegraph lines in the state cannot be deprived of the right thereby given to maintain the same by any act of the Legislature, because it exercises also the right, given it by the Constitution and laws of the United States, to maintain suits in the federal courts or to remove causes thereto from the state courts, which is not within the power given to the Legislature by such section to regulate the business. Forfeiture of a right to do business because the owner resorts to the courts is not "reasonable regulation" of the telegraph business. It is not regulation of the business in any sense. It is destruction of the right to do the business. The power to destroy a business never exists when the only grant of authority over the subject is to regulate the carrying on of the business. *Western Union Tel. Co. v. Julian*, 169 Fed. 166, 167, 173.

#### REASONABLE REPAIR

A city was not shown to have failed to perform its duty to keep a paved street in reasonable repair by reason of the fact that it permitted a saucer-shaped depression three inches deep and the size of a washtub, to remain in the asphalt surface. *Jones v. City of Detroit*, 137 N. W. 513, 514, 171 Mich. 608.

#### REASONABLE SATISFACTION

Under Code 1907, § 7175, fixing the degree of proof of the affirmative on an issue of insanity, in a criminal case to the "reasonable satisfaction of the jury," an instruction requiring accused to establish insanity "to the satisfaction of the jury" was erroneous as requiring too high a degree of proof. *James v. State*, 52 So. 840, 842, 167 Ala. 14.

#### REASONABLE SELLING VALUE

The two expressions "reasonable selling value" and "market value" are in some measure synonymous, but the usage of trade has affixed a technical meaning to "market value." The selling value of an article is often equivalent to its actual value and should be

so regarded in the case of a seller suing to recover for stoves specially made for a buyer, and which the latter refused to accept; that being necessary in order that the seller may be reimbursed fully. *St. Louis Steel Range Co. v. Kline-Drummond Mercantile Co.*, 96 S. W. 1040, 1043, 120 Mo. App. 438.

#### REASONABLE STATE OF USEFULNESS

The phrase "reasonable state of usefulness," when applied to a finding in mandamus to compel a railroad company to restore a highway to its former state, that the court was not convinced that the highway could be restored to a reasonable state of usefulness only by the construction of an undercrossing, is equivalent to a state as not to have unnecessarily impaired its usefulness as a highway. *People ex rel. Town of Colesville v. Delaware & H. Co.*, 69 N. E. 651, 652, 177 N. Y. 337.

#### REASONABLE TERMS

See On Reasonable Terms.

#### REASONABLE TIME

See, also, As Soon as Possible; At Once.

What is a "reasonable time" in any case depends on the circumstances of that particular case. *Smith v. Pelton Water Wheel Co.*, 90 Pac. 934, 935, 151 Cal. 394; *Salmon v. Helena Box Co.*, 147 Fed. 408, 410, 77 C. A. 586.

"Reasonable time" means such time as a prudent man could exercise or employ in or about his own affairs. *Glassey v. Sligo Furnace Co.*, 96 S. W. 310, 312, 120 Mo. App. 24.

"Reasonable time" is such promptitude as the situation of the parties and the circumstances of the case will allow. It never means an indulgence in unnecessary delay or in a delay occasioned by a vain and fruitless effort to do the act required. *Frech v. Lewis*, 67 Atl. 45, 46, 218 Pa. 141, 11 L. R. A. (N. S.) 948, 120 Am. St. Rep. 864, 11 Ann. Cas. 545 (citing *Leedom v. Phillips* [Pa.] 1 Yeates, 527).

"Reasonable time" is defined to be "so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. \* \* \* In determining what is a reasonable time or an unreasonable time, regard is to be had to the \* \* \* facts of the particular case. \* \* \* A reasonable time when no time is specified is a question of law, and depends on the subject-matter and the situation of the parties." *Colfax County v. Butler County*, 120 N. W. 444, 446, 83 Neb. 803 (citing 7 Words and Phrases, p. 5977).

"Reasonable time" means that a party shall do an act as soon as he conveniently can. What is a 'reasonable time' is generally a mixed question of law and fact, not only where the evidence is conflicting, but even in some cases where the facts are not dis-

puted and the matter should be decided by the jury on proper instructions, on the particular circumstances of each case. The term is a technical and legal expression, which in the abstract involves matters of law as well as fact, and the law cannot prescribe what shall be 'reasonable time' by any defined combination of facts, so much does the question depend on the situation of the parties and the minute and peculiar circumstances incident to each case." *Claus-Shear Co. v. E. Lee Hardware House*, 53 S. E. 433, 434, 435, 140 N. C. 552, 6 Ann. Cas. 243 (quoting and adopting definition in *Murry v. Smith*, 8 N. C. 42; *Starkie*, Ev. pp. 769, 774; 1 Dan. Neg. Inst. § 612).

An instruction defining "reasonable time" to be such length of time as may fairly, properly, and reasonably be allowed or required, having regard to the nature of the act or duty and to the attending circumstances, is not erroneous, though unnecessary, since the average juror is supposed to know what the term means. *Houston & T. C. R. Co. v. Roberts*, 109 S. W. 982, 983, 50 Tex. Civ. App. 69.

**As promptly**

See Promptly.

**As proper time**

See Proper Time.

**As shortly**

See Shortly.

**Acceptance of offer**

Where a proposition of sale, made by mail, arrived at the buyer's place of business on Saturday and was accepted on Monday, the court, in submitting the question whether this was an acceptance within a "reasonable time" did not err in using the words "within such time as was reasonably in contemplation between the parties at the time the offer was made and delivered," instead of "considering the nature of the case." *Paducah Packing Co. v. J. T. Polk Co. (Ky.)* 99 S. W. 929, 930.

**Alighting from train**

"Reasonable time" allowed a passenger for alighting is "the time in which persons of ordinary care and prudence under like circumstances" alight. *Atlantic City R. Co. v. Kiefer*, 66 Atl. 930, 932, 75 N. J. Law, 54 (quoting and adopting the definition in *Imhoff v. Chicago & M. R. Co.*, 20 Wis. 344).

**Allowance or rejection of claim against estate**

What is a "reasonable time," when the facts are undisputed, is a question of law for the court. Where it is undisputed that a claim was presented to the executrix by April 1st, and was in her possession six months later, when the action was commenced, it was clearly a reasonable length of time in which to determine whether she would allow or reject it. *Goltra v. Penland*, 77 Pac. 129, 132, 45 Or. 254.

**Applying water for use in irrigation**

What is a "reasonable time" in which to apply water originally intended to be used for some beneficial purpose of irrigation depends upon the magnitude of the undertaking and the natural obstacles to be encountered in executing the design; an unexplained delay of over five years being unreasonable. *Seaward v. Pacific Livestock Co.*, 88 Pac. 963, 965, 49 Or. 157 (citing *Hindman v. Rizer*, 27 Pac. 13; 21 Or. 112; *Nevada Ditch Co. v. Bennett*, 45 Pac. 472, 30 Or. 59, 60 Am. St. Rep. 777).

**Binding municipality by contract**

A "reasonable time" during which municipal officers may bind the municipality by contract is limited to their term of office. *Wadsworth v. Concord*, 45 S. E. 948, 952, 133 N. C. 587.

**Demand for performance of contract**

What is a "reasonable time" must of necessity depend upon the circumstances of each case. Where plaintiff entered the employment of defendant's company and bought stock therein on agreement by defendant to take it off his hands at any time after 6 months, a request that defendant take the stock, made about 18 months after expiration of the 6 months, and within a month after leaving the service of the company, was in a "reasonable time" within the contract. *Moench v. Hower*, 115 N. W. 229, 230, 137 Iowa, 621.

**Examination of goods by purchaser**

The general rule is that on the sale and delivery of goods it is the duty of the purchaser to examine them upon their arrival, or within a "reasonable time" thereafter, and, if they are found not to comply with the same as to kind and quality, to rescind the contract promptly and return the goods, and what is a "reasonable time" is a question of fact to be determined upon the circumstances of the case, including the situation and liability to injury of the vendor by delay in returning the goods, the convenience and necessity of the vendee, and customs of the trade, and, in general, the surrounding facts and circumstances of the case. Defendant bought goods by sample in June, 1901, which were delivered in November of the same year, and defects were not discovered by him until April following, after which the goods were paid for on May 5th following, and defendant having disposed of a portion of the goods, when sued for a debt subsequently contracted, counterclaimed damages alleged to have been sustained by reason of such defects. Defendant failed to inspect the goods within a "reasonable time" and therefore waived the implied warranty that the goods were equal to the sample. *Boessneck v. William Taylor Son & Co.*, 91 N. Y. Supp. 360, 361, 46 Misc. Rep. 63.

**Filling up instrument delivered in blank**

Under Negotiable Instruments Law (Consol. Laws, c. 38) § 33, requiring that a negotiable instrument delivered in blank, in order to be enforced, must be filled up within a reasonable time, from October 22, 1907, to June 9, 1908, is unexplained, more than a "reasonable time" within which to fill up a check delivered in blank. *Madden v. Gaston*, 121 N. Y. Supp. 951, 953, 137 App. Div. 294.

**Giving security**

The security required by Rev. St. 1899 (Ann. St. 1906, p. 2390) § 4343, to be given by a redemptioner in mortgage foreclosure proceedings, must be given within a "reasonable time," which means a period in which the security could be obtained supposing the party to be desirous of obtaining it and able to do so. It means a reasonable time to accomplish that which the party could accomplish at once if it were not for some particular condition hindering, as for example sickness or other adventitious circumstances. The hindering cause to excuse the delay must be such as to prevent the immediate giving of the security which otherwise could and would be given and which would be given as soon as the condition should cease. *Moss v. King*, 111 S. W. 589, 591, 212 Mo. 578.

**Inquiries by assessors**

"Reasonable time," to which assessors are entitled in making inquiries as a basis for assessment for money at interest April 1st, under Rev. St. c. 9, §§ 73-75, is such period as may be properly allowed, having regard to the nature of the act and to the attending circumstances; the quoted term being flexible. *Powell v. City of Old Town*, 81 Atl. 1068, 1070, 108 Me. 532.

**Lighting platforms, approaches, and station grounds**

What constitutes a "reasonable time" during which platforms, approaches, and station grounds must be kept lighted, within the rule of law that a carrier of passengers by rail is bound to exercise reasonable care to keep its platforms, approaches, and station grounds, so far as passengers would naturally resort to them, properly lighted at night for a "reasonable time," is determined by the circumstances of each particular case and depends upon the size and importance of the station and the number of persons who lawfully visit it at night for the purpose of transacting business with the railroad company. *Abbott v. Oregon R. Co.*, 80 Pac. 1012, 1014, 46 Or. 549, 1 L. R. A. (N. S.) 851, 114 Am. St. Rep. 885, 7 Ann. Cas. 961.

**Notice of accident**

A notice not given to the insurer until several months after an elevator accident and the bringing of suit against the insured, nor until a few days before the time set for trial, was not notice within a "reasonable time,"

as required by the terms of the policy insuring the elevator against accident to passengers, and providing that immediate notice of any accident should be given to the insurer. *Jefferson Realty Co. v. Employers' Liability Assur. Corporation*, 149 S. W. 1011, 1013, 149 Ky. 741.

**Objections to sale**

Irregularity in selling land without an inquisition must be objected to within a "reasonable time," which time is before the confirmation of the sale and the acknowledgment of the deed. *Collins v. Phillips*, 84 Atl. 854, 856, 236 Pa. 386.

**Payment**

One year was a "reasonable time" for the repayment of money loaned to be repaid by defendant "when convenient, or when business picked up." *Samuels v. Larrimore*, 104 Pac. 1001, 1002, 11 Cal. App. 387.

Where a party in a written contract for sufficient consideration promises to pay another a certain sum of money, when he shall be able to convey by a good and sufficient deed premises of which he then had no title, no action can be maintained upon the promise until the other party has first obtained a title and tendered a good and sufficient deed thereof. This is a condition precedent, and to avail it must be performed, when no time is named, within a "reasonable time"—that is, such time as is necessary conveniently to do what the contract requires should be done—and a delay of one year not satisfactorily explained is an unreasonable time. *Saunders v. Curtis*, 75 Me. 493, 495.

"Reasonable time" within which payment of a demand note must be made is a question of law to be determined under all the circumstances. Thus, where a demand note provided for less than a legal rate of interest, and the holder did not make a demand for 3½ months before he died, and there was no demand made thereafter for 4½ months, though during the first two months of the latter period there were no administrators or any one authorized to make demand, demand subsequently made was within a reasonable time, so that indorsers were not relieved. *Yates v. Goodwin*, 51 Atl. 804, 805, 96 Me. 90.

A provision in a lease that the lessee shall pay the taxes "promptly when the same become due and payable" does not mean that the taxes shall be paid in a "reasonable time," but the word "promptly" means something more definite and covers a shorter time than a "reasonable time." *Metropolitan Land Co. v. Manning*, 71 S. W. 696, 699, 98 Mo. App. 248.

**Performance of contract**

Determination of what is a "reasonable time" in a given case depends on consideration of all the circumstances of the case. A reasonable time is such time as is necessarily convenient to do what the contract requires

should be done. *Hollis v. Libby*, 64 Atl. 621, 624, 101 Me. 302.

Within the rule that if by the terms of a contract each party is to do certain acts upon the happening of a certain event, and no time is fixed, performance or tender of performance must be made within a "reasonable time" after the event happened, "reasonable time" means so much time as is necessary conveniently to do what the contract requires should be done. *Howe v. Huntington*, 15 Me. 350, 356.

"Reasonable time" for the performance of acts under a contract is such a period of time as would suffice for their performance if the person whose duty it was to perform used in the performance such diligence, care, and prudence as a person of ordinary diligence, care, and prudence, under like circumstances, would use in the performance of a like duty. *Herf & Frerichs Chemical Co. v. Lackawanna Line*, 73 S. W. 346, 350, 100 Mo. App. 164.

Where no time is fixed for performance, the contract implies performance within a "reasonable time," and what is a reasonable time depends upon the nature of the act to be done, the nature of the contract, and all the circumstances relating to the same. *Kelley, Maus & Co. v. Hart-Parr Co.*, 115 N. W. 490, 491, 137 Iowa, 713 (citing *Tufts v. McClure*, 40 Iowa, 317).

What constitutes a "reasonable time" for delivery under a contract of sale usually depends upon the circumstances of the case, such as the parties may be supposed to have contemplated in a general way when making the contract. *Robinson Clay Product Co. v. American Locomotive Co.*, 107 N. Y. Supp. 69, 71, 56 Misc. Rep. 589.

Where a proposal for bids for the paying of a portion of a city street less than two-thirds of a mile in length required the work to be done within 90 days, but the contract contained no such provision, and the work was not completed for more than a year, it was not completed with a "reasonable time." *Turner v. City of Springfield*, 93 S. W. 867, 868, 117 Mo. App. 418.

The term "reasonable time" is a relative one, and its meaning depends entirely upon the attendant circumstances. It has been held in one case to mean as soon as convenient; in another, the least possible time after an event; and in many others it was held that such time must be determined according to the circumstances of the case, and with particular reference to the means and ability of the person by whom the contract is to be performed. *Neilsen v. Mayer*, 85 N. Y. Supp. 1069, 1070.

What is a "reasonable time" must be determined by the circumstances of the case. A delay of a month under some circumstances may be unreasonable, while under others that

of a year or more will not be so regarded. Where plaintiff, knowing that the authorities of a city deemed it an imperative necessity to provide at once for a new reservoir for the storage of water, gave the city an option on a tract of land, limiting the option to three days from the date of the offer, and providing that the purchase money shall be paid within 60 days from the date of acceptance, unless further time be required by the city law department to examine the title to the land, in which event further reasonable time should be given for that purpose, and plaintiff had no title which he could convey, and by a decree entered nearly a year after the expiration of the 60 days from the acceptance of the option he was left wholly without interest in the greater part of the tract, and after a further delay of 2 months he succeeded in procuring the consent of the owner to convey to the city, but, 6 months after the time for performance, the city rescinded and plaintiff had notice thereof, plaintiff was not entitled to a decree for specific performance because of his inability to perform within a reasonable time. *North Avenue Land Co. v. City of Baltimore*, 63 Atl. 115, 118, 102 Md. 475.

Defendants in February, 1905, purchased of plaintiffs 200 barrels of certain flour at \$5.35 per barrel, for delivery in fractional lots as requested by defendants within a "reasonable time." Between March 20th and May 16th, defendants accepted 55 barrels, and in July requested further delay. In August plaintiffs notified defendants that if they did not carry out their contract plaintiffs would dispose of the flour on defendant's account, and, receiving no response, plaintiffs tendered the flour to the defendants on September 2, 1905, which defendants refused to receive, whereupon without further notice plaintiffs sold the flour on a produce exchange on September 20th for \$4.20 a barrel, which was the best price obtainable. Held, that plaintiffs acted in "good faith" and with "due diligence" and within a "reasonable time," and that the resale fixed the measure of plaintiff's damages. *Ford v. Erde*, 99 N. Y. Supp. 487, 488, 50 Misc. Rep. 665.

What is "reasonable time" in which to comply with the terms of an oil lease, after notice of intention to forfeit, as a rule, is a question of fact, for its determination largely depends upon the circumstances surrounding the particular case and the means and ability of the person by whom the lease is to be performed. Where the facts are undisputed or admitted or are clearly established, "reasonable time" has been held to be a question of law; but should the question of "reasonable time" depend upon any controverted facts, or where the motives of the party enter into the question, the whole is necessary to be submitted to a jury before any judgment can be formed as to whether the time

was reasonable. It has also been defined as the time that preserves to each party the rights and advantages he possesses, and protects each party from the losses that he ought not to suffer. "Reasonable time" will not begin to run until some one interested in the matter calls for something to be done respecting it. *American Window Glass Co. v. Indiana Natural Gas & Oil Co.*, 76 N. E. 1006, 1008, 37 Ind. App. 439 (citing *Consumers' Gas Trust Co. v. Littler*, 70 N. E. 363, 162 Ind. 320; *Island Coal Co. v. Combs*, 53 N. E. 452, 152 Ind. 379, 387; *Words and Phrases*, vol. 7, p. 5977).

#### Performance of covenant

If, in the absence of a limitation as to the time within which a covenant to pay one-half of the mortgage should be performed before title should pass, it should be inferred a "reasonable time" was intended, such time would be one within which it would be equitable for him to do so. *Emery v. Dana*, 84 Atl. 976, 978, 76 N. E. 483.

#### Presentation of claim against municipality

*Seattle City Charter*, art. 4, § 29, requiring claims for damages against the city to be filed with the clerk within 30 days after the time when such claims accrue, is not invalid as not allowing a "reasonable time" within which to present such claims. *Postal v. City of Seattle*, 83 Pac. 1025, 1026, 41 Wash. 432.

#### Presentation of bill or note

As to what is a "reasonable time" for the presentation of a check for payment depends upon the facts and circumstances of each particular case. *Edmisten v. Henry Herpolshelmer Co.*, 92 N. W. 138, 141, 66 Neb. 94, 59 L. R. A. 934.

What is a "reasonable time" within which a demand of payment must be made of the maker of an instrument, payable on demand, in order to subject the indorser, is a question of fact as a general rule. *Hampton v. Miller*, 61 Atl. 952, 954, 78 Conn. 267 (citing *Lockwood v. Crawford*, 18 Conn. 361, 372; *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 268-273; *Oley v. Miller*, 74 Conn. 304, 310, 50 Atl. 744, 746).

Where a seller of goods accepted a check in payment and did not present the check in the bank on which it was drawn until two weeks after the sale, such presentment was within a "reasonable time" and did not prevent him from reclaiming the goods on non-payment of the check. *People's State Bank of Michigan Valley v. Brown*, 103 Pac. 102, 104, 80 Kan. 520, 23 L. R. A. (N. S.) 824.

While the liability of an indorser of a note is fixed by law, the question of what is a "reasonable time" to present the note to the maker for payment, when it is indorsed after maturity, is not fixed by law, but depends upon the facts and the understanding

and agreement of the parties, *Rev. Codes, § 3650*, providing that in determining what is a reasonable time regard must be had to the nature of the instrument, the usage of trade or business, if any, with respect to such instrument, and the facts of the particular case. *Sheffield v. Cleland*, 115 Pac. 20, 21, 19 Idaho, 612.

What is a "reasonable time" for presenting for payment as required by *Negotiable Instruments Law, Laws 1897, c. 612, § 131*, so as to bind an indorser of a note payable on demand, is a question of fact to be determined by the circumstances of the particular case. The presentation for payment of a note payable on demand is presumptively within a "reasonable time," and an indorser to raise the issue that its presentation was delayed for an unreasonable time must plead and prove such matter as a defense. *German-American Bank v. Mills*, 91 N. Y. Supp. 142, 143, 99 App. Div. 312.

Under a *Negotiable Instruments Law* requiring presentment of checks for payment within a "reasonable time," where a check drawn on October 11, 1907, was received through the mail on October 12th, a "reasonable time" for presentation expired at the close of business on October 13th, under the general rule that a reasonable time for presentation of a check ends with the next day after it is dated. *Dehoust v. Lewis*, 112 N. Y. Supp. 559, 560, 128 App. Div. 131 (citing *Eaton & Gilbert, Commercial Paper, § 167; Wood's Byles, Bills, 19; Smith v. Jones* [N. Y.] 20 Wend. 192, 32 Am. Dec. 527).

Under *Negotiable Instruments Law, Laws 1897, p. 736, c. 612, § 131*, providing that where an instrument is payable on demand presentment must be made within a "reasonable time" after its issue or after the last negotiation thereof, and section 4, p. 721, providing that in determining what is a "reasonable time" regard is to be had to the nature of the instrument, the usage of trade, and the facts of the particular case, where a demand note was indorsed without consideration for the maker's accommodation, and its payment was secured by the deposit of certain securities, and two years after its making the plaintiff complained to the indorser of its nonpayment, and twice, a year later, wrote that the maker was in default as to the interest, but no steps were taken to charge the indorser by presentment of the note for payment until more than 3½ years had elapsed, such presentment was not within a "reasonable time." *Commercial Nat. Bank of Syracuse v. Zimmerman*, 77 N. E. 1020, 1021, 185 N. Y. 210.

When the payee to whom a check is delivered receives it in the same place where the bank on which it is drawn is located, he may preserve recourse against the drawer by presenting it for payment at any time before

the close of banking hours on the next day. Under B. & C. Comp. § 4455, providing that, where an instrument payable on demand is negotiated an unreasonable length of time after it is issued, the holder is not deemed a holder in due course, a check issued on a certain date, bearing that date and negotiated at noon of the following day, was negotiated within a "reasonable time" so as not to carry to the indorsee notice of its illegality or previous dishonor. *Matlock v. Scheuerman*, 93 Pac. 823, 826, 51 Or. 49, 17 L. R. A. (N. S.) 747 (citing 2 Daniel, Neg. Inst. [5th Ed.] § 1590).

Negotiable Instruments Law, § 322, provides that a check must be presented for payment within a reasonable time after its issue. Section 4 provides that, in determining what is a reasonable time, regard is to be had to the nature of the instrument, any usage of trade or business with respect to such instruments, and the facts of the particular case. Held that, in view of the custom of the New York Clearing House Association, the deposit of a check received after banking hours, on the morning of the day after its receipt, and its presentment for payment in the usual course of business by the bank of deposit on the day following, showed due diligence in presentment; "reasonable" being a relative term to be determined according to the circumstances of the case, "reasonable time" meaning "so much time as is necessary under the circumstances conveniently to do what the contract requires," and "usage of trade" meaning a known, uniform, and reasonable usage, not contrary to law or public policy. *Zaloom v. Ganim*, 129 N. Y. Supp. 85, 87, 72 Misc. Rep. 36.

#### Redemption

Where a mortgagor was given a "reasonable time" beyond the statutory period of redemption, an attempt to redeem 5½ years after the foreclosure, and after a large amount had been expended for permanent improvements of the property, was not within a "reasonable time" within the agreement. *Mann v. Provident Life & Trust Co.*, 85 Pac. 56, 58, 42 Wash. 581.

#### Removal of goods from depot

The period of "reasonable time" for the removal of goods begins when the consignee knows, or in the exercise of reasonable diligence should know, that they have arrived. *Lewis v. Louisville & N. R. Co.*, 122 S. W. 184, 188, 135 Ky. 361, 25 L. R. A. (N. S.) 698, 21 Ann. Cas. 527.

Plaintiff's agent learned of the arrival of the goods in question between 4 and 5 o'clock p. m., which was a few hours after the car in which the goods were transported reached destination. The shipping receipt had not arrived, and it was customary for the carrier's office to close at 6 p. m. Plaintiff did not remove the goods that night, during

which they were destroyed by fire. Held, that the loss occurred before the expiration of a "reasonable time" for the removal of the goods as a matter of law. *McGregor v. Oregon R. & Nav. Co.*, 93 Pac. 465, 470, 50 Or. 527, 14 L. R. A. (N. S.) 668.

The "reasonable time" within which a consignee after notice of the arrival of his goods at their destination is required to remove them, before the termination of the liability of the carrier as insurer, is such time as will enable one, residing in the vicinity of the place of delivery, and who is informed of the probable time of arrival of the goods and of the course of the carrier's business, to inspect and remove the goods during business hours." *United Fruit Co. v. New York & B. Transp. Co.*, 65 Atl. 415, 419, 104 Md. 567, 8 L. R. A. (N. S.) 240, 10 Ann. Cas. 437.

#### Rescission of contract

"The law has not defined reasonable time. It cannot be defined by any prescribed rule. What is reasonable in one case may be unreasonable in another case. What is reasonable in any case must be ascertained by the application of reason to the facts which characterize the particular case. Delay for one week after full discovery may be unreasonable in some cases. A much longer delay may in other cases be reasonable. The injured party should observe ordinary vigilance and good faith. He should not, by culpable negligence or by design, subject the other party to unnecessary inconvenience, loss, or hazard; and, whenever he offers to return the property, it should be in as good condition as it was when he might have first returned it after full discovery of its defectiveness, so as to place both parties as nearly as possible in statu quo. All this may appear in a supposable or possible case, even though months may have interlapsed. It may not appear in another possible case in which one week had evolved. Time, in the abstract, is not essential. It is material so far only as, when associated with other circumstances, it may produce injuries or unjust consequences. The great object of the rule of law on this subject is to prevent injury or wrong to the vendor; and the main question in every such case should be: Has he any just cause to object to the rescission of the contract? Has he been trifled with? Will he have suffered by unnecessary and improper delay?" *Hogan v. Tucker*, 77 S. W. 197, 199, 116 Ky. 918 (quoting *Hoggins v. Becraft*, 31 Ky. [1 Dana] 28, 31).

#### Sale of realty by alien heirs

B. died intestate in 1860, seised of land, and left, him surviving, his mother, two brothers, and two sisters. One brother, a sister, and the mother were residents of the United States. The others resided in Germany, from where they removed to the United States in 1869. The mother died in 1862.

Under the statute prior to 1868, a nonresident alien could not inherit real estate. When B. died, a treaty was in force allowing nonresident alien heirs to sell real estate within a "reasonable time." Held that, in the absence of excusing circumstances, more than a reasonable time had elapsed after the death of the mother, and before the legislation of 1868 and the expiration of such time worked a failure of the condition imposed in the treaty; such failure vesting a fee-simple title in the resident heirs. *Ahrens v. Ahrens*, 123 N. W. 164, 166, 144 Iowa, 486, Ann. Cas. 1912A, 1093.

**Suit to set aside orders approving claims against estate**

Where orders approving certain claims against a decedent's estate as legal charges against the same were entered, respectively, November 7, 1901, and January 30, 1902, a suit brought to set aside such orders, filed April 24, 1902, was instituted within a "reasonable time." *Smart v. Panther*, 95 S. W. 679, 681, 42 Tex. Civ. App. 262.

**Taking possession by mortgagee of chattels after default**

Under Sess. Laws 1899, p. 160, c. 86, declaring that 30 days shall be a reasonable time within which a mortgagee of chattels shall take possession after default, where the first mortgagee permitted the property to remain in the possession of the mortgagor for more than 30 days after maturity of the debt, after which a second mortgagee, who took "subject" to the first mortgage, took possession of the property thereunder though not until more than four months had elapsed after the maturity of his debt, he nevertheless acquired a prior right to the property over the first mortgagee. *Cassell v. Deisher*, 89 Pac. 773, 774, 39 Colo. 367.

**Transportation by carrier**

"Reasonable time," as used in Revisal 1905, § 2632, imposing a penalty on a common carrier which shall "omit or neglect to transport within a 'reasonable time' any goods, received for shipment," is the ordinary time required for transporting such articles between the receiving and shipping stations, and a delay of two days at the initial point is not to be charged against the carrier as unreasonable, but is prima facie reasonable, and a failure to transport within such time is prima facie unreasonable. *Alexander v. Atlantic Coast Line R. Co.*, 56 S. E. 697, 144 N. C. 93 (citing *Walker Bros. v. Southern R. Co.*, 49 S. E. 84, 137 N. C. 163).

Revisal 1905, § 2682, declares that it shall be unlawful for any railroad company to neglect to transport within a reasonable time any goods received for shipment and billed to or from any place in the state, unless otherwise agreed between the parties or unless the same be destroyed, under a penalty. It is further provided that the company

shall be deemed to have transported the goods in a reasonable time if it has done so within the ordinary time required for such transportation; and that a delay of two days at the initial point, and 48 hours at one intermediate point for each 100 miles or fraction over which goods are to be transported, shall be held to be prima facie reasonable, and a failure to transport within such time shall be held prima facie unreasonable. The duty imposed by the statute is but declaratory of the common law, and the definition of "reasonable time," "as the ordinary time required" within which an act is to be done, is the regular, customary, and usual time, and is synonymous with "reasonable time," which means "as soon as the party conveniently can." The provision as to the allowance of time at the initial point and intermediate points lowers the standard of duty, as it is not clear that so much time would be given under all circumstances. The last sentence in the statute, "and a failure to transport within such time will be held prima facie unreasonable," is not very clear, and the words cannot refer to the time which "shall not be charged," because to do so would be contradictory and destructive of the immediately preceding sentence. The last sentence should therefore be referred to the terms "ordinary time," thus making the act to read, "A failure to transport within ordinary time shall be held prima facie unreasonable." *Stone & Co. v. Atlantic Coast Line R. Co.*, 56 S. E. 932, 934, 144 N. C. 220 (citing *Moore, Car.*, 188; *Tiffany, Sales*, 195; *Crook v. Cowan*, 64 N. C. 743; *State v. Patterson*, 47 S. E. 808, 134 N. C. 612; *Ober v. Smith*, 78 N. C. 316).

**Working about machine after promise to repair**

"Reasonable time," within the rule that a servant will not be negligent in continuing to work about an unsafe machine for a reasonable time after promise to repair, is any period which does not preclude all reasonable expectations that the promise may be kept. *Anderson v. Fielding*, 93 N. W. 337, 358, 92 Minn. 42, 104 Am. St. Rep. 665.

**REASONABLE USE**

The "reasonable use" which an owner of land may make of it is such a use as an ordinary man would make of his premises. *Hamlin v. Blankenberg*, 60 Atl. 1010, 1011, 78 N. H. 258 (citing *Horan v. Byrnes*, 54 Atl. 945, 72 N. H. 93, 97, 100, 62 L. R. A. 602, 101 Am. St. Rep. 670; *Franklin v. Durgee*, 51 Atl. 911, 71 N. H. 186, 58 L. R. A. 112).

Within the rule that one has the right to the "reasonable use" of his own property, it is not a reasonable use of it, if it deprives an adjoining owner of the lawful use and enjoyment of his property. An instruction that if smoke, soot, and ashes are blown on the plaintiff's house in such a manner as to

"reasonably" annoy him, would have been better had it used the expression "necessarily and materially annoy." It is to be presumed that by the word "reasonable" in this connection was meant ordinary and necessary result of the smoke, cinders, and ashes. *Junction City Lumber Co. v. Sharp* (Ark.) 123 S. W. 372.

When there exists a natural flow sufficient to make a floatable stream, but both parties need the water for their different purposes at the same time, and the use of the water by one injuriously interferes with its use by the other, the maxim or doctrine of "reasonable use" applies. If they cannot both enjoy the same thing at the same time, each must take to himself and concede to the other a "reasonable use" of the common boon. "The reasonableness of the use depends upon the nature and size of the stream, the business or purposes to which it is made subservient, and on the ever-varying circumstances of each particular case. Each case must stand upon its own facts, and can be a guide in other cases only as it may illustrate the application of general principles. Such general rule should be laid down as appears best calculated to secure the entire water of the stream to useful purposes." *Pearson v. Rolfe*, 76 Me. 380, 390 (quoting and adopting definition in *Cool. Torts*, 583).

#### REASONABLE VALUE

The expression "reasonable value" is not so broad as "market value." *Alcon v. Koons*, 82 N. E. 92, 95, 84 N. E. 1104, 42 Ind. App. 537.

"Reasonable value," like market value, is sometimes difficult to ascertain and fix with certainty, and depends upon the surroundings and conditions existing at the time it is sought to be ascertained. *Old River Rice Irr. Co. v. Stubbs* (Tex.) 137 S. W. 154, 157.

In the absence of proof that articles furnished by claimant for decedent's funeral were not sold under fair trade conditions, or that competition had been stifled or prices otherwise inflated, their "reasonable value" was their "market value" at the place where they were sold, by which is meant the prices which the articles customarily brought at the time. On a claim against an estate for articles furnished for decedent's funeral, a charge that plaintiff was entitled to recover their "reasonable value" was sufficient; "reasonable value" being used as synonymous with "market value." *Wagoner Undertaking Co. v. Jones*, 114 S. W. 1049, 1051, 134 Mo. App. 101.

#### REASONABLE WORTH

The expression "reasonable worth" is not so broad as "market value." "Reasonable worth" imports the conditions of time and terms, and not a sale for cash. *Alcon*

*v. Koons*, 42 Ind. App. 537, 82 N. E. 92, 95, 84 N. E. 1104.

"'Reasonable worth' is an elastic term, especially as to farm property. It ordinarily means what may be obtained by one under no pressure or compulsion to sell until he can seek and find a customer desiring to purchase." *Rosenheimer v. Krenn*, 106 N. W. 20, 25, 126 Wis. 617, 5 L. R. A. (N. S.) 395.

#### REASONABLY

"The word 'reasonably' has different significations. It sometimes means tolerably or moderate. Its meaning, when applied to a time within which a thing is to be done, has given the courts much trouble in its application to the particular facts of the case. What is reasonable is most generally a question upon which the minds of men do not agree. What one would think was reasonable, another might think unreasonable." *Hunt v. Metropolitan St. R. Co.*, 103 S. W. 1088, 1089, 128 Mo. App. 79.

In an instruction that every protection reasonably accessible must be used in the first place in protecting electric wires and the utmost care should be used to keep them so, the words "reasonably" and "utmost care" meant the same thing. *Winkelman v. Kansas City Electric Light Co.*, 85 S. W. 99, 100, 110 Mo. App. 184.

Where, on a prosecution for murder, it appeared that defendant went to the house of deceased, and there killed him, and there was a question as to whether he went to the house because the wife of deceased had sent for him on a lawful mission, or whether he went there on an unlawful purpose, an instruction which required accused to "actually" believe that the wife had sent for him on a lawful mission placed too great a burden on accused, and the use of the word "reasonably," instead of "actually," would have been more appropriate. *Nicks v. State*, 79 S. W. 35, 36, 46 Tex. Cr. R. 241.

#### REASONABLY APPARENT

There is no material difference between the words "apparent" and "reasonably apparent" as used in an instruction, in an action for injuries sustained in a railroad crossing accident, making the doctrine of discovered peril applicable if the employes on the engine saw the person injured on the track, and it was apparent, or reasonably apparent, that he would not get off, and the words "realized his peril." Webster defines "apparent" as clear or manifest to the understanding; plain; evident; obvious; known; palpable; indubitable. If the danger was apparent or reasonably apparent to the employes operating the engine, it was known to them. *Missouri, K. & T. Ry. Co. of Texas v. Reynolds* (Tex.) 115 S. W. 340, 343.

#### REASONABLY CERTAIN

See *Reasonable Certainty*.



The words "reasonably certain," as used in the rule relating to prospective losses, do not mean that such losses must be absolutely certain, but certain to a reasonable probability. *Gallamore v. Olympia*, 75 Pac. 978, 980, 34 Wash. 379.

In an action for injuries alleged to be permanent, the question asked of an expert medical witness as to what results were "likely" to follow was competent; the term "likely" being used synonymously with "reasonably expected," which might be substituted for "reasonably certain." *Garard v. Manufacturers' Coal & Coke Co.*, 105 S. W. 767, 771, 207 Mo. 242.

To say that proof of the fact must be made "reasonably certain" is, by literal import of the words, tantamount to saying that the proof must be made beyond a reasonable doubt. This has been expressly held as to the phrase "moral certainty," which is equivalent to the words "reasonable certainty." A charge that if a passenger's sickness was not the result of her being put off the train, and that it was "reasonably certain" to have resulted from other causes, the carrier is not liable, is erroneous as requiring proof beyond reasonable doubt. *St. Louis, A. & T. R. Co. v. Burns*, 9 S. W. 467, 468, 71 Tex. 479, 481.

#### REASONABLY CONVINCING

Where, after sustaining an exception to a master's report, the court in recommitting it said, in respect to the evidence warranting a particular finding, that it must be "reasonably convincing," it was held that the term "reasonably convincing" was liable to lead to a hurtful misconception on the part of the master; that it might mean a mere preponderance of the evidence, a weighing of the relative strength of conflicting testimony, as would be sufficient to reasonably convince the mind that there were gross errors and the like. Whereas, the language of the law is that the evidence which will warrant a disturbance of such an award must be "the most irrefutable proof," "overwhelming," or persuasive "beyond a reasonable doubt," or "free from all doubt and convincing," or "so outrageous, etc." *Choctaw & M. R. Co. v. Newton*, 140 Fed. 225, 234, 71 C. C. A. 655.

#### REASONABLY EXPECTED

In an action for injuries alleged to be permanent, the question asked of an expert medical witness as to what results were "likely" to follow was competent; the term "likely" being used synonymously with "reasonably expected," which might be substituted for "reasonably certain." *Garard v. Manufacturers' Coal & Coke Co.*, 105 S. W. 767, 771, 207 Mo. 242.

#### REASONABLY FIT

An appliance is "reasonably fit" when it can be used by the servant in the course of

his employment without danger to himself by exercising ordinary care. The owner of a vessel is not negligent in furnishing, for the use of seamen, a winch in which the cogwheels are not protected so as to prevent the operator's fingers from being caught, where it can be safely used by the exercise of ordinary care. *The Chico*, 140 Fed. 568.

#### REASONABLY LIKELY

There is no distinction between such phrases as "reasonably likely to suffer" and "likely to suffer" used in various cases in stating the rule when prospective damages are recoverable. *Gallamore v. Olympia*, 75 Pac. 978, 980, 34 Wash. 379.

#### REASONABLY PRACTICABLE

Under P. L. 1895, p. 462, providing that, where the route of a railway crosses an established steam railway, applications shall be made to the chancellor to define the mode, who shall proceed to define it, and shall avoid a grade crossing if, in his judgment, it be reasonably practicable, it is not "reasonably practicable" to avoid a grade crossing of an electric railway or a steam railroad where an overhead or undergrade crossing will cost \$100,000 and will materially interfere with the approach on the highway to an important depot, and it appears a grade crossing can be rendered safe by a signal tower and apparatus for stopping an electric car if the motorman disobeys signals to stop. In re *Atlantic Highlands, R. B. & L. B. Electric Ry. Co.* (N. J.) 35 Atl. 387, 388.

#### REASONABLY PRUDENT

See Reasonable Prudence.

"A 'reasonably prudent man' may mean the same as an ordinarily prudent man." *International & G. N. R. Co. v. Trump*, 94 S. W. 903, 906, 42 Tex. Civ. App. 536 (quoting the definition in *Missouri, K. & T. Ry. Co. of Texas v. Hannig*, 43 S. W. 508, 91 Tex. 350).

A "reasonably prudent man" will neither neglect what he can foresee as probable, nor waste his anxiety on events that are barely possible, but will order his precaution by the measure of what appears likely in the known course of things. Whether or not a defendant is negligent depends on two questions: (1) Whether the particular act or acts charged in the petition were performed or omitted; (2) whether the performance or omission of these acts or some one or more of them was a breach of legal duty. *Holden v. Missouri R. Co.*, 84 S. W. 133, 136, 108 Mo. App. 665 (citing *American Brewing Ass'n v. Talbot*, 42 S. W. 682, 141 Mo. 685, 64 Am. St. Rep. 538; 1 *Shear. & R. Neg.* § 52).

#### REASONABLY SAFE

A car stall in which a horse was transported by a carrier is "reasonably safe" when it is such as a person of ordinary prudence would provide. *Southern Express Co. v. Fox*

& Logan, 115 S. W. 184, 117 S. W. 270, 131 Ky. 257, 133 Am. St. Rep. 241.

An appliance furnished by an employer to his employé is "reasonably safe," where it is in general use among employers of ordinary caution and prudence in the same line of business under the same circumstances. *Yazdewski v. Barker*, 111 N. W. 689, 691, 131 Wis. 494, 120 Am. St. Rep. 1059 (citing *Guillard v. Knapp-Stout and Company*, 70 N. W. 671, 95 Wis. 482; *Prybyski v. Northwestern Coal R. Co.*, 74 N. W. 117, 98 Wis. 413; *Sladky v. Marquette Lumber Co.*, 83 N. W. 514, 107 Wis. 251).

A master's duty to furnish "reasonably safe" tools and appliances means reasonably safe under all the circumstances, and does not forbid him from placing a servant at work on a machine which is inherently dangerous. *Chandler v. Bowersock*, 106 Pac. 54, 55, 81 Kan. 606.

"Reasonably safe" appliances means safe according to the usages, habits, and ordinary risks of the business. *Morton v. William Barr Dry Goods Co.*, 103 S. W. 588, 592, 126 Mo. App. 377 (quoting and adopting definition in *Titus v. Bradford, B. & K. R. Co.*, 20 Atl. 517, 136 Pa. 618, 20 Am. St. Rep. 944); *Norfolk & Portsmouth Traction Co. v. Ellington's Adm'r*, 61 S. E. 779, 781, 108 Va. 245, 17 L. R. A. (N. S.) 117.

"Reasonably safe," within the rule which requires an employer to furnish reasonably safe appliances, etc., means safe according to the usage, habits, and ordinary risks of the business. A master is bound to use reasonable care to furnish his servants safe appliances, but is not bound to furnish any particular appliances, nor the newest and best appliances; his duty being performed when he furnishes those of ordinary character and of reasonable safety. *Brands v. St. Louis Car Co.*, 112 S. W. 511, 514, 213 Mo. 698, 18 L. R. A. (N. S.) 701 (quoting and adopting *Minnier v. Sedalla, W. & S. Ry. Co.*, 67 S. W. 1072, 167 Mo. 112; and citing and adopting *Chrismer v. Bell Telephone Co.*, 92 S. W. 378, 194 Mo. 189, 6 L. R. A. [N. S.] 492).

"'Reasonably safe' means safe according to the usages, habits, and ordinary risks of the business. Absolute safety being unattainable, and employers not being insurers, they are liable for the consequences, not of danger but of negligence, and the unheeding test of negligence in methods, machinery, and appliances is ordinary usage of the business." *Chrismer v. Bell Telephone Co.*, 92 S. W. 378, 383, 194 Mo. 189, 6 L. R. A. (N. S.) 492 (quoting and adopting definition in *Titus v. Bradford, B. & K. R. Co.*, 20 Atl. 517, 136 Pa. 618, 20 Am. St. Rep. 944).

"In regard to the style of the implement or nature of the mode of performance of any work, 'reasonably safe' means safe according

to the usages, habits, and ordinary risks of the business." *McManus v. Oregon Short Line R. Co.*, 94 S. W. 743, 745, 118 Mo. App. 152 (quoting and adopting the definition in *Titus v. Bradford, B. & K. R. Co.*, 20 Atl. 518, 136 Pa. 626, 20 Am. St. Rep. 944).

"The expression 'reasonably safe place' is quite generally and almost universally used to express the duty of the master to exercise due or reasonable care to provide a safe place." *Firment v. Berwind-White Coal Min. Co.*, 162 Fed. 758, 764.

A reasonably safe place to work, required of the owner or operator of a coal mine with respect to ventilation and the accumulation of dangerous gases, after he has provided ample means of ventilation and employed a competent mine boss and fire boss, as required by Code 1906, §§ 409, 410, means a reasonably safe place in the first instance; and the subsequent negligence of such mine boss or fire boss in allowing the accumulation in the mine of gases in dangerous quantities will be regarded as the negligence of a fellow servant of the miner, and a risk assumed by such miner. *Squillache v. Tidewater Coal & Coke Co.*, 62 S. E. 446, 449, 64 W. Va. 337.

When the character of the work is not complicated or attended with obvious and inherent dangers, or when the general method of doing it, long established and recognized by the employés, does not appear to be unreasonably or unnecessarily dangerous, the master need not provide rules, or command specifically the observance of a system of work which his employés adopt and observe without special instructions; a reasonably safe method of operation, customarily followed, being in effect equivalent to the establishment of reasonable rules, so far as the master's duty in this respect is concerned. *Parmaieu v. International Paper Co.*, 71 Atl. 31, 33, 75 N. H. 69.

The adverb "reasonably" is a qualifying word, and modifies the adjective "safe." It is defined by Webster as meaning moderately or tolerably, and that is its commonly understood meaning. The use of the word in an instruction in a prosecution for homicide that accused had the right to kill, if there was, as it then appeared to him, no reasonably safe means of averting the danger of losing his life or suffering great bodily harm at the hands of decedent, is erroneous, since by such instruction accused would not be compelled to choose an alternative method of escaping danger, unless it promised absolute safety. *Tompkins v. Commonwealth*, 77 S. W. 712, 713, 117 Ky. 138.

A railroad company, though entitled to equip its switch engines with such appliances as it sees fit, must use reasonable care to furnish its employés safe appliances and to keep them in good condition, but it need not use the newest and best appliances, and in this

connection the term "reasonably safe" means safe according to the usages and ordinary risks of the business. *Cannon v. South Dakota Cent. Ry. Co.*, 137 N. W. 347, 350, 29 S. D. 433.

### REASONABLY SATISFY

The expression "reasonably satisfies," as used in an instruction defining the term "preponderance of the evidence" as meaning that greater and superior weight of the testimony as reasonably satisfies the minds of the jury, must have been understood by the jury to mean that a preponderance of the evidence was established if, upon consideration of the evidence, the result was to reasonably satisfy their minds that the greater weight of the evidence was with plaintiff, and the use of the words did not, therefore, render the instruction erroneous, as being too great a burden on the party having the burden of proof. *Ball v. Marquis*, 98 N. W. 496, 497, 122 Iowa, 665.

### REASSESSMENT

Under a city charter providing that, when any assessment is set aside or declared void by any court, then the board of public works shall make a "reassessment upon all property which has been or will be benefited by the improvement to the extent of its proportionate part," the term "reassessment" refers to an entirely new apportionment of the benefits. *State ex rel. Eaton v. District Court of Ramsey County*, 104 N. W. 553, 556, 95 Minn. 503.

### REBATE

#### In carpentry art

In the carpentry art, "rebated," as applied to the mode of joining moldings or strips used in construction, means the same as "rabbeted." *Decker v. Sanford*, 135 Fed. 112, 117.

#### In insurance

A life insurance company, issuing contracts providing for a special income in consideration of insured rendering on request services to the company, such as reporting on the fitness of agents or applicants for insurance, does not violate Code 1907, § 4579, prohibiting offering "to pay or allow, as inducement to insurance, any rebate of premiums"; for the services which insured obligates himself to perform afford a consideration for the obligation assumed to allow a special income, though the company has the option to demand the services—"rebate" being deductions from stipulated premiums allowed in pursuance of antecedent contract. *Julian Ins. Com'r v. Guarantee Life Ins. Co.*, 49 South. 234, 235, 159 Ala. 533 (citing 7 Words and Phrases, p. 5986).

#### Of assessment

An ordinance requiring a street railway company laying its tracks on a paved street

to pay into the city treasury the cost of the pavement of the part of the street between the tracks, between the rails, etc., and that the same shall be "rebated" to the owners of the property where the special assessment against the same shall have been paid, applies only to the ordinary case where the owner at the time the assessment was paid was the owner at the time of the payment into the treasury by the company, and it does not provide for a case where the person who paid the assessment sold the premises to a purchaser before the payment into the treasury by the company; the word "rebate" meaning to draw back. *Savage-Scofield Co. v. City of Tacoma*, 105 Pac. 1032, 1034, 56 Wash. 457.

#### Of freight rate

A rebate or concession from a part of a single rate whereby property is transported thereunder at a less rate than the established rate is a concession from the entire rate, and renders all transportation thereunder illegal. *Armour Packing Co. v. United States*, 153 Fed. 1, 21, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400. See, also, *Thomas v. United States*, 156 Fed. 897, 908, 84 C. C. A. 477, 17 L. R. A. (N. S.) 720 (quoting with approval from *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135, 14 L. R. A. [N. S.] 400).

A carrier by water which has not joined in a tariff and division sheet filed and published by connecting railroad carriers for the through carriage of interstate shipments between two points does not become a party to a "common arrangement" for the carriage of such a shipment within the meaning of *Elkins Act* Feb. 19, 1903, c. 708, § 1, 32 Stat. 847, by accepting and carrying the same under a through bill of lading issued by the initial railroad carrier stating the published tariff rate and the division of the charges in accordance therewith, nor by receiving its divisional part of such rate, where it had previously privately contracted with the shipper to "protect" a lower through rate, pursuant to which contract the shipment was made, and its return to the shipper of a part of its divisional share of the freight paid, in fulfillment of the contract, was not the "giving of a rebate" in violation of the act. *Mutual Transit Co. v. United States*, 178 Fed. 664, 669, 102 C. C. A. 164.

Private tracks built by the owner of a packing plant on its own property, extending from a connection with the tracks of a belt line railroad company to and around its buildings, and used in loading cars for shipment, are not a part of the railroad system, but plant facilities, and the refunding by a railroad company, which made and published a schedule of through rates, including the belt line charge, of \$1 per car to such packing company on shipments made by it and paid for at the schedule rate, on the ground that it was a payment for the use of such private

tracks, thus making the rate charged \$1 per car less than that published and charged to shippers generally from the same point, constituted the giving of a rebate, in violation of section 1 of Elkins Act February 19, 1903, c. 708, 32 Stat. 847. *Chicago & A. Ry. Co. v. United States*, 156 Fed. 558, 562, 84 C. C. A. 324, 26 L. R. A. (N. S.) 551.

In the federal statutes forbidding carriers to offer, grant, or give, and shippers to solicit, accept, or receive any rebate, concession, or discrimination in respect of transportation, etc., the word "rebate" in and of itself implies a comparison with, a measurement by, and a departure from, a determined standard. *Standard Oil Co. of Indiana v. United States*, 164 Fed. 376, 390, 90 C. C. A. 364.

## REBELLION

See Actual Rebellion.

## REBILLING RATE

A true "rebillings rate" is one in which goods received in unbroken car load lots over one line of railway can be rebilled over the same or another line, completing one continuous trip, simply changing the consignee, and altering the destination of the identical shipment, without unloading. A so-called "rebillings rate" adopted by a railroad, which is not applied to consignments arriving over all connecting lines, but is only available to those receiving freight over associate lines, and under which freight reconsigned over the rebilling road does not complete one continuous trip without rehandling, and is not necessarily the identical shipment originally consigned, there being a custom of granting dealers handling freight over the associate line the privilege within 90 days from the date of their "expense bills," or receipts showing the amount of freight received over such line, of shipping an equal amount of freight over the rebilling line at the rate adopted, is not a true rebillings rate. *Alabama & V. Ry. Co. v. Railroad Commission of Mississippi*, 38 South. 356, 357, 86 Miss. 607.

## REBUILD

Anything which is "built" is formed "by uniting materials into a regular structure," and that which is "rebuilt" is constructed "after having been demolished." *United States v. Blair*, 190 Fed. 372, 374.

### As repair

See Repair—Repairs.

## REBUTTABLE PRESUMPTION

A "rebuttable presumption" of law is an inference which obtains until overthrown by proof. *Barrow v. Territory*, 114 Pac. 975, 976, 13 Ariz. 302.

## REBUTTAL

### REBUTTING EVIDENCE

"Rebutting evidence" is that which is given to explain, repel, counteract, or disprove testimony or facts given in evidence by the adverse party. *State v. Silva*, 120 Pac. 835, 839, 21 Idaho, 247.

To "rebut" means to contradict by counter proof, or repel by opposing testimony. Thus proof that one was peaceable and quiet does not rebut testimony that he was a large and strong man. *Kelly v. People*, 82 N. E. 198, 201, 229 Ill. 81, 12 L. R. A. (N. S.) 1169, 11 Ann. Cas. 226.

"Rebutting evidence" is that which is given by a party in a cause to explain, repel, contradict, or disprove the facts given in evidence by the other side. Evidence which shows that the evidence of the opposite party was not entitled to the force and effect which the law imputes to it prima facie must in its strictest sense be rebutting. *West Pub. Co. v. Edward Thompson Co.*, 152 Fed. 1019, 1020 (citing *United States v. Holmes*, 26 Fed. Cas. 349, 1 Cliff. 98; *Davis v. Hamblin*, 51 Md. 525, 529; *Lux v. Haggin*, 10 Pac. 674, 767, 69 Cal. 255; *United States v. Gardiner*, 25 Fed. Cas. 1245).

"Rebuttal evidence" is that which has become relevant or important only as an effect of some evidence introduced by the other side. The fatal shot having been fired by one of a crowd and killed a bystander, and the question being as to who fired it, and the prosecution having rested its case after offering evidence to show that defendant had fired it, and the defendant having rested his case after offering evidence to show that another member of the crowd had fired it, the prosecution could not offer the confession of defendant that he had fired the fatal shot as rebuttal. The confession was not "rebuttal evidence," but should have been offered as part of the evidence in chief. *State v. Smith*, 45 South. 415, 120 La. 530 (citing *Wigmore on Ev.* p. 2474).

"Rebutting evidence" is that evidence which is given by a party to counteract or disprove alleged facts which have been given in evidence by the other party. In an action for malicious prosecution on a charge of larceny by selling a mortgaged horse, plaintiff testified on cross-examination that he had never sold the horse; but, in support of the defense, a witness was permitted to testify that she saw a certain person bring a horse to plaintiff's residence and exchange it with him for the one in question, and plaintiff then was called in rebuttal to state whether he had ever traded horses, and what had been done with the horse in question. Held, that the exclusion of such offered evidence on the ground that it was not proper rebuttal was error. *Potter v. Sims*, 111 N. W. 29, 30, 135 Iowa, 739 (citing *Bouvier's Law Dict.*; *State v. Gadbois*, 56 N. W. 272, 89 Iowa, 25; *State*

v. Fourchy, 51 La. Ann. 228, 25 South. 109; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674).

Since rebutting evidence is that given by a party to explain, repel, counteract, or disprove facts given in evidence by the other side, more particularly applied to the evidence given by plaintiff to explain or repel evidence given by the defendant, defendant in a suit to restrain it from constructing certain railroad tracks in a street, not having offered in evidence the ordinance granting it the right to do so, plaintiff was not entitled to introduce evidence in rebuttal showing that the ordinance was invalid. *Seibel-Suessdorf Copper & Iron Mfg. Co. v. Manufacturers' Ry. Co. (Mo.)* 130 S. W. 288, 293.

## REBUTTER

In either sort of warranty, lineal or collateral, if the warrantor should implead the warrantee, the latter (the tenant) might show the warranty, and demand judgment whether, contrary to the warranty, the warrantor should be suffered to demand the thing warranted; and this was called a "rebutter." This rebutter was given as a defense to the title, to avoid circuity of action, since, if the demandant were to have recovered contrary to the warranty, the other party would recover the same lands, or lands of equal value, by force of the warranty. While in some of the states this doctrine of rebutter, which sprang from the common-law warranty, has been applied to the modern covenants for title, producing results often incongruous, and at times of greater or less hardship, yet in other states the English statutes have been declared to be in force; in others, they have been re-enacted, either literally or in substance; in others, the whole common-law doctrine of lineal and collateral warranty is deemed inapplicable to our system of jurisprudence; while in others lineal and collateral warranty, with all their incidents, have been abolished by statute. As the statute of Gloucester touching tenants by the curtesy, and that of fourth and fifth Anne (chapter 16) relating to joint tenants and tenants in common, wherein, in section 21, it was declared that all warranties made by any tenant for life of any lands coming to any person in reversion or remainder should be void, and that all collateral warranties of any lands by an ancestor who had no estate of inheritance in possession in the same should be void as against his heirs, are included in a resolution of the General Assembly of the then colony of Rhode Island, passed at a session held on the last Tuesday of February, A. D. 1749, for the purpose of introducing in full force into the colony certain English statutes named therein, the doctrine of "rebutter" probably had little or no application in this colony and state, and may be regarded as foreign to our practice, except in the manner suggested by Judge Story in *Sisson et al. v. Seabury*, 1

*Sumn.* 235, at page 263, 22 Fed. Cas. 238. The covenant of warranty may operate as a bar to the title of the heir by way of "rebutter," when it descends upon him from the warranting ancestor. Even the common-law definition of the word "rebutter" is becoming obsolete. It is neither to be found in *Bouvier's Law Dictionary*, *American & English Encyclopedia of Law*, nor in the *Encyclopedia of Pleading & Practice*. *Reinhalter v. Hutchins*, 60 Atl. 234, 236, 26 R. I. 585 (citing *Bigelow, Estop.* [5th Ed.] p. 388; *Rawle, Cov.* [5th Ed.] § 239).

## RECALL

As republican government, see *Republican Government*.

"Repeal" and "recall" are synonymous terms. *Wilson v. People*, 85 Pac. 187, 189, 36 Colo. 418.

## RECEIPT

See *Postmaster's Receipt*; *Receiver's Receipt*; *Tax Receipt*; *Trust Receipt*; *Warehouse Receipt*.

Any receipt, see *Any*.

A "receipt" is a written admission of payment. It is a paper given by the creditor to the debtor. *Chicago Art Co. v. Thacker*, 63 S. E. 770, 777, 778, 65 W. Va. 143. See, also, *State v. Scanlan*, 94 N. W. 686, 89 Minn. 244.

The word "receipt," as in common use, means no more than a bare acknowledgment of having received something, and, in the absence of evidence to show the contents of a receipt given by a consignee to a railroad company, it was error to permit the jury to assume that the writing contained any special clause enlarging such acknowledgment. *Erle R. Co. v. Wanaque Lumber Co.*, 69 Atl. 168, 75 N. J. Law, 878.

### Acceptance distinguished

The term "acceptance" covers more than "receipt," and a receipt of goods without an acceptance is not sufficient to satisfy the statute of frauds. *Patterson & Holden v. Sargeant, Osgood & Roundy Co.*, 77 Atl. 338, 339, 83 Vt. 516, 138 Am. St. Rep. 1102.

### Baggage check

A railroad baggage check is not a contract, but a "receipt," and is prima facie evidence of a delivery of baggage to the carrier. *Park v. Southern Ry.*, 58 S. E. 931, 932, 78 S. C. 302.

### Conclusiveness

A "receipt" has not the force of a written contract, and is open to explanation by parol evidence. *Ramapo Foundry & Wheel Works v. Carey*, 113 N. Y. Supp. 10, 11.

"Receipts," whether for money or for property, are informal, nondispositive writings, open to explanation, modification, or contradiction by parol evidence. They may

be of twofold character. It may be not only an acknowledgment or admission of the receipt of money or property in payment or satisfaction of a debt, but it may contain a contract distinct and independent, or, as expressed by Mr. Greenleaf, "terms, conditions, and agreements or assignments." *Willoughby v. Hannon*, 47 South. 241, 156 Ala. 585 (adopting definition in *Gravlee v. Lamkin*, 24 South. 756, 120 Ala. 221).

A "receipt" is only an acknowledgment or admission by the party giving it that he has received the money or property therein named, and, like any other admission or recital, may be controverted or explained by extrinsic evidence. *Jersey Island Dredging Co. v. Whitney*, 86 Pac. 509, 510, 149 Cal. 269 (citing *Greenl. Ev.* § 305; 2 Pars. Cont. 555; *Comptoir D'Escompte de Paris v. Dresbach*, 20 Pac. 28, 78 Cal. 15).

A "receipt" is not intended to be an exclusive memorial, and for this reason the authorities all hold that the facts may be shown. A "receipt" is only a written admission of a transaction independently existing, and, like other admissions, it is not conclusive. It is evidence—and often very convincing evidence—against the party who gives it, but it is not conclusive. Being only evidence of a fact, it cannot be held to destroy any existing right, in no way connected with it. *California Packers' Co. v. Merritt Fruit Co.*, 92 Pac. 509, 511, 6 Cal. App. 507.

In an action to recover a deposit, the exclusion of plaintiff's conversation with defendant's representative, when he signed a receipt taken by defendant to show payment, was reversible error, since a "receipt" is only prima facie evidence of the facts stated therein, which may be explained by parol. *Gutierrez v. Garcia*, 138 N. Y. Supp. 1079.

"A 'receipt in full' given by a creditor to his debtor is prima facie what its language indicates, viz., a complete payment of all that is due the creditor; and, though it may be contradicted, it becomes, in the absence of evidence that full payment was not in fact made, conclusive and cannot be ignored." *Wherley v. Rowe*, 119 N. W. 222, 223, 106 Minn. 494 (citing *Morris v. St. Paul & C. Ry. Co.*, 21 Minn. 91; *Scandinavian Coal & Min. Co. v. Whitaker*, 19 Pac. 330, 40 Kan. 123; *Gleason v. Sawyer*, 22 N. H. 85; *New Jersey Flax Cotton Wool Co. v. Mills*, 26 N. J. Law, 60; *Riley v. Mayor, etc., of City of New York*, 96 N. Y. 331; *Cunningham v. Batchelder*, 32 Me. 316).

"It is perfectly well settled law that 'receipts,' whether contained in deeds or elsewhere, are not conclusive of the payment of money, but only prima facie proof, and always open to explanation. Thus an acknowledgment of the purchase money in the body of a deed, and a receipt indorsed, are not conclusive evidence of such payment. A receipt for the purchase money indorsed on

a deed is only prima facie evidence, and may be rebutted by evidence." In *re McPherson's Estate*, 61 Atl. 954, 955, 212 Pa. 425 (quoting with approval from *Nichols v. Nichols*, 19 Atl. 422, 423, 133 Pa. 438, 454).

**As contract**

See Contract.

**As personal property**

See Personal Property.

**Railroad's per diem sheet**

"The term 'receipt' usually implies a formal paper signed by one party and delivered to another." "Receipt," within Code 1902, § 2176, making the initial carrier liable for loss of goods shipped over its own and connecting lines, unless it produces a "receipt" in writing, is not required to be in any particular form, and the railroad company's office record known as "per diem sheet," which accompanies all cars transferred from one railroad company to another and is signed by the agents for both receiving and delivering roads, and being an acknowledgment of a receipt of the car by the receiving company, is sufficient. *Jonesville Mfg. Co. v. Southern R. Co.*, 58 S. E. 422, 423, 77 S. C. 480 (citing *Miller v. Railway Co.*, 11 S. E. 1093, 33 S. C. 359, 366, 9 L. R. A. 833).

**Release distinguished**

"A 'receipt' is evidence that an obligation has been discharged, but a 'release' is itself a discharge of it." A release cannot be varied, as against one whose interests may be affected by it, by parol evidence that the parties did not intend it according to its legal effect. A release given for a valuable consideration for all causes of action, including trespasses, is a release of a cause of action for unlawful confinement of the person previously procured by the persons to whom the release is given jointly or severally. Where a release is given extinguishing a demand wholly unliquidated, whether the sum received for the release is large or small is immaterial. *Allen v. Ruland*, 65 Atl. 138, 140, 79 Conn. 405, 118 Am. St. Rep. 146, 8 Ann. Cas. 344.

**RECEIPT OF PROCEEDS**

The acceptance of an oral promise to deliver brick in consideration of the conveyance of land constituting a homestead is not a "receipt of the proceeds" of a sale thereof within Rev. St. 1898, § 1158, exempting the "proceeds" of a sale of a homestead for one year after the "receipt thereof," and the year of exemption does not run from that time, but from the time of delivery of the brick. *Christensen v. Beebe*, 91 Pac. 129-131, 32 Utah, 406.

**RECEIPT OF WRIT**

Under Comp. Laws 1909, c. 87, art. 32 (section 6226), providing that the defendant in a mandamus proceeding, immediately upon "receipt of the writ," or at some other speci-

fled time, shall obey its mandate, and that he shall then "return the writ" with his certificate of having done as commanded, the original writ should be served and not a copy, since the defendant could not be in receipt of the writ until it was delivered to him, and could not return the writ unless he had previously received it, and not a mere copy thereof. *Ellis v. Outler*, 106 Pac. 957, 958, 25 Okl. 469.

### RECEPTOR

In attachment a "receptor" is one to whom possession of the property is delivered as bailee for the sheriff until production is required by the court. *McDonald v. Loewen*, 130 S. W. 52, 55, 145 Mo. App. 49.

### RECEIPTS

See Gross Receipts; Net Receipts.

Acts 30th Leg. (1st Ex. Sess.) c. 18, § 11 provides that wholesale dealers or distributors of intoxicating liquors, shall make a quarterly report to the Comptroller of Public Accounts, showing the "gross amount collected and uncollected from any and all sales made within this state \* \* \* during the quarter next preceding," and "at the time of making said report shall pay \* \* \* an occupation tax for the quarter beginning on said date, equal to one-half of one per cent. of said gross receipts from said sales as shown by said report." Held, that the tax was on the gross sales whether collected or uncollected during the preceding quarter; the word "receipts," when used in a commercial sense, meaning the receiving of obligations or promises to pay, whether written or verbal, as well as cash. *Eppstein v. State*, 143 S. W. 144, 146, 105 Tex. 35.

### RECEIVABLE

See Bill Receivable.

### RECEIVE

See Injury Received; Value Received.  
Received in cash or otherwise, see Otherwise.

In a deed of marriage settlement conveying to a trustee all the estate, both real and personal, and all the choses in action, that the wife may be possessed of or entitled to receive, etc., "and all the estate, either real or personal, or choses in action, that the above-named C. [the wife] may hereafter receive or be entitled by right, devise, or bequest," the word "receive," in the clause quoted, refers only to the personal property, leaving the deed, so far as it relates to the future acquisition of real estate, as if it read, "and all the real estate that the above-named C. may hereafter be entitled to by right, devise, or bequest"; and hence land conveyed by deed to the wife during her coverture is not within the deed of settle-

ment, and may be mortgaged by her without the trustee's consent. *Dunlap v. Hill*, 59 S. E. 112, 114, 145 N. C. 312.

#### As accept

The terms "accept" and "receive," within Kirby's Dig. § 1814, which makes it an offense to accept and receive deposits in an insolvent bank, are synonymous. *Morris v. State*, 145 S. W. 213, 214, 102 Ark. 513.

The ordinary and accepted meaning of "receive" is synonymous with that of "accept." *Standard Oil Co. of Indiana v. United States*, 164 Fed. 376, 390, 90 C. C. A. 364.

#### As charged in settlement

Usurious interest, being charged in the settlement of a building and loan association with a borrowing member, is "received," within Code 1906, § 2678, authorizing recovery of interest paid, where usury is received. *Mississippi Building & Loan Ass'n v. McElveen*, 56 South. 187, 189, 100 Miss. 16.

#### As including assent

Act March 29, 1907 (St. 1907, p. 414, c. 189), penalizing every officer of any bank who "receives any deposits" knowing that the bank is insolvent, does not penalize the act of assent to the reception of a deposit, and, where a receiving teller of an insolvent incorporated bank received a deposit, the president, though knowing of the insolvency, cannot be punished on the theory that he assented to the reception of the deposit; the word "receives" involving an affirmative act, and does not include an assent to the reception involving only a mere passive acquiescence. *Ex parte Rickey*, 100 Pac. 134, 142, 31 Nev. 82, 135 Am. St. Rep. 651.

#### As received by executor or successor of trustee

Under Code Civ. Proc. §§ 2730, 2802, 3320, prescribing the compensation of trustees, a trustee, succeeding a deceased trustee, is not entitled to commissions on the funds "received" from the representative of the deceased trustee. In *re Ward's Estate*, 112 N. Y. Supp. 763.

Moneys found among the effects of a deceased trustee are not "received" by his executor, as that term is used in section 2730 of the Code of Civil Procedure, relating to commissions of executors and administrators on moneys received by them. In *re Ingraham*, 112 N. Y. Supp. 763, 766, 60 Misc. Rep. 44.

#### As received by lessors

Where the lease to plaintiff recites that it is subject to a prior lease to other persons and provides that all rents "received on account of said lease" are to be credited as part payment under the terms of this lease (the lease to plaintiff), the word "received" means received by the lessors, and the language fairly implies that the rent to accrue under the prior lease is to remain payable to them notwithstanding the second lease.

Shea v. McCauliff, 72 N. E. 69, 70, 186 Mass. 569.

#### **As receiving protection of trade union**

The constitution of the Brotherhood of Painters, providing that the initiation fee paid by an applicant for membership must accompany the application and be returned in case the applicant is rejected, with a proviso that, if the fee is paid in installments while the applicant is "working at the trade and 'receiving the protection of the brotherhood,'" such payments shall be forfeited to the brotherhood if the applicant has made any false statements or is unable to qualify as a member, and there being evidence tending to show a custom of the brotherhood not to permit its members to work with men who were not members. Held, that evidence that an applicant, pending his application, worked at the trade together with members of the brotherhood, did not show that plaintiff was "receiving the protection of the brotherhood." Levin v. Cosgrove, 87 Atl. 1070, 1071, 75 N. J. Law, 344.

#### **Indians receiving rations and annuities**

An Indian woman of the half-blood was born on the Sioux reservation and exercised what she believed to be her right to go on the reservation because of her Indian Yankton Al blood, and she constantly associated and affiliated with the Sioux tribes. She married a white man; but according to the custom of the tribes of the Sioux Nation, she remained the head of the family, and the right to tribal property was determined by her nationality. Her children were born into such Indian tribes, and she and her descendants were actual residents on the reservation and associated and affiliated with the tribes of the Nation prior to Act March 2, 1889, c. 405, 25 Stat. 888, setting apart a permanent reservation for the Indians "receiving rations and annuities." Held, that she and her descendants were within the Treaty of April 29, 1868, 15 Stat. 635, setting apart land for Indians of the several tribes of the Sioux Nation and such other friendly tribes or individual Indians as from time to time they adopted with the consent of the United States, the words "receiving rations and annuities" in the act of 1889 not being intended to be interpreted in the light of future regulations requiring rolls to be made up and approved by an officer of the United States in the Indian Department, and she and her descendants were entitled to be considered Indians of the Rosebud reservation within Act March 3, 1889, c. 450, 30 Stat. 1362. Sully v. United States, 195 Fed. 113, 128, 129.

#### **Receive message by telegraph as including telephone**

There are authorities which hold that in the construction of statutes the word "telegraph" embraces "telephone," and that statutes concerning telegraph companies include

telephone companies as well. But the Arkansas statute declaring that "telegraph" companies shall be liable for mental anguish or suffering on account of negligence "in receiving, transmitting, or delivering messages" does not include "telephone" companies. A telephone company does not "receive," "transmit," and "deliver" a message in the ordinary acceptance of those words. It merely furnishes to the patron facilities for carrying on a conversation at long distance. Southern Telephone Co. v. King, 103 Ark. 160, 146 S. W. 489, 490, 491, 39 L. R. A. (N. S.) 402 (citing Northwestern Telephone Exchange Co. v. Chicago, M. & St. P. Ry. Co., 79 N. W. 315, 76 Minn. 334).

#### **As transfer of possession**

Where the buyer of goods canceled the order before shipment, and refused them on shipment, and notified the seller that the goods were in the freighthouse at his risk, and awaiting his order, there was no receipt of the property within section 7 of the statute of frauds (Burns' Ann. St. 1908, § 7469) invalidating contracts for the sale of goods for the price of \$50 or more, unless the purchaser shall "receive" a part thereof. Porter v. Patterson, 85 N. E. 797, 799, 42 Ind. App. 404.

### **RECEIVING EVIDENCE**

#### **View**

The jury in a criminal case, in viewing the place of the commission of the offense, as authorized by Pen. Code, § 1119, is receiving evidence, and accused is entitled to have the judge present. People v. White, 90 Pac. 471, 475, 5 Cal. App. 329.

### **RECEIVING STOLEN GOODS**

See Fence (Receiving Stolen Goods).

See, also, Permanently Deprive the Owner.

To constitute the crime of "receiving stolen property," knowing the same to have been stolen, the act of receiving or concealing the same must be accompanied with a criminal intent of the accused to aid the thief or hope to obtain some gain or reward for restoring the stolen property to the owner, or in some way to derive a benefit or profit therefrom. Pickering v. United States, 101 Pac. 123, 124, 2 Okl. Cr. 197. See, also, People v. O'Reilly, 138 N. Y. Supp. 776, 783, 153 App. Div. 854.

One of the essential ingredients of the crime of "receiving" and aiding in the concealment of stolen goods knowing the same to have been stolen is knowledge on the part of the doer or receiver that the goods have been stolen, and this knowledge must exist at the time of the receipt or purchase of the goods. It need not be such direct knowledge as comes from witnessing a theft, but it is sufficient that circumstances were such accompanying the transaction as to make defend-



ant believe the goods had been stolen. *State v. Druxinman*, 75 Pac. 814, 815, 34 Wash. 257.

"The same person cannot be both thief and the receiver in a criminal sense. In order to constitute the crime of 'receiving stolen goods,' knowing them to have been stolen, there must be a thief and a receiver. The statute never contemplated that the thief could be guilty of 'receiving stolen goods' from himself." *Perry v. Martin*, 62 Atl. 1001, 1002, 73 N. J. Law, 310.

Under Pen. Code, § 550, providing that "a person who buys or 'receives' any stolen property \* \* \* knowing the same to have been stolen, \* \* \* or who corruptly, for any money, property, reward, or promise or agreement for the same, conceals, withholds, or aids in concealing or withholding any property, knowing the same to have been stolen, \* \* \* is guilty of criminally receiving such property," the property must have been stolen by some one and have been bought, received, or withheld by one who must have known it was stolen, to constitute a crime. *People v. Walker*, 91 N. E. 806, 807, 198 N. Y. 329.

To constitute the crime of "receiving stolen goods" under Cr. Code, § 239 (Hurd's Rev. St. 1908, c. 38), prohibiting the receiving of stolen property with knowledge that it has been stolen, the property must be bought for the purchaser's own gain, or to prevent the owner from again possessing it, and the purchaser must have knowledge that the property was obtained by larceny. *People v. Israel*, 88 N. E. 802, 803, 240 Ill. 375.

To sustain the prosecution of a prisoner for receiving goods, knowing them to be stolen, it must be shown that the goods or other things were previously stolen by some other person; that the accused bought or received them from another person, or aided in the concealing of them; that, at the time he so bought or received them, or aided in concealing them, he knew they had been stolen; that he so bought or received them, or aided in concealing them, *malo animo*, or with a dishonest intent. *Territory v. Graves* (N. M.) 125 Pac. 604, 605.

The doctrine seems to be established that in those states in which, by statute or at common law, it is larceny to bring into the state goods stolen in another state or a foreign country, one who there "receives" goods with knowledge that they have been stolen in another state or country is liable to indictment for receiving the goods. This does not apply, however, in those states, in which it is held that bringing into the state goods stolen in another state or foreign country does not constitute larceny; for the goods must have been stolen in the jurisdiction in which it is sought to punish the receiving. It is not a crime for one to receive in Georgia goods stolen in a foreign jurisdic-

tion. *Golden v. State*, 58 S. E. 557, 2 Ga. App. 440 (citing 12 Cyc. p. 210).

## RECEIVER

See Auxiliary Receiver; Chancery Receiver; Equitable Receiver; Permanent Receiver; Special Receiver; Statutory Receiver; Temporary Receiver. Application for receiver, see Application. Discharge of receiver, see Discharge. Included in street railroad corporation, see Street Railroad Corporation. Removal, see Remove—Removal.

A "receiver" is but an officer of the court, whose tenure of office is indeterminate. *National Exchange Bank v. Woodside*, 80 S. W. 715, 716, 107 Mo. App. 47.

A "receiver" is "the officer of the court, appointed on behalf of all parties, to take the possession and hold [the property] for the benefit of the party ultimately entitled." *Town of Vandalla v. St. Louis, V. & T. H. R. Co.*, 70 N. E. 662, 664, 209 Ill. 73 (citing *Coates v. Cunningham*, 80 Ill. 467).

A "receiver" is a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit, and he holds the property for the benefit of all the parties interested, and his title and possession is that of the court. *State v. Norfolk & S. Ry. Co.*, 67 S. E. 42, 44, 152 N. C. 785, 26 L. R. A. (N. S.) 710, 21 Ann. Cas. 692.

"The conception of a receiver is some one to take manual possession, for the court, of property, to take it out from the possession of others, and hold it for the better security of those who may be ultimately entitled thereto." *Harrigan v. Gilbert*, 99 N. W. 909, 951, 121 Wis. 127.

A receiver is only an officer of the court. Where a receiver appointed by a state court was authorized to demand and receive any and all sums which may have been or might thereafter be collected or received on account of a certain police board tax for certain years, and thereafter the authority was enlarged so as to include all the assets, claims, and taxes owned and collected by and due to such board prior to 1879, such authority was not sufficient to give the receiver the right to sue to recover such assets or claims. *Hubert v. City of New Orleans*, 130 Fed. 21, 24, 64 C. C. A. 389 (quoting *Screven v. Clark*, 48 Ga. 41).

A receiver is the arm of the court, to hold possession of property and manage it for the benefit of the persons ultimately entitled to it, his possession being that of the court; and he is not the representative of the corporation whose property he holds. *Sullivan Timber Co. v. Black*, 48 South. 870, 876, 159 Ala. 570.

A receiver is an officer of the court, the representative of the court in administering

trust estates. He acts by order of the court. His powers come from the court. He has no individual status. His duty is to bring all the property belonging to his trust into possession, familiarize himself with the details of the estate and its business, keep accurate accounts, and make detailed reports with his recommendations to the court, to the end that the estate may be closed by the court as soon as the best interests of its owners or creditors will justify. *Decker Bros. v. Berners Bay Min. & Mill. Co.*, 2 Alaska, 504, 509.

Though the mandatory words of an order directing the delivery of possession of property to a person "as receiver" pending an action were addressed to another than the "receiver," they necessarily carried with them an authorization to the person designated as "receiver" to take possession as such, and the order is sufficient as an appointment, since a receiver is a person authorized to take possession of property in litigation for the purpose of preserving it for whichever of the litigants the court may finally determine is entitled thereto. *Cook v. Terry*, 127 Pac. 816, 817, 19 Cal. App. 765.

A receiver is but an arm of the court to take care of and administer the property, assets, and estate in suit, to do with it as the law may direct for the benefit of the parties concerned; and, while in theory he can do nothing without the court's order or sanction, he has, in matters of management and manner of disposition of the estate, a large discretion. *Coy v. Title Guarantee & Trust Co.*, 198 Fed. 275, 280.

A receiver is an arm or officer of the court which appoints him, and whatever he does under order of the court regarding the property in his hands is the act of the court; nor is the possession altered by an order vacating the appointment of the receiver and substituting another person in that position. *State ex rel. Sullivan v. Reynolds*, 107 S. W. 487, 492, 209 Mo. 161, 15 L. R. A. (N. S.) 963, 123 Am. St. Rep. 468, 14 Ann. Cas. 198.

A receiver is an officer of the court appointing him, and his power does not extend beyond the jurisdiction of that court, and will not be recognized by the courts of another state, except upon considerations of comity. *Choctaw Coal & Mining Co. v. Williams-Echols Dry Goods Co.*, 87 S. W. 632, 75 Ark. 365, 5 Ann. Cas. 569. See, also, *Malone v. Johnson*, 101 S. W. 503, 505, 45 Tex. Civ. App. 604.

Receivers being officers of the court are not agents of the party for whom they are appointed receivers, in the sense that they have authority to bind such party by any act or omission on their part. *Stannard v. Robert H. Reid & Co.*, 103 N. Y. Supp. 521, 527, 118 App. Div. 304.

The "receiver" being an arm of the court, his authority for taking over the properties of

concerns involved, for administering their business affairs, and for issuing receiver's certificates, with a view for obtaining funds for discharging liabilities incident to the receivership, is but another expression for the authority of court, without whose orders and directions the receiver is powerless to do anything. *International Trust Co. v. Decker Bros.*, 152 Fed. 78, 82, 81 C. C. A. 302, 11 L. R. A. (N. S.) 152.

A "receiver" considered as an arm of the court usually termed an "equitable receiver" is a mere custodian without title and without power saving that conferred upon him by the order appointing him, and under Corporation Act (P. L. 1896, p. 277) is a statutory "receiver." He is the legislative agency to be named by the court to have such powers as the Legislature has vested in him, and is a separate entity. *Cogan v. Conover Mfg. Co.*, 60 Atl. 408, 415, 69 N. J. Eq. 358.

A "receiver" is a person appointed by a court to take into his custody, control, and management the property or funds of another pending judicial action concerning them. *John C. Orr Co. v. Cushman*, 104 N. Y. Supp. 510, 511, 54 Misc. Rep. 121 (quoting *Stand. Dict.* vol. 2, p. 1489).

The main purpose of a "receiver" is to preserve the property or thing in controversy pending litigation concerning it, and hence the principal ground for a receiver's appointment is danger of loss of or injury to the property or thing in controversy before the court can make a disposition thereof by final decree on the merits. *Hastings v. Tousey*, 106 N. Y. Supp. 639, 640, 121 App. Div. 815.

A "receiver" is an officer of the court from which he receives his appointment. He is sometimes described as an impartial and indifferent person between the parties to a cause, appointed by the court to receive and preserve the property or funds in litigation pendente lite, when it does not seem reasonable to the court that either party should hold it. He is in no sense an agent or representative of any party to the action. He exercises his function in the interests of no individual interested in the litigation, but for the common benefit of all concerned. He is frequently spoken of as the "hand of the court," and has been called the "executive hand of the court" (citing *High. Rec.* § 2; *Beach, Rec.* § 2). Hence the compensation of a receiver and the party or parties to be charged with the payment of the same are matters to be determined by the court from which the receiver derives his appointment. *Hall v. Stulb*, 55 S. E. 172, 126 Ga. 521.

A "receiver" is "the mere right arm of the court appointing him, to obey its orders in matters of administration within its jurisdiction, and as such is entirely subject to its control. He executes bond for the faithful performance of his duties, to account alone

to the court appointing him; and the funds coming to his hands as such receiver are in custodia legis, held by him for distribution and application by the court whose commission he holds." A receiver in chancery of an insolvent corporation appointed by the United States Circuit Court for the Southern District of Iowa has no legal status to maintain a suit in a jurisdiction foreign to that appointing him, though leave to institute the suit has been granted by the court appointing him. *Fowler v. Osgood*, 141 Fed. 20, 21, 72 C. C. A. 270, 4 L. R. A. (N. S.) 824.

"A 'receiver' by his appointment does not become a litigant in the action, nor does he represent one more than the other of any of the parties to the controversy. He, when appointed, takes possession of the property as the right arm of the court for the benefit of the party ultimately entitled to it." *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 97 N. W. 613, 617, 68 Neb. 222, 63 L. R. A. 791, 110 Am. St. Rep. 400, 4 Ann. Cas. 59.

In general, a "receiver" by virtue of his appointment is clothed with only such rights of action as may have been maintained by the persons over whose estate he has been appointed and to whose rights, for purposes of litigation, he has succeeded. The "receiver" is the officer, the agent, and hand of the court, and therefore his powers are limited, and are derived from the order of appointment, if a common-law receiver, and from statute, if a statutory receiver. In *re National Mercantile Agency*, 128 Fed. 639, 640 (quoting and adopting *High*, Rec. [3d Ed. 1894] § 201; *Beach*, Rec. [Alderson's Ed. 1897] § 650).

"The 'receiver' is the representative of the court and of all the parties in interest, and can neither surrender to others nor divide with them the management of the prosecution or defense of such suits or the responsibility therefor." A receiver is appointed upon a principle of justice for the benefit of all concerned. He is virtually a representative of the court, and of all the parties in interest in the litigation wherein he is appointed. *Atlantic Trust Co. v. Dana*, 128 Fed. 209, 223, 62 C. C. A. 657 (quoting and adopting *Davis v. Gray*, 16 Wall. [83 U. S.] 203, 217, 21 L. Ed. 447; citing and adopting *Doggett v. Florida R. Co.*, 99 U. S. 72, 78, 25 L. Ed. 301; *Southern Exp. Co. v. Western North Carolina R. Co.*, 99 U. S. 191, 199, 25 L. Ed. 319; *Porter v. Sabin*, 13 Sup. Ct. 1008, 149 U. S. 473, 37 L. Ed. 815; *Gray v. Davis*, 10 Fed. Cas. 1006, 1009; *Ames v. Union Pac. Ry. Co.*, 60 Fed. 906; *High*, Rec. [3d Ed.] §§ 134, 135, 650; *Jones*, Railroad Securities, § 495).

A "receiver" is an officer of the court and not in any sense an agent or representative of either party; he is not such a general agent as to have any implied power, and he

cannot make effectual contracts which are not authorized or ratified by the court. *Lazear v. Ohio Valley Steel Foundry Co.*, 63 S. E. 772, 773, 777, 778, 65 W. Va. 105.

A "receiver" is but an officer of the court by whom he is appointed—as it is sometimes said, the right hand of the court. His custody is that of the court, and he cannot act, save as he may be specially authorized. He may not enter into litigation respecting property in his possession, save by consent of the court. And the law of comity among courts, whether of the same or a different state or jurisdiction, requires that leave should be asked and granted before suit against a receiver. *Manker v. Phoenix Loan Ass'n of St. Joseph (Iowa)* 96 N. W. 982, 983 (citing *Smith v. St. Louis & S. F. Ry. Co.*, 52 S. W. 378, 151 Mo. 402, 48 L. R. A. 368; *Keen v. Breckenridge*, 96 Ind. 69; *Central Trust Co. v. Railway*, 59 Fed. 523; *Haag v. Ward*, 89 Mo. App. 186).

A "receiver" is an officer of the court appointing him. He is its immediate representative in the custody and administration of the property of which it has taken possession, and a suit against him without permission of the court, unless authorized by statute, is an unwarranted interference with the court's possession; but, where the receiver has contested a suit on the merits; the record of the judgment against him need not affirmatively show that permission was obtained to sue, in order that the judgment may be given effect in other suits in other courts. *Ridge v. Manker*, 132 Fed. 599, 601, 67 C. C. A. 596.

A "receiver" is a mere officer of the court whose first duty is to obey the orders of the court. He has no discretion, speaking generally, as to the application of funds which are in his hands by virtue of the receivership, and he holds them strictly subject to the order of the court, to be disposed of as the court may direct. Being a mere agent of the court, he has no authority to appeal from orders made by it in the pending proceeding, except as it may authorize him so to do, and with the further exception that he has the right to appeal in all matters relating to his official conduct or his accounts and credits, or from judgments rendered against him in other proceedings. *Polk v. Johnson (Ind.)* 76 N. E. 634, 635 (citing *Herrick v. Miller*, 24 N. E. 111, 123 Ind. 304; *Smith v. Harris*, 35 N. E. 984, 135 Ind. 621, 629; *How v. Jones*, 14 N. W. 193, 60 Iowa, 70; *Dorsey v. Sibert*, 9 South. 288, 93 Ala. 312; *People v. Troy Steel & Iron Co.*, 31 N. Y. Supp. 337, 82 Hun. 303; *Smith on Receiverships*, § 417).

A "receiver" is a person appointed by a court or judicial officer to take charge of property during the pendency of a civil action, suit, or proceeding, or upon a judgment, decree, or order therein, and to manage and

dispose of it as the court or officer may direct. *B. & C. Comp. § 1080. Egan v. North American Loan Co., 76 Pac. 774, 775, 45 Or. 131.*

Under Ballinger's Ann. Codes & St. § 5455, defining a "receiver" as a person appointed by a court to take charge of property pending a civil action or proceeding, and to manage and dispose of it as the court may direct, a person appointed by the court to take charge of mortgaged chattels and retain the same pending foreclosure proceedings is a "receiver," whether appointed under section 5486, providing generally when receivers may be appointed, or under sections 5877, 5878, relating to the case of a chattel mortgagee having reasonable cause to believe the debt is insecure. *Libert v. Unfried, 91 Pac. 774, 775, 47 Wash. 182.*

A "receiver" is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question, pending the suit, where it does not seem reasonable to the court that either party should do it. He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant, or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court. He has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate; the possession of the receiver is but the possession of the court; and the court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. The trustee in a mortgage of the property of a canal and irrigation company, who brings a suit for foreclosure and sale, and obtains the appointment of a receiver to take charge of and manage the property pendente lite, does not, by reason of such action, become personally liable for money borrowed, expenses incurred, and certificates issued by the receiver under orders of the court, in keeping the corporation on its feet as a going concern, which the proceeds of the sale proved insufficient to pay. *Atlantic Trust Co. v. Chapman, 28 Sup. Ct. 406, 409, 208 U. S. 360, 52 L. Ed. 528, 13 Ann. Cas. 1155 (citing Booth v. Clark, 58 U. S. [17 How.] 322, 331, 15 L. Ed. 164, 167; Porter v. Sabin, 13 Sup. Ct. 1008, 1010, 149 U. S. 473, 479, 37 L. Ed. 815, 818).*

A receiver appointed in an action to foreclose, on allegation that the property is

insufficient to satisfy the debt, as expressly authorized by Burns' Ann. St. 1901, § 1236, subd. 4, is neither an "assignee" nor "receiver," within section 7051, providing that where a property owner's business shall be put into the hands of any assignee, receiver, or trustee, the debts owing to laborers or employes by the property owner shall be treated as preferred debts; nor is such receiver an "assignee" or "receiver" within section 7058, providing that all debts due any person for manual or mechanical labor shall be preferred claims in all cases where property shall pass into the hands of an "assignee" or "receiver," and shall be first paid in full. *McDaniel v. Osborn (Ind.) 72 N. E. 601, 603.*

The bill having been framed against the defendant as "receiver," the suit cannot be turned into a personal action against him, on the theory that the word "receiver" is only descriptio personæ and may be disregarded. *Thompson v. Evans, 2 Tenn. Ch. App. 61, 70.*

**As creditor**

See Creditor.

**As legal representative**

See Legal Representative.

**As officer**

See Officer.

**As successor**

See Successor.

**Receiver in bankruptcy**

A bankrupt's receiver is not invested with title, but is a mere custodian without discretion, and until a trustee is appointed there is no legal representative of the estate clothed with title or authority regarding the same. *In re Rubel, 166 Fed. 131, 133.*

**Receiver of railroad**

A receiver of a railroad is not the agent of the company, nor its representative, nor in any sense under its control. He is a person who comes into possession of the equipment and business in invitum, placed there by the court which virtually sequesters the property for the time being to preserve it from ruin for the benefit of creditors primarily and other parties interested secondarily. *Eckels v. Farley, 131 Ill. App. 557, 559.*

**RECEIVERSHIP**

See Dry Receivership.

As suit, see Suit.

**RECEIVER'S RECEIPT**

A final receiver's "receipt" is an acknowledgment by the government that it has received full pay for the land; that it holds the legal title in trust for the entryman and will in due course issue to him a patent. The entryman is the equitable owner of the land, and it becomes subject to state taxation and under the control of the state laws in respect to conveyances, inheritances, etc. A bona

hide purchaser of standing timber from the holders of receivers' final receipts for the purchase price of lands entered under the timber act of June 3, 1878 (20 Stat. 89, c. 151), cannot, upon avoidance for the fraud of the entryman of the patents afterwards issued, be required to account to the federal government for the timber which it has paid for and cut and removed in reliance upon its purchase. *United States v. Detroit Timber & Lumber Co.*, 26 Sup. Ct. 282, 287, 200 U. S. 321, 50 L. Ed. 499 (citing *Carroll v. Safford*, 44 U. S. [3 How.] 441, 11 L. Ed. 671; *Witherspoon v. Duncan*, 71 U. S. [4 Wall.] 210, 18 L. Ed. 339; *Simmons v. Wagner*, 101 U. S. 260, 25 L. Ed. 910; *Winona & St. P. Land Co. v. Minnesota*, 16 Sup. Ct. 83, 159 U. S. 528, 40 L. Ed. 247; *Cornelius v. Kessel*, 9 Sup. Ct. 122, 128 U. S. 456, 32 L. Ed. 482; *Hastings & D. R. Co. v. Whitney*, 10 Sup. Ct. 112, 132 U. S. 357, 33 L. Ed. 363; *Benson Min. & Smelting Co. v. Alta Min. & Smelting Co.*, 12 Sup. Ct. 877, 145 U. S. 428, 36 L. Ed. 762).

#### RECEIVER'S SALE

As judicial sale, see *Judicial Sale*.

#### RECENT

"Recent," within the rule as to inference of guilt from recent possession of stolen property, is a relative term, depending on the surrounding circumstances, including the character of the property (citing Words and Phrases, "Recent"). *People v. Friedman*, 134 N. Y. Supp. 153, 156, 149 App. Div. 873.

The term "recent possession," as used in an instruction in a prosecution for larceny, as to the "recent possession" of stolen property, is merely relative and depends on all the circumstances of the case, and whether it is sufficiently recent to justify drawing an inference is usually a question of fact for the jury. *State v. Minnick*, 102 Pac. 605, 607, 54 Or. 86.

The term "recent," in the rule that the recent possession of a stolen article imposes on the possessor the burden of explaining his possession, and that his failing to make a reasonable explanation raises an evidential presumption of guilt, which will support a conviction, has reference to the time of the larceny; so that the evidence being that the article was stolen in November of a certain year, and he testifying that he received it some time before Christmas of that year, there is evidence of such possession. *Jackson v. State*, 52 South. 730, 731, 167 Ala. 77.

The bill to remove cloud from title, complainants claiming under their ancestor, who died 55 years before, and through an execution sale made to him 9 years before that, alleging that "after" such sale persons set about to cheat and defraud them of the lands, get possession and dispose thereof, and concealed as far as possible all the

facts from complainants, who have just of "recent years" learned the facts, does not show that complainants have not had knowledge of the facts for 10 years, or have used diligence to discover them, so as to bring them within the exception to Code 1892, § 2731, providing a limitation of 10 years from the accrual of the right to recover for suits in equity to recover land. *Jones v. Rogers*, 38 South. 742, 748, 85 Miss. 802.

#### RECENTLY

In order that threats should be part of the *res gestæ*, something more must be shown than that they were made "recently," as this may mean hours, days or, for the matter of that, months before the fatal occurrence. *State v. Thomas*, 35 South. 914, 111 La. 804.

#### RECESS

Where the record of the board of supervisors showed that the board adjourned to a specified time, an amendment of the record showing that it took a recess until that time was unimportant; the words "recess" and "adjourn" both meaning that the meeting was postponed until the time specified. *Beattie v. Roberts (Iowa)* 137 N. W. 1006, 1008.

#### RECIPROCAL

See *Mutual and Reciprocal*.

#### RECIPROCAL WILL

A joint will is a single instrument containing the wills of two or more persons. A mutual will, or more strictly speaking a "reciprocal will," is one by which each testator makes testamentary disposition in favor of the other. *Bower v. Daniel*, 95 S. W. 347, 357, 198 Mo. 289 (citing *Schumaker v. Schmidt*, 44 Ala. 454, 4 Am. Rep. 135; *Dias v. Livera*, 5 App. Cas. 123; *In re Diez*, 50 N. Y. 88; *Cawley's Estate*, 20 Atl. 567, 136 Pa. 628, 10 L. R. A. 93).

Wills by two parties each in favor of the other are sometimes called "counter" or "reciprocal" wills. *Deseuneur v. Rondel*, 74 Atl. 703, 705, 76 N. J. Eq. 394 (citing *Duvale v. Duvale*, 35 Atl. 750, 54 N. J. Eq. 581, 588; *Id.*, 39 Atl. 687, 40 Atl. 440, 56 N. J. Eq. 375).

#### RECITE

#### RECITAL

##### In deed

"A 'recital in a deed' is defined to be in setting down or report of something done before, or more specifically the narrative of the previous agreements or matters of fact on which the transaction is founded." The residence of the purchaser who is named in a tax deed and who is not fictitious is not, in a legal sense, a recital therein, and the omission thereof will not render the deed void

upon its face. *Havel v. Decatur County Abstract Co.*, 91 Pac. 790, 792, 76 Kan. 336.

The limits of a grant must be sought for in the deed of the premises, and the description there is not technically a "recital"; for, instead of being either a narrative of the facts on which the instrument is based, or an explanation of the motive for the operative part thereof, it is the very thing, which, by setting a limit to the grant, creates the boundary, and to this extent a deed is effective against privies and strangers alike. *Bristol Mfg. Co. v. Palmer*, 74 Atl. 76, 77, 82 Vt. 438.

## RECKLESS — RECKLESSLY—RECKLESSNESS

See Rashly, Recklessly, or Wantonly.

In order to constitute willfulness or wantonness or reckless indifference to probable consequences, the act done or omitted must be done or omitted with a knowledge or a present consciousness that injury will probably result; and this consciousness is not to be implied from mere knowledge of the elements of the dangerous situation a person may be in and negligent and inadvertent acts in respect of the peril. *Duncan v. St. Louis & S. F. R. Co.*, 44 South. 418, 420, 423, 152 Ala. 118.

Where an engine, running at an unusually high speed in a railroad yard, struck coaches on a side track, injuring a car cleaner therein, and the engine came so fast that it knocked the coaches from a stationary position a car and a half in length, and damaged the engine and the coaches, punitive damages were authorized, within the rule permitting punitive damages where the wrongdoer acts in a "reckless disregard" of another's rights. *Bennett v. Charleston Union Station Co.*, 73 S. E. 340, 341, 90 S. C. 308.

The Rhode Island statute provides that no person shall operate a motor vehicle on the highways "recklessly," or so as to endanger the life or limb of any person and prescribes precautions to be taken by operators using the highways. A criminal complaint charged that defendant did "unlawfully" operate a certain motor vehicle on a certain highway "recklessly," and in operating it "recklessly" ran and drove into a team driven by complainant, so as to endanger his life and limb, etc. Held, that disregard of or inattention to the duty prescribed by the law constituted unlawfulness and recklessness; that the words "unlawfully" and "recklessly" in the complaint described the manner in which defendant drove, so as to negative an inference that the collision was an innocent accident; and that the facts stated constituted an offense. *State v. Welford*, 72 Atl. 396, 397, 29 R. I. 450.

### As intentional

A count is demurrable which in its charging part alleges that the act was recklessly "and" wantonly done while the specification shows that it was recklessly "or" wantonly done; "reckless" not being equivalent to "wanton" or "intentional." *Merrill v. Sheffield Co.*, 53 South. 219, 222, 169 Ala. 242.

### Negligence distinguished

The word "recklessly," when used conjunctively with "wantonly," means more than "negligently," and the conjoined words never import less than such conscious disregard or an indifference to the probable consequences of the act to which they refer as is the legal equivalent of willful misconduct and intentional wrong. *Bailey v. North Carolina R. Co.*, 62 S. E. 912, 914, 149 N. C. 169.

### As negligence

The word "reckless," as used in a complaint for negligence, does not impute willfulness or intention; it means nothing more than simple negligence. *Atchison, T. & S. F. R. Co. v. Baker* (Ind. T.) 104 S. W. 1182, 1192 (quoting and adopting definition in *Great-house v. Croan*, 76 S. W. 273, 4 Ind. T. 668).

A complaint for injuries caused by the explosion of a powder magazine, which alleges that the explosion was the result of the reckless and heedless act of defendant's servant in igniting the powder, alleges negligence; the words "reckless" and "heedless" implying negligence. *Fisher v. Western Fuse & Explosives Co.*, 108 Pac. 659, 661, 12 Cal. App. 739.

Where a complaint charged that an engineer wantonly, willfully, or recklessly caused or permitted steam to escape, thus causing the plaintiff to fall, and there was no allegation showing that this act was done while plaintiff was in obvious and imminent peril, the term "recklessly" cannot be understood as wantonly, and means no more than negligently, and charges but simple negligence, and thus the count merely charges willful, wanton, or simple negligence in the alternative. *Southern R. Co. v. Goins*, 56 So. 253, 254, 1 Ala. App. 370.

### As wantonness

In an action for death, an instruction directing a verdict for defendant, unless the jury found that the motorman in charge of the defendant's car, after perceiving the dangerous situation then and there existing, did "recklessly and wantonly" send his car forward, the terms "recklessly" and "wantonly" are synonymous. *Harrington v. Los Angeles Ry. Co.*, 74 Pac. 15, 20, 140 Cal. 514, 63 L. R. A. 238, 98 Am. St. Rep. 85.

The term "recklessly," in an allegation that a certain thing was done "carelessly, negligently, and recklessly," is tantamount to the allegation that it was a wanton disre-

gard of all consequences. *Gustafson v. Chicago, R. I. & P. Ry. Co.*, 128 Fed. 85, 96.

"Recklessness" is the equivalent of "wantonness" or intentional wrong. *Bussey v. Charleston & W. C. Ry.*, 55 S. E. 163, 167, 75 S. C. 116.

#### As willfulness

A "reckless act" is always regarded as the equivalent of a willful one. *Walsh v. United States*, 174 Fed. 615, 618, 98 C. C. A. 461 (quoting *Lear v. United States*, 147 Fed. 359, 77 C. C. A. 537).

The term "reckless" does not imply willfulness, but means rather "heedless, careless, rash, indifference to consequences." *Robinson v. Helena Light & Ry. Co.*, 99 Pac. 837, 843, 38 Mont. 222.

The Oklahoma statute declares that every person who "willfully" discharges a firearm in a public place, etc., is guilty of a misdemeanor. A complaint charged defendants with violating the statute by shooting "recklessly" and in a manner liable to injure some one. Held, that the words "recklessly" and "willfully" were not synonymous; the word "willfully" being employed in penal statutes as synonymous with intentionally, designedly, or without lawful excuse, while the word "recklessly" is used to mean heedlessly, carelessly, or indifferent to consequences, without contemplating or intending such consequences, there being in general a wide difference between "intentional" acts and those resulting as the consequence of recklessness or carelessness. *Thurman v. State*, 104 Pac. 67, 68, 2 Okl. Cr. 718.

An allegation in the complaint in an action against a railroad company characterizing the act by which plaintiff was injured as "reckless" is equivalent to characterizing it as "willful," so as to justify punitive damages; the word "reckless" being defined as rashly negligent, utterly careless or heedless. *Pickett v. Southern R. Co.*, Carolina Division, 48 S. E. 466, 469, 69 S. C. 445 (citing *Webster's International Dict.*); *Cole v. Blue Ridge Ry.*, 55 S. E. 126, 127, 75 S. C. 156.

The word "reckless" is defined to be "desperately heedless" (Cent. Dict.). To be reckless of consequences. It is more than carelessness. It implies willfulness. *Pegram v. Seaboard Air Line Ry. Co.*, 51 S. E. 975, 976, 139 N. C. 303, 4 Ann. Cas. 214.

Each of the words "wantonness," "willfulness," and "recklessness," embodies the element of malice, either express or implied, and are in law substantially the equivalent of each other, in so far as they give rise to an action based upon punitive damages. *Hull v. Seaboard Air Line Ry.*, 57 S. E. 28, 76 S. C. 278 (citing *Pickett v. Southern R. Co.*, Carolina Division, 48 S. E. 466, 69 S. C. 445).

A complaint, in an action for injuries to a passenger while alighting from a train, which alleges that plaintiff, urged by the "willful," "unlawful," and "reckless" injunctions of the conductor, and in obedience to his directions, proceeded to alight from the train while in motion, and in so doing was injured, does not charge negligence, but charges willfulness; the word "unlawful" assigning no specific legal character to the acts alleged, and the word "reckless" being equivalent to "willful." *Crosby v. Seaboard Air Line Ry.*, 61 S. E. 1064, 1067, 81 S. C. 24.

"Recklessness" and "wantonness" are stronger terms than mere or ordinary negligence, and mean a disregard of security equivalent to bad faith and a willful or malicious disposition to injure. To constitute wantonness, there must be a design, purpose, or intent to do wrong, or cause the injury, though recklessness amounting to an utter disregard of consequences will supply the place of a specific intent. *Chicago, R. I. & P. R. Co. v. Lacy*, 97 Pac. 1025, 1027, 78 Kan. 622.

#### RECKLESS STATEMENT

In *Derry v. Peek*, 14 App. Cas. 337, Lord Herschell thus explained what is meant by a "statement made recklessly or without care": "To make a statement careless whether it be true or false and therefore without any real belief its truth appears to me to be an essentially different thing from making through want of care a false statement which is nevertheless honestly believed to be true." *Donnelly v. Baltimore Trust & Guarantee Co.*, 61 Atl. 301, 306, 102 Md. 1.

#### RECLAMATION

Drainage of land distinguished, see Drainage of Land.

The word "reclamation" in Pol. Code, § 3481, providing that owners desiring to have their lands set off from a reclamation district must show to the board of supervisors that the land sought to be excluded is capable of an independent reclamation, means practical protection from probable dangers, and does not mean absolute protection from all dangers, and where a district may properly be classed, under the evidence, as one in which the land has been reclaimed, owners are not entitled to relief under the statute. *Inglis v. Snider*, 127 Pac. 60, 62, 163 Cal. 747.

"The term 'drainage of land' has practically the same application as 'reclamation'; the one is the means employed, the other the result." *Laguna Drainage Dist. v. Charles Martin Co.*, 77 Pac. 933, 935, 144 Cal. 209.

#### RECLAMATION ACT

As revenue law, see Revenue Law.

**RECLAMATION DISTRICT**

As corporation, see Corporation.

As municipal corporation, see Municipal Corporation.

As public corporation, see Public Corporation.

While "reclamation districts" are sometimes called "quasi corporations," it would perhaps be more accurate to say that they are not corporations at all, but are so classed because of the many presumptions and rules which apply to corporations and have been made applicable to them. They are public agencies which would cease to exist when the policy of the state has changed, so that they are no longer required or when there is no further function for them to perform. *Reclamation Dist. No. 70 v. Sherman*, 105 Pac. 277, 280, 11 Cal. App. 399 (citing *People ex rel. Van Loben Sels v. Reclamation Dist. No. 551*, 148 Pac. 1016, 117 Cal. 121).

**RECOGNITION**

See General Recognition.

**RECOGNIZANCE**

See Moneys Recovered on a Recognizance.

See, also, Statutory Undertaking.

A "recognizance" is an obligation of record entered into before a court or other duly authorized officer, conditioned to do some act required by law, which is therein specified. *Calhoun v. Gray*, 131 S. W. 478, 481, 150 Mo. App. 591. A "recognizance" is where the prisoner and his recognizers appear before the court or justice and acknowledge themselves to be indebted to the state in a certain sum, on a certain condition, which is entered on the record and thereby becomes a part of it. While the writing may not be in the form of a recognizance, yet, under our statute, it cannot be quashed for informality, if it possess the essentials of a recognizance. "It differs from a bail bond merely in the nature of the obligation created, the former being an acknowledgment of record of an existing debt, while the latter, which is attested by the signature and seal of the obligor, creates a new obligation." *State v. Dorr*, 53 S. E. 120, 122, 59 W. Va. 188, 5 L. R. A. (N. S.) 402, 115 Am. St. Rep. 915.

A "recognizance" is an obligation of record in the case, and the cognizers thereby voluntarily submit themselves to the jurisdiction of the court as parties with respect to proceedings for estreat. *State v. Johnson*, 57 S. E. 846, 847, 77 S. C. 252.

A "recognizance" is part of the record in which it is taken. It is an obligation of record and thus imports verity. *Tully v. Lewitz*, 98 N. Y. Supp. 829, 833, 50 Misc. Rep. 350.

In order to create a valid "recognizance," it is essential that the defendant and his sureties in some manner should acknowledge the obligation in the presence of the court, but this may be done orally as well as in writing, so that a written instrument reciting that the principal and surety appeared personally before the police justice and acknowledged themselves severally indebted to the state in the sum of \$200, to be void if the principal personally appeared to answer the offense of selling liquor to minors, duly signed, witnessed, and filed, was a proper "recognizance." *Thomsen v. State*, 118 N. W. 330, 331, 82 Neb. 634.

When it is said by the court, in *State v. Mills*, 19 N. C. 552, that a "recognizance is in the nature of a conditional judgment, subject only to such matters of legal avoidance as may be shown by plea, or to such matters of relief as may induce the court to remit or mitigate the forfeiture," it was not intended that a denial of the truth of the record could be thus set up by way of plea or answer to a scire facias. The entry of the forfeiture of a recognizance in a criminal case cannot be contradicted by an answer or a plea to a scire facias issued to enforce the forfeiture. *State v. Morgan*, 48 S. E. 604, 606, 136 N. C. 593.

**RECOMMENCE**

The "renewal" of a conspiracy means to begin it again; to "recommence" it; to repeat it. Each renewal is a new offense; a repetition, it is true, of a former one, but still an offense for which an indictment would lie. *Commonwealth v. Bartilson*, 85 Pa. 482, 487.

**RECOMMEND**

Const. art. 10, § 2, provides that all other officers whose "election or appointment" is not provided for by the Constitution shall be elected or appointed as the Legislature directs. Election Law (Consol. Laws 1909, c. 17) § 190, creates a board of elections in every first class city of four persons. Section 191 requires such commissioners of elections to be appointed by the mayor and any vacancy to be filled by him. Section 193 provides that the mayor of New York City shall appoint four persons as commissioners, not more than two of whom shall belong to the same political party. Section 194 provides that the chairmen of the county committees within New York and Kings counties of each of the two political parties polling the highest and next highest number of votes shall file with the mayor of New York City a certificate in the form stated, each of which four certificates shall certify the name of a qualified voter who is recommended as a proper person to be appointed for election commissioner, and the certificate certifies that the person named is a proper person to be appointed commissioner, and that the signer



does "hereby recommend" his appointment. Section 195 provides that, in case of a vacancy, the chairman of the party committee shall file with the mayor a certificate certifying and "recommending" the name of a person for commissioner. Const. art. 2, § 6, provides that all laws creating boards charged with registering voters or distributing ballots shall secure equal representation of the two political parties holding the highest number of votes, and such boards shall be appointed as the Legislature may direct. Held, that section 194 did not require the mayor of New York City to appoint one as commissioner of elections who was recommended by the chairman of a county committee of Kings county; the mayor not being limited to persons so certified in making appointments. In re Kane, 129 N. Y. Supp. 280, 285, 144 App. Div. 196.

#### In will

The words "desire," "request," "recommend," "hope," "not doubting" used by testator in a will to express his desire that the executor will conduct a fund in a specified manner, testator having power to command, will not be construed as precatory only, but as commands clothed in the language of civility, and to impose on the executor an enforceable duty, sufficient to create a trust. Trustees of Pembroke Academy v. Epsom School Dist., 75 Atl. 100, 101, 75 N. H. 408, 37 L. R. A. (N. S.) 646.

#### RECOMMENDATION

Reference synonymous, see Reference.

#### RECONCILE

The words "reconciliation and amity," in a will whereby testator made a devise to certain persons in case "reconciliation and amity" should take place between them and testator's brothers and sisters, import a mental state rather than an active condition of association, which mental state is hard to establish except by declarations of the parties in interest. Alexander v. Page (Ky.) 101 S. W. 346, 347.

#### RECONDITIONED

Cotton in a bale is "reconditioned" by loosening the ties, removing the packing, and pulling or picking the damaged part of the cotton from the outside of the bale. Southern Ry. Co. v. Jones Cotton Co., 52 South. 899, 900, 167 Ala. 575.

#### RECONSTRUCT—RECONSTRUCTION

The word "reconstructed," in Act March 11, 1903 (Sess. Laws 1903, p. 244, c. 29, art. 2), providing that bridges may be constructed, repaired, or "reconstructed" across any stream in the territory, as provided in the act, is used in its ordinary acceptance, and means to rebuild; to construct again. Mc-

Millan v. Board of Com'rs of Payne County, 79 Pac. 898, 900, 14 Okl. 659.

The word "reconstructing" in Rev. St. 1909, § 9411, authorizing the repairing of streets or reconstructing the same by the proper officer or committee on improvements, is used in its restricted sense, and is somewhat synonymous with the word "repairing," and is not used in its comprehensive sense as meaning to rebuild or construct again. Noel v. Town of Lees Summit, 148 S. W. 194, 196, 166 Mo. App. 114.

Where, under a single ordinance, a new pavement is to be laid, and the old curbing and guttering must be reset and replaced in part, the curbing and guttering are "reconstruction work," though the contractor is required to utilize serviceable old curb and gutter stones, and not "repair work," within Rev. St. 1899, § 5681 [Ann. St. 1906, p. 2892], providing that the cost of repair of curbing or guttering shall, when not done by the owner liable therefor in the first instance, be paid out of the general revenue of the city, and the cost of the curbing and guttering was properly included in special tax bills. Rackliffe v. Duncan, 108 S. W. 1110, 1112, 130 Mo. App. 695.

Where a portion of an old turnpike road, by the extension of the limits of a city, was included within, and became a public way of, the city, and, as such, had a few repairs made on it, the regrading and paving of the road was an "original construction" of the street, within St. 1894, § 2833, making lot owners liable for the costs of the "original construction," and the city liable for costs of "reconstruction," of streets. McHenry v. Selvage, 35 S. W. 645, 99 Ky. 232.

#### Repair distinguished

Repair as including, see Repair—Repairs.

"Construct" means to build; "reconstruct" means to rebuild, to build over again; and a street is not reconstructed by being resurfaced either in whole or in part." "Webster defines 'repair' as to restore to a sound or good state after decay, injury, dilapidation, or partial destruction, as to repair a house, a wall, or a ship. He defines 'reconstruction' as to construct again, to rebuild." Where, after a street which had been paved with asphalt at the expense of abutting owners had fallen into disrepair, the city passed an ordinance directing that it be reconstructed with asphalt pavement in accordance with the ordinance, in so far as it related to resurfacing streets with asphalt paving, so that the entire improvement consisted merely of relaying a new three-inch asphalt surface on the original macadam base, without disturbing the same, the work did not constitute a "reconstruction" of the street, but was a mere "repair" thereof, for which the city was solely responsible. City of Covington v. Bullock, 103 S. W. 276, 277, 126 Ky. 236 (quoting and

adopting the definition in *Levi v. Coyne*, 57 S. W. 790, 22 Ky. Law Rep. 493).

A contract called for the paving of a street to be constructed with a stone curbing, with a foundation of broken stone and sand, and a six-inch concrete superstructure thereon, with a surface layer of two inches of asphaltum, to be kept in "repair" by the contractor for seven years. After its completion and use it soon became perforated with holes, which the contractor undertook to repair by patchwork. The condition of the asphalt surface continued, however, to grow worse, greatly interfering with the use of the street. Experts reported that it was in the interests of economy and business judgment to relay the entire surface asphaltum coating. Held, that as applied to the whole pavement as a unit this resurfacing was of the nature of repair work. Plaintiff's contention was that the work was "reconstruction" and not "repair." The court says that it may be conceded that there are some varying shades of difference in the general term "repair," but there is none more apt and comprehensible than the accepted dictionary definition: "To restore to a sound or good state after decay, injury, dilapidation, or partial destruction." "Reconstruction" is "to construct again, to rebuild, to remodel, to form again or renew." It would therefore follow that to constitute a work of reconstruction of the pavement would involve the rebuilding of the whole unit, including the concrete foundation as well as the asphalt surface, to say nothing of the curbing. "Repair is 'restoration to a sound, good, or complete state after decay, injury, dilapidation, or partial destruction.' Reconstruction is 'the act of constructing again.' Reproduction is 'repetition,' or 'the act of reproducing.' These definitions are instructive in bringing home to the mind that repair carries with it the idea of restoration after decay, injury, or partial destruction, and that reconstruction or reproduction carries with it the idea of complete construction or production over again." *American Bonding Co. v. City of Ottumwa*, 137 Fed. 572, 579, 70 C. C. A. 270 (citing *Goodyear Shoe Machinery Co. v. Jackson*, 112 Fed. 146-150, 50 C. C. A. 159, 163, 55 L. R. A. 692).

*Buffalo City Charter*, § 288 (Laws 1891, p. 200, c. 105, as amended by Laws 1901, p. 661, c. 228, § 8), requires the owner or occupant of premises to lay and relay sidewalks whenever ordered, and to keep the sidewalk in good repair. It also requires the public works commissioner to notify the owner or occupant of any premises in front of which any such work, except the removal of stone and ice, and the repair of sidewalks, shall be required to be done, and, if the same is not done by the owner or occupant within 10 days, it shall be done by the city and the expense assessed against the property. There was a plank sidewalk five feet wide in front of plaintiff's premises, which plaintiff was di-

rected to repair, and, after he had failed to do so, the commissioner caused the entire walk to be removed, and constructed a new concrete walk 17½ feet wide. Held, that the construction of such new walk was not a "repair," but was a "reconstruction," which the commissioner had no authority to make except pursuant to a resolution of the city council after notice to the property owner and an opportunity to be heard. *Konowalski v. City of Buffalo*, 115 N. Y. Supp. 467, 468, 131 App. Div. 465.

In a suit to charge land with tax bills, defendants could not contend that the work was repair work chargeable to the city instead of work of "reconstruction" chargeable to the abutting owner, on the ground that the contractors had repaired holes and cuts in the concrete foundation beneath the surface of the pavement which was being reconstructed, where such repairs were paid for by the city. *Perkinson v. Schnaake*, 83 S. W. 301, 302, 108 Mo. App. 255.

"To reconstruct" is to construct and build again. One who only assumes an obligation to repair a house could not be required to tear it down and rebuild it. *Attorney General ex rel. Gibson v. Board of Sup'rs of Montcalm County*, 104 N. W. 792, 795, 141 Mich. 590 (quoting and adopting definition in *Board of Com'rs of White County v. Gwin*, 36 N. E. 237, 136 Ind. 562, 22 L. R. A. 402).

Where, under a single ordinance, a new pavement is to be laid and the old curbing and guttering must be reset and replaced in part, the curbing and guttering are "reconstruction" work and not repair work within Rev. St. 1899, § 5681, providing that the cost of repair of curbing or guttering shall, when not done by the owner liable therefor in the first instance, be paid out of the general revenue of the city, and the cost of the curbing and guttering was properly included in special tax bills. *Rackliffe v. Duncan*, 108 S. W. 1110, 1112, 130 Mo. App. 695.

## RECONVERSION

Though a will may convert land into money, the subsequent acts of the beneficiaries may reconvert the subject-matter into land; "reconversion" being an imaginary process by which a prior constructive conversion is annulled and the converted property restored, in contemplation of law, to its original state—such reconversion being exercised before the property is actually converted. *Nall v. Nall*, 147 S. W. 1006, 1008, 243 Mo. 247.

## RECORD

See Apparent on the Face of the Record; Complete Record; Contract of Record; Counsel of Record; Court Not of Record; Court of Record; Court Record; Debt of Record; Duly Admitted to Record; Estoppel by Record; Facts

Shown by the Record; Inferior Court of Record; Irregular Records; Judicial Record; Marriage Bond Record; Mining Records; Nul Tiel Record; Of Record; Original Record; Owner of Record; Public Record; Remittitur of Record.

Any record, see Any.

Entered of record, see Enter—Entry (In Practice).

Error apparent on face of record, see Error Apparent.

Face of the record, see Face.

Make record, see Make.

Such record, see Such.

A "record" is a memorial or history of judicial proceedings in a case, commencing with the writ or complaint and terminating with the judgment; and only the records of magistrates which are made in the course of judicial duty are of force. *State v. Houltan*, 83 Atl. 1106, 1107, 109 Me. 281.

The original files in a prosecution before a justice of the peace for assault and theft, together with the mittimus addressed to the officer on conviction and sentence, do not constitute a "record." *McVeigh v. Ripley*, 58 Atl. 701, 702, 77 Conn. 136.

The "record" proper in a criminal action, under the Oklahoma statutes includes the information, the plea of the defendant, the verdict of the jury, the sentence of the court, the instructions given by the court, and those requested by the defendant, together with all indorsements made thereon. *Chandler v. State*, 105 Pac. 375, 376, 3 Okl. Cr. 254; *Rasberry v. State*, 103 Pac. 865, 870, 4 Okl. Cr. 618.

The "record" in a criminal case includes a statement of the time and place of holding court, the indictment or information, with the indorsement thereon, the arraignment, the plea of the accused, the impaneling of the jury, the verdict, and the judgment of the court; and a motion in arrest of judgment will be sustained only when it is patent on the face of the record that there has been some irregularity in relation to one of the above-enumerated steps of the proceeding. *State v. McCrocklin*, 57 South. 645, 646, 130 La. 106.

The word "record," as used in Ky. St. 1903, § 1130, providing that one convicted three times of felony shall be confined in the penitentiary for life, but judgment for the increased penalty shall not be given unless the jury find, from the record and other competent evidence, the fact of former convictions, was not intended to include the whole record, but merely the verdict and judgment of conviction and of the sentence, and hence the indictment in the cases in which former convictions were had cannot be read in evidence, nor argument permitted thereon. *Tall*

*v. Commonwealth*, 110 S. W. 425, 428, 33 Ky. Law Rep. 541.

The indictments against a person are "records or documents filed in a public office under authority of law." Code Cr. Proc. § 272; Code Civ. Proc. § 866. They are the property of the state, and a willful and unlawful removal of them constitutes a crime under Pen. Code, § 94. *People v. Mills*, 70 N. E. 786, 789, 178 N. Y. 274, 67 L. R. A. 131.

Where the record defined by Pen. Code, § 2229, as including the indictment, a copy of the minutes of the plea and of the trial, the charge given or refused, and the indorsements thereon, and a copy of the judgment, is included in the bill of exceptions, and not certified up by the clerk as the record, as required by section 2231, the merits of the appeal cannot be considered. *State v. Farriss*, 87 Pac. 177, 34 Mont. 424.

Oral instructions are not a part of the "record" under a statute requiring the charge to be given in writing and filed with the clerk as a part of the "record" on request of either party. *Casto v. Murray*, 81 Pac. 388, 47 Or. 57.

The record proper in civil cases consists of the process and return, the pleadings, and the verdict. *Smith v. Moseley*, 137 S. W. 971, 974, 234 Mo. 486.

Under Court and Practice Act 1905, § 474 (Gen. Laws 1909, c. 298, § 1), providing that, when the constitutionality of an act shall be brought in question on the record, the court shall forthwith certify the question to the Supreme Court, the constitutionality of an act is brought in question on the record where the constitutionality of a statute is clearly questioned by the allegation of any pleading, or by any other formal objection filed in the case, and the court must certify the question, and where a bill in equity attacks the constitutionality of an act a certification is not premature, because made before issue has been joined on the allegation of unconstitutionality, or while there remains the possibility that the case may be disposed of without reference to the constitutional question; the word "record" not requiring a completed record of the case, which is the orderly history of a case from beginning to end. *Blais v. Franklin*, 75 Atl. 399, 402, 30 R. I. 413.

The record on appeal consists of the judgment roll and the bill of exceptions as settled, signed, and certified to by the judge, and a document presumably sent up from the county clerk's office, together with the record purporting to be a notice of intention to move for a new trial, but not referred to in the bill of exceptions, cannot be considered. *Walker Bros. v. Skiliris*, 98 Pac. 114, 119, 34 Utah, 353.

The "record" in a case at law consists of the record proper and the bill of exceptions.

Hanson v. Anderson, 121 S. W. 736, 91 Ark. 443.

The "abstract" is the "record" on which the court on appeal determines a case, and it only refers to the original record when there is a conflict in the abstracts presented by the parties, and where it appears from the journal of the Supreme Court that the bill of exceptions was withdrawn and amended by inserting exceptions therein, but no change was made in the abstract, the court must be governed entirely by the abstract. *State v. Harbour*, 129 N. W. 565, 567, 568, 27 S. D. 42.

The "record" on appeal in criminal cases embraces only the summons or indictment, pleadings (in civil cases), verdict, and judgment. *State v. Matthews*, 55 S. E. 342, 343, 142 N. C. 621 (quoting and adopting the definition in *Thornton v. Brady*, 5 S. E. 910, 100 N. C. 38).

As used in the rule that an action in equity to remove a cloud on title can be maintained only when some evidence extrinsic to the record is necessary to show its invalidity, the word "record" means, not merely the record of the instrument of conveyance or lien on which the adverse claim may be based, but where such an instrument is the result of judicial proceedings, the entire record of such proceedings. *Rumble v. Smith*, 121 N. Y. Supp. 501, 502, 66 Misc. Rep. 298.

Under *Burns' Ann. St. 1908*, §§ 681, 690, relating to appeals, and providing for the filing of a transcript of the record in the Supreme Court, a "record for appeal" ordinarily consists of a copy of all papers, entries, and proceedings in the lower court, or so much thereof as appellant in writing requests, duly certified and sealed, and any original paper, document, or entry incorporated in the transcript will be disregarded, unless express statutory authority for embracing it exists. *Curless v. State*, 87 N. E. 129, 88 N. E. 339, 172 Ind. 257.

Where a summons, dated August 15th, and served August 22d, required defendants to appear on October 15th, and an appeal was taken from an interlocutory order appointing a receiver in vacation, the transcript being filed in the Supreme Court August 22d, there could be no "appearance" by defendants until after the appeal was taken, within *Burns' Ann. St. 1908*, § 691, providing that certain documents shall be deemed part of the record, except a summons for defendant, when all the persons named in it have appeared to the action; and hence the summons and return thereon are part of the record, especially in view of section 663, providing that any pleading or paper filed, or offered to be filed, shall be a part of the record, etc. *Marshall v. Matson*, 86 N. E. 339, 342, 171 Ind. 238.

The docket entries of the trial court, showing orders granting motions for new trial unless defendant consented to entry of

judgment for certain sums, supplemented by an agreed statement of the parties sanctioned by the judge, constitute the "record" until formally extended; and, where the entire proceedings are set forth, any question of law disclosed may be reviewed. *Shanahan v. Boston & N. St. Ry. Co.*, 79 N. E. 751, 193 Mass. 412.

As used in Code, § 5462, requiring the Supreme Court to examine the "record" without regard to technical errors or defects which do not affect the substantial rights of the parties, and to render such judgment on the record as the law demands, the word "record" means that upon which the cause is submitted. This may be on transcript of all the papers in the case on file save those returned by a committing magistrate and by entries in the record book, but does not include the evidence. *State v. Blodgett*, 121 N. W. 685, 689, 143 Iowa, 578, 21 Ann. Cas. 231 (citing Code, § 5450; *Harriman v. State*, [Iowa] 2 G. Greene, 271).

The word "record," as used in Rev. St. § 5403, making it a criminal offense to steal or destroy any record, etc., of a court of justice or any paper document or record filed or deposited in any public office, is not limited to the technical common-law records of courts as enrolled, nor to technical documents, but is used in the common and ordinary sense, and includes an original paper or document, which, though not spread upon the record books, is treated as a "record" of what it contains. *McInerney v. United States*, 143 Fed. 729, 732, 733, 74 C. C. A. 655.

The "record" for review of a final order of the corporation commission consists of a certification of all the facts upon which the action appealed from was based, and which may be essential for the proper decision of the appeal, together with such evidence introduced before or considered by the commission as may be selected, specified, and required to be certified by any party in interest, as well as such other evidence so introduced or considered as the commission may deem proper, and also a written statement of the reasons upon which the action sought to be appealed from is based. *Atchison, T. & S. F. Ry. Co. v. Love*, 99 Pac. 1081, 1083, 23 Okl. 192.

A sufficient compliance with general order No. 36 (18 Sup. Ct. ix), providing that appeals under the bankrupt act from the Supreme Court shall be taken within 30 days after judgment, and that the court below shall, at or before the time of entering the judgment, make and file findings of fact and conclusions of law, which, together with the pleadings and judgment, shall constitute the record, is shown where the appeal was taken within 30 days, and the Circuit Court of Appeals made its findings of fact and conclusions of law part of the record by an order

made within 30 days, directing the same to be filed nunc pro tunc as of the date of the judgment. *Coder v. Arts*, 29 Sup. Ct. 436, 441, 213 U. S. 223, 53 L. Ed. 772, 16 Ann. Cas. 1008.

The "record" of a board of arbitrators, creating a new school district from territory detached from contiguous districts, does not include the petition presented to the clerk or clerks of the district or districts and the notices posted before the election, for, notwithstanding their importance, the statute is silent as to what disposition shall be made of them, and there is no provision for their custody or perpetuation, and the sole and only "record" of the proceedings of the board is the certificate of the board of arbitrators forming a new district. *School Dist. No. 2 v. Pace*, 87 S. W. 580, 582, 113 Mo. App. 134.

#### Conclusiveness

"Records" of judicial tribunals as to parties affected are conclusive as to all matters contained therein of which the law requires a record, and cannot be contradicted or varied by parol testimony; but there is another class of entries, sometimes called "records," which are of a public nature and required by law to be kept by various non-judicial officers, which are of a less solemn nature, and are not accorded the conclusiveness attached to judgments of courts of record. They are competent evidence of the facts required by law to be recorded, but are not conclusive. They are prima facie evidence of the facts required to be recorded. And so, where it is not made the duty of an officer to indorse the date of filing on documents, his file mark is merely his own private mark, which may be contradicted by extrinsic evidence. *Barber Asphalt Paving Co. v. O'Brien*, 107 S. W. 25, 30, 128 Mo. App. 267 (quoting and adopting the definition in *Goodrich v. Senate*, 42 Atl. 409, 92 Me. 248).

#### County records

Section 17 of the act in relation to the collection of taxes in New Castle county (20 Del. Laws, p. 9, Append.) provides that, if the collector advertise for sale any property in which any person other than the one to whom the taxes are assessed has an interest, he shall, provided the interest of such other person appears "on the records of New Castle county," leave notice of the sale at the place of abode of such other person a certain time before the sale. Section 20 provides that the deed of real estate sold for taxes, executed by the collector, shall vest in the purchaser, subject to right of redemption, all the estate, right, and title the owner thereof had in and to it when the taxes were assessed, free from any interest or incumbrance of any person to whom the notice required by section 17 was given. Held, that "record of New Castle county" means county records, and does not embrace records of a city of the county, so that, though notice of a tax sale was given

the city, the tax deed did not vest in the purchaser the title free from the lien of municipal taxes. *Knowles v. Morris* (Del.) 65 Atl. 782, 786, 6 Pennewill, 76.

#### Docket entries

The docket and minute books of the county court, though records for the purpose of keeping a memoranda of the business that is to go before the court, or has been transacted by it, are not record books in which the permanent orders of the court should be recorded or preserved, but such orders must be entered in the order book of the court. *Rails v. Sharp's Adm'r*, 131 S. W. 998, 1000, 140 Ky. 744.

The court or bench docket is not a record of the court in which its official entries are kept, but is merely a docket for the convenience of the court, and the notes of the judge are not the record entries to be incorporated in a transcript for the appeal of the case, and in determining what the record discloses the entries on such docket may not be considered. *Pittsburgh, C. & St. L. Ry. Co. v. Johnson*, 93 N. E. 683, 686, 49 Ind. App. 126.

#### Internal revenue collector's certificate

Shannon's Code, § 5573, provides that duly certified copies of all records and entries, or other papers belonging to any public office, or filed to be kept therein, are evidence in all cases. Section 5576 provides that the term "records" includes any record of any county, common-law, circuit, etc., court. Section 5580 provides for proof of judicial records of a sister state. Section 5583 relates to proof of the acts of the executive of the United States or of a state, etc. Section 5584 relates to proof of the proceedings of the Legislature of a state or of the United States, etc. Section 5588 provides that the certificate of the head of any department or bureau of the general government is a sufficient authentication of any paper or document appertaining or belonging to his office. Held, that none of such sections are broad enough to render a certificate issued by an internal revenue collector that a special tax stamp was issued to defendant admissible in a prosecution for selling intoxicating liquors, under Acts 1903, p. 1079, c. 355, § 1, providing that, in a prosecution for selling intoxicating liquors within four miles of a schoolhouse, the fact that defendant has paid the internal revenue special tax as a retail liquor dealer, etc., shall be prima facie evidence of sales within the meaning of the law, etc. *Bayless v. State*, 113 S. W. 1039, 1040, 121 Tenn. 75.

#### Jury list

A list of the names of duly qualified jurors drawn to serve at a term of court certified by the sheriff and by the judge of common pleas pursuant to P. L. 1876, p. 363 (Gen. St. p. 1854, § 50) forms no part of the "record of the proceedings had upon the trial" within

Criminal Procedure Act, section 136 (P. L. 1898, p. 915). *State v. Tomasi*, 69 Atl. 214, 215, 75 N. J. Law, 739.

#### Land office books

Where the land commissioner in the discharge of his official duties indorsed in red ink a cancellation of an award of school lands on the purchaser's obligation and on the classification and appraisal record, these indorsements became a "record of an office," within the statutory meaning, so that it was competent to prove the cancellation by certified copies of the documents and indorsements thereon. *Smithers v. Lowrance* (Tex.) 91 S. W. 606, 607.

#### Motion to set aside judgment

A motion to set aside a judgment on ground that it was procured by fraud and to recall execution is not a pleading nor any part of the record proper, which consists of the petition, summons, and all subsequent pleadings, including verdict and judgment, and the ruling on the motion is a matter of exception only, and, unless the motion is preserved in a bill of exceptions and an exception is saved to the ruling, the matter is not reviewable. *Graff v. Dougherty*, 120 S. W. 661, 662, 139 Mo. App. 56.

#### Testimony

For the purpose of a motion in arrest of judgment for errors appearing on the face of the record, the word "record" means the strict record in the case as at common law. It does not include the evidence in the case, for, though the evidence be set out in the bill of exceptions, it is no part of the record proper, but a motion in arrest may raise the question of want of jurisdiction of the court to try the case where the question of jurisdiction appears on the face of the record proper. *State v. Shappy*, 65 Atl. 78, 79, 79 Vt. 306.

The term "record of the council with reference to said assessment," as used in the statute authorizing appeal to superior court from decision of the council confirming a special assessment, and specifying a copy of the notice of appeal, a transcript of the assessment roll, a copy of the objections, and of the order of the council confirming the assessment roll as necessary to be certified on appeal, but containing no provision taking testimony before the council, nor for certification of any testimony taken, does not include the testimony, but refers to such record as the minutes of the proceedings of the council upon the subject; and under the statute the appellant may submit and have considered any competent evidence, whether it was heard by the council or not. *Ahrens v. City of Seattle*, 81 Pac. 558, 560, 39 Wash. 168.

#### RECORD (Verb)

See *Duly Recorded*; *Immediate Recording*.

See, also, *File*.

"Record" means to preserve the memory of by committing to writing; to printing; to inscription; or the like; to make note of." *Seaboard Air-Line Ry. v. Memory*, 55 S. E. 15, 16, 126 Ga. 183 (quoting and adopting definition in Webster's Dict.).

"Recorded in like manner" within Statute of Wills (Hurd's Rev. St. 1909, c. 148), § 9, making a foreign will "recorded as aforesaid" valid in like manner as domestic wills, means recorded with the probate clerk as provided for in section 2. *Dibble v. Winter*, 93 N. E. 145, 150, 247 Ill. 243.

#### As register

"Record" and "register," as used in Revision of 1846 (Nixon Dig. pp. 526, 527), relating to the registration of mortgages, are synonymous. *Manchester Building & Loan Ass'n v. Beardsley*, 66 Atl. 1, 4, 72 N. J. Eq. 714.

"The verb 'record,' in statutes relating to recordable papers, has a technical meaning, the legal registry of an acknowledged or proven paper." A tax deed must be either acknowledged or proven before it can be recorded, and, if recorded without such acknowledgment or proof, it passes no title. *State v. Harman*, 50 S. E. 828, 830, 57 W. Va. 447.

#### As take stenographic notes

Under Civ. Code 1895, § 4447, providing that the compensation of the reporter, or stenographer for "recording," or taking stenographic notes and "recording," the evidence in such civil cases as may be agreed by counsel to be recorded, etc., and section 4446, providing that it shall be the duty of the official stenographer to attend all courts in the circuit for which he is appointed, and when directed by the judge, as hereinafter set forth, to exactly, and truly "record," or "take stenographic notes," of the testimony and proceedings in the cases tried, a stenographer is "recording" the evidence when he has taken it down in shorthand, although he is not making a record thereof which is intelligible to those who are not versed in the system of shorthand which he uses, and even though no one but himself may be able to read his shorthand notes. Under this statute, the word "record," and the expression "or taking stenographic notes," mean identically the same thing; the latter expression being merely explanatory of the former. *Seaboard Air-Line Ry. v. Memory*, 55 S. E. 15, 16, 126 Ga. 183.

#### RECORD TITLE

Where a husband conveyed to a wife, who conveyed to another, who gave to the wife a bond for the deed, the bond constitut-

ed the wife's "record title," within the homestead statute, requiring the word "Homestead" to be entered in the margin of the record title. *Brooks v. Black*, 123 Pac. 131, 134, 22 Colo. App. 49.

### RECORDER

As judicial officer, see Judicial Officer.

The "recorder" in the city of Independence, Or., is the judicial officer of said city, and the office is analogous to that of a police judge. *Wong Sing v. City of Independence*, 83 Pac. 387, 388, 47 Or. 231.

St. 1905, p. 940, c. 15, constituting the charter of the city of San Bernardino, section 95 (page 956) provides that the judicial power of the city shall be vested in a police court, consisting of one police judge. Section 14 (page 944) provides that such judge shall be elected at a general municipal election to be held on the first Monday of April, 1907. Section 13 (page 944) provides that the police judge and recorder shall continue to hold office and act as such until the second Monday of May, 1907, but that the first election of city officers under the charter shall be held on the second Monday of April, 1905. Section 51 (page 952) provides that the mayor shall fill all vacancies in an elective office, but that at the next municipal election an election shall be held for the office vacated, to fill the unexpired term. The incumbent of the office of recorder died prior to April, 1905, and on such date an election was held at which a judge of the police court was elected, but he was called the "recorder" instead of the police judge. Held, that with reference to the interval of time between the adoption of the charter and the second Monday of May, 1907, the terms "recorder" and "police judge" were used synonymously, though the charter did not continue in existence the recorder's court previously existing, and hence the fact that a warrant of commitment issued by the judge elected in 1905 was signed by him as "city recorder" did not render it insufficient so as to entitle the prisoner to release on habeas corpus. *In re Baxter*, 86 Pac. 998, 999, 3 Cal. App. 716.

### RECORDER'S COURT

As inferior court, see Inferior Court.

As state court, see State Court.

### RECORDARI

A "recordari" is a substitute for an appeal when a party has lost his right to appeal otherwise than through his own fault, and it may be granted by the judge in a proper case. *Marsh v. Cohen*, 68 N. C. 283, 286.

### RECOUNT

The word "recount," as used in the election law, means not merely a mathematical count of the ballots or votes, but involves

a recanvass of the votes. The statute presumes a mistake, not by the ballot clerks in making their return of the total number of ballots voted, but by the inspectors in canvassing and counting the votes. *In re Hearst*, 96 N. Y. Supp. 341, 343, 110 App. Div. 346.

The "recount" is not a contest. On the contrary, it is a mere ascertainment of the result shown by the ballots. It merely corrects mistakes made by the precinct election officers in counting the ballots and certifying the results. In the absence of a demand for a recount the votes are not counted. The ballots are simply checked up and compared with the poll books, and the returns, certified from the several precincts, are footed up and the general result ascertained and declared. The demand for a recount imposes upon the canvassing board the further duty of counting the votes as shown by the ballots. *Goff v. Young*, 57 S. E. 328, 329, 61 W. Va. 693.

### RECOUPMENT

See, also, Counterclaim; Set-Off.

Civ. Code Ga. 1895, § 3756, defines "recoupment" as a right of the defendant to have a deduction from the amount of plaintiff's damages for the reason that plaintiff has not complied with cross-obligations or independent covenants arising under the same contract. So where a landlord sues out a warrant to dispossess his tenant because of nonpayment of rent under a lease contract, and the tenant arrests such proceedings by filing a counter affidavit and giving the required bond, upon a trial of such case the tenant, upon proper pleadings and proof, can prevent eviction and a recovery of double rent by showing that the landlord was indebted to him at the time of the suing out of the warrant by reason of damages ensuing from a violation of his cross-obligations under the contract in an amount equal to the rent due when the warrant was issued; and, if such damages exceed the amount of rent due the landlord, the tenant can obtain judgment for such excess. *Weaver v. Roberson*, 67 S. E. 662, 666, 134 Ga. 137. And so also where goods damaged during transportation are delivered by the carrier without payment of the freight charges and suit is thereafter brought to recover such charges, the defendant may file a plea of recoupment for the damages to the shipment, such plea may be filed notwithstanding the Hepburn Act, prohibiting carriers from accepting anything but money in payment of freight and other transportation charges. *Battle v. Atkinson*, 71 S. E. 775, 776, 9 Ga. App. 488. But damages arising upon the breach of an agreement to extend or defer the maturity of a note cannot be pleaded as recoupment to an action to recover the principal and interest due upon such note. The contract to extend (though

referring to the note) is independent of the original promise to pay. Recoupment can be pleaded only where the plaintiff is in good conscience liable to the defendant under the same contract. *Jester v. Bainbridge State Bank*, 61 S. E. 926, 928, 4 Ga. App. 469.

"Recoupment" is the keeping back of something that is due because there is equitable reason for holding it, and this defense crept from courts of chancery into the practice at law to enable courts of law to prevent circuity of action. *Williams v. Neely*, 134 Fed. 1, 4, 67 C. C. A. 171, 69 L. R. A. 232.

"Recoupment" is a common-law right to reduce plaintiff's claim which continues so long as plaintiff's cause of action exists, and the right must grow out of or be connected with the transaction on which plaintiff sues. *State v. Arkansas Brick & Mfg. Co.*, 135 S. W. 843, 844, 98 Ark. 125, 33 L. R. A. (N. S.) 378.

The word "recoupment" in its truest sense means a right of deduction from the amount of the plaintiff's claim, by reason of either a payment thereon or some loss sustained by the defendant by reason of the plaintiff's wrongful or defective performance of the contract out of which his claim originated. It has been defined to be a "keeping back of something which is due because there is an equitable reason for withholding it." The word is nearly if not quite synonymous with discount, reduction, or deduction. *Michigan Yacht & Power Co. v. Busch*, 143 Fed. 929, 936, 75 C. C. A. 109 (citing *Ives v. Van Epps* [N. Y.] 22 Wend. 155; *Ward v. Fellers*, 3 Mich. 281, 291; *Wheat v. Dotson*, 12 Ark. 699; 2 Pars. Cont. [7th Ed.] 880; *Hatchett v. Gibson*, 13 Ala. 587, 595).

The doctrine of "recoupment" was recognized and allowed at common law, and was and is applied to actions whether founded in contract or in tort, but it is limited as a defense to defeating the plaintiff's action, in whole or in part. Recoupment rests on the principle of the desirability of avoiding circuity and multiplicity of actions by allowing the defendant, at his election, to give in evidence matters growing out of the same transaction by way of defense, instead of requiring a cross-action, when it can be done without a violation of principle or great inconvenience in practice; but while it is the policy of our law not to compel parties to bring two actions, when, with equal convenience, their rights can be settled in one, the defendant may not set up his claim by way of recoupment unless it would be just and practicable to adjust it in the plaintiff's action. The claim or damage to be recouped must be a valid cause of action for which a separate suit could be maintained, and must not have occurred through the fault or negligence of the defendant. As developed and permitted by the American courts, recoup-

ment has attained a wider and more extended application than in England. Very generally, at least, if not altogether, the courts of this country have not restricted its application to cases where the defendant may recoup his damages for the purpose of affecting the value of the goods sold, or of the work done, but they have allowed the defendant to recoup damages suffered by him from any fraud, breach of warranty, or negligence of the plaintiff, growing out of and relating to the transaction in question, for the purpose, as we have already indicated, of avoiding needless delay and litigation. In an action for the price of a traveling crane, defendant cannot recoup damages alleged to have been suffered through having paid, without suit, a claim for damages on account of the death of a servant killed by the overturning of the crane because of its alleged negligent construction. *Edgemoor Iron Co. v. Brown Hoisting Mach. Co.* (Del.) 62 Atl. 1054, 1055, 1056, 6 Pennewill, 10 (citing *Dorr v. Fisher* [Mass.] 1 Cush. 271; *Sawyer v. Wiswell* [Mass.] 9 Allen, 39; *Dushane v. Benedict*, 7 Sup. Ct. 696, 120 U. S. 630, 30 L. Ed. 810; *Johnson v. White Mountain Creamery Ass'n*, 36 Atl. 13, 68 N. H. 437, 73 Am. St. Rep. 610; 1 *Suth. Dam.*, §§ 172, 174).

#### As growing out of contract in suit

"Recoupment" is the right of defendant to claim damages, either because plaintiff has not complied with the contract sued on, or violated some duty which the law imposes on him in its performance. *Carolina Portland Cement Co. v. Alabama Const. Co.*, 50 South. 332, 334, 162 Ala. 380.

"Recoupment" exists only at common law, and must arise out of the contract sued on. *American Bridge Co. of New York v. City of Boston*, 58 N. E. 1089, 1090, 202 Mass. 374.

"Recoupment" implies that plaintiff has a cause of action, and defendant has a cause arising out of the breach of some other part of the contract upon which the action is based, or for some other cause connected with the contract, and is in the nature of a cross-action. *Richard Deeves & Son v. Manhattan Life Ins. Co.*, 88 N. E. 395, 396, 399, 195 N. Y. 324.

"Recoupment" is the right of a defendant in the same action to claim damages from the plaintiff for some cross-obligation or violation of duty relating to the contract sued on. *Hawthorne v. Murray* (Del.) 84 Atl. 5, 6.

"Recoupment" is the keeping back or stopping of something which is due, and could be invoked at common law when defendant had sustained damages from plaintiff's breach of the contract sued on; defendant's damages being abated from plaintiff's claim. *J. S. Wood & Bro. v. M. E. Jones & Son*, 73 S. E. 1099, 1100, 10 Ga. App. 735; *Krausse v. Greenfield* (Or.) 123 Pac. 392, 394, 61 Or. 502.



### Set-off distinguished

As defined by Civ. Code Ga. 1895, § 3757, a "set-off" is distinguishable from "recoupment" in that a set-off includes all mutual debts and liabilities, while recoupment is confined to the contract on which plaintiff sues. *Weaver v. Roberson*, 87 S. E. 662, 666, 134 Ga. 137.

"Recoupment" is distinguished from set-off in these particulars: First, it arises out of matters connected with the transaction or contract in which the plaintiff's cause of action is founded; second, it matters not whether it be liquidated or unliquidated; third, it is not dependent on any statutory regulation, but is controlled by the principles of the common law. *Hayes v. Sildell Liquor Co.*, 55 South. 356, 358, 99 Miss. 583.

In an action for the price of a stock of millinery goods, a plea termed by the defendant a "plea of recoupment," claiming a sum had and received by plaintiff, which the defendant offers as a set-off against the demands of the plaintiff and claims judgment for the excess, was not demurrable, being good as a set-off, though not as a plea of recoupment. *Thomas v. Thomas*, 41 South. 141, 142, 146 Ala. 533.

"Recoupment" goes to show that the amount claimed is not due the plaintiff, while "set-off" is a defense which goes, not to the justice of the plaintiff's demand, but sets up a demand against the plaintiff to counterbalance his in whole or in part. It does not attack or deny plaintiff's claim, but admits it. As set-off does not go to show that the amount claimed by plaintiff is not due or owing by the defendant, it is not available as defense by affidavits of illegality to the foreclosure of a chattel mortgage. *Arnold v. Carter*, 54 S. E. 177, 179, 125 Ga. 319.

### Actions in tort

"Recoupment" is in law a mitigation of damages, and the defense is of such a nature as will permit a claim originating in contract to be interposed as against one suing in tort; likewise damages for a tort may be recouped against a claim predicated upon a contract. *Spurgin v. Kruse*, 125 Ill. App. 507, 508.

## RECOURSE

See Without Recourse.

## RECOVER—RECOVERY

See Duly Recovered; Lost All Hope of Recovery.

Money paid to plaintiff in a personal injury action, under a contract of settlement, was "recovered," as affecting an attorney's right to a lien, under the attorney's lien law (Laws 1909, p. 97); the word "recover" being often used in the sense of "receive" or "come into possession of." *Standidge v. Chicago*

*Rys. Co.*, 98 N. E. 963, 966, 254 Ill. 524, 40 L. R. A. (N. S.) 529, Ann. Cas. 1913C, 65.

The word "recover," as first used in Rev. St. 1899, § 1552 (Ann. St. 1906, p. 1177), providing that if plaintiff in an action not on contract recover any damages he shall recover his costs, refers to instances where he is entitled to a judgment, and not to cases where he prevails as to certain issues, but on the whole case suffers a judgment against him. *Ozias v. Haley*, 125 S. W. 556, 557, 141 Mo. App. 637.

Under Code Civ. Proc. § 3228, subd. 5, providing that a plaintiff in an action in the City Court, where, but for the amount claimed, the action should have been brought in the Municipal Court, can have no costs unless he shall "recover" \$250 or more, and section 734, providing that, if the plaintiff proceeds in the action after accepting the tender, the sum accepted must be deducted from the recovery and judgment rendered for the residue, and that plaintiff's right to costs is determined by the amount of the residue, a sum accepted pending suit is not a "recovery," so that where plaintiff accepted payment of the amount claimed in, and withdrew, his first cause of action, thereby limiting his possible recovery to a sum less than \$250, his right to costs was lost. *Hill v. Kahn*, 98 N. Y. Supp. 682, 683, 50 Misc. Rep. 360.

Where, in a suit by partners to settle the partnership and to enforce their lien on the assets, defendant partner obtained an affirmative judgment for a definite sum then under the control of the court, the title to which up to the time of the judgment was in the partnership and not in himself alone, there was a recovery within the meaning of a statute, providing that, where an action is prosecuted to a recovery, the attorney shall have a lien on the judgment for money or property recovered for his fee, and defendant's attorney was entitled to a lien. *T. Harlan & Co. v. Bennett, Robbins & Thomas*, 106 S. W. 287, 288, 127 Ky. 572, 32 Ky. Law Rep. 473, 128 Am. St. Rep. 360.

Under Act Feb. 23, 1903 (24 St. at Large, p. 81), providing that failure to adjust claims against a carrier within the times prescribed shall subject a carrier to a penalty, provided that, unless the consignee recover the full amount claimed, no penalty shall be recovered, a consignee of freight cannot recover the penalty for failure to pay for the lost freight, where he accepts, after the time provided in the act, the amount claimed for loss of freight before bringing the action for penalty. "The term 'recover,' when considered by itself, is not the usual or apt word to indicate a voluntary payment or receipt of money for damages suffered, but ordinarily means the obtaining in a suit of the right to something by a verdict and judgment of a court, and that this is the meaning in the

present statute is manifest by the context—"recover in such action." *Best v. Seaboard Air Line Ry.*, 52 S. E. 223, 225, 72 S. C. 479.

There is not a "settlement or recovery," within an agreement of a plaintiff with his retreating attorney to pay him a certain sum, in case of a settlement or recovery of the claims sued on, where the defendant in the action, not acknowledging the validity of the claim, made a certain payment merely for the purpose of terminating the litigation and disposing of the annoyance from its prosecution. *Randel v. Vanderbilt*, 78 N. Y. Supp. 124, 75 App. Div. 313.

#### **Attorney's fees as part of recovery**

Code Civ. Proc. § 1195, providing that in a suit to foreclose a mechanic's lien plaintiff shall be entitled "to recover an attorney's fee," should be construed as entitling plaintiff to such fee as a part of the recovery, and therefore confers a lien for the fee, as well as for the subject-matter of the action. *Peckham v. Fox*, 82 Pac. 91, 92, 1 Cal. App. 307.

#### **Recover by suit**

"Recover by suit," in *Cobbey's Ann. St.* 1907, proviso of section 6147, authorizing a county to "recover by suit" from another county moneys expended for repairs of a bridge, include a suit instituted by an appeal from the disallowance of a claim by a county board. *Cass County v. Sarpy County*, 119 N. W. 685, 686, 83 Neb. 435.

#### **Recovery of vein**

In a coal mining lease which provides for suspension of a minimum royalty clause or exemption therefrom so long as a "fault" in existence in the mine, contact with which occasioned such exemption clause, shall be a hindrance to the successful operation of the mine and for resumption of the minimum royalty after the "fault" has been "pierced" and the normal vein "recovered," the words "pierced" and "recovered" mean more than a mere breach of the fault and discovery of coal on the opposite side, but, if the immediate obstacle has been overcome, the main entry put in condition for successful operation and, together with side entries, carried into the body of the coal for several hundred feet, encountering the same obstacle or others in some of the entries, but none in others, it is for the jury to say whether the fault has been overcome within the meaning of the lease. *Collins v. White Oak Fuel Co.*, 71 S. E. 277, 280, 69 W. Va. 292.

#### **RECOVERED ON A RECOGNIZANCE**

See *Moneys Recovered on a Recognizance*.

#### **RECOVERY OF LAND**

See *Action for the Recovery of Real Estate*.

#### **RECOVERY OF MONEY**

See *Action for Recovery of Money; Right to Recover Money*.

#### **RECOVERY OF REAL ESTATE**

See *Action for the Recovery of Real Estate*.

#### **RECOVERABLE**

The provision in *Indianapolis Track Elevation Law*, Acts 1905, c. 82, §§ 2, 5, including in the expenses of the work damages "recoverable" under existing laws by any person on account of the elevation or depression of tracks, and directing the board of public works to determine damages "recoverable" under existing laws, merely directs persons aggrieved to seek redress under existing laws if any, the word "recoverable" meaning that which can be recovered as a matter of legal right. *Morris v. City of Indianapolis*, 94 N. E. 705, 710, 177 Ind. 369.

#### **RECRIMINATION**

Civ. Code Mont. § 170, defines "recrimination" as "a showing by defendant of any cause of divorce against plaintiff." If defendant alleges and proves facts constituting cause of divorce against plaintiff in bar of plaintiff's cause of action, the averment of the facts constituting such recriminatory defense, and the denial thereof by plaintiff, create a material issue on which the court must find. *Bordeaux v. Bordeaux*, 75 Pac. 524, 526, 30 Mont. 36.

The Idaho statute defines the term as a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce. *Stoneburner v. Stoneburner*, 83 Pac. 938, 939, 11 Idaho, 603.

"By the weight of authority the offense pleaded in 'recrimination' need not be of the same nature as the offense which defendant has committed. Any misconduct on the part of complainant which constitutes ground for divorce bars his suit without reference to the nature of the offense of which he complains, although in some states a contrary rule prevails by statute or otherwise, and the two offenses must be of the same character. 'Recrimination' in divorce law is the defense that the applicant has himself done what is ground for divorce either from bed and board or from the bond of matrimony. It bars the suit founded on whatever cause, whether the defendant is guilty or not. It is a bar to any suit to dissolve a valid marriage, or to separate the parties from bed and board, that either before or after the complained of delictum transpired the plaintiff himself did what, whether of the like offending or any other, was cause for a divorce of either sort. The doctrine of 'recrimination' is applicable to all the causes for divorce. The Legislatures having provided the same legal effect for each cause for divorce, the courts refuse

to measure the gravity of the several causes, but hold each effectual as a bar in recrimination." Where both parties are found guilty of any of the enumerated offenses for which a divorce may be granted, the court should dismiss the bill. *Wilson v. Wilson*, 132 N. W. 401, 403, 404, 89 Neb. 749 (citing 2 Bish. Mar., Div. & Sep. c. 11; 14 Cyc. p. 650).

## RECTIFICATION

A large part of the whisky used in the United States is "rectified"; that is, that a barrel of whisky, as it comes out of the distillery, is adulterated by the rectifiers, so as to make five or six barrels of whisky out of it; and it is on this business of multiplying whisky which is distilled that the Legislature imposes the license tax. *Brown-Foreman Co. v. Commonwealth*, 101 S. W. 321, 324, 125 Ky. 402.

### RECTIFIED SPIRITS

Liquor as including, see Liquor.

### RECTIFIER

Rev. St. § 3244, in defining "rectifiers," includes "every person who, without rectifying, purifying or refining distilled spirits, shall, by mixing such spirits, wine or other liquor with any materials manufacture any spurious imitation or compound liquors for sale under the name of whisky, brandy \* \* \* or any other name." Held, that in view of such statutory recognition of the manufacture of "imitation whisky," etc., and of the process of such manufacture, the regulation by the Commissioner of Internal Revenue which directs that "alcohol, commercial alcohol or high wines which have been manipulated, \* \* \* so as to resemble some particular kind of potable spirits, will be marked with the name of such spirits preceded by the word 'imitation,' as for example 'Imitation Whisky,'" is a proper and reasonable regulation, having also in view the provisions of Food & Drugs Act June 30, 1906, c. 3915, 34 Stat. 768, notwithstanding the fact that such compounds may have been previously sold in the trade under the name of the liquors they imitate. *Woolner & Co. v. Rennick*, 170 Fed. 662, 664.

A manufacturer of vanilla or ginger extract by mixing the comminuted vanilla beans or ginger root with alcohol in a percolator, and who afterward recovers a part of the alcohol remaining in the mixture for re-use by distillation, is a "rectifier of distilled spirits" and subject to the special tax imposed by Rev. St. § 3244. *Henry K. Wampole & Co. v. United States*, 191 Fed. 573, 574, 112 C. C. A. 663.

Where a party manufactured a ginger ale paste used for making ginger ale by placing a quantity in a percolator and adding alcohol, and the oleoresin thus obtained from the ginger, containing unnecessary alcohol,

was distilled, and the alcohol separated, he, by such act, became a person who "rectifies, purifies, and refines" distilled spirits of wines, within Rev. St. § 3244, imposing an internal revenue tax on every person so engaged. *United States v. S. Twitchell Co.*, 184 Fed. 525, 527.

## RECURRING

See Contantly Recurring.

## REDEEM

"To redeem" is defined as to purchase back; to regain possession by payment of a stipulated price; to repurchase; to regain property by paying what is due; to receive back by paying the obligation." B., being desirous of reorganizing the business of K. & Co., who were indebted to claimant, organized the E. Company, of the preferred stock of which claimant agreed to accept \$5,000 of K. & Co.'s indebtedness, with a bonus of 20 per cent. common stock, and agreed not to press the new corporation for the remaining indebtedness so long as claimant felt assured of its ultimate success, it being also agreed that B., through the new corporation, should sell to others the full preferred capital stock issue of the company and redeem, within 18 months, the preferred stock and bonus which claimant agreed to accept as a temporary arrangement to further a reorganization, but, before this could be accomplished, the new corporation became a bankrupt. Held, that claimant's arrangement constituted a pledge of the new corporation's stock as security for the debt of K. & Co., and not a sale of such stock. In re *United Educational Co.*, 153 Fed. 169, 171, 82 C. C. A. 343.

"The word 'redeem' does not mean to buy; it means to buy back; to liberate an estate by paying the debt for which it stood as security; to purchase in a literal sense" (citing Black, Law Dict. 1008). Hence a consent decree, declaring that defendant "has an equity to redeem" land on the payment to plaintiff of a specified sum, and, in case of the failure to pay the same within the time limited, "defendant shall stand absolutely debarred" of all equity, is not a contract for the purchase by defendant, for the right to "redeem" implies that he previously owned the land; redemption being an inseparable incident to a mortgage. *Bunn v. Braswell*, 55 S. E. 85, 86, 142 N. C. 113.

The word "redeem," in an agreement extending the time within which the right to redeem land from a foreclosure sale may be exercised, means that the owner of the equity of the land sold may have the title vested in him which was divested by the sale, by tendering or paying to the holder of the certificate of sale within the redemption period the amount of principal and interest evidenced

thereby. *Williams v. Hoffman*, 76 N. E. 440, 443, 39 Ind. App. 315.

The word "redeem," used in a contract forming part of a transaction which plaintiff sought to show constituted a mortgage, and not a conveyance, was not controlling, as the word has no definite significance. It means to repurchase or to regain, and does not necessarily imply the existence of a valid existing indebtedness, and, if it is shown that there was no debt, the word will be construed as repurchase. *Cold v. Beh*, 132 N. W. 73, 77, 152 Iowa, 368.

#### As repurchase

The word "redeem," as used in statutory provisions authorizing a party to redeem, means "repurchase." *Mannington v. Hocking Val. R. Co.*, 183 Fed. 133, 145.

### REDEMPTION

See Equity of Redemption; Right of Redemption; Statutory Right to Redeem. Cost of redemption, see Cost.

The term "redemption" implies that there is something to be redeemed, something lost to be gotten back; and hence, where a sale for taxes is void and passes no title, there can be no redemption. *Webb v. Ritter*, 54 S. E. 484, 491, 60 W. Va. 193.

Where an insolvent husband's land goes to tax sale, and his wife purchases, the attempted purchase must be treated as if made by the husband, and, with respect to his creditors, it will be treated as a "redemption" of the land from his delinquency. *Herrin v. Henry*, 87 S. W. 430, 431, 75 Ark. 273.

Intestate died seised of 957 acres of land, subject to a mortgage for \$15,000. The land was purchased by the mortgagee on foreclosure for \$16,005.39, after which he agreed to assign the purchase certificate to the widow on payment of such amount, with interest, which agreement was extended until September 1, 1889, when a redemption was effected by a payment of the amount due, made up of two partial payments previously made by the widow, \$6,326.67, the price of 100 acres of land sold by J., one of the heirs, for their benefit to another, \$9,000 raised by a deed of trust on the remaining 857 acres, and \$153.53, furnished by J. A quitclaim deed to the land was made by the purchaser under the mortgage sale to J. in his own right. At this time the land was worth \$38,000. Held, that such transaction operated as a "redemption" of the land for the benefit of the widow and heirs of intestate, and not a purchase by J. for his sole use. *Donason v. Barbero*, 82 N. E. 620, 625, 230 Ill. 138.

Where an owner of land, knowing that the taxes thereon were delinquent, gave money to an agent to pay the taxes and wrote the county clerk and was informed of the amount required to redeem, and the agent subse-

quently went to the county clerk and informed him of the desire to pay delinquent taxes, and the clerk, after examining the records, informed the agent that there were no delinquent taxes, and by reason of such misinformation the taxes were not paid, there was a constructive "redemption," within St. 1898, § 1165, providing that the owner of land sold for taxes may, within a specified time, redeem the same; and a tax deed must be set aside on repayment of the amount for which the land was sold for taxes, and subsequent taxes paid by the holder of the tax deed. *Menasha Wooden Ware Co. v. Thayer*, 137 N. W. 750, 751, 150 Wis. 611.

Where, in a suit in which foreclosure of a mortgage was asked, upon a compromise between the mortgagor and mortgagee, a decree was entered foreclosing the equity of a judgment lienor, unless the premises should be redeemed as provided by law and within the time fixed by law, the decree should be construed as having fixed the priority of liens and having necessitated redemption in case of a subsequent sale, and, there having been no sale, the judgment lienor's equity was not terminated, since "redemption," as provided by law and within the time fixed by law in such a case, has a well-defined meaning and should be construed to have reference to redemption from a sheriff's sale within the period allowed judgment creditors. *First Nat. Bank of Newton v. Campbell*, 98 N. W. 470, 472, 123 Iowa, 37.

### REDEMPTIONER

Under Rev. Code, 1905, § 7465, the property sold may be redeemed within one year from the date of sale, as provided in chapter 12, for redemption of real property sold under execution by the mortgagor or his successor in interest by a creditor having a judgment or mortgage lien on the property subsequent to that on which the property was sold, and those creditors only mentioned are redemptioners entitled to redeem from previous redemptioners within 60 days. *North Dakota Horse & Cattle Co. v. Serungard*, 117 N. W. 453, 456, 17 N. D. 466, 29 L. R. A. (N. S.) 508, 138 Am. St. Rep. 717.

When land is taken by the state in lieu of taxes which the owner failed to pay, it is then optional with the owner whether to take advantage of the privilege given him by law to redeem the land or let the state keep it. He is then a "redemptioner," and he cannot divest the state of its interest in the land, except he redeem within the period of the redemption, which continues until the state has disposed of the land. He is not any longer a tax delinquent, in any proper sense; he is not even a redemption delinquent, for there is no duty on him to redeem. *Honeycutt v. Colgan*, 85 Pac. 165, 168, 3 Cal. App. 348.

## REDELIVER

### REDELIVERY

In a charter party, in absence of any parol evidence and even against any such evidence, clauses as to "delivery" simply mean that the ship is turned over for the purpose of the charter, and the term "redelivery" means that, at the end, the ship is turned back to the owner, and the hire ceases. *Callahan v. Munson S. S. Co.*, 130 N. Y. Supp. 869, 870, 71 Misc. Rep. 525.

### REDELIVERY BOND

The "redelivery bond" in replevin is a substitute for the property only in those cases where a delivery of the property cannot be had on final judgment. It stands in place of the property as security for the payment of the value thereof. *O'Brien v. Curry & Whyte*, 127 N. W. 411, 412, 111 Minn. 533, 137 Am. St. Rep. 563.

## REDUCE

Rev. Laws, c. 203, § 9, provides that, if two or more cases are tried together in the superior court, the presiding judge may "reduce" the witness fees and other costs, but "not less than the ordinary witness fees, and other costs recoverable in one of the cases" which are so tried together shall be allowed. Held that, in reducing the costs, the amount in all the cases together is to be considered and reduced, providing that there must be left in the aggregate an amount not less than the largest sum recoverable in any of the cases. The word "reduce," in its ordinary signification, does not mean to cancel, destroy, or bring to naught, but to diminish, lower, or bring to an inferior state. *Green v. Sklar*, 74 N. E. 595, 596, 188 Mass. 363.

#### In mining

As applied to mining the word "reduce" means to bring to a specified form or condition, as to reduce rock to powder, or to deprive an ore of nonmetallic constituents. In *re Martin*, 106 Pac. 239, 157 Cal. 60.

#### In taxation

That an application that an assessment should be "wiped out" and "reduced to nothing" is an application to reduce an assessment is untenable. *Standard Marine Ins. Co., Limited, of Liverpool, England, v. Board of Assessors*, 49 South. 483, 484, 123 La. 717, 29 L. R. A. (N. S.) 59.

### REDUCED RATE

A "reduced rate" given by a carrier must be one fixed lower than another rate which is offered to the public, and the sale of a return trip ticket at a price less than two single trip fares is not a reduced rate. *Robert v. Chicago & A. R. Co.*, 127 S. W. 925, 931, 148 Mo. App. 96.

Where a carrier had but one regular rate applicable to a given class of property, it is

not a "reduced" or a special rate that will serve as a consideration for an owner's risk contract, as the word "reduced" implies a comparison, and it is not permissible to go outside the subject-matter to seek the comparison; but it must be made with another higher rate on the same class of property, and, where there is no such rate, there can be no reductions. *Leas v. Quincy, O. & K. C. R. Co.*, 136 S. W. 963, 965, 157 Mo. App. 455.

The term "reduced rate" presupposes the existence of a higher regular rate available to the shipper for the carriage of the same class of property under a contract that leaves unimpaired the carrier's common-law liability. It certainly does not mean a lower rate than that provided for the transportation of some other class of property. *Ficklin v. Wabash R. Co.*, 93 S. W. 847, 848, 117 Mo. App. 221.

### REDUCTION

#### In mining

The word "reduction," as applied to mining, means the separation of metals from their ore. In *re Martin*, 106 Pac. 239, 157 Cal. 60.

## REDUNDANT—REDUNDANCY

"Redundancy" is the insertion in a pleading of matters foreign, extraneous, and irrelevant to that which it is intended to answer; the fault of introducing superfluous matters into a legal instrument. *Berry v. Gelser Mfg. Co.*, 85 Pac. 699, 700, 15 Okl. 364 (quoting and adopting the definition in *Black, Law Dict.* p. 1009).

"Unnecessary matter is called 'redundant' when there is an effort to reform the pleadings by striking it out. It is called 'surplusage' when there has been no such effort, in which case it should be disregarded by the court as if the pleading did not contain it." *Nels v. Whitaker*, 84 Pac. 699, 700, 47 Or. 517 (citing *Bliss, Code Pleading* [3d Ed.] § 215).

Where a claim under a special contract for services is united with one for the reasonable value of the services the allegation as to reasonable value of the services is not surplusage, neither is it redundant nor irrelevant; "redundancy" being an excessive statement or a representation. *E. D. Metcalf Co. v. Gilbert*, 116 Pac. 1017, 1021, 19 Wyo. 331.

## REED

Rattan reeds, from which the outside has been removed, are not "in the rough," within the meaning of the Tariff Act, but are "reeds wrought or manufactured from rattans." *Foppes & Partisch v. United States*, 154 Fed. 868.

**REED CAP**

The front of the lathe sword in a loom is called the "reed cap." *Chambers v. Wampanoag Mills*, 75 N. E. 1093, 1094, 189 Mass. 529.

**RE-ENACT**

The meaning of the word "re-enactment," as used in speaking of the re-enactment of a statute, is to continue in force the particular provision unchanged and not to do away with for any purpose. *Jessee v. De Shong* (Tex.) 105 S. W. 1011, 1015.

**RE-ENTER**

In a lease requiring a deposit to secure the performance of the covenants, declaring that if any rent shall be due or unpaid, or any default shall be suffered, the landlord or her representative might lawfully re-enter, by force or otherwise, the word "re-enter" is not restricted to a re-entry by a common-law action of ejectment. *Anzalone v. Paskusz*, 89 N. Y. Supp. 203, 205, 96 App. Div. 188.

Though the term "re-enter," used in its strict common-law meaning, did not refer to remedies described by existing statutes, a covenant in a lease drawn in a modern form, giving the lessor the right, upon the premises becoming vacant during the term, to "re-enter, either by force or otherwise," and relet the premises as agent of the lessee, holding him liable for the deficiency, included a re-entry by the lessor by summary proceedings. *Pannuto v. Foglia*, 105 N. Y. Supp. 495, 497, 55 Misc. Rep. 244.

**RE-ENTRY**

"Re-entry," in its legal sense, is applicable only to real estate which is capable of livery of seisin, and is inapplicable to an incorporeal hereditament. Where a grantor of an oil lease conveyed only the right to drill for oil on his land, together with the oil and gas discovered, and the right to go on the land for such purposes only, subject to certain conditions, such right was an incorporeal hereditament incapable of livery of seisin, and therefore not subject to re-entry. *Monaghan v. Mount*, 74 N. E. 579, 582, 36 Ind. App. 188.

**RE-EXCHANGE**

The damages recoverable by the payee of a negotiable foreign bill of exchange protested for nonpayment against the drawer may include the face of the bill, interest thereon, protest fees, and "re-exchange," which under the law merchant is the price which the holder of a dishonored bill must pay in the currency of the country where the original bill was drawn for a good bill payable where the original bill was payable,

for the same amount of money and the expenses of protest. *Pavenstedt v. New York Life Ins. Co.*, 96 N. E. 104, 105, 203 N. Y. 91, Ann. Cas. 1913A, 805.

**RE-EXECUTE**

The publication of a revoked will is not a "re-execution," and a "re-execution" would not be a republication. *Danley v. Jefferson*, 114 N. W. 470, 471, 150 Mich. 590.

**REFER**

**REFEREE**

As court, see Court (Of Justice).

As judge, see Judge.

As judicial officer, see Judicial Officer.

As trustee, see Trustee.

Decision of referee, see Decision.

The "referee" is an officer to take the proof, reduce it to writing, and report to the court, and upon such proof the court determines the question presented. In re *Lawson*, 96 N. Y. Supp. 33, 35, 109 App. Div. 195.

A "referee" is an officer who exercises judicial functions, and where he is unable, by reason of mental disease, of discharging the judicial duties, such mental incapability would be ground for the vacation of a judgment directed by him. On a motion to set aside a judgment, entered on a decision, of a "referee" on the ground of his insanity, the question to be determined is whether he was unable to comprehend the nature of the act and its relations, effects, and legal consequences, without reference to his sanity on other subjects. *Schoenberg & Co. v. Ullman*, 99 N. Y. Supp. 650, 651, 51 Misc. Rep. 83 (citing *Shelford, Law of Lunatics*, p. 618; *Buswell, Insanity*, p. 351; *United States v. Haskell*, 4 Wash. C. C. 402, 26 Fed. Cas. 207; *Hoyt v. Adeo* [N. Y.] 3 Lans. 173).

**Commissioner synonymous**

In an action on a deficiency judgment on mortgage foreclosure, the word "referee," as used in an allegation that the sale was made by a referee, is synonymous with "commissioner," within Code Civ. Proc. § 726, requiring a foreclosure sale to be made by a commissioner when not made by the sheriff. *Hibernia Savings & Loan Soc. v. Boyd*, 100 Pac. 239, 241, 155 Cal. 193.

**REFERENCE**

The provision in Code, § 3650, for a "reference" does not authorize an order for trial on depositions; reference being distinguishable from an order to try on depositions, in that it may be with consent or without, but is always to find the facts, or the facts and the law, and not simply to take testimony. In re *County Printing of Cherokee County* (Iowa) 136 N. W. 765, 768.

**Recommendation synonymous**

According to Webster's International Dictionary a reference is "one who or that

which is referred to specifically; one of whom inquiries can be made as to the integrity, capability, and the like of another." On cross-examination, one seeking to establish a claim against the estate of decedent was asked concerning a conversation with one of the executors, and on the redirect he testified that at one time he was requested to bring references. He was asked to give the number of "recommendations" of men of business. The word "recommendations," as used, was synonymous with the word "references." *Kinney v. McFaul*, 98 N. W. 276, 277, 122 Iowa, 452.

### REFERENCE STATUTE

"Reference statutes" are those which refer to, and by reference adopt wholly or partially, pre-existing statutes. *City of Pond Creek v. Haskell*, 97 Pac. 338, 357, 21 Okl. 711 (citing *Phoenix Assur. Co. of London v. Fire Department of City of Montgomery*, 23 South. 843, 117 Ala. 631, 42 L. R. A. 468).

### REFERENDUM

The function exercised by voters or a representative body, upon whose approval the inception of a franchise grant by the Legislature is made conditional, is not the exercise of a "legislative function." It is the exercise of the function of "referendum," which is not legislative. *Duffield v. Ashurst*, 100 Pac. 820, 825, 12 Ariz. 360.

Const. art. 11, § 2, as amended June 4, 1906, prohibits the Legislature from amending the charter of cities and towns, the right of which is reserved to the voters thereof, and article 4, as amended June 4, 1906, by section 1a, provides that the "referendum" may be demanded by the people, which power is reserved to the legal voters of every municipality and district as to all local, special, and municipal legislation of every character in and for their respective municipalities and districts; that the manner of exercising such power shall be prescribed by the general laws, except that the cities and towns may provide for the manner of exercising such power as to their municipal legislation. Held, that the initiative and referendum power so conferred on municipalities was not limited to the enacting or repealing of ordinances, but extended to the amendment of the city's charter. *Acme Dairy Co. v. City of Astoria*, 90 Pac. 153, 154, 49 Or. 520.

### REFORM

The term "reform" means to correct; to make new; or to rectify. *McCorquodale v. State*, 29 Sup. Ct. 146, 147, 211 U. S. 432, 435, 53 L. Ed. 269 (citing *Rapalje*, Law Dict. p. 1083); *Id.*, 98 S. W. 879, 887, 54 Tex. Cr. R. 344.

Authority to "reform and correct" a judgment implies power to correct a judg-

ment which is incomplete. *McCorquodale v. State*, 98 S. W. 879, 887, 54 Tex. Cr. R. 344.

To "reform" implies both the lessening of evil and the increasing of good. *Little v. State ex rel. Huey*, 35 South. 134, 136, 137 Ala. 659.

### REFORMATION

As suit for land, see *Suit for Land*.

"Reformation" is not an incident to an action at law, but can be granted only in equity. 'When relief is granted also on the contract as reformed, it means only that the court of equity sees fit to go on and finish the whole case.' *United States v. Milliken Imprinting Co.*, 26 Sup. Ct. 572, 573, 202 U. S. 168, 50 L. Ed. 980.

### REFRIGERATOR

As vessel, see *Vessel*.

### REFUND

To "refund" a thing does not necessarily mean to return the identical property received. To "refund" means to return in payment or compensation for what has been taken; to repay; to restore. *Farmers' Bank of Roff v. Nichols*, 106 Pac. 834, 836, 25 Okl. 547, 138 Am. St. Rep. 931, 21 Ann. Cas. 1160.

A "refunding" of a debt is merely a funding anew, and not the creation of a new debt. The purpose of Const. art. 11, § 6, as amended in 1888, prohibiting counties from contracting any debt by loan except to erect public buildings, etc., but permitting any county having an indebtedness outstanding, either in form of warrants issued prior to December 31, 1886, or in the form of funding bonds issued prior thereto, to contract a debt for the purpose of liquidating such indebtedness, was to permit the funding of an illegal indebtedness, and any legal county indebtedness existing before the adoption of the amendment could be funded under the Constitution prior to the amendment, and hence could be refunded. *Manly v. Board of Com'rs of Pueblo County*, 104 Pac. 1045, 1046, 46 Colo. 491.

In view of Code, § 1417, providing that the board of supervisors shall direct the treasurer to refund any tax erroneously or illegally exacted or paid, with all interest actually paid thereon, and section 4341, which defines "mandamus" as an action to compel an inferior board to do an act, the performance of which the law enjoins as a duty resulting from an office, and provides that mandamus cannot control discretion, there can be no recovery in mandamus to compel a board of supervisors to order the payment of interest on taxes erroneously exacted founded on section 1417; the section providing merely for the return of interest paid, and the word "refund" meaning to pay back, to restore. *Home Sav. Bank v. Morris*, 120 N. W. 100, 101, 141 Iowa, 560.

In the Ohio Statute providing that township funds may be deposited in some bank, subject to the order of the treasurer, and declaring that the failure of the bank to refund the money deposited shall not release the treasurer from responsibility, the word "refund" is used in its ordinary sense; that is, to repay. It does not mean that the identical money deposited is to be returned. A deposit by a township treasurer of separate township funds in a bank under the statute is an ordinary, and not a special, trust deposit, and hence was not entitled to a preference on the insolvency of the bank. In *re Smart*, 136 Fed. 974, 976.

A contract of sale of a steam shovel for use by the buyer in excavating an irrigation ditch stipulated that the seller guaranteed the same to be in good working condition, and that in the event of not proving so will refund all money paid by the buyer. The seller was not the manufacturer nor a dealer, but merely bought and sold the shovel for the profit arising on a resale. The buyer knew that fact. Neither party had ever seen the shovel and had no personal knowledge of its condition. The buyer, on finding that the shovel did not conform to the warranty and was worthless, notified the seller thereof and demanded an immediate refund of the amount paid on the price. Held, that the seller was liable only to repay the price paid; the word "refund" meaning to pay back by the party who has received it to the party who has paid money which ought not to have been paid. *Shaw v. Water Supply & Storage Co.*, 128 Pac. 480, 481, 23 Colo. App. 110.

#### As debt

See Debts.

## REFUSE

#### See Dry Refuse.

It is not a strained construction of Rev. Laws, c. 25, § 14, providing that a town may contract for the disposal of its garbage, refuse, and offal, to include ashes under the term "refuse." This word is defined by the Century Dictionary as "that which is refused or rejected; waste or useless matter; the worst or meanest part; rubbish." Ashes have been held to be included within the meaning of the word "refuse," in the English case of *Gay v. Cadby*, 2 C. P. D. 391. *Haley v. City of Boston*, 77 N. E. 888, 889, 191 Mass. 291, 5 L. R. A. (N. S.) 1005.

## REFUSE—REFUSAL

See Absolute Refusal to Pay; First Refusal; Neglect and Refusal; Offer and Refusal.

Every refusal, see Every.

Willful refusal, see Willful—Willfully.

To "refuse" is literally to pour back, viz., to send back. The word "refusal," in its derivative and intrinsic meaning, includes the

idea of absolute rejection. Generally speaking, when a service contemplates the doing of a definite work, there may be a "refusal" to serve after one has begun the work, which "refusal" may include the idea of an absolute rejection of the service. Thus, the resignation of a referee after his appointment and service for a considerable time is a "refusal" to serve, within Code Civ. Proc. § 1011, requiring the court to appoint another referee, when the referee named in the stipulation refuses to serve. *Brooklyn Heights R. Co. v. Brooklyn City R. Co.*, 93 N. Y. Supp. 849, 850, 105 App. Div. 88 (citing *Crabb*, Syn.; Cent. Dict.).

St. 1906, c. 516, § 5, providing for an application to the Board of Railroad Commissioners by an electric railroad company for a certificate of public convenience and necessity, provides that, if the board refuse to issue such certificate, no further proceedings shall be had, but that the application may be renewed after one year from the date of such refusal. Held, that the dismissal of an application at the request of the petitioners because of an informality was not a "refusal" of it, within the statute. *Inhabitants of Weston v. Board of Railroad Com'rs*, 91 N. E. 303, 304, 205 Mass. 94.

Where a shipper was permitted to place lumber on a car, but the carrier refused to receive it for shipment, this was a "refusal to receive" it, within Revised 1905, § 2631, imposing a penalty for such refusal. *Garrison v. Southern Ry. Co.*, 64 S. E. 578, 579, 150 N. C. 575.

Rev. St. 1895, art. 4494, requires railroad corporations to take and transport property on the due payment of the legal freight. Article 4496 provides that on refusal so to transport any property, or to deliver the same at the regular appointed time, the railroad shall pay to the party aggrieved all damages sustained thereby, with costs of suit, etc. Held, that the words on "the refusal," etc., "so to take," etc., refer to the preceding article and mean in case of the refusal to take under the conditions prescribed in such article. *Dorrance & Co. v. International & G. N. R. Co.*, 125 S. W. 561, 563, 103 Tex. 200.

"Neglect," within Rev. St. 1899, § 2228, declaring that every able-bodied married man who shall "neglect" or "refuse" to support his family shall be deemed a "vagrant," arises from an inattentive state of mind, want of care for, and utter disregard of the obligation resting on the husband to support his family, whereas the word "refuse" imports a willful disavowal or disregard of such obligation; and hence where a physician of good habits endeavored to establish a practice, maintained an office where he waited for patients, and attended to such calls as he had, contributing his entire income from his practice to the support of his wife and himself, he was not a "vagrant," so as to en-



title his wife to a divorce under section 2921, declaring that, when the husband shall be guilty of such conduct as to constitute him a "vagrant," within the meaning of the law respecting "vagrants," the wife may be divorced, though he did not succeed in earning enough to support both of them, and she was compelled to contribute to their support from her separate means. *Gallemore v. Gallemore*, 91 S. W. 406, 410, 115 Mo. App. 179.

Where plaintiff alleged that defendant, a constable, "refused and wholly failed" to execute two writs for the seizure of personal property, etc., the allegation being conjunctive, plaintiff was bound to prove, not only that the constable failed to exercise due diligence, but that he refused to execute the process. *Reeder v. Huffman*, 41 South. 177, 148 Ala. 472 (citing *Louisville & N. R. Co. v. Dancy*, 11 South. 796, 97 Ala. 338).

#### **Demand, offer, or notice implied**

"A party cannot be said to refuse to do a thing of which he knows nothing. 'Refusal' implies demand, knowledge, or notice." *Mutual Life Ins. Co. v. Hill*, 20 Sup. Ct. 914, 915, 178 U. S. 347, 350, 44 L. Ed. 1097.

"Refusal" is the denial of anything demanded, solicited, etc.; the verb "refused" means to deny a request, demand, invitation, or command, to decline to do what is solicited, claimed, or commanded. *Beckhard v. Rudolph*, 63 Atl. 705, 707, 68 N. J. Eq. 740 (quoting *Webst. Dict.*). Under a statute providing for notice to an owner by a materialman when a contractor "refuses" to pay the materialman in order to preserve a materialman's lien, the notice is defective where it states a refusal of the contractor to pay the sum demanded, but fails to state that such refusal was made upon demand. *Id.*, 59 Atl. 253, 258, 68 N. J. Eq. 315.

A fair construction of Pol. Code, § 1699, providing that any teacher whose salary is withheld may appeal to the superintendent of public instruction, who shall pronounce a final judgment advising the county superintendent, and that, upon receiving such judgment, the superintendent, if the judgment is in favor of the teacher, shall, in case the trustees refuse to issue an order for such salary, issue his requisition in favor of the teacher, "seems to require a notice of the final judgment to be given to the trustees so that they may act in conformity with it and issue their warrant, because a 'refusal' presupposes a demand. and it is only on a refusal by the trustees that the county superintendent can act." *Williams v. Bagnelle*, 72 Pac. 408, 409, 138 Cal. 699.

As used in Ann. St. 1906, § 729, providing that, if the judge refuse to sign a bill of exceptions because it is untrue, he shall certify thereon under his hand the cause of such refusal, the word "refuse" implies that some suggestion should be made to the judge to sign the bill or do otherwise, so that where

a judge determined that a bill submitted to him within the time prescribed was untrue, but exceptor made no request within such time that the judge allow the bill or indorse his refusal thereon, with his reasons for so doing, the judge was not remiss in omitting to indorse his refusal, etc., until after the time for allowing and filing the bill had expired. *State ex rel. Winsor v. Taylor*, 114 S. W. 1029, 1032, 134 Mo. App. 430.

The word "refuse" of itself imports a request declined, and it is used in this sense in Civ. Code 1895, §§ 2299, 2301, imposing a penalty on railroad companies if they should "refuse" to put on sale tickets for points on connecting lines. *Wimberly v. Georgia Southern & F. R. Co.*, 63 S. E. 29, 31, 5 Ga. App. 263.

The terms "refusing" and "failing" as used in Code Pub. Gen. Laws 1904, art. 33, § 24, providing that any person who feels aggrieved by the action of any board of registry in "refusing" to register him as a qualified voter, or in erasing or misspelling his name, or that of any person on the registry or in registering, or "failing" to erase the name of any fictitious, deceased, or disqualified person, etc., have reference to what may be termed negative action in cases that have been specifically brought before the judgment of the board of registry. *Collier v. Carter*, 60 Atl. 104, 105, 100 Md. 381.

#### **As failure**

In an action by a passenger for his expulsion from a railroad train, the defendant's plea, averred that, when the conductor demanded of him his ticket or fare, plaintiff "refused" and "willfully failed" to present or tender any ticket or fare, and the conductor thereupon ejected him, and plaintiff's replication alleged that, when the conductor demanded his ticket or fare, he had misplaced his ticket in his clothing, and the conductor ejected him without giving him a reasonable time within which to produce the ticket. Held that, as the replication was in the nature of a confession and avoidance, it was insufficient, for, while the word "fail" at times is synonymous with "refuse," the word "refuse" here means to decline to accept, or reject, and the words "willfully fail" mean an intentional neglect, and so it does not show that plaintiff attempted to produce his ticket or notified the conductor that he had one, and requested reasonable time within which to search for his ticket, which was necessary before he could complain of his ejection. *Louisville & N. R. Co. v. Mason*, 58 South. 963, 965, 4 Ala. App. 353 (citing 7 Words and Phrases, p. 631; 8 Words and Phrases, p. 7468).

Failure by a property owner to lay sidewalks within the time prescribed in an order requiring their construction, and with which he has been served, amounts to a refusal within Bluefield City Charter, § 38, as

amended by Acts 1905 (Laws 1905, p. 65, c. 3), providing that, if a property owner shall refuse to lay a sidewalk, the board of supervisors may have the same done, and no express refusal need be shown. *City of Bluefield v. McClaugherty*, 63 S. E. 363, 364, 64 W. Va. 536.

Negotiable Instruments Law, § 137 (P. L. 1901, p. 213; 3 *Purd. Dig.* [13th Ed.] p. 3307), providing that, where a drawee to whom a bill is delivered for acceptance "refuses," within 24 hours after such delivery, or such other period as the holder may allow, to return the bill accepted or nonaccepted to the holder, he will be deemed to have accepted it, does not contemplate a tortious refusal to return, amounting to a conversion, the presentation for acceptance being regarded as a demand for acceptance, which, when the bill is retained by the drawee, implies a demand for its return within the time specified by the statute, making a neglect or failure to return a refusal to return; and hence, where a drawee bank failed to return checks to the collecting bank within 24 hours after their delivery to it, it must be deemed to have accepted the checks, and is liable to the holder thereon. *Wisner v. First Nat. Bank of Gallitzin*, 68 Atl. 955, 957, 959, 220 Pa. 21, 17 L. R. A. (N. S.) 1266.

An averment that a master promised to repair machinery, but failed and "refused" to do so, is not inconsistent with the theory that the promise induced the servant to incur a known danger. The definition in Webster's International Dictionary of "refuse" is "not to comply with," and "the words 'refusing to comply' may in general have the same operation in law as the words 'failing to comply' would have." *Virginia & N. C. Wheel Co. v. Harris*, 49 S. E. 991, 993, 103 Va. 708 (quoting and adopting definition in *Taylor v. Mason*, 22 U. S. [9 Wheat.] 327, 6 L. Ed. 101).

The word "failed," as used in an instruction that a defendant, after being notified to produce books and papers has "failed" to do so, is equivalent to "refused." *F. R. Patch Mfg. Co. v. Protection Lodge No. 215, International Ass'n of Machinists*, 60 Atl. 74, 83, 77 Vt. 294, 107 Am. St. Rep. 765.

The words "fail," "refuse," and "neglect," as used in St. 1903, §§ 795-797, providing that any railroad company which "shall fail, refuse and neglect to comply with the provisions" of the act shall be guilty of a misdemeanor, are used interchangeably, and mean something more than an unavoidable and accidental violation of the statute. *Chesapeake & O. R. Co. v. Commonwealth*, 84 S. W. 566, 568, 119 Ky. 519.

#### To pay fare

A passenger who refuses to obey a rule of the carrier excluding dogs from passenger coaches while carrying them for hire in baggage cars does not evade the payment of

fare within Rev. Laws, c. 108, § 18, empowering railroad police officers to arrest a passenger refusing to pay fare, and the arrest of the passenger for evading fare is illegal. *Hull v. Boston & M. R. R.*, 96 N. E. 53, 59, 210 Mass. 159, 36 L. R. A. (N. S.) 406, Ann. Cas. 1912C, 1147.

## REGARD

See Disregard; Due Regard; In Regard To.

## REGISTER

"Record" and "register," as used in Revision of 1846 (Nixon's Dig. pp. 526, 527), relating to the registration of mortgages, are synonymous. *Manchester Building & Loan Ass'n v. Beardsley*, 66 Atl. 1, 4, 72 N. J. Eq. 714.

The word "registered," as used in Acts 1898-99, p. 34, providing that a judgment filed and registered by the judge of probate shall be a lien on the debtor's lands, means recorded. *Emrich v. Gilbert Mfg. Co.*, 35 South. 322, 325, 138 Ala. 316.

### REGISTER (Noun)

As judge, see Judge (In Law).

### REGISTERED HOLDER

Certificates issued by a company provided for payment of a certain sum at the office of a trust company in semiannual installments; that the failure to pay any installment when due should make all future installments at once due and payable; that until such default occurred the company might at any time discharge its liability by paying the amount of all future installments to the trust company in trust to pay the same to the "registered holders" of the certificates. Held, that the "registered holder" was the party appearing on the book of the trust company as the holder of the paper. *Strickland v. National Salt Co.*, 76 Atl. 1048, 1050, 77 N. J. Eq. 328.

### REGISTERED PHYSICIAN

Accused filed his diploma with the county clerk in 1880 pursuant to Act April 28, 1877 (Laws 1877, p. 343), relating to the regulation of the practice of medicine and surgery, and was thereupon registered as a physician and received a license from the county clerk. Laws 1883, p. 115, provided that, if a physician were a graduate of medicine, he should present his diploma to the State Board of Health for verification, and that the board, upon finding the diploma genuine, should issue him a license. The act exempted those who had been practicing medicine five years in the state prior to its enactment. Laws 1901, p. 208, § 5 (Ann. St. 1906, § 8518-5), repealed Acts 1883, p. 115, and provided that any person, except "physicians now registered," practicing medicine or surgery in

the state without first obtaining a license from the State Board of Health, should be guilty of a misdemeanor. Held, that though accused had not been practicing in the state five years at the enactment of the act of 1883, and may have been under such act not entitled to practice without being registered as therein prescribed, yet, inasmuch as he was duly registered under Acts 1877, p. 343, he was subsequent to the enactment of the act of 1901, which repealed the act of 1883, a "physician now registered" within the act of 1901, and entitled to practice without obtaining a license from the State Board of Health; no act of the Legislature having revoked the license granted him in 1880. *State v. Carson*, 132 S. W. 587, 589, 231 Mo. 1.

### REGISTERED TAXES

As municipal claim, see Municipal Claim.

### REGISTERED TONNAGE

The phrase "registered tonnage" is applied indiscriminately to the three classes of registered vessels, enrolled vessels, and licensed vessels, and means merely the capacity that has been ascertained and registered as provided by law, no matter what the size or business of the ship may be. "Registered tonnage" is the language that is always used, whether the ship is engaged in foreign trade, or in domestic trade, or in the coasting trade or fisheries. *Wheaton v. Weston & Co.*, 128 Fed. 151, 153.

### REGISTERED VOTER

As qualified elector, see Qualified Elector.

As qualified voter, see Qualified Voter.

The terms "legal voters" and "qualified electors" are interchangeable, but are not equivalent to "registered voters," as used in Laws 1905, p. 41, providing for the calling of an election to determine whether the sale of intoxicating liquors shall be prohibited on petition of 10 per cent. of the registered voters. The phrase "legal voters" is a synonym for "registered voters," as used in the act. *Roesch v. Henry*, 103 Pac. 439, 440, 441, 54 Or. 230.

A finding by the county court in an order calling the election that a petition for a local option election was signed by "legal" voters, when L. O. L. § 4920, requires such petition to be signed by "registered" voters, would not invalidate the election; "legal" voters being synonymous with "registered" voters as used in the statute. *State v. Billups*, 127 Pac. 686, 689, 63 Or. 277.

Const. art. 6, §§ 1, 3, 4, provide the qualifications of voters and declare that every person shall be able to read and write, unless registered under another clause, before being entitled "to register," as required by section 3, and that, "before he shall be entitled to 'vote,' he shall have paid his poll

tax for the previous year." Laws 1903, p. 290, c. 233, § 7, requires an order for a municipal election to determine whether saloons shall be licensed in lieu of a city dispensary on petition of one-third of the "registered voters" therein for the preceding municipal election, and section 9 declares that "any person entitled to vote for," etc., "shall have the right to vote at such election." Held, that "registered voters" did not include all persons whose names were on the permanent registration roll at the preceding municipal election, but only included those who had paid their poll tax as required and were entitled to vote. *Pace v. City of Raleigh*, 52 S. E. 277, 278, 282, 140 N. C. 65.

### REGISTRATION

See Special Registration; Subsequent Registration.

"Registration" is the method of proof prescribed for ascertaining the electors who are qualified to cast votes. It is a part of the machinery of elections, and is a reasonable regulation, which conduces to their orderly conduct and fairness. *People ex rel. Maher v. Carleton*, 85 N. Y. Supp. 22, 23, 41 Misc. Rep. 523.

### REGISTRATION CERTIFICATE

The "registration certificate" provided for by an act requiring a voter, as a condition of voting, to produce to election officers a certificate of registration, or, in case of its loss, a duplicate certificate from the county clerk, is not conclusive of the holder's right to vote, although it is conclusive as to the fact that the person named therein has been registered. *Yates v. Collins*, 82 S. W. 282, 284, 118 Ky. 682.

### REGRATING

"Regrating" is the buying of corn or other dead victual in any market and selling it again in the same market. *Dutton v. City of Knoxville*, 113 S. W. 381, 383, 121 Tenn. 25, 130 Am. St. Rep. 748, 16 Ann. Cas. 1028.

### REGRET

As mental anguish, see Mental Agony or Anguish.

### REGULAR

See Irregular.

#### Reputable not synonymous

"Regular" and 'reputable are not synonymous words. 'Regular' is defined as conformed to or made in accordance with a rule; agreeable to an established rule, law, type, or principal, to a prescribed mode, or to established customary form. 'Reputable' is defined as being in good repute; held in esteem; estimable." *Wise v. State Veterinary Board*, 101 N. W. 562, 564, 138 Mich. 428 (citing Cent. Dict.).

**REGULAR BUSINESS**

See Regular Course of Business; Regular Real Estate Business.

A nonresident of a county owned property there which he managed and received the rents from, and also collected rent from property which he owned as cotenant with another, receiving a commission from his cotenant for collecting the latter's share. He formerly lived and transacted business in the county, having an office in a dwelling house owned by him, and, when he was in the county collecting rents, he called at the office, upon which his business sign still remained. Held, that he was not engaged in "regular business" or habitual avocation or employment, within Code, art. 75, § 132, authorizing any one so engaged to be sued in the county in which the business is carried on. *State, to Use of Gemundt, v. Shipley*, 57 Atl. 12, 13, 98 Md. 657.

**REGULAR CHAIN OF TITLE**

In respect to Pub. Acts 1899, p. 317, Act No. 204, the court says: "There is nothing in the law of 1899 that required the purchaser to reconvey to any one except the owner of the regular title. There is nothing to indicate an intention to give such a right to the holders of earlier tax titles, unless we are to say that such holder is a 'grantee under the last recorded deed in the regular chain of title to the land.' We are of the opinion that by 'regular chain of title' was meant the chain of title based upon the patent, and that one claiming under another tax title was not intended to be included although we can imagine cases where it would be as important that he should be included (e. g., where his tax title has been sustained by law, and he is in possession under it), and in any case it would seem just that he should be. \* \* \* We think it more probable and more reasonable that the term 'regular title' was used with reference to the original government title, and believe that to be the meaning, as generally understood by lawyers." *Griffin v. Jackson*, 108 N. W. 438, 440, 145 Mich. 23, 9 Ann. Cas. 74.

**REGULAR CLERK**

The term "regular clerk," within Greater New York Charter (Laws 1901, p. 636, c. 466) § 1543, relating to the removal of regular clerks, "means one employed in the duty of keeping the records or accounts or in doing the writing which relates to the ordinary conduct or business details of the department." The property clerk, who, by Greater New York Charter, §§ 331-336 (Laws 1901, pp. 141-143, c. 466), is required to take charge of property stolen or embezzled which comes into the hands of the police, and property taken from prisoners, or lost or abandoned, and to advertise such property, and to sell it in case no claimant appears, and who is required to give security for the faithful per-

formance of his duties, is not a "regular clerk," within the meaning of such section 1543, although he is required to keep a book of registry, description, and disposition of the property in his hands. *People ex rel. Doonan v. McAdoo*, 74 N. E. 1123, 181 N. Y. 548; *People ex rel. Blatchford v. McAdoo*, 91 N. Y. Supp. 553, 554, 101 App. Div. 183.

The words "regular clerk" as used in New York City Charter (Laws 1901, p. 636, c. 466) § 1543, providing that no "regular clerk" or person holding a position in the classified municipal civil service, subject to competitive examination, shall be removed until he has been allowed an opportunity of making an explanation, etc., are used in their popular sense, and include only such positions as did not require any other qualification than the ability to perform purely clerical work. A regular clerkship is a "position in the classified municipal civil service subject to competitive examination." *People ex rel. Corkill v. McAdoo*, 99 N. Y. Supp. 324, 325, 113 App. Div. 770 (citing *People v. Board of Fire Com'rs of City of New York*, 73 N. Y. 437; *People v. Board of Fire Com'rs of City of New York*, 86 N. Y. 149; *Chittenden v. Wurster*, 46 N. E. 857, 152 N. Y. 345, 37 L. R. A. 809).

Laws 1911, c. 641, provided for a chief clerk in charge of the law department in the county clerk's office of Kings county, amending the act to make the office of county clerk of the county of Kings a salaried office, and regulating the management thereof. It fixed the salaries to be paid to assistants, clerks, employes, or subordinates employed in the office, declaring that the deputy clerk should receive \$5,000, a year, expert of records \$3,000, assistant deputy county clerk \$2,500, and the chief clerk in charge of the law department \$2,500. It was the duty of the clerk of the law department to pass on the papers for and enter judgment in law and equity cases, to tax costs, cancel notice of pendency of action, satisfy judgments and liens, issue transcripts and satisfy the same, certify to the correctness of copies, and issue executions and state writs. Held, that the chief clerk in charge of the law department was a "regular clerk," within Civil Service Law (Consol. Laws 1909, c. 7) § 22, and was therefore not subject to removal by the county clerk without notice and an opportunity to explain charges for which he was dismissed. In re *Donnelly*, 137 N. Y. Supp. 789, 790.

**REGULAR COLLEGE**

See Regular School or College.

**REGULAR COURSE OF BUSINESS**

Where a tenant, conducting both a wholesale and retail business, the former only amounting to 10 to 15 per cent. of its entire sales, offered his entire stock for sale for the purpose of closing out his business, and sold the same in such lots and quantities as suited his purchasers, disposing of the entire

quantity within 42 days, such sales were not made in the ordinary course of business, within Rev. St. 1895, arts. 3251 and 3238, providing that all persons leasing any storehouse shall have a lien on the property of the tenant for the rents, and providing that such lien shall not attach to goods or merchandise sold or delivered in the "regular course of business." *Freeman v. Collier Racket Co.*, 101 S. W. 202, 204, 100 Tex. 475. "Regular course of business," as used in such statute, does not apply to a sale of the whole stock of goods by the tenant with a view of going out of business in a closing out sale. *Freeman v. Collier Racket Co.*, 105 S. W. 1129, 1130, 44 Tex. Civ. App. 177.

### REGULAR ELECTION

An election at which judges of the district court are to be chosen for a full term in any of the judicial districts of the state, is, as to that office, a "regular election" within the meaning of Const. art. 3, § 11, providing that, in case of vacancy of any judicial office, it shall be filled by appointment of the Governor until the next regular election that may occur more than 30 days after the vacancy. *Wendorff v. Dill*, 112 Pac. 588, 83 Kan. 782.

### REGULAR ENGAGEMENT

Where a manager of a theater wired a theatrical agency to offer plaintiff a regular engagement, commencing the first week in July, to which the agency replied that plaintiff could come until September 1st, and the manager then wired the agency that he could not consider plaintiff for the summer only, but would give \$100 a week until September, and \$125 after that date, which offer was accepted, the telegrams themselves showed that the engagement was at least for some definite period extending beyond the summer, and justified evidence that in the theatrical business the words "regular engagement" had a definite meaning, and as applied to an engagement in a theater which ran throughout the year meant an engagement for 52 weeks. *Lewis v. Blackwood*, 137 N. Y. Supp. 1061, 1063, 153 App. Div. 36.

### REGULAR INTERVAL

Under Pol. Code, § 4460, defining a "newspaper of general circulation" as one which shall have been established, printed, and published at regular intervals for at least one year preceding the date of publication, where a newspaper had been published weekly for part of a year and daily for the balance of the year preceding the filing of a petition to have it declared a newspaper of general circulation, it was published at "regular intervals" for one year, within the statute, which does not require the interval between the dates of publication to be equal from beginning to end, but only to be regular, and not spasmodic or occasional. In *re Tribune Pub.*

*Co. of Palo Alto*, 108 Pac. 667, 12 Cal. App. 754.

### REGULAR MEETING

The meeting of the board of county commissioners at which they are required to elect a chairman (Gen. St. 1901, § 1630) is a "regular meeting" within the meaning of that phrase as used in the provision that road petitions shall be presented at regular meetings (section 6018) and road viewers be then appointed. *Molyneux v. Grimes*, 98 Pac. 278, 280, 78 Kan. 830.

Where the rules of a common council require action at two regular meetings, and fix the days for the "regular meetings," action had on a day not so fixed is nugatory, where the proceedings are judicial in character, though all the members of the board have agreed to meet on the latter day; such meeting not being a regular one. *Erie R. Co. v. City of Paterson*, 76 Atl. 1065, 1066, 79 N. J. Law, 512.

Under Rev. St. 1909, § 5615, providing that the terms "regular session" and "regular meeting" of the county court, as used in the article, shall include the regular sessions of such court commencing on the first Monday in February, etc., as well as any adjourned term provided for by the court when in session, fixing the date of hearing objections to an assessment of benefits at an adjourned session of the county court was sufficient within Rev. St. 1909, § 5587, contained in the same chapter and article, requiring such date to be fixed at "the next regular term" of the county court. *State ex rel. Coleman v. Blair*, 151 S. W. 148, 152, 245 Mo. 680.

### REGULAR PASSENGER TRAIN

See, also, Regular Train.

The term "passenger train" includes all passenger trains, regular and irregular, not only trains that move every day on scheduled time, but excursion trains, special trains, extra trains, etc.; whereas, the term "regular passenger train" means a passenger train on the regular published schedule. *State v. Missouri Pac. R. Co.*, 117 S. W. 1173, 1176, 219 Mo. 156 (citing 7 Words and Phrases, p. 6038).

### REGULAR REAL ESTATE BUSINESS

Persons engaged in the management of real property are commonly said to be engaged in the "real estate business." *Bennett v. Hebbard*, 68 Atl. 537, 74 N. H. 411.

Where, under the statute which authorizes cities of the third class to impose a license tax upon "real estate agents," the council of such a city enacts an ordinance imposing a license tax upon the business of "real estate," and a real estate agent thereafter continues to conduct his business within said city without a license, and in such business makes a contract to find a buyer of real estate for a compensation, such ordinance does

not render the contract illegal and void. *Manker v. Tough*, 98 Pac. 793, 794, 79 Kan. 46, 19 L. R. A. (N. S.) 675, 17 Ann. Cas. 208.

### REGULAR SCHOOL OR COLLEGE

The word "regular" means conformed to or made in accordance with a rule, agreeable to an established rule, law, type, or principle, and is not synonymous with the word "reputable," which means being in good repute, held in esteem, estimable; and an educational institution properly incorporated under the provisions of the law is a "regular school or college," within the meaning of the law; and the state veterinary board created by Pub. Acts 1899, No. 191, with authority to elect a secretary and to furnish him a list of all "regular colleges and schools of veterinary medicine," has no power to determine whether a college of veterinary medicine and surgery, existing under Comp. Laws 1897, c. 218, is a regular school or college, and cannot refuse a certificate to practice to a person holding a diploma from such college. *Wise v. State Veterinary Board*, 101 N. Y. 562, 563, 138 Mich. 428.

### REGULAR SESSION

"Regular session," as used in a statute regulating sessions of county commissioners, may apply to a session held by adjournment from a regular session. *Inhabitants of Bethel v. Oxford County Com'rs*, 60 Me. 535, 538.

Const. art. 3, § 4, that the legislative districts shall be altered by the Legislature at the "first regular session" after the return of every 10-year enumeration, does not invalidate an apportionment made at an extraordinary session of the Legislature in 1907, after the court had declared invalid the apportionment of 1906 based on the census of 1905; the phrase "first regular session" merely prescribing when the Legislature is first empowered to make an apportionment after a census. *In re Reynolds*, 96 N. E. 87, 90, 202 N. Y. 430.

Under Rev. St. 1909, § 5615, providing that the terms "regular session" and "regular meeting" of the county court, as used in the article, shall include the regular sessions of such court commencing on the first Monday in February, etc., as well as any adjourned term provided for by the court when in session, fixing the date of hearing objections to an assessment of benefits at an adjourned session of the county court was sufficient within Rev. St. 1909, § 5587, contained in the same chapter and article, requiring such date to be fixed at "the next regular term" of the county court. *State ex rel. Coleman v. Blair*, 151 S. W. 148, 152, 245 Mo. 680.

Under County Law, Laws 1892, p. 1750, c. 686, § 23, providing that each supervisor shall receive \$4 per day for attending sessions of the board, and mileage for once going and returning between his residence and

the place of meeting for each regular and special session, and section 10 (page 1745), providing that the board shall meet annually, may hold special meetings, and may adjourn from time to time, the terms "annual meeting" and "regular session" are synonymous, and a "regular" or "special" session is measured by its actual duration; each day not being a session, within section 23, so as to entitle the supervisors to mileage for each day's actual attendance at sessions of their boards. *Wallace v. Jones*, 107 N. Y. S. 288, 290, 122 App. Div. 497.

### REGULAR STATION

The words "regular station," as used in Railroad Commission Act (Laws 1907, p. 75) § 22, requiring every railroad to provide and maintain adequate and suitable depot and toilet buildings at its regular stations where an agent is maintained, means a place established on the road where trains are regularly stopped to receive and discharge passengers and freight, and where the carrier keeps an agent for the transaction of business, so that, in an action against a railroad company for a penalty for failure to construct a depot building pursuant to an order of the Railroad Commission, it may be inferred, from an averment that the station is a "regular station," that defendant maintains an agent there. *State v. Corvallis & E. R. Co.*, 117 Pac. 980, 981, 59 Or. 450.

A railway station was a "flag station," and not a "regular station," within Kirby's Dig. § 6612, authorizing railroad companies to make special charges to passengers boarding or alighting at other than regular stations, where the company had no depot there and no joint agency with the railroad which it crossed and did not use the other company's depot, though trains stopped at the crossing opposite the depot and passengers were received and discharged there on signal, and freight, express, and mail matter was received there; no tickets, bills of lading nor baggage checks being issued, and such stations being designated "flag stations" by the railroad, as distinguished from regular stations at which tickets were sold, baggage checked, bills of lading issued, and station houses and agents were maintained. *Clark v. Jonesboro, L. C. & E. R. Co.*, 112 S. W. 961, 962, 87 Ark. 385 (citing 7 Words and Phrases, pp. 6039, 6644).

### REGULAR TERM

See, also, Next Regular Term.

A "regular term" of court, within the meaning of section 8497, Rev. Codes 1899, which, in the absence of good cause shown, requires the dismissal of a prosecution when an information is not filed at the next regular term after the defendant's commitment, means a jury term as distinguished from a statutory term without a jury. *State v. Foster*, 105 N. W. 938, 940, 14 N. D. 561.

Under Rev. St. 1909, § 5615, providing that the terms "regular session" and "regular meeting" of the county court, as used in the article, shall include the regular sessions of such court commencing on the first Monday in February, etc., as well as any adjourned term provided for by the court when in session, fixing the date of hearing objections to an assessment of benefits at an adjourned session of the county court was sufficient within Rev. St. 1909, § 5587, contained in the same chapter and article, requiring such date to be fixed at "the next regular term" of the county court. *State ex rel. Coleman v. Blair*, 151 S. W. 148, 152, 245 Mo. 680.

### REGULAR TERMS

Where defendants, in the business of canning tomatoes, authorized a broker to dispose of the product in the Chicago market, and on the making of a sale the "bought" note given by the purchaser to the broker called for the "usual guaranty against swells and quality," and specified "terms regular, less one-half per cent. cash, ten days," but the "sold" note delivered by the broker to the purchaser did not contain such requirements, but called for "standard" tomatoes and "cash, less one and one-half per cent.," the notes did not fail to show a contract, on the theory that there was a material variance between the notes; it appearing that in the Chicago market, according to the usages of the trade, all such sales were made on "regular terms," meaning that the buyer was to have a credit of 60 days, with a discount privilege of 1½ per cent. in case of cash payment within 10 days, that a guaranty against swelling of the cans was customary, and that a guaranty of quality meant a "standard" can. *Eau Claire Canning Co. v. Western Brokerage Co.*, 73 N. E. 430, 437, 213 Ill. 561.

### REGULAR TITLE

In respect to Pub. Acts 1899, p. 317, Act No. 204, the court says: "There is nothing in the law of 1899 that required the purchaser to reconvey to any one except the owner of the regular title. There is nothing to indicate an intention to give such a right to the holders of earlier tax titles, unless we are to say that such holder is a 'grantee under the last recorded deed in the regular chain of title to the land.' We are of the opinion that by 'regular chain of title' was meant the chain of title based upon the patent, and that one claiming under another tax title was not intended to be included, although we can imagine cases where it would be as important that he should be included (e. g., where his tax title has been sustained by law, and he is in possession under it), and in any case it would seem just that he should be. \* \* \* We think it more probable and more reasonable that the

term 'regular title' was used with reference to the original government title, and believe that to be the meaning, as generally understood by lawyers." *Griffin v. Jackson*, 103 N. W. 438, 440, 145 Mich. 23, 9 Ann. Cas. 74.

### REGULAR TRAIN

See, also, *Regular Passenger Train*.

The word "regular," when used to designate a railroad train, applies to the operation of the train whether it be a freight or a passenger train, but if it has its designated place on the published schedule, and if it ordinarily arrives and leaves as designated in that place, it is a regular train. Thus there may be two passenger trains, one regular and the other irregular, one that is scheduled on the time-table and the other not; yet the irregular train is as much a passenger train as the regular one. *State v. Missouri Pac. R. Co.*, 117 S. W. 1173, 1176, 219 Mo. 156.

### REGULAR TRANSACTION OF BUSINESS

See *Office for the Regular Transaction of Business in Person*.

### REGULARLY

As promptly, see *Promptly*.

"Regularly," as used in Acts 1891, p. 364, c. 150, § 1, providing "that all railroads \* \* \* having more than two tracks across any public highway \* \* \* and used for switching purposes exclusively or regularly \* \* \* shall, upon the order of the county commissioners, \* \* \* place a flagman at said crossing," means in conformity with the established mode, and as a part of the routine business done at that point, slight variations in the intervals between particular acts of switching being immaterial, and does not mean at certain times or intervals of time according to some certain uniform and well-established practice. *Grand Trunk Western R. Co. v. State*, 82 N. E. 1017, 1019, 40 Ind. App. 695.

### REGULARLY ADMIT TO PRACTICE

An applicant admitted to practice law in the district and inferior courts of the state by the decision of a district court, prior to Laws 1903, c. 64, and who has not been disbarred, continues after the enactment of that chapter to be "regularly admitted to practice" law within the state within Gen. Stat. 1909, § 2225. *Hanson v. Grattan*, 115 Pac. 646, 647, 84 Kan. 843, 34 L. R. A. (N. S.) 240.

### REGULARLY CONDUCT

In the statute forbidding transportation of liquors by persons not "regularly conducting" a general express business, the word "regularly" means fixedness and permanence in the character of the business, and also indicates stated times and established routes of conveyance. *Commonwealth v. People's Express Co.*, 88 N. E. 420, 421, 426, 201 Mass. 564, 131 Am. St. Rep. 416.

Laws 1907, p. 645, c. 344, § 14, now Public Health Law (Consol. Laws, c. 45 [Laws 1909, c. 49]) § 173, provides that any person actively engaged in the practice of osteopathy in the state, who presents to the Board of Regents satisfactory evidence that he is a graduate in good standing of a "regularly conducted" school of osteopathy having a certain curriculum, which facts shall be shown by a diploma, etc., shall, upon application and payment of the fee, be licensed to practice. Relator presented, upon his application for a license to practice, a diploma from a college of osteopathy, which was a stock corporation organized under the corporation laws of another state, and which had not obtained the certificate from the Secretary of State required by General Corporation Law (now Consol. Laws, c. 23 [Laws 1909, c. 28]) § 15, as a condition precedent to doing business here, and had not received permission from the Regents of the University to do business under its corporate name, or assume the name of "college," or confer diplomas or degrees, as required by University Law (Laws 1892, p. 781, c. 378) § 33, as amended, now Education Law (Consol. Laws, c. 16 [Laws 1909, c. 21]) § 1104, as a condition precedent to such acts. Held, that the relator's college was not a "regularly conducted college," within the statute, it not having complied with the requirements for doing business within the state as a stock corporation, or for conferring diplomas, etc.; "regularly," as used in the statute, meaning "duly," "lawfully," or "legally." *People ex rel. Scott v. Reid*, 119 N. Y. Supp. 886, 869, 135 App. Div. 89.

#### REGULARLY ENTER

Where a bill for divorce contained no affidavit that there was no collusion between the parties, as required by Comp. Laws, § 8625, a default entered on nonappearance of the defendant was not "regularly entered," under a court rule providing that, in cases where personal service shall have been made and proceedings taken after default, the default shall not be set aside unless the application shall be made within six months after the default is "regularly entered," and was therefore subject to vacation after that time. *McWilliams v. Lenawee Circuit Judge*, 105 N. W. 611, 612, 142 Mich. 225.

#### REGULARLY ESTABLISH

St. 1905, p. 58, c. 65, § 1, provides for an annual tax levy to support "regularly established high schools of the state," and by section 5 limits the benefits of the high school fund to high schools that "have been organized under the laws of the state or have been recognized as existing under the high school law of the state." "By this provision, the act furnished its own definition of the phrase 'regularly established high schools of the state,' used in the earlier sections, and im-

presses the character of regularly established high schools upon schools which comply with either of the last-quoted requirements of section 5." *Board of Education of City and County of San Francisco v. Hyatt*, 93 Pac. 117, 119, 152 Cal. 515.

#### REGULARLY FILE

Laws 1907, c. 57, § 22, provides that all entries, orders, and rulings of record in the clerk's office and all papers regularly filed in a cause shall be a part of the record proper, and Comp. Laws 1897, § 2997, provides that all instructions demanded must be filed and shall become a part of the record. Held, that the phrase "all papers regularly filed in a cause" only included papers which by statute or order of court are required or directed to be filed, the word "regularly" meaning in a regular manner, in a way or method according to rule or established mode, so that an instruction given by the judge upon his own motion in a criminal case is not a part of the record on appeal, so as to be reviewable unless embodied in a bill of exceptions, though it is included in the transcript. *Territory v. McGrath*, 114 Pac. 364, 367, 16 N. M. 202 (quoting 7 Words and Phrases, p. 6040).

#### REGULARLY FORWARD

Where plaintiff's contract was to "promptly" forward information to defendant, its prayer, merely requiring it to be found that its information was "regularly" forwarded, was defective; "regularly" generally meaning merely in compliance with some prescribed rule, without regard to the idea of absence of unnecessary delay embodied in "promptly." *F. W. Dodge Co. v. H. A. Hughes Co.*, 72 Atl. 1036, 1039, 110 Md. 374.

#### REGULARLY HELD

Const. art. 4, §§ 16, 17, provide for the election of a clerk of the superior court for each county, in the manner prescribed for members of the General Assembly, to hold office for four years. Section 29 provides that if the office of clerk becomes vacant during the term, and the people fail to elect, the judge of the superior court shall appoint some one to fill the vacancy until an "election regularly held." The general scheme of the Constitution as to appointees to vacancies in office occurring during an official term, as evidenced by article 3, §§ 12, 13, and article 4, §§ 21, 23, 24, 25, 28, is that the appointee shall hold only until the next general election. Thus vacancies in offices, the terms of which are two years, are filled by appointment "for the unexpired term," and vacancies in offices, the terms of which are four years, are filled by appointment only until the "next general election." Held, that an appointee to fill a vacancy occurring during the term in the office of clerk of the superior court holds only until the next general election, and not for the unexpired term,



if there is an intervening general election. The adjective "regular," qualifying the word "election," may well refer to an election held at regular periods for the same office, but the adverb "regularly" qualifies the word "held," and refers not so much to the time as to the manner of holding the election; that is, according to the prescribed method or rule. *Rodwell v. Rowland*, 50 S. E. 319, 327, 137 N. C. 617.

#### REGULARLY QUALIFIED

One licensed to practice osteopathy under Public Health Law (Consol. Laws 1909, c. 45) art. 8, and thereby authorized to attend the sick and administer anything curative save drugs, and to do what a surgeon may do without instruments, and thereby becoming a doctor of osteopathy and a physician defined by section 160, is a regularly qualified physician within a policy requiring the attendance on insured of a "regularly qualified physician"; the term being equivalent to one authorized by law to treat the sick. *Anderson v. National Casualty Co.*, 135 N. Y. Supp. 889, 890, 151 App. Div. 439.

#### REGULARLY SUBMIT AND TRY

The Avondale City Charter (Acts 1894-95, p. 139) provides for the levy of special assessments for street improvements, and declares that the property owners assessed may appear and contest the assessment, and, if not satisfied with the action of the city council, they may remove the matter by certiorari to the city or circuit court, "where the case shall be regularly submitted and tried as in other civil cases." Held, that the property owner is entitled to a trial de novo after the case has been removed to the city or circuit court by certiorari. *Harton v. Town of Avondale*, 41 South. 934, 938, 147 Ala. 458.

### REGULATE

See License, Regulate, and Tax.

"To regulate" means to adjust by rule, method, or established mode; to direct by rule or restriction; to subject to governing principles or laws. *Weadock v. Judge of Recorder's Court of Detroit*, 120 N. W. 991, 992, 156 Mich. 376, 132 Am. St. Rep. 527, 16 Ann. Cas. 720.

The word "regulate" means "to adjust, order, or govern by rule, method, or established mode; direct or manage according to certain standards or rules." *Van Ingen v. Hudson Realty Co.*, 94 N. Y. Supp. 645, 648, 106 App. Div. 444 (quoting Stand. Dict.).

While the word "regulate" has been given a comprehensive meaning and construed to signify both government and restriction, thereby including in an act all subjects germane to the object named, it does not so much imply creating a new thing as arranging in proper order and controlling that

which already exists. *Cote v. Village of Highland Park*, 139 N. W. 69, 74, 173 Mich. 201.

"To regulate" means to adjust; to govern by rule; to direct or manage according to certain standards or laws; to subject to rules, restrictions, or governing principles. Stand. Dict. An ordinance making it unlawful to keep open a pawnshop after 6 o'clock p. m. is not a prohibition of the business, but a regulation of it. *City of Butte v. Paltrovich*, 75 Pac. 501, 30 Mont. 18, 104 Am. St. Rep. 698.

"To regulate" means to prescribe the manner in which a thing licensed may be conducted; a license itself being the permit or authority to conduct and carry on. *Pacific University v. Johnson*, 84 Pac. 704, 706, 47 Or. 448.

"The word 'regulating' means to put or keep in order, as to regulate the disordered state of a nation or its finances." The title to an ordinance of a city or village, to wit, "An ordinance regulating and licensing liquor dealers within the village of St. Anthony," is sufficient, where the ordinance provides for the payment of a fixed sum for retail liquor dealers only, and prohibits the business of running a restaurant or lunch counter in connection therewith, or in the same room, and also requires the doors to be closed on Sunday, and also prohibits music, singing and dancing in the room occupied as a saloon. *Village of St. Anthony v. Brandon*, 77 Pac. 322, 325, 10 Idaho, 205 (quoting the definition in Cent. Dict.).

"The word 'regulate' is one of broad import. It is the word used in the federal Constitution to define the power of Congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be." *St. Louis v. Western Union Telegraph Co.*, 13 Sup. Ct. 990, 992, 149 U. S. 465, 469, 37 L. Ed. 810; *Sluder v. St. Louis Transit Co.*, 88 S. W. 648, 651, 189 Mo. 107, 5 L. R. A. (N. S.) 186 (quoting and adopting definition in *St. Louis v. Western Union Telegraph Co.*, 149 U. S. 467, 13 Sup. Ct. 990, 37 L. Ed. 810).

Pub. Acts 1887, No. 145, is entitled "An act to regulate the use of steam engines, steam wagons or other vehicles which are in whole or in part operated by steam, on the public highways of this state," which act was amended by Pub. Acts 1903, No. 71, providing that no township shall be liable for damages sustained by the breaking of any bridge by any steam engine weighing more than six tons. Held, that the word "regulate" included both government and restriction, and broad powers could be exercised thereunder, and the subject-matter of the amendment was included within the title of the original act. *Westgate v. Adrian Township*, 126 N. W. 422, 161 Mich. 333.

The word "regulating," in title of Acts 1902, c. 566, entitled "An act to repeal and reenact section 4 of article 100 of the Code of Public General Laws as it is enacted by chapter 317, Acts 1894, entitled 'Works, hours of, in factories' regulating the employment of children," is sufficiently broad to justify provisions in the body of the act prohibiting the employment in any mill or factory other than establishments for the manufacture of canned goods of any child under 14 years of age, unless such child is the only support of a widowed mother, or invalid father, or is solely dependent on such employment for his support. *Mt. Vernon-Woodberry Cotton Duck Co. v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 75 Atl. 105, 107, 111 Md. 561, 134 Am. St. Rep. 636.

#### As control

As applied to the sale of intoxicating liquors "regulation" means to restrict and control the authorized sale of liquors by providing the conditions under which sales may be made. *McPherson v. State*, 90 N. E. 610, 611, 174 Ind. 60, 31 L. R. A. (N. S.) 188.

*Lewiston City Charter* (Laws 1880-81, p. 386) § 7, authorizes the city to provide for clearing, improving, and repairing streets, etc., for the prevention and removal of obstructions therefrom, and also to regulate cellarways and cellar lights, etc. Held, that the word "regulate" as so used means to put or keep in order, and to regulate sidewalks, and includes control thereof. *City of Lewiston v. Isaman*, 115 Pac. 494, 497, 19 Idaho, 653.

Under the law of Kentucky (Acts 1881-82, p. 817, c. 461), which holds that the use of a street by a telephone company is for a public and not a private purpose, general power expressly given to a city by a special charter to "regulate" the streets, alleys, etc., imports power to control their use, the word "regulate" being a word of wider import than "control," and authorizes the city to grant the right to a telephone company to erect and maintain its poles in the streets. *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 174 Fed. 739, 750, 99 C. O. A. 1.

Laws 1909, c. 222, entitled "An act to revise the laws authorizing the business of banking, providing for the organization and control of banks, and to establish a banking department for the supervision of such business," which, by sections 29 and 30, makes it an offense for officers and directors of a bank to permit shareholders to become indebted to it at one time in excess of 50 per cent. of its paid-up capital, does not conflict with Const. art. 3, § 21, which provides that no law shall embrace more than one subject which shall be expressed in its title; since to "control" has the same sense as to "regulate," and since the term "control of banks" means the control of the banking business, indicates new legislation and means to check or re-

strain, and hence appropriately covers the provisions declaring the offense and the penalty therefor. *State v. McPherson*, 139 N. W. 368, 369, 30 S. D. 547 (citing 2 Words and Phrases, p. 1549; 7 Words and Phrases, p. 6041).

#### As license

*St. Johns City Charter* (Sp. Laws 1905, p. 542) § 69, subd. 45, authorizing the council to regulate and restrain dealers in liquor, places where it is kept for sale, and the sale and disposal thereof, and providing that no provisions of the law concerning the sale or disposition of liquors in Multnomah county shall apply to the sale or disposition thereof in said city, repeals the local option law (Laws 1905, p. 41) as to such city; the word "restrain" being more comprehensive than, and including the power to, "prohibit," and the power to license being included in the word "regulate." *State v. Cochran*, 104 Pac. 419, 421, 55 Or. 157.

#### As prescribe rules

The reservation in a street railroad franchise of power to "regulate" the conduct of the business means the imposition of such restrictions as may be necessary to protect the public from harm, and does not imply confiscation of any right or anything that will affect the revenues of the grantee of the franchise. The right to "regulate" is to prescribe rules for the government of the cars in the city, and applies to the means by which they are propelled, and the speed at which they may pass through the streets. *Shreveport Traction Co. v. City of Shreveport*, 47 South. 40, 43, 122 La. 1, 129 Am. St. Rep. 345 (citing 7 Words and Phrases, p. 6043).

The primary meaning of the word "regulate" is "to lay down the rule by which a thing shall be done." The importation of cigarettes in original packages for personal consumption is a transaction involving interstate commerce, and is not within Acts 1905, p. 82, c. 52, regulating and prohibiting the manufacture, sale, keeping for sale, owning or giving away of cigarettes, etc. *State v. Lowry*, 77 N. E. 728, 733, 166 Ind. 372, 4 L. R. A. (N. S.) 528, 9 Ann. Cas. 350 (citing And. Law Dict.).

#### As prohibit

To "regulate" means to adjust by rule or method or established mode; to direct by rule or restriction; to subject to governing principles of law, but the term does not include the power to prohibit. In *re McCoy*, 101 Pac. 419, 429, 10 Cal. App. 116.

The words "restraint" and "regulate" are not synonymous with the word "prohibit." A power or right to "regulate" a thing, such as the right of aliens to hold property, does not give an authority to "prohibit" that thing. *Madden v. State*, 75 Pac. 1023, 1024, 68 Kan. 658.

The power to "regulate" the sale of intoxicating liquors is not power to prohibit their sale. *Timm v. Common Council of Village of Caledonia Station*, 112 N. W. 942, 943, 149 Mich. 323.

The word "regulate" in Detroit city charter, authorizing the common council to regulate the selling of intoxicating liquors, does not give the power to prohibit the sale of liquors, but authorizes a municipality to confine the exercise of such business to a certain locality. *Churchill v. Common Council of City of Detroit*, 116 N. W. 558, 153 Mich. 93.

Under Rem. & Bal. Code, § 7507, providing that cities of the first class shall have power to "regulate" the selling or giving away of intoxicants, a regulation which works a partial prohibition is valid; the word "regulate" necessarily implying some degree of restraint and prohibition of acts usually done in connection with the thing to be regulated. *City of Tacoma v. Keisel*, 124 Pac. 137, 139, 68 Wash. 685, 40 L. R. A. (N. S.) 757.

"The power given a municipality to 'regulate' does not authorize it to suppress or prohibit a trade or business, as the very essence of regulation is the existence of something to be regulated." The charter power of a village to regulate billiard and pool halls was not a power to suppress them. *State ex rel. McMonies v. McMonies*, 106 N. W. 454, 455, 75 Neb. 443 (citing *Horr & B. Mun. Ord. § 30*; *State v. Mott*, 61 Md. 297, 48 Am. Rep. 106).

A provision giving a municipality "power to regulate" and "suppress" skating rinks gives no power to prohibit them. "A power to 'regulate' will not be construed to include the power to prohibit. 'A power simply to regulate does not embrace a power to prohibit or destroy a trade or occupation.' Therefore ordinances, to be valid, cannot interfere with lawful employment." *Johnson v. Town of Philadelphia*, 47 South. 526, 527, 94 Miss. 34, 19 L. R. A. (N. S.) 637, 19 Ann. Cas. 103 (quoting and adopting definition in *McQuillin, Municipal Ordinances*, p. 79).

"Regulation" contemplates the continuance of the subject-matter in existence, or in activity, while "prohibition" implies its entire destruction or cessation. Under a statute empowering cities to "regulate and to license" dramshops, a city is not authorized to pass an ordinance requiring applicants for dramshop licenses to obtain yearly the consent of two-thirds of the qualified petitioners in the entire city instead of two-thirds of the proper petitioners in the block in which the applicant purposes to keep his dramshop, as required by another statute. *State ex rel. Sheffel v. McCammon*, 86 S. W. 510, 511, 111 Mo. App. 626.

While an ordinance regulating the hours in which intoxicating liquors shall be sold in

Boise City and for Sunday closing, and providing a penalty for the sale thereof during prohibited hours, does prohibit the conduct of the business therein referred to during certain hours, it is a "regulation" of that business and not a prohibition of it. "To prohibit, limit, confine, or abridge a thing, the restraint may be permanent or temporary. It may be intended to prohibit, limit, or abridge for all time or for a day only." Restraint does not contemplate an absolute destruction of business, but rather places it within certain bounds." *State v. Calloway*, 84 Pac. 27-33, 11 Idaho, 719, 4 L. R. A. (N. S.) 109, 114 Am. St. Rep. 285 (quoting and adopting definition in *Re Charge to Grand Jury*, 62 Fed. 828).

"Regulation" and "prohibition" are distinct and incongruous subjects of legislation. The prohibitory act is not unconstitutional on the ground that the exceptions created by the act provide the methods whereby those exceptions may be availed of without violating the major purposes of the act, and contains the subject of regulations as well as the subject of prohibition of dealings in intoxicants foreshadowed by the title, for while, in a sense, regulation is accomplished by the act, it is only a method by which the universal prohibition is bereft of its penalizing qualities by affording exceptions to those who comply with the act. *State ex rel. Woodward v. Skeggs*, 46 South. 268, 273, 154 Ala. 249 (quoting and adopting definition in *Miller v. Jones*, 80 Ala. 89).

St. Louis charter, art. 3, § 26, cl. 6, delegates to the mayor and municipal assembly the power to regulate hospitals, to regulate stone quarries, and the slaughter of animals, provide for the erection, management, and regulation of slaughterhouses, prevent the driving of stock through the city, prohibit the erection of soap factories, stockyards, and slaughterhouses, and to remove and regulate the same. Held, that the power to regulate did not give the municipality the power to prohibit the quarrying of stone; the word "regulate" implying the continued existence of the subject-matter to be controlled, and so an ordinance prohibiting the operation of stone quarries, without permission from the municipal assembly by proper ordinance, is invalid, for the granting of the permission rests in the arbitrary discretion of that body, and such business may be improperly prohibited. *City of St. Louis v. Atlantic Quarry & Construction Co.*, 148 S. W. 948, 950, 244 Mo. 479.

Hurd's Rev. St. 1908, c. 24, par. 62, § 1, cl. 95, authorizes the Chicago counsel to license and regulate junk shops. Clause 50 authorizes it to regulate sale of meats, and provide for the place of selling. Clause 81 authorizes it to direct the location, and regulate the management and construction of packing houses. Clause 82 authorizes it to direct

location, and regulate use and construction of breweries. Held, that the fiftieth and subsequent clauses recognize that power to regulate did not include power to prohibit within certain localities, and like meaning should be given to clause 95, in absence of anything showing contrary intent, so that, under the power to "regulate," the city could not prohibit maintenance of a junk shop in a building, except with consent of a majority of property owners in the block where located, and paragraph 6, providing that all laws not inconsistent with the provision of the act should continue in force, did not authorize the ordinance, where the power conferred by the old charter relating to the subject was also given by section 1 of the present act. *People v. Busse*, 88 N. E. 831, 832, 240 Ill. 338.

#### As refuse or revoke license

*Milwaukee City Charter*, c. 4, subsec. 1, authorizing the council to license, "regulate," and restrain those engaged in the liquor business, does not give the council power to revoke the license of a liquor seller nor to prescribe conditions on which the license may be revoked. *State ex rel. Sepe v. City of Milwaukee*, 109 N. W. 421, 422, 129 Wis. 562.

#### As restrain

Under *Woodburn Charter*, c. 4, § 5, authorizing ordinances deemed expedient to suppress intemperance and to regulate the sale or disposition of liquors, an ordinance restricting the right to sell intoxicants to registered pharmacists upon bona fide prescriptions for disease is a valid "regulation" and not a "prohibition." *Bachelors' Club v. City of Woodburn*, 119 Pac. 339, 343, 60 Or. 331.

As applied to the sale of intoxicating liquors, "regulation" means to restrict and control the authorized sale of liquors by providing the conditions under which sales may be made. *McPherson v. State*, 90 N. E. 610, 611, 174 Ind. 60, 31 L. R. A. (N. S.) 188.

Under *Rem. & Bal. Code*, § 7507, providing that cities of the first class shall have power to "regulate" the selling or giving away of intoxicants, a regulation which works a partial prohibition is valid; the word "regulate" necessarily implying some degree of restraint and prohibition of acts usually done in connection with the thing to be regulated. *City of Tacoma v. Keisel*, 124 Pac. 137, 139, 68 Wash. 685, 40 L. R. A. (N. S.) 757.

#### City affairs

A statute providing for the annexation of one city by another, enlarging the territory and population of one and depriving the other of its charter and government as a city, is a law "regulating the affairs of cities," within the state Constitution prohibiting the enactment of local acts for that purpose. *Sample v. City of Pittsburg*, 62 Atl. 201, 205, 212 Pa. 533 (citing definition in *Morrison v.*

*Backert*, 5 Atl. 739, 112 Pa. 322; *Commonwealth ex rel. Fertig v. Patton*, 88 Pa. 258; *Scowden's Appeal*, 96 Pa. 422; *Perkins v. City of Philadelphia*, 27 Atl. 356, 156 Pa. 554).

#### County business or affairs

The word "regulating," in *Const. art. 4, § 22*, forbidding the passage of local or special laws regulating county business, is used in its ordinary sense as directing by rule or restriction. *Board of Com'rs of Newton County v. State ex rel. Bringham*, 69 N. E. 442, 444, 161 Ind. 616 (citing *Bouv. Law Dict.*).

To "regulate," as contemplated by the Constitution forbidding the passage of local or special laws regulating county business, is to direct by rule or restriction. *Kraus v. Lehman*, 83 N. E. 714, 716, 170 Ind. 408, 15 Ann. Cas. 849.

*Const. art. 3, § 56*, prohibits the Legislature from passing any local or special law regulating the affairs of counties, and declares that no local or special laws shall be passed where a general law can be made applicable. *Acts 29th Leg. c. 161*, as amended by *Acts 30th Leg. c. 168*, created the office of county auditor in all counties having a population of 40,000, or containing a city with 25,000 inhabitants, and prescribed the duties of such auditor, giving him general supervision over the accounts, books, etc., of all county officers having authority to receive money on behalf of the county, etc. B. county having the requisite population, plaintiff was appointed auditor therefor, and served until after the passage of *Acts 31st Leg. c. 120*, on April 1, 1909, amending the prior act and exempting B. county by name from the provisions thereof. Held, that the word "regulating," as used in the constitutional provision, should not be given a narrow or technical interpretation; and that the act establishing the office of county auditor was an act regulating county affairs within such section, and hence the act amending the same by exempting B. county was a special or local law regulating county affairs and was therefore unconstitutional. *Hall v. Bell County (Tex.)* 138 S. W. 178.

By *Laws 1903, p. 38, c. 27, § 3*, in effect April 14th, a new county was created from B. county, and an election ordered to be held on that day for the election of county officers of B. county; but by an amendment passed March 12, 1903 (*Laws 1903, p. 80, c. 49*), two persons named were appointed county commissioners of B. county. They were directed to qualify on or before April 5, 1903, and to hold a meeting not later than April 10th, and appoint an assessor and a probate judge. Held, that such provision, which in effect ousted the existing officers of B. county before their terms of office expired and appointed new officers in their place, was a local and a special law "regulating county affairs," within the prohibition of *Act Cong. July 30, 1886, c. 818, 24 Stat. 170*, prohibiting terri-

torial Legislatures from passing local and special laws regulating county and township affairs. *Territory ex rel. Curran v. Gutierrez*, 78 Pac. 139, 141, 12 N. M. 254.

#### Pool rooms

"The 'power to regulate, or prohibit,' \* \* \* not only includes nuisances, but extends to everything expedient for the preservation of the public health and the prevention of contagious diseases, and to which may be added that it extends to everything expedient for the promotion of public morals, welfare, or safety. It is only when a business is lawful and has no injurious tendency that the governing body cannot say who shall and who shall not exercise the right itself." Since the business of conducting a pool hall is not a useful employment, and is not always unattended with uses injurious to public peace and morals, an ordinance authorizing the police commissioners to make such regulations for granting permits to conduct that business as may be necessary for the maintenance of public order, the promotion of public morals, and the orderly conduct of such places is not invalid. *Goytino v. McAleer*, 88 Pac. 991, 4 Cal. App. 655 (citing *County of Los Angeles v. Hollywood Cemetery Ass'n*, 57 Pac. 153, 124 Cal. 344, 71 Am. St. Rep. 75; *Ex parte Shrader*, 33 Cal. 284).

#### Power over divorces

In Const. art. 2, § 18, granting all power over divorces in the district court, subject to regulation by law, the word "regulation" is of broad signification, and, in the absence of restrictive words, the power granted must be regarded as plenary over the entire subject. *Durland v. Durland*, 74 Pac. 274, 275, 67 Kan. 734, 63 L. R. A. 959.

#### Punishment for contempt

By the use of the word "regulate," in Const. § 63, granting to the General Assembly the right to regulate the exercise by courts of the right to punish for contempt, it was not intended to clothe the Legislature with absolute power over the subject, but to confer on it authority to bring the subject of contempts within reasonable regulations, not inconsistent with the exercise by the courts, with vigor and efficiency, of those functions which are essential to the discharge of their duties. *Yoder v. Commonwealth*, 57 S. E. 581, 583, 107 Va. 823.

#### Railroads and railroad traffic

The right "to regulate" a street railway company means such restrictions as may be necessary to protect the public from harm, but does not mean the least confiscation of any right or anything that will affect the revenues of the company. *Shreveport Traction Co. v. City of Shreveport*, 47 South. 40, 43, 122 La. 1, 129 Am. St. Rep. 345.

The "power of the state to regulate railroads" extends to securing to the public rea-

sonable facilities for making connections between different carriers. *Atlantic Coast-Line R. Co. v. North Carolina Corp. Commission*, 27 Sup. Ct. 585, 593, 206 U. S. 1, 51 L. Ed. 933, 11 Ann. Cas. 398.

The word "regulate," as used in a constitutional provision conferring on a railroad commission authority to make reasonable and just regulations to govern and regulate railroad traffic, has a broad meaning, and includes the power to see to the maintenance of the main track and all its switches and spurs. The commission may order that a spur or switch be not removed, subject to review by the court. *Railroad Commission of Louisiana v. Kansas City Southern Ry. Co.*, 35 South. 487, 488, 111 La. 133.

#### Streets

A grant of power to "regulate" the use of city streets confers the power to regulate the speed of automobiles, and also to provide for their registration and numbering as a means of regulation. *People v. Schneider*, 103 N. W. 172, 173, 139 Mich. 673, 69 L. R. A. 345, 5 Ann. Cas. 645.

To "regulate" implies that there exists the subject which is to be regulated. Under Greater New York Charter (Laws 1901, p. 136, c. 466) § 315, making it the duty of the police department to regulate the movement of teams and vehicles in the streets, this expression recognizes the existence of such a thing, and such movement in every part of a street is a public right. If, under the guise of a regulation, that movement is forbidden in any part of a street, there is an impairment of the right—a pro tanto prohibition. The word "regulate" is defined as to "prescribe the rule by which commerce is to be governed"; but to prescribe a rule for government, even though it afford the exercise of full powers, does not imply the power to prohibit absolutely the thing to be controlled. *Peace v. McAdoo*, 96 N. Y. Supp. 1039, 1041, 110 App. Div. 13 (citing *Anderson v. City of Wellington*, 19 Pac. 719, 40 Kan. 173, 2 L. R. A. 110, 10 Am. St. Rep. 175; *Ex parte Patterson*, 58 S. W. 1013, 42 Tex. Cr. R. 256, 51 L. R. A. 654; *McConvill v. Jersey City*, 39 N. J. Law, 44; *Thousand Island Park Ass'n v. Tucker*, 65 N. E. 975, 173 N. Y. 203, 60 L. R. A. 786; *People v. Gadway*, 28 N. W. 101, 61 Mich. 285, 1 Am. St. Rep. 578; *Andrews v. State*, 3 Heisk. [Tenn.] 165, 8 Am. Rep. 8; *Gibbons v. Ogden*, 22 U. S. [9 Wheat.] 1, 6 L. Ed. 23).

#### Tolls

The words "regulate tolls," as used in the charter of a railroad, providing that, when the aggregate amount of dividends declared shall amount to the full sum invested and 10 per cent., the Legislature may so regulate the tolls and freights that not more than 15 per cent. per annum shall be divided on the capital employed, and the surplus prof-

its, if any, after paying the expenses and reserving such proportion as may be necessary for future contingencies, shall be paid over to the Treasurer of the State for the use of the common schools, do not refer solely to fixing the amount to be charged by the railroad, but the words embrace, not only fixing the amount to be charged to the public, but an order for the division if earnings between the railroad and the schools. The surrender by a railway company of its special charter, to accept a general railroad law, before the state had made any attempt to regulate its tolls, freed the company from all liability to the state under a charter provision that, when declared dividends shall aggregate a specified amount, the Legislature may so regulate the tolls that not more than a fixed percentage shall be divided annually on the capital employed, and the surplus profits shall be paid over to the State Treasurer, and that, "if required," the corporation shall furnish the Legislature a statement of expenditures; and such liability, therefore, cannot be enforced by virtue of subsequent legislation without impairing the rights of the railroad company under the federal Constitution. *Terre Haute & I. R. Co. v. Indiana*, 24 Sup. Ct. 767, 769, 194 U. S. 579, 48 L. Ed. 1124.

#### REGULATE AND RESTRAIN

See, also, License, Regulate, and Restrain.

To say that the words "regulate and restrain" do not in any sense mean "revoke" is distinctly erroneous. Under Milwaukee City Charter, as amended (Laws 1874, pp. 327, 330, c. 184, subc. 4, § 3, subsecs. 9, 40), empowering the common council to regulate and restrain the sale of milk, to tax, license, regulate, and restrain vendors of milk, and to fix and regulate the amount of license, etc., the council had power to revoke milk licenses and to vest such power in the health commissioner, with the right to exercise the same summarily and even without notice. *State ex rel. Nowotny v. City of Milwaukee*, 121 N. W. 658, 659, 140 Wis. 38, 133 Am. St. Rep. 1060 (overruling construction in *Sepic, State ex rel., v. City of Milwaukee*, 109 N. W. 421, 129 Wis. 562).

#### REGULATE COMMERCE

See, also, Commerce; Interstate Commerce.

The word "regulate," as used in the commerce clause of the federal Constitution (article 1, § 8, cl. 3), means to control. *Titsworth v. State*, 101 Pac. 288, 289, 2 Okl. Cr. 268.

The word "regulate," within the constitutional provision authorizing Congress to regulate interstate commerce, imparts the right and power to enact laws, and not simply to make rules and regulations. *Snead*

*v. Central of Georgia Ry. Co.*, 151 Fed. 608, 618.

To "regulate," in the sense intended by Const. U. S. art. 1, § 8, cl. 3, conferring on Congress power to regulate commerce among the several states, is to foster, protect, control, and restrain with appropriate regard for the welfare of those who are immediately concerned and of the public at large. *Mondu v. New York, N. H. & H. R. Co.*, 32 Sup. Ct. 169, 174, 223 U. S. 1, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44.

The power of Congress to "regulate commerce," given by subsection 3, § 8, art. 1, of the federal Constitution, means the power to enact legislation that directly affects interstate commerce or its adjuncts and not legislation that affects it or them indirectly only. It is the power to enact legislation which relates to, acts upon, or touches interstate commerce or its adjuncts, or legislation of which either is the subject. *United States v. Adair*, 152 Fed. 737, 745, 764 (citing *Gibbons v. Ogden*, 9 Wheat. [22 U. S.] 1, 6 L. Ed. 23).

The "power to regulate" interstate commerce, which is vested in Congress, has no limitations other than are prescribed in the Constitution. It is the power to regulate the commerce which originally existed in the states, and Congress, under this authority, may limit and restrain commerce at pleasure. The power is exclusive, and hence the grant carries with it the whole subject, leaving nothing for the states to act upon. *Champion v. Ames*, 23 Sup. Ct. 321, 323, 188 U. S. 321, 47 L. Ed. 492.

"No fixed rule can be prescribed or defined that will amount to a regulation of commerce, within the meaning of the constitutional provision conferring on Congress the power to regulate commerce among the several states." The power of Congress is plenary and exclusive. Chief Justice Waite, in the case of *Hall v. De Cuir*, 95 U. S. 485, 488, 24 L. Ed. 547, said: "The line which separates the powers of the states from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not infrequently differ in their reasons for a decision in which they concur. Under such circumstances it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved. \* \* \* If the statutes of the state are for the purpose of facilitating the safe transportation of goods, without undertaking to regulate commerce or interfere in any manner with the rights of the parties to fix their liability by contract, they will be upheld, notwithstanding they may have an indirect or remote effect upon commerce."

A provision that when there are several connecting railroads under different companies, and goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to its connecting railroad, that the last company which has received the goods as in good order shall be responsible to the consignee for any damages, open or concealed, done to the goods, and that such companies shall settle among themselves the question of ultimate liability, is not a regulation of commerce. *Kavanaugh v. Southern R. Co.*, 47 S. E. 526, 527, 120 Ga. 62, 1 Ann. Cas. 705.

In determining the meaning and scope of the clause of the federal Constitution giving Congress power to regulate commerce, the Supreme Court has deemed it undesirable to give to the words employed therein any hard and fixed definition, or to mark with absolute certainty the extent of the power thereby conferred. It has been declared that "interstate commerce" is a term of very large significance, and the power conferred by the Constitution as to interstate and foreign commerce one without limitation. It authorizes legislation with respect to all subjects of foreign and interstate commerce, the persons engaged in it, and the instruments by which it is carried on. "Commerce" undoubtedly is traffic, but it is something more; it is intercourse. In view of the large significance given to the terms of the commerce clause and the scope of the power thereby conferred, the Act of Congress of June 11, 1906, c. 3073, 34 Stat. 232, commonly called the "Federal Employers' Liability Act," is a "regulation of commerce between the states, or with foreign nations, within the meaning of the commerce clause of the Constitution, and hence within the power of Congress." *Kelley v. Great Northern Ry. Co.*, 152 Fed. 211, 217 (citing *Hopkins v. United States*, 19 Sup. Ct. 40, 171 U. S. 578, 597, 43 L. Ed. 290; *Sherlock v. Alling*, 93 U. S. 101, 23 L. Ed. 819; *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 464, 26 L. Ed. 1067; *Gibbons v. Ogden*, 9 Wheat. [22 U. S.] 1, 189, 194, 6 L. Ed. 23).

The power to "regulate commerce" between the states and with foreign countries conferred on Congress by the federal Constitution includes the power to regulate the transportation of persons. Act Cong. June 25, 1910, c. 395, 36 Stat. 825, making it a felony to furnish transportation, or to persuade, entice, or induce a woman or girl to go, from one state to another as a passenger in interstate commerce for prostitution or debauchery, where the furnishing of such transportation or the inducement, persuasion, or enticement is followed by the woman being actually transported in interstate commerce for such purpose, is a proper exercise of the constitutional power of Con-

gress to regulate commerce between the states, and is not unconstitutional as an infringement of the police power of the states. *United States v. Hoke*, 187 Fed. 992-994.

Rev. St. 1899, § 2090, as amended and re-enacted, making it unlawful to bring infected sheep into the state, is not a "regulation of interstate commerce," in violation of the federal Constitution, but is a reasonable exercise of the state's police power. *Patrick v. State*, 98 Pac. 588, 589, 17 Wyo. 260, 129 Am. St. Rep. 1109.

An order made under state authority, requiring a railroad company to stop on signal two of its through fast mail trains running between Jersey City, N. J., and Tampa, Fla., at a small town in South Carolina, which is also the junction point with a small branch road, is void as a direct "regulation of interstate commerce," where, in addition to several local trains daily, the residents of such town are furnished daily one slower through train each way. *Atlantic Coast Line R. Co. v. Wharton*, 28 Sup. Ct. 121, 124, 207 U. S. 328, 52 L. Ed. 230.

A regulation of "intrastate commerce," as well as of interstate commerce, and therefore one beyond the power of Congress to enact, is made by the provision of the Employers' Liability Act of June 11, 1906, c. 3073, 34 Stat. 232, that "every common carrier engaged in trade or commerce" in the District of Columbia or in the territories or between the several states shall be liable for the death or injury of "any of its employes" which may result from the negligence of "any of its officers, agents, or employes." *Howard v. Illinois Cent. R. Co.*, 28 Sup. Ct. 141, 144, 207 U. S. 463, 52 L. Ed. 297.

The "commodities clause" of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 379, as amended by Act June 29, 1906, c. 3591, 34 Stat. 584), which makes it unlawful for any railroad company to transport in interstate or foreign commerce any article or commodity, "other than timber and the manufactured products thereof, manufactured, mined or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier," is not a "regulation of interstate commerce," within the commerce clause of the Constitution, but entirely excludes from such commerce a certain class of persons, and is unconstitutional and void as applied to railroad companies which, under the sanction and encouragement of state laws, had more than 50 years before its enactment become the owners of coal lands in such state, and by themselves, or subsidiary companies of which they owned the stock, developed mines thereon, and con-

structed railroad lines thereto at great expense, and engaged extensively in the mining of coal, a large part of which was necessarily marketed in other states, and which could not practically be transported, except over their own lines, nor marketed within the state, as depriving such companies of their liberty and property without due process of law, in violation of the fifth constitutional amendment. *United States v. Delaware & H. Co.*, 164 Fed. 215, 225-249.

#### As to prescribe rules

The power to "regulate commerce" is the power "to prescribe the rules by which commerce shall be governed (that is, the conditions upon which it shall be conducted), to determine when it shall be free and when subject to duties or other exactions. The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged." The power to regulate applies as well to traffic on water as to traffic on land. The power is not confined to the instrumentalities of commerce, as they were known or in use when the Constitution was adopted. When a corporation or person engages in interstate commerce, the men who control it and the corps of its employes are subject to the legitimate means which Congress may select for its regulation, and, where the purpose of Congress is legitimate and expressly relates to employes engaged in interstate commerce, it is immaterial to the validity of the act that somewhere in its operation it may have a casual or contingent effect upon state legislation. *Snead v. Central of Georgia R. Co.*, 151 Fed. 608, 614 (quoting and adopting definition in *Gloucester Ferry Co. v. Pennsylvania*, 5 Sup. Ct. 828, 114 U. S. 208, 29 L. Ed. 158).

"The power vested in Congress to 'regulate commerce' with foreign nations, and among the several states, and with the Indian tribes, is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter into its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. And while a state may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet the subject-matter, which has been confided exclusively to Congress by the Constitution, is not within the jurisdiction of the police power of the state, unless placed there by congressional action." *Stubbs v. People*, 90 Pac. 1114, 1116, 40

*Colo.* 414, 11 L. R. A. (N. S.) 1071, 122 Am. St. Rep. 1068, 13 Ann. Cas. 1025.

To "regulate commerce" is to prescribe the rules by which it shall be governed (that is, the conditions upon which it shall be conducted), to determine how far it shall be free and untrammelled, how far it shall be subject to duties and other exactions, and how far it shall be prohibited. The provisions of Laws 1906, p. 197, No. 182, § 1, making it punishable to keep, with intent to ship out of the state, for food purposes, the flesh of a calf which was less than four weeks old, or weighed less than 50 pounds, dressed weight, when killed, are not within the police power of the state, since, whatever may be the extent of that power respecting domestic order, morals, health, and safety, it cannot be exercised over a subject confided exclusively to the commercial power of Congress. So much of the Laws 1906, p. 197, No. 182, § 1, as makes it punishable to keep, with intent to ship out of the state, for food purposes, the flesh of a calf which was less than four weeks old, or weighed less than 50 pounds, dressed weight, when killed, is void as conflicting with Const. U. S. art. 1, § 8, empowering Congress to regulate commerce among the several states. Laws 1906, p. 197, No. 182, § 1, provides that a person who sells, or offers to sell, or keeps with intent to sell, for food purposes, or ships out of the state, or keeps with intent to ship out of the state, for food purposes, the flesh of a calf which was less than four weeks old, or weighed less than 50 pounds, dressed weight, when killed, shall be imprisoned, etc. Held, that that part of the statute relating to the keeping with intent to sell for food purposes is to be construed as having only an intraterritorial effect, under the rule that statutes in this respect, which use general words, are to be so construed, unless they clearly indicate a different intent, and hence such part of the statute is not invalid as in conflict with Const. U. S. art. 1, § 8, empowering Congress to regulate commerce among the several states. *State v. Peet*, 68 Atl. 661, 664, 80 Vt. 449, 14 L. R. A. (N. S.) 677, 130 Am. St. Rep. 998 (citing *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 5 Sup. Ct. 826, 29 L. Ed. 158).

The "power to regulate commerce," conferred by the federal Constitution on Congress, is the power to regulate; that is, to prescribe the rule by which "commerce" is to be governed. Like all other powers vested in Congress, it is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed by the Constitution. Webster defines "commerce" as the "exchange or the buying and selling of commodities. Inter-course." In *Gibbons v. Ogden*, 9 Wheat. (22 U. S.) 1, 6 L. Ed. 23, etc., it is said that:



"Commerce undoubtedly is traffic; but it is something more. It is intercourse." In *Wabash, St. L. & P. R. Co. v. Illinois*, 7 Sup. Ct. 4, 118 U. S. 557, 30 L. Ed. 244, etc., it is held that: "Transportation of freight and passengers is commerce." "Interstate commerce" is the trading and trafficking in commodities between and amongst citizens of different states. It is transporting by common carriers passengers and property from one state into another state. It is the selling and buying of a commodity or commodities by a citizen of one state to a citizen of another state, which commodity is to be transported from the state of the seller to the state of the buyer, or to another state, and there resold or used, as may serve the purpose of the buyer. Under these definitions, Act June 11, 1906, c. 3073, 34 Stat. 232, "relating to the liability of common carriers \* \* \* engaged in commerce between the states \* \* \* to their employes," and which makes every such carrier liable to any employe or his personal representative for all damages which may result from the negligence of any of its officers, agents, or employes, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways or works, is not a "regulation of interstate commerce" but establishes new rules of liability, growing out of the relation of master and servant, which, if valid, are binding on all courts, both state and federal, but which have no such relation to "interstate commerce" as to bring them within the constitutional power of Congress to regulate such commerce, and the act is for that reason void. *Howard v. Illinois Cent. R. Co.*, 148 Fed. 997, 999, 1000 (citing *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Gloucester Ferry Co. v. Pennsylvania*, 5 Sup. Ct. 826, 114 U. S. 196, 29 L. Ed. 158; *Wabash, St. L. & P. R. Co. v. Illinois*, 7 Sup. Ct. 4, 118 U. S. 557, 30 L. Ed. 244; *Hopkins v. United States*, 19 Sup. Ct. 40, 171 U. S. 597, 43 L. Ed. 290).

#### As to prohibit

The constitutional power of Congress to "regulate" interstate commerce includes the power to prohibit, in cases where such prohibition is in aid of the lawful protection of the public. *Bennett v. United States*, 194 Fed. 630, 632, 114 C. C. A. 402; *Overton v. State*, 123 Pac. 175, 7 Okl. Cr. 203.

The constitutional power of Congress to "regulate interstate" and foreign commerce also involves the power, not only to prescribe rules for the carrying on of such commerce, but also in certain instances to absolutely prohibit it. *United States v. Hoke*, 187 Fed. 992, 997.

#### REGULATION

See Intended Regulation; Police Regulations; Reasonable Regulation; Rules

and Regulations; Under Reasonable Laws and Regulations.

Of commerce, see Regulate Commerce. See, also, Rule.

The words "ordinances," "rules," "regulations," and "by-laws" are synonymous terms. *State ex rel. Krebs v. Hootor*, 120 N. W. 199, 200, 83 Neb. 690 (citing 6 Words and Phrases, p. 5025).

"The designation of localities where the sale of intoxicating liquor is inhibited is not 'prohibition' but 'regulation' of the sale." *Garonzik v. State*, 100 S. W. 374, 375, 50 Tex. Cr. R. 533.

While an ordinance regulating the hours in which intoxicating liquors shall be sold in Boise City and for Sunday closing, and providing a penalty for the sale thereof during prohibited hours, does prohibit the conduct of the business therein referred to during certain hours, it is a "regulation" of that business and not a prohibition of it. "To prohibit, limit, confine, or abridge a thing, the restraint may be permanent or temporary. It may be intended to prohibit, limit, or abridge for all time or for a day only." Restraint does not contemplate an absolute destruction of business, but rather places it within certain bounds." *State v. Calloway*, 84 Pac. 27-33, 11 Idaho, 719, 4 L. R. A. (N. S.) 109, 114 Am. St. Rep. 285 (quoting and adopting definition in *Re Charge to Grand Jury*, 62 Fed. 828).

A county ordinance imposing a license on sheep herders equal to three cents for each head of sheep and goats herded or pastured in the county per annum, requiring the license collector to collect the license fees and, after deducting 25 per cent. for collection, to pay the excess into the county treasury, and declaring that every herder who shall refuse or neglect to pay such license fees shall be guilty of a misdemeanor, imposed a license tax for mere purposes of revenue, and not for regulation of the business of sheep herding, and was therefore not within the jurisdiction of the board, under Pol. Code, § 3366, as amended by St. 1910, p. 635, c. 209 authorizing the licensing of business for the purpose of regulation only, which repealed by implication St. 1891, p. 306, c. 216, § 25, subd. 27, and County Government Act 1897, § 25, empowering boards of supervisors to license business generally for the purpose of both "regulation and revenue." *Placer County v. Whitney Estate Co.*, 84 Pac. 277, 278, 2 Cal. App. 614.

Const. art. 11, § 19, as amended in 1911 (see Laws 1911, p. 2180), authorizing any municipal corporation to establish and operate enumerated public utilities, and providing that persons or corporations may establish and operate such works under "such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal govern-

ment shall have the right to regulate the charges thereof," grants to all municipalities the power to construct and operate public utilities, and to prescribe the conditions on which persons and corporations may establish and operate such works, subject to charter provisions; and an ordinance of a city empowered to regulate conduits and works for the production and distribution of gas, etc., which prohibits excavations in streets without first obtaining permission from the board of public works, is valid when applied to one engaged in laying a gas pipe in a street as a part of the distributing system of a corporation engaged in supplying gas to the inhabitants of the city; the word "condition" meaning something established as a requisite to the doing or taking effect of something else, while the word "regulations" is something distinct from the word "conditions," and implies a broader meaning in the latter word than mere regulation of the manner of use. In *re Russell*, 126 Pac. 875, 876, 163 Cal. 668.

#### As law

The term "regulations," as used in Const. U. S. art. 4, § 3, granting courts power to dispose of and make all needful rules and regulations respecting the territories or other property belonging to the United States, means laws, since territories, as well as states, must be governed by laws. *Dorr v. United States*, 24 Sup. Ct. 808, 812, 195 U. S. 138, 49 L. Ed. 128, 1 Ann. Cas. 697.

The words "regulations as may be prescribed by law," as used in Const. art. 8, § 15, providing that writs of error and appeals shall be allowed from the decisions of the said district courts to the Supreme Court under such regulations as may be prescribed by law, refer also "to statutes adopted or to be enacted, \* \* \* providing the methods by which appeals and proceedings upon writs of error may be perfected." *Featherman v. Granite County*, 72 Pac. 972, 973, 28 Mont. 462 (citing and adopting *State ex rel. White-side v. First Judicial District Court*, 63 Pac. 395, 24 Mont. 539; *Finlen v. Heinze*, 69 Pac. 829, 70 Pac. 517, 27 Mont. 107).

#### As rule of law

A rule is a device in words and phrases for the control and direction of those who have something else given them to do. A "regulation" is a rule of law by which some right is to be exercised. They are words of a like import and import a partial restriction which does not wholly prohibit, and imply uniformity in operation, not discrimination. *Borough of Belmar v. Prior*, 79 Atl. 1032, 1034, 81 N. J. Law, 254.

As defined by Webster, the word "regulation" means a rule or order prescribed for management or government; prescription; a regulating principle; a governing direction; precept, or law; as, the regulations of a so-

ciety. Const. art. 9, § 9, provides that the Governor, Superintendent of Public Instruction, Secretary of State, and Attorney General shall constitute the state board of land commissioners who shall have direction and control of the public lands under such regulations as may be prescribed by law. Held, that the term "regulations" meant such reasonable rules as might be prescribed by the legislative department of government, so that, in leasing state lands, the board must look to the statutory regulations prescribed, and then so act as in its judgment would secure a maximum amount under the prescribed regulations. *Betts v. Commissioners of the Land Office*, 110 Pac. 766, 770, 27 Okl. 64 (quoting and adopting definition in *Re Leasing of State Lands*, 32 Pac. 986, 18 Colo. 359).

## REHEARING

See Motion for Rehearing.

## REINED

See Being Reined.

## REINSTATE

To "suspend" or "discharge" means to remove either temporarily or permanently from employment, and to "reinstate" may mean to receive back into employment only or to put back into the same position or state from which removed. Under Code Supp. 1907, § 679h, authorizing the chief of police to suspend or discharge any member of the force, but giving such suspended person the right to appeal to the board, which might reinstate him, upon reinstatement by the board of a police captain suspended by the chief of police, the chief is not compelled to reinstate him as captain, but could require him to report for duty as police patrol. *Markey v. Schunk*, 132 N. W. 883, 885, 152 Iowa, 508; *Markey v. City of Dubuque* (Iowa) 132 N. W. 885.

## REINSURANCE

See, also, Double Insurance.

"Reinsurance" is defined to be "insurance by the first insurer of the whole or some part of his interest in the risk created by his contract of insurance." It is otherwise defined as "the contract that one insurer makes with another to protect the first from the risk he has already assumed." *Ruohs v. Traders' Fire Ins. Co.*, 78 S. W. 85, 88, 111 Tenn. 405, 102 Am. St. Rep. 790 (citing *Iowa Life Ins. Co. v. Eastern Mut. Life Ins. Co.*, 45 Atl. 762, 64 N. J. Law, 343).

The term "reinsurance" has a well-defined meaning. That kind of a contract has been in force in the commercial world for a long number of years, and it is entirely different from what is termed double insurance;

i. e., an insurance of the same interest. The contract is one of indemnity to the person or corporation reinsured, and it binds the reinsurer to pay to the reinsured the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured, irrespective of payment of, or ability to pay, the loss to the party originally insured. *Allemania Fire Ins. Co. of Pittsburg, Pa., v. Firemen's Ins. Co. of Baltimore*, 28 Sup. Ct. 544, 546, 209 U. S. 326, 52 L. Ed. 815, 14 Ann. Cas. 948.

"Reinsurance," as used in Laws 1896, c. 908, § 187, as amended by Laws 1901, c. 118, § 1, imposing on domestic insurance companies an annual state tax, and providing that the term "gross premiums" shall include such premiums as are collected from policies subsequently canceled and from reinsurance, means premiums collected by the insurance company from reinsuring the risks of other companies. Reinsurance is a contract by which one insurer insures the risks of another insurer. The statute is dealing with the gross premiums collected by an insurance company for business done; that is, for the insurance furnished. It has to do with receipts, not with disbursements. *People ex rel. Continental Ins. Co. v. Miller*, 70 N. E. 10, 12, 177 N. Y. 515.

A contract of "reinsurance" is simply to indemnify an original insurer for a loss he may sustain upon his contract of insurance. Mutual fire insurance companies, organized under the provisions of chapter 45, p. 257, Sess. Laws 1897, are not authorized to transact reinsurance business. *Allison v. Fidelity Mut. Fire Ins. Co.*, 116 N. W. 274, 275, 81 Neb. 494, 129 Am. St. Rep. 694.

"Reinsurance" is properly applied to an insurance affected by one underwriter with another, the latter wholly or partially indemnifying the former against the risks which he has assumed; that is to say, after insurance has been affected, the insurer could have the subject of insurance reimbursed to him by some other company. There is in such case, however, no privity between the original insured and the reinsurer. The latter is in no respect liable to the former as a surety or otherwise; the contract of insurance and reinsurance being totally distinct and disconnected. Even if the insurer failed or became insolvent, or if his insured received only a dividend, however small, the reinsurer can gain nothing by this, but must pay the amount of the loss to the first insurer. *David Bradley & Co. v. Brown*, 112 N. W. 331, 332, 78 Neb. 836 (quoting and adopting definition in *Appeal of Goodrich*, 109 Pa. 529, 2 Atl. 211).

If there was any doubt as to the meaning of the word "reinsurances" in a contract between a fire insurance company and its agents for commissions, evidence to show that the word, as used in dealings between fire

insurance companies and their agents, has a technical meaning of agency reinsurance, and excludes home office reinsurance, was admissible. *Federal Ins. Co. v. Gilmour*, 92 N. E. 36, 206 Mass. 203.

The term "double insurance" means an insurance of the same interest, and is entirely different from "reinsurance," which is a contract of indemnity to the person or corporation reinsured for the whole loss sustained in respect to the subject of the insurance to the extent to which he is reinsured. *Providence-Washington Fire Ins. Co. v. Atlanta-Birmingham Fire Ins. Co.*, 166 Fed. 548, 553.

"Double insurance" or "coinsurance" occurs when several policies are effected for the benefit of the same person on the same subject-matter, while "reinsurance" is effected by the insurer for his own protection. Where a marine carrier issued insured bills of lading which bound it as an insurer of the cargo covered, and against the risks so assumed it took out a marine policy providing that it was understood and agreed to be in effect a reinsurance of the risks assumed by insured, the latter contract was one of reinsurance and not of coinsurance, such as would entitle the insurance company to prorate the loss with the carrier. *Ocean S. S. Co. v. Aetna Ins. Co.*, 121 Fed. 882, 887.

## REINVEST—REINVESTMENT

Where a house in which a father had a life estate and his children the remainder was sold, under the provisions of Civ. Code Prac. § 491, authorizing such sales and the reinvestment of the proceeds in other real property, the proceeds could not be used to erect a building on other land in which the father had a life estate, and his children the remainder; that not being a "reinvestment." *Globe Realty Co. v. Lentz*, 134 S. W. 882, 142 Ky. 497.

*Kirby's Dig.* § 3803, requiring a guardian to give bond to faithfully conduct a sale, etc., applies only to sales for reinvestment, and a sale to discharge a mortgage on other land was not a sale for "reinvestment," though the petition and order for sale designated it as such; the words "education" and "maintenance" in another statute authorizing sales being broad enough to authorize a sale to protect the ward's estate. *Harper v. Smith*, 116 S. W. 674, 675, 89 Ark. 284, 131 Am. St. Rep. 93.

A corporation was involved financially; its property having been sold under execution, and the time for redemption being about to expire. Plaintiffs owned four-sevenths of the capital stock, and defendants three-sevenths. To give defendants a controlling interest, the parties contracted that plaintiffs should transfer their interest to defendants, with the exception of 279,500 shares, which were to be retained, defendants to have two

years in which to comply with the contract, and should they fail to so comply, the "interest" of plaintiffs should reinvest in them in the same proportion as they held and were possessed of at the signing of the agreement. Held, that upon default of defendants, in view of the fact that the word "reinvest" implies a previous divestiture and the use of the phrase "in the same proportion and ratio as they were held and possessed of," whereas plaintiffs never had possession of the corporate property as such, plaintiffs were entitled to recover their interest conveyed in the stock only, and not in the property of the corporation. *Tevis v. Ryan*, 108 Pac. 461, 464, 13 Ariz. 120.

## REJECT—REJECTION

One of the definitions of the word "reject" given by Webster is: "To refuse to grant; as, to 'reject' a prayer or request." The board of excise, in refusing to grant a license, "rejects" the application within the meaning of the Inn and Tavern Act, prohibiting renewal of an application within one year after rejection of a former application. *Sayre v. Board of Excise of City of Elizabeth*, 79 Atl. 623, 624, 81 N. J. Law, 79.

Verbal rejection of a claim by an administrator is sufficient to set in operation the short statute of limitations prescribed by Code Civ. Proc. § 1822, requiring suit on such claims to be brought within six months after "rejection." *Gardner v. Pitcher*, 95 N. Y. Supp. 678, 681, 109 App. Div. 106.

Where a claim against a decedent's estate was presented at the office of the administrator's attorney, who, under the administrator's direction, indorsed the claim "Rejected," and signed the administrator's name, there was a sufficient compliance with Code Civ. Proc. § 2607, requiring the rejection or allowance of claims by the administrator. *Dorais v. Doll*, 83 Pac. 884, 886, 33 Mont. 314.

## REL. VAL. \$5.00 CWT.

The indorsement on the face of a bill of lading, "Rel. Val. \$5.00 Cwt.," cannot, in the absence of anything to explain the terms and in the face of the provision in the bill that, in case of loss of or damage to the goods shipped, the loss or damage shall be computed at their value, be assumed to be an agreement to reduce the value of the property in case of loss or damage to \$5 per hundredweight. *Kansas City S. R. Co. v. Embury*, 90 S. W. 15, 16, 76 Ark. 589.

## RELATE

The words "relate" and "involve," in the act creating the Court of Appeals (Laws 1911, p. 269) and providing for the retransfer by the Court of Appeals to the Supreme Court of cases which involve the construction

of the federal or state Constitutions or relate to a freehold, are synonymous. *Monte Vista Canal Co. v. Centennial Irrigating Ditch Co.*, 123 Pac. 831, 832, 22 Colo. App. 364.

The answer, in an action for the release or reconveyance of land, conveyed to defendant's intestate by absolute deed, alleged to have been a mortgage, defended by the mortgagee's administrator and sole heir at law, admitted that the deed was a mortgage, but insisted that it was so held by defendant administrator as security for a larger indebtedness claimed to be due from the plaintiff to the estate of the mortgagee, and prayed judgment therefor, but asserted no claim to the property described in the deed as sole heir at law. Held, that the words "relates to a \* \* \* freehold," as used in the act establishing the Court of Appeals, should be given the same construction as the like expression found in the provision of the Code of Civil Procedure for appeals to the Supreme Court; that the terms "relate to" and "involve" were synonymous in this connection; and that a judgment for plaintiff with a money judgment for defendant for the balance found due did not involve a freehold, so that the Court of Appeals, as well as the Supreme Court, was without jurisdiction. *Fehringer v. Martin*, 126 Pac. 1131, 1133, 22 Colo. App. 634.

"Relating" means in respect to; in reference to; in regard to. Hence an act fixing the salaries of judges of all courts is one relating to courts which, under Const. art. 5, § 26, is required to be general. *Commonwealth v. Mathues*, 59 Atl. 961, 975, 210 Pa. 372.

In order to bring a case within a statute authorizing appeal directly to the Supreme Court in cases "relating to revenue," the revenue must be directly, and not merely incidentally or remotely, involved. A suit to restrain a county and its board of supervisors from entering into a contract employing a tax ferret was not one "relating to revenue," within the act. *Wilson v. Marion County*, 68 N. E. 793, 794, 205 Ill. 580.

The title of Laws 1905, p. 2051, c. 725, "An act 'relating to' the acquisition of property by the city of New York for water supply," etc., indicates that it has reference to the subject-matter specified, but does not convey the idea of an exclusive act, presupposing instead that some other provision of law governs the subject-matter, to have "bearing or concern; to pertain; to refer." In re *Water Supply in City of New York*, 109 N. Y. Supp. 652, 655, 125 App. Div. 219 (quoting *Webst. Dict.*).

## RELATED

### Affinity

The phrase "related to," whether used in a statute, will, or contract, includes only relations by blood, and therefore do not include husband and wife. *De Graffenreid v. Iowa*

Land & Trust Co., 95 Pac. 624, 635, 20 Okl. 687 (citing Supreme Council of Order of Chosen Friends v. Bennett, 19 Atl. 785, 49 N. J. Eq. 39).

## RELATION—RELATIVE

See Confidential Relation; Female Relation; Fiduciary Relation; Legal Relation; Near Relatives; Nearest Relations; Parental Relation.

Other relative, see Other.

See, also, Brother-in-Law; Family; Kin.

The words "relative" and "relation," when construed technically, refer to one connected by ties of blood, but, when employed in their generic sense, they include those connected by affinity, as well as consanguinity. *Wapello County v. Eikelberg*, 117 N. W. 978, 979, 140 Iowa, 736.

Webster's International Dictionary (1907) defines the word "relation" to be "a person connected by consanguinity or affinity; a relative; a kinsman or kinswoman." *Bouvier's Law Dictionary* defines a "relation" as "one connected with another by blood or affinity; a relative; a kinsman or kinswoman." *De Graffenreid v. Iowa Land & Trust Co.*, 95 Pac. 624, 635, 20 Okl. 687.

"Relations," as testamentary beneficiaries are relatives, entitled under the statute of distributions, and persons who have married them. *Henderson v. Henderson*, 77 Atl. 348, 350, 77 N. J. Eq. 317.

Although "relatives" is popularly used as a word of general and comprehensive signification, it has acquired a definite and restricted sense when occurring in wills, and unless a contrary intention appears it is construed as equivalent to those persons who would take under the statute of distribution. *Thompson v. Thornton*, 83 N. E. 880, 197 Mass. 273.

"Relative," as used in a by-law of a fraternal benefit association, confining the designation of a new beneficiary to a relative or dependent of the member, is broad enough to include one who married a sister of the wife of the member. *Tolson v. National Provident Union*, 113 N. Y. Supp. 534, 536, 60 Misc. Rep. 460.

Though the term "relative" is to be extended to cover relatives by marriage as well as by blood, a niece of a deceased member's father's first wife, deceased being a son of the second wife, was not a "relative" of deceased either by consanguinity or affinity, and, although named as beneficiary in the certificate, was not, in the absence of a will making her deceased's legatee, entitled to the death benefit, under Code, § 1824, providing that no fraternal association shall issue a certificate to one not "the husband, wife, relative, legal representative, heir, or legatee" of the member. *Smith v. Supreme Tent,*

*Knights of Maccabees of the World*, 102 N. W. 830, 127 Iowa, 115, 69 L. R. A. 174.

Under the statute providing that any female under the permanent or temporary protection of accused at the time of the killing shall be included within the term "relative" in the statute, justifying one in protecting a female relative and reducing a killing to manslaughter when committed in protecting her, the mistress of accused is a female relative, and, where decedent attempted to take her away from the house of accused against her consent, accused had the legal right to protect her under the law of manslaughter. *Gaines v. State (Tex.)* 148 S. W. 717, 721.

The word "family," within the charter of a mutual benefit society, like "relative," has a very extensive scope, and has been held to include relatives and connections both by blood and marriage. The charter of a beneficial association provided that its object was to establish a benefit fund for the families or dependents of members as they shall direct, and a by-law declared that on the death of one or more beneficiaries prior to the death of the member, if no change of beneficiary should have been made, the share or shares to which such beneficiaries would have been entitled shall be paid to the beneficiary's legal representative, to be distributed to his or her heirs at law. Held that, where a member of such order died after the death of his wife, who was named as his beneficiary, without appointing a new beneficiary, the heirs of the wife at the time of the member's death were entitled to the fund. *Anderson v. Supreme Council Catholic Benevolent Legion*, 60 Atl. 759, 69 N. J. Eq. 176.

Under Probate Act (Laws 1873, p. 269) § 90, granting the right of administration to creditors in certain cases, a person whose claim as creditor rests entirely on assignments taken by him since the death of intestate is not qualified, since it is against the policy of the law to purchase the right to administer an estate. Probate Act (Laws 1873, p. 269) § 90, as amended by Laws 1881, p. 6, § 1, provides that administration of the estate of an intestate shall be granted to: First, the surviving husband or wife, or such person as he or she may request to have appointed. Second, the next of kin in the following order: First, child or children; second, father or mother; third, brothers or sisters; fourth, grandchildren. Third, to one or more of the principal creditors: Provided, that if there be no "relatives or next of kin," then the probate court or judge may appoint any suitable and competent person to administer such estate. Held, that the words in the proviso, "no relatives or next of kin," must be construed to mean "no relatives or next of kin such as are specified in the enacting clause," and hence next of kin not within those mentioned in the enacting clause have no priority over any suitable person whom

the judge may appoint. In *re Hoss Estate*, 109 Pac. 1071, 1072, 59 Wash. 360.

#### As relation by blood

With the exception of a few special bequests, and a provision for the erection of a monument and a direction that any note owing him by any of his "kin" should be canceled and the amount given to such "relative," a will provided for the distribution of the estate among testator's relatives "equally as provided by statute, as if no will had been made," thus embracing only blood relatives. Held, that the words "kin," "relative," and "relatives" referred *prima facie* to blood connections only, so that the husband of testator's niece was still liable on notes given to the testator. *Boyd v. Perkins*, 113 S. W. 95, 96, 130 Ky. 77.

Rev. Laws Mass. 1902, c. 119, § 6, provides that a fraternal death benefit shall be payable only to the husband, wife, etc., or relative of the member named in the certificate. The charter of a fraternal benefit society declared its object to be to establish a fund from which, on a member's death, a sum not exceeding a certain amount should be paid to his family or a relative, and its constitution declared its object to be to create a fund from which a sum not exceeding a certain amount should be paid to the husband, wife, or relative of a member. Held, that a son-in-law of a member was not a "relative" of such member, and could not be named as a beneficiary; only a relative by blood being intended to be included in that expression. *Supreme Lodge, New England Order of Protection, v. Hine*, 73 Atl. 791, 792, 82 Conn. 315.

#### As next of kin

Under a will giving all testator's property to his wife, and providing, "Previous to her death she may will or distribute to her 'relations' and to my 'relations' any property as she may choose or desire them to have," she, in distributing the property, is not limited to next of kin of her self and testator as beneficiaries. *Levi v. Fidelity Trust & Safety Vault Co.*, 88 S. W. 1083, 1084, 121 Ky. 82.

#### Husband or wife

A husband is not a "relative" of his wife, nor is a wife a "relative" of her husband. *De Graffenreid v. Iowa Land & Trust Co.*, 95 Pac. 624, 635, 20 Okl. 687.

"Relatives," in the statute directing bodies of strangers or convicts to be delivered to their "relatives or friends," includes the surviving spouse, though in other statutes it may not. *Koerber v. Patek*, 102 N. W. 40, 46, 123 Wis. 453, 68 L. R. A. 956 (citing *Cleaver v. Cleaver*, 39 Wis. 96, 20 Am. Rep. 30).

A deceased devisee, testator's wife, was not a "relative," within Rev. St. c. 76, § 10, providing that when a "relative" of the testator, having a devise of real or personal

estate, dies before the testator, leaving lineal descendants, they take such estate as would have been taken by such deceased "relative," if he had survived. *Farnsworth v. Whiting*, 66 Atl. 831, 833, 102 Me. 296.

Under Rev. Laws, c. 135, § 21, providing that if a devise or legacy is made to a child or other relation of the testator, who dies before the testator, but leaves issue surviving the testator, such issue shall, unless a different disposition is made by the will, take the same estate which the person whose issue they are would then have taken if he had survived the testator, a wife is not a "relation of testator," her deceased husband. *Curley v. Lynch*, 92 N. E. 429, 430, 206 Mass. 289.

Under Laws Me. 1847, c. 33, § 10, providing that if the mayor and aldermen of any city, or the selectmen of any town, shall refuse or neglect to examine and decide on any case of insanity, as required by section 8, two justices of the peace, one of whom shall be of the quorum, upon complaint made in writing by any relative of an insane person, shall sit and hear and decide on the case, a complaint in writing made to the selectmen by the wife of the person alleged to be insane is sufficient; she being a "relative," within the intentment of the statute. *Treasurer of Insane Hospital v. Inhabitants of Belgrade*, 35 Me. 497, 504.

#### RELATION (In Contract, Conveyance, or Other Transaction)

Under the doctrine of "relation," all of the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act and operate from the substantial part by relation. The formal part effectuates the substantial part, and hence must relate to it. *Thompson v. Ramsey*, 66 Atl. 588, 589, 72 N. J. Eq. 457.

The doctrine of "relation," while of equitable origin, has a well-recognized application to proceedings at law, and is applied most frequently to conveyances of real estate made pursuant to an antecedent contract, and to give effect to the intention of the parties or to protect purchasers pending the fulfillment of the contract. It is also applied to public land transactions, so as to cut off intervening claimants between the date of the entry and that of the patent. *Knapp v. Alexander-Edgar Lumber Co.*, 130 N. W. 504, 506, 145 Wis. 528, 140 Am. St. Rep. 1091.

By the fiction of relation, a legal title is held to relate back to the initiatory step for the acquisition of the land. The doctrine of "relation" precludes the United States from retaining, as against its grantees of lands within the indemnity limits of the grant made by Act June 3, 1856, c. 41, 11 Stat. 17, in aid of railway construction, a sum which it collected from trespassers there-

on for the removal of iron and stone from the land during the period between the selection of such lands to supply in part a large deficiency in the place limits and the approval of such selection by the Secretary of the Interior. *United States v. Anderson*, 24 Sup. Ct. 716, 718, 194 U. S. 394, 48 L. Ed. 1035.

While the doctrine of "relation" is of equitable origin, it has a well-recognized application to proceedings at law. By it is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding, which consummates the conveyance, is held for certain purposes to take effect by relation as of the day when the first proceeding was had. *Peyton v. Desmond*, 129 Fed. 1, 11, 63 C. C. A. 651.

"By the doctrine of 'relation' is meant that principle by which an act done at one time is considered, by a fiction of the law, to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had." *Krakow v. Wille*, 103 N. W. 1121, 1123, 125 Wis. 284, 4 Ann. Cas. 1016 (quoting and adopting definition in *Gibson v. Chouteau*, 80 U. S. [13 Wall. 92] 20 L. Ed. 534).

The doctrine of "relation," like every other fiction of the law, has its limitations. It can never be made to bear fruit where its root is not planted in some antecedent, lawful right. It is sometimes allowed to prevent injustice, as when an attachment has been issued and levied without sufficient affidavit, and an amended affidavit is afterwards made. It will relate back so as to uphold the attachment and the previous levy. *United States v. Atchison, T. & S. Ry. Co.*, 142 Fed. 176, 187.

The doctrine of "relation" is a fiction of law to prevent injustice and the occurrence of injuries, or otherwise there would be no remedy. The doctrine of relation does not authorize a widow, afterwards appointed administratrix of the estate of her husband, to take possession by herself or agent, prior to such appointment, of personalty claimed by and in the possession of another, though at the husband's death he had a mortgage on such property. *James v. Nunley*, 97 S. W. 1028, 1030, 6 Ind. T. 336.

"Title by relation" must be limited to valid acts done in respect to the goods and chattels of a decedent by a person prior to his appointment as administrator, and the doctrine has no application to wrongful acts of a person who, to the prejudice of a third

person, officiously intermeddles with the goods and chattels of an intestate before his appointment as administrator, but the granting of letters of administration legalize all other acts, otherwise valid, that have been done by the administrator before his appointment. *Casto v. Murray*, 81 Pac. 883, 885, 47 Or. 57.

By the doctrine of "relation," the title of a purchaser at a judicial sale relates back to the date of the lien. While the title acquired by a purchaser at a mechanic's lien foreclosure sale relates back to the date the lien became effective, the purchaser is nevertheless precluded by the doctrine of caveat emptor from recovering damages for injuries to the property by the owner between the date of the filing of the lien and the date of the sale. *Van Buskirk v. Summitville Min. Co.*, 78 N. E. 208, 209, 38 Ind. App. 198.

As between two persons beginning irrigation ditches at the same time, and prosecuting work thereon with reasonable diligence to completion, the one who first began work had the prior right, even though the other had completed his first. This is the doctrine of "relation back." *Wright v. Cruse*, 95 Pac. 370, 372, 37 Mont. 177; *Murray v. Tingley*, 50 Pac. 723, 725, 20 Mont. 260.

"The question of 'relation back' of amendments is a fiction of the law and should never be allowed when to do so would, to the prejudice of a litigant, deprive him of a substantial right." *Gen. St. Fla. 1906*, § 3146, giving a right of action for wrongful death, gives such right to the widow alone, if there be a widow, for her sole benefit, while the federal Employers' Liability Act (Act June 11, 1906, c. 3073, 34 Stat. 232) gives such right, for the death of an employé against an interstate carrier, to the personal representative of the deceased alone, and for the benefit of his widow and children or dependent next of kin; and where, therefore, a widow of an employé of an interstate railroad company brought suit against such company in a state court of Florida, in her capacity as widow, to recover for the death of her husband, such action was necessarily based on the state statute, and an amendment of her declaration, changing the capacity in which she sued to that of administratrix, introduced a new and different cause of action based on the federal statute, and was in effect the bringing of a new action thereunder, which was begun for the purpose of limitation, when the amendment was filed, and did not relate back to the time of the commencement of the original action. *Hall v. Louisville & N. R.*, 157 Fed. 464-466.

## RELATIONSHIP

"Relationship," in the law of homicide, justifying the taking of life to prevent the commission of a felony, is not restricted to the ties of affinity or consanguinity, but has

the broader sense, denominating any tie, even if it be ephemeral, which binds the parties together. *Gillis v. State*, 70 S. E. 53, 54, 8 Ga. App. 606.

In an action against a telegraph company for damages for delay in the delivery of a death message, the court found that the deceased and the plaintiff were first cousins, that the sender at the time of delivering the message to defendant informed its agent of the relationship existing between the plaintiff and the deceased. Held, that the word "relationship" meant the state of being related by kindred affinity or other alliance, and the finding was only to the effect that defendant knew that the parties were first cousins, and not that the company had notice of any special tender relationship, and was insufficient to sustain a judgment for plaintiff. *Western Union Telegraph Co. v. Samuels (Tex.)* 141 S. W. 802, 805.

#### RELATIVE INTERESTED IN WELFARE

Within a rule of an insane asylum requiring patients entering the same to be searched and money or other things of value taken from the persons, to be deposited with the superintendent, and making it his duty to keep the same for the patient or turn it over to the guardian, relative, or friend interested in him and looking after his welfare, a sister of a patient claiming money on his person as having been stolen, and requesting its delivery to her as the rightful owner, is not a relative interested in looking after his welfare. *Worsham v. Votgsberger (Tex.)* 129 S. W. 157, 159.

#### RELATIVE VALUE

The term "relative value," as used in a building contract requiring monthly estimates of the relative value of the work done, meant that the value was not absolute; the estimated value of a part as it stood in connection with the whole. *Drhew v. Altoona City*, 121 Pa. 401, 418, 15 Atl. 636.

#### RELATOR

Where the Attorney General appeared in chancery in relation to the improper conduct of a charity, and he sued at the relation of others, they were termed "relators." *MacKenzie v. Trustees of Presbytery of Jersey City*, 61 Atl. 1027, 1040, 67 N. J. Eq. 652, 3 L. R. A. (N. S.) 227.

#### RELEASE

See Date Released; Deed of Release; Technical Release.

See, also, Parole.

The word "release" may be shown to be the same as the word "discharge." *Egan v. Winnipeg Baseball Club*, 104 N. W. 947, 96 Minn. 345.

The word "release," in a quitclaim deed, means "discharged." *Sherman v. Sherman*, 122 N. W. 439, 443, 23 S. D. 486.

"A 'release' is a discharge of a debt by act of the party. A release is a voluntary relinquishment of a lien and right of action or an obligation." *Woodrough v. Douglas County*, 98 N. W. 1092, 1095, 71 Neb. 354.

A "release" is a discharge or a conveyance of a man's right in lands or tenements to another that held some former estate in possession. The words generally used therein are "demised, released, and forever quitclaimed." *Sanborn v. Crowds Bros. & Co. (Tex.)* 99 S. W. 444, 447 (quoting and adopting definition in 2 Blackstone, Com. 324).

A "release," not under seal, given by a beneficiary in a mutual benefit certificate in consideration of receiving a part of the amount of the certificate, is a mere receipt in full of the society's liability, and the acceptance by the beneficiary thereof is a discharge only of so much of the debt as is equal in amount to the sum received. *Farmers' & Mechanics' Life Ass'n v. Caine*, 79 N. E. 956, 959, 224 Ill. 599 (citing *Titsworth v. Hyde*, 54 Ill. 386; *Heffer v. Cahn*, 73 Ill. 296; *Hayes v. Massachusetts Life Ins. Co.*, 18 N. E. 322, 125 Ill. 626, 1 L. R. A. 303; *Ostrander v. Scott*, 43 N. E. 1089, 161 Ill. 339; distinguishing *Rigdon v. Walcott*, 31 N. E. 158, 141 Ill. 649; *Papke v. G. H. Hammond Co.*, 61 N. E. 910, 192 Ill. 631; *Hartley v. Chicago & Alton Railroad Co.*, 73 N. E. 398, 214 Ill. 78; and *Chicago City Railway Co. v. Uhter*, 72 N. E. 195, 212 Ill. 174).

Under a receipt given to the sheriff garnishees, acknowledging the receipt of property of the judgment debtor, and agreeing to "release" the same, when ordered by the sheriff, the term "release" must have been used in the sense of a return or redelivery to the sheriff. Hence an allegation in the complaint, in an action by the sheriff for breach of the contract to return the property, that plaintiff had demanded possession of the property, which receiptors refused and still refuse to deliver, was sufficient, after answer, as an allegation of breach of the agreement to return the property. *Colbath v. Hoefer*, 73 Pac. 10, 12, 43 Or. 366.

In 2 Ballinger's Ann. Codes & St. § 5374, as to the effect of giving a bond in attachment, expressly stating that the attachment shall be "discharged" and restitution made of property taken, the term "discharged" is used as referring to the attachment, and must mean that the attachment then becomes a closed incident in the case. Section 5376 provides that at any time before or after the "release" of the property, or before an actual levy has been made, application may be made that the writ be discharged on the ground that it was improperly issued. This section cannot be consistent with section 5374, if it is held that application may



be made to discharge the writ of attachment after it has already been discharged by the giving of the bond. It must therefore refer to a "release" of the property made voluntarily or authorized, but without a discharge of the writ. *Brady v. Onffroy*, 79 Pac. 1004, 1007, 37 Wash. 482.

Const. art. 14, § 7, providing that the state thereby releases to the owner or owners of the soil all mines and minerals thereon, was curative in its nature and retrospective in its effect, and intended as an extinguishment of the rights of the state in only those mines and minerals in soil owned at the time of its adoption, and was not intended to prevent the state from reserving mines and minerals in lands of the public domain subsequently granted by it, in view of the facts that this provision was originally adopted by the convention which framed the Constitution of 1866 at a time when the state could not afford to be generous in its disposal of the ungranted public domain; that it was adopted, not as a general provision of the Constitution, but as an ordinance substituted for one having special reference to the title to a salt lake, then in dispute; and that its language has remained unchanged in subsequent Constitutions, especially as the term "release" commonly means to surrender a right or discharge a liability which presupposes the existence of some person against whom the right may be exercised or the liability enforced, and the word "owner" ordinarily means one who already has a legal or rightful title, and not one who must acquire such title in the future, in order to come within the term; and hence *Rev. St. 1895*, art. 3498n, reserving minerals on lands thereafter granted by the state, is valid. *Cox v. Robison*, 150 S. W. 1149, 1155, 105 Tex. 426.

#### **As contract**

See *Contract*.

#### **As a conveyance**

The word "release" means to discharge. An agreement between the owners of land and a railroad company stated that, in consideration of a certain sum paid, the owners "do hereby discharge and forever release" the railroad company from all damages and claims whatsoever on account of the taking, etc., of the land, had the effect of a formal quitclaim deed, the operative words of which are "remise, release, and forever quitclaim," and served to discharge and release the railroad company from all claims of ownership and title to the lands, constituting the transaction a grant of real property, which as thoroughly divested the grantors of their title as warranty deed with full covenants of title. *Sherman v. Sherman*, 122 N. W. 439, 443, 23 S. D. 486.

Where a lessee of school lands under the laws of the territory contracted with A.

that such lessee fully releases said lands to A., provided that A. fully complies with the terms of the contract, then said lessee to have no claims or privileges on said land, his prior right to said land being forever released to A., "to have and to hold the same for a term of four years" (that being the unexpired term of the original lease of such lessee), the contract was not a lease, but a contract of sale—a relinquishment of all rights and claims of the lessee, and conveyed to A. the prior right to re-lease said land at the expiration of the original lease. *Whitaker v. Hughes*, 78 Pac. 383, 385, 14 Okl. 510.

#### **Receipt distinguished**

"A 'receipt' is evidence that an obligation has been discharged, but a 'release' is itself a discharge of it." A "release" cannot be varied as against one whose interests may be affected by it, by parol evidence that the parties did not intend to according to its legal effect. A "release" given for a valuable consideration for all causes of action, including trespasses, is a release of a cause of action for unlawful confinement of the person previously procured by the persons to whom the release is given jointly or severally. Where a "release" is given extinguishing a demand wholly unliquidated, whether the sum received for the release is large or small is immaterial. *Allen v. Ruland*, 65 Atl. 138, 140, 79 Conn. 405, 118 Am. St. Rep. 146, 8 Ann. Cas. 344.

#### **Satisfaction distinguished**

There is a clear distinction between a "satisfaction" of a joint tort and "release" growing out of the right of the injured party to choose whether he will seek redress against all or a less number of those jointly liable to him. A release unsupported by a consideration of one joint tort-feasor does not operate to release another wrongdoer, but a contract which purports to be a satisfaction and release of one wrongdoer jointly liable with another, and which shows that the injured person has for a consideration surrendered his claim against one wrongdoer, cannot recover compensation from another wrongdoer jointly liable. While one who compromises a claim does not necessarily admit that the claim was well founded, the one who receives the consideration is precluded from denying that it was well founded, and, when a pretended claim for a tort has been settled and satisfaction has been rendered the claimant by one so connected with the wrong as to be reasonably subject to an action and possible liability as a joint tort-feasor, the satisfaction will release all who may be liable, though the one released was not liable. The validity and effect of a release of a cause of action does not depend on the validity of the cause of action. *Cleveland C. C. & St. L. Ry. Co. v. Hillgoss*, 86 N. E. 485, 487, 171 Ind. 417, 131 Am. St. Rep. 258 (citing and

adopting *Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711; *Ashcraft v. Knoblock*, 45 N. E. 69, 146 Ind. 169, 174; *Cooley, Torts* [3d Ed.] pp. 224, 225).

#### Seal

A "release," as defined by the Century Dictionary, is: "In law, a surrender of a right; a remission of a claim in such form as to estop the grantor from asserting it again. An instrument by which a creditor or lienor discharges the debt or lien, or frees a particular person or property therefrom, irrespective of whether payment or satisfaction has been actually made. Hence usually it implies a sealed instrument." The words "deed of release," as used in Civ. Code, § 3845, providing that an entry of satisfaction of a mortgage in the margin of a record shall have such effect, means simply the release of the mortgaged property from the lien of the mortgage. *Swain v. McMillan*, 76 Pac. 943, 945, 30 Mont. 433.

#### RELEASE AND DISCHARGE

A lease by a railway company of a part of its right of way stipulated that the lessee covenanted to "assume all the risks" of loss of any building, improvements, or property on or near the premises, occasioned by fire from locomotives, etc., and that the lessee released and discharged the company from any claim on account thereof. The lease provided that if, on termination of the lease, the lessee or owner of any of the buildings on the ground should fail to remove any buildings or other property from the leased premises, the company might remove the same at the cost of the lessee. Held, that the lessee assumed only risk of loss of its own buildings and property, the words "assumes all the risks" applying, in common acceptance, to an employé entering the service of the master, who "assumes all the risks" of injury to himself incident to his employment, and the words "release and discharge" not being used in ordinary parlance in relation to insurance, guaranty, or indemnity, but applying to a claim owned or controlled by the party undertaking to release and discharge another from such claim. *W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas*, 110 S. W. 978, 983, 50 Tex. Civ. App. 420.

#### RELEASE OF A RIGHT OF WAY

The phrase "release of a right of way," in an instrument in writing by which the absolute owner of a tract of land released to a steam railroad company a right of way 100 feet in width and passing through the land, leaving a portion thereof on each side of the right of way, conveys an easement in the land for railroad purposes, leaving the fee subject to such servitude in the general owner. *Cincinnati, H. & D. Ry. Co. v. Wachter*, 70 N. E. 974, 975, 70 Ohio St. 113.

#### RELEASE, REMISE, AND FOREVER DISCHARGE

Where a partnership was dissolved on one of the partners retiring and a new firm was created, consisting of the remaining partner and a third person, and the new firm took over the assets and business of the old one, and at the same time the partners of the new firm executed an instrument reciting that they "released, remised, and discharged" the retiring partner from the payment of all liabilities of the old firm, the new firm assumed all the liabilities of the old firm, and the retiring partner's right against the partners of the new firm was complete at the latest when a judgment was rendered against the partners of the old firm based on a claim against the old firm; for, though the words "release, remise, and forever discharge" are not the most appropriate, they must be given a meaning which will effectuate the plain intention of the parties, and they must be construed to be an agreement to assume and discharge all the debts, agreements, and liabilities of the old firm. *Alexander v. McPeck*, 75 N. E. 88, 89, 189 Mass. 34.

#### RELEASED

The term "released," as a legal phrase, and when used in reference to a shipment by a carrier, means that the carrier is relieved from losses not occasioned by its negligence. *Central of Georgia Ry. Co. v. Butler Marble & Granite Co.*, 68 S. E. 775, 777, 8 Ga. App. 1.

The word "released," as used "in contracts of shipment, has from usage acquired a well-defined meaning. \* \* \* In this state \* \* \* the word must be held to mean only that the shipper agrees to relieve from all liability as against which the law allows the carrier to exempt itself by contract." Therefore the contract to ship goods "released" must be construed to mean that the carrier is only relieved from losses occasioned without his negligence. *Georgia S. & F. R. Co. v. Johnson, King & Co.*, 48 S. E. 807, 121 Ga. 231.

#### RELEVANT

One fact is relevant to another, when, according to the common course of events, the existence of the one taken alone or in connection with the other renders the existence of the other certain or more probable. *Locke v. Kraut*, 83 Atl. 626, 627, 85 Conn. 486.

"Relevant," as applied to testimony, means that the testimony bears upon the issues so as to tend to prove or disprove them, but testimony may be relevant if it is only a link in the chain of evidence tending to prove the issues by reasonable inference, though not directly bearing upon them. *San Antonio Traction Co. v. Higdon (Tex.)* 123 S. W. 732, 734.

Any evidence is "relevant" which logically tends to prove or disprove a material fact in issue; and every act or circumstance serving to elucidate a material issue is relevant. *Alexander v. State*, 68 S. E. 274, 275, 7 Ga. App. 88.

The word "relevant" means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or nonexistence of the other. *Texas & P. Ry. Co. v. Coutourie*, 135 Fed. 465, 469, 68 C. C. A. 177 (quoting and adopting definition in 1 Steph. Dig. Ev. c. 1, p. 36).

"The word 'relevant' means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either by itself or in connection with other facts, proves or renders probable the past, present, or future existence or nonexistence of the other." In an action on a note given for the purchase of a steam engine, where the issue was whether plaintiff agreed to take back such engine and return the note if defendant would buy goods in which plaintiff was interested at a certain price, evidence that plaintiff was offered by another after the sale to defendant, without knowledge thereof, the same price defendant had paid, was "relevant." *Strickland v. Phillips*, 55 S. E. 453, 75 S. C. 264 (quoting and adopting definition in Steph. Dig. Law of Evidence [3d Ed.]).

The word "relevant," as applied to the admission of evidence, means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself, or in connection with other facts, proves or renders probable the past, present, or future existence or nonexistence of the other. Where, in an action for breach of warranty of variety of seed wheat sold, the seller denied the making of the warranty, and the evidence showed that he had only a different variety of wheat for sale, evidence that he sold wheat during the same season to third persons and warranted it to be of the variety warranted to plaintiff was admissible as bearing on the fact in issue. *Moody v. Peirano*, 88 Pac. 380, 382, 4 Cal. App. 411 (quoting and adopting definition in Steph. Dig. Law of Evidence, c. 1; and citing Thayer's Introduction to Cases on Evidence).

## RELEVANCY

Irrelevancy, see Irrelevancy—Irrlevant.

The test of "relevancy" of evidence is whether it tends legitimately to establish the issuable fact. *People v. Furlong*, 125 N. Y. S. 164, 169, 140 App. Div. 179.

"Relevancy of testimony" means that any two facts to which it is applied are so related to each other that, according to the common course of events, one, either taken by itself or in connection with other facts proves or renders possible the past, present, or future existence or nonexistence of the other. *Fishman v. Consumers' Brewing Co.*, 73 Atl. 231, 78 N. J. Law, 300.

## RELIABLE

Defendant in complaining of plaintiff, a general freight agent, wrote to the general manager of the railroad that plaintiff told him one thing and wired the agent another, and concluded with a separate paragraph, saying that the plaintiff was not a reliable man in any respect, and that his word was not good with people who knew him. Held that, in view of the arrangement of the letter which showed that the last paragraph related to plaintiff's personal character, the communication was libelous per se, as tending to injure him in his business; the letter charging him with not being "reliable" in any respect, which means untrustworthy, and that his word was not "good," the word "good" as applied to one's word meaning untarnished, honorable; and so action might be maintained without allegation of special damage. *Allen v. Earnest* (Tex.) 145 S. W. 1101, 1104.

## RELICT

### RELICITION

"Accretion" is the increase or growth of property by external accessions as by alluvium naturally added to land situated on the bank of a river, or on the seashore; "alluvium" is applied to the most recent sedimentary deposits, such as occur in the valleys of large rivers—an imperceptible deposit usually of mingled sand and mud resulting from the action of fluviatile currents; and the term "reliction" is applied to land made by the gradual and imperceptible withdrawal of the water by which it was covered. *Wilson v. Watson*, 138 S. W. 283, 284, 144 Ky. 352, Ann. Cas. 1913A, 774.

## RELIED

See Rely.

## RELIEF

A letter given by an overseer of the poor to a wife, by means of which she obtained her husband's wages, was not "relief" within the meaning of the Poor Law. In re *Kelly*, 95 N. Y. Supp. 53, 56, 46 Misc. Rep. 548.

The term "relief," as often used in equity, has reference to the kind and degree of aid furnished to the plaintiff; whereas, in truth it has reference to the mode in which the aid was given. If given in an answer, he

calls it "discovery"; if by decree, he calls it "relief." Where complainant filed a bill for an accounting and foreclosure of a mechanic's lien, the fact that the bill waived an answer under oath did not amount to a waiver of complainant's right to discovery. *Utah Const. Co. v. Montana R. Co.*, 145 Fed. 981, 987.

Under St. 1898, § 2886, the "relief granted plaintiff" on default cannot exceed that prayed for. A husband was granted a divorce on the wife's failure to appear, and division of "his" property was ordered, though not prayed for. Held, that the division was not "relief granted to plaintiff," within section 2886, but rather relief to defendant. *Lessig v. Lessig*, 117 N. W. 792, 793, 136 Wis. 403.

### RELIEF ASSOCIATION

See Mutual Relief Association.

## RELIGION

"Religion" has reference to man's relation to divinity; to the moral obligation of reverence and worship, obedience, and submission. It is the recognition of God as an object of worship, love, and obedience; right feeling toward God, as highly apprehended. *People v. Board of Education of Dist. 24*, 92 N. E. 251, 252, 245 Ill. 334, 29 L. R. A. (N. S.) 442, 19 Ann. Cas. 220.

While "religion" in its broadest sense includes all forms of belief in the existence of superior beings capable of exercising power over the human race, as commonly accepted it means the formal recognition of God, as members of societies and associations, and the term, "a religious purpose," as used in the constitutional provision exempting from taxation property used for religious purposes, means the use of property by a religious society or body of persons as a place for public worship. *People v. Deutsche Evangelisch Lutherische Jehovah Gemeinde, etc.*, 94 N. E. 162, 164, 249 Ill. 132.

"Theology, the science of 'religion'—that is, of formulating our thinking with respect to religion—has steadily insisted upon connecting religion with the life men lead and the things they do in this world. Indeed, the great religious struggles of the past have come in most cases from the undertaking of men to impose on other men, not their religion, but their science of religion; and against this, rather than religion, as defined by the Attorney General, the law has interposed its shield of protection. When theologians formulate their conclusion that anything such as a particular mode of life is essential to the attainment of the promised benefits of a religion, it is not for the courts by resorting to the definitions of lexicographers to perform the ungracious, if not herculean, task of determining whether this is so.

The anticipated advantages of nearly every religion or creed are made dependent on the life its followers live, and the criticisms oftenest heard are that the exalted doctrines of righteousness professed are too frequently forgotten in the ordinary pursuits of life, and that the contests for wealth in some circles are wedged with the rapacity of beasts of prey. Surely a scheme of life designed to obviate such results, and by removing temptations, and all the inducements of ambition and avarice, to nurture the virtues of unselfishness, patience, love, and service, ought not to be denounced as not pertaining to religion when its devotee regards it as an essential tenet of their religious faith." *State v. Amana Society*, 109 N. W. 894, 898, 132 Iowa, 304.

### Piety synonymous

In determining the validity of a charity, there is no distinction between the promotion of "piety" and of "religion"; the two words being synonymous. *Glover v. Baker*, 83 Atl. 916, 931, 76 N. H. 393.

## RELIGIOUS CORPORATION

The Church Home & Infirmary of Baltimore City, organized under Acts 1852, c. 231, composed (article 1) of certain persons, "together with such clergy of the Protestant Episcopal Church \* \* \* and laymen of the same as contribute to the funds," the object (article 2) being to provide a home for poor and distressed persons of such church "through the Ladies Church Home Society or other agencies to minister to their temporal and spiritual wants," is not a "religious corporation" within the Declaration of Rights, § 38, requiring legislative sanction to render valid a devise to religious institutions. *Baltzell v. Church Home & Infirmary of Baltimore City*, 73 Atl. 151, 153, 110 Md. 244.

Under the act of 1872 (3 Gen. St. p. 2759), a presbytery may be said to present a two-fold aspect. It is a strictly spiritual body or court, and the trustees, or presbyterial corporation. Neither the church corporation nor the presbyterial corporation is strictly ecclesiastical in the English sense inasmuch as the former is composed wholly of laymen, and the latter, partly so. However, they are classed as "religious corporations." *MacKenzie v. Trustees of Presbytery of Jersey City*, 61 Atl. 1027, 1035, 67 N. J. Eq. 652, 3 L. R. A. (N. S.) 227.

The term "religious corporation" in Tax Law (Laws 1896, p. 869, c. 908) § 221, as amended, providing that any property devised or bequeathed to any "religious corporation," including corporations organized exclusively for Bible or tract purposes, shall be exempt from the transfer tax and that there shall also be exempted personal property other than money or securities bequeathed to a corporation or association organized for the moral or mental improvement of men

or women or for missionary, benevolent, or charitable purposes, means religious corporations as separate and distinct from charitable, benevolent, and missionary societies, and, though missionary societies are in a sense organized for religious purposes, they are not religious corporations. *Laws 1848, p. 447, c. 319*, provided for the incorporation of benevolent, charitable, scientific, and missionary societies, and such statute was repealed by *Membership Corporation Law (Laws 1895, p. 331, c. 559)*, whereby all corporations organized under the repealed statute became membership corporations. A corporation organized under the *Laws of 1848* was known as the "W. Street Mission," and, according to the certificate of incorporation, formed to do good spiritually and materially to those coming under its influence, to proclaim the Christian religion, and to provide a place to which persons might resort for Christian worship and fellowship. Held, that a devise of money to the corporation in question was not exempt from the tax. *In re White's Estate, 103 N. Y. Supp. 688, 690, 118 App. Div. 869 (citing In re Huntington's Estate, 61 N. E. 643, 168 N. Y. 399; In re Watson's Estate, 63 N. E. 1109, 171 N. Y. 256).*

*St. 1898, §§ 1990 to 2001—20*, provide for the incorporation of religious societies, and sections 1771-1791m provide for the formation of corporations for benevolent, charitable, or medical institutions, and for schools, hospitals, asylums, or other like institutions. The charter of the city of Superior (*Laws 1891, c. 124, § 244*) provides that no land benefited shall be exempt from assessment for sewers, "excepting only \* \* \* property owned by some religious society" or corporation and not used for pecuniary profit. Held, that a corporation, incorporated under chapter 86, to maintain parochial schools, hospitals, and to help the poor, and not organized for profit, though authorized to acquire and hold property, its principal place of business being its hospital, in which religious services were conducted as a part of its administrative work was not exempt from sewer assessments, the term "religious corporation," in the charter, meaning the same as in chapter 91, and the words "property owned," as used in the charter, referring to a use in connection with religious purposes, and that defendant could not incorporate as a religious corporation, because it had no membership maintaining regular religious worship as a church society, a "religious society" being a body of persons organized to maintain religious worship only, who usually meet in some stated place for worship of God and religious instruction. *United States Nat. Bank v. Poor Hand Maids of Jesus Christ, 135 N. W. 121, 122, 148 Wis. 613.*

#### RELIGIOUS INSTITUTION

The New York Baptist Union for Ministerial Education furnished means of instruc-

tion to young men of the Baptist denomination, without reference to residence, who should give satisfactory evidence to their church and to the trustees of the society of their personal piety and of their call to gospel ministry. The Baptist Educational Society of the State of New York furnished means of instruction to young men of the Baptist denomination who gave satisfactory evidence to their church and to the board of trustees of their personal piety and call to preach, and was similarly supported. The American Baptist Home Missionary Society was organized to promote the preaching of the gospel in North America. Its constitution provided for officers and members, and that all money or property contributed and designated for any particular field should be used as appointed or returned to the donors. It had no other purpose than the extension of gospel preaching. Held, that all three were "religious institutions" not confined in their operations to local or state purposes, but for the general good of the people interested therein, and were therefore exempt from payment of the collateral inheritance tax imposed by *Laws 1898 (P. L. p. 106)*. *In re Jones' Estate, 67 Atl. 1035, 1036, 73 N. J. Eq. 353.*

*Laws 1893, p. 1748, c. 701, § 1*, as amended by *Laws 1901, p. 751, c. 201*, provides that no gift for religious, educational, charitable, or benevolent uses, which shall in other respects be valid under the laws of this state, shall be deemed invalid on account of indefiniteness or uncertainty of the beneficiaries; but the title to the subject-matter of the gift shall vest in the trustee named in the instrument, and, if no trustee is named, the same shall vest in the Supreme Court. Section 2 provides that the Supreme Court shall have control over the gifts provided for by section 1, and that the Attorney General shall represent the beneficiaries and enforce the trust by proper proceedings. A will devised the residue of testator's estate to his executor in trust to collect the rents and profits thereof and to pay the same annually to "religious, educational or eleemosynary institutions" as in his judgment shall seem advisable, not more than \$500 to any one institution in any one year. Held: That the statute applies to public and not private charitable gifts, and has reference to indefiniteness of beneficiaries, but not of the purposes for which the gift is made; that while the words, "religious" and "eleemosynary," when used to designate institutions, may necessarily imply that the institutions are engaged in public and not private charitable work, the words "educational" and "institutions" have a broad significance, and may refer as well to private as to public organizations or charities; and that, since the terms used are in the disjunctive, the invalidity of the provision as to educational institutions

renders the entire gift invalid. *In re Shattuck's Will*, 86 N. E. 455, 193 N. Y. 446.

### RELIGIOUS PURPOSES

As charity, see *Charity*.

As purely public charity, see *Purely Public Charity*.

Exclusively used for religious purposes, see *Exclusively Used*.

See, also, *Gift to Church*.

While "religion" in its broadest sense includes all forms of belief in the existence of superior beings capable of exercising power over the human race, as commonly accepted it means the formal recognition of God, as members of societies and associations, and the term, "a religious purpose," as used in the constitutional provision exempting from taxation property used for religious purposes, means the use of property by a religious society or body of persons as a place for public worship. *People v. Deutsche Evangelisch Lutherische Jehovah Gemeinde, etc.*, 94 N. E. 162, 164, 249 Ill. 132.

### RELIGIOUS SEMINARY

See *Theological or Religious Seminary*.

The holding of morning exercises in the public schools consisting of the reading by the teacher without comment, of nonsectarian extracts from the Bible, King James' version, and by repeating the Lord's Prayer and the singing of appropriate songs, in which the pupils are invited, but not required, to join, does not constitute the public schools a place of worship, nor render them sectarian, nor convert them into a "religious seminary," within Const. art. 1, §§ 6, 7, and article 7, § 5, providing that no one shall be compelled to attend or support any place of worship, and that no money shall be appropriated from the treasury for the benefit of any religious society or for the support of any sectarian school. *Church v. Bullock (Tex.)* 100 S. W. 1025, 1027.

"Religious seminary" means a place specifically for the preparation of men for the ministry, or, at least, for the teaching of religious doctrines. *Church v. Bullock*, 109 S. W. 115, 117, 104 Tex. 1, 16 L. R. A. (N. S.) 860.

### RELIGIOUS SERVICES

In popular usage, the expression "religious services" is synonymous with "divine service." *McDaniel v. State*, 63 S. E. 919, 920, 5 Ga. App. 831.

### RELIGIOUS SOCIETY

As precinct, see *Precinct*.

A "religious society" is a voluntary association of individuals or families united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the various ordinances

of religion. *Church v. Bullock*, 109 S. W. 115, 117, 104 Tex. 1, 16 L. R. A. (N. S.) 860.

St. 1898, §§ 1990 to 2001—20, provide for the incorporation of religious societies, and sections 1771—1791m provide for the formation of corporations for benevolent, charitable, or medical institutions, and for schools, hospitals, asylums, or other like institutions. The charter of the city of Superior (Laws 1891, c. 124, § 244) provides that no land benefited shall be exempt from assessment for sewers, "excepting only \* \* \* property owned by some religious society" or corporation and not used for pecuniary profit. Held, that a corporation, incorporated under chapter 86, to maintain parochial schools, hospitals, and to help the poor, and not organized for profit, though authorized to acquire and hold property, its principal place of business being its hospital, in which religious services were conducted as a part of its administrative work was not exempt from sewer assessments, the term "religious corporation," in the charter, meaning the same as in chapter 91, and the words "property owned," as used in the charter, referring to a use in connection with religious purposes, and that defendant could not incorporate as a religious corporation, because it had no membership maintaining regular religious worship as a church society, a "religious society" being a body of persons organized to maintain religious worship only, who usually meet in some stated place for worship of God and religious instruction. *United States Nat. Bank v. Poor Hand Maids of Jesus Christ*, 135 N. W. 121, 122, 148 Wis. 613.

#### As incorporated society

"The term 'religious society' had in the English ecclesiastical law and has in our law a well-defined meaning, and, as commonly used in our law, it is synonymous with 'parish,' 'precinct,' and designates an incorporated society created and maintained for the support of public worship." *Rifle v. Proctor*, 74 S. W. 409, 410, 99 Mo. App. 601.

### RELIGIOUS USES

A bequest for saying masses for the repose of the dead is a gift for a "religious use." *In re Eppig*, 118 N. Y. Supp. 683, 684, 63 Misc. Rep. 613.

A bequest to a priest or his successor, for the purpose of saying masses for testator and his wife, is a "religious use," within Act 1855 (P. L. 328). *In re O'Donnell's Estate*, 58 Atl. 120, 209 Pa. 63.

A bequest in trust to invest and reinvest the principal, and expend the income in keeping testator's cemetery lot and monument thereon in good repair, is not a gift to a "religious, educational, charitable, or benevolent use" within Laws 1893, p. 1748, c. 701, and is invalid. *In re Waldron*, 109 N. Y. Supp. 681, 684, 57 Misc. Rep. 275.

Laws 1893, p. 1748, c. 701, declaring that no "bequest to religious, charitable, or benevolent uses," in other respects valid, shall be deemed invalid by reason of uncertainty of the persons designated as beneficiaries, etc., does not apply to an absolute gift to an unincorporated religious society, which did not constitute a trust for a particular purpose. *Fralick v. Lyford*, 95 N. Y. Supp. 433, 435, 107 App. Div. 543.

### RELIGIOUS WORSHIP

See Building for Religious Worship;  
Disturbing Religious Worship; House  
of Religious Worship.  
See, also, Worship.

### RELINQUISH

"The word 'relinquish' does not import a conveyance of the fee, but rather the use of the land." An instrument in writing, by which the owner of certain land "relinquished to the president and directors" of a certain turnpike company certain described ground, was insufficient to convey a fee, but constituted a conveyance of an easement only. *Mitchell v. Bourbon County (Ky.)* 76 S. W. 16, 17 (citing *Harrison v. Lexington & F. R. Co.*, 48 Ky. [9 B. Mon.] 470).

### RELINQUISHMENT

See Total Relinquishment.  
As sale, see Sale.

### RELOCATE

As applied to a way, the word "relocate," without addition or qualification, means to locate again, and implies a preservation of the identity of the way without material change. *Bennett v. Town of Wellesley*, 75 N. E. 717, 721, 189 Mass. 308.

### RELOCATION

Construction of new switch tracks or side tracks, or a new track on part of a railroad's main line, does not necessarily constitute a "relocation." A railroad company, having the right to locate a depot at a new site, had power to condemn land for the additional right of way required to elevate its tracks, in order that its trains might enter and depart from the depot; this not being a "relocation" of the right of way of the road, or a "change of its terminus." *Chicago & N. W. Ry. Co. v. Chicago Mechanics' Institute*, 87 N. E. 933, 939, 239 Ill. 197.

"Relocation" is the appropriation of mining ground by location where a former claim has become lost by abandonment or forfeiture and the land is consequently restored to the public domain. There can be no relocation unless there has been a prior valid location, or something equivalent, of the same property. *Jackson v. Prior Hill Min. Co.*, 104 N. W. 207, 208, 19 S. D. 453.

The requirements of Rev. Codes 1905, §§ 2358-2363, that, in voting on the question of county seat removal, each elector must vote for the place in the county which he prefers by placing opposite the name of the place the mark "X," are mandatory, and necessitate the construction of the statute as a removal statute, as distinguished from one for relocation. As affecting the question of location of county seats, a removal statute provides for the removal of the county seat to a proposed new county seat designated in the petition therefor, while a relocation statute authorizes a petition and election on the question, not whether the county seat shall be removed to a particular place, but where the county seat shall be located. *Miller v. Norton*, 132 N. W. 1080, 1095, 22 N. D. 196.

### RELOCATOR

A "relocator" of mining ground is not a discoverer of the mineral therein, but an appropriator thereof, and cannot hold the ground except upon making proof that the original locator had abandoned or forfeited his right by failure to comply with the mining laws. *Zerres v. Vanina*, 134 Fed. 610, 614.

The "relocator," when he so describes himself in the notice, solemnly admits, in an instrument which is made a matter of record, that he is not a discoverer of mineral, but an appropriator thereof, on the ground that the original discoverer had perfected his right. *Jackson v. Prior Hill Min. Co.*, 104 N. W. 207, 208, 19 S. D. 453 (quoting and adopting definition in *Wills v. Blain*, 20 Pac. 798, 5 N. M. 238).

### RELY

The word "relied," as used in the finding of a court to the effect that the court was not satisfied that plaintiff "relied upon the oral statements made to him by the defendants," means that the court was not satisfied that the representations operated upon the plaintiff's mind in such a way as to cause him to depend upon them materially or otherwise. *Peabody v. Whitcomb*, 81 N. E. 193, 194, 195 Mass. 330.

The word "relied," as used in an instruction in an action for false representations in locating plaintiff on public land, to the effect that if the jury found the representations were made and were false and that plaintiff "relied" on them he will be entitled to recover, etc., implies a belief, and the instruction is not therefore subject to the objection that it omitted the element of belief of the representations on plaintiff's part. *David v. Moore*, 79 Pac. 415, 417, 46 Or. 148.

The court instructed in a servant's personal injury action that in determining contributory negligence and assumption of risk plaintiff was entitled to rely upon the assurance of safety given by the employer, if one

was given, and was entitled to rely upon the superior knowledge and experience of his employer in the work. Held, that the word "rely" meant to trust or depend upon, and the instruction was improper where plaintiff testified that he knew he was going into a dangerous place pursuant to his foreman's order, since the jury were not required as a matter of law to absolve plaintiff from negligence if he knew the place was dangerous, though they also believed that his employer had assured him that the place was safe, or that plaintiff had relied upon the knowledge and experience of his employer. *Caciatore v. Transit Const. Co.*, 132 N. Y. Supp. 572, 573, 147 App. Div. 678.

#### Believe synonymous

"The words 'rely' and 'believe' are nearly synonymous. 'Rely' is to depend upon some one or something as worthy of confidence; to repose confidence; to trust; used with 'on' or 'upon.' 'Believe' is to accept as true on the testimony or authority of others; to have faith or confidence in the truth of any one or anything." In an action to rescind a sale of real estate for fraud, an allegation that plaintiff relied on the representations made constituted a sufficient averment that he believed them to be true. *Spencer v. Hersam*, 77 Pac. 418, 31 Mont. 120.

### REM

See *In Rem*.

### REMAIN

See *Enter and Remain*.

The word "remain" is defined as "to stay behind after others have withdrawn; to continue unchanged in place; to abide; to stay; to endure; to last." Its synonyms are "to continue; to stay; wait; tarry; rest; sojourn; dwell; abide; last; endure" (Webster). A statute which requires a liquor dealer's bond to be conditioned that he will not sell liquor to a minor, or permit a minor to enter and remain in his saloon, provided that, where the sale was made in good faith and on reasonable belief that the person was of full age, there can be no recovery, was passed for the purpose of repressing two evils—one the purchase of liquors by minors, and the other the immoral influence resulting to them from loitering in saloons; and it follows that where the entering and remaining in a saloon were merely for a time sufficient to get a drink, and the sale was made in good faith on reasonable grounds of belief that the person was of full age, there can be no recovery on a liquor dealer's bond in the terms of the statute, although such person was a minor. *Tinkle v. Sweeney*, 77 S. W. 609, 610, 97 Tex. 190; *Ghio v. Stephens* (Tex.) 78 S. W. 1084.

A liquor dealer's bond, executed under Rev. St. 1895, art. 5060g, conditioned that he

shall not permit any minor to enter and "remain" in his place of business, is not breached by his permitting a minor to enter and remain momentarily in his saloon. *Douthitt v. State*, 83 S. W. 795, 798, 98 Tex. 344 (citing *Tinkle v. Sweeney*, 77 S. W. 609, 97 Tex. 190; *Goldsticker v. Ford*, 62 Tex. 385).

#### Ownership and power of disposal implied

A testator by his will devised and bequeathed to his aged wife all his estate "both real and personal wherever found and however situate for her use during life," and the next clause provided that, "at the death of my said wife, whatever may remain of said estates, I give, devise and bequeath to my daughter." Held, that by the use of the expression "whatever may remain" a power of sale by the life tenant was annexed by implication to the devise of the life estate, and that it sufficiently appeared that the testator intended the power of sale to extend to both the real and the personal estate, so that, the power of sale as to the real estate having been exercised by the life tenant in her lifetime, the remainderman was thereby divested of her title thereto. *Young v. Hillier*, 67 Atl. 571, 572, 103 Me. 17, 125 Am. St. Rep. 283 (citing and adopting *Ramsdell v. Ramsdell*, 21 Me. 288; *Shaw v. Hussey*, 41 Me. 495; *Warren v. Webb*, 68 Me. 133; *Stuart v. Walker*, 72 Me. 145, 39 Am. Rep. 311; *McGuire v. Gallagher*, 99 Me. 334, 59 Atl. 445; *Harris v. Knapp* [Mass.] 21 Pick. 412; *Johnson v. Battelle*, 125 Mass. 453).

#### REMAIN DUE

Plaintiff alleged two causes of action, one to recover \$1,000 loaned to defendants at one time, and the other to recover \$200 loaned at a later date. Defendants answered, admitting the receipt of the money, and alleging that plaintiff was indebted to them for \$337 for board and lodging and a further sum for money paid by them on his behalf. The answer to the first cause of action stated that defendants admitted that plaintiff turned over to defendants the sum of \$1,000, "a portion of which was to be regarded as a loan to defendants," but claimed a right to deduct a sufficient sum therefrom to pay the amount of the accrued board. The answer otherwise alleged that the board so furnished was of the reasonable value of \$30 per month, making the value the sum of \$345, that plaintiff had paid thereon the sum of \$8, and that the balance of \$337 "remains due" defendants. Held, that the words "remains due" were equivalent to an allegation that such amount was unpaid, and that the answer, therefore, in effect admitted that the whole sum was advanced by plaintiff as a loan. *Hendelman v. Kahan*, 97 Pac. 109, 110, 50 Wash. 247.

#### REMAIN UNMARRIED

See *If She Remains Unmarried*.



**REMAIN UNSOLD**

Where a testator bequeathed as follows: "Two hundred and fifty shares of stock that I hold in the great western Turnpike company, in the state of New York, to 'remain unsold,' and the dividends arising thereon I direct to be equally divided between my sons, J., D. and E., my daughters M., M., S. and D., and my grandchild, O. S. T."—the turnpike stock was an absolute specific legacy to be enjoyed by the receipt of the dividends. *Manning v. Craig*, 4 N. J. Eq. 436, 437, 41 Am. Dec. 739.

In a paragraph of a will declaring that a daughter should have the right to use a certain house and lot for two years after testatrix's death, or for such longer period as the house should remain unsold, provided the same could be done without detriment to the estate, etc., the words "remains unsold" mean unsold by the executor under the power given the executor in a following paragraph to sell the testatrix's real estate for any purpose, with full discretion as to the time of sale, provided that he should so far as possible carry out her wishes as expressed in the preceding paragraph. *Faxon v. Faxon*, 55 N. E. 316, 317, 174 Mass. 509.

**REMAINDER**

See Rest, Residue, and Remainder.

All the rest, residue, and remainder, see All.

Said remainder, see Said.

Where plaintiff's grantor covenanted for himself, his assigns, etc., in a deed conveying a certain tract to himself, for the benefit of all other purchasers of the "remainder" of the tract, of which the land conveyed to him formed a part, not to erect thereon houses of amusement or entertainment, providing his grantors inserted similar clauses in all the other deeds of the remainder of the tract which they covenanted to do, the word "remainder" meant all of such tract not embraced in that deed, whether previously or subsequently sold. *City of Baltimore v. Garrett*, 69 Atl. 429, 433, 108 Md. 24.

One-half the net proceeds of the sale of real property in which a testator owned an undivided half interest, and not the entire net proceeds of the sale, is meant by the word "remainder," as used in an agreement for the division of the inheritance between the widow as usufructuary heiress and the heirs, who were also the owners of the other undivided half interest of the property, by which such property was to be sold, certain admitted debts or liabilities were to be deducted from the proceeds, and the remainder was to be turned over to the widow, to be used by her as usufructuary heiress. *Calvo v. De Gutierrez*, 28 Sup. Ct. 382, 384, 208 U. S. 443, 52 L. Ed. 564.

The use of the word "remainder" in the habendum clause of a deed is not decisive

that a technical remainder is intended, where the whole clause, construed together, shows another intent, which will be enforced, though a popular, rather than a strict, meaning be attached to particular words. *Simonds v. Simonds*, 85 N. E. 860, 862, 199 Mass. 552, 19 L. R. A. (N. S.) 686.

Where testator by the second clause of his will gave an undivided fourth of his property in trust for R., one of his four children, the third clause, giving to each of his other three children an undivided quarter of the "said remainder" of his estate, will be construed as giving to each of them a quarter of the whole estate, remaining after payment of his debts, funeral charges, expenses, etc.; it appearing that this was the intention, as otherwise part of the estate would be undisposed of by the will. *Angell v. Angell*, 68 Atl. 583, 586, 28 R. I. 592.

**REMAINDER (Estate In)**

See Contingent Remainder; Limitation of a Remainder; Vested Remainder.

See, also, Estate Remaining.

The essential characteristics of a "remainder" are: (1) There must be a precedent particular estate, whose regular termination the remainder must await. (2) The remainder must be created by the same conveyance and at the same time as the particular estate. (3) The remainder must vest in right during the continuance of the particular estate, or eo instante that it determines. (4) No remainder can be limited after a fee simple. A fee simple is vested in the children of M. by a will devising property to them without further words, and thereafter appointing D. trustee to control the property during their lives. *Dulin v. Moore* (Tex.) 69 S. W. 94, 96 (quoting and adopting definition in *Wells v. Houston*, 57 S. W. 599, 23 Tex. Civ. App. 629).

Real Property Law, § 28, defines a "remainder" as a future estate dependent upon a preceding estate. In *Perry*, 96 N. Y. Supp. 879, 884, 48 Misc. Rep. 285.

The word "remainder," as applied to estates and under the restrictive meaning, is a remnant of an estate in lands and tenements, expectant upon and part of the estate created together with the same at one time; and to be strictly a remainder it must be created not only at the same time, but by the same instrument, as the particular estate. *Biggerstaff v. Van Pelt*, 69 N. E. 804, 806, 207 Ill. 611.

"A 'remainder' is a remnant of an estate in land depending upon a particular prior estate, created at the same time and by the same instrument and limited to arise immediately on the determination of that estate, and not in abridgment of it." If a homestead be selected from the separate property of a married woman in her lifetime, upon her death intestate a life estate vests in the surviving spouse, and "remainder" in the

heirs of the deceased. *Hobson v. Huxtable*, 116 N. W. 278, 279, 79 Neb. 340 (quoting and adopting definition in 4 Kents' Com. [13th Ed.] 353).

A remainder requires a particular estate to support it, and a "contingent remainder" must vest during continuance of the particular estate, or eo instante that it determines; and, if the particular estate terminates before the event upon which the contingent remainder is to vest occurs, the remainder is defeated, whether the preceding estate reaches its natural termination or is ended prematurely by merger, forfeiture, or otherwise. *Bond v. Moore*, 86 N. E. 386, 391, 236 Ill. 576, 19 L. R. A. (N. S.) 540.

"If A., being the owner of land, gives it by deed or will to B. for life, and after the death of B. to C. in fee, the estate given to C. is called a 'remainder,' because it is the remnant or remainder of the estate or title which is left after taking out the lessor estate given to B. The same is true where, instead of a life estate, B. is given an estate for years, or any other terminable estate less than a fee." *Archer v. Jacobs*, 101 N. W. 195, 197, 125 Iowa, 467.

By the habendum clause in a deed E. was to have the premises for life, and, if by any means the estate should come to an end in his lifetime, remainder to N. for the residue of E.'s life, remainder, after the death of E., to E. and his heirs. On the day the deed was executed, E. conveyed the premises to the grantor; and the latter reconveyed as above, reciting a nominal consideration. Held, that E.'s interest, other than the life estate, was an estate in expectancy, a future estate termed a "remainder," which could be created and transferred by that name, and as such was descendible, devisable, and alienable, the same as an estate in possession, as expressly provided by Real Property Law (Laws 1896, pp. 564, 567) §§ 26-28, 49. *Ray v. Jaeger*, 115 N. Y. Supp. 737, 739, 131 App. Div. 294.

#### As executory devise

The word "remainder" includes executory devises. *Gannon v. Albright*, 81 S. W. 1162, 1168, 183 Mo. 238, 67 L. R. A. 97, 105 Am. St. Rep. 471.

#### As a fee

The ninth clause of a will was divided into three seemingly distinct parts, the first part giving and bequeathing to testator's wife, after debts and bequests made in other clauses of the will had been paid, all the residue of the property, both personal and real, "to have and to hold during her lifetime, to manage and control without having to give bonds, and this is to be in lieu of her dower interest in my estate, for the benefit and support of herself and my two minor children \* \* \* excepting" certain described land, which by the second part of the clause he devised to two sons. The third part of the clause provided "the remainder of the estate

after these bequests are made shall be at my wife, M. I.'s disposal, but it is expressly provided that if any of my children mentioned in this will shall die before they come in possession of their bequest, it will revert to the estate and shall be subject to the same conditions as the estate according to the terms mentioned in the will." Held, that the will, aside from the third part of the ninth clause, having disposed of all of testator's property, the word "remainder" as used in such third part must be held to refer to the remainder after the wife's life estate, and, as the word "disposal" indicates the power of absolute disposition, the life estate granted by the first part of the ninth clause was raised to a fee simple by the third part of the clause, and hence the wife took a fee rather than a life estate in the property devised and bequeathed to her by the ninth clause. *Ironside v. Ironside*, 130 N. W. 414, 416, 150 Iowa, 628.

#### As perpetuity

See Perpetuity.

#### As property

See Property.

### REMAINDER AND CONTINGENT INTEREST

"Remainder and contingent interest in real estate" is a term broad enough to include contingent remainders in fee, as well as defeasible fees. *Scheirich v. Maxwell* (Ky.) 89 S. W. 4, 5.

### REMAINDERMAN

As devisee, see Devisee.

Domestic Relations Law, § 64 (Laws 1896, p. 227, c. 272; Consol. Laws, c. 14, § 114), provides that a foster parent and adopted minor child have all the rights of parent and child including the right of inheritance from each other; but as to real and personal property dependent under the provisions of any instrument of the foster parent dying without heirs the minor is not deemed the child of the foster parent so as to defeat the rights of remaindermen. Testator, by his will, set aside a specified sum, the income thereof to be paid to a person named "during his life and upon his death, leaving a child or children surviving him to pay over the principal of said sum to such child or children." Held, that the words "leaving a child or children" had reference to the natural offspring of the life beneficiary, and that on his death his adopted child was not entitled to any of the property left by the will, as the word "remaindermen" was employed in the broad sense of those who might ultimately be entitled to take the estate, whether technically remaindermen under the common law, or not. *In re Leask*, 90 N. E. 652, 654, 197 N. Y. 193, 27 L. R. A. (N. S.) 1158, 134 Am. St. Rep. 866, 18 Ann. Cas. 516.

**REMAINING.**

See Balance Remaining; Estate Remaining; Money Remaining; Then Remaining.

Where testator devised certain real estate in trust, and provided that, if his grandson should die, the trust should be discharged, and the real estate become the property of "the remaining children" of my deceased son jointly, the term "remaining" is equivalent to "other," and not to the "then surviving," children, and does not make the interest of each of the granddaughters contingent. *Smith v. Myers*, 61 Atl. 573, 212 Pa. 51.

Testator gave his wife his estate during her life to be used according to her desire, and the will provided that after her death the property remaining should be divided among his brothers and sisters. Held, that the phrase "property remaining" amounted to a plain implication that the corpus of the estate was likely to be diminished during her life and tended to show an intention that she should have a right to dispose of the property and use the proceeds as she might desire. *McGuire v. Gallagher*, 59 Atl. 445, 446, 99 Me. 334.

**REMAINING ASSETS**

A final adjudication in receivership proceedings, after provisions made for interest and attorney's fees, adjudged that the balance remaining due on the principal due an intervening creditor should be a charge on the general fund, and that the creditor should be entitled to share as an unsecured creditor in the remaining assets. There was then in the hands of the receiver a fund representing the net assets derived by him from his operation of the corporation's property which had come into his hands, and also a fund derived by him from the proceeds of the property of the company. Thereafter a final decree of distribution awarded to such creditor a share in the general fund and in the remaining assets, but denied to it any share in the net earnings fund. Held, that, in view of Rev. St. 1895, art. 1490, providing that all claims against any corporation at the time of the appointment of a receiver, shall be paid out of the earnings of such corporation while in the hands of a receiver to the exclusion of mortgage action, the "remaining assets" did not include the net earnings fund. *First Nat. Bank v. J. I. Campbell Co. (Tex.)* 133 S. W. 311, 312.

**REMAINING IN A PLACE**

Under Pen. Code 1895, art. 388f, as added by Acts 30th Leg. p. 109, providing that if any person shall go into and remain in any gambling house, or shall remain in any place where prohibited games are being played, etc., and further providing that by "gambling house" and "gaming house" is meant any place where people resort for the purpose of gaming, a person remaining in a private

dwelling house, not shown to be a place frequented for the purpose of gaming, while a prohibited game was being played therein, is guilty of no offense, since "remaining in a place," etc., means in a place where gaming is being conducted in a sense continuously. *Walters v. State*, 125 S. W. 11, 58 Tex. Cr. R. 240.

**REMAINING LIVING HEIRS**

The words "remaining living heirs" as used in a will providing that, in case of the death of either one of four children, the property willed to either of them was to be equally divided to the remaining living heirs of testator, mean his surviving children and the children of any such child deceased. In *re Harrington's Will*, 125 N. W. 986, 991, 142 Wis. 447.

**REMANIT**

"Remanit" is a product obtained by carbonizing silk rags. It is a nonconductor of heat, and generally used as a wrapping or covering for steam pipes or boilers. It is a manufacture of silk within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 491 (30 Stat. 187). *Frank v. United States*, 143 Fed. 702, 703.

**REMEDY**

See Appropriate Remedy; Common-Law Remedy; Cumulative Remedy; Domestic Remedy; Household Remedies; Inadequacy of Remedy at Law; Legal Remedy; Personal Remedy; Plain, Speedy and Adequate Remedy; Provisional Remedy; Speedy and Adequate Remedy; Speedy Remedy; Statutory Remedy.

Election of remedy, see Election.

Other remedy, see Other.

"Remedy" signifies the judicial means for enforcing a right or redressing a wrong. *Walters v. City of Ottawa*, 88 N. E. 651, 654, 240 Ill. 259.

The term "remedy," within Rev. St. § 79, providing that, when the repeal or amendment relates to the remedy, it shall not affect pending actions, unless so expressed, is the means employed to enforce a right or redress an injury; that is, the legal mode for enforcing a right or redressing or preventing a wrong. To illustrate: We speak of the remedy for nonfulfillment of contract as an action, under the old practice, in assumpsit, covenant, debt, or detinue, or in tort, if the injury is to the individual, and the like, and under the Code, the civil action, embracing all of these, while in criminal prosecutions the remedy is by indictment or information, or in some minor offenses by complaint before a magistrate. *State v. Barlow*, 71 N. E. 726, 728, 70 Ohio St. 363.

In Act Feb. 4, 1887, c. 104, § 22, 24 Stat. 387, providing that nothing in this act shall in any way abridge or alter the remedies now existing at common law or by statute but the provisions of this act are in addition to such remedies, the term "remedies" includes the necessary courts or tribunals, and, where a carrier in violation of the common law has charged and collected from a shipper an exorbitant freight rate, the shipper had a right under the common law to seek relief in a state court. *Abilene Cotton Oil Co. v. Texas & P. R. Co.*, 85 S. W. 1052, 1055, 38 Tex. Civ. App. 366.

Where, in an action on an accident benefit certificate stipulating that insurer should not be liable for death resulting from surgical treatment, the evidence showed that insured died while chloroform was being administered preparatory to an operation, and an attending physician testified that the proximate cause of death was acute dilatation of the heart immediately caused by the chloroform, and that insured's diseased condition did not contribute to his death, the jury could find that surgical treatment did not include the administering of chloroform; "surgery" being defined as the branch of the healing art that relates to external injuries, deformities, and other morbid conditions to be remedied directly by manual operations, "surgical" being defined as being of or pertaining to surgery, "treatment" meaning the act or manner of treating, "remedy" being defined as something used for the cure or relief of bodily disease, and "surgical treatment" meaning treating a disease by means of surgery. *Belle v. Travelers' Protective Ass'n of America*, 135 S. W. 497, 502, 155 Mo. App. 629.

#### **Cause of action distinguished**

See Cause of Action.

#### **As right**

"The ideas of 'right' and 'remedy' are inseparable. Want of right and want of remedy are the same thing." *Blakemore v. Cooper*, 106 N. W. 566, 569, 15 N. D. 5 (quoting and adopting *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793).

#### **As right of intervention**

The right of intervention given to a claimant is a statutory "remedy at law" and subject to the constitutional guaranty of a jury trial. *Hubbard v. Lamburn*, 75 N. E. 707, 709, 189 Mass. 296.

### **REMEDIAL**

A judgment finding defendants in a pending suit in equity guilty of contempt of its authority in violating an interlocutory injunction previously granted in a suit for the benefit of the complainant, and ordering the payment of specified fines, three fourths of which when paid should go to the complainant "as compensation in part for the

expenses incurred in prosecuting these contempt proceedings," is punitive instead of "remedial," and reviewable on writ of error without awaiting a final decree in the suit in equity. *In re Merchants' Stock & Grain Co.*, 32 Sup. Ct. 339, 340, 223 U. S. 639, 56 L. Ed. 584.

### **REMEDIAL CASES**

"Remedial cases," as used in the Minnesota Constitution conferring original jurisdiction on the Supreme Court in such remedial cases as may be prescribed by law, includes only such cases in which summary remedy is afforded by extraordinary writs. *In re Lauritsen*, 109 N. W. 404, 408, 99 Minn. 520.

The cases intended by the term "remedial cases" are those where the remedy is afforded summarily, through certain extraordinary writs, such as prohibition, mandamus, certiorari, and quo warranto. Any greater or less extensive meaning could hardly be given to the term without making it so indefinite as to make it difficult to say what it means. *State v. St. Paul S. C. R. Co.*, 28 N. W. 245, 246, 35 Minn. 222, 223.

### **REMEDIAL LAW**

Substantive law is that part of the law which creates, defines, and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion. *Mix v. Board of Com'rs of Nez Perce County*, 112 Pac. 215, 220, 18 Idaho, 695, 32 L. R. A. (N. S.) 534.

### **REMEDIAL STATUTE**

The word "remedial," as applied to statutes, is commonly given an extended meaning and made to include all such as are enacted from time to time to supply the defects of the existing law, whether arising from inevitable imperfections of human legislation, from change of circumstances, from mistake, or from any other cause, but it was not so used in Minnesota Constitution giving to the Supreme Court original jurisdiction in such "remedial" cases as may be prescribed by law, but, as so used, included only those cases in which the remedy is afforded summarily in extraordinary writs as in mandamus, quo warranto, and habeas corpus. *In re Lauritsen*, 109 N. W. 404, 408, 99 Minn. 520.

The legislation providing for assessment and all other tax proceedings, though not "remedial" in the ordinary sense of the term, is purely so as between the state, on the one hand, and the persons and property subject to taxation, on the other. *Webb v. Ritter*, 54 S. E. 484, 493, 60 W. Va. 193.

### **REMISE**

The words "remise," "release," and "quitclaim" each mean to discharge. *Sherman v. Sherman*, 122 N. W. 439, 443, 23 S. D. 486.

"Remise" means to release a claim to, remise, or surrender by deed, and it would appear that the words "remise," "release," and "quitclaim" are interchangeable. *Banard v. Duncan*, 112 N. W. 353, 355, 79 Neb. 189, 126 Am. St. Rep. 661.

#### REMISE AND FOREVER DISCHARGE

See Release, Remise, and Forever Discharge.

#### REMISSION

A party in justice's court may remit a part of his demand so as to bring it within the jurisdiction of the justice, but the remission must be absolute for all demands in excess of the jurisdiction, for "remission" implies forgiveness, and means a voluntary relinquishment of a claim or a part thereof by one capable of asserting it, and does not refer to the extinguishment of a debt by agreement of the parties, or by judgment of the court. *Kilgore Lumber Co. v. Thomas & Hammonds*, 128 S. W. 62, 64, 95 Ark. 43.

#### REMITTITUR

The word "remittitur," used in Supreme Court rule 34 (78 Pac. xlii), providing that, when a judgment of a District Court of Appeal becomes final therein, the remittitur shall not be issued until after the lapse of 30 days thereafter, unless otherwise ordered, designates the judgment of the appellate tribunal which is authenticated to the court from which the appeal is taken, and corresponds to "mandate," used in the practice of the United States Supreme Court. In *re Smith*, 83 Pac. 167, 169, 2 Cal. App. 158.

#### REMITTITUR OF RECORD

At common law "remittitur of record" was a writ by which an appellate court handed back jurisdiction to the trial court. *Donnell v. Wright*, 97 S. W. 928, 931, 199 Mo. 304.

#### REMODELING

The words "repairing" and "remodeling" are not synonymous or included within the meaning of the word "building," within an ordinance prohibiting the erection of a wooden building within the fire limits. *City of Mayville v. Rosing*, 123 N. W. 393, 395, 19 N. D. 98.

#### REMONSTRANCE

As pleading, see Pleading.

#### REMOTE—REMOTENESS

See Too Remote.

The words "proximate" and "immediate" are synonymous, and are each the an-

tonym of "remote." *Herke v. St. Louis & S. F. R. Co.*, 125 S. W. 822, 823, 141 Mo. App. 613.

The camp at Los Quemados of the main body of United States troops in the vicinity of Havana, situated about 6 or 8 miles from that city, and about 2½ miles from the beach of Marianao, and connected with both points by rail, is not "situated in the interior of the island," within the meaning of an agreement on the part of the United States to take the fresh beef needed at posts or camps so situated, made pursuant to advertisements for proposals, in which the phrases "posts remote from the seacoast" and "posts and camps in the interior of the island" were used as synonymous. *Simpson v. United States*, 26 Sup. Ct. 54, 199 U. S. 397, 50 L. Ed. 245.

"Remoteness," as applied to evidence, is a term which has regard for other factors than mere lapse of time, even where it is a factor, as it often is not. The essence of remoteness is such a want of open and visible connection between the evidentiary and principal facts that, all things considered, the former is not worthy or safe to be admitted in proof of the latter. Generally speaking, the question of remoteness, as justifying the exclusion of evidence, must depend upon all the considerations, including time, the character of the evidence, and all the surrounding circumstances which, in the opinion of the court, ought to have a bearing upon its worthiness to be brought into the consideration and determination of the matter in contention. *State v. Kelly*, 58 Atl. 705, 706, 77 Conn. 266.

#### REMOTE CAUSE

"The 'remote cause' is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof." *Atchison, T. & S. F. Ry. Co. v. Dickens*, 103 S. W. 750, 755, 7 Ind. T. 16 (quoting and adopting the definition in *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 405, 11 C. C. A. 253, 27 L. R. A. 583).

"Remote cause," as used in the law of negligence, means the improbable cause, or cause which was not the efficient cause, of the injury. *Davis v. Mercer Lumber Co.*, 73 N. E. 900, 903, 164 Ind. 413.

By "remote cause" is intended that which may have happened and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. *Claypool v. Wigmore*, 71 N. E. 509, 510, 34 Ind. App. 35 (citing *Baltimore & O. R. Co. v. Trainor*, 33 Md. 542).

Where, in the sequence of events between an original default and a final injury, an entirely independent and unrelated cause intervenes which is of itself sufficient to stand as the cause of the mischief, the second cause

is ordinarily regarded as the "proximate cause" and the other as the "remote cause." *Atchison, T. & S. F. R. Co. v. Calhoun*, 29 Sup. Ct. 321, 323, 213 U. S. 1, 53 L. Ed. 671 (citing *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. [7 Wall.] 44, 52, 19 L. Ed. 65, 67).

If two distinct causes are successive and unrelated in their operation, one of them must be the "proximate cause" and the other the "remote cause," and in such case the law regards the proximate cause as the efficient cause and disregards the remote. *St. Louis & S. F. R. Co. v. Justice*, 101 Pac. 469, 473, 80 Kan. 10 (quoting *Herr v. City of Lebanon*, 24 Atl. 207, 149 Pa. 222, 16 L. R. A. 106, 34 Am. St. Rep. 603).

In a case where two distinct, successive, causes, wholly unrelated in operation, contribute toward the production of an accident, resulting in injury and damage, one of such causes must be the proximate and the other the "remote cause" of the injury. A prior and "remote cause" cannot be made the basis of an action for the recovery of damages if such "remote cause" did nothing more than furnish the action or give rise to the action by which the injury was made possible, if there intervened between such prior and remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury. A farmer who had driven a team of 11 year old horses 17 miles hitched one of them, as he had been frequently in the habit of doing, to a hitching rail in front of a store, and was engaged in unloading his wagon, going back and forth for this purpose but a short distance. The halter with which the horse was hitched was apparently in good condition, and no defect therein was shown. While the team was standing quietly, a boy, in turning over the hitching rail near the head of the team, struck the nose of the one hitched with his foot, which frightened the team and caused them to break loose, by breaking the halter, and run away, causing damage. Held, that the striking of the horse by the boy was the "proximate cause" of the accident. *Stephenson v. Corder*, 80 Pac. 938, 940, 71 Kan. 475, 69 L. R. A. 246, 114 Am. St. Rep. 500 (quoting and adopting *Missouri Pac. Ry. Co. v. Columbia*, 69 Pac. 338, 65 Kan. 390, 58 L. R. A. 399).

A "remote cause" is one which is inconclusive in reasoning, because from it no certain conclusion can be legitimately drawn. In other words, a remote cause is a cause the connection between which and the effect is uncertain, vague, and indeterminate. It does not contain in itself the element of necessity between it and its effect. From the remote cause the effect does not necessarily flow, and it is this idea of necessity—the necessary connection between the cause and the effect—that is the prime distinction between proximate and a remote cause. Though the existence of a remote cause is necessary for the existence of the effect (for unless there

has been a remote cause, there can be no effect), still the existence of the remote cause does not necessarily imply the existence of the effect. The remote cause being given, the effect may or may not follow. *McGovern v. Degnon-McLean Contracting Co.*, 105 N. Y. Supp. 408, 410, 120 App. Div. 524 (citing 4 Am. Law Rev. 201, 203; *Laidlaw v. Sage*, 52 N. E. 679, 158 N. Y. 73, 99, 44 L. R. A. 216).

An injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, and such an act is either the "remote cause" or no cause whatever of the injury. An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, or that would not have resulted from it had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable. Such an act of negligence is the "remote" and the independent intervening cause is the "proximate" cause of the injury. *Brubaker v. Kansas City Electric Light Co.*, 110 S. W. 12, 14, 130 Mo. App. 439 (quoting *Cole v. German Savings & Loan Society*, 124 Fed. 114, 59 C. C. A. 595, 63 L. R. A. 416).

Where a miner was overcome by gas and while unconscious was found by a searching party and taken to the surface on the elevator cage which was 5½ feet square, two sides being inclosed and two open, and one of his feet projecting beyond an open side of the cage, was caught by the timbers of the shaft and his leg broken, the negligence of the employer in permitting a dangerous quantity of gas in the mine, if conceded, while a "remote" was not the proximate cause of the injury which was the negligence of those placing him on the cage, so that, under the rule that one negligent is responsible only for such consequences as would naturally and probably result and as should reasonably have been foreseen, the employer was not liable. *Tels v. Smuggler Min. Co.*, 158 Fed. 260, 264, 267, 85 C. C. A. 478, 15 L. R. A. (N. S.) 893 (citing and adopting *Hoag v. Lake Shore & M. S. R. Co.*, 85 Pa. 293, 27 Am. Rep. 653; *South-Side Pass. Ry. Co. v. Trich*, 11 Atl. 627, 117 Pa. 390, 2 Am. St. Rep. 672; *Stone v. Boston & A. R. Co.*, 51 N. E. 1, 171 Mass. 536, 41 L. R. A. 794; *Gibson v. International Trust Co.*, 58 N. E. 278, 177 Mass. 100, 52 L. R. A. 928; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256; *Ætna Ins. Co. v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395; *Scheffer v. Washington City, V. M. & G. S. R. Co.*, 105 U. S. 249, 26 L. Ed. 1070; *Chicago, St. P., M. & O. Ry. Co. v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582; *Cole v. German Savings & Loan Soc.*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416).

### REMOTE DAMAGES

"Proximate damages" as a result of an unlawful act are those which are the natural and not "remote" consequence of such act. If, on the contrary, the damages complained of would not naturally and usually flow from the negligent act, but were brought about by some unforeseen casualty, they are "remote." *Louiseau v. Arp*, 114 N. W. 701, 703, 21 S. D. 566, 14 L. R. A. (N. S.) 855, 130 Am. St. Rep. 741 (quoting and adopting definition in 13 Cyc. p. 25).

### REMOTE PROFITS

In an action for breach of contract, "profits" are usually considered too "remote" when not the immediate fruits of the principal contract, but dependent on collateral engagements not brought to the notice of the contracting parties. *Dickerson v. Finley*, 48 South. 548, 552, 158 Ala. 149.

### REMOVE—REMOVAL

See Cut and Remove.

An attachment provided for by Code Civ. Proc. § 3169 (3), on affidavit that defendant has "removed" or is about to remove property from the state with intent to defraud his creditors, is not authorized by an affidavit showing that defendant is in custody in default of \$2,000 bail, and merely suggesting that he may at any time be discharged, and that in such case he will leave the state for the purpose of defrauding plaintiff. *Tocci v. Gianvecchio*, 95 N. Y. Supp. 583, 48 Misc. Rep. 351.

#### As change of residence

Where one is not a resident of the state but is passing through the same with his goods, an attachment may issue against him, on the ground "that he is actually removing out of the county" in which he may then be found. *Johnson v. Lowry*, 47 Ga. 560, 561, 562, 15 Am. Rep. 655.

A resident of Iowa came to Montana in the summer of 1907, to make his home there. He engaged in business therein, and filed on a homestead. He returned to Iowa to arrange his affairs there, and brought his family to Montana after November, 1907. Held that, under Rev. Codes, § 481, Rule 9, providing that a change of residence can only be made by the act of removal, joined with the intent to remain in another state, etc., he was a qualified voter at the November, 1908, election; "removal" meaning the act of changing a former home to a new home. *Carwile v. Jones*, 101 Pac. 153, 159, 38 Mont. 590.

#### Same—Permanent absence

Rev. St. 1899, §§ 4570, 4628, 4637, authorize and contemplate the appointment of non-residents as executors. Section 4622 provides for the suspension of the powers of an executor when the judge has reason to believe that he has permanently removed from

the state, and section 4623 provides that if, upon the hearing, the court is satisfied that there exists cause for his removal, his letters must be revoked. Held, that where a nonresident is appointed as executor, and personally submits himself to the jurisdiction of the court and personally conducts the settlement of the estate, he cannot be removed from office on the ground of his nonresidence unless he subsequently permanently "removes" from the state, in the sense of permanently absenting himself from the place where the business of his trust is transacted, or withdrawing himself beyond the process of the court. *Hecht v. Carey*, 78 Pac. 705, 706, 13 Wyo. 154, 110 Am. St. Rep. 981.

#### As discharge from office, position, or trust

A recall is a method of removal of officers, within Dallas city charter, providing that elective officers may be "removed" in a manner therein provided. *Bonner v. Belsterling*, 138 S. W. 571, 573, 104 Tex. 432.

An assignment to a lower position in the same service under the classified service and at a lower rate of compensation is a "removal" from the position formerly held. *Waters v. City of New York*, 88 N. Y. Supp. 238, 241, 43 Misc. Rep. 154 (citing *People ex rel. Callahan v. Board of Education*, 79 N. Y. Supp. 624, 78 App. Div. 501).

The word "removal," as used in an order of court removing a defendant from office on the filing of an indictment against him under an act according to which, and a constitutional provision, he should then only be suspended, removal following on conviction should be construed as one of suspension; defendant not being prejudiced, he being thereafter convicted. *Howard v. State*, 82 S. W. 202, 72 Ark. 600.

The words "removal" and "discharge" are used indiscriminately in the statute to designate orders of court which have the effect of simply removing guardians, executors, etc., from office without exonerating them from liability to account. Code Civ. Proc. § 1805, requiring action on a guardian's bond to be commenced within three years from the "discharge or removal" of the guardian, applies to an action after a final order of the court removing or discharging the guardian, and does not include termination of the guardianship by the ward attaining majority. *Cook v. Ceas*, 77 Pac. 65, 68, 143 Cal. 221.

The civil service act of 1908 (P. L. 1908, p. 235), providing that officers and employees of any municipality adopting the act shall continue to hold their offices or employments and shall not be removed therefrom except after a written statement of the reason for removal, etc., and requiring the civil service commission to arrange offices and employments in the classified service in classes, etc., refers only to officers whose terms of office

are not fixed by law, and it does not extend the term of an office previously fixed by legislative act; the word "removal" applying to one whose term is indefinite, and not naturally connoting the case of an officer whose statutory term has actually expired. *McKenzie v. Elliott*, 72 Atl. 47, 48, 77 N. J. Law, 43.

"A case of 'removal for just cause' implies some misconduct upon the part of the officer, or imputes to him some violation of the law. Under such circumstances, it is necessary that the charges against him shall be based upon some refusal to obey or intention to violate the law prescribing his duties. There are often such penalties attached to proceedings for the removal of officers 'for cause shown' that they are and should be carefully guarded from abuse; but, as to the right to the office as against the people, it is a well-recognized rule that the agency may be terminated at any time by the sovereign power without reason given." *Good v. Common Council of City of San Diego*, 90 Pac. 44, 46, 5 Cal. App. 265 (citing *Croly v. Board of Trustees of City of Sacramento*, 51 Pac. 323, 119 Cal. 234, and *In re Carter*, 74 Pac. 997, 141 Cal. 319).

Under Const. art. 12, § 8, conferring on the Governor power to remove officers of charitable and penal institutions, and article 4, § 22, authorizing the Governor to suspend an officer indicted for embezzlement, and Cr. Code 1902, §§ 381, 388, 389, 410, providing for the removal by the Governor of local officers convicted of specific misconduct, and providing for the dismissal from office of any magistrate convicted of neglecting to pay over fines, and Civ. Code 1902, §§ 625, 982, authorizing the Governor to remove for cause any officer appointed by him to fill a vacancy, and authorizing the Governor to suspend magistrates for incapacity, misconduct, or neglect of duty, etc., the Governor has no power to remove magistrates serving for a full term except after trial and conviction, as provided by the Constitution and the statutes, but he may suspend any magistrate when a showing has been made to him by affidavit that the magistrate is probably guilty of embezzlement and a true bill has been found, and he may suspend for incapacity, misconduct, or neglect of duty, but submit the suspension to the Senate for approval or disapproval, and an attempt of the Governor to remove a magistrate without indictment and conviction is without effect as a removal. A "suspension" is the mere temporary withdrawal of the power to exercise the duties of an office, while a "removal" is a complete deprivation of official tenure. *McDowell v. Burnett*, 75 S. E. 873, 877, 92 S. C. 469.

The "removal" of a receiver means simply a change in the personnel of the receivership which continues unaffected. *Ripy v.*

*Redwater Lumber Co.*, 103 S. W. 474, 478, 48 Tex. Civ. App. 311.

The term "remove," as applied to a receiver, means simply a change in the personnel of the relationship. The receivership itself continuing unaffected. The effect of such removal is only to substitute one person for another in the office, and the cause of the removal is some personal objection to the receiver. It is thus distinguished from a discharge, which relates to the termination of the receivership, and is asked and ordered for the reason that because of the state of the suit there is not any longer any necessity for continuing the receiver. *Pagett v. Brooks*, 37 South. 263, 264, 140 Ala. 257.

Under a city charter providing that teachers in their first or second year should be classified as probationary, and might be dropped on the adverse report of the classification committee, and that teachers who have been assigned for more than two years, other than special teachers, shall be classed as permanent teachers, and shall hold their positions until removed, and that no teacher shall be removed save at the close of the year and with at least one month's notice. While there does not appear to be any great difference between "dropping" a teacher from the department, and "removing" him, so far as the effect on the teacher is concerned, the section does apply the latter term only to permanent teachers, and the clause protecting teachers from removal without prior notice, except at the end of the school year, was intended to refer only to permanent teachers, but an appointee during the probationary period could be legally dropped only on the adverse report by the classification committee. *Barthel v. Board of Education of City of San Jose*, 95 Pac. 892, 894, 153 Cal. 376.

#### Removal statute

The requirements of Rev. Codes 1905, §§ 2358-2363, that, in voting on the question of county seat removal, each elector must vote for the place in the county which he prefers by placing opposite the name of the place the mark "X," are mandatory, and necessitate the construction of the statute as a removal statute, as distinguished from one for relocation. As affecting the question of location of county seats, a removal statute provides for the removal of the county seat to a proposed new county seat designated in the petition therefor, while a relocation statute authorizes a petition and election on the question, not whether the county seat shall be removed to a particular place, but where the county seat shall be located. *Miller v. Norton*, 132 N. W. 1080, 1095, 22 N. D. 196.

#### Remove at pleasure

See At Pleasure.

#### Remove location of college

Where an agricultural college was a part of Wyoming University at Laramie be-



fore the Wyoming Agricultural College was located at Lander by a vote of the people after it was established by the Legislature, the repeal of the sections of the act establishing an agricultural college, providing it with a managing board and regulating its affairs, was not a "removal" of its location so as to violate Const. art. 7, § 23, providing that the Legislature shall not locate any public institutions other than those indicated, except under general laws and by vote of the people. *State ex rel. Wyoming Agriculture College v. Irvine*, 84 Pac. 90-107, 14 Wyo. 318.

#### **Remove timber**

Timber cannot be said to be "removed" from the premises unless it is carried off, and hence, under a contract requiring that logs shall be removed from the premises in three years, the timber cannot be said to be "removed" from the premises when it is merely cut down and left lying on the lands. *Clark v. Ingram Day Lumber Co.*, 43 South. 813, 814, 90 Miss. 479.

A contract to sell timber, giving the buyer four years to cut and remove it, and providing that if longer time should be required to "remove" the timber, an extension would be granted covering the time required to "cut and remove" the timber, not exceeding two years, entitled the buyer to cut, as well as remove, timber during the extension period. *Norfolk Lumber Co. v. Smith*, 63 S. E. 954, 955, 150 N. C. 253.

#### **Remove tracks**

Under a contract with a borough stipulating that a street railway company should not "remove" its tracks without the borough's consent, the company could not take up its tracks to readjust them without the borough's consent. *Chester, D. & P. Ry. Co. v. Borough of Darby*, 66 Atl. 357, 358, 217 Pa. 275.

#### **As special proceeding**

See Special Proceeding.

### **REMUNERATION**

See Just Remuneration.

As compensation, see Compensation.

### **REMUNERATIVE DONATION**

A "remunerative donation" is a gift, the object of which is to recompense for services rendered. A manual gift may be free, onerous, or remunerative. *Ackerman v. Larner*, 40 South. 581, 587, 116 La. 101.

### **RENDER**

See Duly Rendered; Personal Services Rendered.

### **RENDITION OF JUDGMENT**

#### **As announcement of decision**

Where a statute refers to the rendition of judgment, it means the formal announce-

ment by the court and does not mean the entry of the same by the clerk. The judgment is a judicial act of the court. The entry is a ministerial act of the clerk. The judgment is as final when pronounced by the court as when it is entered and recorded by the clerk as required by statute. *State ex rel. Ryan v. Murphy*, 97 Pac. 391, 30 Nev. 409, 18 L. R. A. (N. S.) 1210 (quoting *California State Tel. Co. v. Patterson*, 1 Nev. 155).

"A judgment is rendered whenever the trial judge officially announces his decision in open court, or out of court signifies to the clerk, in his official capacity and for his official guidance—whether orally or by written memorandum—the sentence of the law pronounced by him in any cause. This pronouncement of the court it is incumbent upon the clerk to forthwith enter. The writing out of the judgment in the form of a judgment file, to be recorded is a matter of subsequent clerical action. There is recognized a clear distinction not only between the judgment and the writing which is required to be made to evidence it, but also between the 'rendition' of the judgment and the preparation of this writing at some subsequent time. In *Goldreyer v. Cronan*, 55 Atl. 594, 76 Conn. 113, this distinction is judicially asserted. It is there said that the filed memorandum of decision brought a judgment into existence; that a judgment, speaking generally, is the determination or sentence of the law, speaking through the court, and does not exist as a legal entity until pronounced, expressed, or made known in some appropriate way; that it may be expressed orally or in writing, or in both of these ways, in accordance with the customs and usages of the court in which it is rendered." *Appeal of Bulkeley*, 57 Atl. 112, 113, 76 Conn. 454.

A judgment of conviction pronounced by the court constitutes the "rendition of a judgment," within the meaning and requirements of chapter 389, p. 594, Laws 1903, allowing 90 days after the rendition of a judgment in which to file a record in the Supreme Court on appeal from the conviction of a misdemeanor, to entitle defendant to a stay of execution pending the appeal. *Youngberg v. Smart*, 78 Pac. 422, 423, 70 Kan. 299.

"While in one sense a judgment is 'rendered' when it is announced by the judge, yet until that judgment is entered of record there is no competent evidence of such rendition. It cannot exist or be dependent upon the memory of the officers of the court or in memorandum not embraced in the record, which the law provides shall be made." *Kennedy v. Citizens' Nat. Bank*, 93 N. E. 71, 119 Iowa, 123 (citing and adopting *Balm v. Nunn*, 19 N. W. 810, 63 Iowa, 641; *Cadwell v. Dullaghan*, 37 N. W. 178, 74 Iowa, 239; *Winter v. Coulthard*, 62 N. W. 732, 94 Iowa 312).

"Where the statute refers to the 'rendition of judgment,' it means the formal an-

announcement by the court and does not mean the entry of the same by the clerk." Hence under Comp. Laws, §§ 3425, 3426, providing that an appeal may be taken from a final judgment within one year "after the rendition" thereof, etc., the time within which an appeal must be taken begins to run from the date the court made its decision and ordered judgment to be entered accordingly, though the judgment was not entered until later. *Central Trust Co. of California v. Holmes Min. Co.*, 97 Pac. 390, 391, 30 Nev. 437.

Rev. St. Wis. c. 120, § 160, requires a justice on verdict by a jury to "render judgment forthwith," or he will lose jurisdiction. But under this statute, if a justice on receipt of verdict render judgment by saying that he renders judgment in favor of one of the parties for the damages found by the jury with costs, the judgment thus rendered may be subsequently entered on his docket, and the costs taxed without affecting its validity. *Kleinsteuber v. Schumacher*, 35 Wis. 608, 611, 613.

"A judgment rendered by a justice of the peace at the regular time and place of holding his court, but which was written out and signed at some other time and place in the district, is not void. The word 'rendered,' as used in section 462 of the Code [Civ. Code 1910, § 4705], refers to the making up and announcement of the judgment, and not to the clerical act of reducing it to writing." *Constitution Pub. Co. v. Dean*, 75 S. E. 335, 336, 11 Ga. App. 361.

#### As entered

A judgment in an action at law is rendered when it is entered in the minutes during term time, or when in vacation it is put in form for such entry or record and is signed by the judge. *Pittsburg Steel Co. v. Streety*, 53 South. 505, 60 Fla. 183.

Where findings are required, there can be no rendition of the judgment until they are filed, unless they are waived, and where they are waived or are not required, the entry of the decision in the minutes of the court is the rendition of the judgment. *Brownell v. Superior Court of Yolo County*, 109 Pac. 91, 93, 157 Cal. 703.

Under a statute providing that a notice of appeal must be given when the judgment is "rendered or made," and one providing that in a trial by jury judgment shall be immediately entered by the clerk in conformity to the verdict, a judgment in a trial by jury is "rendered or made" when the clerk enters judgment. *Chilcott v. Globe Nav. Co.*, 95 Pac. 264, 265, 49 Wash. 302.

Within Code Civ. Proc. § 974, authorizing appeal from a justice within a certain time after the "rendition" of the judgment, judgment is not rendered till it is "entered," and mere entry of memorandum of the verdict is not enough; as, while section 891 provides

that in case of trial by jury judgment must be entered by the justice "at once," in conformity with the verdict, section 893 provides that it must be entered substantially in the form required by section 667, and that "no judgment shall have effect for any purpose till so entered." *Thomson v. Superior Court of Mendocino County*, 119 Pac. 98, 100, 161 Cal. 329.

#### Entered or entry distinguished

"The 'rendition' and 'entry' of a judgment are entirely different acts—one is to be performed by the court and must be in order of time, and the other by the clerk." *People v. Schmitz*, 94 Pac. 407, 410, 7 Cal. App. 330, 15 L. R. A. (N. S.) 717 (quoting from *Peck v. Courtis*, 31 Cal. 207).

"The 'rendition of a judgment' \* \* \* is an entirely different thing from the entry of it. The former is the act of the law through the mouth of the judge; the latter the act of the clerk. The former gives force and efficacy to the judgment; the latter preserves a memorial of it. The former is a judicial act; the latter a ministerial act." *Jaqua v. Harkins*, 82 N. E. 920, 922, 40 Ind. App. 639 (quoting and adopting the definition in 1 Black, Judg. § 179).

#### As judicial act

See Judicial Act.

#### As official act

See Official Act.

## RENEW

See Covenant To Renew.

The word "renew," in a lease providing that the lessee shall have the right to renew the lease, imports a giving of a new lease like the old one, with the same terms, stipulations, and covenants. *Leavitt v. Maykell*, 89 N. E. 1056, 1057, 203 Mass. 506, 133 Am. St. Rep. 323.

The covenant in a lease to "renew" indicates the intention of the parties to execute a new lease, and the duty of the lessee to give notice to the lessor at or before the expiration of the lease of his election to renew. *Whalen v. Manley*, 69 S. E. 843, 844, 68 W. Va. 323.

A bond in renewal of a former bond securing the payment of notes recited that the obligee was willing to "renew" the notes in consideration of the bond, and provided that the bond should be void if, within a year, or at the expiration of any renewal notes, the principal obligor should pay the notes or renewals, and that the notes might be renewed during one year, for periods customary in bankable paper, and that the liability of the surety should not, in any event, exceed a certain sum. Held, that the obligee was required to renew the notes only once, and not to grant repeated renewals for the space

of a year. *Haney School Furniture Co. v. Medary*, 101 N. W. 929, 930, 123 Wis. 364.

#### As extended

The meaning of the word "renew" is to make over, to re-establish or to rebuild; and the meaning of "extend" is to prolong, to lengthen out. Where a lease for 10 years provides for an extension of the term for 10 years at the option of the lessee, as distinguished from a renewal of the lease, the lease makes the term 20 years, at the option of the lessee, and his holding over, after the expiration of the 10 years, is a sufficient exercise of the option, so that it is immaterial whether the lessor was insane when he afterwards gave a written extension for the 10 years. *Quinn v. Valiquette*, 68 Atl. 515, 518, 80 Vt. 434, 14 L. R. A. (N. S.) 962.

The words "renew" and "extend" do not always mean the same thing; but, in interpreting a stipulation in a lease "granting the privilege of renewing and extending this contract for a period of three years from" the expiration of the term named in the lease, the context of the lease will be construed for the purpose of arriving at the intent of the parties, and the words may be given a similar meaning, if that seems to be what the parties intended. *Hamby & Toomer v. Georgia Iron & Coal Co.*, 56 S. E. 1033, 1037, 127 Ga. 792 (citing 7 Words & Phrases, p. 6086; *Insurance & Law Bldg. Co. v. National Bank of Missouri*, 71 Mo. 58, 60; *Jones, Landlord & Tenant*, § 338).

The word "renewed" may properly be used to express an agreement on the part of the maker of a note, but is inappropriate to express an agreement on the payee's part extending to the time of payment. The words, "Renewed July 6," indorsed on the back of a note over the signature of the payee, are too indefinite to extend time of payment. *Brenneke v. Smallman*, 83 Pac. 302, 304, 2 Cal. App. 306.

#### RENEWAL

A "renewal" of a license, within Gen. St. 1902, § 2647, as amended by Pub. Acts 1907, p. 750, c. 200, provided that no liquor license, excepting a renewal, shall be granted in the residential and manufacturing parts of a town, is a granting to the same person of the same privilege granted to him the previous year to sell in the same place; and hence an application for a removal permit was properly not treated as an application for a renewal, where it was found that the new location was unsuitable and more unsuitable than the original location. *Appeal of Bormann*, 71 Atl. 502, 503, 81 Conn. 458.

A liquor license granting the same privilege to the same person to sell in the same place is a renewal license within Gen. St. 1902, § 2647, providing that no license except a renewal of a license shall be granted in purely residential or manufacturing parts of

a town, with certain exceptions, but a license granted to a different person would not be a renewal. *Appeal of Stavolo*, 71 Atl. 549, 550, 81 Conn. 454.

Under a contract, entered into February 15, 1906, to act as a salesman at a stated salary per year payable in equal monthly installments with a specified commission payable at the end of the year, and with provision that, in the event either or both parties did not desire to renew the agreement at its expiration, notice should be given in writing of intention not to renew at least 30 days prior to its expiration, continuing to work after the expiration of the year until October 30th following without notice by either party operates as a "renewal" for one year of the contract with all its provisions. *Allen v. Chicago Pneumatic Tool Co.*, 91 N. E. 887, 888, 205 Mass. 569.

The "rent period"—that is, the stated period by which the rent is reserved in a lease—is the criterion by which to measure an implied renewal by holding over. A tenant's holding over and paying monthly rent beyond the term of a lease for a year, relating to urban premises, in which lease rent is reserved by the month and is payable at monthly periods, does not, alone, imply a renewal by the year. A renewal of the tenancy by the month is implied. *Kaufman v. Mastin*, 66 S. E. 92, 93, 66 W. Va. 99, 25 L. R. A. (N. S.) 855.

The "renewal" of a conspiracy means to begin it again; to recommence it; to repeat it. Each renewal is a new offense. *Commonwealth v. Bartilson*, 85 Pa. 482, 487.

#### As extension

Where a lease provided that at the expiration thereof the tenant should have the privilege of leasing the premises for a further term of one year, commencing on the day the lease expired, such covenant was a contract for a "renewal" and not an "extension" of the lease, and required notice in order to entitle the lessee to exercise its right. *Gray v. Maier & Zobelein Brewery*, 84 Pac. 280-282, 2 Cal. App. 653.

Where a lease of street railway property, which was subject to a mortgage securing an issue of bonds, contained a provision requiring the lessee on the maturity of the debt to "provide for the renewal thereof by the issue or renewal of bonds," there was no duty on the lessee to pay and extinguish the bonds at maturity and its acquisition of them at or near their maturity, through a trustee, with the purpose of having them held by the trustee to protect its lease and its own bonds with the proceeds of which they were purchased and which were secured by a mortgage to the trustee on such lease and other property, did not operate as a payment but only as an extension which was fairly within the provision of the lease for a "renewal." *Farmers' Loan & Trust Co. v. Central Park*

N. & E. R. B. Co. 193 Fed. 963, 965, 113 C. C. A. 591 (citing 7 Words and Phrases, p. 6085).

The word "renew" etymologically contemplates something more than passivity in suffering a state to continue as it was. A distinction is sometimes recognized between a covenant to renew a lease and a provision for an extension of the term at the option of the lessee, but the intention of the parties is controlling. Thus where a lease of a river bank and appurtenant boom privileges for a period of five years provided for a "renewal from year to year at the same rent per annum," as long as the lessee might want the land, and the lessee continued to occupy the property and pay rent for several years after the expiration of the original term, the lessor would not be heard to say that the contract contemplated that a new lease should be executed in writing at the beginning of each year after the five-year term expired, and that, as no such renewal lease was executed, the lessee was without right in the possession of the land. The word "renewal" in such lease was evidently used in the sense of extending. *Kentucky Lumber Co. v. Newell* (Ky.) 105 S. W. 972, 973.

#### As re-establishment of contract

The term "renewal," as applied to a note, means the re-establishment of the particular contract for another period of time. *Lowry Nat. Bank v. Fickett*, 50 S. E. 396, 397, 122 Ga. 489.

#### Same—Conditions imported

A "renewal" of a policy of insurance constitutes a separate and distinct contract for the period of time covered by such renewal. It is, however, a contract with the same terms and conditions. *Long Bros. Grocery Co. v. United States Fidelity & Guaranty Co.*, 110 S. W. 29, 31, 130 Mo. App. 421 (citing *De Jernette v. Fidelity & Casualty Co. of New York*, 33 S. W. 828, 98 Ky. 558; *Florida Cent. & P. R. Co. v. American Surety Co.*, 99 Fed. 674, 41 C. C. A. 45; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425).

In a provision that the lessee has to make arrangements with the lessor "for the renewal of another term three months before this term expires," at a specified increased rent, by the words "renewal of another term" was meant the creation of a new term of lease, having the same conditions and characteristics as the first lease, except as to the rent. *Christian Feigenspan v. Popowska*, 72 Atl. 1003, 1005, 75 N. J. Eq. 342.

#### RENEWAL PREMIUM

Where an insurance contract provides that premiums must be paid in advance as a condition of continuing the policy in force for another year, or for the period for which they are paid, such premiums are known as "renewal premiums," because they renew and continue the policy in force for another

year, or another period. *People ex rel. Provident Sav. Life Assur. Soc. v. Miller*, 71 N. E. 930, 932, 179 N. Y. 227.

#### RENOVATE

Where plaintiff knew that magnesium stains are a frequent, inherent, and ineradicable defect in bricks, and defendant did not know that fact, and plaintiff contracted to "renovate the entire brickwork on a house, guaranteeing to make it look like new," without making any exception of magnesium stains, he could not urge the impossibility of eradicating magnesium stains, which appeared on the house, and which he was unable to remove, as an excuse for not complying with the terms of his contract by removing all the stains. *Finney v. Bennett*, 97 N. Y. Supp. 291, 292, 49 Misc. Rep. 230.

#### RENT

See Dead Rent; Demand for Rent; Ground Rent; Loss of Rents.  
Distress for rent, see Distress.

"Rent" is the compensation, either in money, provisions, chattels, or labor, received by the owner of the soil from the occupant thereof. *Shartenberg & Robinson v. Ellbey*, 62 Atl. 979, 981, 27 R. I. 414.

"Rent" is a sum stipulated to be paid for the use and enjoyment of land. *In re Roth & Appel*, 181 Fed. 667, 669, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270.

"Rent" is the consideration paid for the use of the land. *Brooks v. Cook*, 38 South. 641, 643, 141 Ala. 499.

"Rent" is something given by way of compensation to the lessor for the right to make use of the land demised. *National Subway Co. v. City of St. Louis*, 69 S. W. 290, 294, 169 Mo. 319.

The term "rent," under the common law and feudal system, had reference distinctively to land, and was inappropriately used when intended to indicate a return for the use of money or personalty; and, while now applied indiscriminately to the return for the use of personalty as well as of real property, the fundamental distinction and derivation must be kept in view in determining the question of suspension of rent by eviction. *Metropole Const. Co. v. Hartigan*, 85 Atl. 313, 314, 83 N. J. Law, 409; *Magoon v. Eastman*, 84 Atl. 869, 870, 86 Vt. 261.

"Rent" is a certain profit issuing yearly out of lands and tenements corporeal as a compensation for the use thereof. *Kendall v. Uland*, 120 N. W. 152, 153, 83 Neb. 527.

Where a landlord wrote a merchant that, if the latter would furnish the tenant advances, the landlord would not advance him anything and would only hold the crop for the land "rent," whereupon the merchant con-

tracted with the tenant to make the advances and took a mortgage on the crop, the landlord could not as against the merchant subsequently increase the rent by adding thereto a balance due for "rent" for the previous year; the agreement of the landlord to hold the crop only for the land "rent" meaning the rent for that year. *Beattie v. Hughes & Mercer*, 101 S. W. 170, 171, 82 Ark. 199.

Where land was absolutely conveyed, a subsequent provision of the deed that, if the purchase-money notes were not paid, the conveyance should be void, and the grantee should be entitled to hold as tenant, paying a rent which should be credited to him as purchase money, did not create the relation of landlord and tenant upon nonpayment of a note, as it would have done in case of an executory contract of sale; that relation being inconsistent with the fee-simple ownership conveyed to the grantee, as merely calling the debt "rent" after default did not make it such. *Levy v. McDonnell*, 122 S. W. 1002, 1003, 92 Ark. 324, 135 Am. St. Rep. 183.

The word "rent" is defined as meaning to grant the possession and enjoyment of for a consideration in the nature of rent; to take and hold for a consideration in the nature of rent. Where a lease provided for rent in installments, the last installment being payable on a certain date or sooner when the "party renting" desired it, and there was a clause in the lease speaking of the landlord having "rented" the farm, it was held that the lease gave the landlord an option to make the last installment payable sooner than the specified date. *Musewald v. Seeker*, 101 N. Y. Supp. 287, 51 Misc. Rep. 355.

#### **Price of conditional sale**

Where a peddler delivered goods on an understanding that title should vest in the one to whom they were delivered on payment of all the installments of "rent," the transaction amounted to a sale within Acts 1902-03-04, p. 484, c. 271 [Va. Code 1904, p. 2223], making sales by peddlers unlawful unless a license has been issued. *Crall & Ostrander v. Commonwealth*, 49 S. E. 638, 640, 103 Va. 855; *Id.*, 49 S. E. 1038, 103 Va. 862 (citing *City of South Bend v. Martin*, 41 N. E. 315, 142 Ind. 31, 29 L. R. A. 531; *Evansville & T. H. R. Co. v. Erwin*, 84 Ind. 457; *Lanman v. McGregor*, 94 Ind. 301).

#### **As income**

See Income.

#### **As necessities**

See Necessaries.

#### **As personal property**

See Personal Property.

#### **Repairs**

The term "rent," as used in Code Civ. Proc. § 2231, authorizing the maintenance of summary proceedings for the dispossession of a tenant for nonpayment of rent, cannot be

extended to include the cost of repairs for which the tenant had agreed to pay. *Simionelli v. Di Ericco*, 110 N. Y. Supp. 1044, 1045, 59 Misc. Rep. 485.

#### **Royalty for mining privilege**

Under Rev. St. 1899, § 130, authorizing the probate court, on being satisfied that it is necessary to rent the real estate for payment of debts, to order the administrator to take possession of and rent the same, etc., the probate court may order the administrator of a decedent owning a mine to lease the same for the purpose of obtaining money with which to pay debts; for the word "rent" means a compensation for the use of lands demised, and is treated as a profit issuing out of the land, and rent may be in the form of royalty. *Meeks v. Clear Jack Mining Co.*, 124 S. W. 1084, 1089, 141 Mo. App. 648.

### **RENT CHARGE**

#### **Annuity distinguished**

A "rent charge" is a charge against land in the hands of the purchaser and arises out of the land itself, while an "annuity" is a yearly payment of a certain sum of money granted to one for life, years, or in fee, chargeable upon the person of the grantor. A deed of land in consideration of the payment to the grantor of an annual sum until the grantor's death, and retaining a lien to secure such payments, imposed merely a personal obligation on the grantee to make the payments and created an "annuity," and not a "rent charge," the provision securing the payments by a lien not affecting the personal character of the obligation, and that the grantor rented the land and applied the rent on the annual payments with the grantee's acquiescence did not affect the character of the instrument. *Lynch v. Huston*, 119 S. W. 994, 996, 138 Mo. App. 167.

### **RENTAL**

See Crescendo Rental; Occupation Rental.

### **RENTAL VALUE**

The term "rental value," as applied to land covered with a growing crop, means, not what the lands may be rented for in the vicinity for ordinary purposes, but the value of the use of the land for the purposes of maturing and harvesting the crop, and the value of a crop in the condition in which it exists at the time of an injury thereto is the prime factor in the ascertainment of the value of the use, and the rule of rental value as so defined governs in cases presenting only an injury to growing crops. *Blunck v. Chicago & N. W. Ry. Co.*, 115 N. W. 1013, 1017; *Blunck v. Chicago & N. W. Ry. Co.*, 120 N. W. 737, 741, 142 Iowa, 146 (citing *Black v. Minneapolis & St. L. R. Co.*, 96 N. W. 984, 122 Iowa, 32; *Lommelund v. St. Paul, M. & M. Ry. Co.*, 29 N. W. 119, 35 Minn. 412; *Folsom v. Apple River Log-Driving Co.*, 41 Wis. 609; *Shot-*

well v. Dodge, 36 Pac. 254, 8 Wash. 337; Galveston, H. & S. A. Ry. Co., v. Ryan [Tex.] 21 S. W. 1013; Suth. Dam. § 1023).

In an action for damages to plaintiff's land through the pollution by defendant of a stream through the land, defendant was not prejudiced by an instruction that plaintiff was entitled to recover the value of the use of the land; there being practically no difference between such value and the rental value. Williams v. Haile Gold Mining Co., 66 S. E. 117, 118, 85 S. C. I.

Lands upon which crops can be grown have a value, known as a "rental value," and such value is the true measure of damages for the destruction of the crops. For people are ready to pay rent and take the risk of a crop. Knight v. Chicago, R. I. & P. Ry. Co., 98 S. W. 81, 82, 122 Mo. App. 38.

The "usable value" of premises is not synonymous with "rental value," but has as a term an equivalent sense, which should be allowed to be shown in condemnation proceedings. Reiser v. New York, 66 N. E. 731, 736, 174 N. Y. 196.

By "rental value" as damages to a lessee for failure to obtain possession of a farm is meant, not the probable loss of profits that might occur to the lessee, but the value, as ascertained by proof, of what the premises would rent for, or by evidence of other facts from which the fair rental may be determined. Herpolshelmer v. Christopher, 111 N. W. 359, 361, 76 Neb. 352, 9 L. R. A. (N. S.) 1127, 14 Ann. Cas. 399.

### RENTING ROOMS

As business, see Business.

### RENTS AND PROFITS

See Dividends, Rents, and Profits.

As damages, see Damage—Damages.

"The coal and other materials derived from the ordinary and reasonable operation of opened coal mines, iron mines, lead mines, gravel banks, clay pits, stone quarries, slate quarries, salt works, oil wells, and other property of this character which diminishes in quantity and value by use, constitute the 'rents and profits' thereof, and not the body of the property, and belong to the owners of the former and not to the owners of the latter." Traer v. Fowler, 144 Fed. 810, 816, 75 C. C. A. 540.

### RENTS, ISSUES, AND PROFITS

#### Increase in value

As to the terms creating a trust, the words "rents, income, issues, and profits" give the intermediate beneficiary only the annual income, and not any increase in the value of the securities in which the fund was vested. In re Stevens, 98 N. Y. Supp. 28, 31, 111 App. Div. 773 (approving Stewart v. Phelps, 75 N. Y. Supp. 526, 71 App. Div. 91).

### Property included

The words "rents, issues, and profits," as used in instruments declaring trusts, if not restrained by the context, will be given a meaning broad enough to include the sale of the property itself. Connolly v. Bouck, 174 Fed. 312, 316, 98 C. C. A. 184 (quoting and adopting the definition in Charter Oak Life Ins. Co. v. Gisborne, 5 Utah, 319, 15 Pac. 253).

### As net income

The expression "rents, issues, and profits of land," as used in a will by which a testatrix devised lands to her executors in trust to collect the "rents, issues, and profits" during the life of her sister, to pay over to her sister during her life, out of said "rents, issues, and profits" \$500 semiannually, and, after paying municipal charges on the lands, to deposit the surplus of the rents to their credit in bank, at interest, until her sister's death, means that sum of receipts from the land which remains: First, after maintaining the property by needed repairs and by protective insurance; and, second, after payment of public charges, the intention was to pay \$1,000 annually out of the annual "rents, issues, and profits" and therefore out of what the trustees had of such "rents, issues, and profits" to make payment with. Hopkins v. Remy, 53 Atl. 676, 677, 64 N. J. Eq. 12.

## RENUNCIATION

Rem. & Bal. Code, § 3512, providing that the holder of a negotiable instrument may renounce his rights against any party thereto, but that a renunciation must be in writing, unless the instrument is delivered up to the person primarily liable, refers to a release, for the word "renunciation" is used in the sense of release, and, in the absence of any written release or surrender of the note to the maker, the maker is not relieved from liability. Pitt v. Little, 108 Pac. 941, 943, 58 Wash. 355.

Under Negotiable Instruments Act (Laws 1890, p. 361) § 122, authorizing the holder of a negotiable instrument to "renounce his rights against any party to the instrument," and providing that a "renunciation must be in writing," the release of a surety on a note cannot be shown by parol; the word "renunciation" being used in the sense of "release." Baldwin v. Daly, 83 Pac. 724, 725, 41 Wash. 416.

## REPAIR—REPAIRS

See Good Repair; Necessary Repairs; Needed Repairs; Operation and Repair; Ordinary Repairs; Person Who Makes, Alters, or Repairs; Properly Repair; Reasonable Repair; Running Repairs; Specific Repairs; Substantial Repair.

All inside and outside repairs, see All. Keep in repair, see Keep.

Laid up for repairs, see Laid Up.

To "repair" is to mend; to restore to a sound state whatever has been partially destroyed; to make good an existing thing; restoration after decay, injury, or partial destruction. *Dougherty v. Taylor & Norton Co.*, 63 S. E. 928, 930, 5 Ga. App. 773.

"The word 'repair,' as defined by Webster, means 'to restore to a sound or good state after decay, injury, dilapidation, or partial destruction.'" *Missouri, K. & T. Ry. Co. of Texas v. Bryan (Tex.)* 107 S. W. 572, 576.

The word "repairs" as used with reference to mechanics' liens, and as affecting priority of other liens, signifies articles used to replace others which are worn out or unsatisfactory, as well as repairs in the sense of patchwork on decayed or worn parts of a building. *Elliott & Barry Engineering Co. v. Baker*, 114 S. W. 71, 73, 134 Mo. App. 95.

"Repairs," as used in *Cobbey's Ann. St. 1907*, § 6417, as to contracts between counties for repair of bridges, is used in its ordinary sense, and does not include ice breaks. *Colfax County v. Butler County*, 120 N. W. 444, 446, 83 Neb. 803.

#### **Alteration distinguished**

A decision of county commissioners, made on petition of a mayor and aldermen, as authorized by Pub. St. Mass. c. 112, § 129, for alteration of a railroad bridge over a highway, requiring certain additions to the upper surface of the masonry to prevent the dripping of water on the street below, requires an "alteration," within the meaning of the act, and not mere "repairs," where it appears that the bridge has remained exactly as it was built, without any injury or dilapidation. *Boston & A. R. Co. v. County Com'rs of Hampden*, 42 N. E. 100, 101, 164 Mass. 551.

#### **As construct**

See Construct.

#### **Existence of thing repaired implied**

As used in Rev. St. 1809, § 1105, which requires railroads in the first instance to build "lawful fences" on the sides of its road, and provides that, if it fails for three months after completion of the road to build a fence as required, the owner may build it and recover the cost, and also declares that, if a fence once erected becomes out of repair, the owner may, after giving five days' notice, and on failure of the railroad company to make the repairs, make them himself, and recover the cost, the word "repair" means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction, and hence, where a lawful fence, viz., one required to keep the landowner's stock from getting onto the track, had not been constructed, the adjoining owner was not required to give notice as a condition of his right to construct a lawful fence and recover the cost from the railroad company. *Sharp v.*

*Quincy, O. & K. C. Ry. Co.*, 123 S. W. 507, 508, 130 Mo. App. 525.

#### **As guaranty**

An "agreement to keep in repair" for a period of 12 months, contained in a contract for street paving, is a mere guaranty of good work and not a contract for repairs within the meaning of a charter requiring repairs of streets and highways to be paid out of the general revenue of the city. *Allen v. Labsap*, 87 S. W. 926, 929, 188 Mo. 692, 3 Ann. Cas. 306.

#### **Improvement**

See Improvement.

To "repair" is to mend, to restore to a sound state whatever has been partially destroyed, to make good an existing thing, restoration after decay, injury, or partial destruction. An "improvement" is a valuable and useful addition, something more than a mere repair or restoration to the original condition. *Dougherty v. Taylor & Norton Co.*, 63 S. E. 928, 930, 5 Ga. App. 773 (citing Words and Phrases, vol. 7, p. 6090).

Under Rev. Codes, § 2419, authorizing directors of irrigation districts to fix rates of tolls and charges for water against persons using its canals, or to levy assessments to defray expenses of the operation, repair and improvement of such portion of its works as are in use, the laying of a pipe line caused by the lawful removal of a ditch by municipal authorities is a repair or improvement, the funds for defraying which may be included in a maintenance assessment or in increased toll rates, and is not a new construction which must be defrayed by a special assessment under section 2391, or a bond issued under section 2396. *City of Nampa v. Nampa & Meridian Irr. Dist.*, 115 Pac. 979, 983, 19 Idaho, 779.

A sidewalk improvement by a town incorporated under the town act of March 7, 1895 (Gen. St. 1895, p. 3525), and the supplements thereto, consisting of cutting the edge of the flagging and replacing some of the stones to permit the growth of trees, and a few slight changes in the grade, is a "repair" not subject to an assessment for benefits under section 64 as amended by Act May 2, 1906 (P. L. p. 325), relating to sidewalk building, but the cost should be collected from the landowner either by suit, or included in the tax levy against the land, as provided by section 58. *Willard Woman's Christian Temperance Union v. Town of Westfield (N. J.)* 75 Atl. 174, 175.

An agreement by a street railroad company in its franchise to keep the street between the tracks in "repair" is not an agreement to "improve" the street or to pay for such improvement; it being necessary to render the company liable for improvements of the street that there be an expressed stipulation in the franchise to that effect. In-

dianapolis & E. R. Co. v. Town of New Castle, 87 N. E. 1067, 1069, 43 Ind. App. 467.

New Code Civ. Proc. § 649 (Gen. St. 1909, § 6244), gives a mechanic's lien to one who shall, under contract with the owner of any land or with a trustee, agent, etc., of such owner, perform labor or furnish material for the repair of any building, improvement, or structure thereon. Held, that where the owner rented his land, stipulating in the lease that the lessees should have the right to make reasonable repairs to the building and deduct the actual cost thereof from the rentals, the lessees will be deemed the agents of the owner and persons doing work and furnishing material for improving the property at the instance of the lessees are entitled to a mechanic's lien on the interest of the lessee and the owner; the term "repairs" in the lease being intended by the parties thereto to include the improvements made by the contractors. *Potter v. Conley*, 112 Pac. 608, 609, 83 Kan. 676.

#### As maintain

The word "repair," as applied to bridges in road laws, means to restore to a sound or good state after decay, injury, dilapidation, or partial destruction. *Brown County v. Keya Paha County*, 129 N. W. 250, 251, 88 Neb. 117, Ann. Cas. 1912B, 790; *Platte County v. Butler County*, 135 N. W. 439, 440, 91 Neb. 132.

Any act that is reasonably necessary to put or keep a street in good repair suitable for the travel thereon is "repairing" or maintaining the street, within the meaning of Pub. St. N. J. c. 75, § 1 (Laws 1893, p. 47, c. 59, §§ 1, 2), requiring towns to keep their highways in good repair, suitable for travel thereon. *Connor v. Manchester*, 60 Atl. 436, 437, 73 N. H. 233.

#### Manufacturing distinguished

Laws 1912, c. 157, prohibiting any person, firm, or corporation, engaged "in manufacturing or repairing," to work employes more than 10 hours per day, is sufficiently definite; for "manufacturing" is the system of industry which produces manufactured articles, and "manufacture" is the production of articles for use from raw or prepared materials, by giving them new forms, qualities, and properties, or combinations, and "repairing" is the making or restoring of an article or thing to its completeness. *State v. J. J. Newman Lumber Co.*, 59 South. 923, 926, 102 Miss. 802, 45 L. R. A. (N. S.) 851.

#### New or additional structure

New building distinguished, see New Building.

Under statutes making a distinction between the erection of new structures, and the repairing of existing structures, the repair of a structure presupposes the retention of the substantial identity of the structure. *Attorney General ex rel. Gibson v. Board of*

Sup'rs of Montcalm County, 104 N. W. 792, 794, 795, 141 Mich. 590.

One installing a sprinkling system is not engaged in "repairing" within Labor Law (Consol. Laws 1909, c. 31) § 18, relating to unsafe scaffolds, holsts, stays, etc., since "repair" is the restoration to a sound or good state after decay, waste, injury, or partial destruction, dilapidation, or loss, and involved the idea of something pre-existing. *Grady v. National Conduit & Cable Co.*, 138 N. Y. Supp. 549, 553, 153 App. Div. 401.

New records for a talking machine intended to increase the repertory could not be regarded as "repairs." *Victor Talking Mach. Co. v. Leeds & Catlin Co.*, 150 Fed. 147.

#### As rebuilding

A lessee, bound by the terms of his lease to keep the premises in a good state of "repair," was bound to restore the buildings when they were destroyed by fire. *David v. Ryan*, 47 Iowa, 642, 644 (citing and adopting *Phillips v. Stevens*, 16 Mass. 238; and *Beach v. Crain*, 2 N. Y. 86, 49 Am. Dec. 369).

The regrading, widening, and macadamizing of a highway is "repair," within Laws N. H. 1891, c. 186, providing that all repairs on roads in the care of the city of Concord shall be under the direction of the commissioner of highways. *Hall v. Concord*, 52 Atl. 864, 867, 71 N. H. 367, 58 L. R. A. 455.

#### Reconstruction distinguished

In a suit to charge land with tax bills defendants could not contend that the work was repair work, chargeable to the city, instead of work of reconstruction, chargeable to the abutting owner, on the ground that the contractors had repaired holes and cuts in the concrete foundation beneath the surface of the pavement which was being reconstructed, where such repairs were paid for by the city. *Perkinson v. Schnake*, 83 S. W. 301, 302, 108 Mo. App. 255.

The word "repairing," in Detroit City Charter 1904, § 193, providing that "repairing" of sidewalks shall be at the expense of the city, does not include a reconstruction of a sidewalk when necessary, and the section does not qualify Loc. Acts 1901, p. 709, No. 472, amending section 57 (Loc. Acts 1883, p. 614, No. 326), authorizing the council to require an owner to reconstruct a sidewalk in front of his premises. *Walker v. City of Detroit*, 106 N. W. 1123, 1124, 143 Mich. 427.

Buffalo City Charter, § 288 (Laws 1891, p. 200, c. 105, as amended by Laws 1901, p. 661, c. 228, § 8), requires the owner or occupant of premises to lay and relay sidewalks whenever ordered, and to keep the sidewalk in good repair. It also requires the public works commissioner to notify the owner or occupant of any premises in front of which any such work, except the removal of stone and ice, and the repair of sidewalks, shall



be required to be done, and, if the same is not done by the owner or occupant within 10 days, it shall be done by the city and the expense assessed against the property. There was a plank sidewalk five feet wide in front of plaintiff's premises, which plaintiff was directed to repair, and, after he had failed to do so, the commissioner caused the entire walk to be removed, and constructed a new concrete walk 17½ feet wide. Held, that the construction of such new walk was not a repair, but was a reconstruction, which the commissioner had no authority to make except pursuant to a resolution of the city council after notice to the property owner and an opportunity to be heard. *Konowalski v. City of Buffalo*, 115 N. Y. Supp. 467, 468, 131 App. Div. 405.

Ky. St. § 4315, providing that, in counties where the funds for working the roads are raised by taxation, the road supervisor shall advertise for bids, and let to the lowest and best bidder the working and keeping in repair of all the roads in the county, has no reference to the reconstruction of a turnpike by the fiscal court, the language applying only to the supervisor and not the court, and showing that only ordinary repairs were contemplated under this section; and hence a contract for reconstruction need not be submitted to competition. *Hanlon v. Cleary*, 133 S. W. 953, 954, 142 Ky. 46.

Ky. St. § 1840, giving the fiscal court power to appropriate county funds for the maintenance of highways, and section 4306, giving the fiscal court general charge and supervision of the public roads with authority to repair same, the fiscal court had power to reconstruct a turnpike road. *Hanlon v. Cleary*, 133 S. W. 953, 954, 142 Ky. 46.

Under a grant to a railroad company of the right to cut timber from adjacent public lands "for the construction and repair" of its road, where neither the grant nor the company's articles of incorporation specified the kind of road to be built, it was optional with the company to build either a broad or narrow gauge, and, having constructed a narrow-gauge road, it had no authority to take timber to make the same over into a broad gauge, which was reconstruction, and not repair, but it did have the right to take such timber to keep the road in repair after such change had been made. *United States v. Denver & R. G. R. Co.*, 190 Fed. 825, 854.

A contract called for the paving of a street to be constructed with a stone curbing, with a foundation of broken stone and sand, and a six-inch concrete superstructure thereon, with a surface layer of two inches of asphaltum, to be kept in "repair" by the contractor for seven years. After its completion and use it soon became perforated with holes, which the contractor undertook to repair by patchwork. The condition of the asphalt surface continued, however, to grow worse, greatly interfering with the use

of the street. Experts reported that it was in the interest of economy and business judgment to relay the entire surface asphaltum coating. Held, that as applied to the whole pavement as a unit this resurfacing was of the nature of repair work. Plaintiff's contention was that the work was "reconstruction" and not "repair." The court says that it may be conceded that there are some varying shades of difference in the general term "repair," but there is none more apt and comprehensible than the accepted dictionary definition: "To restore to a sound or good state after decay, injury, dilapidation, or partial destruction." "Reconstruction" is "to construct again, to rebuild, to remodel, to form again or renew." It would therefore follow that to constitute a work of reconstruction of the pavement would involve the rebuilding of the whole unit, including the concrete foundation as well as the asphalt surface, to say nothing of the curbing. "Repair is 'restoration to a sound, good, or complete state after decay, injury, dilapidation, or partial destruction.' Reconstruction is 'the act of constructing again.' Reproduction is 'repetition,' or 'the act of reproducing.'" These definitions are instructive in bringing home to the mind that repair carries with it the idea of restoration after decay, injury, or partial destruction, and that reconstruction or reproduction carries with it the idea of complete construction or production over again. *American Bonding Co. v. City of Ottumwa*, 137 Fed. 572, 579, 70 C. C. A. 270 (citing *Good-year Shoe Machinery Co. v. Jackson*, 112 Fed. 146-150, 50 C. C. A. 159, 163, 55 L. R. A. 692).

"Webster defines 'repair' as, to restore to a sound or good state after decay, injury, dilapidation, or partial destruction, as to repair a house, a wall, or a ship. He defines 'reconstruction' as, to construct again, to rebuild." Where, after a street which had been paved with asphalt at the expense of abutting owners had fallen into disrepair, the city passed an ordinance directing that it be reconstructed with asphalt pavement in accordance with the ordinance, in so far as it related to resurfacing streets with asphalt paving, so that the entire improvement consisted merely of relaying a new three-inch asphalt surface on the original macadam base, without disturbing the same, the work did not constitute a "reconstruction" of the street, but was a mere "repair" thereof, for which the city was solely responsible. *City of Covington v. Bullock*, 103 S. W. 276, 277, 126 Ky. 236 (quoting and adopting definition in *Levi v. Coyne* [Ky.] 57 S. W. 790).

Where, under a single ordinance, a new pavement is to be laid, and the old curbing and guttering must be reset and replaced in part, the curbing and guttering are "reconstruction work," though the contractor is required to utilize serviceable old curb and gutter stones, and not "repair work," within Rev. St. 1899, § 5681, providing that the cost of re-

pair of curbing or guttering shall, when not done by the owner liable therefor in the first instance, be paid out of the general revenue of the city, and the cost of the curbing and guttering was properly included in special tax bills. *Rackliffe v. Duncan*, 108 S. W. 1110, 1112, 130 Mo. App. 695.

#### Remodeling distinguished

The words "repairing" and "remodeling" are not synonymous or included within the meaning of the word "building," within an ordinance prohibiting the erection of a wooden building within the fire limits. *City of Mayville v. Rosing*, 123 N. W. 393, 395, 19 N. D. 98, 26 L. R. A. (N. S.) 120.

#### As rendering suitable for use

Where improvements are limited to repairing interior arrangements of an old building to suit the convenience of the owner, they are repairs or alterations within the meaning of Mechanic's Lien Law, § 10. *Grantwood Lumber & Supply Co. v. Abbott*, 78 Atl. 1046, 80 N. J. Law, 564.

#### As rent

See Rent.

#### Repavement of street

"Repairing" a pavement means restoration of the paved surface, while "repaving" means replacement of old pavement with new. *People ex rel. Keller v. City of Buffalo*, 137 N. Y. Supp. 464, 466, 77 Misc. Rep. 532.

*Milwaukee City Ordinance June 6, 1887*, § 4, granted certain rights and privileges to the Milwaukee City Railway Company, defendant's predecessor in interest, and obligated it to maintain in good and thorough repair during the charter term all portions of W. street between the outside rails, and one foot therefrom toward the curb, of the same material as that of which the street should be composed when such repairs should be necessary. Held that, while the word "repair" does not mean "repave," yet the section requires the company to keep the street in repair, and that, when a given pavement becomes defective, the company must renew that portion of the pavement within its zone, using the same material which the city uses on the rest of the street. *State ex rel. City of Milwaukee v. Milwaukee Electric Ry. & Light Co.*, 139 N. W. 396, 398, 151 Wis. 520.

Where the wearing surface of a paved street in a metropolitan city has become so decayed as to be unfit for use, and it is proposed that the material composing the wearing surface shall be removed and a new material relaid thereon on the same concrete base, it constitutes a "repaving" as distinguished from "repairing," as used in the provisions of the charter of such a city (Comp. St. 1903, c. 12a), regulating the manner and method of improving streets. *McCaffrey v. City of Omaha*, 101 N. W. 251, 252, 72 Neb. 583.

A charter empowering a city council to raise money for regulating, cleaning, and keeping in repair streets and highways, and providing also that grading and macadamizing, etc., shall be done at the expense of the owner, does not authorize an expenditure of a part of the money raised for graveling or macadamizing. *State v. City Council of Passaic*, 46 N. J. Law, 124.

The relaying of macadam in the center of a macadamized street to the width of 14 feet part of the way and 20 feet for the remainder of the way, and to the depth of 18 inches, and presenting, when completed, after work continuing for 2 months and 10 days, at a cost apportioned to the abutting property of \$4,025.90, a uniform and even appearance the entire length of the street, as though repaved, is not "repairing" a street, within Rev. St. 1909, § 9411, authorizing a town of the fourth class to repair streets without notice, through its proper officer or committee on improvements, as the word "repair" is not the substitution of a structure in place of a similar original structure; but to constitute a repair there must be an original on which to rest the repair. *Noel v. Town of Lees Summit*, 148 S. W. 194, 195, 166 Mo. App. 114.

The work of lining up and repairing a curb by replacing rotten stones with new ones where necessary is repair work, which must be paid for by the city, under St. Louis city charter. *Perkinson v. Schnake*, 83 S. W. 301, 302, 108 Mo. App. 255.

In performing a contract for a street improvement, the old asphaltum was removed, and the old concrete base was replaced by new material where necessary. Where no concrete existed, new concrete was used, not more than six inches in depth, and the finished surface was made to conform to a plane parallel with and three inches below the finished surface of the pavement. Wherever the earth where the new concrete was used was soft and spongy, it was dug up and repaired. Wherever the concrete base then in place was below a point parallel to three inches below the finished surface of the pavement, new concrete was laid on the old so as to bring its surface up to such parallel; and wherever such base was above such point it was cut down to the same parallel. In addition, a binder course of bituminous concrete, 1½ inches thick, composed of clean broken stone, was laid on the concrete base, and on this foundation a compressed asphalt wearing surface 1½ inches thick was placed. It was held that the work done was not "repairs," within the meaning of Rev. St. 1899, § 5681, providing, as to cities of the second class, that the cost of the repairing and keeping in repair of all streets shall be paid out of the general revenue fund, and exempting abutting property owners from liability therefor. *Barber Asphalt Paving Co. v. Munchenberger*, 78 S. W. 280, 282, 105 Mo. App. 47.

The obligation of a city passenger railway company under its charter to keep the street embracing the track of its road and two feet on each side in "repair" does not require it to repave it with a new and different and, perhaps, more costly material. Mayor, etc., of Baltimore v. Scharf, 54 Md. 499, 500, 503.

Under a city charter providing for repairs to sidewalks and curbs and authorizing the board of works to require the owner of the lot in front of which repairs might be needed, to make them, upon notice, and that if not done by the owner the city might do it and sue for the expense as for labor done and materials furnished for him, but which gave no authority to make the cost of such repairs by an assessment, the resetting of curbs and flagging of sidewalks, already laid, constituted "repairs," not subject to assessment. State v. Jersey City, 38 N. J. Law, 410, 415.

#### As restoration to original condition

"To 'repair,' as is ordinarily understood, is to mend; not to make a new thing, but to reft or make good or restore an existing thing." Walker v. City of Detroit, 106 N. W. 1123, 1124, 143 Mich. 427.

The language of the statute as to the employer's duty to furnish safe appliances for work of "repairing" includes any work of restoration to a former more perfect condition. Koepf v. National Enameling & Stamping Co., 139 N. W. 179, 184, 151 Wis. 302.

The word "repair," is used in connection with a patented article, means the restoration of worn-out parts. Leeds & Catlin Co. v. Victor Talking Mach. Co., 29 Sup. Ct. 503, 506, 213 U. S. 325, 53 L. Ed. 816 (citing Wilson v. Simpson, 50 U. S. [9 How.] 109, 13 L. Ed. 66; Same v. Rosseau, 45 U. S. [4 How.] 709, 11 L. Ed. 1169).

Where, at the commencement of a lease for a term of years, the premises were changed from a loft and office building to a factory, the expense of alterations necessary to place them in their original condition after surrender on the tenant's bankruptcy was not "repairs," for which the landlord was entitled to claim under the lease, providing that the tenant shall make all inside repairs and alterations at his own expense. In re International Milling Co., 175 Fed. 308, 309.

Pol. Code, § 3459, provides that if further assessments are required to protect, maintain, or "repair" the works of a reclamation district, the trustees must present to the supervisors a statement of the work done and to be done, and that the board must direct an assessment. Held, that proceedings to restore 1,500 feet of washed-out levee were properly had under the section, and that the landowners were not entitled to the advice of the supervisors before the work was done.

Reclamation Dist. No. 535 v. Clark, 100 Pac. 1091, 1092, 155 Cal. 345.

A lease provided that the lessee should not deface the premises, by removal of any fixture or otherwise, and yield up the premises and all additions in good repair, but permitted him to make alterations necessary for his business, and to remove the same at the termination of the lease, provided he put the premises in good repair. The lessee built on the premises bathrooms, and installed appropriate fixtures and tiled floors, all of permanent construction, to adapt the premises for his business of selling bathroom and sanitary fixtures. Held, that the lessee had the option of removing the additions at the end of the term, and when he exercised the option the premises must be left undefaced and in good repair, but, where he did not elect to exercise the privilege of removal, the lessor could not compel him to make such removal; the word "repair" meaning mending a waste or decay incident to a removal, and not a restoration to an original state, when the additions were sound as structures and not defacing the premises. Perry v. J. L. Mott Iron Works Co., 93 N. E. 798, 799, 207 Mass. 501.

#### Street paving

It was not improper to include, in an assessment for the improvement of a street, the cost of work performed on the sidewalks, curbing and guttering, on the theory that such work constituted repairs chargeable to the city. Halsey v. Richardson, 122 S. W. 326, 329, 139 Mo. App. 157.

#### Repair of road

As county purpose, see County Purpose.

#### Repair of vessel

Inclosing the deck of a barge to protect her cargo from the weather to fit her for a particular business constitutes "repairs," and not construction. The O. H. Vessels, 183 Fed. 561, 562, 106 C. C. A. 107; 177 Fed. 589 (citing The Iris, 100 Fed. 104, 40 C. C. A. 301; The Ella, 84 Fed. 471).

The word "repair" contemplates an existing structure, which has become imperfect by reason of the action of elements or otherwise. In the case of vessels particularly, this distinction is one which cannot be ignored, as it lies at the basis of an important diversity of jurisdiction between the common-law and maritime courts. Gagnon v. United States, 24 Sup. Ct. 510, 512, 193 U. S. 451, 48 L. Ed. 745.

The test to be applied in distinguishing between a new vessel and one repaired does not depend upon the comparative amount of new and old material used. Nor is it necessary that the dimensions or burden should remain unchanged to constitute a repaired vessel. The real test is whether the existence and identity of the vessel remain. Homer v. The Lady of the Ocean, 70 Me. 350, 352.

**Widen or deepen ditch**

The phrase "widen or deepen," as used in Laws 1905, p. 327, c. 230, § 26, authorizing county commissioners to keep drainage ditches in proper repair, etc., by removing obstructions therefrom, is not included in the term "repairs," so as to authorize such work without notice to interested property owners. In *re Renville Co.*, 122 N. W. 1120, 1122, 109 Minn. 88.

**REPAIR SHOP**

A condition attached to the grant of aid to a railroad that it locate its "repair shop and roundhouse" at a particular place means no more than such repair shop and roundhouse as may be required upon the particular section or division of the road to which it refers. *Bradley Ramsay Lumber Co. v. Perkins*, 33 South. 351, 354, 109 La. 317.

**REPARTIAMENTO**

"Repartimento" is a proceeding in its nature judicial—a partition of common property. *Steinbach v. Moore*, 30 Cal. 498, 505.

**REPAVE—REPAVEMENT**

Where a street has been paved for a part of its width, subsequent pavement of those parts which have never been paved is not a "repavement," as affecting liability for the expense of an improvement. *People ex rel. Keller v. City of Buffalo*, 137 N. Y. Supp. 464, 465, 77 Misc. Rep. 532.

Milwaukee City Ordinance June 6, 1887, § 4, granted certain rights and privileges to the Milwaukee City Railway Company, defendant's predecessor in interest, and obligated it to maintain in good and thorough repair during the charter term all portions of W. street between the outside rails, and one foot therefrom toward the curb, of the same material as that of which the street should be composed when such repairs should be necessary. Held that, while the word "repair" does not mean "repave," yet the section requires the company to keep the street in repair, and that, when a given pavement becomes defective, the company must renew that portion of the pavement within its zone, using the same material which the city uses on the rest of the street. *State ex rel. City of Milwaukee v. Milwaukee Electric Ry. & Light Co.*, 139 N. W. 396, 398, 151 Wis. 520.

Where the wearing surface of a paved street in a city of the metropolitan class has become so rotten and decayed as to be unfit for use, and, in a work for the improvement of such street, it is proposed and required that all the material composing the wearing surface of the entire portion of the paved street shall be removed, and a new material of the same or of a different kind replaced or relaid thereon, even though on the

same concrete base, such proposed work constitutes a "repaving" of the street, as distinguished from "repairing," as those words are used in the charter of the city. *McCaffrey v. City of Omaha*, 101 N. W. 251, 252, 72 Neb. 583.

**As paving**

See *Pave—Pavement*.

**As repair**

See *Repair—Repairs*.

**REPEAL**

See *Express Repeal*.

The primary meaning of the word "repeal," as used in speaking of the repeal of a statute, is, as its etymology imports, that the statute has been recalled or revoked. To repeal signifies the abrogation of one statute or some of its particular provisions by another. *Jessee v. De Shong* (Tex.) 105 S. W. 1011, 1014 (quoting 7 Words and Phrases, p. 6102, and citing *Oakland Paving Co. v. Hilton*, 11 Pac. 3, 6, 69 Cal. 479; *Butte & B. Consol. Min. Co. v. Montana Ore-Purchasing Co.*, 60 Pac. 1039, 24 Mont. 125).

The term "repeal" with reference to statutes means the abrogation of a previously existing law by a subsequent statute, which either declares that the former shall be revoked, or which contains provisions so irreconcilable with those of the earlier law that only one of the two can remain in force; the former being an express repeal and the latter an implied repeal. *City of St. Louis v. Kellman*, 139 S. W. 443, 235 Mo. 687. See, also, *Wilson v. People*, 85 Pac. 187, 189, 36 Colo. 418.

Laws 1899, c. 141, relating to compensation of county officers, provided (section 12) that probate judges should retain fees in amounts proportioned to the population, dividing the excess with the county. Section 14 required such judge to keep a record of all fees collected, and file quarterly reports showing their amount. Laws 1901, c. 214, fixed the fees of the probate judge in two counties in accordance with the general schedule, except as to two items which were increased, and allowed him to retain the entire amount collected and expressly repealed original section 14 of chapter 141. Laws 1909, c. 142, purported to repeal the act of 1901 so far as it applied to one of the counties covered thereby. Held, that the act of 1901 was not a repeal of chapter 141 within the meaning of the rule that the repeal of a statute does not revive a statute previously repealed, and the county as to which it was repealed again came within the operation of the law of 1899. *State v. Prattler*, 112 Pac. 829, 830, 84 Kan. 169, 36 L. R. A. (N. S.) 1094.

**Amendment distinguished**

There is a distinction between a "repeal" and an "amendment" of a statute. A "repeal" necessarily involves a change in the law, whether the statute repealed is the only enactment on the subject dealt with in the repealed act. A statute, in derogation of the common law, is not an amendment of the common law, and therefore the fact that an independent act, full and complete in itself, repeals by implication any portion of a statutory system does not render it an amendatory statute, where it makes no reference to the statutes affected by it. It is true that such an act alters or changes the system, but this change or alteration is and must be ascribed to the repeal wrought by the independent act and not to the change or alteration consequent upon the repeal. An amendment also involves some change or alteration in the existing statute law, and may also operate as a repeal of some of its provisions, but such change or alteration made by the amendment is direct and not consequential, as is the case of a repeal. There is also another marked difference between a "repeal" and an "amendment." An "amendment" may not, and often does not, operate as a repeal, but merely as an addition to the statute of which it is amendatory. This can never be the effect or operation of a repealing statute, whether the repeal be by implication or be direct. As stated in Bouvier's Law Dictionary, a "repeal" is "the abrogation or destruction of a law by a legislative act," while an "amendment" is "an alteration or change of something proposed in a bill or established as law." A "supplemental" act adds something that was left out of the original act, and does not necessarily revise it or amend it in the technical sense, while an amendment is something that may be incorporated into the act amended on its passage. A supplemental act is an independent law, and a "healing act" is one that cures some defect in a proceeding which the Legislature could have authorized in the first instance. From this it is held that an independent legislative act, complete in itself, and inconsistent with other statutory provisions on the same subject, is not an "amendment" but is a "repeal." *State ex rel. Gamble v. Hubbard*, 41 South. 903, 905, 906, 148 Ala. 391.

**Synonyms**

The term "repeal" is synonymous with "annul," "cancel," "reverse," and "abolish," so that a statute or ordinance is repealed when it is destroyed, abolished, abrogated, canceled, annulled, recalled, or rescinded by a later one. *City of St. Louis v. Kellman*, 139 S. W. 443, 445, 235 Mo. 687; *Wilson v. People*, 85 Pac. 187, 189, 86 Colo. 418.

**REPEAL BY IMPLICATION**

"A 'repeal by implication' must be by necessary implication. It is not sufficient to

establish that the subsequent law or laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy. *Evans v. McFarland*, 85 S. W. 873, 878, 186 Mo. 703 (citing *State ex rel. Reid v. Walbridge*, 24 S. W. 457, 119 Mo. 383, 41 Am. St. Rep. 663, and quoting *And. Law Dict.* p. 879); *Jessee v. De Shong* (Tex.) 105 S. W. 1011, 1014 (citing 7 Words and Phrases, p. 6103).

For a later statute to repeal an earlier one on the same subject by implication, there must be such a repugnancy or conflict between the two acts that they cannot stand together. *Austin v. State*, 135 S. W. 1167, 1168, 61 Tex. Cr. R. 573 (quoting 7 Words and Phrases, p. 6103).

"Repeals by implication" are not favored, and, where two statutes, covering in whole or in part the same matter, are not absolutely irreconcilable, effect should be given, if possible, to both of them. *Giles v. Denison*, 78 Pac. 174, 177, 15 Okl. 55; *McMillan v. Board of Com'rs of Payne County*, 79 Pac. 898, 899, 14 Okl. 659.

**REPEL**

**REPEL IMPUTATION OF NEGLIGENCE**

In an action for injuries sustained by a passenger while attempting to alight from a street car, it is error to give to the jury an instruction in which, after telling them that, under the law, the defendant is held liable for the slightest negligence, they are instructed that the defendant must "repel by satisfactory proof every imputation of such negligence," when the facts are not such as to create a presumption of negligence against the defendant and cast the burden upon it to disprove negligence, and also when the contributory negligence of the plaintiff is involved. To "repel by satisfactory proof every imputation of negligence" means that the burden is upon the defendant to prove that the injury was not the result of its negligent act. *Blake v. Camden Interstate Ry. Co.*, 50 S. E. 408, 409, 57 W. Va. 300.

**REPLACEMENT**

The word "replacement," as applied to a patented article, means the restoration of worn-out parts. *Leeds & Catlin Co. v. Victor Talking Mach. Co.*, 29 Sup. Ct. 503, 506, 213 U. S. 325, 53 L. Ed. 816 (citing *Wilson v. Simpson*, 50 U. S. [9 How.] 109, 13 L. Ed. 66; *Same v. Rosseau*, 45 U. S. [4 How.] 709, 11 L. Ed. 1169).

# REPLEVIN

"Replevin" is a possessory remedy. *Matison v. Hooberry*, 78 S. W. 642, 643, 104 Mo. App. 287.

"Replevin" is a mere possessory action. It is said in *Shinn*, Repl. § 164, that it is a universal principle of the law of replevin that the action will only lie against the party in possession of the property at the time the action is instituted. *Jenkins v. City of Ontario*, 74 Pac. 466, 467, 44 Or. 72, 102 Am. St. Rep. 625.

In an action of "replevin," nothing can be tried but the right of possession of the property in controversy. *Nicolette Lumber Co. v. People's Coal Co.*, 62 Atl. 1060, 1061, 213 Pa. 379, 3 L. R. A. (N. S.) 327, 110 Am. St. Rep. 550, 5 Ann. Cas. 387.

"Replevin" is a possessory action only. *Roach v. Curtis*, 100 N. Y. Supp. 411, 414, 50 Misc. Rep. 122.

"The 'action of replevin' is one for the possession merely." *Kelly v. Lewis*, 88 Pac. 388, 389, 38 Colo. 18.

"Replevin" "is strictly a possessory action, and the right of the possession of the property involved at the commencement of the action is the question at issue." The gist of action is the unlawful detention of the property. *Hyde v. Elmer*, 88 Pac. 1132, 14 N. M. 39.

The remedy of "replevin" is specific in purpose and limited in scope. It can only be invoked against unreasonable detention existing when suit is brought, and one not in possession is invulnerable to such suit, and it is immaterial that the value of the thing sought might be recovered in the event it could not be produced to satisfy the judgment. *Redinger v. Jones*, 75 Pac. 997, 999, 68 Kan. 627.

"Replevin" cannot be maintained by one who has neither title to the property, general or special, nor the right to possession. *Clark v. Anderson*, 68 Atl. 633, 634, 103 Me. 134.

Under the Code, the gist of "replevin" is the wrongful detention of the property in dispute. *Robb v. Dobrinski*, 78 Pac. 101, 103, 14 Okl. 563, 1 Ann. Cas. 981.

"Replevin" is a form of action to recover possession of personal chattels that have been unlawfully taken or detained from their owner. The action is founded on the general or special property of the plaintiff, and his consequent right to immediate and exclusive possession, and the action is therefore one in which the title or property of a chattel is determined. *Hitch v. Riggin* (Del.) 80 Atl. 975, 976.

"Replevin" does not lie to recover the amount which may be found due from defendant to plaintiff on account, but to recover possession of the property in dispute.

*Malsby v. Gamble*, 54 South. 766, 768, 61 Fla. 310.

An action of "replevin" is not only an action to recover the specific property, but also to recover damages for the detention and plaintiff is entitled to recover such damages, though he has not, pursuant to the statute, required the immediate delivery of the property. *Pedrick v. Kuemmell*, 65 Atl. 846, 847, 74 N. J. Law, 379.

"'Replevin' is strictly a possessory action for the recovery of personal property, and, in order to recover, the plaintiff must be the legal owner and entitled to the possession at the time of the commencement of the action;" and "replevin" will lie to recover growing strawberry plants attached to the soil, where the testimony shows a sale of all the strawberry plants on a certain tract. *Cannon v. Mathews*, 87 S. W. 428, 429, 75 Ark. 336, 69 L. R. A. 827, 112 Am. St. Rep. 64, 5 Ann. Cas. 478.

"Replevin" is an action for the wrongful detention of possession, and the primary object is to recover the thing and not its value. *O'Brien v. Curry & Whyte*, 127 N. W. 411, 412, 111 Minn. 533, 137 Am. St. Rep. 563.

"Replevin" is an action for the recovery of chattels wrongfully taken and detained, or wrongfully detained; the gist of the action being indifferently stated to be the "wrongful" or "unlawful" detention. *Boswell v. First Nat. Bank of Laramie*, 92 Pac. 624, 632, 16 Wyo. 161.

"Replevin" is a suit involving only the right to possession. *Welker v. Appleman*, 90 N. E. 35, 39, 44 Ind. App. 699.

The statutory action of "claim and delivery" (B. & C. Comp. § 284) for the recovery of possession of specific personal property is substantially the ancient remedy of "replevin." *Freeman v. Trummer*, 91 Pac. 1077, 1079, 50 Or. 287.

"Replevin" is one of the most ancient and well-defined writs known to the common law. The plaintiff in replevin does not take or hold the goods replevied as a bailee or custodian, nor are the goods in any sense in custodia legis. It is an ancient common-law proceeding by which the owner recovers possession of his own. It is defined in the old books as "a redelivery to the owner, by the sheriff, of his cattle or goods distrained upon any cause, upon surety that he will pursue the action against him that distrained. If he pursue it not, or if it be adjudged against him, then he who took the distress shall have it again, and for that purpose may have a writ of retorno habendo." *Three States Lumber Co. v. Blanks*, 133 Fed. 479, 481, 66 C. C. A. 353, 69 L. R. A. 253 (quoting from 6 Bac. Abr. [Wilson's Ed.] side page 52).

"'Replevin' is strictly an action at law. The right of recovery must exist at the time

the action is commenced. It cannot be created by bringing notes into court, as in an equitable suit for rescission, and offering to surrender them up as the court may direct." Plaintiff sold implements to defendant on credit obtained by fraudulent representations of defendant. Subsequently defendant made a payment on the account, but sold some of the implements for an amount greater than that which he paid on account. Held, that plaintiff was not entitled to maintain replevin for the goods without first offering to return defendant's notes for the price, but that it was not necessary for plaintiff to offer to return the payment made. *Kingman-Moore Implement Co. v. Ellis*, 103 S. W. 127, 129, 125 Mo. App. 692 (quoting and adopting the definition in *Thompson v. Peck*, 18 N. E. 16, 115 Ind. 512, 1 L. R. A. 201).

#### Trover distinguished

The primary purpose of "replevin" is to recover the property in specie, not its value. A text-writer, in distinguishing between the compensation to be awarded to the injured party in certain cases, says: "The essential distinction between trover and replevin, as regards the rule of damages, aside from the element of willfulness in the taking or detention, is briefly this: In trover the title to the property is regarded as having passed to the defendant, who is therefore liable for its value, simply, with interest. In replevin the title is treated as still in the plaintiff, who is therefore to recover, not only the chattel itself, or its value, but also damages for its detention, of which interest may be the measure, but is not in all cases the necessary limit." *La Vie v. Crosby*, 74 Pac. 220, 222, 43 Or. 612 (citing *Sedg. Dam.* [8th Ed.] § 528).

Trover is an action to recover damages sufficient to cover the value of personal property wrongfully held by another, while "replevin" or detinue is primarily an action to recover the property, and a judgment is given only in the absence of ability to secure the specific articles claimed. *Leeper Graves & Co. v. First Nat. Bank of Hobart*, 110 Pac. 655, 660, 26 Okl. 707, 29 L. R. A. (N. S.) 747, Ann. Cas. 1912B, 302.

#### REPLICATION

The "replication de injuria" is a general mode of pleading available when the defendant has pleaded matter of excuse. It denies briefly by a general form and in summary terms, but is not permissible when the matters of excuse consist of justification under the process of a court of record. Justification by arrest upon view and under warrant and conviction had under the provisions of the New Jersey act of March 29, 1897 (P. L. p. 109), for the enforcement of the game act (Act April 14, 1903; P. L. p. 526), are matters of record provable by the conviction, and, when pleaded in an action, do not permit of the replication de injuria. Where a protest-

ando is not broad enough to cover all the matters of record set out in such plea, and the remainder of these matters of record become mixed with other facts not matters of record, the general replication de injuria absque residuo causæ cannot stand against a notice to strike out. *Taverna v. Churchill*, 72 Atl. 43, 44, 77 N. J. Law, 430.

#### REPORT

See Department Report; Immediate Report; Inquire and Report; Phonographic Report of Testimony; Separate Report.

As public document, see Public Document.

An award of commissioners in eminent domain proceedings is neither a verdict, a "report," nor a decision, within the meaning of Code Civ. Proc. § 1235, which provides that, where final judgment is rendered for a sum of money granted by a verdict, report, or decision, interest on the sum awarded must be computed by the clerk and included in the amount of the judgment. In *re Pine's Stream and East Meadow Stream in Town of Hempstead*, 114 N. Y. Supp. 681, 684, 129 App. Div. 929.

An invalid "report" amounts to no "report," within Code Civ. Proc. § 1019, providing that, on a trial, by a referee his report must be filed or delivered within 60 days of final submission of the case, and, if not, either party may, before it is filed or delivered, terminate the reference. *Lederer v. Lederer*, 95 N. Y. Supp. 623, 625, 108 App. Div. 228.

In an action to recover land which plaintiff claimed by devise, where there was testimony that the witness knew the testator in 1862 and understood that he died during the war, such being the report, the word "war" must be understood as the war between the states, and "report" as meaning common rumor. *McDoel v. Jordan* (Tex.) 151 S. W. 1178, 1179.

A case reserved is a "case reported," within Rev. Laws, c. 173, § 115, providing for discharge of reports by the trial court on failure to take necessary steps for review. *Daly v. Foss*, 95 N. E. 899, 209 Mass. 470.

Rev. St. c. 79, § 46, provides that questions of law arising on reports of cases may come before the Supreme Judicial Court as a court of law. Held, that the word "case" is used in its unrestricted sense, as a contested question before a court or justice, a suit or action, a cause, and the phrase "reports of cases" contemplates a method of submitting questions involving both law and fact, in the most comprehensive manner to the decision of the court, so that a report of a case under the statute must submit the whole controversy for final decision unless some question is reserved, and hence, upon a report without restriction, the law court may

pass upon the question of costs in a probate case. *Mather v. Cunningham*, 78 Atl. 102, 103, 107 Me. 242 (quoting 1 Words and Phrases, p. 985).

## REPOSSESS

The word "repossess," as used in a covenant in a lease authorizing the landlord, on the tenant's breach of covenant, to re-enter the premises and repossess himself of the same, was not equivalent to "dispossess," as used in the statute providing for regaining possession of real property by summary proceedings. *Kleinstein v. Gonsky*, 118 N. Y. Supp. 949, 950, 134 App. Div. 266.

## REPREHENSIBLE

The term "reprehensible," used to characterize a statement in the opinion of a court, is disrespectful and scurrilous. *In re Breen*, 93 Pac. 997, 1002, 30 Nev. 164.

## REPRESENT

See As Represented.

### As conduct legal proceeding

A guardian ad litem, who is appointed to "represent" the infant in an action or proceeding pursuant to Code Civ. Proc. Cal. § 372, conducts and controls the proceeding on behalf of the infant; and an attorney for minors in probate proceedings is to "represent" them pursuant to Code Civ. Proc. Cal. § 1718, and, so far as he is concerned, to conduct and control the proceedings. *State ex rel. Eakins v. District Court of Second Judicial Dist.*, 85 Pac. 1022, 1023, 34 Mont. 226.

### As declare

To "represent" is to describe or portray; in other words, to declare or set forth. *Beck v. Budd*, 88 N. E. 785, 786, 44 Ind. App. 145.

### As misrepresent

Rev. Codes 1905, § 4058, defines collusion, as a ground for denying a divorce, as an agreement between the husband and wife that one of them shall commit, or appear to have committed, or be represented in court as having committed, acts constituting a cause for divorce, to enable the other to obtain a divorce. Held, that "represented," within the statute, means misrepresented, and such collusion is not proved by evidence failing to show any agreement between the husband and wife that one of them should commit or appear to have committed acts constituting cause for divorce, where it does not appear that defendant was represented as having committed acts for such purpose, which he had not committed. *Wiemer v. Wiemer*, 130 N. W. 1015, 1017, 21 N. D. 371.

### Eligibility or qualification indicated

Sacramento City Charter, § 8, as amended 1911, provides that the board of trustees shall consist of nine members, one from each

ward, who shall be a resident of such ward, a trustee to which ward shall be elected by the qualified voters of the city, and each such elector shall be entitled to vote on the election of each trustee. Primary Election Act 1911 (St. 1911, p. 775) § 5, subd. 6, provides that, except in the case of a candidate to a nomination to a judicial office or a school office, nomination papers shall be signed as follows: By not less than 1 per cent. and not more than 2 per cent. of the voters of the party of the candidate seeking nomination within the state or political subdivision thereof in which the candidate seeks nomination. Section 7 of the charter declares that the legislative power of the city is vested in the board of trustees, and that each member of the board shall be a qualified elector at least 25 years of age, shall have been a citizen of the state and an inhabitant of the city three years, and "of the ward which he represents for at least one year next before the day of his election." Held, that the word "represents" was used in section 7, not to define the power or prescribe the duties or limit the territorial authority of a member of the board of trustees, but was employed to declare one of the several qualifications of eligibility of a member of the board; and, since, under the primary election law, candidates to be voted for within the city by the voters at large must be nominated by the voters at large, the charter should be construed as requiring the nominations of trustees by electors belonging to the political party of the candidate residing in the entire city, and not alone by the members of the candidate's political party within the ward from which the trustee is elected. *Hicks v. Desmond*, 117 Pac. 943, 945, 16 Cal. App. 722.

Acts 1901, p. 534, c. 231 (Burns' Ann. St. 1901, § 3623a), provides that if a remonstrance against a street improvement "is signed by two-thirds of the property owners, residing upon the lots abutting on such improvement, and representing two-thirds of the number of lineal feet of such improvement, then all further proceedings shall be abandoned." Held, that the persons whose signatures can make the remonstrance peremptory must be two-thirds of those property owners who reside upon lots which abut on the improvement, and who also represent two-thirds of the number of lineal feet of the improvement, the word "residing" and the words "and representing" relating equally to the preceding "two-thirds of the property owners"; and hence, where the remonstrators owned more than two-thirds of the lineal feet abutting on the improvement and were more than two-thirds of the property owners residing on the real estate abutting on the improvement, but the remonstrators who resided on their lots did not own or represent two-thirds of the lineal feet, the remonstrance was insufficient. *Maley v. Clark*, 70 N. E. 1005, 1006, 33 Ind. App. 149.



**REPRESENTATION**

See By Right of Representation; Equality of Representation; False Representation; Fraudulent Misrepresentation; Fraudulent Representation; Legal Representative; Material Representation; Misrepresentation; Personal Representative; Promissory Representation; Statements and Representations; Taking by Representation; Unit of Representation.

Estoppel by representations, see Estoppel in Pals.

Code, art. 46, § 19, provides that the reality of an intestate who leaves no child or descendant shall descend to his brothers and sisters and their "descendants" in equal degree, equally. Section 21 provides that, if no brother or sister or any "descendant" from such brother or sister be living, then it shall descend to the father, and if no father living, then to the mother, and, if no mother living, then to the grandfather on the part of the father, and, if no such grandfather living, then to the descendants of such grandfather in equal degree, equally. Section 27 provides that, if in the descending or collateral line any parent shall be dead, the child or children of such parent shall by representation be considered in the same degree as the parent would have been in if living, and shall have the same share of the estate as the parent would have been entitled to if living; "provided that there be no representation admitted among collaterals after brothers' and sisters' children." Held, in a contest between first cousins and grandnieces of an intestate who left no nearer relatives, the former claiming as descendants of his grandfather and the latter as descendants of his sister, that the word "descendants," as used in section 19, was not limited to "children" by the proviso in section 27 limiting the right to take "by representation," which only applies to one seeking to be considered in the same degree as a deceased parent would have been in if living; and the grandnieces took as "descendants," under section 19, to the exclusion of the cousins, because the latter, who could only inherit by virtue of section 21, could only take in default of the persons mentioned in section 19. *Hoffman v. Watson*, 72 Atl. 479, 482, 109 Md. 532.

Though it is a general rule in equities that parties not before the court will not be bound by the decree, under the exception known as the "doctrine of representation," where it appears that a particular party, though not before the court in person, is so far represented by others that his interests receive actual and an efficient protection, the decree will be held binding upon him. *De Witt County v. Leeper*, 70 N. E. 760, 762, 209 Ill. 133.

**Administrator**

The appointment of a temporary administrator does not constitute "representation" on the estate of the decedent, within Civ. Code 1910, § 4376, providing that the time between the death of a person and representation on his estate shall not be counted against his estate, provided the time does not exceed five years, so as to cause limitations to begin to run against an estate on the appointment of such administrator. *Baumgartner v. McKinnon*, 73 S. E. 518, 521, 137 Ga. 165, 38 L. R. A. (N. S.) 824.

**As to character, credit, etc.**

In Rev. Laws c. 74, § 4, providing that no action shall be brought to charge a person on or by reason of a representation or assurance made concerning the character, conduct, credit, ability, trade, or dealings of any other person unless such representation is made in writing and signed by the party to be charged thereby the phrase "concerning the character, conduct, credit, ability, trade, or dealings of any other person," should be construed as limited to "representations" made to induce the plaintiff to enter into a transaction which will result in a debt due to him from a third person and did not include representations as to the financial credit of a corporation, made to induce plaintiff to subscribe to shares thereof to be paid for in cash. *Walker v. Russell*, 71 N. E. 86, 88, 186 Mass. 69, 1 Ann. Cas. 688.

**Implied statements**

While in its strict sense, a "representation" is an assertion or statement of some fact, it may also include an implied representation by conduct that a fact exists, including both express and implied statements, so that whatever word, action, or conduct conveys a real impression that a fact exists is embraced in the term. *Ricks v. State*, 69 S. E. 576, 577, 8 Ga. App. 449.

**In false pretense**

A "representation," to come within Rev. St. 1908, § 1849, denouncing the offense of knowingly and designedly, by any false pretense, obtaining property from another, must be of some fact, past or present, which is not the case where the property is obtained on promise to deliver a check, and that the check will be paid, though at the time thereof it is the intention of the person so promising to stop payment on the check, as he afterwards does. *People v. Orris*, 121 Pac. 163, 164, 52 Colo. 244, 41 L. R. A. (N. S.) 170.

**In insurance**

A "representation," in a contract for insurance, is collateral to the contract, and to be effective must be material to the risk. *Donley v. Glens Falls Ins. Co.*, 76 N. E. 914, 916, 184 N. Y. 107, 6 Ann. Cas. 81.

A "representation" is not strictly a part of the contract of insurance, or of the essence thereof, but is something collateral or pre-

liminary, in the nature of an inducement, so that its falsity, unlike a false warranty, will not vitiate the contract or avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by agreement of the parties; it being sufficient if the representations are substantially true, though not strictly or literally so. A misrepresentation renders the policy void on the ground of fraud, while noncompliance with a warranty operates as an express breach of the contract. *Pelican v. Mutual Life Ins. Co. of New York*, 119 Pac. 778, 781, 44 Mont. 277.

There is a material and substantial difference between the legal effect of a "warranty" and a "representation." A "representation" must relate to a material matter, and it is only required to be substantially true, while a "warranty" must be literally true, and its materiality cannot be called in question. It is said that warranties enter into and are made a part of the contract, while "representations" are merely inducements to it. *Minnesota Mut. Life Ins. Co. v. Link*, 82 N. E. 637, 638, 230 Ill. 273 (citing *Continental Ins. Co. v. Rogers*, 119 Ill. 474, 10 N. E. 242, 50 Am. Rep. 810; *Metropolitan Life Ins. Co. v. Moravec*, 214 Ill. 186, 73 N. E. 415); *Id.*, 131 Ill. App. 89, 94.

The difference in legal effect between a "warranty" and a "representation," in an insurance policy, is that falsity in a warranty in any particular bars recovery on the policy, while a "representation" to do so must refer to some fact material to the insurance, and be false, or fraudulent. *Hoeland v. Western Union Life Ins. Co. of Spokane*, 107 Pac. 866, 867, 58 Wash. 100; *Monahan v. Mutual Life Ins. Co. of Baltimore*, 63 Atl. 211, 212, 103 Md. 145, 5 L. R. A. (N. S.) 759.

The distinction between a "representation" and a "warranty," as applied to statements by insured in his application for a policy, is that in the case of a representation it is sufficient if the representation is substantially true, while in the case of a warranty it must be literally true. In the case of representations, the policy is not avoided unless the statements are false to a degree or in a sense that materially affects the risk, or are such that, if they had not been made, the policy would not have been issued. In the case of a "warranty," it cannot be said that, though literally false, it is substantially true. In the case of a representation, the law clearly contemplates that it shall be viewed liberally, and though false, as a matter of fact, to a degree sufficient to defeat the liability of the company if it were a warranty, it may nevertheless, as a representation, be held to be substantially true. *Royal Neighbors of America v. Wallace*, 92 N. W. 897, 898, 66 Neb. 543.

All statements regarding the risk contained in or appearing on the face of a policy

are warranties, and such is the rule irrespective of the use of the word "warranty" or "warranted." A stipulation in an insurance policy, reducing the price of insurance 50 per cent. on "Sprinkler risks" without requiring insured to use due diligence in maintaining an automatic sprinkler system in good working order, is a "warranty," and not a "representation." *Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 106 Pac. 194, 195, 196, 56 Wash. 681, 28 L. R. A. (N. S.) 593.

"A 'warranty' in the law of insurance is not matter collateral to the contract, stated as an inducement to the other party to enter into the agreement, as a 'representation' is. It is parcel of the contract, and, in the absence of a statute to the contrary, invalidates the obligation if not strictly true; and this though the thing warranted does not affect the risk." *Salts v. Prudential Ins. Co.*, 120 S. W. 714, 716, 140 Mo. App. 142.

In insurance a "representation" is a statement of the applicant to the insurer regarding a fact material to the proposed insurance, and it must be, not only false, but fraudulent, to defeat the policy. The crucial distinction between a "representation" and a "warranty" is that the one is not, and the other is, a part of the contract, and that the truth of the one is not and the truth of the other is, a condition precedent to a recovery on the policy. Thus where the president of a bank applies to a bonding company for a bond indemnifying the bank against defalcations by an employé, and answers questions in writing at the request of the bonding company as to the former conduct of such employé, such questions and answers are representations and not warranties, but must be given in good faith, and any material false representations will relieve the company from liability. *Fidelity & Deposit Co. of Maryland v. Guthrie Nat. Bank*, 87 Pac. 300, 17 Okl. 397 (citing *Rice v. Fidelity & Deposit Co. of Maryland*, 103 Fed. 430, 432, 43 C. C. A. 270, 275; *Moulou v. American Life Ins. Co.*, 4 Sup. Ct. 466, 111 U. S. 335, 28 L. Ed. 447).

Statements made in good faith by the president of a bank to an indemnity company, for the purpose of inducing the company to give a bond guaranteeing the faithful discharge of the duties of a bookkeeper of the bank, that the bookkeeper had kept his accounts correct and had made proper settlements for cash and securities intrusted to his care, and that the books had been inspected and examined, are "representations," and not warranties, where they are made on blanks furnished by the company, notwithstanding a stipulation therein that the answers are to be taken as conditions precedent, and as the basis of the bond applied for, and the liability of the company does not depend on the absolute truth of the statements.

*Guthrie Nat. Bank v. Fidelity & Deposit Co. of Maryland*, 79 Pac. 102, 103, 14 Okl. 636.

A warranty in insurance enters into and is a part of the contract, and must be literally true to permit a recovery on the policy, while a representation is not a part of the contract, but an inducement thereto. A "representation" must relate to a material matter, and is only required to be substantially true. *Spence v. Central Accident Ins. Co.*, 86 N. E. 104, 105, 236 Ill. 444, 19 L. R. A. (N. S.) 88.

The difference between a "warranty" and a "representation" lies in the fact that in the former the question of materiality is closed, while in the latter it is left open, and, if untrue in the former case, the policy is voidable at the option of the other party, while if untrue in the latter case, and also material, the same result follows. *American Bonding & Trust Co. of Baltimore v. Burke*, 85 Pac. 692, 693, 36 Colo. 49 (quoting and adopting definition in *Ostrander, Fire Ins.* [2d Ed.] § 135).

Whether the answers made by the applicant for a policy of indemnity or insurance are "warranties" or mere "representations" must depend upon the character of the question and its answer, the opportunity of the insurer to guard against the "representation" in the light of its consequences, or whether it is material to the risk. A warranty must be strictly true. A "representation" need only be substantially true. The crucial distinction between a "representation" and a warranty is that the one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent to a recovery upon the policy or bond to which they relate. *Poultry Producers' Union v. Williams*, 107 Pac. 1040, 1041, 58 Wash. 64, 137 Am. St. Rep. 1041.

"A 'warranty' is a stipulation expressly set out or by inference incorporated in the policy whereby the assured agrees 'that certain facts relating to the risk are or shall be true, or certain acts relating to the same subject have been or shall be true, or certain acts relating to the same subject have been or shall be done.' Its purpose is to define the limits of the obligation assumed by the insurer, and it is a condition which must be strictly complied with, or literally fulfilled, before the right to recover on the policy can accrue. It is not necessary that the fact or act warranted should be material to the risk, for the parties by their agreement have made it so. Lord Eldon says: 'It is a first principle in the law of insurance that, if there is a warranty, it is a part of the contract that the matter is such as it is represented to be.' On the other hand, 'representations' are no part of the contract of insurance, but are collateral or preliminary to

it. When made to the insurer, at or before the contract is entered into, they form a basis upon which the risks proposed to be assumed can be estimated. They operate as the inducement to the contract. Unlike a false warranty, they will not invalidate the contracts because they are untrue, unless they are material to the risks and need only be substantially true. They render the policy void on the ground of fraud, 'while a noncompliance with a warranty operates as an express breach of the contract.'" *Capital Fire Ins. Co. v. King*, 102 S. W. 194, 195, 82 Ark. 400 (quoting and approving definition in *Providence Life Assur. Soc. v. Reutlinger*, 25 S. W. 835, 58 Ark. 528, and citing *Mechanics' Ins. Co. v. Thompson*, 21 S. W. 468, 57 Ark. 279; *Western Assur. Co. v. Althelm-er*, 25 S. W. 1067, 58 Ark. 565).

The word "representation," in an answer in an action on a life insurance policy averring, as to the application for insurance, that the false representation of the deceased in relation to his use of liquors afforded legal ground to claim annulment of the contract, was evidently used in that connection merely as synonymous with the word "statement" or "declaration." *Briguac v. Pacific Mut. Life Ins. Co.*, 36 South. 595, 601, 112 La. 574, 66 L. R. A. 322.

#### REPRESENTATIVE

"The 'representatives' of a deceased person are not usually designated by the term 'assignees.'" *Sere v. Pitot*, 10 U. S. (6 Cranch) 332, 336, 3 L. Ed. 240.

#### As one having authority to act for another

An agent authorized to conduct the business of buying and shipping cotton is the "representative" of the principal in such business; and his acts within the scope of his apparent authority are binding on the principal. *Birge-Forbes Co. v. St. Louis & S. F. R. Co.*, 115 S. W. 333, 335, 53 Tex. Civ. App. 55.

One directing and superintending the stringing of wires for a telegraph company is the "representative" of the company, and his knowledge is the knowledge of the company. *Postal Telegraph-Cable Co. v. Likes*, 80 N. E. 136, 141, 225 Ill. 249.

Rev. St. 1895, art. 1223, provides that citation may be served on a foreign corporation by service on the local agent; and article 1194, subd. 25, provides that a foreign corporation may be sued in any county where it has an agency or "representative." Held, that the statute contemplates service on a person employed in forwarding the particular business for which the corporation was organized, and service on an attorney representing the defendant, and who was in the county at the time of service merely for the purpose of settling certain claims between the parties to the action, was insufficient. *Bay City Iron*

*Works v. Reeves & Co.*, 95 S. W. 739, 740, 43 Tex. Civ. App. 254.

**Executor or administrator**

"The primary and ordinary meaning of the words 'representatives,' or 'legal representatives,' or 'personal representatives,' when there is nothing in the context to control their meaning is 'executors and administrators'; they being the representatives constituted by the proper court." *Briggs v. Walker*, 19 Sup. Ct. 1, 171 U. S. 466, 471, 43 L. Ed. 243.

"The word 'representative' has been held to include any person or party who has succeeded to the rights of the decedent, whether by purchase, descent, or operation of law." In a proceeding for the distribution of the estate of an intestate, in a contest between parties, each claiming as next of kin and heir at law, the administrator is a representative of his intestate. *Sorensen v. Sorensen*, 98 N. W. 837, 840, 68 Neb. 483 (quoting *Kroh v. Helms*, 67 N. W. 771, 48 Neb. 691; *Sorensen v. Sorensen*, 77 N. W. 68, 56 Neb. 729).

The words "representative" and "legal representative" of a person do not necessarily exclude the administrator or executor, but such words employed in a policy of a benefit association in view of the purposes of the association to benefit the family and heirs of deceased members were not intended to include the administrator of the member referred to in a policy. *Tucker v. Knights of Pythias of North & South America*, 68 S. E. 796, 797, 135 Ga. 56.

Where action against a nonresident was commenced by issuance of summons and attachment of his property in the state, and he then died, his administrator, appointed by a court of the state of his residence, entitled to possession of the property subject to the lien of attachment, in the absence of administration in New York, was his "representative" or successor in interest, within Code Civ. Proc. § 757, providing that action against a sole defendant, for a cause of action surviving, shall, on his death, be continued against his representative or successor in interest. *Logan v. Greenwich Trust Co. of Greenwich, Conn.*, 129 N. Y. Supp. 577, 580, 582, 144 App. Div. 372.

The terms "personal representative" and "representative" are synonymous and refer to the person constituted representative by the proper court. An administrator is a "personal representative" of the decedent, within the statute providing that the personal representative may maintain an action for the recovery of damages for death by wrongful act. *Jones v. Minnesota Transfer Ry. Co.*, 121 N. W. 606, 607, 108 Minn. 129 (citing 6 Words and Phrases, p. 5359).

"Representatives," as used in Ky. St. 1903, § 655, providing that when a policy of insurance is effected on one's own life in favor

of some person other than himself, having an insurable interest therein, the lawful beneficiary, other than himself or his legal representatives, shall be entitled to its proceeds against creditors and "representatives" of insured, means the personal representatives of an insured, as distinguished from "legal representatives," meaning heirs and distributees. *Hall v. Ayers' Guardian* (Ky.) 105 S. W. 911, 913, 914.

The word "representatives," as used in *Bates' Ohio St.* 1908, § 3628, subd. 2, exempting the amount of life insurance policy from "all claims by the representatives and creditors" of the insured, means personal representatives. *Mutual Life Ins. Co. of New York v. Farmers' & Mechanics' Nat. Bank of Cadiz, Ohio*, 173 Fed. 390, 393.

**Grantee**

Comp. Laws 1897, § 496, in relation to substituted service, provides that, if a defendant against whom a decree shall have been made on substituted service, or his "representatives," shall afterwards appear and petition to be heard, petitioner may be admitted to answer on certain conditions. Held, that the grantee of a defendant, in a suit to quiet title, was embraced within the word "representatives." *Coffin v. Outonagon Circuit Judge*, 103 N. W. 835, 837, 140 Mich. 420.

**As heir, devisee, or administrator**

The word "representatives," as used in a will whereby a testator devised land and personalty to his wife, and then made to each of his children certain devises and bequests, and then declared that at the expiration of the life of the wife that which was given to her for life should be equally divided between all his children, share and share alike, "the representatives of such as may have died to stand in the place of their ancestors," means the persons who are appointed, not by the deviser in a will, but by the law, to represent him, and upon whom the law would have cast the inheritance. *Bowen v. Hackney*, 48 S. E. 633, 635, 136 N. C. 187, 67 L. R. A. 440.

A testamentary trustee holding a trust estate for the benefit of his children with power to appoint by will the manner, and the trust under which the estate should be divided among his children, executed a will, whereby he provided that the income of the trust fund should be divided equally among his living children and the legal representatives of any who might be dead, and declared that, if any of the children should die without having children, his or her share in the trust fund should be divided equally among his brothers and sisters surviving, and the representatives of any deceased child. Held, that since the word "representatives" meant legal representatives or heirs, and might include descendants of remote degree, the gift was against

the statute of perpetuities. *Allen v. Davies*, 82 Atl. 189, 192, 85 Conn. 172.

Bouvier in his *Law Dictionary* says that the heir represents the ancestor; the devisee, his testator; the administrator, his intestate. It seems that, in a suit against the heirs for the specific performance of the ancestor's contract, the contractee complainant cannot testify as to transactions with or statements by the ancestor, since probably heirs or devisee are "representatives" of the deceased debtor under the statute. *Kleb v. Kleb*, 62 Atl. 396, 401, 70 N. J. Eq. 305.

#### As heir or next of kin

"While technically the words 'legal representatives' mean administrators or executors, they may refer to heirs or next of kin. A 'representative' is one who stands in the place of an owner of real estate as heir, of personality as next of kin. He is one, also, who takes by representation; and in wills and settlements the terms 'representatives' and 'legal representatives' are frequently held to mean heirs and next of kin, and not executors and administrators." *Davidson v. Jones*, 98 N. Y. Supp. 265, 266, 112 App. Div. 254 (citing *Griswold v. Sawyer*, 26 N. E. 464, 125 N. Y. 411).

#### As next of kin

Testator by his will gave "unto all my brothers and sisters and their representatives, after the decease of my wife, the house and lot left in trust to her and also the bank stock left in trust to her, to be equally divided, share and share alike." The sisters died, leaving issue. Held, that the word "representatives" meant, with reference to the context, next of kin under the statute of distribution. *Howell v. Westbrook*, 66 Atl. 417, 418, 69 N. J. Eq. 641.

"The word 'representative' may mean the next of kin of decedent, or executors, or administrators, according as the intention of the decedent is manifest in the will." In *re Harton's Estate*, 62 Atl. 1058, 1059, 213 Pa. 499, 4 L. R. A. (N. S.) 939 (quoting and adopting definition in *Appeal of Trustees of University of Pennsylvania*, 97 Pa. 187).

Testator devised the residue of his estate in trust for his wife for life, remainder to the children of his sisters, the "heirs and representatives" of any such children who died between testator's decease and the time of distribution to be entitled to such share or shares as their respective ancestors would have been entitled to receive if living. Held, that the word "heirs" must be construed to mean the same persons as "representatives," and that both together should be construed to mean "next of kin." In *re Nelson's Estate*, 74 Atl. 851, 859, 9 Del. Ch. 1.

#### Purchaser

A purchaser from the mortgagor is the "representative" of the mortgagor for the

purpose of redemption, within Ky. St. §§ 2364, 2365, defining the right of redemption, and authorizing a sale thereof, and such a purchaser, who files his affidavit and deed showing his title, and who moves for leave to redeem from a sale under a foreclosure decree, may appeal from an adverse ruling, under Civ. Code Prac. § 734, granting an appeal from a judgment, as a matter of right, to a party or privy thereto. *Miller v. Wheeler*, 143 S. W. 1028, 1030, 147 Ky. 131.

#### Widow

Under Ky. St. § 2364, providing that, if property sold on mortgage foreclosure does not bring two-thirds of its appraised value, defendant and his representatives may redeem within a year by paying the purchaser the original purchase money and 10 per cent. interest, the mortgagor's widow, who joined in the mortgage and was entitled to dower in the surplus proceeds on foreclosure sale, could redeem; she coming within the term "representatives." *Hiller v. Nelson* (Ky.) 118 S. W. 292, 293.

#### REPRESENTATIVE CAPACITY

In a suit to establish title to real estate claimed under a sheriff's sale, where complainant paid the consideration for his own benefit, but took title in the name of his three sons, testimony as to conversations with one of the sons, since deceased, is not inadmissible, the suit being one in rem and not in personam, so that the representative of the deceased son defending the suit does not appear in a "representative capacity" within the meaning of the statute. *Thomas v. Thomas*, 81 Atl. 748, 749, 79 N. J. Eq. 461.

#### REPRESENTATIVE GOVERNMENT

See, also, *Republican Government*.

"A 'representative form of government' is defined in the universal dictionary of the English language as one 'conducted and constituted by the agency of delegates or deputies, chosen by the people.'" This definition fairly expresses the modern American idea of representative government. A fraternal benefit association must have a representative form of government. This requires that the directors or other officers who have charge and control of the property and business of the society and the management of its affairs shall be chosen by the membership thereof. *Lange v. Royal Highlanders*, 106 N. W. 224, 226, 75 Neb. 188, 10 L. R. A. (N. S.) 666, 121 Am. St. Rep. 786 (following *State v. Bankers' Union of the World*, 99 N. W. 531, 71 Neb. 622).

#### REPRESENTATIVE OF VALUE

Other representative of value, see *Other*.

#### REPRIEVE

As proceeding, see *Proceeding*.

A "reprieve" is a respite by the Governor from a sentence of death. *State v. Finch*, 103 Pac. 505, 511, 54 Or. 482.

"At common law 'reprieves after judgment' were of three kinds: (1) At the pleasure of the crown; (2) in the discretion of the court; (3) of necessity—which latter was in the case of a woman convict alleging pregnancy when called for sentence." But the insanity of one in confinement awaiting execution under capital sentence cannot be tested under Act July 5, 1906, § 13 (P. L. p. 722), as it does not give the court the common-law power of "reprieve after judgment." In *re Herron*, 72 Atl. 133, 135, 77 N. J. Law, 315 (citing the definition in 12 Cyc. p. 790; 1 Chit. Cr. Law, 758).

#### Suspension distinguished

Acts 32d Leg. c. 44, is not unconstitutional in authorizing district courts to suspend sentences in certain cases as an invasion of the right to "reprieve" or grant "commutations of punishment" reserved to the Governor by Const. art. 4, § 11, as a "reprieve" postpones the execution of a sentence to a day certain, whereas a "suspension" is for an indefinite time, and a "commutation" is the changing of the punishment assessed to a less punishment. *Snodgrass v. State* (Tex.) 150 S. W. 162, 165, 41 L. R. A. (N. S.) 1144 (citing 7 Words and Phrases, pp. 6115, 6116).

## REPRODUCTION

"Reproduction" is repetition or the act of reproducing, and carries with it the idea of a complete production over again. *American Bonding Co. v. Ottumwa*, 137 Fed. 572, 579, 70 C. C. A. 270 (citing *Goodyear Shoe Machinery Co. v. Jackson*, 112 Fed. 146-150, 50 C. C. A. 159, 163, 55 L. R. A. 692).

## REPTILE

A conviction will not be reversed because the counsel for the state, in his argument to the jury, referred to defendant's conduct as showing "reptilian sagacity," since the remark amounted to no more than saying that defendant was as wise as a serpent. *State v. Barrington*, 95 S. W. 235, 257, 198 Mo. 23.

## REPUBLIC

### REPUBLICAN GOVERNMENT

See, also, Representative Government."

"A republican form of government is a government administered by representatives chosen or appointed by the people or by their authority. Mr. Madison says it is 'a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior.'" *Kadder-*

*ly v. City of Portland*, 74 Pac. 710, 719, 44 Or. 118.

A "republican form of Government" is one in which the people select those who are to make or direct their laws, and is radically different from a pure democracy, in which the people collectively, and as their own original act, make the laws. In *re Pfahler*, 88 Pac. 270, 280, 150 Cal. 71, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911 (citing *Webst. Dict.*).

The term "republican," as used in the federal constitutional provision (article 4, § 4) guaranteeing to every state a republican form of government, means a government by the citizens en masse acting directly, though not personally, according to rules established by the majority. *Kiernan v. City of Portland*, 112 P. 402, 404, 57 Or. 454, 37 L. R. A. (N. S.) 339.

"A republican form of government," within the meaning of Const. U. S. art. 4, § 4, guaranteeing to the states a republican form of government, is a government by the people, through the representatives appointed by them to the various departments, executive, legislative, and judicial, as provided, either by direct vote or through some intervening officer or body by them selected and appointed by direct vote, for the purpose. *Eckerson v. City of Des Moines*, 115 N. W. 177, 181, 137 Iowa, 452.

#### Recall

A recall provision in a city charter, vesting the powers of government in the people and constituting all inhabitants of the city a body politic, is not violative of Const. U. S. art. 4, § 4, guaranteeing to every state a "republican form of government," which merely means a government by the citizens in mass, acting directly, and not personally, according to the rules established by the majority. *Bonner v. Belsterling*, 138 S. W. 571, 574, 104 Tex. 432.

## REPUBLISH

"Republication" of a revoked will signifies publishing or declaring again. A will revoked by a will of a later date is not revived upon the destruction of the later will, by the testator's oral declarations to revive it, but his intention must be expressed in writing sufficient to satisfy the statute. *Danley v. Jefferson*, 114 N. W. 470, 471, 150 Mich. 590, 121 Am. St. Rep. 640, 13 Ann. Cas. 242.

## REPUDIATION

A "repudiation" of a contract is something said or done by a contracting party to indicate that he will not perform, or further perform, his contracts. It is an essential element of a repudiation that there be something still to be performed by the repudiating

party in the future. *Holden & Martin v. Gilfeather*, 63 Atl. 144, 146, 78 Vt. 405.

A bare refusal to pay calls made on the stockholders of a corporation is no more a "repudiation" of the status of a shareholder than a refusal to pay what is due under a contract which can be rescinded is a rescission. *Electric Welding Co. v. Prince*, 81 N. E. 306, 310, 195 Mass. 242.

That a broker, under a contract to obtain insurance annually for his principal for ten years, demanded more compensation than he was entitled to in one year did not amount to a "repudiation" of the contract, or justify rescission by defendant; the broker not refusing to fulfill his contract unless the payment was made, his demand involving no hidden fraud or deceit, it being immaterial that his construction of the contract made defendant's insurance more expensive than he had expected, and the broker's demand not being violative of any confidential relation. *Tanenbaum v. Federal Match Co.*, 81 N. E. 565, 566, 189 N. Y. 75.

Where a seller's traveling salesman took an order for flour to be filled by shipment of one car each month for five months from date of order, and the seller wrote the buyer on receipt of the order, thanking them for same, and complaining only of the length of time allowed to move the flour, the letter was not a "repudiation" of the sale. *J. B. Brennan & Son v. Dansby*, 95 S. W. 700, 702, 43 Tex. Civ. App. 7.

An allegation in a complaint that defendant abandoned the contract is equivalent to an allegation that the contract was repudiated, though technically "abandonment" is the relinquishment of a right, and "repudiation" the renunciation of a duty. *Parker Land & Imp. Co. v. Ayres*, 87 N. E. 1062, 1063, 43 Ind. App. 513.

A refusal to pay the amount due for a portrait painted under contract is a "repudiation" of the contract, authorizing suit without further offer of delivery. *Scott v. Miller*, 99 N. Y. Supp. 609, 611, 114 App. Div. 6.

## REPUGNANCE

### REPUGNANCY

"Repugnancy" consists in two inconsistent allegations, which destroy the effect of each other." An indictment for conspiracy to defraud by the use of the mails, in violation of Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], as amended, is not bad for repugnancy because it charges in the same count that defendant conspired to defraud by dealing or pretending to deal in what are commonly called "green articles" and spurious treasury notes. *Lehman v. United States*, 127 Fed. 41, 45, 61 C. C. A. 577 (citing 10 Ency. Law, 565).

To vitiate a pleading for "repugnancy," the conflict must be irreconcilable. *Town of Cameron v. Hicks*, 64 S. E. 832, 833, 65 W. Va. 484, 17 Ann. Cas. 926.

If, where the sense of the language used in a pleading may be ambiguous, it is sufficiently marked by the context, or other means, in what sense it was intended to be used, no objection can be made on the ground of "repugnancy," which only exists where a sense is annexed to words which is either absolutely inconsistent therewith or, being apparently so, is not accompanied by anything to explain or define them. To vitiate a pleading on the ground of repugnancy, the conflict or inconsistency must be irreconcilable. *Town of Cameron v. Hicks*, 64 S. E. 832, 833, 65 W. Va. 484, 17 Ann. Cas. 926.

## REPURCHASE

Where a mortgagee agreed, in consideration of the mortgagor conveying the property to him by deed absolute on its face, that the latter might "repurchase" it within a certain time at a certain price, the word "repurchase" was equivalent to the word "redeem." *Day v. Davis*, 61 Atl. 576, 578, 101 Md. 259.

## REPUTE

See Good Repute.

### REPUTABLE

A "reputable college," within the statute entitling graduates in pharmacy from any "reputable college" to a license, is one of whose character the public, having general acquaintance with the subject, entertain a good opinion. *State ex rel. Mauldin v. Matthews*, 62 S. E. 695, 697, 81 S. C. 414, 22 L. R. A. (N. S.) 735, 128 Am. St. Rep. 919, 16 Ann. Cas. 182.

The meaning of the word "reputable," as used in Laws 1903, p. 664, c. 411, authorizing the board of dental examiners to recognize graduates' diplomas from reputable institutions, is "worthy of good repute"; it relates to real character, not to mere reputation in that regard. *State ex rel. Milwaukee Medical College v. Chittenden*, 107 N. W. 500, 522, 127 Wis. 468.

The term "reputable," as used in the statute providing for the registration of reputable resident physicians, was not limited to physicians and surgeons who were graduates of some reputable medical school, or are members of some incorporated medical society, but has reference merely to general character or some honorable work, and is satisfied in case the applicant is regarded as honorable and praiseworthy by reason of his worth and professional conduct. *State v. Schmidt*, 119 N. W. 647, 650, 138 Wis. 53.

"Regular" and "reputable" are not synonymous words. "Regular" is defined as con-

formed to or made in accordance with a rule; agreeable to an established rule, law, type, or principal, to a prescribed mode, or to established customary form. 'Reputable' is defined as being in good repute; held in esteem; estimable. Cent. Dict. A school or college may be regular (i. e., regularly incorporated) and not 'reputable.' Wise v. State Veterinary Board, 101 N. W. 562, 564, 138 Mich. 428.

The word "reputable," as used in a statute requiring an affidavit of a reputable person to certain facts, means one of good repute in the community, one held in esteem; and a person may be reputable, although he has committed an offense against the law. In re Consent to Sell Intoxicating Liquors in City of Oskaloosa, 134 N. W. 620, 623, 155 Iowa, 149.

The words "reputable persons" in the statute requiring that the signatures on a petition of general consent under the mulct law shall be verified by affidavits of "reputable persons" are not equivalent to the words "credible persons," and, where an objection to a petition is based on the fact that the persons making the verification had been convicted within a year of violations of the liquor laws, the court, in the absence of any evidence of subsequent engagement in lawful business by such persons, cannot consider such persons as reputable; the word "reputable" not being confined to a matter of reputation, but implying to some degree a character worthy of good repute, or entitled to the esteem of good citizens generally. Jackman v. Board of Sup'rs of Blackhawk County (Iowa) 137 N. W. 906, 910.

As applied to witnesses, the words "respectable" and "reputable" have practically the same meaning. Mr. Webster defines the term "respectable" as "worthy of respect; fitted to awaken esteem; deserving regard; hence of good repute; not mean; as a respectable citizen"—and the term "reputable" as "having or worthy of good repute; held in esteem; honorable; praiseworthy; as a reputable man or character." State v. Spivey, 90 S. W. 81, 87, 191 Mo. 87 (citing Freleigh v. State, 8 Mo. 606).

### REPUTABLE FREEHOLDERS

"A deed of lands made to a large number of persons for a single consideration, and merely for the purpose of qualifying them to sign recommendations for licenses, is fraudulent, and will not constitute them 'reputable freeholders.'" In re Cohn, 121 N. W. 107, 108, 84 Neb. 230 (quoting with approval from Black, Intox. Liq. § 161).

### REPUTATION

See General Reputation.

"Reputation" is a sort of right to enjoy the good opinion of others, and is capable of growth and real existence, as an arm or leg.

An injury to reputation is an injury to the person, within Rev. Civ. Code, La. 1870, art. 2402, providing that damages for personal injuries to the wife are not community property, but her separate property. Times-Democrat Pub. Co. v. Mozee, 136 Fed. 761, 763, 69 C. C. A. 418 (quoting and adopting definition in Johnson v. Bradstreet Co., 13 S. E. 250, 87 Ga. 79, 80).

"Reputation" is the general opinion or common knowledge of the community, being "a sort of right to enjoy the good opinion of others, and is as capable of growth and has as real an existence as an arm or leg. It is a personal right, and an injury to reputation (as by a libel) is a personal injury, within the meaning of statutes providing that injuries to a person shall not abate." Cohen v. New York Times Co., 138 N. Y. Supp. 206, 208, 153 App. Div. 242 (quoting and adopting the definition in 7 Words and Phrases, p. 6118).

A sort of distinction is allowed between "hearsay" and "reputation." Yet "reputation" is nothing more than hearsay derived from those who had the means of knowing the fact, and may exist when those best acquainted with the fact are dead. Still it is a general rule that reputation is evidence as to general character as to the fact of legitimacy, relationship, pedigree, rights of common, rights of way, and all rights depending upon custom or prescription. Scott v. Blood, 16 Me. 192, 196.

### As character

The word "character" has a dual meaning, and may refer to a person's private life, about which the public may have no knowledge, or may mean the character that a person enjoys by reputation; and in libel actions "character" is synonymous with "reputation." Lydlard v. Daily News Co. of Minneapolis, 124 N. W. 985, 987, 110 Minn. 140, 19 Ann. Cas. 985.

A person's "reputation" and "character" are not the same. Reputation as evidence may tend to prove character; but a man may in fact have a good character while suffering from a bad reputation. Curtice v. Dixon, 68 Atl. 587, 589, 74 N. H. 386 (citing Bottoms v. Kent, 48 N. C. 160).

Webster's International Dictionary defines "reputation" as "the estimation in which one is held; character in public opinion; the character attributed to a person, thing, or action; repute. (Law.) The character imputed to a person in the community in which he lives." Speaking of character and reputation, the same author quoting from Abbot, says: "It would be well if character and reputation were used distinctly. In truth, character is what a person is; reputation is what he is supposed to be. Character is in himself; reputation is in the minds of others. Character is injured by temptation and by wrongdoing; reputation by slander and li-



bels. Character endures throughout defamation in every form, but perishes when there is a voluntary transgression; reputation may last through numerous transgressions, but be destroyed by a single, and even an unfounded, accusation or aspersion." Thus an instruction that, in determining the weight and credibility to be given to the testimony of any witness, the jury might take into consideration the "character" of the witness was proper, where each party contended that the testimony on behalf of the other party was unreliable. *Harrison v. Lakenan*, 88 S. W. 53, 54, 58, 189 Mo. 581 (citing *State v. Gee*, 85 Mo. 647; *State v. Brooks*, 5 S. W. 257, 330, 92 Mo. loc. cit. 557; *State v. Harrod*, 15 S. W. 373, 102 Mo. loc. cit. 598; *State v. Hillsbeck*, 34 S. W. 38, 132 Mo. loc. cit. 358; *State v. Hudspeth*, 60 S. W. 136, 159 Mo. loc. cit. 200).

The defendant, in a criminal action, was charged with larceny and was a material witness in his own behalf. At the trial the state attacked his "reputation" for truth and veracity. The defendant then called witnesses and offered to prove by them that they knew his "character" for truth and veracity, and that it was good. An objection was sustained to the testimony on the ground that his "reputation" and his "character" for truth and veracity was involved. Held that, inasmuch as the distinction between "reputation" and "character" is not commonly understood by witnesses, and the terms are frequently used without discrimination both by the courts and lawmakers, it was error to exclude the testimony. *State v. Tawney*, 99 Pac. 268, 78 Kan. 855.

The terms "character" and "reputation" are often used interchangeably. Where it is proper to show the character of a party, it was not error to permit witnesses to answer questions referring in direct terms to his character as a fighting, quarrelsome, and vindictive man, as well as questions inquiring what his general reputation was in respect to the qualities named, although the generally approved rule is to restrict such questions to general reputation. *Spain v. Rakestraw*, 101 Pac. 466, 79 Kan. 758 (citing *State v. Tawney*, 99 Pac. 268, 78 Kan. 855).

Under Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596, providing that it shall be made to appear to the satisfaction of the court that the person desiring citizenship has resided in the United States at least five years preceding his application and one year in the state, "and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same," an alien who is a saloon keeper, and has known for over two years that the state law requires the closing of saloons on Sunday, but has kept the back door of his saloon open

on Sunday regularly, and who states that, if he should take an oath to support the United States Constitution and laws, he would continue to keep the back door of his saloon open on Sundays, should be denied citizenship, as the word "character," although frequently used as synonymous with "reputation," is what a person is, while reputation is what he is supposed to be, and one who is an habitual violator of the law is not a person of good moral character, and well disposed to the good order of the country. *United States v. Hraskey*, 88 N. E. 1031, 1033, 240 Ill. 560, 130 Am. St. Rep. 288, 16 Ann. Cas. 279 (citing 2 Words and Phrases, pp. 1061-1063).

Strictly speaking, the words "reputation" and "character" are not synonymous. "Character" is what a man or woman is morally, while "reputation" is what he or she is reputed to be. "Reputation" is the estimate which the community has or expresses of a person's character; and, if the reputation is bad, this is treated as evidence where general character is involved. *Moore v. Dozier*, 57 S. E. 110, 113, 128 Ga. 90 (citing *Leverich v. Frank*, 6 Or. 212, 213).

"Character" signifies the reality, and 'reputation' merely what is reputed or understood from report to be the reality about a person or thing." *Woodruff v. State*, 101 N. W. 1114, 1118, 72 Neb. 815 (citing 6 Cyc. p. 892).

"Reputation" is the evidence of character, and character is not to be established by the opinions or conclusions of witnesses, nor by the personal knowledge of the witness, nor by particular acts or circumstances, but in the respect involved is proven by evidence of the general reputation which one bears in the locality where he resides as to that particular trait. *State v. Simmons*, 88 Pac. 57, 58, 74 Kan. 799.

Good general "reputation" for honesty, chastity, veracity, and like qualities is synonymous with "good character" as to those qualities, within the meaning of Pen. Code, § 268. The good character of a man is the estimation in which he is held in the community in which he resides. As stated in *Anderson's Law Dictionary*, the term "character" means: "The qualities impressed by nature or habit on a person, which distinguish him from other persons. These constitute his real character, while the qualities he is supposed to possess constitute his estimated character or 'reputation.'" *Ex parte Vandiveer*, 88 Pac. 994, 4 Cal. App. 650.

#### As general reputation

The word "reputation," when unqualified, means general reputation, and a question as to "the reputation for chastity" of the paramour of defendant in a prosecution for lewdness is proper in form. *State v. Poyner*, 107 Pac. 181, 182, 57 Wash. 489.

If an impeaching witness understands, when asked if he knows the "reputation" of the witness whose credibility is being attacked, that "reputation" means "general reputation" (i. e., what is generally said of him in the community where he lives), then the omission of "general" from the question will not make the question improper, and hence a question of omitting the word "general" was not objectionable, where the impeaching witness had been informed in effect that the term "reputation" meant "general reputation." *St. Louis Southwestern R. Co. of Texas v. Garber*, 111 S. W. 227, 229, 51 Tex. Civ. App. 70.

#### As popular estimation

A man's "reputation" consists in the esteem in which he is held by his fellow men. *State v. O'Hagan*, 63 Atl. 95, 96, 73 N. J. Law, 209.

"Reputation" is what people say of a man, whereas character is what he is. *People v. Montgomery*, 68 N. E. 258, 260, 176 N. Y. 219.

A man's "reputation" is the estimate in which others hold him, and not the opinion which he has of himself. *Lyon v. Lash*, 88 Pac. 262, 74 Kan. 745, 11 Ann. Cas. 424.

A witness, though not acquainted with accused, may testify as to his general character and reputation, where such testimony is based on what acquaintances of accused have said, "reputation" being the estimation in which others hold one, and this can only be made known or communicated by some expression, usually oral statements. *McGuire v. State*, 58 South. 60, 61, 3 Ala. App. 40.

"Reputation" is what is generally said of a person by the people of the community where he is known. And, when the subject of inquiry is a corporation, the same rule governs that controls in the introduction of evidence respecting the "reputation" of a natural person. *State v. Brown*, 93 Pac. 52, 53, 33 Utah, 109.

#### REPUTED CHARACTER

The "reputed character" of a person is the slow-spreading influence of opinion, arising out of the deportment of an individual in the society in which he moves, as distinguished from his real character, which is that impressed by nature, traits, or habits upon the person. *Moore v. Dozier*, 57 S. E. 110, 113, 128 Ga. 90 (citing *Wright v. City of Crawfordville*, 42 N. E. 227, 229, 142 Ind. 642; 7 Words and Phrases, p. 6118).

#### REPUTED FATHER

The object of Code 1896, § 364, providing that the marriage of the mother and "reputed" father of a bastard renders it legitimate, if recognized by the father as his child, is to enable parents by marrying to clothe their offspring with legitimacy, and a publication

before marriage of the parentage of the child is not required, but if the child is regarded by the parents themselves as their child, either before or after marriage, it is legitimate; the use of the word "reputed" being intended merely to dispense with absolute proof of paternity. *McBride v. Sullivan*, 45 South. 902, 904, 155 Ala. 166.

#### REPUTED HOUSE OF ILL FAME

In Gen. St. 1902, § 1316, as amended by Pub. Acts 1907, c. 122, which imposes a punishment upon any person "who shall keep a house which is, or is reputed to be, a house of ill fame, or which is resorted to, or is reputed to be resorted to, for the purposes of prostitution or lewdness," the word "reputed" is to be regarded as describing the real character of the place, and the offense is the keeping of a place whose reputation of being a place unlawful to keep is founded on fact; and so construed the statute is constitutional. *Morse v. Brown*, 78 Atl. 430, 431, 83 Conn. 550.

#### REPUTED OWNER

Where one entered into possession of land under a contract with the authorized sales agent of the owner, which contract was in effect one of purchase and sale, though containing a provision that it should not be considered a contract of sale, and held himself out as the owner and contracted for the erection of a building on the land, he was, as against the vendor, the "reputed owner" of the land within Code Civ. Proc. § 1192, giving a lien upon property for labor and material furnished with knowledge of the owner or the person having or claiming any interest in the property. *National Lumber Co. v. Whalley*, 121 Pac. 729, 730, 162 Cal. 224.

Whenever the word "owner" or "reputed owner" is used in the mechanic's lien statutes, it means the owner or reputed owner with whom the contract was made, and he is therefore the only necessary defendant under the statute. *Carswell v. Patzowski* (Del.) 55 Atl. 342, 343, 4 Pennewill, 403.

#### REQUEST

A "request" is the act of asking for anything desired; expression of desire. In re *Kreiders' Estate*, 61 Atl. 1115, 1116, 212 Pa. 587.

Under the law of England the word "request," when used in a will, may be construed to be mandatory or directory, depending on the intention of the testator as gathered from the will. *McCurdy v. McCallum*, 72 N. E. 75, 76, 186 Mass. 464.

A "request" from one in authority is understood to be a mere euphemism. It is in fact a command in an inoffensive form. *State ex rel. Freeman v. Schere*, 93 N. W. 169, 170, 65 Neb. 853, 59 L. R. A. 927.

Where a testator, in the bequest of his personal property, and in the devise of certain realty in remainder, and in the nomination of executors, employs the word "request" as expressive of will, purpose, and desire, and the will further "requests" that on the death of his wife all his real estate shall go to his heirs, the word "request," as last used, will be given the same meaning. *Kirkpatrick v. Kirkpatrick*, 64 N. E. 267, 268, 197 Ill. 144.

Where testator gave to his wife the residue of his real and personal estate, and requested that at her death she should by will bequeath at least two-thirds of what she received under his will to certain charities, the word "request" was used in the sense of "will" or "direct," and therefore rendered the request mandatory, and not precatory. *Gilchrist v. Corliss*, 118 N. W. 938, 940, 155 Mich. 126, 130 Am. St. Rep. 568.

Where a person is employed by the owner of a lot in a city to construct a sidewalk, and purchased materials which were used in its construction, the purchase will be considered as made at the "request" of the owner, within Comp. Laws 1897, § 2218, so as to entitle the materialman to a lien thereon. *Houston-Hart Lumber Co. v. Neal*, 113 Pac. 621, 16 N. M. 197.

Under a mortgage providing that, upon "request" of one-fourth of the bondholders in amount, the mortgagee might take possession and manage the property through receivers or sell it, there was a sufficient "request" for the bondholders to exercise the power of sale, where one-fourth of them in amount by written "request" instructed the trustee to declare the principal sum due and to proceed to a sale, referring in general terms to specified defaults, and specifically mentioning, as one of the grounds of the request, the mortgagor's insolvency. *Union Trust Co. of Maryland v. Thomas*, 66 Atl. 450, 457, 105 Md. 507.

#### Implied request

Where the witnesses to a will go to testatrix's house for the purpose of attesting her will, which was drawn up and executed by testatrix in their presence, and one of the witnesses heard her say that she wanted the will written, and testified that it was written and read to her, and the other witness held her up in bed for the purpose of having her affix her signature, and both witnesses testified that the will was executed in their presence and that they attested it at her request, it is sufficient to show a proper execution of the will, although both witnesses denied that testatrix requested them to sign. *Hughes v. Rader*, 82 S. W. 32, 51, 183 Mo. 630 (citing *Schierbaum v. Schemme*, 57 S. W. 526, 157 Mo. 1, 80 Am. St. Rep. 604).

#### As persuade

The words "hereby agree to request" in a covenant in a lease for years that on de-

struction of the buildings lessors would rebuild or repair with any money received from insurance held by mortgagees if they would permit and direct it to be so applied, which lessors "hereby agree to request and do hereby so request," were not equivalent to "hereby agree to endeavor to persuade." *Putts v. Pendleton*, 73 Atl. 900, 901, 111 Md. 280, 283.

#### Require equivalent

St. 1895, p. 273, c. 207, provides that for each day's actual attendance when legally "required" to attend on the superior court witnesses shall be entitled per day to \$2 in civil cases, and may demand the payment of their mileage and fees for one day in advance, and, when so demanded, shall not be compelled to attend unless the sum shall have been paid, and Code Civ. Proc. § 1985, declares that a subpoena is a process by which the attendance of a witness is required. Held, that the word "required," was synonymous with "requested," meaning merely to give notice, and since the party making a request for the attendance of a witness is liable for the statutory fee, in case the witness attends, such party may tax costs for such attendance, though the witness was not subpoenaed. *Linforth v. San Francisco Gas & Electric Co.*, 99 Pac. 716, 718, 9 Cal. App. 434.

#### Trust or estate in fee created

The words "desire" and "request" do not import a trust, where testatrix devised certain real estate to her husband, and stated that it was her desire and request that he should convey the same to a lodge, so as to impose on it the duty to properly care for the cemetery lot in which she might be buried. They should be understood in their usual sense, in the absence of anything in the will to indicate that they were used in any other than their ordinary sense. *Kauffman v. Gries*, 74 Pac. 846, 848, 141 Cal. 295.

"The mere use in a will of the precatory words 'desire' and 'request' will not be sufficient to create an enforceable trust, or a power in the nature of a trust, when the context clearly shows that the testator's intention was contrary." A testator made a devise to an educational institution, and provided that, in case the devise should fail for any cause, the same should go to the children of his two brothers. In a codicil he authorized, empowered, and requested his daughter, his only lineal descendant, to ratify and confirm the devise to the institution, declaring that, in case she complied with the request, the gifts over should be revoked. The daughter executed the power by a deed to the institution, and the gift over was thereby revoked. *Thomas v. Board of Trustees of Ohio State University*, 70 N. E. 896, 899, 70 Ohio St. 92.

The words "desire," "request," "recommend," "hope," "not doubting" used by testator in a will to express his desire that the

executor will conduct a fund in a specified manner, testator having power to command, will not be construed as precatory only, but as commands clothed in the language of civility, and to impose on the executor an enforceable duty, sufficient to create a trust. *Trustees of Pembroke Academy v. Epsom School Dist.*, 75 Atl. 100, 101, 75 N. H. 408, 37 L. R. A. (N. S.) 646.

Testatrix, domiciled in Nova Scotia, gave to her daughter-in-law \$2,000, to be free from the control of husband and a son, and declared "I request" that she shall at her death give the same to her two daughters, and provided that the receipt of the daughter-in-law "shall be a sufficient discharge" to the executors. She devised real estate to a son, and specified sums to another son and a granddaughter absolutely. She made no provision as to the receipt of these legatees. She also made a bequest to two grandsons, and provided that if they, or either of them, should not have arrived at the age of 21 when the executors were ready to pay the legacies, the executors were authorized to accept the receipt of the parent of these legatees. Held, that by the law of Nova Scotia, which is the same as that of England, the daughter-in-law held the \$2,000 with the right to use the income for life, and that the principal was charged with a trust in favor of her two daughters, the word "request" being mandatory. *McCurdy v. McCallum*, 72 N. E. 75, 76, 186 Mass. 464.

Language not imperative in form, but which appears to be imperative in its real meaning, as intended by a testator, will create a testamentary trust, while language used by way of suggestion, advice, etc., with a view to influence, but not to direct the discretion of the devisee, will not raise a trust. The word "request," in a will, "I therefore request" the devisee to pay to a third person such sums of money as may be requisite for her comfort, may properly be read as imperative so as to create a trust. *Russell v. United States Trust Co.*, 127 Fed. 445, 447.

To "request" is not to empower, but to recognize that power to do the thing requested already resides of right in the one of whom the request is made. A devise of the residue of testator's property to his widow, to have the use and control of the same, with the right to use as much as she pleased for her comfort and pleasure, and, if there were anything left at her death, "it is my request that she give" to a church a parsonage, "and one-half of the residue to my heirs," gave the widow an estate in fee in the whole property, with the right to dispose of the same by will, subject only to the request above recited. *Brown v. Eastman*, 57 Atl. 96, 97, 72 N. H. 356.

In nearly all of the cases in which the effect of the word "request" has been discussed, it is stated that its precise meaning

must depend on circumstances in which it is employed. Since *Burns' Ann. St.* 1901, § 2737, provides that "every devise in terms denoting the testator's intention to devise his entire interest in all his real or personal property shall be construed to pass all the estate in such property," under a clause in a will that "I bequeath my entire estate, both real and personal, to my beloved wife," the wife acquired a fee-simple title in testator's real estate, though there was in a subsequent clause a "request that at the death of my wife my estate that I am now seised of be equally divided between my children." *Snodgrass v. Brandenburg*, 72 N. E. 1030, 1031, 164 Ind. 59.

#### REQUEST FOR DIRECTED VERDICT

A request to direct a verdict is not a request to charge, but is a motion to take the case from the jury, and the jury must render the verdict directed, and there is no occasion to charge as to the law. *Smalley v. Rio Grande Western Ry. Co.*, 98 Pac. 311, 318, 34 Utah, 423.

#### REQUIRE

See *As is Required*; *Legally Required*.

The word "require" means to demand; to ask as of right and by authority; to insist on having; to exact. *Federal Lead Co. v. Swyers*, 161 Fed. 687, 692, 88 C. C. A. 547.

"Require" means to make necessary, to ask as of right. *Boyce v. Stringfellow*, 114 S. W. 652, 654, 52 Tex. Civ. App. 504.

"Require" means to ask of right and by authority and is synonymous with demand. Anything is a "requirement" by a public officer which brings home to the person called upon that the officer is there officially and desires compliance. *United States v. Armour & Co.*, 142 Fed. 808, 822.

Under a railroad mortgage to secure refunding bonds, providing that a certain amount thereof, or such less amount thereof as shall be necessary for that purpose, shall be reserved to be issued in exchange for, or to take up at maturity or before maturity, certain underlying bonds, and that any of such reserved refunding bonds which "shall no longer be required" to be reserved for such purpose may be issued for development of the road, they are "required" so long as any of the underlying bonds have not in some way been retired; the railroad company having no power to determine that they are not so required because the remaining outstanding underlying bonds, which it has made every reasonable effort, without success, to have retired, do not mature till after the refunding bonds. *St. Louis & S. F. R. Co. v. Guaranty Trust Co. of New York*, 99 N. E. 162, 163, 205 N. Y. 609.

#### As cause

In a petition alleging that defendant employed plaintiff and his wife to feed cer-

tain cattle, that the cattle were placed by defendant on the premises where plaintiff resided, and that the feeding "required" the services of plaintiff and his wife, the word "required" was not the synonym of "caused" or "occasioned"; yet the subsequent allegation "that the services of plaintiff and his wife and children so performed" indicates with reasonable fairness that such was the meaning of the pleader. *Stapper v. Wolter* (Tex.) 85 S. W. 850, 851.

**As compel**

Where, in an action for injuries to a servant while painting a roof, the court instructed the jury that if the master was guilty of negligence "in requiring plaintiff to go upon said ladders on the roof," etc., and there was evidence that plaintiff was told to go upon the roof, etc., but there was nothing to show that he was compelled to do so, the word "requiring" was used by the court in the sense of "directed," and could not have mislead the jury. *Planters' Gin Co. v. Washington* (Tex.) 132 S. W. 880, 881.

**As demand or request**

A contract for the sale of stone for the construction of a building according to specifications, which provides that the stone shall be delivered in such quantities as may be required, not to exceed a specified quantity per day, and that the seller shall continue the delivery of stone in the quantities required, executed on the theory that the seller should prepare the stone at his quarry and deliver it in varying dimensions, does not require the seller to deliver any stone except on demand specifying quantities and dimensions; the word "require" according to lexicographers and in common parlance meaning demand, or to ask as of right and by authority. *Duhamel v. Port Angeles Stone Co.*, 109 Pac. 597, 599, 59 Wash. 171, Ann. Cas. 1912A, 1229.

A party contracted to furnish all kinds of nuts and bolts and wrought-iron material in constructing a large building covering 22 acres, the contractor to furnish lists of "material required at least thirty days prior to the time" they required it. Held that, according to the reasonable intention of the parties and the natural meaning of the word "require," which imports a demand or request made authoritatively, the contract must be held to provide that the materialmen should have 30 days in which to manufacture or provide the materials prior to the time they should be needed, rather than that the submitting of a list should of itself require the delivery of the articles within 30 days, so that a failure to deliver within 30 days articles specified in a list submitted at the beginning of the work, which covered two-thirds of all the material, was not a breach. *Moran Bolt & Nut Mfg. Co. v. Caldwell*, 144 S. W. 472, 474, 240 Mo. 358.

The word "requires," as used in Rem. & Bal. Code, § 4003, providing that no sheriff, deputy sheriff, or coroner shall be liable for neglecting or refusing to serve any civil process unless his legal fees and indemnity bond, if he "requires" one, are first tendered to him, is equal to "demand," and a levying officer has the unqualified right to require an indemnifying bond in all cases where he is requested to seize and take into his possession personal property under a process placed in his hands for service. *Canfield-Caulkins Implement Co. v. Cowden*, 127 Pac. 216, 70 Wash. 587.

A contract for the purchase of stone provided that the vendor should furnish to the purchaser not less than 5,000 and no more than 8,000 cubic yards of stone, and that, if more than 5,000 were required, three weeks' notice should be given for the extra amount. The vendor sued for a breach of contract before 5,000 yards had been delivered. Held, that he could only recover damages for the difference between the stone furnished and the 5,000 yards referred to in the contract, there being no agreement that he should furnish the stone for any particular work, or for use in any particular place, nor allowing the vendor to furnish more than 5,000 yards without notice from the purchaser that more was required; the word "required" referring to the notice of requirement and not the necessity of having more stone to complete the job. *Ready v. J. L. Fulton Co.*, 72 N. E. 317, 319, 179 N. Y. 399.

In a fire policy making the loss payable 60 days after its ascertainment, including an award by appraisers when appraisal has been required, the word "required" implies more than the existence of some fact making a thing necessary, and includes a request or demand as an element of the necessity. *American Ins. Co. of Newark, N. J., v. Rodenhouse*, 128 Pac. 502, 504, 36 Okl. 211.

The word "required," as used in a policy of fire insurance, providing that no loss therein shall become payable until 60 days after the notice, ascertainment, estimate, and satisfactory proof of the loss "herein required" have been received by the company, including the award by appraisal when appraisal has been "required," may mean not only "requested," or "demanded," but "made necessary," or "made an essential condition," as the term is defined in the *Century Dictionary*. *Graham v. German American Ins. Co.*, 79 N. E. 931, 933, 75 Ohio St. 374, 15 L. R. A. (N. S.) 1055, 9 Ann. Cas. 79.

Rev. St. 1899, § 8822, providing that the owner, etc., of any mine shall keep a sufficient supply of timber, when required, to be used as props so that the workmen may at all times be able to properly secure the workings from caving in, and it shall be the duty of the owner, etc., to send down

props when required, means that the mining company shall keep on hand a sufficient supply of props so that, when a miner requests them, it shall send them down without unnecessary delay to enable him to prop his room; and the word "required" does not mean when needed, so as to impose upon the master the duty of sending down the timbers without any demand or request from the employé. *Wojtylak v. Kansas & T. Coal Co.*, 87 S. W. 506, 517, 188 Mo. 260; *McKinnon v. Western Coal & Mining Co.*, 96 S. W. 485, 488, 120 Mo. App. 148.

St. 1895, p. 273, c. 207, provides that for each day's actual attendance when legally "required" to attend on the superior court witnesses shall be entitled per day to \$2 in civil cases, and may demand the payment of their mileage and fees for one day in advance, and, when so demanded, shall not be compelled to attend unless the sum shall have been paid, and Code Civ. Proc. § 1985, declares that a subpoena is a process by which the attendance of a witness is required. Held, that the word "required," was synonymous with "requested," meaning merely to give notice, and since the party making a request for the attendance of a witness is liable for the statutory fee, in case the witness attends, such party may tax costs for such attendance, though the witness was not subpoenaed. *Linforth v. San Francisco Gas & Electric Co.*, 90 Pac. 716, 718, 9 Cal. App. 434.

#### Discretion implied

The word "required," as used in Acts Md. 1898, c. 123, § 758, by which the police commissioners are "required" to make a detail of policemen for park service, is directory merely, and does not create an imperative absolute duty, admitting of no discretion. *Upshur v. City of Baltimore*, 51 Atl. 953, 958, 94 Md. 743.

The word "required," as used in an act providing that the municipal authorities in cities of 5,000 inhabitants or more are "hereby authorized, empowered, and 'required'" to adopt such ordinances as would be necessary to prevent stock running at large, is equivalent to "commanded," and is mandatory on the municipal authorities of the cities and towns to which it applies. There is no discretion left with those governing bodies as to the passage of such ordinances, and, without a violation of municipal duty, they cannot forego the discharge of the obligation. The duty is entirely ministerial, and mandamus is the proper remedy to compel adoption of such ordinances. *Huey v. Waldrop*, 37 South. 380, 381, 141 Ala. 318.

When, after the filing of a libel against a vessel and giving the stipulation to answer judgment, the claimant and owner of the vessel dies, and the answer is put in by the administrator of his estate, the rule with regard to exclusion of parties in interest (*U. S. Rev. St. § 858*, which contains an exception

in favor of parties called to testify to transactions with the deceased by the opposite party or "required" to testify thereto by the court) applies as if the case were an ordinary common-law action brought against the administrator; and in such case the surviving party is not entitled, as a matter of right, to testify as to transactions with the deceased; but, when the court can see that justice demands that he should be sworn, it is within its discretion to permit his testimony to be given. *The Poland*, 19 Fed. Cas. 908, 909.

#### As fairly reasonably required

The word "require," as used in the phrase "such as the said party of the second part may require for its own purposes," etc., in a municipal electric lighting contract, refers to such a reasonable amount as the reasonable exigencies of the municipal service might call for. *Albany Power & Mfg. Co. v. City of Albany*, 65 S. E. 886, 890, 133 Ga. 375.

A contract between a promoter of a proposed railroad and certain subscribers provided that the promoter would cause the railroad company to be organized, and that the company would build a line to A., where it would connect with two specified railroads. The subscribers agreed to procure a right of way, depot grounds, etc., at their expense, according to a proposition of a general solicitor attached to the contract, and which contained a provision to "give the company whatever right of way, depot grounds, etc., it may 'require' at A." Held, in view of the object to be attained—the connection with the other railroads—all that the company could "require" of the subscribers were right of way, depot grounds, etc., reasonably necessary to accomplish the connection, and it was not entitled to a right of way through the town beyond the point of connection required by the road for an ultimate extension in that direction. *Boyce v. Stringfellow*, 114 S. W. 652, 654, 52 Tex. Civ. App. 504.

#### Intention to allow no fee indicated

The word "required," as used in Laws 1891, p. 126, c. 109, authorizing the issuance of child labor permits by the county judge, and providing that "no charge or fee shall be required" by him, indicates a legislative intent to make such permits free to the applicants, and the statute does not prevent him from recovering from the county the per diem compensation allowed by St. 1898, § 2454, as amended by Laws 1903, p. 81, c. 45, as for the time actually engaged in matters not appertaining to probate business, and as Laws 1895, p. 493, c. 249, conferring civil jurisdiction on the county judge of Lincoln county, saves him the right to the per diem compensation allowed by section 2454, he is entitled to such compensation from the county for time actually engaged in passing on applications for such permits. *Hoffman v. Lincoln County*, 118 N. W. 850, 852, 137 Wis. 353.

**As necessary**

The word "necessary" or "required," as used in connection with expenses of the government, does not mean those expenses which are absolutely indispensable and without which government could not be maintained, but it imports no more than that one thing is convenient or essential to another, and the choice of what may be so convenient, useful, or essential is necessarily left to the Legislature and cannot be reviewed by the courts. *State ex rel. Lucero v. Marron*, 128 Pac. 485, 490, 17 N. M. 304.

The word "required," as used in Ky. St. 1903, § 1321, providing a penalty for Sabbath working, except "work required" in maintaining or operating railroads, etc., means that which is necessary, and does not refer to work which may as well be done on other days. *Commonwealth v. Chesapeake & O. R. Co.*, 108 S. W. 851, 852, 128 Ky. 542.

Where a will provides that the widow may draw from the estate all the money required for her support and maintenance, the word "require" does not mean an amount needed or necessary for such purpose, but includes such sums as she may wish to use for such purpose. *Blair v. Blair*, 108 Pac. 827, 828, 82 Kan. 464.

A request for bids for coal for a city asked for coal to be delivered "as needed" and also as fast as "required." The bids offered to deliver at such times and in such quantities as the city might direct, and the body of the contract stated in one place that the coal should be delivered promptly "as ordered," and in another, that on failure to make delivery "as ordered," the city might either forfeit the contract or buy coal at the contractor's expense in the open market. Held, that the words "order" and "direct" should be construed as synonymous with the word "require," and that the word "require" was used as the substantial equivalent of "need." *McLean County Coal Co. v. City of Bloomington*, 84 N. E. 624, 627, 234 Ill. 90.

Where a contract for the sale of coal requires the sellers to deliver as "required," and the parties construe it as meaning that it is to be delivered as "needed," such construction will be adopted in litigation as to the meaning. *W. H. Purcell Co. v. Sage*, 65 N. E. 723, 725, 200 Ill. 342.

The word "required," as used in the provision of the Constitution, as to appropriations for expenses required by law, means "to have need or necessity for." *State ex rel. Lucero v. Marron*, 128 Pac. 485, 490, 17 N. M. 304.

**Prohibit equivalent**

The mandate of New York Laws 1897, c. 415, § 110, providing that no employé shall be "required or permitted" to work in a bakery more than 60 hours in any one week, is the substantial equivalent of an enactment

that "no employé shall contract or agree to work" more than 10 hours per day; there being no real distinction between the words "require" and "permit." The law is unconstitutional as interfering with freedom of contract. *Lochner v. New York*, 25 Sup. Ct. 539, 541, 198 U. S. 45, 49 L. Ed. 937, 3 Ann. Cas. 1133.

**Record or registry as required by law**

A state statute, which "requires" a conveyance or transfer to be recorded in order to be effectual against any class or classes of persons, is a law by which such recording is "required," within the meaning of Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 790, which defines preference given by a debtor within four months prior to his bankruptcy, and provides that, "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is "required." *Loeser v. Savings Deposit Bank & Trust Co.*, 148 Fed. 975, 979, 78 C. C. A. 597, 18 L. R. A. (N. S.) 1233. Contra, *In re Chadwick*, 140 Fed. 674, 678. In this provision of the Bankruptcy Act the word "required" has reference to the character of the instrument of transfer required to be recorded by the state law, rather than to the particular individuals who by reason of adventitious circumstances may or may not be affected by an unrecorded instrument. The purpose and effect of such amendment was to change the rule applied to the original and prior acts, under which, not only the requirement of recording, but the effect of a failure to record were controlled by the state law, by making instruments of transfer required by the state law to be recorded, in the sense in which such phrase is ordinarily used, speak from the date of recording, and not the date of execution, upon the question of voidable preferences. *First Nat. Bank v. Connett*, 142 Fed. 33, 36, 73 C. C. A. 219, 5 L. R. A. (N. S.) 148. The word "required," found in the phrase, "the recording or registering of the transfer, if by law such recording or registering is required," of the amendment of section 60a, Bankruptcy Act, has reference to the character of the instrument of transfer required to be recorded by the state law rather than to the particular individuals who, by reason of adventitious circumstances, may or may not be affected by an unrecorded agreement. *In re Reynolds*, 153 Fed. 295, 300. By the Ohio statute, providing that unrecorded deeds, as to bona fide purchasers for value without knowledge, are void, record of deed is "required," within this provision of the Bankruptcy Act. *Ragan v. Donovan*, 189 Fed. 138, 144. And so, by the Nebraska statute, providing that every chattel mortgage not accompanied by immediate delivery, and followed by continued change of possession, shall be absolutely void

as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, "unless it or a copy is filed with the county clerk for registration, the registration of a mortgage is "required," within the Bankruptcy Act. *Mattley v. Giesler*, 187 Fed. 970, 972, 110 C. C. A. 90. Under this provision of the Bankruptcy Act, a mortgage of property in New York, which is not required by the laws of the state to be recorded to be valid, except as against subsequent purchasers or mortgagees in good faith, for value, takes effect, for the purpose of computing the four months' period, at once on its execution, without reference to its recording, and, if executed more than four months prior to the bankruptcy of the mortgagor, does not constitute a preference, and creates a valid lien, in the absence of proof that it was withheld from record pursuant to agreement for the purpose of defeating the provisions of the bankruptcy law, or that other persons were thereby induced to extend credit to the mortgagor or forego their legal rights. The word "required," in this provision, does not mean the same as "permitted," or the same as the words "required in any case, or for any purpose." In *re Hunt*, 139 Fed. 283, 286.

#### Service requiring presence

A yard foreman of a railway company, in the discharge of whose duties it was customary and necessary for him to ride on a yard engine, and whose position on the step of the engine, at the time he was thrown therefrom, was the usual and proper place for him to be, is an employé engaged in service "requiring" his presence on an engine, within Const. § 162 (Va. Code 1904, p. cclix), abolishing, as to such an employé, the doctrine of fellow servant, so far as it affects the employer's liability for injuries to the employé resulting from another employé's acts or omissions, and authorizing a recovery for injury due to the act or omission of a co-employé in another department or in charge of a switch, signal point, or engine; that section not being limited to an employé actually engaged in the operation of the engine, but extending to others present in the reasonable and proper discharge of their duties. *Southern Ry. Co. v. Smith*, 59 S. E. 372, 373, 107 Va. 353.

#### REQUIRED BY LAW

See *Business Required by Law*.

See, also, *Law*.

The expression "required by law," employed in a statute, refers to statutory law. *People v. Knapp*, 132 N. Y. Supp. 747, 750, 147 App. Div. 436.

In Ky. St. § 3098, as amended and reenacted by Acts 1910, c. 107, providing that when, in any city of the second class having a street railway, the railway company is required by law or its franchise, or by any con-

tract with the city, to pave any part of a street or alley, the cost shall be assessed against the company, the term "required by law" applies where the general council passes an ordinance making the requirement, and such a requirement by ordinance is authorized by the act. *City of Newport v. Silva*, 137 S. W. 546, 549, 144 Ky. 450.

#### REQUIREMENT

The word "requirements," as used in a policy of fire insurance providing that no action should be maintained on the policy "until after full compliance by the insured with all the foregoing 'requirements,'" may mean "essential conditions" or "things made necessary," according to the definition of the word in the Century Dictionary. *Graham v. German American Ins. Co.*, 79 N. E. 932, 933, 75 Ohio St. 374, 15 L. R. A. (N. S.) 1055, 9 Ann. Cas. 79.

Where a party agrees to purchase certain goods for his "requirements," he thereby contracts to purchase what he shall need in the regular course of his business, and not merely what he may choose to order. *Russell, Burdsall & Ward v. Excelsior Stove & Mfg. Co.*, 120 Ill. App. 23, 33.

The words "requirements of this section," in Local Improvement Act, § 41 (*Hurd's Rev. St. 1903*, c. 24, § 547), requiring the filing, before final hearing of the correctness of assessments for a local improvement, of an affidavit "showing a compliance with the requirements of this section," refer only to the giving of the notices provided for in the section; and an affidavit in the language of the section, made by the proper person, is sufficient, though it does not show a compliance with sections 39 and 40 of the act (*Hurd's Rev. St. 1903*, c. 24, §§ 545, 546). *Howe v. City of Chicago*, 79 N. E. 421, 422, 224 Ill. 95.

The statute of Nebraska (Comp. St. 1909, c. 32, § 3647) providing that every chattel mortgage not accompanied by immediate delivery and followed by continued change of possession "shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith," unless it or a copy is filed with the county clerk for registration, is a "requirement of registration," within the meaning of Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799. *Mattley v. Giesler*, 187 Fed. 970, 972, 110 C. C. A. 90.

#### REQUISITE

##### REQUISITE BOND

The "requisite bond," named in Rev. St. c. 6, § 125, is not such a bond as the assessors may require, but is such as is required by section 128, providing that the assessor shall require the constable or collector to



give bond for the faithful discharge of his duty to the residents of the town, with such sureties as the municipal officers approve. *Smith v. Randlette*, 56 Atl. 199, 200, 98 Me. 88.

### REQUISITE MAJORITY

As used in a constitutional provision that, whenever the requisite majority of the judges of the Supreme Court of Appeals sitting are unable to agree upon a decision, the case shall be reheard by a full bench, the words "requisite majority" means that the assent of at least three of the judges shall be required to determine that any law is or is not repugnant to the Constitution. *Funkhouser v. Spahr*, 46 S. E. 378, 379, 102 Va. 306.

### REQUISITE NOTICE

The term "requisite notice," in a statute authorizing a notary to give requisite notice or notices on protest of notes, means that he should give such notice or notices as are necessary to charge all the parties who are sought to be made liable on the paper and whose liability is dependent upon notice. *Bowling v. Arthur*, 34 Miss. 41, 54.

## RES

### RES ADJUDICATA

See, also, Final Decree or Judgment; Former Adjudication; Law of the Case; Matter in Issue.

"Res judicata" is a thing adjudged. *First Nat. Bank of Covington v. City of Covington*, 129 Fed. 792, 794.

The rule of "res judicata" is based upon the idea that there should be an end of litigation, as well as upon the maxim that one should not be twice vexed for the same cause. *Ludwick v. Penny*, 73 S. E. 228, 231, 158 N. C. 104.

The doctrine of "res judicata" is not a mere rule of procedure, but a rule of justice unlimited in operation, which must be enforced whenever its enforcement is necessary for the protection of rights and preservation of the repose of society, based upon the grounds that there should be an end to litigation, and that a person should not be twice vexed for the same cause. In *re Walsh's Estate*, 74 Atl. 563, 565, 80 N. J. Eq. 565.

The doctrine of "res judicata" is that a question once determined by a judgment on the merits is forever settled so far as the litigants and those in privity with them are concerned. *Herpolsheimer v. Acme Harvester Co.*, 119 N. W. 30, 32, 83 Neb. 53.

The term "res judicata" means that a question which is once decided is, in the absence of fraud, collusion, or review, finally decided as between the parties to the action and their privies. *State ex rel. Forgue v.*

*Superior Court of Lewis County*, 127 Pac. 313, 315, 70 Wash. 670.

"The doctrine of 'res adjudicata,' or estoppel by reason of a former judgment, rests upon the principal that a cause of action which has been once determined upon its merits by a competent tribunal, between parties over whom that tribunal had jurisdiction, cannot afterward be litigated by them in another proceeding, either in the same or a different tribunal, and it is immaterial whether such cause of action is of equitable or of legal cognizance, or whether the judgment was given in a common-law court or was rendered by a court of equity. \* \* \* But, if the judgment in either tribunal is rendered for a reason or upon a ground not involving the merits of the controversy, no such effect can result." *Shively v. Eureka Tellurium Gold Min. Co.*, 89 Pac. 1073, 1075, 5 Cal. App. 236 (quoting *City of Oakland v. Oakland Water Front Co.*, 50 Pac. 277, 118 Cal. 160, and citing *Pyle v. Piercy*, 55 Pac. 141, 122 Cal. 383; *South San Bernardino Land & Improvement Co. v. South San Bernardino Nat. Bank*, 59 Pac. 699, 127 Cal. 245; *Beronio v. Ventura County Lumber Co.*, 61 Pac. 958, 129 Cal. 232, 79 Am. St. Rep. 118; *Freeman v. Barnum*, 63 Pac. 691, 131 Cal. 387, 82 Am. St. Rep. 355; *Moore v. Russell*, 65 Pac. 624, 133 Cal. 297, 85 Am. St. Rep. 166).

The well-nigh universal rule is that the judgment of a court of competent jurisdiction, whether it be a court of record or not, upon a point litigated between the parties, is conclusive in all subsequent controversies directly involving the same question. It makes no difference whether that adjudication was in a proceeding according to the course of the common law, or summary in its character. It is quite enough that the question in controversy was submitted to a judicial officer, to be determined in a judicial way; that the parties and their proofs were heard, and their rights settled by a judicial determination. *State v. Corron*, 62 Atl. 1044, 1051, 73 N. H. 434, 6 Ann. Cas. 486 (quoting and adopting definition in *Marsteller v. Marsteller*, 19 Atl. 344, 132 Pac. 517, 19 Am. St. Rep. 604).

There are two deductions that may be made as to the rule of "res judicata" from the cases: First, that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another court for a different purpose, but neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incident-

ally cognizable, nor of any matter to be inferred by argument from the judgment. *Baumhoff v. St. Louis & K. R. Co.*, 104 S. W. 5, 10, 205 Mo. 248, 120 Am. St. Rep. 745.

"When a tribunal having jurisdiction of the subject-matter and the parties has once decided a question, it is 'res adjudicata' between those parties and cannot be relitigated in an original proceeding before another tribunal." *State ex rel. Roberts v. Lawrence*, 92 Pac. 1131, 1133, 76 Kan. 940 (quoting and adopting definition in *Norton v. Graham*, 7 Kan. 166 [syl. 2]).

The term "res adjudicata" signifies that a judgment is final and conclusive between the parties when rendered on a verdict on the merits, not only as to the facts actually litigated and decided, but upon all facts which were necessarily involved in the issue. *Nelson Bennet Co. v. Twin Falls Land & Water Co.*, 92 Pac. 980, 987, 13 Idaho, 767 (citing *Cummings v. McGehee*, 9 Port. [Ala.] 349).

"The doctrine of 'res adjudicata,' which accords with substantial justice, forbids the bringing of several vexatious lawsuits upon issues which might have been litigated in a single one. \* \* \* The tendency of courts is to require a party who brings a matter into litigation to present his entire case and all of the evidence then available, and also to regard a judgment in the case as conclusive between the same parties upon all things essentially connected with the subject-matter of the litigation, and which the parties might have had decided." A recovery for a part of goods wrongfully taken is a bar to a later action between the same parties to recover for the remainder of the same stock of goods, although taken and sold under another attachment, which had been levied before the first action was brought. *Burdge v. Kelchner*, 66 Kan. 642, 72 Pac. 232, 233 (citing and adopting *Bolen Coal Co. v. Whittaker Brick Co.*, 35 Pac. 810, 52 Kan. 747; *Whitaker v. Hawley*, 1 Pac. 508, 30 Kan. 317; *Hoisington, Sheriff, v. Brakey*, 3 Pac. 353, 31 Kan. 560; *Wichita & W. R. Co. v. Beebe*, 18 Pac. 502, 39 Kan. 465; *Shepard v. Stockham*, 25 Pac. 559, 45 Kan. 244; *Ellis v. Crowl*, 26 Pac. 454, 46 Kan. 100).

If a trial court had jurisdiction of the subject-matter and the parties to a suit, its decree, even if erroneous, is binding alike upon all of them. "In the application of the principle of 'res judicata,' there is no difference between courts of law and courts of equity. When an issue of fact or of law has been adjudicated upon the merits in either tribunal it cannot be again litigated in another." The foreclosure of a mortgage for the interest only on the principal debt secured thereby, where the whole debt, both principal and interest, is due and payable at the time of such foreclosure, ordinarily exhausts the lien of the mortgage, and is a bar

to a second foreclosure suit. But where the decree in such former suit specifically provides that it is subject to the mortgage lien for the principal debt, and that the sale shall be made subject thereto as a first lien, the parties to the record are estopped to plead the decree as a bar to a second foreclosure to obtain the payment of said principal sum. After a judgment or decree in rem, a party to the record, who is duly served with process, and appears personally therein, is estopped from asserting any claim or defense contrary to the terms of the decree. *Nebraska Loan & Trust Co. v. Doman*, 93 N. W. 1022, 1024, 4 Neb. (Unof.) 334 (citing and adopting 2 Black, Judgm. §§ 517, 518).

The "right, question, or fact," which when put in issue and determined, to become the subject of the rule of "res judicata," must be a question of fact, as distinguished from an abstract proposition of law; and the determination must be with reference to such question or questions of fact or a mixed question of fact and law or a legal deduction arising from a state of facts common to both actions; as for example, a decision construing, as a matter of law, an agreement is binding between the parties and their privies, where the same instrument is urged as a ground of recovery or defense in a subsequent suit on a different cause of action. *State ex rel. Kennedy v. Broatch*, 94 N. W. 1016, 1020, 68 Neb. 687, 110 Am. St. Rep. 477.

"A 'judgment' rendered by a court of competent jurisdiction, determining the rights of the litigants on a cause of action or defense, is an effectual bar against future litigation over the same right determined by such judgment." *Chicago, B. & Q. R. Co. v. Cass County*, 101 N. W. 11, 12, 72 Neb. 489, 117 Am. St. Rep. 806 (quoting and adopting definition in *State ex rel. Kennedy v. Broatch*, 94 N. W. 1016, 68 Neb. 687, 110 Am. St. Rep. 477).

#### As requiring decision on merits

To constitute "res judicata" the adjudication must be on the merits. *Armstrong v. County of Manatee*, 37 South. 938, 49 Fla. 273; *Robb v. New York & C. Gas Coal Co.*, 65 Atl. 938, 940, 216 Pa. 418.

The doctrine of "res judicata" is that a question once determined by a judgment on the merits is forever settled so far as the litigants and those in privity with them are concerned. *Herpolshelmer v. Acme Harvester Co.*, 119 N. W. 30, 32, 83 Neb. 53.

Where a so-called judgment roll of the Municipal Court contains no testimony taken upon the trial, and the only evidence of any judgment having been entered was a statement: "As the proof stands, and upon the testimony before me, the plaintiff cannot succeed. Judgment for defendant"—the judgment was not shown to be on the merits, so as to be conclusive, since the only way it can be determined whether or not a judgment

of the Municipal Court is upon the merits is by an inspection of the minutes of the testimony taken. *Mossler Co. v. Cesare*, 119 N. Y. Supp. 274, 275, 65 Misc. Rep. 40.

"A general judgment or decree of dismissal, without more, renders all the issues in the case 'res adjudicata' and constitutes a bar to any subsequent suit for the same cause of action. Hence when a court dismisses a suit upon some ground which does not go to the merits of the cause of action, but leaves them open to consideration in another court, or at another time, or in another way, the decree of dismissal must expressly adjudge that it is rendered for the specific reason upon which it is based or must expressly provide that it is made without prejudice." *Fowler v. Osgood*, 141 Fed. 20, 24, 72 C. O. A. 270, 4 L. R. A. (N. S.) 824 (citing *Indian Land & Trust Co. v. Shoenfelt*, 135 Fed. 484, 487, 68 C. C. A. 196; *United States v. Pine River Logging & Improvement Co.*, 78 Fed. 319, 325, 24 C. C. A. 101, 107; *Speer v. Board of Commissioners*, 88 Fed. 749, 752, 32 C. C. A. 101, 105; *Mitchell v. Dowell*, 105 U. S. 430, 26 L. Ed. 1142; *Cecil National Bank v. Thurber*, 59 Fed. 913, 914, 8 C. C. A. 365, 367; *Russell v. Clark*, 7 Cranch, 69, 90, 3 L. Ed. 271; *Hooven, Owens & Rentschler Co. v. John Featherstone's Sons*, 49 C. C. A. 229, 233, 111 Fed. 81, 85; *House v. Mullen*, 22 Wall. 42, 46, 22 L. Ed. 838).

#### Necessary elements

"In order to make a matter 'res judicata' there must be the concurrence of the four conditions following: (1) Identity in the thing sued for; (2) identity of the cause of action; (3) identity of persons and the parties to the action; (4) identity of the quality in the person for or against whom the claim is made." *Turner Tp. v. Williams*, 97 N. W. 842, 843, 17 S. D. 548 (quoting *Bouv. Dict.*); *State v. Kaemmerling*, 111 Pac. 443, 83 Kan. 383; *Creegan v. Hyman*, 46 South. 952, 954, 93 Miss. 481; *Seigfried v. Boyd*, 85 Atl. 72, 73, 237 Pa. 55; *Virginia-Carolina Chemical Co. v. Fisher*, 50 South. 504, 507, 58 Fla. 377.

To constitute a former judgment a bar or estoppel in a pending action, there must exist in the two cases identity of subject-matter, of cause of action, of persons and parties, and of the quality in the persons for or against whom the claim is made. *Vincent v. Mutual Reserve Fund Life Ass'n*, 58 Atl. 963, 964, 77 Conn. 281.

A matter is not *res adjudicata* unless there be identity of the thing sued for, of the cause of action, of the persons and parties, the quality of the persons for and against whom the claim is made, and the judgment in the former action be so in point as to control the issue in the pending one. *Hoffmeyer v. Trost*, 85 Atl. 221, 222, 83 N. J. Law, 358.

The rule of "*res adjudicata*" is confined to those cases where the parties to the two

suits are the same, the subject-matter the same, the point directly in issue is identical, and the judgment has been rendered in the first suit on that point. *Ryan v. Young*, 41 South. 954, 957, 147 Ala. 660 (citing *McCall v. Jones*, 72 Ala. 368; *Gilbreath v. Jones*, 66 Ala. 129; *Fidelity & Deposit Co. of Maryland v. Robertson*, 34 South. 933, 136 Ala. 379).

A judgment is not "*res adjudicata*," unless the identical matter in issue in the subsequent proceeding was determined by the former adjudication. *Murphy Chair Co. v. American Radiator Co.*, 137 N. W. 791, 795, 172 Mich. 14.

To constitute estoppel, the judgment pleaded in bar must be a valid judgment rendered by a court having jurisdiction, and these facts must be shown to justify the reception in evidence of such judgment. *Page v. Garver*, 90 Pac. 481, 482, 5 Cal. App. 383.

The basis upon which an adjudication bars a further action is that the same question was actually and directly in issue, and judicially determined in a former suit between the same parties or their privies. *Keane v. Pittsburg Lead Min. Co.*, 105 Pac. 60, 65, 17 Idaho, 179.

The test of the identity of causes of action to determine the question of *res judicata* is the identity of the facts essential to the maintenance of the action, and, if there is any uncertainty, the burden of showing the same is on the party claiming the benefit of the former judgment. *Prall v. Prall*, 50 South. 867, 870, 58 Fla. 496, 26 L. R. A. (N. S.) 577.

"The doctrine of '*res judicata*' does not rest upon the fact that a particular proposition has been affirmed and denied in the pleading, but upon the fact that it has been fully and fairly investigated and tried; that the parties have had an adequate opportunity to say and prove all that they can in relation to it; that the minds of the court and jury have been brought to bear on it, and so it has been solemnly and finally adjudicated. These conditions are fully met with when any question, though foreign to the original issue, becomes the decisive question." For these reasons the correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict, whether it was technically in issue or not. *Gulling v. Washoe County Bank*, 89 Pac. 25, 26, 29 Nev. 257.

"The essential conditions upon which the plea of '*res judicata*' becomes applicable are the identity of the thing demanded, the identity of the cause of demand, and of the parties in the character in which they are litigants." "It is for the public good that there be an end to litigation; and, if there be any one principal of law settled beyond all question, it is this: That whenever a cause of

action, in the language of the law, 'transit in rem judicatum,' and the judgment thereupon remains in full force and unreversed, the original cause of action is merged and gone forever. A plea of 'res judicata' must show either an actual merger, or that the same point has already been decided between the same parties; that the plaintiff had an opportunity of recovering, and but for his own fault might have recovered in the original suit, that which he seeks to recover in the second action." A judgment in favor of a city, in an action by a wife in her own right for personal injuries sustained in consequence of a defective sidewalk, is not *res judicata* in an action by the husband against the city for damages to him by reason of such injuries. *Womach v. City of St. Joseph*, 100 S. W. 443, 445, 201 Mo. 467, 10 L. R. A. (N. S.) 140 (quoting and adopting definition in *Herm. Estop.* §§ 100, 102).

"*Res judicata*" is the decision of the court upon a contested matter between parties. When a judgment or decree is rendered by consent, or is the result of a compromise, it cannot be admitted as "*res judicata*." Where a judgment in a suit for maintenance, brought by a wife against her husband in another state, was entered on stipulation, and recited that the stipulation admitted that the separation was without any fault on the part of the wife, and such judgment would not have estopped the husband, in the state where it was rendered, to recontest the question of the wife's desertion in another suit, it could not have such effect in a suit for divorce brought by the husband in California on the ground of desertion. *Harding v. Harding*, 74 Pac. 284, 286, 140 Cal. 600 (citing *Wadhams v. Gay*, 73 Ill. 417).

The essence of estoppel by judgment is that some right, question, or fact in dispute between parties has been judicially determined by a court of competent jurisdiction, and, where such judgment is pleaded in bar of a subsequent action, the question for determination is whether such question has been so determined between the same parties and their privies, and not upon what evidence it was determined or the reason therefor. *Fitch v. Stanton Tp.*, 190 Fed. 310, 314, 111 C. C. A. 210.

A judgment in a suit to recover land against the tenant in possession, by a party claiming through the purchaser at a sale under a deed in trust given to secure notes given as part of the purchase price, adjudging the plaintiff entitled to a half interest in the land, and that the other half belonged to the administrator and heirs of the wife of the purchaser who executed the notes and trust deed, she having purchased a half interest in the land prior to her death, was *res judicata* in an action by the administrator of the wife and her minor son against the plaintiff

in the former action to recover a half interest in the land and for partition, since the action was for the same land, between the same parties or their privies, and involved the same facts as in the second case. *Whitmire v. Powell*, 125 S. W. 889, 890, 103 Tex. 232.

"In order to constitute 'estoppel by judgment,' the same matter must have been in issue in the former suit, and the precise fact determined by the former judgment." A judgment of the probate court, in which it was found that more than six years had intervened between the time the cause of action presented by a claimant arose and the time set for the hearing of said claim, disallowing the claim for that reason, is not a finding that the debt was barred on the date the foreclosure action was begun, and hence is no bar to that action. *Hickey v. Anheuser-Busch Brewing Ass'n*, 85 Pac. 838, 36 Colo. 386.

#### Matters included

"The doctrine of estoppel (that is, the conclusiveness of a former judgment) is restricted to facts directly in issue, and does not extend to facts which rest in evidence and are merely collateral." *People v. Albers*, 100 N. W. 908, 910, 137 Mich. 678 (quoting *Freem. Judgm.* § 257).

As a general rule, an "estoppel by judgment" resides in the judgment itself, and not in the reason for rendering it, and when the decree is definite and certain the opinion of the court cannot be used to show what matters were considered or determined. *Gentry v. Pacific Live Stock Co.*, 77 Pac. 115, 117, 45 Or. 233.

As a general rule a judgment in a former action is not conclusive of any matters which only come collaterally in issue, nor of any matters incidentally cognizable, nor of any collateral facts offered in evidence to establish facts in issue. *Ahlers v. Smiley*, 104 Pac. 997, 998, 11 Cal. App. 343.

The judgment of a court of competent jurisdiction on a question of law or fact, or of mixed law and fact, once litigated and determined, is, so long as it remains unreversed, conclusive upon the parties and their privies not only as to the particular property involved in the suit, but as to all future litigation between the same parties or their privies, touching the subject-matter, not only as to every matter which was offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for that purpose, and though the property involved in the subsequent litigation be different from that which was involved in the first, if there be substantial identity in the subject-matter of the two suits. Where the second action is upon a different claim but between the same parties, the judgment in the prior action operates as

an estoppel only as to those matters in issue or points controverted upon the determination of which the findings or verdict was rendered. Where, in an action by legatees against an executrix to set aside her assignments of mortgages and stock, she claimed that testatrix had given her the mortgages in consideration of her furnishing testatrix a home for life, but offered proof only of the transfer of part of the mortgages when she had the right and opportunity to prove her entire plea, and the court held that she had not supported her plea of a transfer to her for a valuable consideration, and on appeal based her contention upon legal grounds not tenable because of her failure to prove her entire plea, the judgment was *res judicata* against her as to the entire plea on her final accounting, where she claimed the proceeds of such property in consideration of giving testatrix a home, which claim one of the complainants in the former suit and a personal representative of the other contested, under the rule that a judgment is final between the parties as to all defenses which were or could have been set up in the earlier suit, provided the later suit involves substantially the same matters between the same parties. In *re Walsh's Estate*, 74 Atl. 563, 565, 80 N. J. Eq. 565.

Upon a plea of former adjudication, a matter will be held "*res judicata*," although not raised as an issue by the pleadings in the former action, if from the record it appears that it formed one of the premises upon which the judgment necessarily rested. "The doctrine of '*res judicata*' does not rest upon the fact that a particular proposition has been affirmed and denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried; that the parties have had an adequate opportunity to say and prove all that they can in relation to it; that the minds of court and jury have been brought to bear upon it, and so it has been solemnly and finally adjudicated. \* \* \* For these reasons, the more correct doctrine is that the estoppel covers the point which was actually litigated, and which actually determined the verdict or finding, whether it was statedly and technically in issue or not." *Bleakley v. Barclay*, 89 Pac. 906, 910, 75 Kan. 462, 10 L. R. A. (N. S.) 230 (quoting 2 Black, Judg. § 614).

Where a party of the first part to a contract of sale has sued the party of the second part and his guarantor in justice's court for an installment due under the contract, and has recovered judgment on certain defenses set up by them, such defenses are "*res judicata*" and cannot be urged in another action brought by the same plaintiff for other installments due on the same contract, though, in the second action, the guarantor is not made a defendant with the party of

the second part, *Jones v. Silver*, 70 S. E. 1109, 1112, 97 S. W. 231.

Under the rulings of the United States Supreme Court, a judgment is not "*res adjudicata*" in a second action on a different cause of action, unless the question was actually litigated in the original action. *Kirven v. Virginia-Carolina Chemical Co.*, 58 S. E. 424, 425, 77 S. C. 493.

#### Parties

The reason upon which the decisions rest is that there can be no "*estoppel*" arising out of judgment unless the same parties have had their day in court touching the matter litigated, and unless the judgment is equally available to both parties, and there can be no estoppel under our law or under general principles of jurisprudence, unless it is mutual. One of several joint tort-feasors, sued by the person injured, cannot plead by way of estoppel a judgment in favor of another joint tort-feasor, rendered in an action by the person injured, for one may try his case against every one who has done him a wrong by immediate and direct culpable action. *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 89 N. E. 193, 218, 203 Mass. 159, 40 L. R. A. (N. S.) 314 (citing and adopting *Sprague v. Oaks* [Mass.] 19 Pick. 455).

That a judgment in a former action shall bind parties and privies in a subsequent action, it must have directly decided a point material in the former action which is in litigation in the subsequent action, and where parties defendant in a subsequent action, not identical with the parties defendant in a prior action involving the same question, join in offering in evidence in support of their defense the record and judgment in the prior action, they are all equally bound by the judgment. *Richardson v. Southwestern Cotton Seed Oil Co.*, 81 Pac. 781, 783, 784, 15 Okl. 263.

#### As applying to points which might have been raised

The doctrine of "*res judicata*" embraces, not only questions determined in the former suits, but also matters which might have been raised and determined therein. *Ward v. Field Museum of Natural History*, 89 N. E. 731, 736, 241 Ill. 496.

A decision on appeal is "*res judicata*" between the parties, not only as to all matters pleaded, but as to all the matters necessarily involved, and which might have been pleaded. In *re Cook's Estate*, 122 N. W. 578, 579, 143 Iowa, 733.

"The plea of '*res judicata*' applies, not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought for-

ward at the time." *W. C. Belcher Land Mortg. Co. v. Norris*, 78 S. W. 390, 391, 34 Tex. Civ. App. 111.

The principle of "res judicata" embraces not only what was actually determined in the former case, but also extends to any other matter properly involved, and which might have been raised and determined in it. *In re Assessment of Property of Northwestern University*, 69 N. E. 75, 76, 206 Ill. 64 (citing *Rogers v. Higgins*, 57 Ill. 244).

Where a second suit is upon the same cause of action and between the same parties as the first, a final judgment in the first suit on the merits is conclusive in the second suit as to every question presented, or which might have been presented under the pleadings. Where a second suit is on a different cause of action, but between the same parties as the first suit, the judgment is an estoppel in the second suit only as to every point actually litigated in the first suit, and is not conclusive as to other matters that might have been litigated. *Prall v. Prall*, 50 South. 867, 870, 58 Fla. 496, 26 L. R. A. (N. S.) 577.

All issues of fact or law which might have been adjudicated in a former suit between the same parties are foreclosed. *Ross v. Dowden Mfg. Co.*, 123 N. W. 182, 183, 147 Iowa, 180.

A judgment of a court of competent jurisdiction, rendered on the merits, is as between the parties final and conclusive of the matter in controversy, including what might or ought to have been litigated in the suit. *Crausby v. Crausby*, 51 South. 529, 530, 164 Ala. 471.

The doctrine of estoppel by former judgment rests upon the maxim that there must be an end to litigation. The rule is elementary that, when a matter is in litigation, parties are required to bring forward their whole case; and "the plea of 'res judicata' applies, not only to the points upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." A judgment against the contestants in a proceeding for the contest of a local option law election is conclusive upon every person in the territory affected, and therefore, in a prosecution for a violation of the law, the defendant is estopped to claim that the election was void by reason of the fact that the petition for the election was not filed in the county court at the term preceding the one at which the election was ordered, though that question may not have been raised in the contest case; the judgment being conclusive as to every question which might have been properly raised. *Locke v. Com-*

*monwealth*, 69 S. W. 763, 764, 113 Ky. 864 (quoting and adopting definitions in *Davis v. McCorkle*, 77 Ky. [14 Bush] 746; *Williams v. Rogers*, 77 Ky. [14 Bush] 776; *Hardwicke v. Young*, 62 S. W. 10, 110 Ky. 504; *Freem. Judgm.* § 249).

### RES GESTÆ

The "res gestæ" is defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander. They may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary in this sense that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculating policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with the act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. *Sprinkle v. United States*, 141 Fed. 811, 816, 73 C. C. A. 285 (citing *St. Clair v. United States*, 14 Sup. Ct. 1002, 154 U. S. 134, 149, 38 L. Ed. 936); *State v. Birks*, 97 S. W. 578, 582, 199 Mo. 263 (quoting 1 Whart. Ev. § 259); *State v. Kane*, 72 Atl. 39, 40, 77 N. J. Law, 244. The res gestæ are those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. *McMahon v. Chicago City R. Co.*, 88 N. E. 223, 224, 239 Ill. 334; *Jones v. United States*, 179 Fed. 584, 602, 103 C. C. A. 142 (quoting and adopting the definition in *St. Clair v. United States*, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936, which cites *Greenleaf & Bishop's Cr. Proc.* §§ 1083, 1086, and quotes and adopts the definition of Wharton).

Chamberlayne, in his notes to Taylor's Evidence, 391 (1), says: "Legal liability in any case is predicated upon the existence of some particular transaction or state of affairs, and it is this group of facts or events which make up its res gestæ." *Greenleaf on Evidence*, § 108, intimates that the phrase "res gestæ" consists of the principal fact and surrounding circumstances consisting of kindred facts materially affecting its character, and essential to be known in order to a right understanding of its nature. And both of these authors and others of repute lay it down as essential to the inclusion of a given fact within the meaning of the term that it should be contemporaneous with the princi-

pal fact, and so connected with it as to illustrate its character. And this term "contemporaneous" does not always of necessity refer to any single or ultimate fact, however important to any precise or definite time, for a "transaction" may, and not infrequently does, include a series of occurrences extending over a great length of time, and a relevant fact in any one of them, and, until the close of the matter, may come within this term "contemporaneous," and constitute a part of the "res gestæ." Thus, in a suit to cancel decedent's deed to defendants for fraud and undue influence, evidence of a decision of persons called in by decedent before the conveyance to determine whether the property was worth more than services to be rendered by defendants, and of an announcement of the decision to decedent, was admissible as part of the *res gestæ*; any fact in the transaction leading to the deed and tending to affect decedent's mind in making the deed being admissible. *Fraley v. Fraley*, 64 S. E. 381, 383, 150 N. C. 501.

"*Res gestæ*' are the circumstances, acts, or declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. An indispensable characteristic of declarations is that they must be made at the time of the act done, which they are supposed to characterize; and, further, they must be calculated to unfold the nature and quality of the facts they are intended to explain, and so to harmonize with them as obviously to constitute one transaction. Acts are pertinent if they are done pending the enterprise, and whilst it is in continuous progress to its catastrophe, and are of a nature to promote or obstruct, advance or retard, or to evince essential motive or purpose in reference to it; and declarations are pertinent if they are uttered contemporaneously with pertinent acts, and serve to account for, qualify, or explain them, and are apparently natural and spontaneous." *Goodman v. State*, 49 S. E. 922, 924, 122 Ga. 111 (citing *Travelers' Ins. Co. v. Sheppard*, 12 S. E. 18, 85 Ga. 751; *Monroe v. State*, 5 Ga. 85).

The "*res gestæ*" of a transaction is what is done during the progress of it, or so nearly upon the actual occurrence as fairly to be treated as contemporaneous with it. No precise point of time can be fixed *a priori* where the *res gestæ* ends. Each case turns on its own circumstances, and the inquiry is rather into events, than into the precise time which has elapsed. *Carswell v. State*, 72 S. E. 602, 604, 10 Ga. App. 30; *Lyles v. Same*, 60 S. E. 578, 580, 130 Ga. 294 (quoting and adopting the definition in *Hall v. State*, 48 Ga. 607, and citing *Pen. Code* 1895, § 998).

To bring a matter within the rule of "*res gestæ*," the act or declaration should be contemporaneous with the litigated transaction, must spontaneously spring out of and tend

to elucidate it, and must not be in effect a mere narrative of a past occurrence. *State v. Gardner*, 65 S. E. 630, 631, 83 S. C. 476.

The test whether declarations are "*res gestæ*" is: Were they the facts talking through the party, or the party talking about the facts? Instinctiveness is the requisite, and when this exists the declarations are admissible. *Cromeenes v. San Pedro*, L. A. & S. L. R. Co., 109 Pac. 10, 15, 37 Utah, 475, Ann. Cas. 1912C, 307.

"*Res gestæ*" is matter incidental to a main fact and explanatory of it, including acts and words so closely connected therewith as to constitute a part of it, and without knowledge of which the main fact may not be properly understood, and declarations which are the natural outgrowth of the act in controversy, though not precisely concurrent in point of time, are admissible as a part of the *res gestæ* where they are voluntary and spontaneous, and so nearly contemporaneous with the act as to be in the presence of the transaction which they illustrate. *Denver City Tramway Co. v. Brumley*, 116 Pac. 1051, 1052, 51 Colo. 251.

The "*res gestæ*" rule authorizes the admission of such circumstances and declarations as are contemporaneous with the main fact under consideration, and so closely connected with it as to illustrate its character. The term "contemporaneous," however, in such sense does not mean coincidence, but requires that the circumstance or declaration be substantially at the same time as the main fact, so that it will appear that the evidence offered has not the ear-marks of a device or afterthought, or a narrative of a transaction which is really and substantially past. *Bessierre v. Alabama City, G. & A. Ry. Co. (Ala.)* 60 South. 82, 86.

The term "*res gestæ*" in the law of evidence means a collection of primary facts constituting the necessary and immediate field of a judicial inquiry, within which field all the facts are competent evidence. *Royle Mining Co. v. Fidelity & Casualty Co. of New York*, 142 S. W. 438, 443, 161 Mo. App. 185.

The sole distinguishing feature of statements as a part of the "*res gestæ*" is that they must be the automatic and necessary incidents of the litigated act, necessary in this sense: That they are part of the immediate preparations for, or emanations of, such act, and are not produced by the calculated policy of the actors. They are the act talking for itself, not what people say when talking about the act. The statement of a person, who was knocked senseless and robbed, that defendant was the man who robbed him, made immediately after recovering his senses, is not admissible, in a prosecution of defendant for the robbery, as a part of the *res gestæ*. *Rogers v. State*, 115 S. W. 156, 157, 88 Ark. 451, 41 L. R. A. (N. S.) 357 (quoting

and adopting definition of Mr. Wharton, quoted in *Little Rock Traction & Electric Co. v. Nelson*, 52 S. W. 7, 66 Ark. 494).

Words uttered during the continuance of the main action, or so soon thereafter as to preclude the hypothesis of concoction or premeditation, whether by the active or passive party, become a part of the transaction itself, and, if they are relevant, may be proved as any other fact, without calling the party who uttered them. Thus, in an action for injuries through falling down an elevator shaft, the door of which was alleged to have been left open, a declaration of a child immediately after the accident that "a man pushed the door open, and walked in," was admissible as part of the "res gestæ." *Beal-Doyle Dry Goods Co. v. Carr*, 108 S. W. 1053, 1055, 85 Ark. 479, 14 Ann. Cas. 48 (quoting and adopting *Flynn v. State*, 43 Ark. 292, and citing and adopting *Clinton v. Estes*, 20 Ark. 225; *Carr v. State*, 43 Ark. 102; *Little Rock, M. R. & T. Ry. Co. v. Leverett*, 3 S. W. 50, 48 Ark. 333, 3 Am. St. Rep. 230).

A declaration, to be admissible as "res gestæ" "must be an undesigned part or incident of the occurrence in question. It must be, in a general sense, contemporaneous with the main occurrence, although, in case of a sudden accident or attack, the declaration would not be admissible merely because the blow or collision immediately preceded it. It must be the natural and spontaneous outgrowth of the main occurrence, and must exclude the notion of deliberation or calculation, or the design to manufacture evidence for future purposes; and, if it be a mere narrative of past events, it then is clearly within the category of inadmissible hearsay, and must, beyond doubt, be excluded." *Rulofson v. Billings*, 74 Pac. 35, 36, 140 Cal. 452 (quoting and adopting definition in *Heckle v. Southern Pac. Co.*, 56 Pac. 56, 123 Cal. 442).

The "res gestæ" are the circumstances, facts, and declarations which are connected with and illustrate a litigated fact. To admit declarations there must be a main and principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction and tend to illustrate its character. In an action for injuries to a passenger resulting from his forcible ejection from a train, a witness testified that, after plaintiff fell off the train, witness went back to plaintiff, reaching him not over three minutes from the time plaintiff fell off, and that a couple of minutes later the conductor came back and stated that plaintiff had stepped off the train backwards, but that plaintiff denied it, and said, "You pushed me off." Held, that there was no reversible error in admitting such testimony. *Pittsburgh, C., C. & St. L. R. Co. v. Halslup*, 79 N. E. 1035, 1037, 39 Ind. App. 394 (citing *Ohio & M. Ry. Co. v. Stein*, 31 N. E. 180, 133 Ind. 243, 247, 32 N. E. 831, 19 L. R. A. 733; *Louisville, N. A. & C.*

*Ry. Co. v. Buck*, 19 N. E. 453, 116 Ind. 566, 576, 2 L. R. A. 520, 9 Am. St. Rep. 883; *Bolds v. Woods*, 36 N. E. 933, 9 Ind. App. 657, 665; 3 Wigmore, Evidence, § 1750, p. 2257; *O'Connor v. Chicago, M. & St. P. Ry. Co.*, 6 N. W. 481, 27 Minn. 173, 38 Am. Rep. 288; *Sullivan v. Oregon Ry. & Nav. Co.*, 7 Pac. 508, 12 Or. 392, 53 Am. Rep. 364; *Hall v. State*, 48 Ga. 607; *Travelers' Ins. Co. v. Sheppard*, 12 S. E. 18, 85 Ga. 775; *Ohio & M. Ry. Co. v. Stein*, 31 N. E. 180, 32 N. E. 831, 133 Ind. 243, 247, 19 L. R. A. 733; *Louisville, N. A. & C. Ry. Co. v. Buck*, 19 N. E. 453, 116 Ind. 566, 2 L. R. A. 520, 9 Am. St. Rep. 883; *Louisville, E. & St. L. R. Co. v. Berry*, 28 N. E. 714, 2 Ind. App. 427; *Cincinnati, L. & A. Electric St. R. Co. v. Stahle*, 76 N. E. 551, 77 N. E. 363, 37 Ind. App. 539; *Travelers' Ins. Co. v. Mosley*, 75 U. S. [8 Wall.] 397, 19 L. Ed. 487).

#### Coincidence in time

Declarations to be a part of the "res gestæ" need not be precisely coincident in point of time with the principal fact, but, if they spring out of it, shed light upon it, and tend to explain it, are voluntary and spontaneous, and are made at a time so near as to preclude the idea of deliberation and fabrication, they are to be regarded as contemporaneous and are admissible. *Price v. State*, 98 Pac. 447, 451, 1 Okl. Cr. 358.

A declaration, to be a part of the "res gestæ," need not necessarily be coincident in point of time with the main fact proved. It is enough that the two are so clearly connected that the declaration can be considered to be a spontaneous expression of the fact or condition. Thus a witness, who testifies that he was with plaintiff when the injury occurred, may also testify that, in response to a question which he put to plaintiff as to whether he was hurt, plaintiff replied that he was. *City of Lexington v. Fleharty*, 104 N. W. 1056, 1057, 74 Neb. 626.

Neither the length of time intervening or the place of a declaration is necessarily controlling in a criminal case in determining whether the declaration is admissible as "res gestæ," the declaration being admissible if, under all the circumstances, it can reasonably be said that it is probably true as the natural and spontaneous reproduction of the picture impressed on the mind and memory of the declarant, who has been in the meantime in no state of mind to reflect and consider a narrative of the past event. Prosecutrix having been criminally assaulted near a highway, while wheeling her child in a baby carriage, and choked into insensibility on regaining consciousness found the child and carriage missing, and within half an hour approached a house about half a mile distant in an exhausted and excited condition. To the person who came to her assistance she made statements that some one had knocked her down and stolen her baby; that some one had killed her baby. "A man tried to kill



me and my baby." She repeatedly called on people present to find it. She was bleeding from wounds in the face, and, the child being found and returned to her, she was then taken into the house, after which she made certain other declarations within the space of an hour from the time of the occurrence, tending to identify defendant as the author of the crime. Held, that such declarations as were made by her prior to the time the child was found and brought to her were admissible as "res gestæ," but the subsequent declarations made in defendant's absence after prosecutrix entered the house were inadmissible. *State v. Alton*, 117 N. W. 617, 619, 105 Minn. 410, 15 Ann. Cas. 806.

In *Leahey v. Cass Ave. & F. G. Ry. Co.*, 10 S. W. 58, 97 Mo. 165, 10 Am. St. Rep. 300, it was said that a declaration, to be a part of the "res gestæ," need not be coincident in point of time with the main fact to be proved. It is enough that the two are so nearly connected that the declaration can, in the ordinary course of affairs, be said to be a spontaneous explanation of the real cause. The declaration is, then, a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue, taken together, form a continuous transaction, then the declaration is admissible. Much, therefore, depends on the nature and character of the transaction in question; for it may be, and often is, of a continuing character. It cannot be said that a mere subsequent declaration will of itself furnish a sufficient connecting circumstance. *Gotwald v. St. Louis Transit Co.*, 77 S. W. 125, 126, 102 Mo. App. 492.

"Res gestæ" means the "circumstances, facts, and declarations" which grow out of the main fact, contemporaneous with it, and serve to illustrate its character." Declarations "made under circumstances to warrant the court in presuming that they grew out of the litigated issue and illustrate the true character of the transaction, and were dependent upon it, were not designedly made or devised, for a self-serving purpose, are evidentiary facts, and not within the rule applicable to hearsay evidence." Declarations of a railroad engineer as to the cause of the accident, made in not less than five minutes after a wreck of his train, and to the first person who reached him while he was lying within a few feet of the wreck, was a part of the "res gestæ" and admissible as against the company. *Illinois Cent. R. Co. v. Houchins*, 101 S. W. 924, 925, 125 Ky. 483 (quoting and adopting the definition in *Hermes v. Chicago & N. W. Ry. Co.*, 50 N. W. 584, 80 Wis. 590, 27 Am. St. Rep. 69; *Coffin v. Bradbury*, 35 Pac. 715, 3 Idaho [Hasb.] 770, 95 Am. St. Rep. 37).

"Since a minor circumstance cannot be properly said to be part of the 'res gestæ' as to the major matter, unless it is so connected

with the latter as to speak for itself, as it is said, indicating the character of the main fact, such minor circumstance, in order to fall within the field of res gestæ, must necessarily be undesigned, and so must have an unbroken causal relation to the main subject of inquiry. At the point where that causal relation is so interrupted by time or other circumstances that what lies further on no longer appreciably illustrates the character of the main fact is the boundary line between what is and what is not res gestæ. There is no controlling rule as to the length of time between the happening of the main fact and that of the minor incident claimed to characterize the former, by means of which the validity of the claim in that regard can even be established prima facie. The time which is sufficient to break the chain under some circumstances would not be under others. Under some the time might be very brief, and under others it might be considerable. When the claimed evidentiary circumstance is so far disassociated with the main fact as not to be appreciably considered an incident of it, it is mere hearsay, not res gestæ." In a prosecution for murder, it appeared that, after the shooting, accused telephoned for a physician for deceased, waited in the room where the shooting occurred for some little time, and then went to his own room, which was in the same building, got his hat, and started for the police station to surrender himself, and where, after walking about one-third of a mile, he boarded a street car to finish his journey, and there told the motorman what had occurred. Held, that his statements to the motorman were not admissible as "res gestæ." *Johnson v. State*, 108 N. W. 55, 58, 129 Wis. 146, 5 L. R. A. (N. S.) 809, 9 Ann. Cas. 923.

Exclamations made contemporaneously with the main fact under investigation, and which evidently spring therefrom, and are calculated to throw light upon its nature, are always considered a part of the transaction itself, while that which is merely narrative in its nature, occurring after the main transaction is closed, cannot be considered a part of the transaction, but must be considered as simply hearsay; but the line between the two classes is sometimes very shadowy and hard to draw. Defendant was charged to have caused decedent's death by striking her with a lamp, from which she was burned. After the occurrence defendant called his son, and sent him for witness, who resided across the street. Witness appeared at once, and when she arrived deceased was sitting 10 or 12 feet from the door of the kitchen, which was open. The flames had been extinguished, but there was some fire in decedent's clothing, in the kitchen, and a little fire was smoldering in a curtain, which witness extinguished. Defendant was in the kitchen when witness came in, and deceased stated to her: "See what he has done now! Struck me with a lamp." Such statement

was admissible as "res gestæ." *Bliss v. State*, 94 N. W. 325, 327, 117 Wis. 596.

In order to authorize the admission of a declaration by deceased, after he was shot, as "res gestæ," it must be shown, before the evidence is admitted, that it stood in such immediate causal relation to the shooting as to be an emanation thereof. *Baker v. State*, 107 S. W. 983, 985, 85 Ark. 300.

The "res gestæ" of a transaction is what is done during the progress of it, or so near upon the actual occurrence as fairly to be treated as contemporaneous with it. No precise point of time can be fixed where the res gestæ ends. Each case turns on its own circumstances. *Walker v. State*, 73 S. E. 368, 369, 137 Ga. 398 (quoting and adopting the language of *Hall v. State*, 48 Ga. 608).

A decedent's statement after an accident, to constitute part of the "res gestæ," must have been made so recently after the accident that there was no room for collusion or premeditated self-serving, but no time can be arbitrarily fixed; the circumstances of each individual case largely governing. Deceased, with certain associates, went to a depot in the early morning, intending to take a certain train. Deceased left his associates, and after the train was gone he was found with both arms so mangled and crushed that amputation was necessary, and he died within 36 hours after the accident. Within an hour after the accident, he made a statement that in attempting to go round the end of the train he fell, struck his head against a railroad tie, which rendered him unconscious, and when the train pulled out he discovered that he had sustained the injuries in question. Held, that such statement was not so remote from the time the injury occurred as to render it inadmissible as "res gestæ." *Starr v. Aetna Life Ins. Co.*, 83 Pac. 113, 116, 41 Wash. 199, 4 L. R. A. (N. S.) 636.

Where there is evidence of insured's injured condition other than his declarations, his declarations as to the cause of injury, made immediately after the occurrence, are admissible as part of the "res gestæ." *Union Casualty, etc., Co. v. Mondy*, 71 Pac. 675, 678, 18 Colo. App. 395.

In a prosecution for robbery, where the evidence showed that the prosecuting witness had been drinking, and had received a blow, and was knocked down in the street, that he was afterwards dragged in an unconscious condition to the sidewalk, statements made within a few minutes afterward, as he was aroused, were "res gestæ." *State v. Ripley*, 72 Pac. 1036, 1038, 32 Wash. 182.

In a prosecution for murder, evidence that, while deceased was lying on the ground where he fell when he was shot, he told witness that defendant shot him, was admissible as "res gestæ." *Franklin v. State* (Tex.) 88 S. W. 357, 358.

Where plaintiff, in an action for assault, claimed that during the quarrel the defendant ejected her from a house so roughly that she fell and injured her arm, it was not error to admit plaintiff's declaration, made eight or ten seconds after she fell and before she regained her feet, that defendant pushed her down, as "res gestæ." *Robinson v. Stahl*, 67 Atl. 577, 74 N. H. 310 (citing *Murray v. Boston & M. R. R.*, 54 Atl. 289, 72 N. H. 32, 37, 61 L. R. A. 495, 101 Am. St. Rep. 660).

A statement of a motorman, made seven or eight minutes after a collision between cars at a crossing, as to the cause of the accident, is not a part of the "res gestæ," and is not admissible for or against his employer. *Kimic v. San Jose-Los Gatos Interurban Ry. Co.*, 104 Pac. 986, 991, 156 Cal. 379.

Statements made by prosecutrix the day after an alleged rape are too remote to constitute "res gestæ." *In re Kelly*, 83 Pac. 223, 224, 28 Neb. 491.

A statement otherwise hearsay is competent as part of the "res gestæ" if it was connected with the accident in question both in relation thereto and in proximity of time. *Swanson v. Chicago City Ry. Co.*, 148 Ill. App. 135, 139; *Id.*, 90 N. E. 210, 242 Ill. 388.

In an action for injury to a passenger by starting the car before plaintiff had time to alight, evidence that the conductor stated at the time that he "thought they were off" is admissible as "res gestæ." *Reese v. Detroit United Ry.*, 124 N. W. 539, 540, 159 Mich. 600.

The statement by an engineer, "I told him to get off the engine, and he dropped down in front of the engine," made three or four minutes after injury to a boy jumping from a train and run over, is admissible as part of the "res gestæ" in an action against the railroad for the injury. *Stone v. Campbells Creek R. Co.*, 66 S. E. 521, 522, 66 W. Va. 417.

Declaration of deceased to his wife immediately after he was shot that defendant shot him, that he saw him, is admissible as part of the "res gestæ." *State v. Spivey*, 65 S. E. 995, 997, 151 N. C. 676.

Declaration of a person who had been shot within two minutes after the shot, and just prior to his death, which ensued almost instantly, "Oh, Lordy! Turner Williams shot me," is admissible as part of the "res gestæ." *Williams v. State*, 50 South. 749, 751, 58 Fla. 138.

In a prosecution for manslaughter, statements of defendant after the difficulty were not part of the "res gestæ." *State v. Gianfala*, 37 South. 30, 31, 113 La. 463.

In a prosecution for theft from the person, the evidence showed that defendant, under pretext of buying prosecutor's watch,

snatched it from the latter's hands, and while running away was caught by an officer. Prosecutor was permitted to testify that he told the officer, in defendant's presence, of the taking of the watch, and that defendant was the thief, which testimony was corroborated by the officer. The witnesses were also permitted to state that defendant then said that at the time of the theft he was at a saloon, and did not commit the theft. It appeared that but a few minutes elapsed between the capture of defendant and the time when prosecutor reached him and the officer. Held, that the testimony was "res gestæ" and admissible. *Nelson v. State*, 88 S. W. 807, 808, 48 Tex. Cr. R. 471.

Evidence of statements made by defendant and his companions within 15 minutes after the shooting of deceased at a point about a half mile distant, was properly excluded when offered as "res gestæ"; there having been sufficient time intervening during which defendant and his companions could have concocted a defense. *Deneaner v. State*, 127 S. W. 201, 203, 58 Tex. Cr. R. 624.

In a trial for burglary, a statement made by appellant, shortly after he was shot down by a prosecuting witness at the door of the latter's chicken house, that he and his companions had gone into the chicken house, breaking off the lock, that when interrupted they had caught a number of chickens, that accused had followed that business for some time, that when interrupted he started to escape, etc., was admissible as a "res gestæ" statement. A res gestæ statement made by accused was admissible as such, notwithstanding it was inadmissible as a confession or admission, since "res gestæ" is independent of, and cannot be restricted or limited to, the rules relating to admissions or confessions made after arrest. *Bronson v. State*, 127 S. W. 175, 177, 59 Tex. Cr. R. 17.

In an action for injuries to a passenger, statements made by him, while he lay where he had fallen, to parties who hastened to his assistance, and who reached him not over five minutes after the accident, and made in answer to questions, not calculated to elicit any particular answer, and the answers being as to the manner and means which caused him to be placed where he was, were admissible as "res gestæ." *International & G. N. R. Co. v. Hugen*, 100 S. W. 1000, 1001, 45 Tex. Civ. App. 326.

A memorandum not being made fairly contemporaneous with the fact of a parol agreement was not admissible as part of the "res gestæ." *Luttrell v. Parry* (Tex.) 129 S. W. 865, 866.

#### Declaration of deceased

In a prosecution for homicide, a dying declaration that defendant knocked J. in the head and jerked deceased out of bed, and that she got up and secured J.'s pistol, and

turned up the light, and tried to shoot defendant, but the pistol would not fire, whereupon defendant wrenched the pistol out of her hand and hit her over the head with it, and that she begged him to spare her life and let her raise her children, was competent as "res gestæ." *Walker v. State*, 41 South. 878, 880, 146 Ala. 45.

Where a person was shot from ambush about 175 yards distant, and within a few minutes after the shooting said to his brother, who was present at the shooting, "Do you know who did this?" and the brother in reply said, "One of them was Will Regnier," to which the deceased responded, "Yes, and the other one was John Labrier," such conversation was inadmissible as a part of the "res gestæ," since "the declaration of the deceased was not a declaration indicative of what or who had caused the injury," but "was a question rather which would indicate that the deceased was seeking information rather than giving expression to what naturally and irresistibly arose in his mind by reason of the occurrence." *Regnier v. Territory*, 82 Pac. 509, 510, 15 Okl. 652 (citing and adopting *Gillett, Indirect & Collateral Ev. § 254*; *Smith v. Territory*, 69 Pac. 805, 11 Okl. 669; and citing and distinguishing *Puls v. A. O. U. W.*, 102 N. W. 165, 13 N. D. 559; *Travelers' Ins. Co. v. Mosley*, 75 U. S. 397, 19 L. Ed. 437; *State v. Martin*, 28 S. W. 12, 124 Mo. 514; *Lewis v. State*, 15 S. W. 642, 29 Tex. App. 201, 25 Am. St. Rep. 720; *Linderberg v. Crescent Mining Co.*, 33 Pac. 692, 9 Utah, 163; *Pelrce v. Van Dusen*, 78 Fed. 693, 24 C. C. A. 280, 69 L. R. A. 705).

In mandamus to compel the granting of a pension to the applicant as the widow of a deceased police officer, alleged to have been killed while in the performance of his duties, a witness, who testified that he heard the call of a police whistle and walked a distance of over 300 feet, where he saw the deceased officer supported by two men, could not testify as to what the deceased officer stated as to what was the matter with him; the statement not being a part of the "res gestæ." *Murphy v. Board of Police Pension Fund Com'rs*, 83 Pac. 577, 2 Cal. App. 468.

#### As illustrative of main transaction

Declarations to be admissible as part of the "res gestæ" must be so connected as to be a part of the transaction in controversy, and tend to illustrate or explain it, the fact itself also being admissible. *Horst v. Lewis*, 103 N. W. 460, 464, 71 Neb. 365.

In a prosecution for homicide, evidence describing the details of what occurred at the time of the homicide constituting one continuous transaction is admissible as "res gestæ." *Williams v. State*, 41 South. 992, 997, 147 Ala. 10 (citing *Collins v. State*, 34 South. 993, 138 Ala. 57; *Churchwell v. State*, 23 South. 72, 117 Ala. 124; *Smith v. State*, 7 South. 52, 88

Ala. 73; *Seams v. State*, 4 South. 521, 84 Ala. 410).

In a prosecution for murder, the "res gestæ" is not limited to the act of killing, but includes, not only the murder itself, but also acts demonstrating the *quo animo* and motive. *Smithson v. State*, 137 S. W. 487, 490, 124 Tenn. 218, 36 L. R. A. (N. S.) 397.

Evidence as to the ages of decedent's children, who were lying on the floor with him at or immediately before the shooting, was admissible as a part of the "res gestæ," describing the situation at the time of the shooting. *Johnson v. State*, 53 South. 769, 169 Ala. 10.

Where, in an action by a passenger for an assault by the conductor, the evidence showed that the assault followed a wrangle concerning the failure of the passenger and his companions to leave the car at their destination, evidence of what the passenger and his companions said at the time was admissible as a part of the "res gestæ," and to show who was in fault for the failure of the passenger and his companions to alight at their destination. *Alabama City, G. & A. Ry. Co. v. Sampley*, 53 South. 142, 144, 169 Ala. 372.

In an action on a life policy, defended on the ground of suicide, the facts showing the financial, mental, and physical condition of insured immediately prior to the time of his death are relevant, as a part of the "res gestæ." *Goldschmidt v. Mutual Life Ins. Co. of New York*, 119 N. Y. Supp. 233, 236, 134 App. Div. 475.

Where certain transactions between defendant and a railroad agent, as to the shipment of wool sued for, were in themselves admissible, conversations between defendant and the agent explanatory of such transaction, though in plaintiff's absence, were admissible as "res gestæ." *Welker v. Appleman*, 90 N. E. 35, 40, 44 Ind. App. 699.

Where, in an action to recover for ejection of plaintiff from a street car, there was evidence that passengers had left the car because of the conduct of plaintiff and his companions, and had complained to the conductor or within his hearing as to such conduct, the evidence was competent as "res gestæ" to explain the motive of the conductor, and it was error to instruct the jury to disregard the same unless they should find that what was said by the passengers to the conductor or in his hearing was in the hearing of plaintiff, or that he could have heard it. *United Power Co. v. Matheny*, 90 N. E. 154, 155, 81 Ohio St. 204, 28 L. R. A. (N. S.) 761.

Where a person is arrested and is in the possession of the property alleged to have been stolen, any statement or declaration made by him at the time of the arrest in reference to the possession thereof is admissible in evidence as explanatory of the char-

acter of his possession, and constitutes a part of the "res gestæ"; but any statement or declaration made by the accused in reference to the property stolen, when not in the possession thereof, is not part of the *res gestæ*. *Smith v. Territory*, 79 Pac. 214, 14 Okl. 518.

#### As a part of principal act

Declarations or acts sought to be introduced in evidence as part of the "res gestæ" must be connected with or grow out of the main or principal transaction which is the subject-matter of the litigation, and must tend to elucidate and explain such transaction. *Leach v. Oregon Short Line R. Co.* (Utah) 81 Pac. 90, 92.

The phrase "res gestæ" implies a substantial coincidence in time; but, if declarations of third persons are not in their nature a part of the fact, they are not admissible in evidence, however closely related in point of time. *Burns v. Borden's Condensed Milk Co.*, 87 N. Y. Supp. 883, 884, 93 App. Div. 566.

The acts and declarations of persons not parties which are receivable as "res gestæ" must have been done or made at the time of the occurrence of the main fact, must have a tendency to elucidate it, and must harmonize with it as obviously to constitute one transaction. It is not essential that they should be precisely in point of time with the main fact, provided they spring out of the transaction and elucidate it. On a prosecution for murder, it was error to admit testimony that, after deceased had received the fatal wound, people near the scene of the crime, who pursued defendant, cried "Murder!" *Benjamin v. State*, 41 South. 739, 740, 148 Ala. 671 (citing *Wesley v. State*, 52 Ala. 182; *Gordon v. State*, 30 South. 30, 129 Ala. 113).

Since "res gestæ" is matter incidental to a main fact and explanatory thereof, made up of acts and words so closely connected with a main fact as to really constitute a part thereof and without knowledge of which the main fact might not be properly understood, proof of a separate rape alleged to have been committed on prosecutrix by defendant's male companion some time after the offense alleged to have been committed by defendant was complete and at a point some distance therefrom, having no connection therewith, was inadmissible as *res gestæ*. *People v. Edwards*, 110 Pac. 342, 343, 13 Cal. App. 551.

"Nothing can be said to be included in the 'res gestæ' except those matters which properly speaking enter into the accident, which serve to discover its immediate cause, or explain the particular manner of its happening." The fact that the method of work was changed immediately after the accident did not authorize the admission of evidence of such method as changed, as part of the *res*

gestæ. *Fitter v. Iowa Telephone Co.*, 106 N. W. 7, 8, 129 Iowa, 610.

Declarations, in order to become a part of the "res gestæ," and distinguished from mere hearsay, must be connected with a principal fact or transaction, and only such declarations are admissible as grow out of it, illustrate its character, are contemporaneous with it, and derive some degree of credit from it. *State v. Ryder*, 68 Atl. 652, 653, 80 Vt. 422.

Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object forms part of the "res gestæ" and is admissible in evidence. *Jones v. United States*, 179 Fed. 584, 601, 103 C. C. A. 142.

Statements to induce a person to drink that the liquor was good, and bought from a person named, were not concomitant with the act of obtaining the liquor, nor a part of such act, but simply related to the completed transaction, and were inadmissible in an action for negligence in selling the same. *Campbell v. Brown*, 106 Pac. 37, 38, 81 Kan. 480, 26 L. R. A. (N. S.) 1142.

In an action for injuries to a pedestrian from the falling of an awning, evidence that a man was working with the awning at the time of the accident was admissible as "res gestæ." *Lewy Art Co. v. Agricola*, 53 South. 145, 148, 169 Ala. 60.

In ejectment, it was not error to permit a witness to testify that the person through whom the plaintiff derived title had been trying to sell witness' father the land three years before, where there was evidence that he was in possession, as this was part of the "res gestæ," and it was for the jury whether it applied to the particular parcel of land. *Owen v. Moxom*, 52 South. 527, 530, 167 Ala. 615.

The rule that declarations of a party in actual possession of property asserting title in himself are admissible in evidence as part of the "res gestæ," explanatory of the possession, does not extend to his declarations as to the history and source of such title. *Baker v. Drake*, 41 South. 845, 148 Ala. 513 (citing *Ray v. Jackson*, 90 Ala. 513, 7 South. 747; *Vincent v. State*, 74 Ala. 275).

In an action for damages for the flooding of land, caused by an excavation being made so near a ditch as to break in its walls, conversations had between plaintiff's agent and the one doing the excavation for defendant, relative to the cutting down of the embankment of the ditch made during the progress of the work, were admissible as part of the "res gestæ." *Southern Ry. Co. v. Lewis*, 51 South. 746, 750, 165 Ala. 555, 138 Am. St. Rep. 77.

The admission of an agent to bind the principal must be made at the time of doing the act he is authorized to do, and must concern the act either while actually engaged in the transaction or so soon thereafter as to constitute a part of the "res gestæ," which term has reference to and applies to a condition of affairs, a condition of fact rather than a rule of evidence. The statement by the agent of an owner of cattle killed by a train made after the accident and after the train had come to a stop, in response to a question as to why he left the cattle on the track, put by the conductor who had not seen the agent until after the accident, was not a part of the act of the agent in protecting the cattle from the train, and was not a spontaneous declaration, and was not admissible as a part of the res gestæ. *Jungworth v. Chicago, M. & St. P. Ry. Co.*, 123 N. W. 695, 696, 24 S. D. 342.

The declarations of an agent, and declarations made in the presence of an agent, at the time of doing an act within the scope of his authority, and relating to the subject-matter of the act, are evidence as part of the "res gestæ." *Zart v. Singer Sewing Mach. Co.*, 127 N. W. 272, 275, 162 Mich. 387.

Declarations of the agent of the seller at the time of sale are admissible as part of the "res gestæ." *American Pure Food Co. v. G. W. Elliott & Co.*, 66 S. E. 451, 452, 151 N. C. 393, 31 L. R. A. (N. S.) 910.

Where an agent of a carrier, while engaged in tracing and locating a car, stated that it had not yet reached a certain place, the declaration was admissible as part of the "res gestæ" in an action for damages to the shipment contained in the car, as was also a statement made by another agent when he was attempting to adjust plaintiff's claim for damages, and when he and plaintiff were examining the shipment to ascertain the damages. *St. Louis & S. F. R. Co. v. Watkins*, 100 S. W. 162, 163, 45 Tex. Civ. App. 321.

Where a railway employé was injured while assisting laborers to put a hand car on the track, remarks made just after the accident, by the foreman, who did not see it, were not "res gestæ," but purely hearsay. *St. Louis S. W. Ry. Co. of Texas v. Brisco*, 100 S. W. 989, 990, 42 Tex. Civ. App. 321.

In trespass for cutting standing timber, statements in the nature of admissions and directions by defendant's foreman while he was on the land, and also while cutting the timber, tending to show that the timber was being cut by defendant and not by another, were admissible as "res gestæ." *Kentucky Stave Co. v. Page* (Ky.) 125 S. W. 170, 174.

In a suit by a shipper of cattle for damages, an objection to the account of sales of the cattle read in evidence that the evidence showed the same was made up from data

furnished by salesmen and weighmasters, the correctness of which was not proven, was not tenable, where witnesses who actually weighed the cattle testified to their weights, and the reports of the weights and prices realized, made to the bookkeeper of the company selling the same, all appeared to have been contemporaneous with the transactions to which they related, and so were a part of the "res gestæ." *Missouri, K. & T. Ry. Co. v. Gober (Tex.)* 125 S. W. 383, 385.

In an action for the ejection of a passenger, testimony as to the conduct of the conductor towards other passengers shortly after the alleged ejection was not admissible, not being a part of the "res gestæ." *Dobbins v. Little Rock Ry. & Electric Co.*, 95 S. W. 794, 796, 79 Ark. 85, 9 Ann. Cas. 84 (citing *Hot Springs St. Ry. Co. v. Hildreth*, 82 S. W. 245, 72 Ark. 572, *Little Rock Traction & Electric Co. v. Nelson*, 52 S. W. 7, 66 Ark. 501; *St. Louis & S. F. Ry. Co. v. Brown*, 35 S. W. 225, 62 Ark. 259).

Where a carrier claimed that one injured while riding on a train was a trespasser because riding on a pass not issued to her or her mother, who was traveling with her, the conductor may testify as to whether the mother in handing the pass to the conductor indicated for whom she was tendering the pass, as it was part of the "res gestæ." *Broyles v. Central of Georgia Ry. Co.*, 52 South. 81, 85, 166 Ala. 616, 139 Am. St. Rep. 50.

Where, in a prosecution for murder, defendant was charged with fatally shooting decedent, a policeman, testimony of a witness that immediately prior to the shooting he told decedent that defendant had pulled a gun, that about this time defendant came up and was pointed out to decedent by witness, and that, after saying that no policeman could arrest him, defendant broke and ran, and was followed by decedent, was competent as part of the "res gestæ." *Hull v. State*, 100 S. W. 403, 405, 50 Tex. Cr. R. 607.

In a prosecution for murder, exclamations by the son of deceased, "Don't shoot Pap!" shown by an eyewitness to the shooting, who stood 200 yards from the place of the shooting, to have been uttered immediately before, and when, the father was shot, are admissible as a part of the "res gestæ." *Kennedy v. Commonwealth (Ky.)* 100 S. W. 242, 243.

On a prosecution for assault and battery by a parent on a child, evidence that the parent compelled the child to travel barefooted about three or four miles over a hilly and rocky road ahead of a horse on which the parent was riding, the child being urged on to the limit of his speed by occasional lashes of a whip, was admissible as a part of the "res gestæ" of a continuous

assault. *State v. Koonse*, 101 S. W. 139, 142, 123 Mo. App. 655.

On the trial of a physician for prescribing intoxicating liquors with intent to evade the law, statements of a clerk at the drug store where the prescriptions were filled made to prosecuting witness on his application for the purchase of whisky, before obtaining the prescription, that he could only sell on prescription, which could be procured from accused, were a part of the res gestæ, because a part of the transaction culminating in the giving of the prescription, and the sale of whisky thereon; the term "res gestæ" extending to statements establishing liability by showing acts done on distinctly other occasions as part of a consistent plan of operation. *State v. Terry*, 55 South. 15, 17, 128 La. 680.

A barge and schooner in tow of the same tug, passing down the James river at night, the schooner being behind the barge, came in collision. Shortly before the collision, the captain of the schooner, coming on deck, called to the master of the barge to stop sheering, and he replied that the tug "was going all the way round the river." Held that, on an issue between the tug and barge as to the fault for the collision, such statement was admissible in evidence as part of the "res gestæ." *The Theodore Roosevelt*, 154 Fed. 155, 157.

Declarations of accused while at the scene of the killing with his pistol in his hand and in the presence of deceased were admissible as "res gestæ," without preliminary proof that they were voluntary. *Williams v. State*, 41 South. 992, 996, 147 Ala. 10.

In an action for injury to a vessel by collision with a drawbridge, because of the bridge tender's negligence in failing to open it in time, evidence that, the morning after the injury, the bridge tender visited the vessel and inquired whether plaintiff would take a named sum and drop the matter, was inadmissible as part of the "res gestæ." *Southern R. Co. v. Reeder*, 44 South. 699, 702, 152 Ala. 227, 126 Am. St. Rep. 23.

On a prosecution for murder, testimony that some of the shots from defendant's gun passed through the clothing of witness was admissible as part of the res gestæ." *Hammond v. State*, 41 South. 761, 764, 147 Ala. 79.

On a prosecution for murder, evidence that, immediately after shooting deceased, defendant shot the brother of deceased, was admissible as part of the "res gestæ." *Hammond v. State*, 41 South. 761, 764, 147 Ala. 79 (citing *Seam v. State*, 4 South. 521, 84 Ala. 410; *Smith v. State*, 7 South. 52, 88 Ala. 73; *Plant v. State*, 37 South. 150, 140 Ala. 52).

In a prosecution for murder, where accused shot decedent and simultaneously shot

a little girl, evidence of the shooting of the latter was a part of the "res gestæ." *Nelson v. State*, 101 S. W. 1012, 1013, 51 Tex. Cr. R. 349.

Where, in trespass for the removal of plaintiff's furniture, defendant claimed that plaintiff had fully consented to such removal, evidence that she was sitting in one corner of the house crying at the time was admissible as "res gestæ," and as bearing on the question of consent. *Terry v. Williams*, 41 South. 804, 805, 148 Ala. 468.

In an action against a gas company for injuries from an explosion of gas which escaped from an uncapped pipe, a declaration by an employé of the company, sent to plaintiff's house to install a gas meter and make a test of the piping in the house, made to plumbers at the house, that he would make the test, though the pipes had been tested, was admissible as a part of the "res gestæ." *Kenney v. South Shore Natural Gas & Fuel Co.*, 119 N. Y. Supp. 363, 365, 134 App. Div. 859.

In an action for injuries to a boy by a street car, evidence that four or five minutes before the injury, as plaintiff and his companions were passing on their way from school, defendant's conductor asked him to help push the car, is admissible as "res gestæ," not for the purpose of showing negligence by the conductor, but to show that the conductor had notice of the presence of the boys. *Swanson v. Chicago City R. Co.*, 90 N. E. 210, 213, 242 Ill. 388.

In a prosecution for the larceny of a check given to defendant by a person with whom he had agreed to join in the purchase of a piece of property for speculative purposes, there was evidence that the check was given as a part of the contribution which the other person was to make to enable defendant to purchase the property, and that the check was not so used, but was appropriated by defendant to his own use. The check was written by defendant, and the drawer, who could not read, testified that he did not know when he delivered the check that it was made payable to the persons named as payees, but supposed that it was payable to the owner of the land which he and defendant intended purchase. Two days later another check was drawn payable to defendant's order for the remainder of the amount which the drawer was to contribute to the purchase of the land. Held, that this check and the stub, showing that it was payable to defendant, was admissible in evidence as part of the "res gestæ" bearing on the question as to a partnership and the credibility of the testimony of the drawer of the check. *People v. Hart*, 99 N. Y. Supp. 758, 763, 114 App. Div. 9.

In an action for the value of live stock seized under an execution against plaintiff's

father, wherein it was claimed by plaintiff that the stock levied on was his share of stock purchased by his father for plaintiff and his brothers, who with their mother managed the homestead without the assistance of their father, who had turned over the business of carrying on the farm to them, giving them all the proceeds, one of plaintiff's brothers was permitted to answer a question as to what was the agreement between them as to the amount to be paid by each of them on the balance of the mortgage given by the father on the stock. Held proper, witness having testified that there was a division of the stock between the brothers and mother, and that there was a balance unpaid on the purchase price thereof; and hence it was competent to show that, when the stock was divided, provision was made for the balance due on the purchase of the same, as it was a part of the transaction which plaintiff claimed resulted in his becoming sole owner of the stock in controversy, and bore directly on the question of good faith, and was admissible as a part of the "res gestæ." *Comeau v. Hurley*, 123 N. W. 715, 717, 24 S. D. 275.

Statements of a purchaser to his vendors in the treaty of purchase are part of the "res gestæ" and admissible against him to show a mutual mistake in the description, though made in the absence of the person in whose name the legal title was taken. *Moore v. Moore*, 66 S. E. 598, 599, 151 N. C. 555.

In order for a statement to be a part of the "res gestæ," it must be so connected with the very transaction or fact under investigation as to constitute a part of it. On a prosecution for the murder of one who was shot while riding in a buggy, testimony that decedent stated to witness after the shooting that a person other than accused had ridden with decedent, and then left decedent before he reached the point where he was shot, was not admissible as "res gestæ," though the statement was made a couple of hours after the shooting, and the witness was the physician who had been called to attend decedent. *Richards v. Commonwealth*, 59 S. E. 1104, 1108, 107 Va. 881.

"Admissions of a principal, made during the transaction of the business for which the surety is bound, become a part of the 'res gestæ,' and are admissible against the surety." *Balley v. McAlpin*, 50 S. E. 388, 395, 122 Ga. 616.

#### Narratives

A declaration which is but a narrative of what occurred, and not an incident of the event, is not admissible as "res gestæ." *Salas v. People*, 118 Pac. 992, 993, 51 Colo. 461, 37 L. R. A. (N. S.) 252.

While a narrative of past events cannot be introduced as part of the "res gestæ," continuousness is not always measured by time;

the true inquiry being whether the declaration is a verbal act, illustrating or explaining other parts of the transaction of which itself is a part, or is merely a history or part of a history of a completed past affair. *McMahon v. Chicago City R. Co.*, 88 N. E. 223, 224, 239 Ill. 334.

"The 'res gestæ' may be defined as those circumstances which are the automatic and undisguised incidents of a particular litigated act, and which are admissible when illustrative of such act, indeed, must be, in contemplation of law, a part of the act itself. Narratives, unconnected with the principal facts, are universally rejected." Thus, where a street car came to a sudden stop, and a passenger was thrown from his seat and injured, and when he regained consciousness, while the conductor was removing him from the car, he inquired of the conductor the cause of the trouble, the statement of the conductor as to what had caused it was not admissible as *res gestæ* in an action for the injuries. *Redmon v. Metropolitan St. Ry. Co.*, 84 S. W. 26, 29, 185 Mo. 1, 105 Am. St. Rep. 558.

"The 'res gestæ' may be defined as those circumstances which are the undesigned incident of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander. They may comprise things left undone, as well as things done. Their sole distinguishing feature is that they should be the necessary incidents of the litigated act; necessary, in this sense, that they are part of the immediate preparations for or emanations of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by the interposition of voluntary individual wariness, seeking to manufacture evidence for itself. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. They are admissible, though hearsay, because in such cases, from the nature of things, it is the act that creates the hearsay, and not the hearsay the act." In a prosecution for homicide, testimony by defendant's sister that accused told her, within from two to five minutes after the killing that he killed decedent in self-defense, etc., was not admissible as "res gestæ," being a self-serving statement, in that it was a narrative of a past event, not sufficiently connected with the fact of the killing to illustrate. *State v. McKenzie*, 128 S. W. 948, 952, 228 Mo. 385 (quoting and adopting definition in 1 Whart. Ev. § 259).

In an action against the owners of a vessel for injuries to sheep pelts, alleged to have been caused by negligent stowage, a letter written to plaintiffs by defendant's agents, through whom plaintiff had made a claim for damages, purporting to state the facts concerning the shipment and the manner in which the pelts were stowed, was a mere narrative of past events, not a part of the "res gestæ." *Herman, Waldeck & Co. v. Pacific Coast S. S. Co.*, 83 Pac. 158, 159, 2 Cal. App. 167.

To justify the declarations of third parties to be admitted as part of the "res gestæ," they must be so connected with the transaction as to characterize or explain it. They must be more than a mere narrative of a past occurrence. Upon the trial of an indictment against M., an officer of a county, for assisting O. in obtaining from the county money not lawfully and justly due to O., evidence by one C. that O., upon coming to the place where he (C.) was from the bank where he (O.) had received the money, for the aiding in obtaining which M. had been indicted, O. told him that he had just come from the bank and had too much money was hearsay, and no part of the "res gestæ." *State v. Mickler*, 64 Atl. 148, 149, 73 N. J. Law, 513 (citing 7 Words and Phrases, p. 6130).

"It is said that events which speak for themselves through the instructive words and acts of participants are parts of the 'res gestæ,' but that evidence of the acts and words of the participants when narrating the evidence is mere hearsay." In an action for contribution under an alleged agreement of cosuretyship between defendant and plaintiff's testator for the payment of the note of a third party, which note plaintiff claimed was afterwards indorsed by them pursuant to said agreement, and was finally paid by her, declarations of the testator in respect to such agreement, made in his own interest in the absence of defendant, were not admissible as part of the "res gestæ." *Chapman v. Pendleton*, 59 Atl. 928, 26 R. I. 573.

In an action against a railroad company for killing an animal, the testimony of a witness that the section boss showed him where the animal was when struck, and stated that after it was struck he killed it, was not admissible as "res gestæ." *Polindexter & Orr Live Stock Co. v. Oregon Short Line R. Co.*, 88 Pac. 886, 887, 33 Mont. 338.

In an action against a gas company for injuries from an explosion of gas which escaped from an uncapped pipe, a statement by an employé made after the explosion as to his test of the piping in the house was not a part of the "res gestæ." *Kenney v. South Shore Natural Gas & Fuel Co.*, 119 N. Y. Supp. 363, 365, 134 App. Div. 859.



**Statements of observers**

The exclamation of a bystander contemporaneous with an occurrence is a part of the "res gestæ." Where something startling enough to produce nervous excitement occurs, spontaneous utterances of the parties present are admissible as a part of the "res gestæ," and the inquiry is whether they were made at a time and under such circumstances as to induce the belief that they were not the result of reflection or premeditation. And so, where, in an action against a street railroad company for injuries to a boy stealing a ride, the issue was whether the boy fell off the car or was kicked off by the conductor, a statement of a passenger made at the time the boy was observed riding on the step of the car and as the conductor was pulling the bell cord and starting to open the door that the boy was off was admissible as a part of the "res gestæ." *Britton v. Washington Water Power Co.*, 110 Pac. 20, 22, 59 Wash. 440, 33 L. R. A. (N. S.) 109, 140 Am. St. Rep. 858.

Declarations of bystanders may be so connected with a transaction as to characterize and be a part of it. When this is the case, they are admitted on the same theory as if they had been made by one of the actors. Thus, where a declaration or statement is made by a bystander during an altercation in which one of the parties shoots and kills the other, and which remark gives character to an act of the accused, which act is a proper subject of proof on the trial, such statement may be introduced in evidence as part of the "res gestæ." *Baysinger v. Territory*, 82 Pac. 728, 731, 15 Okl. 386 (quoting and adopting definition in 1 McClain, Cr. Law, § 412, and Elliott, Ev. § 550).

In an action by a passenger for the misconduct of the conductor, consisting of insulting language, the statement of a fellow passenger, who had heard the conductor's language, made to the passenger after the termination of the dispute, that it was a shame for a man to have to take anything like that, and that the passenger ought to have slapped the conductor, was inadmissible as the opinion of a stranger to the occurrence, and not a part of the "res gestæ." *Texas & N. O. R. Co. v. Marshall*, 122 S. W. 946, 947, 57 Tex. Civ. App. 538.

In an action for death of a railway trackman by being struck by a train, evidence that on the morning in question witness saw the train and "talked about it running fast," not shown to have been contemporaneous with the passing of the train, was not "res gestæ," but was inadmissible as hearsay. *Norfolk & W. Ry. Co. v. Gesswine*, 144 Fed. 56, 60, 75 C. C. A. 214.

**Spontaneity**

Declarations to be "res gestæ" must be spontaneous, and not statements which are deliberate and prepared for a purpose. Thus,

in an action against a city to recover for property alleged to have been destroyed through mob violence, a dispatch by the mayor of the city to the Governor of the state describing conditions and asking for troops, prepared by the legal department of such city, is not a part of the res gestæ, and is not competent against the city. *Pittsburgh, C., C. & St. L. Ry. Co. v. City of Chicago*, 144 Ill. App. 293, 307, 308.

To constitute statements "res gestæ" they must be spontaneous, the transaction voicing itself. The person making the declarations need not have been a competent witness. *Thomas v. State*, 84 S. W. 823, 824, 47 Tex. Cr. R. 534, 122 Am. St. Rep. 712 (citing *Kenney v. State*, 79 S. W. 817, 65 L. R. A. 316).

**Statements not made in defendant's presence**

A declaration by an attorney claiming a half ownership in real estate for his services for successfully prosecuting an action therefor, made long after the making of the alleged contract to pay him a contingent fee of one-half of the property on his successfully prosecuting the action, and wholly disconnected with the transaction constituting the making of the contract, and in the absence of the client, is not a part of the "res gestæ," and is inadmissible. *Batcheller v. Whittier*, 107 Pac. 141, 143, 12 Cal. App. 262.

**RES INTER ALIOS ACTA**

The acts and declarations either of strangers or of one of the parties to the action in his dealings with strangers are designated "res inter alios acta." *Chicago & E. I. R. Co. v. Schmitz*, 71 N. E. 1050, 1054, 211 Ill. 446.

Where a debtor was arrested on the complaint of an attorney for the creditor, and the debtor's release from custody was obtained on habeas corpus, the declarations of the judge in the habeas corpus proceedings were "res inter alios acta," and inadmissible in an action by the debtor against the creditor for false imprisonment. *West v. A. F. Mesick Grocery Co.*, 50 S. E. 565, 566, 138 N. C. 166.

"Res inter alios acta alteri nocere non debet" means "a transaction between two parties ought not to operate to the disadvantage of a third." It relates only to the law of evidence. *Carroll v. Rye Tp.*, 101 N. W. 894, 897, 13 N. D. 458.

**RES IPSA LOQUITUR**

The meaning of the maxim "res ipsa loquitur" is that the res, the thing, of itself, is evidence of negligence. *Cunningham v. Dady*, 83 N. E. 689, 690, 191 N. Y. 152.

In some cases the term "res ipsa loquitur" has been used as synonymous with "prima facie case," and it is sometimes spoken of as evidence raising a presumption.

*Overcash v. Charlotte Electric Ry. Light & Power Co.*, 57 S. E. 377, 379, 144 N. C. 572, 12 Ann. Cas. 1040 (citing *Ellis v. Portsmouth & R. R. Co.*, 24 N. C. 138; *Womble v. Merchants' Grocery Co.*, 47 S. E. 493, 135 N. C. 574; *State v. Barrett*, 50 S. E. 506, 138 N. C. 630, 1 L. R. A. [N. S.] 626).

The "res ipsa loquitur doctrine" applies only where the circumstances speak for themselves, and, unexplained, point to negligence. *Rosenblum v. Brooklyn Heights R. Co.*, 137 N. Y. Supp. 1078, 1079, 153 App. Div. 304.

The maxim "res ipsa loquitur" relates to cases involving negligence, and has no application to an alleged breach of warranty that a rope would be sufficient to lower a safe. *Oregon Auto Dispatch v. Portland Cordage Co.*, 95 Pac. 498, 499, 51 Or. 583.

"Res ipsa loquitur," the thing speaks for itself, symbolizes that the occurrence of the injury raises a presumption of culpability on the part of the owner or manager of an apparatus. *Delaware & H. Co. v. Dix*, 188 Fed. 901, 905, 110 C. C. A. 535.

The doctrine of "res ipsa loquitur" is merely a short way of saying that the circumstances attendant upon an accident are themselves of such character as to justify a jury in inferring negligence as the cause of that accident, and it is applicable to two classes of cases, namely, when the relation of carrier and passenger exists and the accident arises from some abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of persons or property and is so tortious in its quality as, in the first instance at least, to permit no inference save that of negligence on the part of the person in control of the injurious agency. *Strasburger v. Vogel*, 63 Atl. 202, 203, 103 Md. 85 (quoting *Benedick v. Potts*, 40 Atl. 1068, 88 Md. 55, 41 L. R. A. 478). See, also, *State, to Use of Charles, v. United Rys. & Electric Co.*, 60 Atl. 249, 251, 101 Md. 183; *Louisville & N. R. Co. v. Clark*, 106 S. W. 1184, 1186. Thus, where defendant dock company, as incident to its business, operated a short line of railroad, over which it moved cars between defendant's docks and warehouse, it having complete management and control of the cars thereon, and while plaintiff was removing freight in a car on the side track to which he had been taken for that purpose by an employé of defendant, the car was violently moved injuring him, by the rear wheels of the second of two cars which were being moved from a side onto the main track failing to follow the switch track, thereby derailing the car and drawing it against that at which plaintiff was at work, the facts furnished evidence of defendant's negligence which, in the absence of explanation, authorized verdict for plaintiff. *Fisher*

*v. New York Dock Co.*, 87 N. Y. Supp. 117, 119, 91 App. Div. 526.

"Res ipsa loquitur"—the thing speaks for itself—is applicable in the law of negligence to cases where the cause of an accident may be inferred from circumstances, or the law itself raises inferences from proved facts, unless the defendant produces evidence to explain or overcome such facts and show that no such inference is justified; thus, where plaintiff claimed that an unseen blow by which he was injured came from an iron pipe accidentally dislodged from refuse on an upper floor, and falling thence through an opening, rather than from an unseen assailant or an accidental fall, the doctrine was applicable. *Huggard v. Glucose Sugar Refining Co.*, 109 N. W. 475, 480, 132 Iowa, 724.

The maxim "res ipsa loquitur," literally translated "The thing itself speaks," means that when, through any instrumentality or agency under the management or control of a defendant or his servants, there is an occurrence, injurious to plaintiff, which in the ordinary course of things would not take place if the person in control were exercising due care, the occurrence itself, in the absence of explanation by defendant, affords prima facie evidence that there was want of due care. *Mumma v. Easton & A. R. Co.*, 65 Atl. 208, 210, 73 N. J. Law, 653 (citing *Thompson, Neg.* §§ 15, 7635; *Smith, Neg.* p. 246; *Excelsior Electric Co. v. Sweet*, 30 Atl. 553, 57 N. J. Law, 224, 227-229; *Sheridan v. Foley*, 33 Atl. 484, 58 N. J. Law, 230, 232, 233; *Consolidated Traction Co. v. Thalheimer*, 37 Atl. 132, 59 N. J. Law, 474, 476; *Bergen County Traction Co. v. Demarest*, 42 Atl. 729, 62 N. J. Law, 755, 756, 72 Am. St. Rep. 685; *Shay v. Camden & S. Ry. Co.*, 49 Atl. 547, 66 N. J. Law, 334, 335; *Paynter v. Bridgeton & M. Traction Co.*, 52 Atl. 367, 67 N. J. Law, 619, 625; *Oglesby v. Missouri Pac. Ry. Co.*, 76 S. W. 623, 638, 177 Mo. 272 (quoting with approval from *Thompson, Neg.*, in dissenting opinion by *Valliant, J.*).

The meaning of the term "res ipsa loquitur" is that the thing itself speaks; that the accident itself raises a presumption of negligence on the part of defendant, which he must rebut by showing that he took reasonable care to prevent the happening of the accident. The doctrine only applies where the machine, appliance, or other thing from which the injury results is shown to be under the management of defendant, and the accident is such as in the ordinary course of things does not happen if those in control use proper care. *Illinois Cent. R. Co. v. Swift*, 72 N. E. 737, 741, 213 Ill. 307 (citing 1 Add. Torts, § 33; *North Chicago St. Ry. Co. v. Cotton*, 29 N. E. 899, 140 Ill. 486; *Chicago City Ry. Co. v. Barker*, 70 N. E. 624, 209 Ill. 321). It does not apply to the case of one run over while walking on a railroad

track in the nighttime. *Frye v. St. Louis, I. M. & S. R. Co.*, 98 S. W. 566, 572, 200 Mo. 377, 8 L. R. A. (N. S.) 1069.

Where an accident itself, with all its surroundings, speaks in such way and is of such character as to show negligence on the part of defendant, the doctrine of "res ipsa loquitur" applies, and plaintiffs are entitled to recover, in the absence of other proof. *Wood v. Wilmington City Ry. Co.* (Del.) 64 Atl. 246, 247, 5 Pennewill, 369.

The doctrine of "res ipsa loquitur" applies only in cases where the occurrence would not happen in the ordinary course, except by negligence on the part of defendant. *Elliott v. Brooklyn Heights R. Co.*, 111 N. Y. Supp. 358, 359, 127 App. Div. 300. And while the doctrine does not permit a recovery without some proof of negligence, yet, if proof of the occurrence shows that the accident could not have happened without negligence according to the ordinary experience of mankind, the doctrine is applicable, though the precise omission or act of negligence is not specified. *Levine v. Brooklyn, Q. C. & S. R. Co.*, 119 N. Y. Supp. 315, 316, 134 App. Div. 606.

Where the thing causing an injury is under the management of defendant, and the accident would not have ordinarily happened if those who had such management had used proper care, under the doctrine of "res ipsa loquitur," proof of the happening of the event raises a presumption of the defendant's negligence, and casts upon him the burden of showing that ordinary care was exercised; but where the circumstances leave room for a different presumption, the reason of the rule fails, and the doctrine cannot be invoked. *McGowan v. Nelson*, 92 Pac. 40, 42, 36 Mont. 67.

Where the agency causing an injury is under the management and control of defendant, and the injury is such as in the ordinary course of things does not occur if those having such management and control use proper care, it affords reasonable evidence, in absence of explanation by defendant, that the injury resulted from negligence, and the rule of "res ipsa loquitur" applies. *Bice v. Wheeling Electrical Co.*, 59 S. E. 626, 628, 62 W. Va. 685.

"Whenever injuries occur in the conducting of operations which common experience has shown can be safely carried on with the exercise of reasonable diligence, judgment, and care, the mere happening of an accident, unexplained, will be regarded as sufficient to raise a presumption of negligence." Defendant had a contract to sell and deliver timber on board cars to a railroad company, and, when the timber was ready for loading, plaintiff, a railroad timber inspector, was directed to inspect the timber, and while performing his duty was injured

by the breaking of a rope by which a log was being rolled on skids onto the car, causing the log to roll back, striking other logs on the ground and causing injury. Held, that proof of such facts was sufficient to raise a presumption of negligence on the part of the timber contractor, under the doctrine of "res ipsa loquitur." *Jefferys v. Nebraska Bridge Supply & Lumber Co.*, 157 Fed. 932, 933.

The statement that "res ipsa loquitur" applies where there is no explanation by the defendant means that the rule applies where the defendant does not show the cause of the accident, and the rule of "res ipsa loquitur" means that in the ordinary experience of mankind the accident would not have happened without fault on the part of defendant. *Minihan v. Boston Elevated R. Co.*, 83 N. E. 871, 873, 197 Mass. 367.

The rule of "res ipsa loquitur" applies only when the circumstances are such as to afford just ground for a reasonable inference that, according to ordinary experience, the accident would not have occurred, except for want of due care. If causes other than negligence of the defendant might have produced the accident, the plaintiff is bound to exclude the operation of such causes by a fair preponderance of the evidence. *Lincoln Traction Co. v. Webb*, 102 N. W. 258, 260, 73 Neb. 136, 119 Am. St. Rep. 879.

The doctrine of "res ipsa loquitur," the thing speaks for itself, is a principle applied by the law where under the circumstances shown the accident presumably would not have occurred in the use of a machine if due care had been exercised, or, in the case of an elevator, when in its normal operation after due inspection. The doctrine does not dispense with the requirement that the person who alleges negligence must prove the fact, but relates only to the mode of proving it. The fact of the accident furnishes some evidence to go to the jury, requiring the defendant to go forward with his proof. The rule of "res ipsa loquitur" does not relieve the plaintiff of the burden of showing negligence, nor does it raise any presumption in his favor. Whether the defendant interposes any evidence or not, the plaintiff will not be entitled to verdict unless he satisfies the jury by a preponderance of the evidence that his injuries were caused by a defect attributable to the defendant's negligence. *Stewart v. Van Deventer Carpet Co.*, 50 S. E. 562, 564, 138 N. C. 60.

The maxim "res ipsa loquitur" is an exception to the general rule that negligence is not to be inferred, but must be affirmatively proved, except in cases of absolute duty, or an obligation practically amounting to that of an insurer. *Johns v. Pennsylvania R. Co.*, 75 Atl. 408, 409, 226 Pa. 319, 28 L. R. A. (N. S.) 591, 134 Am. St. Rep. 1081; *Sowers v. McManus*, 63 Atl. 601, 214 Pa. 244 (citing *Zahniser v. Pennsylvania Torpedo Co.*,

42 Atl. 707, 190 Pa. 350); *Dalton v. Towanda Borough*, 64 Atl. 547, 548, 215 Pa. 402.

The rationale of the doctrine of "res ipsa loquitur" is that, in some cases, the very nature of the accident, of itself and through the presumption it carries, supplies the requisite proof, and it applies when, under the circumstances, the accident presumably would not have happened if due care had been exercised. The doctrine of "res ipsa loquitur" is available in a case wherein the declaration is for specific acts of negligence and no count charges negligence generally; but it is limited to a presumption of the negligence charged, which presumption defendant is called on to rebut by evidence of due care as to the matter complained of. *Alabama & V. Ry. Co. v. Groome*, 52 South. 703, 704, 97 Miss. 201.

The maxim "res ipsa loquitur" is one of evidence, and the force to be given to the mere happening of an occurrence depends upon all the circumstances surrounding the occurrence, and the application of the maxim depends upon the circumstances of each case. *Pascell v. North Jersey St. Ry. Co.*, 69 Atl. 171, 172, 75 N. J. Law, 836 (citing 21 Enc. Law, p. 513).

The maxim "res ipsa loquitur" is a simple rule of evidence, and whether, under a given state of facts, the maxim is to be applied, is an inference to be reached by the jury and not by the court. In a case where one, himself in the exercise of due care, sustains an injury which is primarily traceable to the operation of some portion of a building, and the casualty is of a kind which does not ordinarily occur where a building has been properly constructed, a jury may be authorized to infer that the resultant injury was due to original defective construction. *Monahan v. National Realty Co.*, 62 S. E. 127, 130, 4 Ga. App. 680.

The doctrine of "res ipsa loquitur" is simply a rule of circumstantial evidence, permitting an inference to be drawn from proved facts, and its practical application is authorized by Civ. Code 1895, § 5157, providing that in arriving at a verdict the jury from facts proved, and sometimes from the absence of counter evidence, may infer the existence of other facts reasonably and logically consequent on those proved. *Cochrell v. Langley Mfg. Co.*, 63 S. E. 244, 247, 5 Ga. App. 317.

The "res ipsa loquitur doctrine" is based upon the idea that every apparent injury which may only be explained by facts within the peculiar knowledge of the wrongdoer carries with it proof of its wrongful character requiring the wrongdoer to show a just excuse. *Thompson v. St. Louis Southwestern Ry. Co.*, 148 S. W. 484, 243 Mo. 336. The doctrine is based upon the general consideration that, where the management and control of the instrumentality which occasioned the in-

jury are in the defendant, it is within defendant's power to produce evidence of the actual cause of the accident, which the plaintiff may be unable to produce. Its application presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring the existence of the traversable or principal fact in issue, the defendant's negligence. *Nebraska Bridge Supply & Lumber Co. v. Jeffery*, 169 Fed. 609, 611, 95 C. C. A. 137 (citing *Griffen v. Manice*, 59 N. E. 925, 166 N. Y. 188, 52 L. R. A. 922, 82 Am. St. Rep. 630). The doctrine simply calls upon the defendant, after proof of the accident, to give such evidence as will exonerate him, if any be, and relieves the plaintiff from the burden of proving the nonexistence of an adequate explanation or excuse. *Sullivan v. Brooklyn Heights R. Co.*, 102 N. Y. Supp. 982, 983, 117 App. Div. 784 (quoting *Clarke v. Nassau Electric R. R. Co.*, 41 N. Y. Supp. 78, 9 App. Div. 51).

The rule of "res ipsa loquitur" is not one of substantive law, but is a rule of evidence only. Proof of an injury alone affords no evidence of negligence; but where the thing is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care. Unless the circumstances surrounding an injury render it more probable that it resulted from the negligence of defendant than otherwise, the injury itself affords no just inference against defendant, and the doctrine of "res ipsa loquitur" does not apply. *St. Louis, S. F. & T. Ry. Co. v. Cason* (Tex.) 129 S. W. 394, 397.

The maxim of "res ipsa loquitur" may be termed a rule of evidence to the extent that, when properly applied, it raises a presumption of negligence sufficient to make a prima facie case for plaintiff, and call for an explanation from defendant. If the circumstances do not suggest superior knowledge or opportunity for explanation on defendant's part, or if plaintiff has equal or superior means of information, the doctrine of "res ipsa loquitur" does not apply. *Lynch v. Ninemire Packing Co.*, 115 Pac. 838, 840, 63 Wash. 423.

"Res ipsa loquitur" is a rule of evidence, whereby an unusual injury, caused by instrumentalities over which defendant has control, warrants a presumption of negligence; the occurrence being such as does not happen if reasonable care has been used. *Sinkovitz v. Peters Land Co.*, 64 S. E. 93, 95, 98, 5 Ga. App. 788 (citing *Benedict v. Potts*, 40 Atl. 1067, 88 Md. 52, 41 L. R. A. 478; *Palmer Brick Co. v. Chenall*, 47 S. E. 329, 119 Ga. 842; 7 Words and Phrases, pp. 6137, 6138).

The doctrine of "res ipsa loquitur" is that "where the charge of negligence is a

general one, and the plaintiff can show that the loss or injury occurred under such circumstances that it may be reasonably inferred from the fact that injury did occur, and that, if ordinary care had been used by the party charged, the injury would not have resulted, he thereby makes out a prima facie case, and casts upon the defendant the burden of showing that he exercised that degree of care which, under the law, it was his duty to exercise in the particular case." *Freeman v. Foreman*, 125 S. W. 524, 526, 141 Mo. App. 359.

The doctrine of "res ipsa loquitur" does not dispense with the rule that the person alleging negligence must prove it; but it is simply a mode of proving negligence, and does not change the burden of proof. *Lyles v. Brannon Carbonating Co.*, 52 S. E. 233, 234, 140 N. C. 25 (citing *Labatt, Mast. & S.* § 834; *Womble v. Grocery Co.*, 47 S. E. 493, 135 N. C. 481; *Stewart v. Van Deventer Carpet Co.*, 50 S. E. 562, 138 N. C. 67). And while the doctrine does not dispense with the necessity of evidence of defendant's negligence, the attendant circumstances of the given case may be sufficient to raise an inference of negligence, without proof of any specific negligent act; but such inference must be directed to defendant as the person guilty of the negligence. *Houston, E. & W. T. Ry. Co. v. Roach*, 114 S. W. 418, 422, 423, 52 Tex. Civ. App. 95 (citing 7 Words and Phrases, pp. 6136-6138).

The doctrine of "res ipsa loquitur" negatives the degree of the proof required under certain circumstances, and is properly invoked in behalf of a case where the proof of negligence is furnished by the occurrence itself, and its application presents principally the question of the sufficiency of circumstantial evidence to justify the jury in inferring defendant's negligence. *Eaton v. New York Cent. & H. R. R. Co.*, 88 N. E. 378, 379, 195 N. Y. 267.

The phrase "res ipsa loquitur," as applied to negligence cases, expresses the idea that, when an accident is shown to be of such a character, as in the light of ordinary experience, is inexplicable except as the result of negligence, then negligence is presumed. *De Yoe v. Seattle Electric Co.*, 104 P. 647, 53 Wash. 588. Thus evidence that defendant's steam roller, used on the street in front of plaintiffs' residence, was run over their fence and lawn and against their house, is sufficient to sustain a finding that the injury was occasioned by the negligence of defendant. *Harlow v. Standard Imp. Co.*, 78 Pac. 1045, 145 Cal. 477 (citing *Judson v. Giant Powder Co.*, 40 Pac. 1020, 107 Cal. 549, 29 L. R. A. 718, 48 Am. St. Rep. 146). And so, under the rule of "res ipsa loquitur," a prima facie case of negligence is shown, where a basket from an overhead carrier system, of standard make and in general use, falls on a customer in

a store. *Anderson v. McCarthy Dry Goods Co.*, 95 Pac. 325, 49 Wash. 398, 16 L. R. A. (N. S.) 931, 126 Am. St. Rep. 870 (citing *Am. & Eng. Ency. Law*, 512, 513).

The "res," in the maxim "res ipsa loquitur," is not simply an accident resulting in injury, but the accident and the surrounding circumstances, and the doctrine does not permit a recovery without some proof of negligence, but, if the occurrence could not have happened without negligence according to the ordinary experience of mankind, the doctrine is applied, though the precise omission or act of negligence is not specified. *Robinson v. Consolidated Gas Co. of New York*, 86 N. E. 805, 806, 194 N. Y. 37, 28 L. R. A. (N. S.) 586.

The doctrine of "res ipsa loquitur" simply calls upon the defendant, after proof of an accident, to give such evidence as will exonerate him, and relieves the plaintiff from the burden of proving the nonexistence of an adequate explanation or excuse, the proof of the occurrence and the surrounding circumstances. The "res" makes a prima facie case; the legal presumption arising from such proof establishing prima facie the defendant's negligence. *Moglia v. Nassau Electric R. Co.*, 111 N. Y. Supp. 70, 71, 127 App. Div. 243 (quoting and adopting definition in *Clark v. Nassau E. R. Co.*, 41 N. Y. Supp. 78, 9 App. Div. 51; *Kay v. Metropolitan St. Ry. Co.*, 57 N. E. 751, 163 N. Y. 447; *Griffen v. Manice*, 59 N. E. 925, 166 N. Y. 188, 52 L. R. A. 922, 82 Am. St. Rep. 630).

"The meaning of the maxim 'res ipsa loquitur' is that, while negligence is not as a general rule to be presumed, yet the injury itself may afford sufficient prima facie evidence of negligence, and the presumption of negligence may be created by the circumstances under which the injury occurred. \* \* \* Where negligence is thus presumed from the occurrence of the injury, defendant is called upon to rebut the prima facie case by showing that he took reasonable care to prevent the happening of such injury." *Chicago City R. Co. v. Barker*, 70 N. E. 624, 626, 209 Ill. 321.

The principle of "res ipsa loquitur" renders the question of negligence one for the jury, but does not relieve the plaintiff of the burden of proof. It does not raise any presumption in plaintiff's favor, but simply entitles the jury, in view of all the circumstances and conditions as shown by the plaintiff's evidence, to infer negligence, and to say whether, upon all the evidence, the plaintiff has sustained his allegation. *Ross v. Double Shoals Cotton Mills*, 52 S. E. 121, 123, 140 N. C. 115, 1 L. R. A. (N. S.) 298 (citing *Womble v. Grocery Co.*, 47 S. E. 493, 135 N. C. 474; *Stewart v. Van Deventer Carpet Co.*, 50 S. E. 562, 138 N. C. 60; *Ellis v. Portsmouth & R. R. Co.*, 24 N. C. 138; *Aycock v. Raleigh & A. L. R. Co.*, 89 N. C. 323; *Haynes v. Raleigh*

Gas Co., 19 S. E. 344, 114 N. C. 208, 26 L. R. A. 810, 41 Am. St. Rep. 786).

The part of the rule of "res ipsa loquitur" that, where defendant is in a position to clear away all doubts as to its alleged negligence, and fails to do so, it would be presumed that negligence existed, only applies where plaintiff has proved a state of facts which, while not free from question, is yet sufficient in the absence of explanation to justify an inference of negligence on defendant's part, and does not apply where the facts shown are equally consistent with the hypothesis that the injury was caused by the negligence of the injured person, or by that of defendant, or by both combined. *Texas & P. Coal Co. v. Kowalski*, 125 S. W. 3, 4, 103 Tex. 173. Thus the fact alone that a person who was walking is found dead beneath a railroad engine at a grade crossing raises no presumption that those operating the engine were negligent or in fault for the killing, and the burden rests upon one alleging such negligence to prove the same. *St. Louis & S. F. R. Co. v. Chapman*, 140 Fed. 129, 130, 71 C. C. A. 523. So, where a pedestrian was injured by colliding in the nighttime with a truck belonging to a railroad company, and standing on the sidewalk in front of the depot, the doctrine of "res ipsa loquitur" is not applicable. *Tiborsky v. Chicago, M. & St. P. Ry. Co.*, 102 N. W. 549, 550, 124 Wis. 243. But where a horse was killed on a railroad track by being struck by a train, the killing was presumably due to the railroad's negligence. *Kansas City Southern Ry. Co. v. Cash*, 96 S. W. 1062, 80 Ark. 284.

Where the injured party complains of a particular act of negligence, the doctrine of "res ipsa loquitur," which is a presumption of negligence arising out of the happening of the accident, has no application. *Gulf Pipe Line Co. v. Brymer* (Tex.) 124 S. W. 1007, 1009.

The doctrine of "res ipsa loquitur" applies only where on proof of the occurrence and the injury the existence of negligent default is the more reasonable probability, and it must not be allowed to prevail where, on proof of the occurrence without more, the matter rests only in conjecture. *Dall v. Taylor*, 66 S. E. 135, 136, 151 N. C. 284, 28 L. R. A. (N. S.) 949.

The doctrine of "res ipsa loquitur," that where the thing causing the injury complained of is shown to be under the management of defendant or his servant, and the occurrence is such that in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the occurrence arose from want of care, rests on the assumption that the thing is under the exclusive management of defendant, and the evidence of

the true cause of the accident is accessible to him and inaccessible to the person injured, and it has no application where the accident is due to a defective appliance under the management of plaintiff, or to a case involving divided responsibility, where the unexplained accident may have been attributable to one of several causes, for some of which defendant is not responsible. *Peters v. Lynchburg Light & Traction Co.*, 61 S. E. 745, 746, 108 Va. 333, 22 L. R. A. (N. S.) 1188.

The doctrine of "res ipsa loquitur" is uncertain, if not dangerous in practice, and should not be applied except when it not only supports the conclusion contended for, but also reasonably excludes all others. "The maxim 'res ipsa loquitur' is itself the expression of an exception to the general rule that negligence is not to be inferred, but to be affirmatively proved. The ordinary application of the maxim is limited to cases of an absolute duty, or an obligation practically amounting to that of an insurer. Cases not coming under one or both of these heads must be those in which the circumstances are free from dispute, and show, not only that they were under the exclusive control of the defendant, but that in the ordinary course of experience no such result follows as that complained of. It is sometimes said that the mere happening of an accident in this class of cases raises a presumption of negligence, but this is hardly accurate. Negligence is never presumed. If it were, it would be the duty of the court, in the absence of exculpatory evidence by the defendant, to direct a verdict for the plaintiff, whereas in these cases the question is for the jury. The accurate statement of the law is not that negligence is presumed, but that the circumstances amount to evidence from which it may be inferred by the jury." *Minneapolis General Electric Co. v. Cronon*, 166 Fed. 651, 659, 92 C. C. A. 345, 20 L. R. A. (N. S.) 816 (quoting *East End Oil Co. v. Pennsylvania Torpedo Co.*, 42 Atl. 708, 190 Pa. 353). See, also, *Allen v. Kingston Coal Co.*, 61 Atl. 572, 212 Pa. 54 (citing *East End Oil Co. v. Pennsylvania Torpedo Co.*, 42 Atl. 707, 190 Pa. 350; *Alexander v. Pennsylvania Water Co.*, 50 Atl. 991, 201 Pa. 252).

The rule of "res ipsa loquitur" cannot be applied where no negligence on defendant's part is shown by direct evidence, and it is apparent that other causes may have led to the accident. *Keenan v. McAdams & Cartwright Elevator Co.*, 113 N. Y. Supp. 343, 344, 346, 129 App. Div. 117 (citing *Duhme v. Hamburg-American Packet Co.*, 77 N. E. 387, 184 N. Y. 409, 112 Am. St. Rep. 615). See, also, *Duhme v. Hamburg-American Packet Co.*, 77 N. E. 386, 387, 184 N. Y. 404, 112 Am. St. Rep. 615.

The doctrine of "res ipsa loquitur" has no application "unless the thing causing the accident is under the control of the defendant or his servants, and the accident is of a kind

which does not ordinarily occur if due care has been exercised." *Paris & G. N. R. Co. v. Robinson*, 114 S. W. 658, 659, 662, 53 Tex. Civ. App. 12 (quoting and adopting 6 *Thomp. Neg.* § 7635). And where the act causing injury cannot be shown, defendant cannot be held liable, in the absence of any proof of negligence, by the application of the doctrine of "res ipsa loquitur." *Young v. Sibley, Lindsay & Curr Co.*, 119 N. Y. Supp. 446, 448.

The principle of "res ipsa loquitur" depends for its application on the circumstances and character of the occurrence, and not on the relation between the parties, except indirectly, so far as that relation defines the measure of duty imposed on the defendant. In an action against the owner of a building, for injuries sustained by plaintiff owing to the fall of the elevator in the building, it was not necessary for plaintiff to prove the specific defect or misconduct, but sufficient to show facts from which the jury might fairly infer that the car was defective or negligently operated. *Glassman v. Surpless*, 103 N. Y. Supp. 789, 791, 53 Misc. Rep. 586 (quoting and adopting definition in *Griffen v. Manice*, 59 N. E. 925, 106 N. Y. 188, 52 L. R. A. 922, 82 Am. St. Rep. 630).

The application of the doctrine of "res ipsa loquitur" is not limited to cases involving the failure of some mechanical contrivance or machine in some unusual and unexpected manner to do its work properly, where the default is imputed to the negligence of its owner or the employé who is charged with the duty of keeping it in order. The doctrine is, not that in any case negligence can be assumed from the mere fact of an accident and an injury, but that in many cases the surrounding circumstances, which are necessarily brought into view by showing how the accident occurred, contain without further proof sufficient evidence of the defendant's duty and of his neglect to perform it. *Fitzgerald v. Southern Ry. Co.*, 54 S. E. 391, 394, 395, 141 N. C. 530, 6 L. R. A. (N. S.) 337 (citing *Shear. & R. Neg.* § 59; *Hale, Torts*, 482; *Labatt, Mast. & S.* § 843; *Railroad v. Wood* [Tex. Civ. App.] 63 S. W. 164).

A prima facie case of negligence is made out, under the rule of "res ipsa loquitur," if defendant is liable for negligence in selecting nurses or for the negligence of nurses selected; they having permitted a patient to be severely burned by hot-water bottles, while still under the influence of an anæsthetic given for the purpose of an operation which had just been performed. *Adams v. University Hospital*, 99 S. W. 453, 122 Mo. App. 675.

In cases resting on contract, the mere happening of the event will be prima facie evidence of a breach of contract, without further proof, under the doctrine of "res ipsa loquitur"; but in those cases not resting on contract, it must not only appear that the

affair occurred, but the surrounding circumstances must be such as to raise a presumption that it happened on account of the failure of the defendant to perform a duty that it owed to the complaining party. In an action against a carrier for damages by reason of alleged negligence in allowing diseased cattle to escape from its pen, from whence they wandered into plaintiff's pasture, it appearing that the gate of the pen in which the cattle were placed was properly shut, and that it was not defective, and that the cattle could not have escaped unless they worked the gate loose or some one opened it, the evidence was insufficient to warrant a finding of negligence. *Reynolds v. Galveston, H. & S. A. R. Co. (Tex.)* 99 S. W. 569, 571.

Where the door of a car fell on an employé while he was endeavoring to open it to inspect the contents assigned to his employer, the occurrence of the accident was evidence of the faulty condition of the door, within the principle of "res ipsa loquitur," and the burden was on the carrier, to free itself from liability, to show that it had made a proper inspection reasonably calculated to discover the defect. *Tateman v. Chicago, R. I. & P. R. Co.*, 70 S. W. 514, 96 Mo. App. 448 (citing *Blanton v. Dold*, 18 S. W. 1149, 109 Mo. 74; *Gallagher v. Edison Illuminating Co.*, 72 Mo. App. 576; *Houston v. Brush*, 29 Atl. 380, 66 Vt. 331, 342).

Under a count alleging negligence of defendant, and stating the nature and particulars of the accident, but not stating the particulars of the negligence, plaintiff may rely on the doctrine of "res ipsa loquitur," if the accident is of a kind to indicate that it would not have happened unless there was negligence. *James v. Boston Elevated R. Co.*, 90 N. E. 513, 514, 204 Mass. 158.

The mere fact that an ornamental bracket fell from a building injuring a person does not raise the presumption of negligence, and the rule of "res ipsa loquitur" does not apply. *Joyce v. Black*, 75 Atl. 602, 603, 226 Pa. 408, 27 L. R. A. (N. S.) 863.

The mere fact that a part of some lumber which was being unloaded by defendant from a car under his control at the time as consignee fell and injured plaintiff's intestate, who was working near said car, does not raise a presumption of negligence on defendant's part; the doctrine of "res ipsa loquitur" not being applicable. *Laforrest v. O'Driscoll*, 59 Atl. 923, 925, 26 R. I. 547.

#### **Injuries incident to use of electricity, gas, or fire**

"Res ipsa loquitur" means that the thing speaks for itself; that the very occurrence itself imports negligence. In consideration of the dangerous character of electricity, when it is shown that one on a public street in a proper place is injured without fault on his part by improper insulation or derange-

ment of an electric company's appliances, a presumption of negligence arises, which casts the burden on the company of showing that it exercised due care. *Shawnee Light & Power Co. v. Sears*, 95 Pac. 449, 455, 456, 21 Okl. 13.

Where a person was killed by an electric current from a telephone on his premises, the rule of "res ipsa loquitur" applies. *Delahunt v. United Telephone & Telegraph Co.*, 64 Atl. 515, 517, 215 Pa. 241, 114 Am. St. Rep. 958.

One of the considerations on which the rule of "res ipsa loquitur" is based is that the person against whom it is applied has exclusive control of the thing which has produced the injury. The doctrine of "res ipsa loquitur" could not be applied to an action against a subway company for injuries received by plaintiff while passing a subway man-hole, caused by the explosion of gas ignited by a lamp held by some one near the man-hole; it being not shown who that person was, nor how gas came to be in the subway, and it appearing that, though the company owned the subway and "kept the same in repair," a gas company used it to carry pipes not under the care or control of defendant company. *Robinson v. Empire City Subway Co., Ltd.*, 103 N. Y. Supp. 717, 718, 53 Misc. Rep. 593 (citing *Griffen v. Manice*, 59 N. E. 925, 166 N. Y. 188, 52 L. R. A. 922, 82 Am. St. Rep. 630).

The application of the rule of "res ipsa loquitur" depends on the facts and circumstances of each individual case; but the mere fact of the explosion of a gas regulator, which up to the time of the accident had properly performed its functions, is not a circumstance to which the rule may be applied. *Marshall Window Glass Co. v. Cameron Oil & Gas Co.*, 59 S. E. 959, 961, 63 W. Va. 202.

In an action for injuries to plaintiff's health by an alleged leak of a gas main in a street near her residence, the fact that the leakage occurred did not establish a prima facie case of negligence on the part of the gas company. *Hammerschmidt v. Municipal Gas Co.*, 99 N. Y. Supp. 890, 114 App. Div. 290 (citing *Hutchinson v. Boston Gaslight Co.*, 122 Mass. 219).

The mere proof that one set fire to grass on his land, and that the fire escaped to the land of another, did not raise the presumption of negligence against him, as the doctrine of "res ipsa loquitur" does not apply, but the burden was on the party injured to prove that he was negligent in starting the fire, or that he did not exercise ordinary care to confine the fire on his own land. *Pfeiffer v. Aue*, 115 S. W. 300, 302, 53 Tex. Civ. App. 98.

#### Injuries to employé

The mere happening of an accident is not always sufficient to charge one with neg-

ligence under the doctrine of "res ipsa loquitur," and the presumption does not arise unless the surrounding circumstances necessarily brought into view by showing how the accident occurred contain, without further proof, evidence of defendant's duty and of his neglect to perform it. The doctrine cannot be invoked between employer and employé, unless it appears from the circumstances attending the accident that except for some negligence of the master, either of omission or commission, the accident would not have happened. *Feingold v. Ocean S. S. Co. of Savannah*, 113 N. Y. Supp. 1018, 1020, 61 Misc. Rep. 638. So where a brakeman was thrown from the car by the giving way of something connected with the brake appliances, the doctrine of "res ipsa loquitur" was not applicable in aid of his recovery, there being no affirmative proof of defendant's negligence. *Hamilton v. Kansas City Southern Ry. Co.*, 100 S. W. 671, 673, 123 Mo. App. 619. And so, where the crosshead and piston rod of a railway engine are so constructed and fastened that it is not possible, by the exercise of ordinary care, to discover incipient fractures forming in the concealed portions of the rod, without detaching the parts, and an injury is occasioned by the breaking of the piston rod within the crosshead, no presumption of negligence arises with respect to the sufficiency of the rod by reason of the mere occurrence of the accident, and the rule of "res ipsa loquitur" does not apply. *Cederberg v. Minneapolis, St. P. & S. S. M. R. Co.*, 111 N. W. 953, 955, 101 Minn. 100 (citing *Labatt, Mast. & S. § 834*; *Ryder v. Kinsey*, 64 N. W. 94, 62 Minn. 85, 34 L. R. A. 557, 54 Am. St. Rep. 623, and *Waller v. Ross*, 110 N. W. 252, 100 Minn. 7, 12 L. R. A. [N. S.] 721, 117 Am. St. Rep. 661, 10 Ann. Cas. 715).

The doctrine of "res ipsa loquitur" is inapplicable to negligence cases arising between master and servant because the possible causes of accidents during service are many, for some of which the master, and for others of which the servant, is responsible, and the happening of an accident does not indicate to which class its cause belongs. The burden in such cases is always on him who alleges that the master was guilty of causal negligence to establish that fact. A finding that an accident happened and that the servant injured was not at fault does not sustain this burden, because the accident may have been unavoidable, or may have resulted from the negligence of fellow servants, or from other causes for which the master is not liable. *Northern Pac. Ry. Co. v. Dixon*, 139 Fed. 737, 740, 71 C. O. A. 555. Mere proof of accident or injury to a servant does not raise the presumption of negligence on the part of the master. *Visman v. Southern Ry. Co. (Ky.)* 89 S. W. 502, 503, 2 L. R. A. (N. S.) 469; *Finn v. Oregon Water Power & Ry. Co.*, 93 Pac. 690, 691, 51 Or. 66; *Redus v. Milner Coal & R. Co.*, 41 South. 634, 635, 148



*Ala.* 665; *Kremer v. Eagle Mfg. Co.*, 96 S. W. 720, 727, 120 Mo. App. 247. And so, where the accident did not result from the condition of a pile driver which fell, the injured servant could not recover under the doctrine of "res ipsa loquitur." *Illinois Cent. R. Co. v. Swift*, 72 N. E. 737, 741, 213 Ill. 307.

An employé, injured through a nut on the end of a shaft loosening allowing a pulley to fall on her, does not make out a prima facie case, under the rule of "res ipsa loquitur"; the attendant circumstances not suggesting the employer had failed in any duty owing the employé. *Griffin v. Flank*, 95 N. Y. Supp. 546, 48 Misc. Rep. 617.

The "res ipsa loquitur" doctrine cannot be applied to injury to an employé caused by the fall of a structure which he was assisting in tearing down. *Henahan v. Lyons*, 87 N. E. 602, 201 Mass. 269; *Ferrick v. Eldlitz*, 88 N. E. 33, 34, 35, 195 N. Y. 248, 24 L. R. A. (N. S.) 837 (citing *Griffen v. Manice*, 59 N. E. 925, 166 N. Y. 188, 52 L. R. A. 922, 82 Am. St. Rep. 630; *Henson v. Lehigh Val. R. Co.*, 87 N. E. 85, 194 N. Y. 205, 19 L. R. A. [N. S.] 790). Or to injury received in a stone quarry. *Mitchell Lime Co. v. Nickless (Ind.)* 85 N. E. 728, 731; *Bonin v. Ballard*, 82 N. E. 702, 196 Mass. 524.

The application of the maxim "res ipsa loquitur" does not ordinarily depend upon the relation between the parties, except indirectly, so far as that relation defines the measure of duty imposed on the defendant. Under certain circumstances it may apply to a servant's injury caused by an agency of the master. The maxim at most raises a prima facie case of negligence, which is rebuttable. No presumption of negligence necessarily follows the plaintiff through the case, so as to compel the submission of the question of fact to the jury. *Jenkins v. St. Paul City R. Co.*, 117 N. W. 928, 931, 105 Minn. 504, 20 L. R. A. (N. S.) 401.

The doctrine of "res ipsa loquitur," applicable to personal injuries to passengers, cannot be applied against a mining company, in an action against it for injuries to a miner, who was crushed by a descending cage. *Southwestern Development Co. v. Boyd*, 104 S. W. 1174, 1178, 7 Ind. T. 773. And it does not apply in an action by a mining employé for injuries received by the fall of a bucket down the mine shaft. *Reino v. Montana Mineral Land Development Co.*, 99 Pac. 853, 855, 38 Mont. 291.

Mere proof that a freight car was derailed and overturned, and that a brakeman on the car was injured, does not cast on the railroad the burden of giving some adequate explanation of the accident that would free it from the imputation of negligence, since the rule of "res ipsa loquitur" is not applicable. *Henson v. Lehigh Val. R. Co.*, 87 N. E. 85, 86, 194 N. Y. 205, 19 L. R. A. (N. S.) 790. But where plaintiff was injured in a rear-end col-

lision, while he was riding in the caboose of a freight train in the performance of his duty, the fact of collision is sufficient to create a prima facie case of negligence on the part of the railroad company under the doctrine of "res ipsa loquitur," though plaintiff was a servant, and not a passenger. *St. Clair v. St. Louis & San Francisco R. Co.*, 99 S. W. 775, 778, 122 Mo. App. 519.

The doctrine of "res ipsa loquitur" was held not applicable to its full extent to the case of an accident resulting from the use of complicated machinery, wherein it appeared that a rod in a sawmill had parted at one of the places where it was joined, causing the sawyer to lose control of the carriage, which then ran back to and against a bumper at the end of the track, whereby plaintiff was thrown from the carriage and injured, and wherein it was therefore held that the mere fact that the accident happened, the rod being in the exclusive possession and control of the defendant, was not alone sufficient to establish a prima facie case of negligence on the part of defendant. *Gomulak v. C. A. Smith Lumber Co.*, 107 N. W. 542, 543, 98 Minn. 149.

The essential import of the doctrine of "res ipsa loquitur" in any given case is that on the facts proved plaintiff has, without direct proof of negligence, made out a prima facie case; so that, whether or not the doctrine obtains in a case between master and servant, it need not be invoked, where there is specific evidence, positive or circumstantial, bearing on the question of negligence. *Western Steel Car & Foundry Co. v. Cunningham*, 48 South. 109, 110, 112, 158 Ala. 369; *Chesapeake & O. R. Co. v. Rowsey's Adm'r*, 62 S. E. 363, 369, 108 Va. 632. And so, where defendant's evidence established the cause of an accident resulting in injury to a servant, his right to recover did not depend on the doctrine of "res ipsa loquitur." *Kluska v. Yeomans*, 103 Pac. 819, 821, 54 Wash. 465, 132 Am. St. Rep. 1121.

The mere happening of an accident and injury to an employé while stepping off the elevator in a building, does not justify the inference of negligence, and the doctrine of "res ipsa loquitur" does not apply. *Foquet v. New York Cent. & H. R. R. Co.*, 103 N. Y. Supp. 1105, 1107, 53 Misc. Rep. 121.

The doctrine of "res ipsa loquitur" does not apply to cases of the class to which a personal injury caused by the falling of a freight elevator belongs, and, when an employé is injured while operating such an elevator, the mere happening of an accident raises no presumption, and cannot serve as proof of the master's negligence. *National Biscuit Co. v. Wilson*, 82 N. E. 916, 917, 169 Ind. 442 (citing *Hill v. Iver-Johnson Sporting Goods Co.*, 74 N. E. 303, 188 Mass. 75; *Moran v. Racine Wagon Co.*, 26 N. Y. Supp. 852, 74 Hun. 454; *Kirby v. Rainer Grand Hotel Co.*, 69 Pac.

378, 28 Wash. 705; *Robinson v. Charles Wright & Co.*, 53 N. W. 938, 94 Mich. 283; *Davidson v. Davidson*, 48 N. W. 560, 40 Minn. 117; *Haynie v. Hammond Packing Co.*, 103 S. W. 581, 126 Mo. App. 88; *Rush v. Thos. D. Murphy*, 112 N. W. 814, 135 Iowa, 376). The fact that a servant was killed by the fall, without any apparent cause, of a freight elevator in which he was riding, does not render the master liable under the doctrine of "res ipsa loquitur." *Starer v. Stern*, 91 N. Y. Supp. 821, 824, 100 App. Div. 393 (citing *Moran v. Racine Wagon Co.*, 26 N. Y. Supp. 852, 74 Hun, 454; *Hart v. Naumburg*, 25 N. E. 385, 123 N. Y. 641; *Ingram v. Fosburgh*, 76 N. Y. Supp. 344, 73 App. Div. 129; *Biddiscomb v. Cameron*, 55 N. Y. Supp. 127, 35 App. Div. 561, affirmed in 57 N. E. 1104, 161 N. Y. 637; *Bucher v. Prybil*, 45 N. Y. Supp. 972, 19 App. Div. 126; *Fink v. Slade*, 72 N. Y. Supp. 821, 66 App. Div. 105). And so, where a safety clutch in a freight elevator wholly failed to act when an emergency arose, and the servant in no way contributed to such failure, its failure to act affords evidence of negligence on the part of the master under the doctrine of "res ipsa loquitur." *National Biscuit Co. v. Wilson (Ind.)* 80 N. E. 33, 35. But where deceased got on an elevator, and after the elevator had risen a few feet the bottom of it was torn out, and there was evidence that it was in the habit of shaking, tilting, and jerking, as though the sides of the bottom caught, it was held that the facts were sufficient to justify an inference of defendant's negligence under the doctrine of "res ipsa loquitur." *Samuels v. McKesson*, 99 N. Y. Supp. 294, 113 App. Div. 497.

In an action for injuries to a servant by the sudden starting of a printing press, instructions that, if the press started of its own accord after it had been properly stopped, such fact, unexplained, was some evidence of negligence on defendant's part, and that, if the jury found that the belt shipper was pushed back to the extreme limit in its proper way, then the fact that it started up was in itself some evidence of negligence on the part of defendant or his superintendent in allowing the defect to exist, properly presented the doctrine of "res ipsa loquitur." *Byrne v. Boston Woven Hose & Rubber Co.*, 77 N. E. 696, 697, 191 Mass. 40.

#### Injuries to passenger

"Res ipsa loquitur," which, literally translated, means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident; and the doctrine which it embodies, though correct enough in itself, may be said to be applicable to two classes of cases only, viz.: First, when the relation of carrier and passenger exists, and the accident arises from some

abnormal condition in the department of actual transportation; second, where the injury arises from some condition or event that is in its very nature so obviously destructive of the safety of person or property, and is so tortious in its quality, as in the first instance, at least, to permit no inference save that of negligence on the part of the person in control of the injurious agency. But it is obvious that in both instances more than the mere isolated, single, segregated fact that an injury has happened must be known. The injury, without more, does not necessarily speak or indicate the cause of that injury. It is colorless; but the act that produced the injury being made apparent may, in the instances indicated, furnish a ground for a presumption that negligence set that act in motion. The maxim does not go to the extent of implying that you may, from the mere fact of an injury, infer what physical fact produced the injury; but it means that when the physical act has been shown, or is apparent, and is not explained by the defendant, the conclusion that negligence superinduced it may be drawn as a legitimate deduction of fact." Thus the mere fact that a passenger in a street was injured does not of itself raise the presumption of negligence on the part of the carrier. *State, to Use of Charles, v. United Rys. & Electric Co.*, 60 Atl. 249, 251, 101 Md. 183 (quoting and adopting *Benedick v. Potts*, 40 Atl. 1067, 88 Md. 55, 56, 41 L. R. A. 478). See, also, *Wilbur v. Rhode Island Co.*, 61 Atl. 601, 602, 27 R. I. 205 (quoting *Benedick v. Potts*, 40 Atl. 1067, 1068, 88 Md. 52, 41 L. R. A. 478).

The maxim "res ipsa loquitur" means that the affair speaks for itself. Thus, where plaintiff's intestate was directed by his superior to assist in unloading a box car loaded with cotton bales, and while opening the sliding door of the car as instructed, and before he could get away, a large cotton bale fell out and crushed him, and it appeared that the car was loaded two bales deep, one bale on the end of the other, and the bales opposite the doors were not pinned or tied together, or boarded in, it was held that the circumstances surrounding the accident were sufficient to establish a prima facie case of defendant's negligence under the doctrine of "res ipsa loquitur." *Chamberlain v. Southern Ry. Co.*, 48 South. 703, 704, 159 Ala. 171. And so, where, in an action for injury to an employé through the falling of a pile of lumber, there was evidence that the master, through its vice principal, not only had actual charge and control of piling the lumber, but directed the manner in which it should be piled, and that no particular pains should be exercised, and that no cross-strips should be used, and there was evidence that plaintiff was directed to go to the very place where he was injured, and it is self-evident that, if properly piled, the lumber would not

have fallen of its own accord, the doctrine of "res ipsa loquitur" is applicable, so that a prima facie case of negligence is made out. *Hardesty v. Largey Lumber Co.*, 86 Pac. 29, 30, 31, 34 Mont. 151.

The doctrine of "res ipsa loquitur" is defined in *Shearman & Redfield on Negligence* (section 59), where it is said: "It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances, which are necessarily brought into view by showing how the accident occurred, contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer." And the court says: "The res, therefore, includes the attendant circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue—the defendant's negligence. The maxim is also in part based on the consideration that, where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause of the accident, which the plaintiff is unable to present." Hence, where there were two actors in the collision, the motorman and the driver of a horse, which became frightened and ran into the side of the car on which plaintiff was a passenger, it was error to charge that the mere happening of the accident created a presumption of negligence on the part of the street railway company. *Munzer v. Interurban St. Ry. Co.*, 91 N. Y. Supp. 21, 23, 45 Misc. Rep. 568. See, also, *Grant v. Metropolitan St. Ry. Co.*, 91 N. Y. Supp. 202, 204, 99 App. Div. 422.

The scope of the doctrine of "res ipsa loquitur" is well illustrated in *Shear. & R. Neg. § 59*, where it is said: "Where a thing which causes the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who had the management of it used proper care, it affords reasonable evidence, in the absence of an explanation by the defendant, that the accident arose from a want of care. So, also, where it is shown that the accident is such as that its real cause may be the negligence of the defendant, and whether it is so or not is within the knowledge of the defendant, the plaintiff may give the required evidence of negligence, without himself explaining the real cause of the accident, by proving the circumstances, and thus raising a presumption that if the defendant does not

choose to give the explanation, the real cause was negligence on the part of the defendant." Thus the sudden starting of a street car with a jerk of sufficient violence to throw to the ground a passenger, who had placed her foot on the running board to alight at the crossing which the car was slowly approaching, justifies an inference of negligence. *Paducah Traction Co. v. Baker*, 113 S. W. 449, 452, 130 Ky. 360, 18 L. R. A. (N. S.) 1185 (quoting and adopting *Shear. & R. Neg. § 59*: citing *Griffen v. Manice*, 59 N. E. 925, 166 N. Y. 188, 52 L. R. A. 922, 82 Am. St. Rep. 630; *Breen v. New York Cent. & H. R. R. Co.*, 16 N. E. 60, 109 N. Y. 297, 4 Am. St. Rep. 450; *Howser v. Cumberland & P. R. Co.*, 30 Atl. 908, 80 Md. 146, 27 L. R. A. 154, 45 Am. St. Rep. 332; *Consolidated Traction Co. v. Thalheimer*, 37 Atl. 132, 59 N. J. Law, 474). So the occurrence of a sudden lurch or jerk of a street railway car of a sufficient violence to throw a passenger off the platform, who was then preparing to alight, and awaiting the stoppage of the car for that purpose, justifies the inference of a breach of duty upon the part of those operating the car within the maxim, "res ipsa loquitur." *Nirk v. Jersey City, H. & P. St. Ry. Co.*, 68 Atl. 158, 160, 75 N. J. Law, 642 (citing *Scott v. Bergen County Traction Co.*, 43 Atl. 1060, 63 N. J. Law, 407). See, also, *Paul v. Salt Lake City R. Co.*, 83 Pac. 563, 565, 30 Utah, 41 (citing *Nellis*, St. R. R. p. 576; 2 *Thomps. Com. Neg. § 2830*; *United Rys. & Electric Co. v. Beidelman*, 52 Atl. 913, 95 Md. 480; *Lincoln St. Ry. Co. v. McClellan*, 74 N. W. 1074, 54 Neb. 672, 60 Am. St. Rep. 736; *New York, C. & St. L. R. Co. v. Blumenthal*, 43 N. E. 809, 160 Ill. 40; *Doolittle v. Southern Ry. Co.*, 40 S. E. 133, 62 S. C. 130; *Bosqui v. Sutro R. R. Co.*, 63 Pac. 682, 131 Cal. 390; and *Texas & P. Ry. Co. v. Nunn*, 98 Fed. 963, 39 C. C. A. 364; *Lincoln Traction Co. v. Shepherd*, 107 N. W. 764, 765, 74 Neb. 369.

The maxim "res ipsa loquitur" is applied in an action for a casualty to a passenger on a street car, or other vehicle in the control of a defendant, only when the accident is one that, according to ordinary experience, does not happen if the vehicle is operated with proper care. The improbability of the event happening under good management is what gives it probative force as evidence of negligence. Some injuries to passengers in vehicles proclaim negligence on the part of the carrier, or indicate it so strongly as to call on the carrier for an explanation. Collisions of two trains or two street cars, or the overturning of a car, have this effect, because experience has shown them to be due generally to carelessness. But not every casualty to a passenger traveling on a street car or railway train will constitute evidence of negligence and transfer to the railway company the burden of proof. This is so because casualties will happen in using those modes of conveyance under the most careful

management, and a common carrier of passengers is not held to be an insurer of their safety. It is true a contractual relation exists in such cases, but the carrier does not agree to carry the passengers safely in every contingency, but only in so far as it can be done by using great care. *Trotter v. St. Louis & S. Ry. Co.*, 99 S. W. 508, 510, 122 Mo. App. 405 (citing *Dougherty v. Missouri R. Co.*, 81 Mo. 325, 330, 51 Am. Rep. 239; *Och v. Missouri, K. & T. Ry. Co.*, 31 S. W. 962, 130 Mo. 27, 51, 36 L. R. A. 442; *Clark v. Chicago & A. R. Co.*, 29 S. W. 1013, 127 Mo. 197). Mere injury to a passenger while aboard a car or while alighting from it creates no presumption that it was caused by negligence of the carrier operating the car; but it must be first shown the injury came from the movement of the car by those in charge of it, or from something connected therewith, or in control of the carrier, and then it is presumed that the thing causing the injury was due to the carrier's negligence, throwing on it the burden of disproving the *prima facie* case. *Wyatt v. Pacific Electric R. Co.*, 103 Pac. 892, 893, 156 Cal. 170. Thus, where the injured passenger's dress was caught while she was alighting from the front platform so firmly that some one pulled her towards the car to loosen her dress, it was insufficient as a matter of law, notwithstanding the doctrine of "res ipsa loquitur," to show negligence on the theory that the platform was defective. *Thomas v. Boston Elevated R. Co.*, 79 N. E. 749, 750, 193 Mass. 438 (citing *Faulkner v. Boston & M. R. R.*, 72 N. E. 976, 187 Mass. 254; *Wadsworth v. Boston El. Ry. Co.*, 66 N. E. 421, 182 Mass. 572; *Obertoni v. Boston & M. R. R.*, 71 N. E. 980, 186 Mass. 481, 67 L. R. A. 422; *Hill v. Iver-Johnson Sporting Goods Co.*, 74 N. E. 303, 188 Mass. 75). And the inference of negligence was not justified where a train started so suddenly that the passenger was obliged to seize hold of the frame of the doorway of the car, the door of which closed, injuring her finger. *Goold v. New York, N. H. & H. R. Co.*, 111 N. Y. Supp. 1106, 1107, 59 Misc. Rep. 36.

Proof of an accident to a passenger, without evidence that it was caused by apparatus wholly under the carrier's control and furnished and applied by it, or by some defect in machinery, cars, or tracks, and that the accident was of such character as would not ordinarily occur if due care was used, will not raise a *prima facie* presumption of negligence under the doctrine of "res ipsa loquitur," though in certain cases mere proof of the accident does, under that doctrine, raise such presumption. *Barnes v. Danville St. Ry.*, etc., Co., 85 N. E. 921, 923, 235 Ill. 566, 126 Am. St. Rep. 237. So, where a passenger is struck by a missile thrown by a bystander, no presumption of negligence on the part of the carrier arises from the mere fact of the injury. *Woas v. St. Louis Transit Co.*,

96 S. W. 1017, 1020, 198 Mo. 664, 7 L. R. A. (N. S.) 231, 8 Ann. Cas. 584.

The rationale of the doctrine of "res ipsa loquitur" is that in some cases the very nature of the act complained of may, of itself and through the presumption it carries, supply the requisite proof of negligence. The sound rule on the subject, declared in an early case and often approved by the courts, is: "Where the thing is shown to be under the management of defendant or its servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care. The *res ipsa loquitur* doctrine applies to injury received by a passenger on a freight train, where cars were coupled so violently that he was thrown from a trunk on which he was sitting in the caboose, through a side door, to the ground, and a water keg in the car was overturned, etc. *Mitchell v. Chicago, & A. R. Co.*, 112 S. W. 291, 294, 132 Mo. App. 143 (citing *Dougherty v. Missouri Pac. Ry. Co.*, 9 Mo. App. 478; *Id.*, 81 Mo. 325, 51 Am. Rep. 239; *Trotter v. St. Louis & S. R. Co.*, 99 S. W. 508, 122 Mo. App. 405; *St. Clair v. St. Louis & S. F. Ry. Co.*, 99 S. W. 775, 122 Mo. App. 519; *Labatt, Mast. & S.* § 834; 21 Am. & Eng. Ency. of Law [2d Ed.] 512, 513). But where a passenger's injury was caused by the sudden closing of the car door against his hand as it rested on the door frame, any presumption of negligence arising from the accident was overcome by the uncontradicted evidence that the catch provided for the car door was in good repair and that the train was not operated at a dangerous rate of speed. *Goss v. Northern Pac. R. Co.*, 87 Pac. 149, 150, 48 Or. 439.

The maxim "res ipsa loquitur" is merely a rule of evidence applicable in a certain class of cases, and is generally applied in cases of injuries to passengers. The maxim, when applicable to the facts and circumstances of a particular case, is not intended to, and does not, dispense with establishing negligence. In all cases when negligence is the gist of the action, the negligence must be proved; but in case of an injury to a passenger he is only required to prove that the injury was occasioned by a collision, derailing or upsetting of coaches, breaking of machinery or appliances, or things of that character, or through some act or acts of the servants operating machinery or appliances, or in the management of the instrumentalities or the means used in the business over which the carrier has control, and for the conduct and management of which he is responsible. *Christensen v. Oregon Short Line R. Co.*, 99 Pac. 676, 678, 35 Utah, 137, 20 L. R. A. (N. S.) 255, 18 Ann. Cas. 1150. Where a collision or derailment occurs, or there is an accident to

the machinery or appliances used as a means of transportation, evidence of the accident and of the passenger's injuries arising therefrom, without other proof raises the presumption of negligence. The thing speaks for itself. "*Res ipsa loquitur*." *Lincoln Traction Co v. Shepherd*, 104 N. W. 882, 883, 74 Neb. 369; *Russell v. Seattle R. & S. Ry. Co.*, 92 Pac. 288, 47 Wash. 500; *Goodloe v. Metropolitan St. Ry. Co.*, 96 S. W. 482, 484, 120 Mo. App. 194; *Bamberg v. International Ry. Co.*, 103 N. Y. Supp. 297, 301, 53 Misc. Rep. 403; *Dearden v. San Pedro, L. A. & S. L. R. Co.*, 93 Pac. 271, 273, 33 Utah, 147. The doctrine of "*res ipsa loquitur*" is applicable where a manilla rope used in the operation of an inclined railway broke, the safety appliance did not work, the device on the car did not hold it and also broke, and the car fell to the bottom of the incline. *Burke v. State*, 119 N. Y. Supp. 1089, 1104, 64 Misc. Rep. 558 (citing and adopting *Hogan v. Manhattan Ry. Co.*, 43 N. E. 403, 149 N. Y. 23; *Axlebrood v. Rosen*, 47 N. Y. Supp. 164, 21 Misc. Rep. 352; *Flinn v. New York Cent. & H. R. R. Co.*, 22 N. Y. Supp. 473, 67 Hun, 631). The collapse of a trapdoor forming a part of the floor of a street car, under the weight of a passenger who was simply walking thereon, resulting in injury to her, is evidence of negligence under the doctrine of "*res ipsa loquitur*." *Jorden v. St. Louis & M. R. R. Co.*, 99 S. W. 492, 493, 122 Mo. 330.

The rule of "*res ipsa loquitur*" is based on the apparent fact that the particular accident could not have happened without negligence on the part of the carrier, or upon the literal meaning of the expression that the thing itself speaks and shows *prima facie* that the carrier was negligent. Negligence will not be presumed from the mere fact of accident, which is as consistent with the presumption that it was unavoidable as it is with negligence; and therefore, if it be left in doubt what the cause of the accident was, or if it may as well be attributable to the act of God or unknown causes as to negligence, there is no such presumption. Where an injury to a passenger on a street car was caused by the blowing out of the controller, and the company had control over the equipment and operation of the car, and the passenger was not charged with contributory negligence, the company was *prima facie* guilty of actionable negligence; it being presumed that the accident was caused by a defect in the controller. *Firebaugh v. Seattle Electric Co.*, 82 Pac. 995, 996, 40 Wash. 658, 2 L. R. A. (N. S.) 836, 111 Am. St. Rep. 990 (citing and adopting *Nellis, Street Railroad Accident Law*, pp. 590, 591, and citing and explaining *Hawkins v. Front St. Cable Ry. Co.*, 28 Pac. 1021, 3 Wash. 592, 16 L. R. A. 808, 28 Am. St. Rep. 72; *Allen v. Northern Pac. R. Co.*, 77 Pac. 204, 35 Wash. 221, 66 L. R. A. 804; *Williams v. Spokane Falls & N. R. Co.*, 80 Pac.

1101, 39 Wash. 77). See, also, *Chicago Union Traction Co. v. Newmiller*, 74 N. E. 410-411, 215 Ill. 383.

If proof of the occurrence shows that the accident was such as could not have happened without negligence according to the ordinary experience of mankind, the doctrine is applied, even if the precise omission or act of negligence is not specified, and when it does not appear that the accident was owing to some act done or to some act not done. It is applied when the inference of negligence is required by the nature of the occurrence. If the res, or the entire occurrence as proved, could not have happened without negligence of some kind, negligence is presumed, without showing what kind, and the burden of explanation is thrown on the defendant. But where a passenger, approaching an elevated railroad platform in order to gain it, pressed his hand against the glass of a locked door with sufficient force to break it, such facts were insufficient to raise a presumption that the door was improper for the purpose for which it was constructed, or that the breakage arose from any defect in the glass or door, under the doctrine of "*res ipsa loquitur*." *McCormack v. Interborough Rapid Transit Co.*, 117 N. Y. Supp. 532, 534, 132 App. Div. 703 (quoting and adopting definition in *Robinson v. Consolidated Gas Co. of New York*, 86 N. E. 805, 191 N. Y. 40, 28 L. R. A. [N. S.] 586).

The "res," of the maxim "*res ipsa loquitur*," is not simply an accident resulting in injury, but the accident and the surrounding circumstances necessarily shown by proving how the accident occurred, or, in other words, the occurrence as it appears by proof of the accident. Thus, where plaintiff, who was riding in defendant's passenger elevator, was struck by a piece of mortar which fell down the shaft, and there was evidence that mortar had been allowed to protrude into the shaft, so as to be liable to be broken off by constant vibration, and defendant undertook to show that the condition of the mortar was not necessarily dangerous, and that it had exercised all reasonable care to inspect and guard against such accidents, the court should have instructed that the verdict must be for defendant, in the absence of evidence that it knew, or in the exercise of reasonable care should have known, that the mortar was in such condition that a reasonably prudent person would believe that it might fall; and an instruction which, after giving in general terms the rule of "*res ipsa loquitur*," stated negligence might be found from the mere happening of the accident, unexplained, stated the case too broadly. *Frahm v. Siegel Cooper Co.*, 116 N. Y. Supp. 90, 92, 131 App. Div. 747 (quoting and adopting definition in *Griffen v. Manice*, 59 N. E. 925, 166 N. Y. 188, 52 L. R. A. 922, 82 Am. St. Rep. 630).

The doctrine of "res ipsa loquitur" does not apply where the accident might as plausibly have resulted from negligence on the part of the passenger as on the part of the carrier; nor is it applicable to the death of a passenger from circumstances that are personal and peculiar to him, and not by reason of any management of or accident to the train itself. *Price v. St. Louis, L. M. & S. Ry. Co.*, 88 S. W. 575, 578, 75 Ark. 479, 112 Am. St. Rep. 79.

#### **Injuries to traveler on street or highway**

Where a street was originally constructed in a proper manner, one injured by a defect therein cannot recover against the municipality on the doctrine of "res ipsa loquitur," which is the rule that where the thing which causes the injury is under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management or control use proper care, it affords sufficient evidence, in the absence of an explanation by defendant, that it arose from negligence; for the streets are not only under the control of the municipality, but are constantly used by the traveling public. *City of Cortin v. Benton*, 152 S. W. 241, 242, 151 Ky. 483, 43 L. R. A. (N. S.) 591.

"The doctrine of 'res ipsa loquitur' does not apply to collisions of passers in highways." *Stone v. Forest City Exp. Co.*, 74 Atl. 23, 24, 105 Me. 237. See, also, *Luecke v. Graham*, 100 S. W. 505, 506, 123 Mo. App. 212; *Sauer v. Eagle Brewing Co.*, 84 Pac. 425, 426, 427, 3 Cal. App. 127. But the doctrine applies to a railroad crossing accident, when the facts indicate that, had deceased done what he was bound to do, the accident would not have happened. *Clemons v. Chicago, St. P., M. & O. R. Co.*, 119 N. W. 104, 106, 137 Wis. 387.

Where one lawfully on a public street of a city was injured by the fall of an awning attached to a building, there was a presumption of negligence on the part of the persons maintaining the awning, which, unexplained, was sufficient to support a verdict for the person injured. *McHarge v. M. M. Newcomer & Co.*, 100 S. W. 700, 705, 117 Tenn. 595, 9 L. R. A. (N. S.) 298. See, also, *Waller v. Ross*, 110 N. W. 252, 253, 100 Minn. 7, 12 L. R. A. (N. S.) 721, 117 Am. St. Rep. 661, 10 Ann. Cas. 715.

The rule of "res ipsa loquitur" is founded upon the doctrine of probabilities. The presumption arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. When a thing that causes injury is shown to be under the management of the defendant,

and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care. In an action for injuries to plaintiff by being thrown to a sidewalk by the sudden raising of trap elevator doors in the sidewalk over which plaintiff was passing at the time, it having been admitted that the doors were raised by defendant's servants, it was proper for the court to refuse to charge that defendant's negligence could not be presumed from the happening of the accident. *Bowley v. Mangrum & Otter*, 84 Pac. 990, 998, 3 Cal. App. 229 (citing *Judson v. Giant Powder Co.*, 40 Pac. 1021, 107 Cal. 549, 29 L. R. A. 718, 48 Am. St. Rep. 146; *Dixon v. Plums*, 33 Pac. 268, 98 Cal. 384, 20 L. R. A. 698, 35 Am. St. Rep. 180; *Johnson v. Walsh*, 85 N. W. 910, 83 Minn. 74; *Shear. & R. Neg.* § 60).

Where, after the completion of a subway by defendant contractor, the sidewalk caved in under the weight of a pedestrian, the doctrine of "res ipsa loquitur" applied, and imposed on defendant the burden of proving that he was not guilty of negligence. *Rockwell v. McGovern*, 88 N. E. 436, 202 Mass. 6, 23 L. R. A. (N. S.) 1022.

An injury caused by a street car leaving the track and striking a wagon in which plaintiff was riding is within the maxim "res ipsa loquitur," and proof of the injury will justify a recovery, unless defendant shows that it was not at fault. *Chicago Union Traction Co. v. Giese*, 82 N. E. 232, 233, 229 Ill. 260.

#### **Race**

Upon the question of race ancestry of a person, the person involved is often the best evidence to produce; it being a case of "res ipsa loquitur." *United States v. Hung Chang*, 134 Fed. 19, 27, 67 C. C. A. 93.

#### **RES JUDICATA**

See Res Adjudicata.

#### **RESALE**

A "resale" is one of the well-known remedies in this country of the seller of personal property. If there is such a remedy in the case of real property, it has never been recognized or adopted in this state. *Swartz v. City & Suburban Realty Co.*, 67 Atl. 283, 284, 106 Md. 290.

#### **RESCIND**

Under the rule that the effect of a pleading is not necessarily determined by the technical definition of a single word, but that words used in a pleading must be construed with reference to the context, and when it is apparent that a word is not used in its stat-

utory sense it will be interpreted in relation to the pleading as a whole, in an action to recover sums paid under a contract of conditional sale on the retaking of possession by the seller, where the answer alleged that the seller rescinded and canceled the contract on default in payment of the price by the buyer, the words "rescind" and "cancel" are not used to indicate a statutory rescission of the contract. *Pfeiffer v. Norman*, 133 N. W. 97, 98, 22 N. D. 168, 38 L. R. A. (N. S.) 891.

## RESCISSION

The word "rescission" has a well-defined meaning in law, and includes the idea of restoration of both parties to a contract to their status quo, and return by each to the other of the consideration given and received. *Relger v. Turley*, 131 N. W. 866, 869, 151 Iowa, 491; *Pugh v. Stigler*, 97 Pac. 566, 567, 21 Okl. 854 (quoting and adopting definition in 2 *Warv. Vend.* § 869, and citing and adopting *Lewis v. Boskins*, 27 Ark. 61).

"Rescission of a contract" is the act of canceling it by restoring the conditions existing immediately before it was made. Rescission is effected by each party returning to the other what has been received pursuant to the contract, or its equivalent." *Raymond v. Edelbrock*, 107 N. W. 194, 195, 15 N. D. 231.

"Rescission" of a contract on the ground of fraud is not a mental process, undisclosed and unacted upon. It requires affirmative action immediately upon its discovery, some overt act and outward manifestation of the intention to apprise the other party to the contract of the right asserted. *Brown v. Gordon-Tiger Co.*, 97 Pac. 1042, 1046, 44 Colo. 311 (quoting and adopting definition in *Richardson v. Lowe*, 149 Fed. 625, 79 C. C. A. 317).

The revocation of a contract of sale by agreement of the parties, or by an attempt of one party to revoke, acceded to by the other, or by a breach by one party which precludes him from any remedy thereon, and for which the other party revokes it, constitutes "rescission." *J. K. Armsby Co. v. Grays Harbor Commercial Co.*, 123 Pac. 32, 34, 62 Or. 173.

A contract is made by the joint will of two parties, and can only be "rescinded" by their joint will; but one party may so wrongfully repudiate it as to authorize the other to renounce it and refuse to be longer bound thereby, as when his acts and conduct evince an intent to no longer be bound. *McAllister-Coman Co. v. Mathews*, 52 South. 416, 417, 167 Ala. 361, 140 Am. St. Rep. 43.

The fact that meat sold on the open market on the buyer's account was not smoked meat, whereas the meat contracted for was of that class, did not constitute a "rescission" by the seller of the contract of sale, where it was shown that smoking was a process which the meat was subjected to prior to shipment, and the buyer failed to give any

shipping directions, and the meat was sold on the seller's home market without shipment. *Bonds v. Thos. J. Lipton Co.*, 37 South. 805, 807, 85 Miss. 209.

Where the vendor was unable to convey good title within a stipulated time, as agreed, and plaintiff, instead of asserting his rights under the contract, acquiesced in defendant's repudiation thereof, and demanded the return of the purchase money paid, there was a "rescission of the contract by consent of the parties" within Civ. Code, § 1689, subd. 5, authorizing rescission by consent of the parties. *Carter v. Fox*, 103 Pac. 910, 912, 11 Cal. App. 67.

## RESCUE

An escape is where one who is under arrest gains his liberty before he is delivered by due course of law, and where an escape from confinement is effected by the prisoner with force, it is called a "prison breaking," and where it is effected by others with force, it is known as a "rescue." *State v. Sutton*, 84 N. E. 824, 826, 170 Ind. 473.

Penal Law (Consol. Laws 1909, c. 40) § 1692, providing that a person who by force or fraud "rescues" a prisoner from lawful custody or from an officer or other person having him in lawful custody is guilty of a felony if the prisoner was held on a charge, commitment, arrest, conviction, or sentence of felony, or misdemeanor, is not limited in its application to a case where the prisoner was held by a magistrate or other lawful authority upon a charge, commitment, arrest, conviction, or sentence, but extends to a case where an officer or other person holds one in lawful custody prior to his arraignment. *People v. Marks*, 135 N. Y. Supp. 523, 524, 75 Misc. Rep. 404.

## RESERVATION

See Indian Reservation; Military Reservation.

Subject to reservation, see Subject to.

A "reservation" is a clause in a deed whereby the grantor reserves some new thing to himself, issuing out of the thing granted, or out of the general words of description in a grant. *Frank v. Meyers*, 11 South. 832, 833, 97 Ala. 437; *Dee v. King*, 77 Vt. 230, 59 Atl. 839, 840, 68 L. R. A. 860; *Dyson v. Bux*, 114 Pac. 1092, 1093, 84 Kan. 596.

"A 'reservation' is always of a thing not in esse, but newly created or reserved out of the land or tenement demise." "It must be to the grantor, and not to a stranger to the deed." *Dawson v. Western Maryland R. Co.*, 68 Atl. 301, 305, 107 Md. 70, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678 (quoting *Co. Lit.*, 47a, and *Shep. Touch.* p. 80).

A "reservation" is something issuing from or coming out of the thing granted, and must be to the grantor or party executing the conveyance, and not to a stranger. *White v. City of Marion*, 117 N. W. 254, 139 Iowa, 479.

"A 'reservation' is never any part of the estate itself, but something issuing out of it, as, for instance, rent or some right to be exercised in relation to the estate." *Westlake v. Koch*, 31 N. E. 321, 322, 134 N. Y. 61 (quoting and adopting definition in *Craig v. Wells*, 11 N. Y. 321).

A "reservation" is something extracted from the whole res covered by the general terms of the grant, lessening the thing granted from what it would otherwise have been. *Hough v. Porter*, 98 Pac. 1083, 1091, 51 Or. 318.

A "reservation" in a deed "is something taken back out of that which is granted, as, for instance, rent, or some right to be exercised, as the cutting of timber." So, where defendant transferred property subject to a trust deed made by him to secure a loan, reserving for his benefit and as surety for the loan the rents and control of the property during the life of the deed, and his agent rented the premises to plaintiff, defendant was plaintiff's landlord, and the proper party defendant in a suit for injuries due to the defective condition of the premises. *Meyers v. Russell*, 101 S. W. 606, 608, 124 Mo. App. 317 (quoting in support of the definition *Youngerman v. Board of Sup'rs of Polk County*, 81 N. W. 166, 110 Iowa, 731; *Cutler v. Tufts* [Mass.] 3 Pick. 274; *Randall v. Randall*, 59 Me. 340; *Gould v. Howe*, 23 N. E. 602, 131 Ill. 490).

A "reservation" has been defined to be an interest retained by a grantor out of the body of the thing granted. *Marshall v. Trumbull*, 28 Conn. 183, 73 Am. Dec. 667. Another definition is: "A clause in a deed whereby the grantor reserves some new thing to himself issuing out of the thing granted and not in esse before." 4 Kent's Comm. 468. In *Winston v. Johnson*, 42 Minn. 398, 45 N. W. 958, the court defined a reservation as "something merely created or reserved out of the thing granted that was not in existence before." In *Craig v. Wells*, 11 N. Y. 315, the court said: "A reservation is always something which is taken back out of that which is clearly granted." In *Parataria Canning Co. v. Ott*, 37 South. 121, 84 Miss. 737, the court said: "A reservation in a deed must not only be, as hereinbefore pointed out, of something which would otherwise, by operation of the terms of the deed, be conveyed, but it must necessarily be of something which belongs to the grantor at and before the execution of the deed. Property cannot be conveyed by reservation." *Stadler v. Missouri River Power Co.*, 139 Fed. 305, 307, 71 C. C. A. 435.

"A 'reservation' is of a thing not in being, but newly created out of the lands and tenements devised. A 'reservation' is said to vest in the grantor some new right or interest not before in him, operating by way of an implied grant. A reservation does not necessarily mean that 'something not in being and newly derived from the thing granted' must be some right that the grantor did not before possess in connection with the use of the land granted. 'A right of way over land conveyed may be reserved, and yet the grantor had the same right to pass over the land before the conveyance, but it would not have existed as a separate thing; and when the land is granted and the right of way reserved that right becomes in the sense of the law a new thing derived from the land.'" *S. E. & H. L. Shepherd Co. v. Shibles*, 61 Atl. 700, 701, 100 Me. 314 (quoting *Gay v. Walker*, 36 Me. 61, 58 Am. Dec. 734; *Engel v. Ayer*, 27 Atl. 352, 85 Me. 453).

A "reservation" is a clause in a deed whereby the grantor reserves some new thing to himself out of that which he granted before. In case of a "reservation," the fee passes, and the grantor reserves to himself some right, privilege, or easement. A deed conveying a portion of a quarter section of land by metes and bounds, and declaring, "provided, however, that a strip \* \* \* 60 feet wide on the east and a strip \* \* \* 80 feet wide on the south and a strip \* \* \* 100 feet wide on the west of said tract \* \* \* is hereby reserved for street purposes when said quarter section \* \* \* shall be platted," creates a "reservation" in the strips, and the fee passes to the grantee. *Edwards v. Brusha*, 90 Pac. 727, 728, 18 Okl. 234.

A "reservation" in a deed applies to a thing not in esse at the time of the grant, but newly created, and which is reserved for the benefit of the grantor; as, for example, the reservation of a right of way over the estate conveyed, which, though it may have been previously enjoyed by the grantor as owner of the estate, becomes a new right. Therefore a so-called reservation of an exclusive power of alienation on the part of the wife of a grantor in a deed was void. *Blair v. Muse*, 2 S. E. 31, 32, 83 Va. 238.

Where A. owns ten acres of land, and conveys it to B., reserving to himself a life estate therein, that is a "reservation." *Dozier v. Tolson*, 79 S. W. 420-422, 180 Mo. 546, 103 Am. St. Rep. 586.

#### Exception distinguished

A "reservation" is always of something taken back out of that which is clearly granted, while an "exception" is some part of an estate not granted at all. *Bardon v. O'Brien*, 120 N. W. 827, 140 Wis. 191, 133 Am. St. Rep. 1066; *Williams v. Jones*, 111 N. W. 505, 506, 507, 131 Wis. 361 (quoting and adopting definition in *Rich v. Zeilsdorff*, 22 Wis. 544,



99 Am. Dec. 81); *Pitcairn v. Harkness*, 101 Pac. 809, 810, 10 Cal. App. 295 (quoting *Sears v. Ackerman*, 72 Pac. 172, 138 Cal. 586).

A "reservation" is of some new thing issuing out of what was granted; an exception is a withdrawal from the operation of the grant of some part of the thing itself. *Dyson v. Bux*, 114 Pac. 1092, 1093, 84 Kan. 596 (quoting and adopting the definition of *Devlin on Deeds*, 979; *Read v. Loftus*, 108 Pac. 850, 852, 82 Kan. 485, 31 L. R. A. [N. S.] 457).

"A 'reservation' is a clause in a deed whereby the grantor doth reserve some new thing to himself out of that which he granted before. This doth differ from an exception, which is ever a part of the thing granted, and a thing in esse at the time. *Shep. Touch. 80.*" *Washington Mills Emery Mfg. Co. v. Commercial Fire Ins. Co.*, 13 Fed. 646, 649 (citing *Rich v. Zellsdorff*, 22 Wis. 544, 99 Am. Dec. 81).

The distinction between a "reservation" and an "exception" in a deed is that the subject of the former is something which did not exist before but is created by and grows out of the transaction, while an "exception" is of something or some right previously existing. *York Haven Paper Co. v. York Haven Water & Power Co.*, 194 Fed. 255, 267.

A "reservation" is a clause in a deed, whereby the grantor reserves some new thing to himself issuing out of the thing granted and not in esse before; but an "exception" is always a part of the thing granted, or out of the general words or description of the grant. *Hicks v. Phillips*, 142 S. W. 394, 395, 146 Ky. 305, 47 L. R. A. (N. S.) 878; *Brown v. Anderson*, 11 S. W. 607, 608, 88 Ky. 577.

A "reservation" is the creation in behalf of the grantor of a new right issuing out of the thing granted, something which did not exist as an independent right before the grant, and an "exception" is a clause in a deed which withdraws from its operation some part of the thing granted which would otherwise have passed to the grantee under the general description. A "reservation" is never part of the estate itself, but is something taken back out of that already granted, as rent or the right to cut timber, or to do something in relation to the estate, while an "exception" is of some part of the estate not granted at all. *Stone v. Stone*, 119 N. W. 712, 714, 141 Iowa, 438, 20 L. R. A. (N. S.) 221, 18 Ann. Cas. 797.

A "reservation" is a clause in a deed whereby the grantor reserves some new thing to himself out of that which he had granted before; that which issues from or is incident to the thing granted, and not a part of it; something newly created out of the granted premises; that part of the deed or other instrument which reserves a thing granted that was not in existence before. It is al-

ways of something taken back out of that which is clearly granted, and is never of any part of the estate itself, but something issuing out of it. It is thus distinguished from an exception, the office of which is to take something out of the thing granted that would otherwise pass. *Barrett v. Kansas & Texas Coal Co.*, 79 Pac. 150, 151, 70 Kan. 649 (quoting and adopting 18 Cyc. 672).

The terms "reservation" and "exception" in deeds are often used as synonymous, when the thing to be secured to the grantor is a part of the granted premises, and, when so used, they are to be construed accordingly, though an "exception" in its technical meaning is something withheld from a grant which otherwise would pass as a part of it while a "reservation" is some newly created right which the grantee impliedly conveys to the grantor, but the natural meaning of the word "reservation" is inconsistent with the technical meaning, and means to keep in reserve, to retain, to keep back. *Smith's Ex'r v. Jones*, 84 Atl. 866, 86 Vt. 258.

By an "exception" the thing excepted is taken wholly out of the grant, and is no parcel of the thing granted, but a "reservation" is never of any part of the estate itself, but of something issuing out of it, as, for instance, rent or a right to cut timber. *City Club of Auburn v. McGeer*, 92 N. E. 105, 198 N. Y. 609.

A "reservation" is a taking back from a grant a right conveyed by it amounting to a mere incorporeal hereditament. The term "exception" is sometimes used in its strict legal sense of retaining something from the grant and at others in the sense of "reservation." *Kansas City, M. & O. R. Co. v. Littler*, 79 Pac. 114, 115, 70 Kan. 556.

"A 'reservation' is always of something taken back out of that which is clearly granted, while an exception is of some part of the estate not granted at all." "The part excepted is already in existence, and is said to remain in the grantor. The grant has no effect upon it. A reservation is the creation, in behalf of the grantor, of some new right issuing out of the thing granted—something which did not exist, as an independent right, before the grant. \* \* \* A reservation is in the nature of a grant to the grantor, and therefore requires the same words of limitation as in the direct grant to the grantee. But an exception requires no words of limitation." There is an exception, not a "reservation," of the "right of building a dam \* \* \* together with the right of flowage," as well as of an acre of land, so that words expressly showing that a fee, and not a life estate, is retained, are not necessary, where one owning land on both sides of a river conveyed the part on the east side, "reserving" the right of building a dam, together with the right of flowages, and "also reserving" an acre of land at the east end of the

dam, though the words are reserving "to myself," while the grant is to one and "his heirs and assigns, forever." *Smith v. Furbish*, 44 Atl. 398, 406, 408, 68 N. H. 123, 47 L. R. A. 226 (citing *Craig v. Wells*, 11 N. Y. 315, 321; *Tied. Real Prop.* § 843).

A recital in a deed, "this conveyance reserves to the parties of the first part and their assigns free access or right of way to or from any lots adjoining either line of said Virginia street, to and over any wharf which may at any time be upon said street," in the technical sense of the term, is a "reservation," as distinguished from an "exception," and is therefore in the nature of a grant to the grantor. *Aden v. Vallejo*, 72 Pac. 905, 906, 139 Cal. 165.

The clause in a deed conveying an entire tract of land that "I, the said grantor, reserve a road through said land," was a mere reservation, giving the grantor a way over the lands granted, but not the fee of the way, as in case of an exception; for a "reservation" creates a new right issuing out of the thing granted, and reserving it to the grantor, while an "exception" merely withdraws from the operation of the grant something which would have otherwise passed. *Parker v. Parker*, 138 S. W. 462, 463, 99 Ark. 244.

The rule that an "exception" withholds some part of the premises conveyed by the general description, while a "reservation" applies to some right or easement reserved by the grantor, is not arbitrary, and cannot override the real intent of the parties to be gathered from the whole instrument. *Zimmerman v. Kirchher*, 131 N. W. 756, 757, 151 Iowa, 483.

The difference between a "reservation" in a deed and an "exception" is that its subject is created by and grows out of the transaction, while an exception applies only where the subject already exists. *Sheffield Water Co. v. Elk Tanning Co.*, 74 Atl. 742, 744, 225 Pa. 614.

A "reservation" is distinguished from an "exception," in that the former is some new thing issuing out of what is granted, while the latter is a withdrawal from the operation of the grant of some part of the thing itself, and can apply only where the subject already exists. The technical meaning of the terms "reservation" and "exception" will give way to their evident intent, though the wrong technical term be used, since they are frequently used interchangeably. *Riefler & Sons v. Wayne Storage Water Power Co.*, 81 Atl. 300, 301, 232 Pa. 282.

An "exception" in a deed is a part of the thing granted, and must be in use at the time of the grant. A "reservation" is some new thing created by the terms of the grant, as an easement or right of way. They are often used interchangeably. *Carlson v. Minnesota Land & Colonization Co.*, 129 N. W. 763, 760, 113 Minn. 361.

An exception is of something that is part of the thing granted, existing at the time of the grant, as coal or oil in the land. "The part excepted is already in existence, and is said to remain in the grantor. The grant has no effect upon it. A 'reservation' is the creation, in behalf of the grantor, of some new right issuing out of the thing granted, usually an incorporeal hereditament, something which did not exist as an independent right before the grant. Sometimes the terms 'exception' and 'reservation' are used synonymously." *Preston v. White*, 50 S. E. 236, 238, 57 W. Va. 278 (citing *Tiedman, Real Prop.* § 843).

A "reservation" in a deed is something taken back from the thing granted, while an "exception" is some part of the estate not granted at all. The terms are often used indiscriminately, and sometimes in a deed what purports to be a reservation has the force of an exception, when such appears to be the clear intention of the parties. Thus a deed from J. to L. of a tract of land, "excepting and reserving" therefrom a strip two rods wide off a certain side of it, "to be used as a right of way," the grantee, however, to have the privilege of fencing said right of way into his inclosure and being required only to maintain a gate at each end for use of the grantor, his heirs and assigns, excepts the fee of the strip, in view of the facts that on the same day J. deeded to P. said strip, describing it as the premises described as right of way two rods wide reserved by the grantor in his deed to L., excepting and reserving all the timber thereon, with the right to the grantor to go on the land and remove it, and the facts that immediately thereafter J., without objection from L., removed from the strip the valuable timber thereon, and that P. thereafter paid the taxes on the strip. *Pritchard v. Lewis*, 104 N. W. 989, 991, 125 Wis. 604, 1 L. R. A. (N. S.) 505, 110 Am. St. Rep. 873.

An "exception" from a conveyance is of a part of the thing granted and of a thing in being at the time of the grant. A "reservation" vests in the grantor some new right or interest that did not exist in him before. It operates by way of an implied grant, and, in the absence of words of inheritance, only an estate for the life of the grantor is created. Whether a clause in a deed creates a "reservation" or an "exception" is not so much a question of words as of intention, to be gathered from all the circumstances of the case. Thus a deed "reserving" to the grantor a right in common with the grantee, "meaning a cart road to and from" the grantor's land, created an exception, and not a "reservation," where the road existed at the time of the deed, and was necessary to the land retained by the grantor, and where the circumstances showed that the provisions were intended for the benefit of the land retained, and not to be merely a personal right.

Hall v. Hall, 76 Atl. 705, 706, 707, 106 Me. 389 (citing Perkins v. Stockwell, 131 Mass. 529; Ring v. Walker, 33 Atl. 174, 87 Me. 550; Bowen v. Conner [Mass.] 6 Cush. 132; White v. New York & N. E. R. Co., 30 N. E. 612, 156 Mass. 181; Hamlin v. New York & N. E. R. Co., 36 N. E. 200, 160 Mass. 459; Chappell v. New York, N. H. & H. R. Co., 24 Atl. 997, 62 Conn. 195, 17 L. R. A. 420; Inhabitants of Winthrop v. Fairbanks, 41 Me. 307; Smith v. Ladd, 41 Me. 314; Bangs v. Parker, 71 Me. 458; Wellman v. Churchill, 42 Atl. 352, 92 Me. 193).

There is a diversity between an "exception," which is ever a part of the thing granted, and of a thing in ease for which "exceptis," "salvo," "præter," and the like, are apt words, and a "reservation," which is always of a thing not in esse, but newly created or reserved out of the land or tenement demised. In Sheppard's Touchstone it is said of the reservation, "It must be to the grantor, and not to a stranger to the deed." When a covenant operated by way of reservation, and not by way of exception, words of inheritance were necessary to convey a fee simple title to an easement, if made prior to the statute, which changed the common law. Dawson v. Western Maryland R. Co., 68 Atl. 301, 305, 107 Md. 70, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678.

In determining whether an easement retained by a grantor is superior to the grant or subordinate to it, it makes no difference whether the deed operates by way of exception, or by way of a grant back from the grantee, which is usually spoken of as a "reservation." Walker Ice Co. v. American Steel & Wire Co., 70 N. E. 937, 944, 185 Mass. 463.

Strictly speaking, "reservation" is something created or reserved out of a thing granted that was not in existence before, while an "exception" must be a part of the thing granted; and while the distinction between the terms is well established, the words are frequently used synonymously. A provision of a deed reserving to the grantors all the rights, etc., secured under an oil and gas lease executed by them, with right to renew or modify the lease \* \* \* same extent as though the conveyance had not been executed, and reciting that it was intended to reserve all oil and gas privileges in the premises, constitutes an exception, and not a reservation. Moore v. Griffin, 83 Pac. 395, 396, 72 Kan. 164, 4 L. R. A. (N. S.) 477.

A grantor conveyed all of a tract of land not included in a tract intended for a reservoir and dam to be built thereon. Subsequently the grantor conveyed to others all of the same tract that might be wanted by the grantee for a reservoir, the dam of which was to be built on the land, the reservoir site to include the quantity of land necessary therefor, together with all the reservations recited in the former deed. The first convey-

ance left in the grantor no property in the tract save the portion which had been excepted and reserved therein. The land was uninclosed, unused, and was of little value except for a reservoir, and the grantor had been negotiating for the sale of the reservoir site prior to making the first deed. If a reservoir had been established and had not occupied the entire site excepted from the former deed, the fringe of land around it would have been of little value to the grantor, and the reservoir would have been a permanent occupation of the land, and, if an easement therefor only had been granted, the servient estate would be practically worthless. The price paid was over six times the assessed value of the land. For 15 years after the conveyance the grantee held sole possession of the land, and paid taxes thereon, while the grantor exercised no dominion over it. Held, that in view of Civ. Code, §§ 1069, 1636, 1641-1647, prescribing rules for the construction of contracts, the term "reserving" as used in the former deed was not used in its technical sense, and the word "reservations" in the subsequent deed was used in its popular sense to signify everything pertaining to the tract which the grantor had not parted with by the prior deed, and the subsequent deed conveyed a fee-simple estate therein to the grantee. Van Slyke v. Arrowhead Reservoir & Power Co., 102 Pac. 816, 818, 155 Cal. 675.

Technically the words "exception" and "reservation," are different in meaning, but have often been used as synonymous. Chapman v. Mill Creek Coal & Coke Co., 46 S. E. 262, 263, 54 W. Va. 193.

Civ. Code, § 1069, providing that a reservation in any grant is to be interpreted in favor of the grantor, refers to exceptions made in deeds, as well as reservations; the words "exceptions" and "reservations" being used synonymously in grants. Seligman v. Carr, 97 Pac. 324, 325, 8 Cal. App. 572.

An "exception" is a part excepted from the general terms of that which is granted. The words "exception" and "reservation" are often used interchangeably, and the mere fact that what is excepted is mentioned as being reserved will not defeat its operation as an "exception." Elsea v. Adkins, 74 N. E. 242, 243, 164 Ind. 580, 108 Am. St. Rep. 320 (citing 13 Cyc. p. 674, 675; 3 Washb. Real Prop. \*640; Jones Law of Real Prop. § 518).

#### As disposition of public land

As public land, see Public Land.

The word "reservation," in an Indian treaty allowing certain Indians a reservation of land, is sufficient to pass title to such land. Newman v. Doe ex dem. Harris, 5 Miss. (4 How.) 522, 560.

The term "reservation" in an Indian treaty is equivalent to an absolute grant, and the title passed as effectually as if a grant

had been executed. *Niles v. Anderson*, 6 Miss. (5 How.) 365, 383.

The term "reservation" in an Indian treaty imports something kept back, and not surrendered, and title to lands reserved passed to the Indians under such a treaty. *Euche-lah v. Welch*, 10 N. C. 155, 165.

The term "reservation" in an Indian treaty reserving land to members of a tribe was equivalent to an absolute grant, and title passed as effectually as if the grant had been executed, though not perfected until the location was made. *Godfrey v. Iowa Land & Trust Co.*, 95 Pac. 792, 797, 21 Okl. 293 (citing *Dewey v. Campau*, 4 Mich. 565, 566).

As used in the treaty with the Cherokees in 1877, granting the right to a "reservation" of land to each head of an Indian family choosing to remain in the state, "the very term 'reservation' seems to imply that the land reserved is taken out of the territory ceded; that is to say, is a portion excepted from the lands of the general cession and kept back when that land was surrendered." *Sutton v. Moore*, 25 N. C. 66, 72.

Where an act of Legislature granted a land certificate, with the right of location upon any public lands of the state within or without the several reservations theretofore created by law, the term "reservation" was used in the grant in the sense of lands subject to appropriation which have at different times been reserved temporarily from general and subjected to particular locations, and did not include islands. *Roberts v. Terrell*, 110 S. W. 733, 735, 101 Tex. 577.

"The word 'reservation' is defined in the Standard Dict. as 'that which is reserved; kept back; withheld.'" Land is within a "reservation," within Rev. St. U. S. § 2275, appropriating and granting to and authorizing the state to select other lands where the school sections are within any reservation, provided, however, that the state shall not be prevented from awaiting the extinguishment of the reservation, where it has been withdrawn by the Secretary of the Interior "pending determination as to the advisability of including the same within a forest reservation." *Alberger v. Kingsbury*, 91 Pac. 674, 675, 6 Cal. App. 93.

The word "reservation," as used in the land law, means any body of land, large or small, which Congress has reserved from sale for any purpose. It may be an Indian reservation, or military reservation, or one for any purpose for which Congress has authority to provide. *United States v. Celestine*, 30 Sup. Ct. 93, 95, 215 U. S. 278, 54 L. Ed. 195.

#### As fixing territorial jurisdiction

The following language of the act of Congress approved June 7, 1897 (30 Stat. 71, c. 3): "And the justices of the peace and the

probate courts in and for the territory of Oklahoma shall not have jurisdiction of any actions in civil cases against members of the Osage and Kansas Tribes of Indians, residing on their 'reservation' in Oklahoma Territory, and the district court shall have exclusive jurisdiction in such actions, and at least two terms of such court shall be held in each year at Pawhuska, on said reservation, \* \* \*" fixed the territorial jurisdiction of the district court at Pawhuska in civil action in which a member of the Osage and Kansas Tribes of Indians is a party defendant as being coextensive with the territorial limits of the Osage reservation, and such language was not intended to require that the Indian defendant must reside upon lands the Indian title to which had not been extinguished. *De Noya v. Hill Inv. Co.*, 127 Pac. 444, 445, 33 Okl. 663.

#### RESERVATION OF TITLE

The fact that there was an understanding between the vendor of timber and the vendee thereof that the vendor was to have the purchase money before the staves into which the timber was to be manufactured were sold did not amount to a "reservation of title." *Neal v. Cone*, 88 S. W. 952, 953, 76 Ark. 278.

#### RESERVE—RESERVED

See Held in Reserve.

"'Reserve' cometh of the Latin word 'reservo,' that is to provide for store; as when a man departeth with his land, he reserveth or provideth for himself a rent for his own livelihood. And sometimes it hath the force of saving or excepting. So, as sometime, it serveth to reserve a new thing, viz., a rent, and sometime to except part of the thing in esse that is granted." *Bowman v. Wathen*, 3 Fed. Cas. 1076, 1082; 2 McLean 376-392 (quoting and adopting definition in *Co. Litt.* 143a).

"A mere reserving of a discount or the including of usurious interest in a renewal note, while it may be the 'reserving or charging' of usury, is not the 'paying' of same." *McCarthy v. First Nat. Bank of Rapid City*, 121 N. W. 853, 856, 28 S. D. 269, 23 L. R. A. (N. S.) 335, 21 Ann. Cas. 437.

Land was not "reserved" from sale at the time the grant of land to the Northern Pacific Railroad Company, under Act Cong. July 2, 1864, c. 217, 13 Stat. 365, attached, though a donation claim of W., under Oregon Donation Act of September 25, 1850, embraced it in 1864; such claim having been finally located by survey wholly outside such land before the railroad company selected its land. *Northern Pac. R. Co. v. George*, 98 Pac. 1126, 1127, 51 Wash. 303.

The words "reserves" and "leases" in the title and body of chapter 244, p. 456,

Laws 1897, providing for the assessment and taxing of mineral reserves, or leases, or separately owned mineral, or mineral rights, to the owner thereof, separately from the land, and providing penalties for its violation, mean at one time reserved or leased mineral, and at another written instruments evidencing mineral rights. *Kansas Natural Gas Co. v. Board of Com'rs of Neosho County*, 89 Pac. 750, 751, 75 Kan. 335.

#### As except

"Reserving" and "excepting," though strictly distinguishable, are often used interchangeably or indiscriminately, and the use of either is not conclusive, as to the nature of the provision, as constituting a reservation or exception. *Hicks v. Phillips*, 142 S. W. 394, 395, 146 Ky. 305, 47 L. R. A. (N. S.) 878.

The words "reserving" and "excepting" are generally used as synonyms, and whether a provision is a reservation or an exception does not depend upon the use of a particular word, but upon the nature and effect of the provision itself. *Smith v. Furbish*, 44 Atl. 398, 406, 68 N. H. 123, 47 L. R. A. 226 (citing *Stockwell v. Couillard*, 129 Mass. 231, 233; *Fischer v. Laack*, 45 N. W. 104, 76 Wis. 313, 319, 320; *Keeler v. Wood*, 30 Vt. 242, 246; *Chicago, R. I. & P. Ry. Co. v. Denver & R. G. R. Co.*, 12 Spp. Ct. 479, 143 U. S. 596, 599, 613, 614, 36 L. Ed. 277).

No arbitrary rule requires that the technical meaning of the words "reserving" or "excepting" shall be given them in every instance where used in grants, written dedications, and other documents. The two words are frequently used interchangeably, and the technical meaning will be made to yield to a manifest intention. In a written document construed as a dedication, the grantors "dedicate to the perpetual use of the public the streets or highways shown" on a plat, "reserving to ourselves, our heirs, etc., owning lands abutting or adjoining the same, the reversion or reversions thereof whenever discontinued by law, also reserving" a strip of land including in said reservation, all riparian rights, etc. This was held to be an absolute dedication, giving a purchaser of lots according to the plat a right to have the land dedicated as a park kept open as such. *Florida East Coast Ry. Co. v. Worley*, 38 South. 618, 623, 49 Fla. 297.

The words "exception" and "reservation" are used synonymously in grants and have the same effect. The words are often used indiscriminately, and whether a particular provision is an exception or a reservation depends, not upon the use of one or the other of these terms, but upon the nature and effect of the provision itself. Civ. Code, § 1069, providing that a reservation in any grant is to be interpreted in favor of the grantor, refers to exceptions made in deeds as well as

reservations; the words "exceptions" and "reservations" being used synonymously in grants. *Seligman v. Carr*, 97 Pac. 324, 325, 8 Cal. App. 572 (citing *Stockwell v. Couillard*, 129 Mass. 231, 233).

The word "reserving" in the clause of a deed, "reserving off the east line of the same two rods in width, running into P. Lake, commencing two rods south of the northwest corner of section 24," will be given the force of "excepting"; the whole clause being significant that an exception was intended, and being immediately followed by a reservation of a right of way over another strip to be used by the parties in common; and the physical situation and surrounding circumstances strongly tending to show that it was the intention of the parties that such land should be excepted from the grant. *Jones v. Hoffman*, 134 N. W. 1046, 1047, 149 Wis. 30.

The clause in a deed of a small part of a farm, "reserving" the privilege of a pass from the highway past the house to the railroad in my usual place of crossing," the grantor having for many years passed over the granted land in going to and from other parts of the farm, is an exception of an existing way, which became an easement appurtenant to the other land, which, with the other land, would pass by descent or assignment. *Dee v. King*, 59 Atl. 839, 840, 77 Vt. 230, 68 L. R. A. 860.

An owner sold the timber on his land under a contract which fixed no time for the purchaser to remove it. Subsequently he conveyed the land to a grantee by a deed "reserving" to the purchaser of the timber all of the timber on said premises and until a specified date to cut and remove it. Held, that the word "reserving" was used in the sense of "excepting," in favor or for the use of the purchaser of the timber. *Kidder v. Flanders*, 61 Atl. 675, 676, 73 N. H. 345 (citing *Cochecho Mfg. Co. v. Whittier*, 10 N. H. 305, 310; *West Point Iron Co. v. Reymert*, 45 N. Y. 703).

#### RESERVE FUND

"The term 'reserve fund,' when applied to a level rate policy, means a sufficient percentage of the annual premium to meet, when invested at a given rate of interest, all present and prospective liability on account of the particular policy. When applied to term insurance, it means the entire mortality premiums collected for the particular year. It has no application to assessment insurance." In Rev. St. 1899, § 1408, declaring that any such fraternal beneficiary associations may create and maintain, disburse and apply a reserve or emergency fund in accordance with its constitution or by-laws, the word "reserve" was not used in a technical meaning, but as a convertible term with "emergency," and the use of such word did not indicate a legislative intention to authorize such associa-

tion to issue nonforfeitable policies and to do an old-line life insurance business not otherwise authorized. *State ex rel. Supreme Lodge K. P. v. Vandiver*, 111 S. W. 911, 918, 213 Mo. 187, 15 Ann. Cas. 283 (quoting 7 Words and Phrases, p. 6147).

Laws N. Y. 1892, p. 1969, c. 690, § 88, requiring the application of the reserve, on a policy lapsed after being in force three full years, to the payment for extended insurance, and providing that "reserve" should include "dividend additions," meant that the surplus on a lapsed policy, as well as the reserve thereon, should be applied in purchasing extended insurance in case of lapse after a policy was in force three years, though the words "dividend additions" may have meant in a technical sense, in life insurance, additions on account of surplus to the face of a policy, payable at death while the insurance was in force. *United States Life Ins. Co. v. Spinks*, 103 S. W. 335, 336, 126 Ky. 405.

#### RESERVED FOR PUBLIC USES

Lands reserved by Rev. St. U. S. § 1947, in each township for common schools are public lands of the United States not "reserved for public uses," within section 2477, granting a right of way for the construction of highways over public lands "not reserved for public uses"; and hence a highway which has existed over such lands for over seven years is a public highway, within the express provisions of Ballinger's Ann. Codes & St. § 3846. *Peterson v. Baker*, 81 Pac. 681, 682, 39 Wash. 275.

#### RESERVED POWER OF DIVESTITURE

For the express purpose of avoiding the result dependent upon the beneficiary dying before the assured, the practice grew up of reserving a "divestiture"; that is, of providing that, if the primary beneficiary was not living when the assured died, the policy and the money arising out of it should go to a named alternative beneficiary, thus preventing the same from passing to the legal representatives of the primary beneficiary, as it otherwise would do. This is called a "reserved power of divestiture," which means, of course, a divestiture of a previously vested interest, and not merely a divestiture of an expectancy; for, if the interest of the beneficiary be merely an expectancy, dependent upon the beneficiary outliving the assured, then, of course, if the beneficiary did not do so, the expectancy would fail, and there would be no necessity for reserving a power of divestiture. Where a life policy provided that it was to be paid, upon the death of the insured, to his daughter, if surviving, if not, to his legal representatives, the daughter had a vested interest upon the issuance of the policy, liable to be defeated by the happening of a condition subsequent, and the legal representatives had a contingent interest, de-

pending upon the divestiture of the daughter's vested interest, which they were required to prove before they were entitled to the proceeds of the policy. *United States Casualty Co. v. Kacer*, 69 S. W. 370, 373, 169 Mo. 301, 58 L. R. A. 436, 92 Am. St. Rep. 641.

#### RESERVOIR

"As ordinarily defined, a 'reservoir' is a place where water collects naturally or is stored for use when wanted, as to supply a fountain, a canal, or a city, or for any other purpose." Where the plan for the construction of an irrigation canal put in operation resulted in the creation of an extensive basin, wherein a large body of water was artificially collected and retained, and witnesses referred to such water as a lake or reservoir, where the water was stored, such basin constituted a "reservoir," within a statute declaring that the owners of reservoirs shall be liable for all damages arising from leakage or overflow of the waters therefrom, or by floods caused by the breaking of the embankments thereof. *Howell v. Big Horn Basin Colonization Co.*, 81 Pac. 785, 787, 789, 14 Wyo. 14, 1 L. R. A. (N. S.) 596.

#### RESIDE

Come to reside, see Come.

The word "resides," in Gen. Laws 1896, c. 45, § 12, providing that all personal property held in trust by an executor for another person shall be assessed against the executor where such other person resides, means resides for the purpose of taxation, as defined in section 9, directing that personal property shall be taxed to the owner in the town in which the owner shall have his actual place of abode for a larger portion of the year. *Clarke v. Addeman*, 58 Atl. 623, 26 R. I. 168.

The word "reside," as used in the statute declaring that schools shall be free to children whose parents or guardians "reside" within a district, does not necessarily mean a legal residence, as distinguished from actual inhabitancy. *State ex rel. Mickey v. Selleck*, 107 N. W. 1022, 1023, 76 Neb. 747.

Laws 1901, p. 294, c. 125, § 3, providing for the sale and lease of public lands, declares that, if any purchaser shall fail to "reside" on and improve the land purchased by him, he shall forfeit the land and all payments made thereon, and the same shall be subject to resale without any action on the part of the Commissioner of the General Land Office. Held, that where plaintiff purchased four sections of school land under a statute requiring three years' residence thereon, but during the time left the land for eight months, during which she attended school, only returning to the land on one occasion for a period of one or two days, she thereby forfeited the land so purchased, though on

her final return from school she again took up her residence on the home section. *Andrus v. Davis*, 89 S. W. 772, 773, 99 Tex. 303.

Municipal Court Act, Laws 1901, p. 1500, c. 580, § 32, provides for the service of summons on a defendant "residing within the city," on satisfactory proof by affidavit and return of a marshal that diligent effort has been made to serve the summons on defendant and that the place of his sojourn cannot be found, or, if he is within the city, that he avoids service, etc. Held, that such section did not authorize substituted service on affidavits asserting that defendant resided out of the city in Westchester county, but maintained a business office in the city, and that plaintiff was informed and believes that the defendant is in the state and avoids service. *Casey v. White*, 96 N. Y. Supp. 190, 48 Misc. Rep. 659.

Code Civ. Proc. § 3318, provides that a witness is entitled, if he resides more than 3 miles from the place of attendance, to 8 cents for each mile going to the place of attendance. A witness had a business office in the county and near the courthouse, where he was served with subpoenas, and came daily to his office to attend to business on the very days for which travel fees were sought; but he resided 45 miles from the courthouse in another county. Held, that the word "resides" refers to the place of business in the county, and "going to the place of attendance" has no reference to the distance from the witness' residence to his office, and he was not entitled to mileage from his place of domicile. *Smith v. Hutton*, 119 N. Y. Supp. 194, 134 App. Div. 445.

Acts 1901, p. 534, c. 231 (*Burns' Ann. St. 1901*, § 3623a), provides that, if a remonstrance against a street improvement "is signed by two-thirds of the property owners, residing upon the lots abutting on such improvement, and representing two-thirds of the number of lineal feet of such improvement, then all further proceedings shall be abandoned." Held, that the persons whose signatures can make the remonstrance peremptory must be two-thirds of those property owners who reside upon lots which abut on the improvement, and who also represent two-thirds of the number of lineal feet of the improvement, the word "residing" and the words "and representing" relating equally to the preceding "two-thirds of the property owners"; and hence, where the remonstrators owned more than two-thirds of the lineal feet abutting on the improvement and were more than two-thirds of the property owners residing on the real estate abutting on the improvement, but the remonstrators who resided on their lots did not own or represent two-thirds of the lineal feet, the remonstrance was insufficient. *Malay v. Clark*, 70 N. E. 1005, 1006, 33 Ind. App. 149.

### As dwell

One "resides" in a place when he lives or dwells there; when it is his settled abode; his habitation; his home. There must be a settled, fixed abode, an intention to remain permanently, at least for a time, for business or other purposes, to constitute a "residence," within the legal meaning of the term. *White's Guardian v. Martin*, 2 Alaska, 495, 500.

The Standard Dictionary defines the word "reside" as "to make an abode for a considerable time; to live; to dwell; to be in official residence." Under Bankr. Act July 1, 1898, c. 541, § 45, 30 Stat. 55, providing that "trustees may be individuals who are respectively competent and reside or have an office in the judicial district within which they are appointed, or corporations having an office in the judicial district," etc., a trustee in bankruptcy, who at the time of his appointment resided in the district of appointment (in the Eastern district of New York, the borough of Brooklyn), and who then had and still has an office therein, is not subject to removal because he has changed his legal residence to another district (the Southern district of New York, the borough of Manhattan), provided such change does not interfere with the performance of his duties, nor render it difficult for persons interested to communicate with or serve notices upon him. *In re Seider*, 163 Fed. 188, 189.

The word "resides," in Laws 1901, p. 588, c. 96, providing that any town not maintaining a high school shall pay for the tuition of any child who with parents "resides" in said town, and who attends a high school in another town, means actual habitation, and not a legal "domicile," which is acquired by residence and an intention of making it a home; and, where a father who lived on a farm in a town sold his stock and removed to another town with his family, and there kept house, without any definite intention either to make the latter town his home or of returning to the former town within which he was taxed, and wherein he voted, the former town was not liable to pay to the latter town for the tuition of his child attending high school in the latter town. *Lisbon School Dist. No. 1 v. Landaff Town School Dist.*, 74 Atl. 186, 187, 75 N. H. 324.

### In reference to corporation

A foreign corporation does not "reside" in any county of the state within the meaning of Code Civ. Proc. § 101, relating to venue in civil actions. *Ivanusch v. Great Northern Ry. Co.*, 128 N. W. 333, 334, 26 S. D. 158.

Under Code Civ. Proc. § 101, as amended by Laws 1909, c. 283, providing that the action shall be tried in the judicial subdivision in which defendant "resides" at the commencement of the action, the venue of an action against a domestic corporation is not any place where it happens to transact busi-

ness, but in the county of its "principal place of business," the place where its president, secretary, and board of directors meet to transact the governing business of the corporation proper, where its books are kept; that is, where its governing power is exercised and controlled by its board of directors and officers. *Mullen v. Northern Accident Ins. Co.*, 128 N. W. 483, 484, 26 S. D. 402 (citing 6 Words and Phrases, p. 5559).

#### As have permanent abode

The word "reside," in its ordinary sense, carries with it the idea of permanence, as well as continuity. *Longwell v. Longwell*, 88 S. W. 416, 417, 39 Tex. Civ. App. 612 (quoting and adopting definition in *Michael v. Michael*, 79 S. W. 74, 34 Tex. Civ. App. 630).

The word "reside," in its ordinary sense, carries with it the idea of permanence, as well as continuity. It does not mean living in one place and claiming a home in another; and, in an action requiring plaintiff to reside in a county in the state before bringing suit for divorce, it does not mean a constructive or imaginary residence in Texas, while actually living in Illinois. It was intended, not only to compel an actual good faith inhabitancy of the state, but an actual residence in the county where the suit for divorce is instituted, on the part of the person seeking the divorce. *Michael v. Michael*, 79 S. W. 74, 75, 34 Tex. Civ. App. 630.

Under the statute providing for the bringing of an action in the county where the injury was done, or in the county where plaintiff "resided" at the time of the injury, she might bring it in the county where her domicile and permanent place of residence was, though she was temporarily residing in another county. *Gulf, C. & S. F. Ry. Co. v. Overton* (Tex.) 107 S. W. 71, 74.

A person, part of whose family resides in W. county, who owns a home there, votes and claims his home there, "resides" there, within Code 1907, § 6110, requiring actions on contract to be brought in the county in which defendant resides, if he has within the state a permanent residence, although such person is engaged in business and with his wife keeps house in another county, since the word "reside" may signify where one temporarily abides, but in section 6110 means where he has a fixed and permanent home. *Taylor v. Chattanooga Medicine Co.*, 59 South. 707, 708, 5 Ala. App. 419 (citing 7 Words and Phrases, pp. 6151, 6165).

The word "resided," within Gen. St. 1902, § 2469, providing that no inhabitant of any town shall gain a legal settlement in any other town, unless he shall have resided four years continuously in such town, and shall have maintained himself and family there during such period, means a fixed, permanent, and established residence, as distinguished from a residence which is merely transient or tem-

porary. *Town of Madison v. Town of Gullford*, 81 Atl. 1046, 1048, 85 Conn. 55.

Acts 27th Leg. (Laws 1901, p. 31, c. 27) provide that an action against a railroad company for personal injuries shall be brought either in the county in which the injury occurred or in the county in which plaintiff resided at the time of the injury, provided that, where plaintiff is a nonresident of the state, then the suit might be brought in any county in which the defendant corporation may operate its railroad or may have an agent. Held that, although under that statute a person might have more than one residence, still by the use of the term "resided" it was not meant that an injured person was to be held a resident of the county of his injury merely because of his casual or temporary presence therein, but the term "reside," the past tense of which is used in the statute, means to make an abode for a considerable time, and imports a habitation of some degree of permanency, coupled with the home thought; the intention being for the time being to make it, and no other, a place of residence, and is to be construed as excluding the mere casual presence of a transient. *Ft. Worth & D. C. Ry. Co. v. Monell*, 110 S. W. 504, 506, 50 Tex. Civ. App. 287.

Under Code Civ. Proc. § 984, providing that actions not specified in the two preceding sections must be tried in the county in which one of the parties resided at the time the action was commenced, the word "resided" means a permanent residence; one's home, as distinguished from a mere stopping place, for the transaction of either business or pleasure. It is nearly or quite synonymous with the word "domiciled," the permanent home and the place to which, whenever absent, one intends to return. Hence, under the statute, where defendant lived with his family at a certain place, where he kept his horses, carriages, and servants, had business interests, and paid taxes, and maintained an office for the transaction of business at another place, where he kept an apartment, which he used while at the latter place transacting business, the former place was his residence. *Washington v. Thomas*, 92 N. Y. Supp. 994, 996, 103 App. Div. 423.

#### RESIDE OUT OF THE STATE

See Nonresidence—Nonresident.

"A person residing without the state" within Code Civ. Proc. § 3268, subd. 1, requiring such a person to give security for costs, did not include a person domiciled within the state for a considerable period before action brought, but at that time temporarily sojourning in another state for treatment for injuries; she having left her household effects in New York and having actually returned there to live before the determination of a motion to compel her to give security for costs. *Taylor v. Norris*, 93 N. Y. Supp. 356, 357, 104 App. Div. 21.



**RESIDED CONTINUOUSLY**

The provision of Naturalization Act June 29, 1906, c. 3592, § 4, par. 4, which requires an applicant for naturalization to prove to the satisfaction of the court that immediately preceding the date of his application he has "resided continuously" within the United States five years at least, does not mean that the applicant must not have been outside of the territory of the United States during the preceding five years, but has reference to changes of domicile only; and the fact that an alien within that time returned temporarily to his native country on a visit, without any intention of remaining or abandoning his residence in this country, did not defeat his right to naturalization, and the length of his absence is material only as evidence on the question of intention. *United States v. Cantini*, 199 Fed. 857, 860.

In Naturalization Act June 29, 1906, c. 3592, § 4, subd. 4, which requires the court, before admitting an alien to citizenship, to be satisfied that he has "resided continuously" within the United States five years at least, and within the state or territory where the court is held one year at least, before his application, the word "continuously" is not used literally, as requiring the applicant to remain at all times physically within such jurisdictions, but applies to changes of domicile only; and a sailor, by going to sea, does not abandon his residence. *In re Schneider*, 164 Fed. 335, 336.

**RESIDENCE**

See Actual Residence—Actual Resident; District of His Residence; Law of His Residence; Legal Residence; Place of Residence; Principal Place of Residence; Private Residence; Usual Residence.

As attribute of possession, see Possession. Change of residence, see Change.

Change of residence as removal, see Remove—Removal.

Every person has in law a "residence," and a residence cannot be lost until another is gained. *Huston v. Anderson*, 78 Pac. 626, 635, 145 Cal. 320.

One who scattered his belongings among his friends and left the state has not a residence within the state, for he has left no domicile, which is necessary to residence. *Hackett v. Kendall*, 23 Vt. 275, 276.

That an employé had worked for several weeks in a county, where he was injured while at such work, does not establish his "residence" in such county, under a statute relating to venue in actions for injuries to servants. *Galveston, H. & S. A. Ry. Co. v. Cloyd* (Tex.) 78 S. W. 43, 44.

The "residence" of one year, required of plaintiff in divorce to give the court jurisdiction, is such as would subject him to taxa-

tion and to the service of process in this state. *Hall v. Hall*, 25 Wis. 600, 607.

The word "residence" directs attention solely to a use or mode of occupancy to which a building may be put. Whether or not a covenant that not more than one building shall be erected on a single lot is violated by the erection of a structure whose exterior walls, foundation, and roof constitute it one building, but whose interior arrangements and entrances show that it is to constitute two residences, is not so clear that a court of equity will aid in its enforcement. *Fortesque v. Carroll*, 75 Atl. 923, 76 N. J. Eq. 583, Ann. Cas. 1912A, 79.

For the purpose of determining the venue of his action against a railway company for personal injuries, the place where an employé of such company establishes his headquarters, boards, and sleeps, is his "residence." *Gulf, C. & S. F. R. Co. v. Rogers*, 82 S. W. 822, 824, 825, 37 Tex. Civ. App. 99.

Under Rev. St. 1899, § 4160, subd. 17, providing that the place where any person having no family shall generally lodge shall be deemed the place of his residence, a traveling salesman showing that for more than a year a city had been the center of his activity, and that he rented a room therein, and that he had selected the city as the place of his residence, showed his "residence in the state," within section 2924, providing that no person who has not resided within the state for one year shall be entitled to a divorce, etc. *Stone v. Stone*, 113 S. W. 1157, 1158, 134 Mo. App. 242.

Decedent Estate Law (Consol. Laws 1909, c. 13) § 22, requires that the witnesses to a will write opposite their names their places of residence, on penalty of \$50, recoverable by suit of any person interested in the property disposed by the will. A notary witnessed a will, and after his name stamped upon it a seal and an impression, both containing the words, "Notary Public, New York County"; the county being a narrower political designation than the city. Held, in an action for the penalty, that the word "residence," standing alone in the statute, did not require the addition of a street number, and that, in view of the strictly penal character of the statute, defendant was not liable. *Bossie v. Edelson*, 134 N. Y. Supp. 615, 617, 76 Misc. Rep. 234.

A married woman who lives with her husband in a town where he last resided three years, supporting himself and family, does not thereby gain a "residence" in the town in her own right, within the meaning of the pauper act, so as to make the town liable to another town in which she lives for support furnished to her, as a pauper, after the death of her husband. *Town of Jericho v. Town of Morristown*, 60 Atl. 233, 234, 77 Vt. 367.

The "residence" of an unmarried man, within Code, § 1090, declaring that no person

shall vote in any precinct but that of his residence, and section 642, providing that each qualified elector may vote at a municipal election who is a resident of the city, etc., and at the time has been ten days a resident of the precinct in which he offers to vote, is the place where he rooms and sleeps, and not the place where he takes his meals. *State v. Savre*, 105 N. W. 387, 129 Iowa, 122, 3 L. R. A. (N. S.) 455, 113 Am. St. Rep. 452.

The term "resident" or "residence," as applied to the complainant in bastardy proceedings, is not used in the sense in which it is employed in the Civil Code, but applies as well to the county in which the mother of the child may actually reside, and which is liable to be charged with its support, although she may, in effect, have a home in another county or state. While the proceeding may be brought in the county where the mother has a legal settlement, it may also be brought and prosecuted to judgment in the county of her actual residence. *Jessen v. Donahue*, 96 N. W. 639, 640, 4 Neb. (Unof.) 838 (citing *Clark v. Carey*, 60 N. W. 78, 41 Neb. 780).

Under B. & C. Comp. § 1173, requiring that a petition for an order of sale shall contain the residence of the heirs and devisees, it is not sufficient for the petition for an order of sale to give the "address" of non-resident heirs served by publication; service at their address not being equivalent to service at their "residence." *Smith v. Whiting*, 106 Pac. 791, 794, 55 Or. 808.

Rev. St. 1899, § 4160, defines "residence" as "the place where the family of any person shall permanently reside in this state, and the place where any person having no family shall generally lodge, shall be deemed the place of residence of such person or persons respectively." In a trial for fraudulent registration in an election precinct, testimony that witness knew defendant lived in a precinct other than where he registered, that he had seen defendant going to and from his place of residence during the day and night, and knew the rest of the family, in the absence of proof to the contrary, was sufficient to show that defendant did not reside in the precinct where he registered. *State v. Keating*, 100 S. W. 648, 651, 202 Mo. 197. Under this statute where a wife resided with her husband in J. county, having all her property therein, but on becoming insane was removed to an asylum in another county, her "residence" continued to be in J. county, even after her husband's death. *State v. Wurdeman*, 108 S. W. 144, 148, 129 Mo. App. 263 (citing and adopting *Flynn v. Hancock*, 80 S. W. 245, 35 Tex. Civ. App. 395; *Marheineke v. Grothaus*, 72 Mo. 204).

Under Code, § 2297, reciting that the provisions for the support of the insane at public charge shall not release the estates of such persons, nor their relatives, from liabil-

ity, and the auditors of the several counties, subject to the direction of the board of supervisors, are authorized to collect from the property of such patient, or any person legally bound for their support, any sums paid by the county in their behalf, but if the board of supervisors, in case of any insane patient supported at the expense of the county, shall deem it a hardship to compel the relatives of such patient to bear the burden of his support, they may relieve such relatives or estate from any part of such burden, the right to recover for the maintenance of an insane person is given to a county, and the county cannot maintain an action against the estate of an insane person, where it appears that it has expended nothing in his maintenance in a state asylum and that the claim is in the name of the state; the insane person having been a nonresident when admitted to the Soldiers' Home, and from there having been sent to the asylum, and so not having acquired a "residence" within the purview of Code, § 4009. *State v. Cole*, 136 N. W. 887, 889, 155 Iowa, 654.

#### Abode synonymous

The word "residence" means a place of abode. The term is held to include a room in a school dormitory, the felonious entry of which is held to constitute burglary of a private residence. *Mays v. State*, 97 S. W. 703, 704, 50 Tex. Cr. R. 391 (citing 7 Words and Phrases, p. 6151).

The word "abode," as used in Gen. St. 1865, c. 164, § 13, providing that "in suits in \* \* \* divorce \* \* \* if the plaintiff or other person for him shall allege in his petition that part or all of the defendants are nonresidents of the state, or have absconded or absented themselves from their usual place of abode in this state," etc., "the clerk shall make an order or publication," etc., means and is used in the same sense as the word "residence" is used. In an action for divorce, a petition alleged "that defendant is a nonresident of this state, or that he has absconded or absented himself from his usual place of abode in this state, so the ordinary process of law cannot be served upon him." Held, that the allegations were sufficient to authorize an order for service of notice by publication. *Hinkle v. Lovelace*, 102 S. W. 1015, 1017, 204 Mo. 208, 11 L. R. A. (N. S.) 730, 120 Am. St. Rep. 693, 11 Ann. Cas. 794.

In its relation to the question to whether a summons has been left at the house of usual abode of the defendant, the term "abode" means one's fixed place of residence for the time being, and may be synonymous with "residence." But ordinarily "usual place of abode" is a much more restricted term than "residence," and means the place where the defendant is actually living at the time when service is made. Service at the dwelling house of defendant, which is not

described as his usual place of abode, is not sufficient. The purpose of the use of the term in an act relating to the service of process has primary reference to the place where the defendant is usually to be found. Therefore "usual place of abode" means "present place of abode." As defined in this state, the term means the customary or settled place of residence. In the case of a married man, the "house of usual abode" is prima facie the house wherein his wife and family reside. *Berryhill v. Sepp*, 119 N. W. 404, 405, 106 Minn. 458, 21 L. R. A. (N. S.) 344 (citing *Missouri, K. & T. Trust Co. v. Norris*, 63 N. W. 634, 61 Minn. 256; *State v. Toland*, 15 S. E. 599, 600, 36 S. C. 515; *Du Val v. Johnson*, 39 Ark. 182, 192; *Walker v. Stevens*, 72 N. W. 1038, 52 Neb. 653; *Mygatt v. Coe*, 44 Atl. 198, 199, 63 N. J. Law, 510; *Ser v. Bobst*, 8 Mo. 506, 507; *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398; *Madison County Bank v. Suman's Adm'r*, 79 Mo. 527, 530).

#### As building

The word "residence," as used in an information under Comp. Laws, § 11,551, prohibiting larceny from any building on fire, which charged defendant with the larceny of goods "from the residence of \* \* \*, the same being then and there on fire," means building. *People v. Klammer*, 100 N. W. 600, 137 Mich. 399.

#### Citizenship equivalent

"Residence" is not equivalent to "citizenship." *Yocum v. Parker*, 130 Fed. 770, 771, 66 C. C. A. 80.

"Citizenship" and "residence" are not synonymous terms. A person may reside in one state and be a citizen of another. An allegation, in a petition for removal, that defendant is a citizen of a state other than that in which the suit is pending, is not equivalent to an allegation that he is a nonresident of that state, and does not show his right to a removal. *Irving v. Smith*, 132 Fed. 207.

"Residence" and "citizenship" are not convertible terms. A party may be a resident of a place, and yet not be domiciled there; for, while he is a resident, still if he does not intend to make that his permanent place of abode, but has an intent to return, his residence in that place does not establish a domicile, while citizenship, is a status or condition and is the result of both act and intent. An adult person cannot become a citizen of a state by simply intending to, nor does any one become such citizen by mere residence. The residence and the intent must coexist and correspond, and, though under ordinary circumstances the former may be sufficient evidence of the latter, it is not conclusive, and the contrary can always be shown, and when the question of citizenship turns on the intention with which a person resides in a particular place, his own

testimony under ordinary circumstances is entitled to great weight. *Eisele v. Oddie*, 128 Fed. 941, 945 (quoting from *Chambers v. Prince*, 75 Fed. 176; *Sharon v. Hill*, 28 Fed. 337, 342).

An averment of the "residence" of a plaintiff is not equivalent to one of citizenship, and does not give a circuit court jurisdiction, where it is dependent on diversity of citizenship. *Sanbo v. Union Pac. Coal Co.*, 140 Fed. 713, 714, 72 C. C. A. 24.

The word "residence" may refer either to a fixed and settled abode, or to one merely of some duration. Hence a statement of an applicant for insurance that his residence was in Kansas was not necessarily a declaration that he was a citizen of that state. *Kroge v. Modern Brotherhood of America*, 105 S. W. 685, 687, 126 Mo. App. 693.

Citizenship carries with it the idea of connection or identification with the state and a participation in its functions, and as such implies much more than "residence." Citizenship, as used in the removal laws, means residence with the intention of permanently remaining in a particular place. *Harding v. Standard Oil Co.*, 182 Fed. 421, 425.

The terms "residence" and "citizenship" are not equivalents. An allegation in a complaint that plaintiff is a "bona fide resident" of a certain state is not one of his "citizenship" in such state, and is not sufficient to give a federal court jurisdiction on the ground of diversity of citizenship. *Koike v. Atchison, T. & S. F. Ry. Co.*, 157 Fed. 623, 624 (citing *Marks v. Marks*, 75 Fed. 321; *Wolfe v. Hartford Life & A. Ins. Co.*, 13 Sup. Ct. 602, 148 U. S. 389, 37 L. Ed. 493; *Horne v. George H. Hammond Co.*, 15 Sup. Ct. 167, 155 U. S. 393, 39 L. Ed. 197; *Menard v. Goggan*, 7 Sup. Ct. 874, 121 U. S. 253, 30 L. Ed. 914).

A distinction is to be observed between "citizenship" and "residence" for the purpose of suit. The question of suability and jurisdiction is not so much one of citizenship as of finding. If a citizen of one state is found for the purpose of lawful service of judicial process in another, he may ordinarily be sued there. *J. B. Pyron & Son v. Ruohs*, 48 S. E. 434, 436, 120 Ga. 1060 (quoting *Baltimore & O. R. Co. v. Koontz*, 104 U. S. 5, 10, 26 L. Ed. 643; *Williams v. East Tennessee, V. & G. Ry. Co.*, 16 S. E. 303, 90 Ga. 519, 522).

#### Domicile distinguished

See Domicile.

#### As dwelling

"Residence" signifies a person's permanent home and principal establishment, to which, when he is absent, he has the intention of returning. *Miller v. Sovereign Camp, Woodmen of the World*, 122 N. W. 1126, 1128,

140 Wis. 505, 28 L. R. A. (N. S.) 178, 133 Am. St. Rep. 1095.

The place where a person lives, within Code, § 1313, providing that moneys and credits shall be listed and assessed where the owner lives, is the place of his "residence." *Glottelty v. Brown*, 126 N. W. 797, 798, 148 Iowa, 124; *Cover v. Hatten*, 113 N. W. 470 471, 136 Iowa, 63.

The word "residence," as used in Const. art. 2, §§ 1, 2, providing who are qualified electors, was there used as equivalent to "home," and was not intended to be understood in the more restricted sense of actual habitation or abode. *State ex rel. Goldsworthy v. Aldrich*, 14 R. I. 171, 175.

The word "residence," as employed in the election laws, is synonymous with "home," and means a fixed or permanent abode or habitation, to which one, when absent, intends to return. *State v. Savre*, 105 N. W. 387, 129 Iowa, 122, 3 L. R. A. (N. S.) 455, 113 Am. St. Rep. 452.

An "inhabitant" is a dweller in a place; a resident; one who dwells or resides permanently in a place; one who has a fixed and permanent abode in a place. "Residence" means a place of abode, and, within the meaning of the Alaska divorce law, it is the place where one resides—his home. *Terrill v. Terrill*, 2 Alaska, 475, 477.

By "residence," as used in the statutes authorizing attachment, is not meant legal domicile, but actual place of abode, either of a temporary or permanent character, at which due service of process might be lawfully made. *Irwin v. Raymond*, 110 N. Y. Supp. 1100, 1101, 58 Misc. Rep. 319.

Statement of a witness that he lived at a certain street and number in a specified city was not inconsistent with his "residence" in another county, since a person may "live" in one place, and have a legal residence in another. *O'Brien v. O'Brien*, 116 Pac. 692, 694, 16 Cal. App. 103.

"Residence" within the statute providing for the place of trial depends on intention as well as fact, and is the place where one remains when not called elsewhere on business, pleasure, or for other temporary purposes, and the place of residence within the statute is the fixed home of a party as understood by himself and his neighbors and friends. *Younger v. Spreckels*, 106 Pac. 895, 896, 12 Cal. App. 175.

An instruction, on the issue of the residence of plaintiff within the venue laws, that, if at the time of the injury complained of plaintiff had his residence in the county in which the accident occurred, the jury must find for defendant on its plea of privilege to be sued in such county, while, if at the time plaintiff resided in a sister state, the jury must find against the plea, and that the word

"residence" meant a fixed and permanent abode or dwelling place for the time being, correctly stated the law, so that it was not error to refuse requested instructions on the issue. Evidence held to show that a servant suing a railroad company for injuries received in another county in the state was a nonresident of the state within the venue laws; "residence" within the statute requiring a settled and fixed abode and an intention to remain at least for a time for business or for other purposes. *Pecos & N. T. Ry. Co. v. Thompson* (Tex.) 140 S. W. 1148, 1153.

"A man's 'residence' is his home or habitation fixed at any place, without a present intention of removing therefrom." A person whose domicile was undetermined, owing to a change of occupation, and who lived apart from his wife and family, and came to the state in order to take out letters of administration on the property of a deceased brother, and declared his intention of becoming a resident, and engaged board and lodging, and opened a bank account, and has since resided in the state, became a resident, and was entitled to letters of administration as such. *Stevens v. Larwill*, 84 S. W. 113, 118, 110 Mo. App. 140 (citing *Greene v. Beckwith*, 38 Mo. 384; *Johnson v. Smith*, 43 Mo. 499).

A definition of "residence," from which all the elements of home and habitation are excluded as a matter of no consideration, is beyond the ordinary conception; and in a prosecution wherein the state sought to overcome the bar of limitations pursuant to a statute providing that the time during which any defendant is not an inhabitant of or usually resident within the state is not to be counted as a part of the limitations in his favor, instructions, one of which told the jury that they had nothing to do with the question whether the defendant was or was not an inhabitant of the state, and another that the fact that he was not an inhabitant of the state and had a home therein was of no significance in finding whether he was usually resident therein, were erroneous, in that, taken together, they were calculated to confuse and mislead the jury. *State v. Snyder*, 82 S. W. 12, 26, 182 Mo. 462.

#### As dwelling house

See Dwelling—Dwelling House.

#### As including more than dwelling house

The word "residence," like the word "homestead," is not confined merely to the dwelling house, but it may also include everything connected therewith, used to make the home more comfortable and enjoyable. But the words "homestead" and "residence" cannot be intended to include some other and independent family's home and residence. *Linn v. Ziegler*, 75 Pac. 489, 490, 68 Kan. 528 (citing *Ashton v. Ingle*, 20 Kan. 670, 681, 27 Am. Rep. 197).

A "dwelling house" does not include a garage and storeroom; and hence the restriction in a deed against the erection of any flat building or tenement house, and against any "residence" or other dwelling house on the premises within a certain distance to the street line, is not violated by the erection of a garage and storeroom beyond such line. *Jones v. Williams*, 106 Pac. 166, 168, 56 Wash. 588.

The house in which accused and others played cards was in the inclosure of the dwelling house of H., one of the participants, but was an outhouse about 250 yards therefrom, in a field, and various vegetables and implements were stored therein. The outhouse was closed, but not locked, and contained no furniture. No betting was done at the games. Pen. Code 1911, art. 548, makes it an offense to play cards at any outhouse where people resort, or at any other place, except a private residence occupied by a family. Article 550 exempts the state from proving that any money or article of value was bet at such game. Held, that the outhouse was not H's. "residence," within the statutes, and accused was guilty of the offense of gaming. *Soape v. State* (Tex.) 150 S. W. 612.

#### **Inhabitaney synonymous**

"Inhabitaney" and "residence" are synonymous terms. *Harding v. Standard Oil Co.*, 182 Fed. 421, 423.

In the provision of the judiciary act, relating to jurisdiction of Circuit Courts, the words "residence," "resident" and "inhabitant" are used synonymously. *Bogue v. Chicago, B. & Q. R. Co.*, 193 Fed. 728, 733.

#### **As residence of individual**

Under Election Law (Acts 29th Leg. 1905, p. 521, c. 11) § 4, making the residence of a single man where he usually sleeps at night, and that of a married man where his wife resides, if he be not permanently separated from her, one's residence must be determined by actual facts, and where the testimony showed that a voter lived with his "family" in a certain town, and that, though he owned a ranch which he considered his home, he had not lived on it since moving to the town, his "residence" was in such town, whether his wife was living or not. *Savage v. Umphries* (Tex.) 118 S. W. 893, 905.

In attempting to define the term "residence," as used in election laws generally, the courts and text-writers have encountered great difficulty, and it may be said that there is not any definition which has been formulated that applies to the facts of every case. From the decided cases certain rules may be gathered which are intended to aid in applying the facts to a particular case, but it is as easy to understand the meaning of some of the terms used in the rules for determining the meaning of "residence." Every case must stand upon its own facts, and a decli-

sion in any event must, of necessity, be the result of a more or less arbitrary application of the rules of law to the facts presented. Rev. Codes Mont. § 481, rule 8, providing that the place where a man's family resides is presumptively his place of residence, is a rule of evidence; and proof that the family of a man who came to Montana from a sister state remained in the other state is prima facie evidence against the man's right to vote in Montana. *Carwile v. Jones*, 101 Pac. 153, 158, 38 Mont. 590.

#### **As affected by intention**

To establish a "residence," act and intent must combine; the act of occupying and living on the claim, and intent to make the place a home, to exclusion of a home elsewhere. *Whaley v. Northern Pac. R. Co.*, 167 Fed. 864, 870.

"Residence" is a matter determined by the intention of a party. However, one already having a fixed residence or place of abode cannot change it by intention alone, but must accompany such intention by an actual removal. *Carter v. Sommermeyer*, 27 Wis. 665, 666.

"Residence," for the purpose of a settlement of a pauper, includes more than mere presence. There must be a settled intention on the pauper's part of choosing the place as a home. *Inhabitants of Hatfield v. Inhabitants of Hatfield*, 82 N. E. 48, 49, 196 Mass. 393.

The idea of "residence" is compounded of fact and intention. To effect a change of residence, there must be an actual removal to another habitation, and there must be an intention of remaining there. Whenever it is proposed to establish a change of residence, it is incumbent on the party to establish by proof, first, an actual removal to another habitation, and, second, that he has an intention of remaining there. As bearing on the question of proof, it has been held that to establish a change of residence it must at least be made to appear that the former residence has been abandoned, or that the family has become settled in the new residence and made it the center of the family affairs. *Pope v. Williams*, 56 Atl. 543, 545, 98 Md. 59, 66 L. R. A. 398, 103 Am. St. Rep. 379 (quoting *Thomas v. Warner*, 34 Atl. 831, 83 Md. 20).

#### **As having permanent abode**

"Residence" as used in tax laws means a permanent abode of the taxpayer as distinguished from a temporary sojourn. *Brookover v. Kase*, 83 N. E. 524, 525, 41 Ind. App. 102.

An actual bona fide resident within the divorce statute is one who is in the state to reside permanently, and who at least for the time being entertains no idea of seeking a permanent home elsewhere. *Andrade v. Andrade*, 128 Pac. 813, 815, 14 Ariz. 379.

The statutory term "resident" or "residence," as used in divorce statutes, contemplate, as we think, an actual residence with substantially the same attributes as are intended when the term "domicile" is used. They do not mean the place where the defendant in fact resides for the time being. They mean a residence of a permanent and fixed character; a domicile. *Humphrey v. Humphrey*, 91 S. W. 405, 115 Mo. App. 361 (quoting and adopting definition in *Hamill v. Talbott*, 81 Mo. App. loc. cit. 215).

A person cannot be a resident of two states at the same time, since residence is the act of residing or dwelling in a place for some continuance of time; the act or state of being seated or settled in a place. The term "residence" is flexible in its meaning, and may be given a restricted or enlarged meaning according to the connection in which it is used. It involves, however, the idea of permanency and fixed intention to remain, so that an allegation of residence in one state implies nonresidence in another. *Harding v. Standard Oil Co.*, 182 Fed. 421, 425.

Under Rev. St. 1899, § 4160, establishing "residence" where one's family permanently reside, the element of permanency is essential; but it does not require that residence never be changed, but only that there be no present intent to change. *McDowell v. Friedman Bros. Shoe Co.*, 115 S. W. 1029, 1031, 135 Mo. App. 276.

"Residence indicates permanency of occupation, as distinguished from temporary occupation, but does not include so much as 'domicile,' which requires an intention continued with residence. 'Residence' has been defined to be a place where a person's habitation is fixed, without any present intention of removing therefrom. It is lost by leaving the place where one had acquired a permanent home and removing to another place animo non revertendi, and is gained, by remaining in such new place animo manendi." Residence within the district, to give the court jurisdiction of proceedings in bankruptcy, must be bona fide, and the removal of a person from one district to another, for the express purpose of filing a petition in bankruptcy therein, and with the intent of leaving the district as soon as he obtained a discharge, does not make him a resident, so as to confer jurisdiction on the court. *In re Garneau*, 127 Fed. 677, 678, 62 C. C. A. 403.

In determining a voter's residence within General Election Law, § 66, providing that a permanent abode is necessary to constitute a "residence," the rules are reasonably well settled that a man must have a residence or domicile somewhere, which when once gained remains until a new one is acquired, and that a man can have but one domicile at a time. *Welch v. Shumway*, 83 N. E. 549, 558, 559, 232 Ill. 54.

One's "residence," within the proviso to Revisal 1905, § 424, that an action against a railroad shall be tried in one of certain counties, including that in which plaintiff "resided" when the cause of action arose, includes the idea of permanency: so that plaintiff having previously resided in W. county till he went to live in R. county, when employed as a car repairer by defendant under a contract terminable at the will of either party, where he lived two months till injured, and having never intended to change his residence from W. county, he retained his residence in the latter county. *Watson v. North Carolina R. Co.*, 67 S. E. 502, 503, 152 N. C. 215.

#### As entire house

An assault committed on the gallery of a private "residence" is within the statute making it an aggravated assault when the party making the assault and battery goes into a private "residence," as the word "residence," as used in the statute defining this crime, means the entire house. *Herd v. State*, 90 S. W. 1119, 1121, 50 Tex. Cr. R. 600.

#### As legal residence

When "residence" is spoken of in connection with the right of a person to vote, legal residence is meant. *Huston v. Anderson*, 78 Pac. 626, 635, 145 Cal. 320.

The words "residence" and "usual place of residence," as employed in the statutes, are generally synonymous; hence the residence essential to confer jurisdiction is a legal one, equivalent to the domicile of the defendant. *Ruby v. Pierce*, 104 N. W. 1142, 74 Neb. 754.

In suits relating to taxation, right of suffrage, divorce, limitations of actions, etc., the term "residence" is used in the sense of "legal" residence; that is, the place of domicile or permanent abode, as distinguished from the place of temporary residence. *Downs v. Downs*, 23 App. D. C. 381, 388.

#### Temporary absence

Permanent "residence" is not affected by a temporary sojourn in another place for business purposes. *Hislip v. Taaffe*, 125 N. Y. Supp. 614, 615, 141 App. Div. 40.

The term "residence," as used in Rev. Code 1899, § 3605, making it a prerequisite to the claiming of homestead rights, is construed not to mean actual and continuous residence on the homestead, and temporary absence and removal therefrom do not defeat the right thereto. *Smith v. Spafford*, 112 N. W. 965, 967, 16 N. D. 208.

Laws 1901, p. 294, c. 125, § 3, providing for the sale and lease of public lands, declares that, if any purchaser shall fail to reside on and improve the land purchased by him, he shall forfeit the land and all payments made thereon, and the same shall be subject to resale without any action on the part of the Commissioner of the General Land Office. Held, that, where plaintiff purchased

four sections of school land under a statute requiring three years' "residence" thereon, but during the time left the land for eight months, during which she attended school, only returning to the land on one occasion for a period of one or two days, she thereby forfeited the land so purchased, though on her final return from school she again took up her residence on the home section. *Andrus v. Davis*, 89 S. W. 772, 773, 99 Tex. 303.

Where a person worked a farm; keeping a furnished room in the house thereon, which he occupied when there, and claimed his residence there, but generally and continuously lodged with his parents in another school district because they were old and helpless, and he considered it his duty to stay with them at night, returning to his farm every morning, the district where his farm was situated was the district of his "residence," within Rev. St. 1899, c. 149, providing that all personal property shall be assessed in the county and "district" where the owners reside. *State ex rel. Kelly v. Shepperd*, 117 S. W. 1169, 1173, 218 Mo. 656, 131 Am. St. Rep. 568.

#### Temporary presence

Rev. St. Wyo. 1899, § 3514, providing for substituted service of summons on an individual by the leaving of a copy at his usual place of "residence" with some member of the family over 14 years of age, does not contemplate a mere temporary stopping or abiding place, as distinguished from a regular or fixed and permanent residence, and hence does not authorize such substituted service on one who is temporarily within the state for the purpose of carrying out a temporary employment. *Honeycutt v. Nyquist, Peterson & Co.*, 74 Pac. 90, 91, 12 Wyo. 183, 109 Am. St. Rep. 975.

"Residence" is lost by leaving the place where one has acquired a permanent home and removing to another place without a present intention of returning. "A temporary sojourn within a state for pleasure or business, accompanied by an intention to return to the state of one's former habitation, does not constitute 'residence.'" *In re Mulford*, 75 N. E. 345, 346, 217 Ill. 242, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986 (citing *Pells v. Snell*, 23 N. E. 117, 130 Ill. 379).

Under St. 1898, § 12, providing that, to entitle a person to vote at an election, he must have been an actual resident of the state for a year and of the election district for ten days, and section 69, subsecs. 2, 4, providing that a person's "residence" is his fixed habitation, from which he has no present intention of removing, and to which, when he is absent, he has the intention of returning, and that one shall not gain a residence by coming into an election precinct for temporary purposes only, a person who moves into a ward a short time before an

election, to stay only while engaged on a particular job of work, and has no intention of making it his home, is not a qualified voter in the ward. *State ex rel. Hallam v. Lally*, 114 N. W. 447, 448, 134 Wis. 253, 15 Ann. Cas. 242.

"Residence" does not mean one's permanent place of abode, where he intends to live all of his days, or for an unlimited time; nor does it mean one's residence for a temporary purpose, with an intention of returning to his former residence when the purpose shall have been accomplished, but means, as we understand it, one's actual home, in the sense of having no other home, whether he intends to reside there permanently or for a definite or indefinite length of time. "The term 'residence' is flexible and may be given a restricted or enlarged meaning, considering the connection in which it is used. It involves, however, some idea of permanence and fixed intention to remain." A defendant sued jointly with another in a state court, who testifies that his home is in another state where he had property to which he expected to return, that he is there with his family for temporary purposes of his employment and for an indefinite time, does not become a resident of the state and district of suit so as to prevent his removal of the cause. *Willingham v. Swift & Co.*, 165 Fed. 223, 224 (quoting and adopting definition in *Shaeffer v. Gilbert*, 20 Atl. 434, 73 Md. 66, and citing and adopting *Bicycle Stepladder Co. v. Gordon*, 57 Fed. 529).

#### Residence of board

Hurd's Rev. St. 1909, c. 93, provides for the creation of miners' examining boards in counties where mines are operated, and declares that such boards shall meet monthly and examine under oath all persons residing in the county in which the boards reside who apply for certificates, and that the members of the boards shall be actually engaged in mining coal in the county for which they are appointed. Held, that the "residence" of the board referred to in the statute meant the place for which the members of the board might be appointed, and that the statute should be so construed as to entitle every miner, whether a resident or nonresident of the state or of the county where he makes his application for examination, who has had two years' actual experience in coal mining and desires to engage in mining in the county where he applies for examination, to take the examination and be granted a certificate to engage in coal mining in Illinois, and when so construed, is not unconstitutional as providing for the examination of miners only that reside in the county where the examining board is appointed. *People v. Evans*, 93 N. E. 388, 393, 247 Ill. 547.

#### Residence of corporation

Though a corporation cannot, in strict legal language, be said to reside in any particu-

lar county, its "residence." for the purpose of venue, may fairly be considered as being where it has its principal office. *Starke Advertising Agency v. Adams*, 64 Atl. 990, 991, 74 N. J. Law, 143.

For the purpose of determining the venue of an action, a corporation defendant's principal place of business is its place of "residence." *Bloom v. Michigan Salmon Min. Co.*, 104 Pac. 324, 325, 11 Cal. App. 122.

The words "residence" and "home" are not, as ordinarily used, synonymous; but when used, as in this case, with reference to a corporation and its general office, the word "home" is the equivalent of "residence." The affidavit herein for the change of the place of trial was sufficient. The change of the place of trial was not waived. *State ex rel. Ballard-Trimble Lumber Co. v. District Court of Clay County*, 139 N. W. 135, 137, 120 Minn. 99.

The "residence" of a corporation, under the Tennessee statutes, is the county where its charter is registered in compliance with the statutes providing for its creation, and it is the place where the governing power of the corporation resides and is exercised, and not the place where its ordinary business is conducted. *Southern Exp. Co. v. Patterson*, 123 S. W. 353, 359, 122 Tenn. 279 (citing 1 *Desty, Tax'n*, p. 341).

A voluntary corporation's "residence" (so far as it has one) is the town or city where its business is principally executed. The place of a steamboat corporation's residence, within P. S. 1901, c. 56, § 12, and Laws 1905, p. 414, c. 25, § 1, providing for the taxation of vessels, etc., at the owner's place of residence, is the place where its business is principally conducted, and not the place where it merely maintains an office and holds stockholders' meetings, and the situs of the corporation's business is not changed by a declaration in its articles of incorporation that the place of business shall be a place other than where it actually conducts its business. *Woodsum Steamboat Co. v. Town of Sunapee*, 69 Atl. 577, 74 N. H. 495 (citing *Kennett v. Woodworth-Mason Co.*, 39 Atl. 585, 68 N. H. 432).

In Judiciary Act as amended and corrected, providing that the Circuit Courts of the United States shall have original cognizance of suits in which there shall be a controversy between citizens of different states, but, where jurisdiction is founded only on diversity of citizenship, suit shall be brought only in the district of the residence of either plaintiff or defendant, and declaring (section 2) that any other suit of which the Circuit Courts of the United States are given jurisdiction by the preceding section may be removed to the Circuit Court for the proper district by the defendant or defendants therein, being nonresidents of that state, the words "residence" and "inhabitant" are used synony-

mously, and hence, where railroads incorporated in other states operated a part of their line in Iowa and were served there, they had a "residence" in Iowa, so that, other jurisdictional requisites being present, nonresidents having been injured in Iowa on such railroads could have sued originally in the federal courts sitting in that state, and therefore suits brought by them in the state courts were subject to removal. *Bogue v. Chicago, B. & Q. R. Co.*, 193 Fed. 728, 733.

"It is now held by the English courts that a foreign corporation, by establishing an office in England and carrying on business there, is to be considered as a resident of England, and may be sued in its courts. Under the system prevailing in this country, corporations are regarded as citizens of the state in which they are created; but in other states are regarded as foreign corporations, and their right to transact business therein is subject to such conditions and restrictions as the legislatures of those states may prescribe. \* \* \* The 'residence' of a corporation is within the state in which it is created, and, so long as it confines the exercise of its corporate powers within that state, it is beyond the reach of the process of courts of other states." *Jameson v. Simonds Saw Co.*, 84 Pac. 289, 2 Cal. App. 582.

Under Civ. Code Prac. §§ 203, 732, subd. 32, authorizing an attachment of corporate stock, and defining the words "residence" and "reside" with reference to a corporation as referring to its chief office or place of business, the court in a suit under section 439 by a plaintiff in execution has jurisdiction to subject to the payment of the judgment the debtor's stock in a foreign corporation having its principal office in the state where its books and assets are, and where dividends on the stock are paid, since the stock has a situs in the state. *Bowman v. Breyfogle*, 140 S. W. 694, 697, 145 Ky. 443.

Under Revisal of 1905, § 424, providing for the trial of certain actions in the county where a party resides, and section 422 making the principal place of business of a domestic corporation its "residence," an action is properly brought by such corporation in the county, where it is required to hold its directors' and stockholders' meetings. A corporation cannot change its residence or its citizenship and can have its legal home only at the place where it is located, under the authority of its charter, though it may transact business anywhere, unless prohibited by its charter or excluded by local laws. The residence or domicile of a corporation is the place where the governing power of the corporation is exercised, and where the persons having control of its affairs meet in council to determine what the corporate policy shall be, and not where the labor, called forth by the measures of such council, is performed. *Garrett & Co. v. Bear*, 56 S. E. 479, 144 N. C.



23 (citing Welty, Assessments, p. 106; Grundy County v. Tennessee Coal, Iron & R. Co., 29 S. W. 116, 94 Tenn. 309).

Comp. Laws 1897, § 3834, makes corporate property taxable where its office is located in its articles of incorporation, provided its business is actually transacted at said office; but, if it shall establish its principal office in any other place than the place named in its articles of incorporation, then the place where it transacts its principal business shall be deemed its "residence" for the purpose of taxation. Held that, where the only business of a navigation company transacted at the place named in the articles of incorporation as its office is the annual meeting of stockholders, the "residence" of the corporation for the purpose of taxation is the place where the principal business is conducted, such as receiving and disbursing the funds of the corporation. *Teagan Transp. Co. v. Board of Assessors of City of Detroit*, 102 N. W. 273, 274, 139 Mich. 1, 69 L. R. A. 431, 111 Am. St. Rep. 391.

#### RESIDENCE ADDRESS

There is a distinction between residence address, as used in the local option law, providing that the petition for a local option election shall contain the residence address of each signer and post office address, a post office address being the place one receives his mail, while a residence address is where one resides, and hence a petition cannot be held defective for lack of post office addresses. *People ex rel. Arfman v. Newell*, 113 Pac. 643, 645, 49 Colo. 349.

#### RESIDENCE STREET

A street on either side of which were homes, all comfortable and many spacious and elegant, of well to do people, which had been selected for homes by this class of residents because of its quietude and repose, was what is termed "residence street." *Holst v. Savannah Electric Co.*, 131 Fed. 931, 935.

#### RESIDENT

See Actual Residence—Actual Resident; Bona Fide Resident; Nonresident—Nonresidence.

The word "resident" is ordinarily used to indicate a person with a fixed domicile or legal residence. *Bechtel v. Bechtel*, 112 N. W. 883, 884, 101 Minn. 511, 12 L. R. A. (N. S.) 1100.

One may be a nonresident of the state and also a fugitive from justice or a fugitive from justice and still a "resident" of the state. *State v. Miller*, 87 S. W. 484, 486, 188 Mo. 370.

An owner residing outside a city, who moves to the city intending to remain there and become a citizen, immediately becomes a "resident" qualified to sign such protest.

*Shaw v. Goben*, 151 S. W. 209, 210, 167 Mo. App. 125.

Under the express provisions of Code, § 4014, the statutory exemptions provided are only for "residents" of the state, though a debtor claiming an exemption is not required to show residence for any particular time; it being sufficient if he has actually come within the state with the intention of remaining. *Union County Inv. Co. v. Messix*, 132 N. W. 823, 826, 152 Iowa, 412.

Where two or more court districts are formed out of one county, a clerk residing in the county can perform the duties of clerk of both courts, he being considered a "resident" of both districts within Const. art. 16, § 14, which requires district clerks to reside in their respective bailiwicks and keep their offices therein. *Kruegel v. Daniels*, 109 S. W. 1108, 1109, 50 Tex. Civ. App. 215.

A wife, who lived in a particular city with her husband during their cohabitation, and who, when abandoned, went to another state solely to make a living, acquiring no domicile there, and regarding such city as her home, was a "resident" of such city within Ky. St. 1909, § 2120, requiring one year's continuous residence next before suit for divorce. *Cummings v. Cummings*, 117 S. W. 289, 133 Ky. 1.

The term "resident," as used in the law of New York regulating divorce, is synonymous with "domiciled person." Thus, where one purchased a farm in Vermont and lived there with his family for five years, voted and held office there, qualification for which required a year's actual residence, he was a "resident" of Vermont, though he worked in New York and spent a portion of his time there. *Hammond v. Hammond*, 93 N. Y. Supp. 1, 6, 103 App. Div. 437.

The term "resident" or "residence," as applied to the complainant in bastardy proceedings, is not used in the sense in which it is employed in the Civil Code, but applies as well to the county in which the mother of the child may actually reside, and which is liable to be charged with its support, although she may in effect have a home in another county or state. While the proceedings may be brought in the county where the mother has a legal settlement, it may also be brought and prosecuted to judgment in the county of her actual residence. *Jessen v. Donahue*, 96 N. W. 639, 640, 4 Neb. (Unof.) 838 (citing *Clark v. Carey*, 60 N. W. 78, 41 Neb. 780).

Consolidated School Law, Laws 1894, p. 1225, c. 556, tit. 7, § 36, provides that the common schools shall be free to all persons of certain age, "residing in the district." Held that, where an orphan child had been placed by a society in the home of a resident of a school district under an arrangement whereby the society paid for his board and clothing, he was entitled to school privileges as a

"resident," though there was no arrangement as to the term of his abode in the district; the well-recognized policy of the state relating to education, as expressed in Const. art. 9, § 1, School Law, tit. 7, §§ 11, 59, 60, and Compulsory Education Law, Laws 1894, pp. 1682, 1687, c. 671, §§ 2, 13, making it obvious that it was not the legislative intent to employ the word "residence," as used in the school law, in the narrow sense of "domicile." *People ex rel. Brooklyn Childrens' Aid Soc. v. Hendrickson*, 104 N. Y. Supp. 122, 54 Misc. Rep. 337.

The divorce and annulment act of 1907 provides that a decree of nullity may be rendered at the suit of the husband, when he was under 18 at the time of the marriage, unless such marriage be confirmed by him after arriving at such age. The act further provides, "for purposes of annulment of marriage, jurisdiction may be acquired by personal service of process upon the defendant within the state when either party is a bona fide resident of the state, at the time of the commencement of the action." Petitioner and defendant resided with their respective parents, who were domiciled in Philadelphia, Pa., and came to New Jersey and were married, returning at once to the homes of their parents in Philadelphia. When the marriage was disclosed a week later, the petitioner's parents would not permit him to receive defendant as his wife, and on March 9, 1910, sent him into the state to board with relatives; his earnings and some assistance from his father going to pay his board. His petition was filed March 26, 1910. Held, that the term "resident," as used in the act, included not only the factum of residence, but also the animus manendi, the residence required by the statute being equivalent to domicile; and that petitioner was not a "bona fide resident" of this state, and hence that the court had no jurisdiction. *Hess v. Kimble*, 81 Atl. 363, 364, 79 N. J. Eq. 454.

#### Absence or removal as affecting

Within Const. art. 10, § 1. granting exemptions only to residents of the state, one who, on being sentenced for one crime and indicted for another, fled the state, presumably with no intention to return, is not such a "resident," though his family continue to reside in the state, and his domicile may be there. *Cromer v. Self*, 62 S. E. 885, 886, 149 N. C. 164, 128 Am. St. Rep. 658.

Where a debtor sold all his nonexempt property, and started for another state with the intent of establishing a residence and while on his way and within the state, an attachment was levied on his horse, he was still a "resident" of the state within the exemption law, and entitled to claim exemption. *Grimestad v. Lofgren*, 117 N. W. 515, 517, 105 Minn. 286, 17 L. R. A. (N. S.) 990, 127 Am. St. Rep. 566.

Shannon's Code, § 4203, provides that a divorce may be granted where the petitioner

has resided in the state for two years next preceding the filing of the petition. A man was born in Tennessee, and resided there until he was appointed to a position in a governmental department at Washington, D. C., to which place he moved with his family, and where he kept house for 22 years, only returning to the state of Tennessee on three occasions, when he voted there; and during such period he paid a poll tax in Tennessee for some years. He testified that it had been his intention to return in the event that he should lose his position. His position was under the civil service law, but the tenure of it was such that he might be discharged. Held, that he was not a "resident" of Tennessee, so as to entitle him to maintain a bill for divorce. *Sparks v. Sparks*, 88 S. W. 173, 174, 114 Tenn. 666.

#### As citizen

A complaint stating that plaintiff is a "resident" of a specified state is insufficient to show that he is a citizen of that state as affecting the question of jurisdiction of a federal court. *Gaugler v. Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79, 81.

An averment in a complaint that plaintiff is "a resident of the state of Delaware" must be intended to mean as averring that the plaintiff is a citizen of that state. *Sun Printing & Pub. Ass'n v. Edwards*, 24 Sup. Ct. 696, 698, 194 U. S. 377, 48 L. Ed. 1027 (citing *Jones v. Andrews*, 77 U. S. [10 Wall.] 331, 19 L. Ed. 935; *United States Express Co. v. Kountze Bros.*, 75 U. S. [8 Wall.] 342, 19 L. Ed. 457).

An averment in a pleading that plaintiff is a "resident" of a particular state is not equivalent to one that he is a citizen of that state, and is insufficient to give a federal court jurisdiction, where that is dependent on diversity of citizenship. *Board of Trustees of Mohican Tp., Ashland County, Ohio, v. Johnson*, 133 Fed. 524, 66 C. C. A. 592.

Under Loc. Acts 1898-99, p. 1444, providing that a resident of the county shall be qualified as a juror, one who resided in the county but who paid his poll tax and voted in another county, was qualified, since the act did not require the juror to be a householder or a freeholder; it not being necessary to become a resident of another locality that the party should change his citizenship or his domicile. *Huckabee v. State*, 53 South. 251, 252, 168 Ala. 27 (citing 7 Words and Phrases, p. 6151).

Under Pol. Code, § 51, defining citizens as persons born in the state and residing within it, and all persons born out of the state who are citizens of the United States and residing within the state, one suing to restrain an illegal payment of county funds, who describes himself as a "resident" of the county, does not show that he is entitled to sue, within Code Civ. Proc. § 526a, authorizing actions to restrain illegal expenditures

of public funds; by a "citizen resident" therein; the words "resident" and "citizen" not being synonymous. *Thomas v. Joplin*, 112 Pac. 729, 730, 14 Cal. App. 662.

The words "inhabitant," "citizen," and "resident" mean substantially the same thing, and one is an "inhabitant," "resident," or "citizen" of the place where he has his domicile or home. A man's residence is his home or habitation, where that residence is fixed, and at a particular place, and he does not entertain a present intention of removing therefrom. To constitute a domicile but two elements are necessary: The act and the intention. *Stevens v. Larwill*, 84 S. W. 113, 118, 110 Mo. App. 140 (citing *State ex rel. Lowe v. Banta*, 71 Mo. App. 32; *Greene v. Beckwith*, 38 Mo. 384; *Johnson v. Smith*, 43 Mo. 499; *Tiller v. Abernathy*, 37 Mo. 196).

#### In reference to corporation

A corporation is a "resident" of the locality where its principal office is situated. *People v. Mahens*, 116 N. Y. Supp. 189, 192, 62 Misc. Rep. 317.

A domestic corporation, having its principal office and place of business in a county, is a "resident" of the county, within the statutes defining the place of trial. *Finch School v. Finch*, 129 N. Y. Supp. 1, 144 App. Div. 687.

A corporation is "resident," irrespective of its domicile, when it does business in a state, and its officers reside there, upon whom process may be served at their homes. Conversely a corporation, no matter where incorporated, which does not do business in the state and does not have officers residing there upon whom process may be served, is nonresident. *Brand v. Auto Service Co.*, 67 Atl. 19, 20, 75 N. J. Law, 230.

A foreign corporation, being a nonresident in fact, becomes, for the purpose of conferring jurisdiction, by fiction of law a "resident" of the city, if it has a place therein for the regular transaction of business. *Goldzler v. Central R. Co. of New Jersey*, 88 N. Y. Supp. 214, 215, 43 Misc. Rep. 667.

Within the meaning of a statute which makes the improvement of a street depend upon the action of such of the owners of the abutting property as are residents of the city, a railroad corporation is not to be deemed a "resident" of any other city than that in which its chief offices and principal place of business are located. *Kimmerle v. City of Topeka*, 128 Pac. 367, 368, 88 Kan. 370, 43 L. R. A. (N. S.) 272.

A corporation organized under the laws of a state cannot be a "resident" of another state, within the meaning of Bankr. Act July 1, 1898, c. 541, § 2, cl. 1, 30 Stat. 545, so as to confer jurisdiction on a court of bankruptcy in the latter state of proceedings against it. *In re Mathews Consolidated Slate Co.*, 144 Fed. 724, 728, 729.

A railway company, though suable in the superior court of a city because its road passes through the city, is not a "resident" in such sense as to preclude it from exercising the right of a change of venue to the district court, given by Code Supp. 1907, § 261, to a defendant who is not a "resident of the city." *Wiar v. Wabash R. Co.*, 130 N. W. 794, 795, 151 Iowa, 121.

Railroad corporations chartered by other states, but owning and operating railroads in this state, have the status of "residents" of this state, although they are not citizens of it, within the meaning of clause 1 of section 2 of article 3 and clause 1 of section 2 of article 4 of the Constitution of the United States, nor domiciled in this state in the technical sense of that term. *Baltimore & O. R. Co. v. Allen*, 52 S. E. 465, 472, 58 W. Va. 388, 3 L. R. A. (N. S.) 608, 112 Am. St. Rep. 975 (criticising *Railroad Co. v. Rogers*, 44 S. E. 300, 52 W. Va. 450, 62 L. R. A. 178).

Within the meaning of the provisions of Judiciary Act March 3, 1875, c. 137, § 1, as amended, that "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant," a railroad or other corporation of a state is a "resident" only of the state by which it is incorporated, and under section 2, which authorizes the removal only of suits "of which the Circuit Courts of the United States are given original jurisdiction by the preceding section," an action brought in a state court by a citizen of another state against a railroad company incorporated in a third state is one of which the federal court in that district is not "given original jurisdiction," and cannot be removed thereto by the defendant on the ground of diversity of citizenship, although it may have a line and places of business within the district and officers or agents on whom valid service may be made under the state law. *Stone v. Chicago, B. & Q. R. Co.*, 195 Fed. 832-840.

The term "resident," contemplated by Code Civ. Proc. § 340, which defines the jurisdiction of county courts and provides that such jurisdiction extends to an action where the defendant, at the time of its commencement, is a resident of the county, and by Const. art. 6, § 14, which declares that the jurisdiction of county courts shall not be extended to an action in which any person, not a resident of the county, is a defendant, may include a "domestic corporation," within Code Civ. Proc. § 341, which provides that, in determining the jurisdiction of a county court, a domestic corporation is to be deemed a resident of the county in which its principal place of business is located, and under section 431, which provides for personal service of summons on a domestic corporation by delivering a copy thereof, if the action is

against the city of New York to the mayor, comptroller, or counsel to the corporation, New York City is such a "domestic corporation" and is therefore a resident of the borough of Manhattan and may not be sued in the county court of another county. *Malsch v. City of New York*, 111 N. Y. Supp. 645, 647, 127 App. Div. 424; 86 N. E. 458, 193 N. Y. 460.

Rev. St. 1899, § 1026, provides that, if any foreign corporation shall fail to comply with the provisions of the statute, it shall not maintain any action in the state on any demand, provided that the statute does not apply to corporations which are entirely non-resident. A foreign corporation having its principal office in another state, and engaged in manufacturing vehicles, delivered vehicles to defendant under an agreement whereby the corporation retained the title, and defendant was to sell them at retail in his own name, making payment for any vehicle that he sold at a certain price, he having the right to retain any excess, and defendant agreed to insure the vehicles at his expense. Thereafter the corporation decided to transfer the vehicles to another dealer, but defendant retained a few that needed repair, agreeing to repair them at plaintiff's expense and sell under the terms of the prior agreement, and to insure them. Subsequently the vehicles were destroyed by fire, and plaintiff sued to recover the value of the vehicles. Held that, at the time of the contract in controversy, the corporation was conducting a fixed business, and had become a "resident foreign corporation," and, as such, not having complied with the statutes, could not recover on the contract. *Wilson-Moline Buggy Co. v. Priebe*, 100 S. W. 558, 559, 123 Mo. App. 521.

A corporation organized under the laws of any one of the United States is in contemplation of law a "citizen" and "resident" of the state in which it is incorporated. Act March 3, 1887, c. 373, 24 Stat. 552, as corrected and amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433, provides for the removal of causes in which there shall be controversy between citizens of the state and foreign states, citizens, or subjects, and section 2 declares that all such suits may be removed to the Circuit Court of the United States for the proper district by the defendant or defendants therein being "nonresidents" of that state. Held that, where defendant was an alien insurance corporation, it was a nonresident of California within such act, though it had a branch office within the state for the transaction of business. *Baumgarten v. Alliance Assur. Co.*, 153 Fed. 301, 302, 303, 304 (citing *Shaw v. Quincy Mining Co.*, 12 Sup. Ct. 935, 145 U. S. 444, 36 L. Ed. 768; *Miller v. Eastern Oregon Gold Mining Co.*, 45 Fed. 348; *Gilbert v. New Zealand Ins. Co.*, 49 Fed. 884, 15 L. R. A. 125; *Barrow Steamship Co. v. Kane*, 18 Sup. Ct. 526, 170 U. S. 100, 42

L. Ed. 964; *In re Keasbey & Mattison Co.*, Petitioner, 16 Sup. Ct. 273, 160 U. S. 229, 40 L. Ed. 402; *Howard v. Gold Reefs of Georgia*, 102 Fed. 657; *Shattuck v. North British & Mercantile Insurance Co.*, 58 Fed. 609, 7 C. C. A. 386).

#### As inhabitant

An "inhabitant" and "resident" mean the same thing. *Pearson v. West*, 77 S. W. 944, 945, 97 Tex. 238.

The word "resident," as used in Code Civ. Proc. § 2476, relating to the jurisdiction of the subrogate courts, is construed as equivalent to "inhabitant." It is coordinate with and intended to have the same meaning that ordinarily attached to the word "inhabitant." *In re Walker's Will*, 105 N. Y. Supp. 890, 892, 54 Misc. Rep. 177.

The word "resident," as used in Code Civ. Proc. § 1763, relating to the jurisdiction of divorce suits, is synonymous with inhabitant; residence being synonymous with inhabitancy or domicile. *Ensign v. Ensign*, 105 N. Y. Supp. 917, 921, 54 Misc. Rep. 289.

Under Burns' Ann. St. 1901, § 240, providing that the word "inhabitant" may be construed to mean a "resident" in any place, an "inhabitant" of a township, town, or city, within section 8421, providing that personal property shall be assessed to the owner in the township, town, or city of which he is an inhabitant, is one whose place of abode is there, and who has no present intention of moving therefrom. *Schmoll v. Schenck*, 82 N. E. 805, 807, 40 Ind. App. 581.

Under Burns' Ann. St. 1908, § 3136, which provides that wills may be proven in any county where the testator was an inhabitant, and section 240, which provides that the word "inhabitant" may be construed to mean a resident in any place, a complaint upon objection to the probate of a will alleging that decedent was a "resident" of the county is good against demurrer. *Ahearn v. Burk* (Ind.) 99 N. E. 1004, 1005.

The words "inhabitant," "citizen," and "resident" mean substantially the same thing, and one is an "inhabitant," "resident," or "citizen" of the place where he has his domicile or home. A man's residence is his home or habitation, where that residence is fixed, and at a particular place, and he does not entertain a present intention of removing therefrom. To constitute a domicile but two elements are necessary: The act and the intention. *Stevens v. Larwill*, 84 S. W. 113, 118, 110 Mo. App. 140 (citing *State ex rel. Lowe v. Banta*, 71 Mo. App. 32; *Greene v. Beckwith*, 38 Mo. 384; *Johnson v. Smith*, 43 Mo. 499; *Tiller v. Abernathy*, 37 Mo. 196).

In the law of process and attachment, "residence" and "habitation" are generally regarded as synonymous. A "resident" and an inhabitant mean the same thing. A per-

son "resident" is defined to be one dwelling or having his abode in any place; an "inhabitant" one that resides in a place. *Atkinson v. Washington & Jefferson College*, 46 S. E. 253, 259, 54 W. Va. 32 (citing *Drake*, Attachment).

#### **Importing legal residence**

As used in Rem. & Bal. Code, § 1284, subd. 1, providing that wills shall be proved and letters testamentary or of administration shall be granted in the county in which decedent was a resident or had his place of abode at his death, the word "resident" imports a legal residence. *Buchholz v. Buchholz*, 115 Pac. 88, 89, 63 Wash. 213, Ann. Cas. 1912D, 395.

#### **As having place of business**

The word "office," as used in Code Civ. Proc. § 3160, providing that a plaintiff in an action brought in the City Court of New York, who has an office for the regular transaction of business in person within the city of New York, is deemed a "resident" of that city, within the meaning of sections 3268 and 3269, which provide that a defendant may require security for costs where plaintiff is not a resident, means a place where service is rendered or business is done. *Brassack v. Interborough Rapid Transit Co.*, 121 N. Y. Supp. 215, 216, 66 Misc. Rep. 190.

#### **Permanent residence indicated**

The word "resident," as used in Act May 4, 1855, authorizing a decree by the common pleas court of the county where the person desirous of adopting a child may be a resident, includes both permanent and temporary residence in the commonwealth. In *re Brown's Adoption*, 25 Pa. Super. Ct. 259, 262.

The statutory terms "resident" or "residence," as used in divorce statutes, contemplate, as we think, an actual residence with substantially the same attributes as are intended when the term "domicile" is used. They do not mean the place where the defendant in fact resides for the time being. They mean a residence of a permanent and fixed character; a domicile. *Humphrey v. Humphrey*, 91 S. W. 405, 115 Mo. App. 361 (quoting and adopting definition in *Hamill v. Talbott*, 81 Mo. App. loc. cit. 215).

"Resident," as used in Rev. St. Me. c. 81, § 17, declaring that, in case of service on residents, the writ shall be delivered to the defendant or left at his dwelling house or place of last and usual abode, means one having a permanent residence within the state, as distinguished from one who is merely temporarily within the state. The term does not include a mere commorancy, or a residence for a temporary or short time, but it means a person residing within the state with the intention of remaining there. *Thomas v. Thomas*, 52 Atl. 642, 96 Me. 223, 90 Am. St. Rep. 342.

Const. art. 7, § 1, provides that every male person of the age of 21 years or upwards, who is a citizen of the United States or who has declared his intention of becoming a citizen at least 30 days prior to an election, and who has resided in the state six months and in the county, precinct, or ward for the term provided by law, shall be an elector. Held, that where a man whose family resided in a foreign country or in another state came to Nebraska temporarily to work on a railroad, and while so engaged boarded in a box car which was moved from station to station under the directions of the superintendent, and when the work was completed departed from the community, he was not a "resident" so as to entitle him to vote. *White v. Slama*, 130 N. W. 978, 979, 89 Neb. 65, Ann. Cas. 1912C, 518.

A "resident" is "one who has a residence; in the legal sense a residence is defined as a place where a man's habitation is fixed, without a present purpose of removing therefrom." The word "resident" is the opposite of "transient." "The former describes the person at rest in a town; the latter describes him in his passage through or across it." "A resident is also defined as one who has a seat or settlement in a place; one who dwells, abides, or lives in a place; inhabitant one who resides or dwells in a place for some time." Hence one who has resided in a state for more than a year, under an expressed intention to make his home there, and is engaged in business, having bought a home, joined a chamber of commerce, and paid a poll tax, is a resident, so far as affects the federal court's jurisdiction, though his affidavit resisting the jurisdiction stated that he had not determined to make his home or to become a citizen of the state. *Reckling v. McKinstry*, 185 Fed. 842, 843 (quoting and adopting the definitions in Cent. Dict. *Town of New Haven v. Town of Middlebury*, 21 Atl. 608, 63 Vt. 399; *Burr. Law Dict.*).

#### **RESIDENT FREEHOLDER**

The words "resident freeholders" mean those living within the subdivision and holding title to real estate. A person holding an executory contract giving the right to purchase land upon a strict compliance with the terms of the contract in the future is not a resident freeholder. In *re Cohn*, 121 N. W. 107, 109, 84 Neb. 230.

The term "resident freeholder," as used in *Cobbey's Ann. St. § 1175*, providing that village authorities may grant a license to sell intoxicating liquors when a petition therefor shall be signed by a designated number of resident freeholders, is used in its ordinary and commonly understood meaning, and a wife, living with her husband on land the title to which is in the latter, and which is occupied by them jointly as family home-

stead, is not a freeholder; and the same is true as to a husband living with his wife on land occupied by them jointly as a homestead, the legal title to which is in her. *Campbell v. Moran*, 99 N. W. 498, 499, 71 Neb. 615.

### RESIDENT LICENSE

Laws 1905, p. 168, § 54, makes it unlawful for any person to hunt outside the county in which he lives without first obtaining a license so to do. Section 53 provides how one may obtain a license on application to the clerk of the county of the applicant's residence. Section 61 imposes a penalty on any one hunting without a license. Section 57 (page 168) provides that county clerks and the license collector of the city of St. Louis shall issue "resident licenses" to persons complying with the statute; and section 58 (page 169) provides that tenants of farm land and owners thereof may hunt on their lands without a license. In the statute as originally drafted, section 54 merely made it unlawful for any person to hunt in the state. Section 64 (page 170) requires all proceeds of license fees to be paid into a fund for the protection of game. Held that, inasmuch as there is an express exception in relation to farm lands, and as little revenue would be received if persons could hunt without a license in the counties of their residence, and as hunters and county clerks might not have understood the phrase "resident license" to mean a "state license," as was no doubt intended by the Legislature, and might have doubts whether a hunter hunting outside of his own county was required to have a license, which doubt is removed by section 54 (page 168), such section does not, by implication, permit one to hunt without a license in the county of his residence. *State v. Kooec* (Mo.) 96 S. W. 721, 723.

### RESIDENT OWNER

Under Rev. St. 1909, § 9255, a former resident of a city, who, with his family, has moved into the country, where he votes, is assessed, pays his taxes, and sends his children to school, is not a "resident owner," although he states that he intends to return to the city, since, while residence is largely a question of intention, an accomplished act cannot be overturned by the mere assertion of a contrary intention. *Shaw v. Goben*, 151 S. W. 209, 210, 167 Mo. App. 125.

The words "resident owners," as used in Act April 4, 1900, being an act providing for the improvement of public roads, designate, and include all owners of real estate, residents of the county, owning land lying within one mile of the road to be improved, and all must be counted in determining whether a majority of the resident owners have signed the petition for the improvement. *Alexander v. Baker*, 78 N. E. 366, 368, 74 Ohio St. 258.

*Cobbeys Ann. St. 1907*, § 5561, provides that a majority in interest of the resident owners in any contiguous body of swamp lands in the state situated in one or more counties may form a drainage district to reclaim such lands, and for that purpose may sign articles of association. Held, that the words "in the state," following the words "swamp lands," modify "resident owners," and it is not required that resident owners be persons residing on the land included in the drainage district. In re Drainage Dist. No. 1 of Harlan County, 121 N. W. 462, 463, 84 Neb. 487.

The word "resident" in Pub. Acts 1909, No. 283, c. 9, § 7, authorizing any resident owner of timber land wishing a temporary highway to be laid out to apply to the commissioner of highways of the proper township, means a resident of the state; it not being restricted, expressly or by fair inference, to any subdivision thereof. *Burdick v. Harbor Springs Lumber Co.*, 133 N. W. 822, 824, 167 Mich. 673.

### RESIDING IN THE COUNTY

See *If Residing in the County*.

### RESIDUARY

A devise of "all the residue of my lands in S. county" is a "residuary devise." *Morley v. Brown*, 56 S. E. 704, 144 N. C. 154.

A "residuary clause" in a will is a gift of all that is left after the gifts specified or designated have been paid and satisfied. In re *Vanuxem's Estate*, 61 Atl. 876, 878, 212 Pa. 315, 1 L. R. A. (N. S.) 400 (quoting *Wood's Estate*, 13 Pa. Dist. R. 195).

A provision in a will may be treated as the "residuary clause," though it does not occur at the end of the will, where the intent to make it the "residuary clause" can be determined from the will as a whole. *Prison Association v. Russell's Adm'r*, 49 S. E. 966, 968, 103 Va. 563 (citing *Schouler, Wills* [3d Ed.] § 522).

"The purpose of a 'residuary clause' in a will is to make a complete testamentary disposition of the estate of the testator, so that no part of it may be left to pass under the intestate laws. It is a gift of all that is left after the gifts specified or designated have been paid or satisfied, and it carries with it, and is presumed to have been so intended, not only all personal estate which remains not specifically disposed of at the time the will is executed, but all that for any reason is illy disposed of, or fails as to the legatees originally intended." In re *Wood's Estate*, 57 Atl. 1103, 1104, 209 Pa. 16.

No particular words are necessary to constitute a "residuary devise." All that is necessary is that the testator's intention is discernible; that the person designated shall take the surplus; and it is immaterial that

the clause is not the last of the disposing provisions, though such is the usual position. The residue of testator's estate is that part which is not otherwise disposed of by the will; and hence a general residuary bequest carries with it everything not in terms disposed of, and, with such exceptions as are pointed out in connection with the subject of lapsed and void legacies, everything not effectually or well disposed of, as well as lapsed legacies, unless a contrary intent clearly appears from the will. To constitute a "residuary devise" of personal property, the words "rest," "residue," and "remainder" are not indispensable, and quite informal words have been given effect as a residuary disposition. *Jordan's Adm'r v. Richmond Home for Ladies*, 56 S. E. 730, 735, 106 Va. 710 (citing *Prison Ass'n v. Russell's Adm'r*, 49 S. E. 968, 103 Va. 567).

### RESIDUARY ESTATE

The term "residuary estate" means what is left when all the debts and particular legacies are discharged. In *re Stark's Will*, 134 N. W. 389, 395, 149 Wis. 631.

Where a testatrix, by three consecutive clauses, disposed of the rest, residue, and remainder of her estate, in effect disposing of a residue of a residue, and in another clause provided that the principal of a trust fund should form a part of her residuary estate, the words "residuary estate" meant that created by the last residuary clause, which was the only true residuary clause. In *re Title Guarantee Co.*, 111 N. Y. Supp. 169, 171, 127 App. Div. 118 (citing *United States Trust Co. v. Black*, 40 N. E. 403, 146 N. Y. 1).

### RESIDUARY LEGATEE

"A 'residuary legatee' is one who takes what remains, or a portion of what remains, after satisfying all other gifts, charges, losses, and expenses." In *re Goggin's Estate*, 88 N. Y. Supp. 557, 560, 43 Misc. Rep. 233.

An appointment of a "residuary legatee," standing alone in a will, is a gift of the personal estate only, but the term may be used to include one receiving land under a will, and the courts will look to the whole will to discover the meaning of testator, and the fact that the will disposes specifically of real estate is important in determining what property passes to the residuary legatee, especially when, considered in connection with the language in the will indicating an intention to dispose of testator's whole estate, or that the real and personal estate constitute a common fund. *Dann v. Canfield*, 84 N. E. 117, 118, 197 Mass. 591, 14 Ann. Cas. 794.

Under Code 1904, art. 93, § 33, which declares that in granting administration with the will annexed the residuary legatee or legatees shall be preferred, and directs the orphans' court to proceed in the manner directed by law with respect to executors within the state before administration with the

will annexed shall be granted to any other person, the phrase "in the manner directed by law" relates to the provisions of sections 32 and 33, relative to notice; and, where the executor named in the will declined to act, the "residuary legatee" was the person next entitled, and a person who, in addition to a bequest of the residue of the estate after the death of another was given a remainder in a specific part of the estate, is a "residuary legatee," and hence on petitions by such legatee and by a creditor the court could not grant administration to the creditor. *McCaughy v. Byrne*, 80 Atl. 653, 654, 115 Md. 85.

### RESIDUE

See Balance and Residue; Rest and Residue; Rest, Residue, and Remainder.

All the rest, residue, and remainder, see All.

Under a deed granting "all the residue of my property, real and personal, that has not otherwise been signed to her for like services, which may be remaining in my name and ownership at time of my death," the term "residue" does not mean what shall remain at his death, but means what had not theretofore been conveyed to the grantee; or, in other words, it means what property he had at the time of the execution of the deed. The effect, therefore, is the same as though he had said, "All of my present property, real and personal, which may be remaining," etc. *Ricker v. Brown*, 67 N. E. 353, 183 Mass. 424.

#### In administration and wills

The term "residue," as used in a will, means that of which no effectual disposition is made other than by the residuary clause. *Kent v. Kent*, 55 S. E. 564, 566, 106 Va. 199.

The "residue" of testator's estate as the term was used in his will, consisted of the part that remained of the general estate after deducting the debts and the widow's legal share. In *re Reynolds' Will* (Wis.) 138 N. W. 1019, 1022.

The "residue" of a testate estate is that which is left after payment of the debts, legacies, specific and general, and satisfying other specific gifts. *Frelinghuysen v. New York Life Ins. & Trust Co.*, 77 Atl. 98, 102, 31 R. I. 150, Ann. Cas. 1912B, 237.

Civ. Code, § 1332, provides that a "devise of the residue" of testator's real property passes all the real property which he is entitled to devise at the time of his death, not otherwise effectually bequeathed by his will. Where a testator gave all the rest, residue, and remainder of his property to a daughter, this could not be limited by a subsequent clause declaring that all the estate therein devised was the community property of his wife and himself, so as to work intestacy as to property that was not com-

munity property. In re Granniss' Estate, 75 Pac. 324, 326, 142 Cal. 1.

The "residue" in the law of wills and administration is what remains after paying the legacies of the will and the debts and expenses of administration and the residue must be distributed in kind to the residuary legatees. McDougald v. Low, 127 Pac. 1027, 1028, 164 Cal. 107.

"Residue" means that which remains, and no particular mode of expression is necessary to constitute a residuary clause. Barker v. Town of Petersburg, 82 N. E. 996, 997, 41 Ind. App. 447.

A general residuary devise is as between it and a specific devise, and specific or even pecuniary legacies, the primary fund for the payment of debts; the "residue" meaning what remains after satisfying all former gifts. Gould v. Winthrop, 5 R. I. 319, 324.

While ordinarily the word "residue," when found in a will, is held to signify the property of the testator, the disposition of which has not otherwise been indicated—what remains after the payment of charges and specific legacies—it cannot well be thought to have been so used where no portion of the estate remained otherwise undisposed of by the will. Woolverton v. Johnson, 77 Pac. 559, 562, 69 Kan. 708.

"Where a testator gives several legacies and then, without creating any express trust for their payment, makes a general residuary disposition of the whole estate, blending the realty and personalty together in one fund, the real estate will be charged with the legacies, for in such cases the 'residue' can only mean what remains after satisfying the previous gifts." Tyler v. Tailman, 68 Atl. 948, 950, 29 R. I. 57 (quoting and adopting definition in Hill, Trustees [4th Am. Ed.] \*360).

"The 'residue' is that part of testator's estate not otherwise disposed of; hence a general residuary bequest carries with it everything not in terms disposed of, and, with such exceptions as are pointed out in connection with the subject of lapsed and void legacies, everything not effectually or well disposed of, as well as lapsed legacies, unless a contrary intent clearly appear from the will." Prison Ass'n of Virginia v. Russell's Adm'r, 49 S. E. 966, 968, 103 Va. 563 (quoting and adopting definition in Woerner, Law of Administration [2d Ed.] § 462).

Where a will made a gift to the testator's wife while she lived and remained unmarried, and at her death or remarriage she is given a power to apportion the "residue" to his children, the word "residue" means "remainder." Cook v. Sackett, 96 N. Y. Supp. 1085, 1087, 110 App. Div. 322.

"Residue" is defined by Webster as that which remains after a part is taken, separated, removed, or designated. While the word

"residue," applied to estate or property generally, as in the usual residuary clause of a will, may include all the remaining estate, whether in possession, remainder, or reversion, when applied only to a given parcel of land, its popular meaning is simply the remaining acres of that parcel, and not the remaining estate in the parcel. Thus, where testator, owning a field of 15 acres on the east side of B. road, devised the eastern 5 acres to his wife for life, and then devised to a son the residue of his land lying on the east side of B. road, it was held that the son took only the remaining 10 acres, and that the estate in the 5 acres after the death of the widow was undevise and descended to testator's heirs. Young v. Quimby, 56 Atl. 656, 657, 98 Me. 167.

"Residue" is variously defined as "that which remains after discharging all legal and testamentary claims on the estate." Eyer v. Marsden, 4 Mylne & C. 231, 243. "That which is left after the payment of charges, debts, and particular legacies." Phelps v. Robbins, 40 Conn. 250, 264. "That which remains after all paramount claims upon the testator's estate are satisfied." Tomlinson v. Bury, 14 N. E. 137, 145 Mass. 346, 1 Am. St. Rep. 464. "All of which no effectual disposition is made by will other than [by] the residuary clause." Skrymsher v. Northcote, 1 Swanst. 570; Morton v. Woodbury, 47 N. E. 283, 153 N. Y. 257. "All property subject to be bequeathed by her not otherwise effectually disposed of." Harrington v. Pier, 82 N. W. 345, 105 Wis. 485, 499, 50 L. R. A. 307, 76 Am. St. Rep. 924. While, of course, the word may be used in a different sense, as to describe the remainder of a fund or, indeed, of the whole estate after deducting merely some particular charges or bequests, the presumption is very strong that it is used in the general sense above defined, unless the contrary clearly appears from the context. In re Bradley's Will, 101 N. W. 393, 394, 123 Wis. 186, 3 Ann. Cas. 716.

As used in Rev. St. 1858, c. 99, § 1, subd. 6, providing that the residue of the personal estate after certain allowances to the widow and children should be distributed in the same proportions to the same persons and for the same purposes as prescribed for the descent and disposition of real estate, the word "residue" was broad enough to include all residue remaining undisposed of by a will, and was not narrowed by the amendment contained in Rev. St. 1878, § 3935, providing that the residue of the personal estate of any intestate or of the personal estate of a testator, not disposed of by his will, and not required for the purposes thereinbefore mentioned, shall be distributed as prescribed for the descent and disposition of real estate. The purpose of the amendment was to cover property not disposed of by a will and not required for the purposes mentioned in preceding subdivisions of the statute and to make



the statute more clear and explicit. *Chapman v. Chapman*, 107 N. W. 668, 669, 128 Wis. 413.

## RESIDUUM

A testator bequeathed to his wife the income from funds for her life, also a cash legacy and personal property, and devised to her their homestead for life; and a later item of his will declared that it was his intention that the provisions in favor of his wife should have precedence over all other gifts, devises, or legacies. Another clause declared that it was his wish that his executors should have ample time in which to administer and settle his estate, so that no property should be unduly sacrificed by a speedy sale. The testator also bequeathed to trustees, on the death of his wife, a part of the fund of which she was given the income for life for the establishment of a children's hospital, which fund upon the failure of the city to comply with certain conditions, was to pass into and become a part of the residue, and to be distributed to the then living children of the testator's brothers and sisters. The testator gave specific legacies to his nephews and nieces, who were his heirs, and also gave specific legacies to his brothers and sisters, besides giving them the remainders in part of the funds bequeathed to his wife. The residuary clause recited that all the rest and residue of the testator's estate, "after providing for the devises, bequests and legacies" mentioned, and after so much thereof as may be necessary to defray the expense of taxes on his homestead and keeping the same in repair for the benefit of testator's wife, was devised and bequeathed to the then living children of his brothers and sisters. Held that, if the testator intended there should be a number of residuums, to be distributed from time to time, his intention would be carried out, but the idea would give a new meaning to the term "residuum" or "residuary estate," which means that which is left when all the debts and particular legacies are discharged; but, in view of the testator's solicitude for his wife, and the fact that part of the fund of which she was given a life income was directed to be disposed of as part of the residuum, and in view of the use of the word "after," which ordinarily denotes subordination as to time, the will created only one residuum, which was not to be distributed until after the death of the testator's wife; the words "then living" referring to the death of the wife. *In re Stark's Will*, 134 N. W. 389, 395, 149 Wis. 631.

## RESIGN

To "resign" is to give back, to give up in a formal manner, an office. *State v. Huff*, 87 N. E. 141, 144, 172 Ind. 1, 139 Am. St. Rep. 355.

## RESIGNATION

As disability, see Disability.  
Tender of, see Tender.

"Resignation" is the act of giving up; it is the act of an officer by which he declines his office and renounces the further right to use it. Hence, independent of statute and under Comp. Laws, §§ 1814-1816, authorizing any officer to resign by transmitting the resignation to prescribed officers, and declaring that the office shall become vacant on the resignation of the incumbent, an acceptance is not necessary to effect a resignation. *State v. Murphy*, 97 Pac. 391, 395, 30 Nev. 409, 18 L. R. A. (N. S.) 1210 (citing *Webst. Dict.* and *Bouv. Law Dict.*).

To constitute a "res'gnation," it must be unconditional, and with intent to operate as such. There must be an intention to relinquish a portion of the term of office accompanied by an act of relinquishment. It is to give back, to give up in a formal manner, an office; any act of an officer by which he declines his office, and renounces the further right to its use. *State v. Huff*, 87 N. E. 141, 144, 172 Ind. 1, 139 Am. St. Rep. 355.

## RESILIENCE

The Century Dictionary defines "resilience" as "the act of recolling (that is, starting back, recolling); leaping or springing back; the act of rebounding"—and defines "resilient" as having resilience; inclined to leap or spring back; leaping or springing back; rebounding. *Palmer v. Jordan Mach. Co.*, 186 Fed. 496, 503.

## RESILIENT CONNECTION

A solid bar of iron or steel screw threaded at each end, and having each end, respectively, inserted in screw-threaded apertures in two frames, and operated by hand to draw the two frames together and force them apart, was not a "resilient connection" between the two frames nor a well-known mechanical equivalent for a "resilient connection." A coil spring connection answers to a "resilient connection," but a rigid iron bar or jackscrew, screw threaded as described and turned by a lever, does not form such a connection. *Palmer v. Jordan Mach. Co.*, 186 Fed. 496, 501, 503.

## RESINOUS BODY

To constitute a "resinous body," that body need not necessarily have resin in its composition, or contain resin. It is a resinous body if it has the essential attributes of such body; that is, if it partakes of the properties of resin. It must partake of all the properties of resin, not necessarily those of all resins, but of resins generally, or of some resin. Resins, or a resinous body, should be soluble in water, and melt by the application of heat. They do not volatilize without par-

tial decomposition. Some of them have a crystalline form or structure. Generally, but not always, they are translucent, and generally are of a brown color. Their consistence is variable. When heated, they melt into a thick viscid liquid, and concrete on cooling into a smooth, shining mass. They take fire by contact with an ignited body. Resins dissolve in ether and the volatile oils. When heated, they combine with the unctuous oils. They combine readily with the alkalis and alkaline earths, and form what were once called soaps; but they are not truly saponified. They represent the acid constitution themselves, and, as such, saturate the salifiable bases. They are not conductors of electricity. The solid resins are amber, amine, benzoin, colophony, copal, dammara, dragon's blood, elemi, gualac, lac, resin of julap, ladanum, mastic, sandarach, storax, and takamahoe. Stearine pitch is a resinous body. *Standard Paint Co. v. Bird*, 175 Fed. 346, 351, 352 (quoting and adopting definition in *Ure Dict.*).

## RESIST

See Unreasonably Resisted.

Under the statute which requires railroad companies to maintain fences sufficient to "resist horses, cattle and live stock," an instruction that a company was required to maintain one sufficient to "turn stock" was not improper; the quoted terms being synonymous. *Deal v. St. Louis, I. M. & S. Ry. Co.*, 129 S. W. 50, 52, 144 Mo. App. 684.

Under Rev. St. 1899, § 1105, requiring a railroad company to construct and maintain fences sufficient to prevent stock getting on the track, an instruction in an action under such section for injuries to stock, which defined a lawful fence as one sufficient "to resist horses, cattle, swine, and like stock," was not erroneous for using the phrase "to resist"; such phrase not being as strong as the phrase "to prevent" in the statute. *Hax v. Quincy, O. & K. C. R. Co.*, 100 S. W. 693, 695, 123 Mo. App. 172.

## RESISTANCE

See Effectual Resistance; Self-Induction and Resistance; Unit of Resistance.

"'Resistance' is opposing force to force (Bouvier), not retreating from force." *Brown v. State*, 106 N. W. 536, 539, 127 Wis. 193, 7 Ann. Cas. 258.

Where a contract for the purchase of defendant's stock in plaintiff corporation provided that defendant should not concern himself in the manufacture or sale of resistance or steel armature binding wire, sheet, or strip, such manufactures must be understood as some alloy of copper used in the manufacture of electric apparatus which does not conduct electricity as freely as pure copper, which is the best conductor, and hence is

called "resistance, wire, sheet, or strip." *Driver-Harris Wire Co. v. Driver*, 62 Atl. 461, 463, 70 N. J. Eq. 34.

## RESOLUTION

See Concurrent Resolution; Joint Resolution.

A "resolution" is somewhat less formal than an ordinance, being generally a mere expression of the opinion of the council as to some matter of administration, and it need not be in any set form. *Sawyer v. Lorenzen & Weise*, 127 N. W. 1091.

The term "ordinances or resolutions," as used in Rev. Codes 1905, § 2658, giving the mayor of the city power to sign or veto any ordinance or resolution passed by the council, was intended to include not only ordinances, as such, but also "resolutions" of a legislative character, which therefore are similar to ordinances in this respect. "A 'resolution' prescribing that certain streets and avenues shall be paved in a certain designated manner is of a legislative character and subject to veto by the mayor. *State v. Duis*, 116 N. W. 751, 753, 17 N. D. 319.

Code, § 2448, par. 2, requires one seeking the right to sell intoxicants among other things to file with the county auditor a certified copy of a resolution regularly adopted by the city council consenting to such sales. Section 659 requires the town clerk to make an accurate record of all proceedings, etc., adopted by the council. The purported council resolution filed by an applicant for leave to sell intoxicants contained his petition to the mayor and town council, and thereafter recited serialim, "sixth month 25th day, 1900. Called vote of council, trustee B. voted yea," followed by a similar statement of the affirmative votes of the other four trustees, which were followed by the word, "Carried," and attested by the signature of the town clerk and signed by the mayor. Held, that the resolution contemplated by the statute was the formal action of the town council and a record of such action preserved, and that the purported resolution was insufficient as not showing what question was voted on; a "resolution" being the formal expression of the opinion or will of an official body or a public assembly, adopted by a vote, nor was the record such as could be certified, as required by the statute, the town clerk not attesting that any action of the town council was made a matter of record. *Sawyer v. Collins*, 127 N. W. 1015, 148 Iowa, 712.

### Ordinance distinguished

The term "ordinances or resolutions," as used in Rev. Codes 1905, § 2658, giving the mayor of the city power to sign or veto any ordinance or resolution passed by the council, was intended to include, not only ordinances as such, but also resolutions of a legislative character, which therefore are similar to or-

dinances in this respect. A resolution prescribing that certain streets and avenues shall be paved in a certain designated manner is of a legislative character and subject to veto by the mayor. *State v. Duis*, 116 N. W. 751, 753, 17 N. D. 319.

An "ordinance" is also a "resolution," and the two are equivalent. Hence an ordinance, authorizing a street improvement, passed only 19 days after the resolution of intention had been passed, is premature and void, under *Vrooman Act* (St. 1885, p. 147, c. 153), though not signed by the mayor until two days after its enactment. *Mulberry v. O'Dea*, 88 Pac. 367, 368, 4 Cal. App. 385 (citing *City of Los Angeles v. Waldron*, 3 Pac. 890, 65 Cal. 285; *Hellman v. Shoulters*, 44 Pac. 921, 45 Pac. 1057, 114 Cal. 157).

Under a city charter giving the council power to make ordinances, regulations, and by-laws, a grant of a privilege to install a system of pipes through the streets of the city to convey water to the inhabitants may be by "resolution." *City of Barre v. Perry & Scribner*, 73 Atl. 574, 575, 576, 82 Vt. 301.

There is a plain distinction between the functions of an "ordinance" and a simple "resolution" not adopted as an ordinance. An "ordinance" is a mode of expressing the legislative acts of a municipal corporation, and a resolution is an order of temporary character and of a ministerial nature. *Pensacola v. Southern Bell Telephone Co.*, 37 South. 820, 824, 49 Fla. 161 (citing *City of Jacksonville v. Ledwith*, 7 South. 885, 26 Fla. 163, 9 La. R. A. 69, 23 Am. St. Rep. 558).

## RESOLVE

One of the definitions of "resolve" is to separate a thing into its component parts; to reduce to constituent elements. *Miquez v. Delcambre*, 51 South. 108, 113, 125 La. 176.

"The word 'resolved' is as potent to declare the legislative will as the word 'enacted.'" A joint resolution enacted by the words "Be it resolved," etc., is a sufficient compliance with the mandatory provision of Const. art. 3, § 16, requiring all laws to be enacted by the words "Be it enacted," etc. *Smith v. Jennings*, 45 S. E. 821, 823, 825, 67 S. C. 324 (quoting *Swann v. Buck*, 40 Miss. 268).

## RESORT

See Public Resort.

In a trial for keeping a liquor resort, the words "commonly" and "habitually" used in a requested instruction, applied to the resort, were properly omitted as mere tautology, since "resort" means a place of "frequent assembly." *State v. Fogg*, 77 Atl. 714, 716, 107 Me. 177.

## RESORT FOR GAMBLING

Where a person opens a house under his control and permits persons to gather there and gamble without invitation, it becomes a "resort for gambling." *Davis v. State* (Tex.) 151 S. W. 313, 314.

## RESORT TO

### Single visit

Suffering a single private act of illicit intercourse or lascivious behavior or exposure of person in one's house is not keeping a house of illfame, or a building "resorted to" for prostitution or lewdness, within the meaning of Gen. St. Mass. c. 87, §§ 6, 7. To hold that it did would be to leave wholly out of view the meaning of the phrase "resorted to," as used in those sections of the statute. The prohibition is against keeping or maintaining a house which persons are permitted to frequent for the purpose of unlawful sexual indulgence. The mischief which the statute seeks to prevent is the existence of such places of resort, with the temptations which they hold out and the vices which they engender and encourage. To prove the offense charged, there need not necessarily be direct evidence of numerous acts of prostitution or lewdness permitted by the keeper of the house. But the evidence, whether direct or circumstantial, must be sufficient to satisfy the jury that it was kept as a place of "resort" for such purposes. *Commonwealth v. Lambert* (Mass.) 12 Allen, 177, 179.

## RESOURCES

The "resources" of a county include its land, timber, coal, crops, improvements, railways, factories, and everything that goes to make up its wealth or to render it desirable. All these the fiscal court has power to advertise under Act March 21, 1906 (Acts 1906, p. 342, c. 73), amending Ky. St. 1903, § 1840; but under such statute the fiscal court cannot appropriate county funds to secure a political convention to be held in the county; that object not being within the statutory authority to advertise the resources of the county. *Jefferson County v. Peter*, 105 S. W. 887, 888, 127 Ky. 453.

## RESPECT

See In Respect To.

## RESPECTABLE

See Not a Respectable Woman.

One who is frequently under the influence of liquor, and who during the preceding year permitted gambling in his place of business, is not a man with "respectable character" within *Cobbey's St.* 1907, § 7150, and not entitled to a liquor license. *Woods v. Garvey*, 118 N. W. 1114, 82 Neb. 776.

As applied to witnesses, the words "respectable" and "reputable" have practically

the same meaning. Mr. Webster defines the term "respectable" as worthy of respect; fitted to awaken esteem; deserving regard; hence of good repute; not mean; as a respectable citizen—and the term "reputable" as having or worthy of good repute; held in esteem; honorable; praiseworthy; as a reputable man or character. *State v. Spivey*, 90 S. W. 81, 87, 191 Mo. 87 (citing *Freleigh v. State*, 8 Mo. 606).

The determination as to how a corpse shall be dressed for burial and the quality of the coffin and the box in which it is to be placed, as well as the depth of the grave, are matters for those who have the burial in charge, so that what is a "decent," "proper," or "respectable" burial will vary with the financial or social standing of the deceased and his relatives, the customs of the community, and the rules of religious, social, and political organizations to which he may have belonged. *Seaton v. Commonwealth*, 149 S. W. 871, 872, 149 Ky. 498, 42 L. R. A. (N. S.) 211.

#### RESPECTING TITLE TO LAND

A suit for specific performance is not a suit "respecting titles to land," within Const. art. 6, § 16, par. 2, requiring cases of that nature to be tried in the county where the land lies. *Marshall v. Whatley*, 72 S. E. 244, 245, 136 Ga. 805, 36 L. R. A. (N. S.) 552.

A suit to recover for trespass to land is not one "respecting titles to land," within the Constitution, conferring on the superior court exclusive jurisdiction of such suits, though title to land may be incidentally involved. *Batson v. Higginbotham*, 68 S. E. 455, 456, 7 Ga. App. 835.

An action under Civ. Code 1910, § 3666, by a remainderman against a life tenant, to have the estate of the latter declared forfeited and the remainderman put in possession, because of waste committed by the tenant, is a suit "respecting titles to land," and the venue thereof is the county in which the land involved is located. *Brown v. Martin*, 73 S. E. 495, 498, 137 Ga. 338, 39 L. R. A. (N. S.) 16.

#### RESPECTIVE

Article 6 of the Treaty of Amity and Commerce of 1783 between the United States and Norway and Sweden as revived by the Treaty of Commerce of Navigation of 1827, art. 17, providing that the subjects of the contracting parties in the respective states may freely dispose of their goods and effects by testament, donation, or otherwise, means that the subject may freely dispose of his property within the country of his citizenship; the word "respective" being defined as "pertaining or relating severally to each of those under consideration; several; particular." In *re Stixrud's Estate*, 109 Pac.

348, 349, 58 Wash. 339, 33 L. R. A. (N. S.) 682, Ann. Cas. 1912A, 850.

#### RESPECTIVELY

While the word "respectively" is not given precisely the same meaning by lexicographers as the word "alternately," it is used in Act 1901 (P. L. 629), allowing challenges to be made by the state and defendant, "respectively," in the same sense as the word "alternately," used in Act 1860 (P. L. 440, § 38), providing that the commonwealth shall challenge one person and the defendant one person, and so "alternately" until all the challenges shall be made. *Commonwealth v. Conroy*, 56 Atl. 427, 428, 207 Pa. 212.

"The power to call a term was conferred originally upon the justices of the Supreme Court, not acting collectively or together, but severally; that is, upon each individual acting as circuit judge in his respective district, and in reference to the court over which he had authority to preside, and not in respect to the circuit court of some other district of which he was not primarily ex officio the judge. "Severally" has been construed to be equivalent in meaning to "respectively." *Hanley v. City of Medford*, 108 Pac. 188, 192, 56 Or. 171.

#### RESPONDEAT SUPERIOR

The law of "respondeat superior" is that the master is liable for the negligent acts of his servants if done in obedience to the master's orders or within the scope of the servants' employment or line of their duty. *Galveston, H. & S. A. Ry. Co. v. Henefy (Tex.)* 99 S. W. 884, 885.

"The maxim of 'respondeat superior' is founded on the principle that he who expects to derive advantage from an act which is done by another for him must answer for any injury which another may sustain from it." A railroad company carrying mails is liable for injuries to a mail clerk caused by the negligence of a railroad employé. *Barker v. Chicago & P. & St. L. Ry. Co.*, 90 N. E. 1057, 1059, 243 Ill. 482, 26 L. R. A. (N. S.) 1058, 134 Am. St. Rep. 382.

"The maxim of 'respondeat superior' means that a master is responsible for the acts of its servants if the particular act causing the injury be within the scope of, and be done in the exercise of, the servant's delegated authority. The test of the existence of the relation of master and servant is found in the exercise of authority in appointing the servant, in directing his acts, in receiving the benefits of his acts, and in reserving the power of dismissal." *Fetting v. Winch*, 104 Pac. 722, 723, 54 Or. 600, 38 L. R. A. (N. S.) 379, 21 Ann. Cas. 352 (quoting and adopting definition in 7 Words and Phrases, p. 6177).

A person can be held liable for negligence of another only under the maxim "respondeat superior," which applies only where the relation of master and servant exists, or where defendant is estopped to deny that it exists. *Thomas v. Springer*, 119 N. Y. Supp. 460, 463, 134 App. Div. 640; *Id.*, 119 N. Y. Supp. 463, 134 App. Div. 982.

The test of a master's liability, under the rule of "respondeat superior," is, not whether a given act was done during the existence of the servant's employment, but whether such act was done by the servant while engaged in the service of and while acting for the master in the prosecution of the master's business. A master is not liable for the negligent act of a servant or employé if, at the time of the doing of such act, the servant or employé is not then engaged in the service or duties of his employment, although the act be one which, if done by such servant or employé while on duty and at a time when actually engaged in his master's service, would be clearly within the course and scope of the usual and ordinary duties of such servant or employé. *Lima Ry. Co. v. Little*, 65 N. E. 861, 863, 67 Ohio St. 91 (citing *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373).

The rule of "respondeat superior" is based upon the right which an employer has to select his servants, to discharge them if not competent, and to direct and control them while in his employ. *Laws 1871, p. 1478, c. 680*, provides for the appointment by the Governor of commissioners to erect a hall for the county of Erie and city of Buffalo, and to assign to the county and city the parts to be occupied by each. *Laws 1880, p. 135, c. 31*, empowers the superior court of Buffalo to appoint trustees for the hall, and makes it the duty of the trustees to assign to the county and city the parts to be occupied by each, appoint servants, and care for the building. Held, that the county and city are not liable for the death of a person due to the negligent operation of an elevator in such hall; the rule of respondeat superior not applying, as the elevator operator was not appointed by, nor responsible to, the county and city. *Moest v. City of Buffalo*, 101 N. Y. Supp. 996, 999, 116 App. Div. 657 (citing statement in *Maxmillian v. Mayor, etc., of City of New York*, 62 N. Y. 160-163, 20 Am. Rep. 468).

Where a mere volunteer (that is, one who has no interest in the work) undertakes to assist the servants of another, he does so at his own risk. In such a case the maxim of "respondeat superior" does not apply. But where one has an interest in the work, either as a consignee or the servant of a consignee, or in any other capacity, and at the request or with the consent of another's servants undertakes to assist them, he does not do so at his own risk, and, if injured by their

carelessness, their master is responsible. In such a case the maxim does not apply. *Kelly v. Tyra*, 114 N. W. 750, 752, 103 Minn. 176, 17 L. R. A. (N. S.) 334 (citing *Welch v. Maine Cent. R. Co.*, 30 Atl. 116, 86 Me. 552, 25 L. R. A. 661).

Where a boy about six years of age, a guest at a hotel with his parents, wandered into a room in which a bell boy or porter was engaged in playing a harmonica for his own amusement, and the latter accidentally or willfully shot the boy with a pistol, the bell boy was not acting within the course of the apparent or actual scope of his employment, and the innkeeper was not liable for the injury inflicted, under the rule of "respondeat superior." *Clancy v. Barker*, 131 Fed. 161, 162, 66 C. C. A. 469, 69 L. R. A. 653.

The doctrine of "respondeat superior" applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged with such neglect or wrong at the time and in respect to the very transaction out of which the injury arose. So, assuming that the relation of master and servant existed between a father and daughter, he is not responsible for her injuries, where it does not appear that, on the occasion in question, she was acting as such servant within the scope of her employment. *Doran v. Thomsen*, 71 Atl. 296, 298, 76 N. J. Law, 754, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677.

The rule of "respondeat superior," by which a master is liable for the wrongful acts of his servants within the scope of their authority, "is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed. If he employs incompetent or untrustworthy agents, it is his fault, and, whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim 'respondeat superior' applies, providing only that the agent was acting at the time for the principal and within the scope of the business intrusted to him." *Chicago Herald Co. v. Bryan*, 92 S. W. 902, 905, 195 Mo. 574 (quoting *Higgins v. Watervliet Turnpike & R. Co.*, 46 N. Y. 24, 7 Am. Rep. 293).

Where a county board, without authority in law, deducted from the taxes, levied by a town, a portion thereof alleged to be invalid, and the county treasurer did not collect the same, the maxim "respondeat superior" did not apply, and the county was not liable to the town for the amount so deducted. *Town of Crandon v. Forest County*, 64 N. W. 847, 848, 91 Wis. 239.

## RESPONSIBLE

See Be Responsible For; Individually Responsible; Personally Responsible.

Plaintiff and defendant entered into a contract by which defendant, the lessee of a coal dock, was to act as bailee and agent in receiving, storing, reshipping, and selling coal produced by plaintiff. The contract provided that plaintiff should remain the owner of the coal until it was sold, and fix the selling price, defendant to receive a commission on the sales and to guaranty the accounts; that plaintiff should insure all coal consigned and deliver the same safely alongside defendant's dock, which should thereupon be "responsible" to plaintiff for all coal after such delivery alongside its dock, and insure the same, and pay taxes thereon, and guarantee weights as per bills of lading, being compensated therefor, and for dock rents by the payment by plaintiff of a stated price per ton for loading and reloading. It is held that the provision that defendant should be "responsible" for the coal after its delivery was not intended to enlarge its common-law liability as bailee by making it an insurer against all possible contingencies, but to mark the time when such liability should commence, and that it was not liable for a loss of coal through a collapse of its dock, occurring without any fault or negligence on its part. *Fairmont Coal Co. v. Jones & Adams Co.*, 134 Fed. 711, 714, 67 C. C. A. 265.

### RESPONSIBLE BIDDER

See Lowest Responsible Bidder.

The word "responsible" in the phrase "lowest responsible bidder," as used in Gen. St. 1909, § 1017, providing for competitive bids before awarding contracts for public improvements, implies skill, judgment, and integrity necessary to a faithful performance of the contract, as well as sufficient financial resources and ability. *Williams v. City of Topeka*, 118 Pac. 864, 866, 85 Kan. 857, 38 L. R. A. (N. S.) 672, Ann. Cas. 1913A, 497.

The word "responsible," applied to an undertaking to pay money, means "financial ability," but, where a statute relating to contracts for public improvements requires a "responsible bidder," it means one of ability to respond to the requirements of the contract; and a statute requiring a contract for a public improvement to be let to the lowest responsible bidder does not require the letting of the contract to the lowest bidder on ascertaining his financial responsibility only, but the term "responsible" includes the ability to respond by the discharge of contractor's obligations in accordance with the demands of the contract. Acts 1909, c. 442, requiring the commissioners of a drainage district to let the work of construction to the "lowest responsible bidder," confers a discretion, exercise of which is not to be interfered with unless influenced by fraud as to determining whether a bidder is responsible; such term including ability to respond

to the requirements of the contract. *Sanderlin v. Luken*, 68 S. E. 225, 227, 152 N. C. 738 (quoting and adopting definition in *People ex rel. Assyrian Asphalt Co. v. Kent*, 43 N. E. 760, 160 Ill. 655).

In awarding a contract for the construction of a drainage ditch, the county auditor, in determining who is the lowest responsible bidder, is not limited to an inquiry as to financial responsibility, but may, in the exercise of the discretion vested in him, inquire also as to the fitness and ability of the bidders to do and perform the particular work. *Kelling v. Edwards*, 134 N. W. 221, 223, 116 Minn. 484, 38 L. R. A. (N. S.) 668.

The statute requiring that contracts for public improvements shall be let to the lowest responsible bidder does not require the letting of contracts to the lowest bidder, on ascertaining his financial responsibility only, but the term "responsible" includes the ability to respond by the discharge of the contractor's obligations in accordance with what may be expected or demanded under the contract, and where the board of local improvements has exercised its discretion in the award of a contract for a public improvement, the presumption arises that its action was legal, and the party asserting the contrary has the burden of overcoming the presumption by proof that the board acted without jurisdiction or fraudulently. *Hallet v. City of Elgin*, 98 N. E. 530, 532, 254 Ill. 343.

### RESPONSIBILITY

See Criminal Responsibility.

The primary meaning of "responsibility" is the state of being answerable for an obligation. A secondary meaning is the ability to pay. *Niagara Fire Extinguisher Co. v. Hibbard*, 179 Fed. 844, 848, 103 C. C. A. 330.

"Liability" in its broadest and most comprehensive use includes any obligation one is bound in law or justice to perform, and is synonymous with "responsibility"; in a more restricted and perhaps in its popular sense, it means that which one is under obligation to pay to another. *State ex rel. City of Milwaukee v. Milwaukee Electric Ry. & Light Co.*, 129 N. W. 623, 630, 144 Wis. 386, 1-0 Am. St. Rep. 1025.

Laws 1907, p. 414, c. 194, regulating the sale of nursery stock, provides for the issuance of a certificate and permit by the state board of agriculture, and declares that, as a condition precedent thereto, the board shall require such references and evidences of integrity as may be necessary to establish the responsibility and good faith of the applicant, but provides for no appeal from the decision of the board. Held, that the word "responsibility," as so used, meant ability to answer in payment or to respond in damages for injuries caused by the sale of improper nursery stock, and that such provision, not being within the police power of the

state to protect the people from fraud, imposition, and deception, was a violation of Const. art. 6, § 2, as depriving nurserymen of their property without due process of law, in conferring on the board an absolute power to determine who shall and who shall not sell nursery stock within the state. *Ex parte Hawley*, 115 N. W. 93, 95, 22 S. D. 23, 15 L. R. A. (N. S.) 138 (citing *Webst. International Dict.*).

## REST

The word "rest," within a will devising the "rest" of testator's estate after specified bequests, means "that which remains after what has previously been given is withdrawn." *Paterson General Hospital Ass'n v. Blauvelt*, 66 Atl. 1055, 1057, 72 N. J. Eq. 725.

### REST AND RESIDUE

A general residuary clause in a will precludes intestacy as to any part of testator's estate, unless the clear intent of the will prevents such a construction; and the words "rest and residue" in such a clause are comprehensive enough to include any interest of testator not previously disposed of. *Holmes v. Mackenzie*, 84 Atl. 340, 342, 118 Md. 210.

A will devised specific realty to testator's wife, bequeathed all his personalty to her absolutely, and devised the "rest and residue" of his estate to a trustee with directions to give her during her lifetime the income therefrom and the proceeds of any sale made pursuant to her written directions, and at her death to distribute what remained to others. Held, that the words "rest and residue," in absence of language showing a contrary intention, meant the estate remaining after payment of charges, debts, and particular legacies, including statutory allowance fixed by the county court for the temporary maintenance of the widow and received by her for that purpose. *Smullin v. Wharton*, 125 N. W. 1112, 1115, 86 Neb. 553.

### REST, RESIDUE, AND REMAINDER

Under a will giving to various persons shares of stock in a corporation, 36 shares in all, while testator owned at the date of the will only 31 shares, and at his death 25 shares, the residuary gift being "all the rest, residue, and remainder of my estate," the legacies of stock are general legacies, so that the executor will make up the deficit by purchase. *Slade v. Talbot*, 65 N. E. 374, 182 Mass. 256, 94 Am. St. Rep. 653 (citing and adopting *Johnson v. Goss*, 128 Mass. 433; *Harvard Unitarian Soc. v. Tufts*, 23 N. E. 1006, 151 Mass. 76, 7 L. R. A. 390).

## RESTAURANT

A "restaurant" is defined by Webster to be an eating house, and such it has always been construed under the law, and not where

intoxicants are dispensed under the guise of running a restaurant. A restaurant keeper, in contemplation of law, is not a saloon keeper. *Savage v. State*, 88 S. W. 351, 353, 50 Tex. Cr. R. 199 (citing 7 Words and Phrases, p. 6181).

"It is clear that as a general rule a restaurant or boarding house, where the meals are wholly cooked and served by the proprietor and members of his family, must be a very small affair, hardly rising to the dignity of a 'restaurant' or 'boarding house.'" *Ex parte Lemon*, 77 Pac. 455, 456, 143 Cal. 558, 65 L. R. A. 946.

### As dramshop or tippling house

Whether or not a "restaurant" is a "dramshop" or "tippling house" depends upon the character of the business that is carried on therein. *Denver City Ordinance 1892*, No. 102, § 1, providing that no person or corporation within the city shall directly or indirectly sell or give away any intoxicating or malt liquors, to be drunk on the premises where sold or given away, without a license first obtained from the city, was applicable to a person who was a bona fide restaurant keeper, and who sold liquor only to customers to be drunk only in connection with a meal. *Scanlon v. City of Denver*, 88 Pac. 156, 157, 38 Colo. 401.

### Drug store

The sale of soda water and ice cream in a drug store does not bring the proprietor thereof within the statute providing that keepers of "eating houses, restaurants, and saloons" cannot be lawfully granted permits for the sale of liquor. *In re Henery*, 100 N. W. 43, 44, 124 Iowa, 358.

### European hotel

A city ordinance imposed an annual license tax on hotels and also on restaurants, and defined "restaurants" as "every place where food or refreshments are prepared for casual visitors and sold for consumption therein." Held, that a hotel conducted on the "European" plan, with an eating place in connection, could not be charged with a restaurant license, since the furnishing of food to casual visitors is only an incident to the business of a hotel, whether it be run on the "American" or "European" plan. *New Galt House Co. v. City of Louisville*, 111 S. W. 351, 352, 120 Ky. 341, 17 L. R. A. (N. S.) 566.

### As mercantile pursuit

See *Mercantile*.

### As place

See *Place*.

### As place of business

See *Place of Business*.

## RESTAURANT KEEPER

A "restaurant keeper," in contemplation of law, is not a saloon keeper. *Savage v.*

State, 88 S. W. 351, 353, 50 Tex. Cr. R. 199 (citing 7 Words and Phrases, p. 6181).

## RESTAURATEUR

As trader, see Trader—Tradesman.

## RESTITUTION

A "writ of restitution" is one which issues to restore a party to the possession of property of which he had been wrongfully deprived by some previous order of the same court or some previous writ issuing from the same court. The chancery court has no power to issue a writ of restitution to supersede a writ or order of the circuit court. *Herrin v. Franklin*, 1 Tenn. Ch. App. 95, 106.

## RESTRAIN

See License, Regulate, and Restrain; Regulate and Restrain.

A person is "restrained of his liberty" as bearing on his right to a writ of habeas corpus whenever he is deprived of the privilege of going when and where he pleases. In *re McMonies*, 106 N. W. 456, 75 Neb. 702, (quoting with approval from *Commonwealth v. Ridgway* [Pa.] 2 Ashm. 247).

### As giving power to prohibit

The word "restrain," in *Wilson's Rev. & Ann. St. 1903*, § 388, providing that the city council shall have power to "restrain," prohibit, and suppress tippling shops, etc., is not synonymous with "prohibit" or "suppress," and does not contemplate an absolute destruction of the business, but rather placing it within bounds. *Territory v. Robertson*, 92 Pac. 144, 145, 19 Okl. 149.

The word "restrain" in *Cities and Towns Law 1905*, § 53, subsec. 40, empowering common councils of cities "to license, tax, regulate and restrain" places where intoxicating liquors are kept for sale to be used on the premises, does not give power to prohibit, but means to abridge, confine, keep in, hold in, and the like; the state itself not having undertaken to prohibit or suppress the traffic. *Ensley v. State*, 172 Ind. 198, 88 N. E. 62, 65.

*St. Johns City Charter*, § 69, subd. 45, authorizing the council to regulate and restrain dealers in liquor, places where it is kept for sale, and the sale and disposal thereof, and providing that no provisions of the law concerning the sale or disposition of liquors in Multnomah county shall apply to the sale or disposition thereof in said city, repeals the local option law as to such city; the word "restrain" being more comprehensive than, and including the power to, "prohibit," and the power to license being included in the word "regulate." *State v. Cochran*, 104 Pac. 419, 421, 55 Or. 157.

### As regulate

See Regulate.

### As restrict

See Restrict.

## RESTRAINED AND DEPRIVED OF LIBERTY

The essential thing to constitute an imprisonment is constraint of the person, which may be by threats as well as by actual force; and if the words or conduct are such as to induce a reasonable apprehension of force, and the means of coercion are at hand, a person may be as effectually "restrained and deprived of liberty" as by prison bars. *Hebrew v. Pullis*, 64 Atl. 121, 122, 73 N. J. Law, 621, 7 L. R. A. (N. S.) 580, 118 Am. St. Rep. 716.

## RESTRAINING ORDER

A temporary injunction is in effect a "restraining order." *Castleman v. State*, 47 South. 647, 649, 94 Miss. 609.

A "restraining order" is an order granted to maintain the subject in controversy in statu quo until the hearing of an application for a temporary injunction, and hence is distinct from a "temporary injunction." *Ex parte Grimes*, 94 Pac. 668, 670, 1 Okl. Cr. 102.

A "restraining order" is in aid only, and not a part, of the main action, and its office is only to hold matters in statu quo for the time being, and until parties can be heard as to the propriety of issuing a temporary injunction. An order enjoining a defendant from entering upon and interfering with the possession of plaintiff of a certain tract was a temporary order of injunction, and not a mere restraining order, and one which could be continued in force, after dissolution by a supersedeas. *State ex rel. Keefe v. Graves*, 117 N. W. 717, 718, 82 Neb. 282.

Though the terms "temporary injunction" and "restraining order" are often used synonymously, a "restraining order" is effective only until an application for an injunction shall be heard; a "temporary injunction" is a restraining order effective until the trial of the action in which it is issued. The effect, and not the name by which an order may be called, determines to which of two classes it properly belongs. *State v. Johnston*, 97 Pac. 790, 791, 78 Kan. 615.

A preliminary injunction runs until the defendant "shall have duly answered the bill of complaint and our said court shall make other order to the contrary," but an ad interim "restraining order" always commands the defendant to show cause why an injunction should not issue, and he is thereby brought in court for the purpose of that motion only. *Allman v. United Brotherhood of Carpenters and Joiners of America*, 81 Atl. 116, 117, 118, 79 N. J. Eq. 150.

"A 'restraining order' is an order granted to maintain the subject of controversy in statu quo until the hearing of an application for a temporary injunction. It may be is-



sued before notice to defendant in order to prevent irreparable injury pending the hearing. Its purpose is merely to suspend proceedings until there may be an opportunity to inquire whether any injunction should be granted, and it is not intended as an injunction pendente lite; hence its duration should be limited to such a reasonable time as may be necessary to notify the adverse party, especially where defendant is likely to be damaged by delay." *Ex parte Sharp*, 124 Pac. 532, 534, 87 Kan. 504, Ann. Cas. 1913E, 460 (citing 22 Cyc. p. 745).

An *ex parte* order, before answer, restraining defendant from doing a particular act, was an "injunction," as defined by Code Civ. Proc. § 525, and not a temporary "restraining order," and was therefore subject to dissolution for plaintiff's failure to give the undertaking required by Code Civ. Proc. § 529. *Neumann v. Moretti*, 79 Pac. 512, 513, 146 Cal. 31.

### RESTRAINT

See General Restraint; Lawful Restraint; Partial Restraint.

The words "restraint" and "regulate" are not synonymous with the word "prohibit." A power or right to "regulate" a thing, such as the right of aliens to hold property, does not give an authority to "prohibit" that thing. *Madden v. State*, 75 Pac. 1023, 1024, 68 Kan. 658.

The French word "brassière," which means simply "brace," as applied to an article of women's wear, but includes the idea of "restraint" and "to be under constraint," is not subject to exclusive appropriation as a trade-mark for a combined corset cover and bust supporter, even by a manufacturer first so using it in the United States. *De Bevoise Co. v. H. & W. Co.*, 60 Atl. 407, 408, 69 N. J. Eq. 114.

While an ordinance regulating the hours in which intoxicating liquors shall be sold in Boise City and for Sunday closing, and providing a penalty for the sale thereof during prohibited hours, does prohibit the conduct of the business therein referred to during certain hours, it is a "regulation" of that business, and not a prohibition of it. "To prohibit, limit, confine, or abridge a thing, the restraint may be permanent or temporary. It may be intended to prohibit, limit, or abridge for all time or for a day only" (quoting and adopting *In re Charge to Grand Jury*, 62 Fed. 828). 'Restraint' does not contemplate an absolute destruction of business, but rather places it within certain bounds." *State v. Calloway*, 84 Pac. 27-33, 11 Idaho, 719, 4 L. R. A. (N. S.) 109, 114 Am. St. Rep. 285.

### RESTRAINT OF COMMERCE

Combination in restraint of commerce, see Combination in Restraint of Trade. See, also, Monopoly; Restraint of Trade.

Under the federal Anti-Trust Act, "restraint of trade" or "commerce" does not mean in unreasonable or partial restraint, but any direct restraint thereof. *United States v. Northern Securities Co.*, 120 Fed. 721, 724.

A combination which places railroads engaged in interstate commerce in such a relation as to create a single dominating control in one corporation whereby natural and existing competition in interstate commerce is unduly restricted or suppressed constitutes a "restraint of interstate commerce" forbidden by the Sherman Anti-Trust Act of July 2, 1890, 26 Stat. at L. 209, c. 647, whether accomplished through a holding company or through a direct transfer of a dominating stock interest from one company to the other. *United States v. Union Pac. R. Co.*, 33 S. Ct. 53, 55, 226 U. S. 61, 57 L. Ed. 124.

### RESTRAINT OF TRADE

See Combination in Restraint of Trade; Illegal Combination in Restraint of Trade.

See, also, Monopoly; Restraint of Commerce; Trust (Combination); Unlawful Combination.

"Contracts in restraint of trade" are loosely spoken of as 'illegal contracts.' It would be more accurate to style them 'unenforceable contracts.' But a contract prohibiting the seller of a business to re-engage in that business, though possibly against public policy, is not contrary to public morals, and, where separable from contract for the sale of the business, the entire transaction does not fail. *Nicholson v. Ellis*, 73 Atl. 17, 18, 110 Md. 322, 24 L. R. A. (N. S.) 942, 132 Am. St. Rep. 445.

"Contracts in restraint of trade" may be either reasonable or unreasonable, and an agreement between retail lumber dealers, whereby one dealer agrees to protect the other by asking a higher price than the other for the same bill of lumber submitted to both for prices, is in violation of Laws 1905, p. 636, c. 162, making such contracts wrongful. *State v. Adams Lumber Co.*, 116 N. W. 302, 310, 81 Neb. 392.

In determining whether an agreement is illegal at common law because in restraint of trade, the question is whether the agreement is injurious to the public interests, and where the natural tendency of the contract is injurious, it is invalid as in "restraint of trade." *Knight & Jilison Co. v. Miller*, 87 N. E. 823, 828, 172 Ind. 27, 18 Ann. Cas. 1146.

The term "restraint of trade," as used in Rev. St. Mo. 1890, §§ 8965, 8966, 8971, 8978, is presumed to have been made by the lawmakers in accordance with the meaning which has always been given to such term in judicial decisions and in the common un-

derstanding. State ex inf. Hadley v. Standard Oil Co., 116 S. W. 902, 1080, 218 Mo. 1 (adopting definition in Dueber Watch-Case Mfg. Co. v. E. Howard Watch & Clock Co., 14 C. C. A. 14, 20, 66 Fed. 637, 643, 645, 652).

Regulation of trade is not restraint of trade, and an indictment charging a combination to regulate interstate trade must go further and aver facts showing that the regulation is in restraint or monopoly of such trade to charge an offense under the Sherman Anti-Trust Act. United States v. John Reardon & Sons Co., 191 Fed. 454, 458.

Under the federal Anti-Trust Act. "restraint of trade" or "commerce" does not mean in unreasonable or partial restraint, but any direct restraint thereof. United States v. Northern Securities Co., 120 Fed. 721, 724.

Under the Sherman Anti-Trust Act, declaring every contract, combination in form of a trust, or conspiracy in the restraint of trade illegal, while the restraint may be slight, it must be a direct restraint upon commerce, and an agreement with a dealer to refrain from purchasing salt within the state or out, and to discourage any shipment or importations by any other parties, is in restraint of trade. Getz Bros. & Co. v. Federal Salt Co., 81 Pac. 416, 417, 147 Cal. 115, 109 Am. St. Rep. 114.

The words "restraint of trade" in Anti-Trust Act July 2, 1890, c. 647, condemning combinations in restraint of interstate or foreign trade or commerce, or the monopolization or attempts to monopolize any part thereof, should be given a meaning which will not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of commerce, the free movement of which it was the purpose of the statute to protect. United States v. American Tobacco Co., 31 Sup. Ct. 632, 634, 221 U. S. 106, 55 L. Ed. 663.

Where the direct and immediate effects of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract or combination may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity at the enhanced price are constantly being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in "restraint of trade." Kilgels' Pharmacy v. Sharp & Dohme, 64 Atl. 1029, 1030, 104 Md. 218, 7 L. R. A. (N. S.) 976, 118 Am. St. Rep. 399, 9 Ann. Cas. 184 (citing Addyston Pipe & Steel Co. v. United States, 20 Sup. Ct. 96, 175 U. S. 211, 44 L. Ed. 136).

To constitute a violation of Anti-Trust Act July 2, 1890, c. 647, §§ 1, 2, 26 Stat. 209, there must be a contract, combination, or con-

spiracy which in purpose or effect tends to restrain trade or commerce among the states or to monopolize some portion thereof. There must be a meeting of the minds of two or more to accomplish some common purpose directly violative of the act, or a purpose which will, whether intentionally or not, in effect constitute a restraint of trade and commerce among the several states. United States v. Reading Co., 183 Fed. 427, 438.

A promise by a partner to his copartner, purchasing the business of the firm, not to engage in such business in that town so long as the copartner remains in the business in the town is not void as in "restraint of trade," either at common law or under the anti-trust laws of the state, including the anti-trust act of 1903 (Laws 1903, p. 119, c. 94). Crump v. Ligon, 84 S. W. 250, 37 Tex. Civ. App. 172.

Provisions in a contract for the sale of a secret process, restraining its use or its communication to others, are not invalid as in "restraint of trade," because necessary to protect the property right in the subject-matter of the contract, but such considerations do not apply to contracts for the sale of the article produced by such process which are subject to the same rules as contracts for the sale of any other article of manufacture. A system of contracts made by the manufacturer of a proprietary medicine between him and wholesale dealers, to whom alone he sold his medicine, by which they were bound to sell only at a certain price and to retail dealers designated by him, and between him and the retail dealers by which, in consideration of being so designated, they agreed to sell to consumers only at a certain price, is not unlawful as in "restraint of trade," but is a reasonable provision for the protection of the manufacturer's trade, and he is entitled to an injunction to restrain a defendant from inducing other parties to such contracts to violate the same. Hartman v. John D. Park & Sons Co., 145 Fed. 358, 378, 379.

Covenants in "restraint of trade" will be enforced, though the restraint is general throughout an entire state or country, provided it is founded upon a sufficient consideration and is not unreasonable, in view of the nature and extent of the business of the covenantee. A contract whereby, on sale of their business, the sellers agreed not to engage in the manufacture of jackets and aprons, for men engaged in certain trades, for sale in any of the states and territories in which they had been previously sold, was not void as in restraint of trade. Angelica Jacket Co. v. Angelica, 98 S. W. 805, 811, 121 Mo. App. 226.

Where one engaged in any business or occupation sells out his stock in trade and good will, he may make a valid contract with the purchaser binding himself not to engage in the same business in the same place for a

time named, and such a contract is not invalid as a "contract in restraint of trade"; but where, by the principal operation of any contract, it encroaches on the rights of the public and transgresses the liberty of free competition, consideration then for the public welfare becomes paramount, and must predominate over any individual right to contract. It is immaterial, in determining the legality of such a contract, whether or not it was entered into with any evil intent; but the material consideration is its injurious tendency and the power thereby given to control prices. To vitiate a contract, it is not essential that its result should be a complete monopoly; but it is sufficient if it really tends to that end. *Anderson v. Shawnee Compress Co.*, 87 Pac. 315, 317, 17 Okl. 231, 15 L. R. A. (N. S.) 846.

A contract recited that plaintiff, who was the patentee of an invention relating to brake beams, for the consideration of \$10,000 to be paid him, had assigned to defendant, which was a corporation engaged in the manufacture of brake beams, a certain patent and a pending application for a second, and provided that plaintiff during the life of the patent should not become connected with any company manufacturing or selling brake beams in the United States either as officer, employé, or shareholder, but reserved to him the right to terminate such part of the contract at any time by refunding the consideration paid him by defendant. Such agreement to remain out of the brake beam business did not render the contract unlawful as one in "restraint of trade" and competition or creating a monopoly, and that plaintiff could maintain an action thereon to recover the stipulated consideration. *American Brake Beam Co. v. Pungs*, 141 Fed. 923, 928, 73 C. C. A. 157.

#### RESTRAINTS OF PRINCES OR PRINCES

The refusal of a deputy collector of the port to grant a clearance while freight was on board a vessel, because it was contraband of war, did not constitute a "restraint of princes, rulers, or people," within the meaning of a bill of lading absolving the carrier from liability for damage so caused. *Northern P. Ry. Co. v. American Trading Co.*, 25 Sup. Ct. 84, 93, 195 U. S. 439, 49 L. Ed. 269.

A provision of a charter party mutually exempting "restraints of princes, rulers, and people" covers a detention of a vessel in quarantine, and exempts the charterer from the payment of hire during the time of such detention. *Tweedle Trading Co. v. George D. Emery Co.*, 146 Fed. 618-620.

The provision in a contract for ocean transportation that the carrier will not be liable for delay from "restraints of princes, rulers, and peoples" does not exempt the carrier from liability for negligence in failing to furnish sufficient and suitable food and lodging, which it undertook to furnish, dur-

ing a quarantine required by the government. *Larsen v. Allan Line S. S. Co.*, 80 Pac. 181, 184, 37 Wash. 555.

The detention of a vessel under a time charter at an intermediate port under a quarantine regulation of the state because she came from a port which was presumptively infected was not caused by a "deficiency of men," within a clause of the charter party relieving the charterer from the payment of hire in case of delay from such deficiency, but was through "restraint of princes or people" within a provision mutually excepting such cause, and the charterer is entitled to no deduction therefor. *Clyde Commercial S. S. Co. v. West India S. S. Co.*, 169 Fed. 275, 278, 94 C. C. A. 551.

#### RESTRICT

To "restrict" is to restrain within bounds; to limit; to confine. *Mumford v. Chicago, R. I. & P. Ry. Co.*, 104 N. W. 1135, 1138, 128 Iowa, 685 (citing *Webst. Dict. Unab. tit. "Restrict"*); *Atlantic Coast Line R. Co. v. Beazley*, 45 South. 761, 777, 54 Fla. 311 (quoting *Mumford v. Chicago, R. I. & P. R. Co.*, 104 N. W. 1135, 128 Iowa, 685, which quotes *Webst. Dict. Unab.*).

#### RESTRICTED PUBLICATION

A "restricted publication" is one which communicates market quotations to a select few on condition expressly or impliedly precluding their rightful ulterior communication, except in restricted private intercourse. *Chamber of Commerce of Minneapolis v. Wells*, 111 N. W. 157, 159, 100 Minn. 205 (quoting and adopting definition in *Keene v. Wheatley*, 14 Fed. Cas. 180).

#### RESTRICTION

See Lawful Restrictions.

Subject to restriction, see Subject To.

"Restrictions as to buildings," in the absence of any further description, means according to custom, restrictions of a general character against cheap buildings, offensive trades and irregular location of building lines with reference to the street line, and the term does not include restrictions which do not restrain except at the election of a remote grantor, and a purchaser of land at auction, with notice that the same is subject to building restrictions, may assume, in the absence of information to the contrary, that all purchasers are restrained in the same way and to the same extent, and that no one may vary the restrictions or release them without the consent of all, and, where such is not the case, he may avoid the sale. *Solins v. Beavis*, 93 N. E. 935, 937, 200 N. Y. 268, 34 L. R. A. (N. S.) 927.

As used in Const. art. 14, § 13, providing that the General Assembly shall provide by general laws for the classification of cities, etc., and declaring that the number of classes shall not exceed four, and the powers of each

class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions, the terms "powers" and "restrictions" manifestly refer to such powers and restrictions as relate to subjects pertaining to local self-government, such as may be designated as purely corporate, municipal subjects, as distinguished from such subjects as involve the relations of the citizens or the cities and towns to the state. Hence such constitutional provision prevents the grant by the Legislature of special charters to cities, and requires the Legislature to provide for a classification of all cities and for a code of laws for the government of all cities of the same class; the powers and restrictions being such powers and restrictions as relate to subjects pertaining to local self-government, as distinguished from such subjects as involve the relations of the citizens or the cities to the state. *People ex rel. Johnson v. Earl*, 94 Pac. 295, 301, 42 Colo. 238.

#### As condition

Where a deed clearly shows the intention of the parties that on breach of a restriction the estate should be defeated and return to the grantor, the "restriction" is a condition whether apt words to create a condition are used or not. *Ball v. Milliken*, 76 Atl. 789, 791, 31 R. I. 36, 37 L. R. A. (N. S.) 623, Ann. Cas. 1912B, 30.

The word "restrictions," when used in connection with the grant of an interest in real property, is the equivalent of "conditions," and either term may be used to denote a limitation upon the full and unqualified enjoyment of the right or estate granted. The word "restrictions," in Pub. St. c. 113, § 7, providing for the location of street railways, subject to such restrictions as required by public interest, is the equivalent of "conditions," and therefore limitations may be imposed on the enjoyment of the right to use the streets granted for such purposes. *Blodgett v. Worcester Consol. St. Ry. Co.*, 78 N. E. 222, 224, 192 Mass. 106 (citing *Skinner v. Shepard*, 130 Mass. 180; *Ayling v. Kramer*, 133 Mass. 12; *Clapp v. Wilder*, 57 N. E. 692, 176 Mass. 332, 50 L. R. A. 120).

#### As private property

See Private Property.

#### RESTRICTIVE COVENANT

A covenant in a deed that the grantee will not carry or permit to be carried on the premises conveyed any noxious, offensive, or dangerous trade or business runs with the land and is "restrictive" and constitutes an incumbrance thereon. *Dieterlen v. Miller*, 99 N. Y. Supp. 690, 701, 114 App. Div. 40 (citing *Campbell v. Seaman*, 63 N. Y. 577, 20 Am. Rep. 567; *Clement v. Burtis*, 24 N. E. 1013, 121 N. Y. 708; *Ray v. Adams*, 50 N. Y. Supp. 663, 44 App. Div. 173; *Wetmore v. Bruce*, 23 N. E. 303, 118 N. Y. 319; *Forster v. Scott*,

136 N. Y. 582, 32 N. E. 976, 18 L. R. A. 548; *Kountze v. Helmuth*, 22 N. Y. Supp. 204, 67 Hun, 348; *Id.*, 35 N. E. 656, 140 N. Y. 432; *Rowland v. Miller*, 34 N. E. 765, 139 N. Y. 93, 22 L. R. A. 182).

#### RESTRICTIVE TITLE

A "restrictive title" to a statute is one by which a particular part or branch of a subject is carved out and selected as the subject of the legislation. Where a restrictive title is adopted, the body of the act must be confined to the particular portion of it expressed in the limited title, notwithstanding a general title could have been adopted, which would have covered the entire subject and authorized legislation upon the whole of it. *Memphis St. R. Co. v. Byrne*, 104 S. W. 460, 462, 119 Tenn. 278.

#### RESULT

See Proximate Result.

The word "result," as used in the rule that an independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means by which it is to be accomplished, means a production or product, and not a service. One may contract to produce a house, or ship, or a locomotive, and such house, ship, or locomotive produced is the "result." Such "results" produced are often, and probably generally, by independent contractors, but plowing a field, mowing a lawn, driving a carriage, or a horse car for one trip, or for many trips a day, is not a result in the sense that the word is used in the rule. Such acts do not result in a product; they are simply a service. *Texas & N. O. R. Co. v. Parsons*, 109 S. W. 240, 247 (citing *Jensen v. Barbour*, 39 Pac. 906, 15 Mont. 582).

"Generally speaking, an independent contractor is one who, in rendering service, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means by which it is to be accomplished. The word 'results,' however, is used in this connection in the sense of a production or product of some sort, and not of a service." *Smith v. Humphreyville*, 104 S. W. 495, 496, 47 Tex. Civ. App. 140 (citing *Casement v. Brown*, 13 Sup. Ct. 672, 148 U. S. 615, 37 L. Ed. 582, and other cases cited in note).

The words "result of said examination," as used in a charter provision, relating to the removal of city officers, requiring the city clerk to examine the petition for such removal, and attach to the petition his certificate showing the "result of said examination," are sufficiently complied with by a certificate that the clerk had compared the names on the petition with the great register, and

found the petition sufficient. *Good v. Common Council of City of San Diego*, 90 Pac. 44, 47, 5 Cal. App. 265.

### RESULTING FROM FIRE

The damage to plate glass from an explosion caused by heat from a fire, both at a distance from the building containing the glass, is not within the provision of a plate glass insurance policy, excepting insurer from liability for damage resulting directly or indirectly from fire, whether on the premises or not; such provision being intended to except only a loss which would be covered by a fire policy, and such a loss not being covered by a fire policy. *Metropolitan Casualty Ins. Co. of New York v. Bergheim*, 122 Pac. 812, 814, 21 Colo. App. 527.

### RESULTING TRUST

See, also, Involuntary Trust.

Trusts are classified into two general divisions: "Direct or express trusts" (that is, those springing from agreement of the parties), and into 'constructive or implied trusts' (that is, those created by the rules and principles of equity). Under this latter class fall all of those trusts known distinctively as implied or constructive, as well as those called resultant; in short, all those that do not spring from the agreement of the parties.

\* \* \* A constructive trust is one not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but only by the construction and operation of equity in order to satisfy the demands of justice." *Newman v. Newman*, 55 S. E. 377, 379, 60 W. Va. 371, 7 L. R. A. (N. S.) 370.

A "resulting trust" is one which arises by implication of law. *Crawley v. Crafton*, 91 S. W. 1027, 1029, 193 Mo. 421.

"A 'resulting trust' arises by implication, in the absence of evidence of a contrary intent, and cannot arise when an express agreement in writing shows a contrary intent." *De Hihns v. Free*, 49 S. E. 841, 845, 70 S. C. 344 (citing *Perry, Trusts*, § 124; *Manning v. Screven*, 34 S. E. 22, 56 S. C. 83).

A "resulting trust" arises by implication by law when the purchase money is paid by one person out of his money and the land is conveyed to another. *Herlihy v. Coney*, 59 Atl. 952, 99 Me. 469 (citing *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617; *Stevens v. Stevens*, 70 Me. 92).

By Civ. Code, § 853, a "resulting trust" arises "when a transfer of real property is made to one person and the consideration thereof is paid by or for another." *Los Angeles & Bakersfield Oil & Development Co. of Arizona v. Occidental Oil Co.*, 78 Pac. 25, 27, 144 Cal. 528.

A "resulting trust" is one which arises where one person buys an estate and pays

the purchase money, but takes the deed in the name of another person, in which case a trust results by construction in favor of the person who pays the money. *Euler v. Schroeder*, 76 Atl. 164, 165, 112 Md. 155.

Where one pays the price of land, title to which is taken by another under a parol agreement that the latter shall hold the title in trust for him, a trust results in favor of the former by operation of law from such payment of the price, notwithstanding the statute of frauds. *Crosby v. Henry*, 88 S. W. 949, 950, 76 Ark. 615.

Where land is purchased and paid for with the money of one person, and title is taken in the name of another, without any consideration running from the grantee, and without any gift being made to or intended for said grantee, a "resulting trust" in the land is created in favor of the person paying the purchase price. *Rothenbusch v. Hebel*, 106 Pac. 119, 120, 11 Cal. App. 692.

Where purchasers of real estate obtained money to pay the price from a third person, who paid the vendor and took title under an agreement to hold the same until repayment of the loan, the third person became a trustee for the purchasers, within Civ. Code, § 853, providing that, when a transfer of property is made to one person and the consideration is paid by another, a trust results in favor of the latter. *Brown v. Spencer*, 126 P. 493, 495, 163 Cal. 589.

Where a wife taking the title to land purchased by the husband, who paid the price, did not agree to hold the property on any trust, she did not hold the land in trust within Real Property Law (Consol. Laws 1909, c. 50) § 94, providing that no trust results, unless the grantee in violation of some trust purchases property so conveyed with money of another. *Welgert v. Schlesinger*, 135 N. Y. Supp. 335, 338, 150 App. Div. 765.

Where on purchase of land a deed is taken in the name of another than the one paying the money, a trust "results" by implication of law without any agreement on behalf of the person making the payment, although a bond or mortgage was a consideration for the deed. *Casciola v. Donatelli*, 67 Atl. 901, 903, 218 Pa. 624 (citing *Bisp. Eq.* 118-120; *Lynch v. Cox*, 23 Pa. 265; *Edwards v. Edwards*, 39 Pa. 369; *Smithsonian Institution v. Meech*, 18 Sup. Ct. 396, 169 U. S. 398, 42 L. Ed. 793; *Galbraith v. Galbraith*, 42 Atl. 683, 190 Pa. 225).

"Ordinarily all that is necessary to establish a prima facie 'resulting trust' is to show that the party seeking to enforce the trust paid the purchase money, and the law presumes that he intended to reap the benefits, although the title was taken in the name of another." *Foster v. Berrier*, 89 Pac. 787, 788, 39 Colo. 398.

When it is clearly shown that one has purchased an estate and paid the purchase money therefor, but has taken a deed in the name of another, a trust results by construction of law in favor of the party who has so paid. *Turpin v. Miles*, 71 Atl. 440, 441, 108 Md. 678 (quoting *Johns v. Carroll*, 69 Atl. 36, 107 Md. 436).

A "resulting trust" is one arising upon the naked fact that one furnishes the consideration, while the title is taken by another, a stranger, without an agreement as to the use or trust; and it was held at common law that a trust resulted from the facts without agreement to that effect. *Smith v. Smith* (Ky.) 121 S. W. 1002, 1004.

"Resulting trusts" do not depend upon an agreement between the parties, but arise by operation of law from their acts; the law implying a trust where honesty and fair dealing require that the property be considered as held in trust, as where the purchase money is paid by one person and title taken in the name of another. *Stevens v. Fitzpatrick*, 118 S. W. 51, 56, 218 Mo. 708.

A "resulting trust," other than a trust resulting to a donor, is one which arises by operation of law, where the consideration is paid by one party and the title is conveyed to another. Such a trust arises by implication of law and cannot grow out of the contract of a grantee to hold the title for a third person who advances the purchase money. *Butts v. Cooper*, 44 South. 616, 617, 152 Ala. 375.

An implied trust, known as a "resulting trust," arises by implication of law where the purchase money is paid by one person out of his own money and the land is conveyed to another. It arises because the payor is virtually and equitably the purchaser. The payor must "pay" or "furnish" or "advance" the consideration. The trust rests upon the supposed intention of the person paying a supposition which is rebuttable. *Merrill v. Hussey*, 64 Atl. 819, 821, 101 Me. 489.

A "resulting trust" arises with reference to an interest in property, where the title is taken in the name of another, only when the intention of the person advancing a portion of the purchase price is shown to have been to acquire a proportionate interest in the property, and not to supply the person acquiring the title, by loan or otherwise, with the means of acquiring the whole title. *German v. Heath*, 116 N. W. 1051, 1053, 139 Iowa, 52.

"Resulting trusts" arise when the legal estate is disposed of or acquired, not fraudulently, or in violation of any fiduciary duty, but the intent in theory of equity appears or is inferred or assumed from the terms of the disposition or from the accompanying facts and circumstances that the beneficial interest is not to go with the legal title. *Fagan v.*

*McDonnell*, 100 N. Y. Supp. 641, 648, 115 App. Div. 89 (citing *Pom. Eq. Jur.* [3d Ed.] § 155).

A "resulting trust" arises by operation of law in favor of a person who advances the purchase money for land, though the title be taken in the name of another, or in favor of a person for whom it is advanced by way of a loan, the title being taken in the name of the lender; and such trust may be established by parol evidence. Such a trust, being one which results by implication or construction of law, does not fall within the provisions of the statute of frauds, and may be established by parol evidence. *Pittock v. Pittock*, 98 Pac. 719, 721, 15 Idaho, 426 (citing *Stand. Dict.*; *Bates v. Kelly*, 80 Ala. 142; *Church v. Sterling*, 16 Conn. 388).

Rev. Codes, § 4538, providing that, when a transfer of real property is made to one person and the consideration is paid by or for another, a trust results in favor of the latter, is but declaratory of the common law, and, in order that a trust shall result, the money paid must be the money of the person who claims the benefit of the trust, though it is immaterial whether the payment is made by him personally or for him by another. *Eisenberg v. Goldsmith*, 113 Pac. 1127, 1129, 42 Mont. 563.

"Resulting trusts," or those created by operation of law, are: First, when an estate is purchased in the name of one person, but the money or consideration is given by another; second, where a trust is declared only as to part and nothing is said as to the rest; and, third, in certain cases of fraud where transactions have been carried on *mala fide*. *Walker v. Bruce*, 97 Pac. 250, 252, 44 Colo. 109 (citing 1 *Greenleaf*, Ev. § 256; *Washburn*, Real Prop. § 1422; *Trapnall's Adm'x v. Brown*, 19 Ark. 39).

At common law where one person pays the purchase money for lands and the conveyance of same is taken to another, a trust "results" in favor of the person who paid the purchase money. This rule is changed, however, by Rev. St. p. 728, c. 1, tit. 2, §§ 51, 53, providing that, where a grant for a valuable consideration is made to one person and the consideration therefor paid by another, no trust results in favor of the person by whom such payment is made, except where the alienee named in the conveyance takes the same as an absolute conveyance in his own name, without the knowledge of the person paying the consideration, or where such alienee, in violation of some trust, purchases the land so conveyed with moneys belonging to another person. *Leary v. Corvin*, 73 N. E. 984, 985, 181 N. Y. 222, 106 Am. St. Rep. 542, 2 Ann. Cas. 664.

"Where land is conveyed or caused to be conveyed by a husband to his wife, he paying the entire consideration out of his own funds, there is no 'resulting trust' presumed in his favor. To establish a resulting trust through

a verbal agreement, the evidence must be so clear and conclusive as to overcome the evidence of the deed, and such agreement must be made at or before the time of the conveyance." Hence, where land was conveyed to a wife by others than the husband in consideration of the purchase price, which was paid by her out of funds received by her out of the funds from other lands to which she had the title, and she had asserted her right to such funds adversely to her husband, and he had assented to her adverse claim, after protest, there was no resulting trust, notwithstanding that she had at some time verbally agreed to hold it in trust for him. *Oliver v. Sample*, 84 Pac. 138, 139, 72 Kan. 582.

Where plaintiff, by his own labor and expense, discovered a mine, but before making a location thereon, under the mining laws, disclosed the location to defendant in consideration of and reliance on an agreement or understanding between them that the mine, when located, should be their joint property, and defendant, in pursuance of such understanding and the agreement to locate the mine in the joint names of plaintiff and himself, subsequently located it in his own name and that of another without plaintiff's consent, such facts were sufficient to raise a "resulting trust" in favor of plaintiff with respect to a half interest in the mine. *Stewart v. Douglass*, 83 Pac. 699, 700, 148 Cal. 511.

#### Constructive trust distinguished

Implied trusts are of two species: One denominated a "resulting trust," and the other a "constructive trust." In the first class are those trusts which attach to a legal estate acquired by consent of the parties, not in violation of any fiduciary duty or trust relation, for the common benefit of both trustee and cestui que trust. This trust arises out of, and is declared in favor of, the intent of the parties creating it. Its inception is in good faith and in furtherance of fair and honest dealing. The other species of implied trusts, which is called "constructive trusts," is one imposed by a court of equity for the purpose of enforcing an equitable right as against the fraudulent intent of the trustee *ex maleficio*. This latter class of implied trusts have their origin in the bad faith of the trustee and are imposed by a court of conscience to defeat his wrongful ends. *Hanson v. Hanson*, 111 N. W. 368, 372, 78 Neb. 584.

"Resulting or presumptive trusts," says Bouvier, "are those which are implied or presumed from the supposed intention of the parties and the nature of the transaction; constructive trusts are such as are raised independently of any such intention, and which are forced on the conscience of the trustee by equitable construction and the operation of law." A familiar example of a resulting trust is where A. purchases real estate with the money of B. (A. and B. being strangers)

and takes the title in his own name. In such case a resulting trust arises in favor of B.; the trust being "raised by the law from the presumed intention of the parties, and the natural equity that one who furnishes the means for the acquisition of the property should enjoy its benefit." Where a part only of the purchase money is furnished by the beneficiary, the trust is for a proportionate share of the land bought. One relying for title on the raising of a resulting or a constructive trust must establish it by proof so clear, unequivocal, cogent, and impelling as to exclude every reasonable doubt. *Bunel v. Nester*, 101 S. W. 69, 77, 203 Mo. 429.

Where a husband uses the coercive power he possesses over his wife to procure her to convey to him her real estate without consideration, the trust raised thereby in equity for the protection of the wife is not a "resulting trust," as defined in *Burns' Ann. St. 1901*, § 3396, but a "constructive trust," which will be enforced against him. *Huffman v. Huffman*, 73 N. E. 1096, 1097, 35 Ind. App. 643.

#### Express trust distinguished

To constitute an express trust there must be some act on the part of the cestui que trust expressive of intent to create a trust and to designate some one as trustee. A resulting trust arises where, from the condition of facts existing, regardless of any intent on the part of the beneficiary, the law presumes a trust. *McCoy v. McCoy*, 121 Pac. 176, 180, 30 Okl. 379, Ann. Cas. 1913C, 146.

#### As founded on presumed intention

A "resulting trust" is one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance. *Wright v. Yates*, 130 S. W. 1111, 1112, 140 Ky. 283.

#### As arising at time of purchase

A "resulting trust" is one arising from the facts, and such a trust in lands must arise at the very time the legal title passes. *Allen v. Allen (Tex.)* 105 S. W. 53, 54.

A "resulting trust" is not the result of contract but arises by implication of law, if at all, at the very moment of the acquisition of the property, because the beneficiary's means have entered in whole or in part into the purchase; and where a wife's separate money pays for land certificates, but the patents are issued to the husband, the land becomes equitably hers under a resulting trust, irrespective of the agreement of the parties that such should be the case, and notwithstanding the husband not only did not make such agreement but really intended to deprive her of all interest in the land. *Matador Land & Cattle Co. v. Cooper*, 87 S. W. 235, 236, 39 Tex. Civ. App. 99.

It is requisite to the application of the doctrine of "resulting trust" that, upon a conveyance of land to one party, the purchase money or some definite portion of it should be paid at the time of the conveyance in some form of payment by another in whose favor a trust results in the land by implication from the actual or presumed intention of the parties. A resulting trust in land does not arise in favor of one who paid no part of the consideration therefor on its conveyance to another, though it may have been the common understanding that the debt incurred for a part of the purchase price and secured by a mortgage thereon was to be regarded as his debt, and that, on his paying it, title to the land would be made to him. *Crawford v. Crawford*, 57 S. E. 837, 838, 77 S. C. 205.

To create a "resulting trust" in lands, it is not necessary that the purchase money be paid at the precise date of the delivery of the deeds. If a party, having funds in his hands belonging to another, contracts for the purchase of lands in his own name, with the intention of paying for the same out of such funds, and the deed for any reason is not then executed and delivered, but is at a later date, and when it is executed and delivered he pays the balance of the purchase money out of the funds in his hands of such person, the contract of purchase, payment of purchase money, and execution and delivery of the deed constitute one entire original transaction, and a "resulting trust" would be created in favor of the party to which the funds belonged. If the payments proceeded from an independent contract, or were the result of conduct or an intervention not constituting a part of the original transaction, no "resulting trust" would be created. *Pearce v. Dyess*, 101 S. W. 549, 551, 45 Tex. Civ. App. 406 (citing 2 Pom. Eq. Jur. § 1037).

"Resulting trusts" are creatures of the law and do not grow out of a contract to hold title to land for a third party who advances all or a part of the purchase price. To constitute a resulting trust, \* \* \* it is necessary to show payment by complainant or an absolute obligation to pay incurred by him as a part of the original transaction of purchase, at or before the time of the conveyance." *Watkins v. Carter*, 51 South. 318, 320, 164 Ala. 456 (citing 3 Pom. Eq. Jur. § 1037).

## RESUME—RESUMPTION

The word "resume," as used in Corporation Act, § 65, providing for a settlement of the affairs of a corporation which becomes insolvent and shall not, within a short time, resume its business, means the taking up again of the suspended function of paying present indebtedness, "so that payment of indebtedness, as well as the operation of the work of the corporation, after temporary,

partial, or complete paralysis, may be resumed with safety to the public and advantage to its stockholders." *Reinhardt v. Interstate Telephone Co.* (N. J.) 63 Atl. 1097, 1101 (quoting *Ft. Wayne Electric Corp. v. Franklin Electric Light Co.*, 41 Atl. 219, 57 N. J. Eq. pp. 7, 13).

The term "resume possession," in a covenant in a lease, authorizing the landlord to "resume possession" and relet for the tenant's account, and not containing the technical term "re-enter," is a term of no technical meaning, and is not inconsistent with the maintenance of summary proceedings to enforce the right. *Landesman v. Hauser*, 91 N. Y. Supp. 6, 7, 45 Misc. Rep. 603.

Where a corporation is losing money in the carrying on of its business, and is seriously embarrassed for want of funds to carry out the project for which it was organized, and is without available assets to pay its present indebtedness, notwithstanding there may not have been a complete suspension of its business, it is insolvent, within the meaning of Corporation Act, § 65, providing that when any corporation shall become insolvent, or suspend its ordinary business for want of funds to carry on the same, any creditor may apply to the court for an injunction and the appointment of a receiver, and that, if upon the hearing, it shall appear that the corporation has become insolvent and is not about to resume its business, the injunction may issue, and the receiver be appointed, and hence is subject to the issuance of an injunction and the appointment of a receiver. A corporation may be insolvent though it has not suspended its business for want of funds, and it may suspend its business for want of funds and still be able to pay its debts if properly administered. Insolvency is a general inability to meet pecuniary liabilities as they mature by means of available assets or an honest use of credit. The court said: "I agree that the word 'resumption,' as used in the statute, predicates some interruption of the insolvent's business, but I do not understand that it contemplates the entire suspension of its workings. Such has been the practical interpretation the bar and the courts have given, for manufacturing and other corporations with plants in operation have constantly been adjudged to be insolvent and put in the hands of receivers, and in so doing large values have been saved to creditors and stockholders because of the salable condition of a live plant as compared with one that is dead. An insolvency carries with it inability to presently pay indebtedness and suspension of that function, and the word 'resumption,' used in the statute, is, I think, to be taken in the sense of taking up again that suspended function, so that payment of indebtedness, as well as the operation of the work of the corporation, after temporary, partial, or complete paralysis, may be resum-



ed with safety to the public and advantage to its stockholders." *Catlin v. Vichachi Min. Co.*, 67 Atl. 194, 196, 73 N. J. Eq. 286 (citing *Reinhardt v. Interstate Telephone Co.* [N. J.] 63 Atl. 107; *Empire State Trust Co. v. Trustees of William F. Fisher Co.*, 60 Atl. 940, 67 N. J. Eq. 602, 3 Ann. Cas. 393).

## RETAIL

### See Sell or Retail.

To "retail" is to sell in small quantities. *Commonwealth v. Poulin*, 73 N. E. 655, 656, 187 Mass. 568.

"Retail" means the sale of commodities in small quantities or parcels. *Katzman v. Commonwealth*, 130 S. W. 990, 992, 140 Ky. 124, 30 L. R. A. (N. S.) 519, 140 Am. St. Rep. 359.

Selling and delivering oil from a tank wagon to merchants in quantities of not less than 25 gallons for resale to customers is a sale by "retail," within an act requiring retail sellers to first procure a license. *Standard Oil Co. v. Commonwealth*, 82 S. W. 970, 971, 119 Ky. 1.

The definition of the word "retail," as applied to sales, is to sell in small quantities, as by the yard, pound, gallon, etc.; to sell directly to the consumer in small quantities, such as are immediately called for by consumers. As a rule, wholesale merchants deal only with persons who buy to sell again, while retail merchants deal with consumers. A manufacturer of beer who sells his product to unlicensed consumers for their use, sells at retail within Laws 1907, c. 82, forbidding sales at retail. In *re Metz Bros. Brewing Co.*, 129 N. W. 443, 444, 88 Neb. 164, 32 L. R. A. (N. S.) 622.

"As a general rule wholesale merchants deal only with persons who buy to sell again, whilst retail merchants deal with consumers." Hence sales of intoxicating liquor direct to customers are "retail" sales and are forbidden to those holding only a wholesale license. *State v. Scampini*, 59 Atl. 201, 206, 77 Vt. 92.

In view of the classification of sales of intoxicants in less quantities than one quart as "retail" sales, by the marginal note to Pol. Code 1872, § 3381, which imposed a license tax on such sales, the Legislature is presumed to have intended that the same meaning be given the word "retail" in Act March 20, 1874 (St. 1873-74, c. 345), prohibiting recovery of more than \$5 for a sale of intoxicants at retail. *Bettencourt v. Sheehy*, 109 Pac. 89, 90, 157 Cal. 698.

Where a person assuming to do business as a wholesale liquor dealer in a prohibition parish sells to another who assumes to be doing a retail liquor business in such parish, the transaction is a sale at "retail" and subjects the wholesaler to the penalty for sell-

ing at retail without having previously obtained a license; there being no such thing, within the meaning of the law, as a dealer for resale in a parish where the sale of liquor at retail is prohibited. *State v. Cunningham*, 58 South. 558, 559, 130 La. 749.

The word "wholesale," in Rev. Laws, c. 100, § 1, providing that the statute prohibiting the sale of intoxicating liquors shall not apply to sales of cider at wholesale by the original makers thereof, must, as required by Rev. Laws, c. 8, § 4, cl. 3, be understood as having a meaning acquired by a prior judicial construction; and the word, in view of such prior judicial constructions, means sales made in large quantities, as distinguished from those made in small quantities, which are to be regarded as sales at "retail," and the court must charge that, in determining whether sales were at wholesale, sales at retail are sales made in small quantities, such as are adapted to individual purchasers, while sales at wholesale are sales made in large quantities, which are beyond the needs of ordinary consumers. *Commonwealth v. Greenwood*, 91 N. E. 141, 142, 205 Mass. 124, 18 Ann. Cas. 185.

## RETAIL DEALER

Act Aug. 2, 1886, c. 840, 24 Stat. 209, regulating the sale of oleomargarine, authorizes three classes of persons to conduct the business of manufacturing and selling oleomargarine, viz., the manufacturer is authorized to sell his own products in his place of business in his own packages with stamps denoting payment of the tax on the contents, the wholesale dealer is defined to be one permitted to sell in the manufacturer's original packages, and the retail dealer, one who sells in less quantities than 10 pounds at one time; and section 6 declares that retail dealers must sell only from original stamped packages in quantities not exceeding 10 pounds. Held, that the restriction on retail dealers violates no constitutional right, and that persons selling oleomargarine at retail in original packages in quantities greater than 10 pounds at any one time are violators of the law, and do not form a class outside its provisions. *Ripper v. United States*, 178 Fed. 24, 28, 101 C. C. A. 152.

## RETAIL LIQUOR DEALER

As R. L. D., see R. L. D.

As R. M. L. D., see R. M. L. D.

One sale of liquor taken from a licensed saloon by an employé of the saloon keeper would not constitute the employé a "retail liquor dealer," under the provisions of Acts 31st Leg. 1st Ex. Sess. c. 17, § 2, defining a retail liquor dealer to be a person or firm permitted by law, being licensed under the provisions of the act, to sell liquors, etc., in quantities of one gallon or less, which may be drunk on the premises. *Cassidy v. State*, 126 S. W. 600, 58 Tex. Cr. R. 454.

Under Comp. Laws 1897, § 5379, as amended by Pub. Acts 1903, p. 83, No. 62, requiring the payment of a tax on the business of selling or keeping for sale at retail intoxicating liquors, and section 5380, providing that retail dealers of spirituous or intoxicating liquors, etc., shall include all persons who sell by the drink to any person or persons, one who sells a single drink is a retail dealer engaged in the business, and liable to prosecution for selling without having paid the tax. *People v. Wilcox*, 115 N. W. 973, 152 Mich. 39, 15 Detroit Leg. N. 172.

Rev. St. § 3244, defines a "retail liquor dealer" as any person who sells distilled spirits or wines in less quantities than five gallons at the same time, and section 3248 defines distilled spirits as that substance known as "ethyl alcohol," etc., commonly produced by fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures thereof. Held that, where a druggist, without paying the internal revenue tax imposed on retail liquor dealers, sold a medical preparation which was 88 per cent. proof spirits more than sufficient to preserve the medical properties of any herbs, roots, or drugs contained therein, he was a "retail liquor dealer," within such sections. *United States v. Morfew*, 136 Fed. 491, 493.

The statute provides that every person who sells intoxicating liquor in quantities of three gallons or less, or one dozen quart bottles or less, at one time, is deemed a retail liquor dealer. Comp. Laws 1897, § 5381, provides that the penal provisions of the act shall not apply to druggists, who sell liquor for medical, etc., purposes, and requires such persons to give a druggist's bond. Section 5386 requires retail liquor dealers, before commencing business, to give a bond in the form stated. An information charged accused with selling liquor on a certain date; he being then a person whose business consisted in part in the sale of drugs and medicine, and the liquors not being sold for medical, chemical, or scientific purposes, contrary to the statute, etc. Held, that accused could not be convicted of the offense of unlawfully selling as a "retail liquor dealer"; there being no averment that he had not given the retailer's bond prescribed by section 5386, and could not be convicted of making the sale as a druggist, there being no averment that he had given a druggist's bond as prescribed by section 5386, and hence, the information charged no offense under the law, and was properly quashed. *Peters v. Eaton Circuit Judge*, 117 N. W. 68, 69, 153 Mich. 467.

## RETAIN

To "retain" means to hold or keep that which one already owns, and not to lose, part with, or dismiss it, and more definitely means to "keep back" that which one owns. *Featherston v. Merrimon*, 61 S. E. 675, 678,

148 N. C. 199 (citing 7 Words and Phrases, p. 6196).

### As accept

A contract for the sale of certain real property provided for payment of \$500 cash on the making of the contract and the balance on a specified date, when the deal was to be closed. It then declared that, if the vendee should make default in paying the balance as provided, the \$500 payment should be forfeited to the vendors and "retained" by them as liquidated damages for breach of the contract, and for the failure of the vendee to pay the balance of the consideration. Held, that the word "retained" could not be construed to mean "accepted," and that the \$500 payment should be regarded as security only for the performance of the contract by the vendee, and its retention by the vendors on the vendee's refusal to perform did not preclude them from maintaining a suit for specific performance of the vendee's obligation to pay the balance of the price. *Donahoe v. Franks*, 199 Fed. 262, 269.

## RETAINER

"Retainer," as used in an agreement to pay a retainer to an expert witness and a per diem sum for the time he is engaged in the case, means a sum paid to secure the services of the witness, and is due as soon as the witness accepts employment, independent of any future work or its results. *Hough v. State*, 124 N. Y. Supp. 878, 880, 68 Misc. Rep. 26.

### As to attorneys

A retaining fee, or "retainer," is a payment in advance, to cover future services and disbursements until further provision is made. *Severance v. Bizallion*, 121 N. Y. Supp. 627, 629, 67 Misc. Rep. 103.

The word "retainer" is defined in *Bouvier's Law Dictionary* as signifying: "The act of a client by which he engages an attorney or counselor to manage a cause, either by prosecuting when he is plaintiff, or defending when he is defendant." \* \* \* A retaining fee is a fee given to counsel on being consulted, in order to insure his future services." The principles of law applicable to claims of attorneys for services are not different from those applicable to claims of surveyors, or mechanics, or farmers. The claimants are to receive a reasonable compensation for that which they do or furnish under their contract. No other payment is required or can be enforced. The rule as to retainers, as distinguished from specific services of attorneys at law, is that, upon making an engagement for services, the attorney is to be paid a reasonable compensation for being so bound. *Blair v. Columbian Fireproofing Co.*, 77 N. E. 762, 763, 191 Mass. 333.

### As to executors and administrators

The right to have the debt of the legatee or distributee charged to him in the adjustment of the legacy or the distributive share

is inaccurately called a right of "set-off" or of "retainer," since the right rests not so much upon any rule of set-off or of retainer as upon the broad principles of equity. *Oxshaer v. Nave*, 40 S. W. 7, 9, 90 Tex. 568, 37 L. R. A. 98.

## RETAKEN

Laws 1897, p. 541, c. 418, § 116, as amended by Laws 1900, p. 1624, c. 762, provides that where articles are sold on condition that the title shall remain in the vendor, and are retaken for default, they shall be retained for 30 days, during which time the vendee may redeem the same. The word "retaken" embraces a case where the retaking was accomplished by an action by the vendor to recover possession in which the vendee suffered judgment by default. *Roach v. Curtis*, 100 N. Y. Supp. 411, 414, 50 Misc. Rep. 122.

## RETIRE

In a prosecution for assault with intent to kill, a charge that it was defendant's duty to "retire," if possible, to a place of safety, before the person assaulted reached his gun, was not equivalent to a charge that it was his duty to "retreat," and was prejudicial on that ground. *Delaney v. State*, 81 Pac. 792, 794, 14 Wyo. 1.

In Laws 1899, p. 443, c. 285, providing that the governing board of the pension fund shall "retire" disabled members from police service, the word "retire" implies necessarily that a candidate for retirement, to be eligible therefor, must be so circumstanced, at the time of favorable action upon his application that he can be retired, that he can be taken from the pay roll of the department and put on the pension roll. *State ex rel. Weber v. Board of Trustees of Policemen's Pension Fund*, 101 N. W. 373, 374, 123 Wis. 245.

## RETIRED ARMY OFFICER

As holding an office, see Officer.

## RETIRED OFFICERS

The term "retired officer" and "ex-officer" and "ci-devant" officer are synonymous, implying that he is no longer an "officer" in the proper sense of the term. *Reed v. Schon*, 83 Pac. 77, 79, 2 Cal. App. 53.

## RETIREMENT

The words "retirement" and "cancellation," in connection with the capital stock of corporations, wherever used in the franchise act or in the amendment of that act (P. L. 1906, p. 31), mean permanent retirement and actual cancellation by the method and in full compliance with the provisions of the statute. *Knickerbocker Importation Co. v. State Board of Assessors*, 65 Atl. 913, 915, 74 N. J. Law, 583, 7 L. R. A. (N. S.) 885.

## RETORT

A "retort" in chemistry and the arts is a vessel of glass, earthenware, metal, etc., employed to distill or effect decomposition by the aid of heat. Glass retorts are commonly used to distill liquids, and consist of a flask-shaped vessel to which a long neck is attached. The liquid to be distilled is placed in the flask, and heat is applied. The name is also generally given to almost any apparatus in which solid substances, such as coal, wood, or bones, are submitted to destructive distillation, as retorts to produce coal gas, which vary much in dimensions and in shape. *MacKinnon Boiler & Mach. Co. v. Central Michigan Land Co.*, 120 N. W. 26, 27, 156 Mich. 11.

## RETRAXIT

A "retraxit" at common law was a voluntary acknowledgment that plaintiff had no cause of action, and would not proceed further, made by him in person in open court. *McPherson v. Swift*, 116 N. W. 76, 82, 22 S. D. 165, 133 Am. St. Rep. 907.

Proof that plaintiff was present in open court during proceedings which resulted in the dismissal of a former action was insufficient to establish a "retraxit," which is a voluntary acknowledgment that the plaintiff has no cause of action, and therefore will not proceed further, made in open court by the plaintiff in person. *McPherson v. Swift*, 130 N. W. 768, 769, 27 S. D. 296.

Withdrawal of a count of a complainant is not a retraxit. A dismissal or discontinuance is not equivalent to a retraxit. To constitute a "retraxit" there must be a formal and final renunciation of plaintiff's right of action, by which it is carried into the judgment. *Southern Ry. Co. v. McEntire*, 58 South. 158, 160, 169 Ala. 42.

Where parties to an action have settled their dispute and agreed to a dismissal, such dismissal is a "retraxit" and amounts to a decision upon the merits. *State Medical Examining Board v. Stewart*, 89 Pac. 475, 476, 46 Wash. 79, 11 L. R. A. (N. S.) 557, 123 Am. St. Rep. 915, 13 Ann. Cas. 653.

"In those jurisdictions where the rule indicated by the word 'retraxit' has been recognized, the substance of the matter seems to be that a dismissal by agreement of the parties is equivalent to and is treated as a public renunciation on the part of the complainant of the claim asserted by him in his pleadings against the defendant, and he is thereafter estopped to bring it forward again." *Lindsay v. Allen*, 82 S. W. 171, 174, 112 Tenn. 637.

### Nonsuit distinguished

"Retraxit" differs from a nonsuit in that, when once entered by a plaintiff on the record, it forever puts an end to the pending suit, as well as the cause of action involved.

Waldron v. Angleman, 58 Atl. 508, 571, 71 N. J. Law, 166.

A "retraxit" is different from a discontinuance or a nonsuit, and by it a plaintiff renounces his right of action irrevocably, and a retraxit must be always in person. Sheffer v. B. B. Perkins & Co., 75 Atl. 6, 7, 83 Vt. 185, 25 L. R. A. (N. S.) 1313.

## RETREAT

In a prosecution for assault with intent to kill, a charge that it was defendant's duty to "retire," if possible, to a place of safety, before the person assaulted reached his gun, was not equivalent to a charge that it was his duty to "retreat," and was prejudicial on that ground. Delaney v. State, 81 Pac. 792, 794, 14 Wyo. 1.

## RETREAT TO THE WALL

The application of the doctrine of "retreat to the wall," originating, as it did, before the general introduction of firearms, has due reference to the difference in danger between a hand to hand encounter with fists, clubs, or even knives, and an encounter in an open space, involving the use of repeating rifles by men experienced in handling them. State v. Gardner, 104 N. W. 971, 975, 96 Minn. 318, 2 L. R. A. (N. S.) 49.

## RETRIAL

Code Supp. 1907, § 245a, provides that a transcript of a witness' testimony shall be admissible on "retrial" of the case or proceeding in which it was taken. Held, that a contest of a later will was not a retrial of a contest of a former will which went to final judgment, without retrial, so as to justify the admission of the transcript of a witness' testimony on such former trial in a contest of the later will. Splers v. Hendershott, 120 N. W. 1058, 1061, 142 Iowa, 446.

## RETROACTIVE

### RETROACTIVE DECISION

A "retroactive decision" is one which makes and applies a new rule of law, and attaches another and unforeseen liability to a contract after its execution, and is as vicious as an ex post facto statute. Clancy v. Barker, 131 Fed. 161, 171, 66 C. C. A. 469, 69 L. R. A. 653.

### RETROACTIVE LAW

See Retrospective Law.

## RETROSPECTIVE LAW

A statute is "retroactive" which creates a new obligation on transactions or considerations already past, or destroys or impairs vested rights. Ross v. Lettice, 68 S. E. 734, 735, 134 Ga. 800, 187 Am. St. Rep. 281.

A "retroactive law" is one made to affect prior acts or transactions, or rights already accrued, and which imparts to them characteristics, or ascribes effects, which were not inherent in their nature in the contemplation of the law as it stood at the time of their occurrence. Keith v. Guedry (Tex.) 114 S. W. 302, 390.

A "retrospective law" is one which is retroactive and which takes away or impairs vested rights acquired under existing laws, creates a new obligation, imposes a new duty, or attaches a disability in respect to transactions or considerations already passed. Gray v. City of Toledo, 89 N. E. 12, 13, 80 Ohio St. 445 (quoting and adopting the definition in Society for the Propagation of the Gospel v. Wheeler, 22 Fed. Cas. 756).

A law is "retrospective" "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." Ducey v. Patterson, 86 Pac. 109, 111, 37 Colo. 216, 9 L. R. A. (N. S.) 1066, 119 Am. St. Rep. 284, 11 Ann. Cas. 393 (quoting Perry v. City of Denver, 59 Pac. 747, 748, 27 Colo. 93, 95).

Retroactive or "retrospective laws" are those which take away and impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already passed. Thus Acts 1903, p. 386, No. 236, by adding to the persons to whom notice of right to redeem from a tax deed shall be given, and providing that the notice shall state that the redemption money may be paid, either to the tax purchaser as theretofore, or to the register in chancery, is retroactive. Hooker, J., dissenting, holding that a retroactive law is one which operates on matters which occurred, and rights and obligations which existed before the time of enactment. Weller v. Wheelock, 118 N. W. 609, 611, 614, 155 Mich. 698.

As a "retrospective law" is one which takes away or impairs vested rights required under existing laws, or creates a new obligation, or attaches a new disability to transactions already past, Building Code of New York City, § 97, providing that all dumb-waiter shafts, except such as do not extend more than three stories above the cellar or basement in dwelling houses, shall be inclosed in fire walls, is not retrospective in requiring the owners of existing buildings having dumb-waiters to alter those buildings to comply with the statute, but is a valid exercise of the police power in requiring such shafts to be protected if in the future maintained. City of New York v. Foster, 133 N. Y. Supp. 152, 155, 148 App. Div. 258.

"The term 'retrospective in their operation,' as used in our bill of rights, is one

which relates to civil rights and proceedings in civil causes. *Ex parte Bethurum*, 66 Mo. loc. cit. 549. Hence the well-settled rule deducted from all the authorities is that the 'acts of the Legislature are not to be considered as retrospective unless they impair rights that are vested, because most civil rights are derived from public laws.'" *Laws* 1897, p. 132, exempting beneficiary associations from the provisions of the general insurance laws, did not, as to the beneficiary in a certificate issued prior to the statute, violate Const. art. 2, § 15, prohibiting the enactment of any law impairing the obligation of contract or retrospective in its operation, as the beneficiary had no vested right in the certificate. *Westerman v. Supreme Lodge Knights of Pythias*, 94 S. W. 470, 480, 196 Mo. 670, 5 L. R. A. (N. S.) 1114 (quoting and adopting the definition in *Gladney v. Sydnor*, 72 S. W. 554, 172 Mo. 318, 60 L. R. A. 880, 95 Am. St. Rep. 517; *Rich v. Flanders*, 39 N. H. 321).

Act March 2, 1903 (St. 1903, p. 67, c. 61), amending Pol. Code, § 3443, so as to provide an additional method for contesting the right of one to purchase public land, on the ground that, at the time of application to purchase, the land had been reclaimed and made fit for cultivation (the method being by action by one who had occupied the land for 10 years before the application), though retroactive in applying, where an application to purchase was made and a certificate of purchase was issued prior to adoption of the statute, impairs no obligation of contract, as it merely gives a new remedy. "The cases uniformly hold that, as long as vested rights are not impaired, 'retrospective laws' giving new and additional remedies for existing rights, or giving a remedy at law where one previously existed in equity only or vice versa, are valid." As said in *Rich v. Flanders*, 39 N. H. 304, a party has no right to complain of "these things as violations of the Constitution," so long as the laws leave him a competent court bound to administer justice to him according to the rights the law gave him, when his right of action or defense became invested." *Boggs v. Ganear*, 84 Pac. 195, 199, 148 Cal. 711.

*Laws* 1905, p. 193, § 8253a, which provided that lands not originally included in drainage districts might be brought in by petition, is not a "retrospective law" because applying to an object already in existence at the time of its enactment, for a retrospective law is one creating a new obligation, imposing a new duty, or attaching a new disability to transactions already past, and it must give to something already done a different effect from that which it originally had. *Squaw Creek Drainage Dist. v. Turney*, 138 S. W. 12, 16, 235 Mo. 80.

Rev. St. c. 46, § 2, provided that "all loans \* \* \* for less than two hundred

dollars, secured by mortgage or pledge of personal property, shall be dischargeable by the debtor upon payment or tender of the principal sum actually borrowed, and interest at the rate specified therein, which shall not exceed" certain specified rates, and further provides, that "all loans made in violation hereof shall bear interest at the legal rate of interest only." By the provisions of Pub. Laws 1905, p. 92, c. 90, said section 2 of said chapter 46 of the Revised Statutes was amended; the amendment providing, among other things, that: "All payments made in excess of six per cent. interest on loans so made in violation hereof shall be applied to the discharge of the principal, and in case a greater sum has been paid by the borrower than the amount of the principal and interest at six per cent. on loans so made in violation hereof, may be recovered from holder of said security by the borrower, in an action on the case." Held, that the amendment of 1905 is not retroactive, and does not apply to payments voluntarily made before the enactment of the amendatory statute. *Carr v. Judkins*, 67 Atl. 569, 570, 102 Me. 506 (citing *Cooley*, Const. Lim. [7th Ed.] p. 529; *Rogers v. Inhabitants of Greenbush*, 58 Me. 395; *Appeal of Lambard*, 34 Atl. 530, 88 Me. 587; *Murray v. Gibson*, 15 How. [56 U. S.] 421, 14 L. Ed. 755; *Harvey v. Tyler*, 2 Wall. [69 U. S.] 328, 17 L. Ed. 871; *Chew Heong v. U. S.*, 5 Sup. Ct. 255, 112 U. S. 536, 28 L. Ed. 770).

Subject to Rev. St. 1889, § 5435, permitting a wife to file a claim of homestead to land occupied by herself and husband, after which he could not alienate without her consent, a husband had, prior to 1895, the right to alienate his homestead, subject only to the wife's dower; and a statute enacted in 1895, making a husband incapable of selling, mortgaging, or alienating the homestead in any manner, so far as it affected a husband's power over an existing homestead, was "retrospective." *Gladney v. Sydnor*, 72 S. W. 554, 557, 172 Mo. 318, 60 L. R. A. 880, 95 Am. St. Rep. 517.

#### Curative acts

A proceeding to assess omitted taxes under an ordinance enacted for that purpose is, from the very nature of the proceeding, essentially "retrospective" and retroactive, but the proceeding is not, properly speaking, the initial levying of a tax to act retrospectively. The tax was levied in advance. It was made a charge upon all property subject to taxation within the city. By omission of the taxpayer or the assessing officer, some of the property liable to the tax was not assessed. Statutes enacted to collect the public dues, if deficient, cannot be deemed to have exhausted the power lodged by the people in their government to do all that is necessary to effectuate the end for which it was established. Hence it occasionally be-

comes necessary, for some cause, to cure what has been attempted under the taxing laws, but which has failed of execution because of former defects. But a law or ordinance providing for the assessment of omitted property is not invalid because the proceedings provided are in a sense retrospective and retroactive. *Muir's Adm'rs v. City of Bardstown*, 87 S. W. 1096, 1098, 120 Ky. 739.

#### Retroactive synonymous

The words "retrospective" and "retroactive," as applied to laws, seem to be synonymous, and, as such, they are used interchangeably by Mr. Sedgwick in his treatise on Constitutional Law. *Gray v. Toledo*, 89 N. E. 12, 13, 80 Ohio St. 445 (quoting *Rairden v. Holden*, 15 Ohio St. 207, 210).

## RETURN

See Further Return; Sale and Return; Sale or Return; Voluntary Return.

"A 'return' implies the prior existence of some state or condition. Webster defines it to turn back; to go or come again to the same place or condition." In the Standard dictionary it is defined 'to cause to take again a former position; put, carry, or send back, as to a former place or holder.' A technical meaning in the law is thus given in *Black's Law Dictionary*: 'The act of a sheriff, constable, or other ministerial officer, in delivering back to the court a writ, notice, or other paper.'" *Clyatt v. United States*, 25 Sup. Ct. 429, 431, 197 U. S. 207, 49 L. Ed. 726.

In Act of December 17, 1901 (Laws 1901, p. 39, § 1), which directs that protest against the return of processioners shall be filed with the ordinary, and requires the ordinary to return all the papers to the clerk of the superior court, the requirement that the ordinary "return all papers" simply means the physical transmission of the papers by the ordinary to the clerk of the superior court. *Norman, Timmons & Co. v. Smith*, 61 S. E. 1039, 1040, 131 Ga. 69.

#### In limitations—Nonresidents

The word "return," in Rev. St. 1898, § 2888, providing that "if when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state," as applied to absent debtors, includes nonresidents as well as citizens of the state who have gone abroad and returned to the state, the words "return to the state" being equivalent to "come into the state." *Lawson v. Tripp*, 95 Pac. 520, 521, 34 Utah, 28.

Rev. St. 1887, § 4069, provides that, when the cause of action accrues, against a person who is out of the state, the action may be

commenced within the term therein limited after his return to the state. Held, that the words "return to the state" apply to a non-resident debtor who enters into a contract in a foreign state, and thereafter comes into the state, as well as to a citizen who enters into a contract within the state, and subsequently departs therefrom. *West v. Thels*, 96 Pac. 932, 934, 15 Idaho, 167, 17 L. R. A. (N. S.) 472, 128 Am. St. Rep. 58.

#### Return of bill as presented

Const. art. 5, § 14, provides that every bill shall be presented to the Governor; that if he approve he shall sign it, but if not he shall return it with his objections to the house in which it originated, which house shall enter the objections at large upon its journals, and proceed to reconsider the bill, and if, after such reconsideration, a majority agree to repass the bill, it shall be sent with the Governor's objections to the other house, by which it shall likewise be reconsidered, and, if approved by a majority of that house, it shall be a law. If any bill shall not be returned by the Governor within three days, Sunday excepted, after presentation to him, it shall be a law without his signature, unless the general adjournment shall prevent its return, in which case it shall be a law unless the Governor within five days after adjournment shall file such bill, with his objections, in the office of the Secretary of State, who shall lay the same before the General Assembly at its next session, in like manner as if it had been returned by the Governor. Held, that where objections are returned with a bill on the last day of the session, at such an hour that the house can neither reconsider the bill nor examine the objections before the time fixed by the Constitution for adjournment sine die, this does not constitute the return required by the Constitution. *State v. Wheeler*, 89 N. E. 1, 4, 172 Ind. 578, 19 Ann. Cas. 834.

#### Return of process

As summons, see Summon.

"Return" is defined as the rendering back or delivery of a writ, precept, or execution to the proper officer or court; the certificate of an officer, stating what he has done in or about the execution of a writ, precept, etc., indorsed on the document, and the sending back of a commission with the certificate of the commissioners. *Tate v. Biggs*, 130 N. W. 1053, 1054, 89 Neb. 195.

A sheriff's "return" to a writ is an official statement by him of his acts under the writ in obedience to its directions and in conformity with law, and must show compliance with such directions and requirements, or a sufficient reason for any noncompliance in whole or in part. *Hooper v. McDade*, 82 Pac. 1116, 1117, 1 Cal. App. 733.

"To make a 'return according to law' is not only to return the precept to the authori-

ty that issued it, but to return it with a statement by the officer of his doings in executing it, and that statement must contain substantially all of his doings, within the scope of proper execution." Under a statute requiring officers to execute and return writs agreeably to the direction thereof, a return merely stating that the officer served the writ on defendant and read it in his hearing is not sufficient to enable the officer to justify under the writ for making the arrest. *Gibson v. Holmes*, 62 Atl. 11, 14, 78 Vt. 110, 4 L. R. A. (N. S.) 451.

#### **Return of tax or delinquent list**

The word "returning," as used in Code 1887, c. 30, § 18, providing that the sheriff or collector returning a list of lands, delinquent for taxes, shall make a certain affidavit, means the delivery of the delinquent list to the court. *Hornage v. Imboden*, 49 S. E. 1036, 57 W. Va. 206.

1 Tenn. St. 1831, pp. 335-362, relating to the levy and collection of taxes, required the property owner to make return of his property for making up the tax lists, and required a justice appointed in each county to receive the list to make return thereof to the county court. Section 3 (1 Tenn. St. 1831, p. 337) provided that the tax shall be a lien on the property of the person returning the same, when it shall become due and payable, on all the taxpayer's taxable property notwithstanding the same may have been divided or alienated or vested in the name of others than those who actually owned the same "at the time of return of such property or sale thereof although the owner may not be known," etc. Acts 1835-36, c. 14, §§ 4, 5, amending the prior act made it the duty of all property owners in a district to attend on the first Friday and succeeding day in June, 1836, and forever thereafter on the third Friday and succeeding day in January each succeeding year, and to return to commissioners the amount of his taxable property which shall be listed for taxation, etc. Held, that the word "return," as so used, in so far as it related to the lien for taxes imposed by the act of 1813, meant not the return of the taxpayer, but the return of the tax list to the county court, since the fact that the taxpayer's return was required to embrace all taxable property owned or possessed by him on January 10th, could not change the character of his return in the sense that it would operate to create a lien, which could arise only by act of the law, and hence where a conveyance of certain real estate to a purchaser was registered before taxes were either assessed or spread for the year 1839, a subsequent assessment of taxes against such land to the grantor as the "reputed owner" was void. *Goodlett v. Goodman Coal & Coke Co.*, 192 Fed. 775, 782, 113 C. C. A. 61.

#### **Return to writ of certiorari**

As written instrument, see Written Instrument.

#### **Return to writ of mandamus**

Under Comp. Laws 1909, c. 87, art. 32 (section 6226), providing that the defendant, in a mandamus proceeding, immediately upon "receipt of the writ," or at some other specified time, shall obey its mandate, and that he shall then "return the writ" with his certificate of having done as commanded, the original writ should be served, and not a copy, since the defendant could not be in receipt of the writ until it was delivered to him, and could not return the writ unless he had previously received it, and not a mere copy thereof. *Ellis v. Outler*, 106 Pac. 957, 958, 25 Okl. 469.

#### **Return to writ of prohibition**

A "return," in proceedings for a writ of prohibition, is in the nature of an answer. A motion to dismiss the cause is tantamount in law to an abandonment of the return. *State ex rel. McEntee v. Bright*, 123 S. W. 1057, 1059, 224 Mo. 514, 135 Am. St. Rep. 552, 20 Ann. Cas. 955.

#### **Return to writ of review**

The cause on a writ of review is tried on the "return" to the writ, which consists of an authenticated copy of the record of the inferior court, from an examination of which it is to be determined whether in the exercise of judicial functions jurisdiction has been exceeded or such functions have been exercised erroneously. *Curran v. State*, 99 Pac. 420, 422, 53 Or. 154.

### **RETURN DAY**

The expression, "return day," as used in Acts 1900, p. 53, amending Civ. Code 1895, § 3667, relating to an agreement to pay attorneys' fees in case of an action on a note, means the same as "filing day," or the last day on which suits may be filed so as to be returnable to the next term. *Everett & Son v. M. Ferst's Sons & Co.*, 55 S. E. 916, 126 Ga. 662 (citing *Baxley v. Bennett*, 33 Ga. 146; *Hood v. Powers*, 57 Ga. 245).

The "return day" of the term of court is the last day a suit can be filed returnable to that term and, under Acts 1900, p. 53, authorizing the recovery of attorney's fees in action on notes when so provided, unless the debtor fails to pay such debt "before the return day of the court to which suit is brought" the term is used to convey the same meaning. *Mt. Vernon Bank v. Gibbs*, 58 S. E. 269, 270, 1 Ga. App. 662.

The expression "return day," as used in Civ. Code 1910, § 4252, providing that agreements for attorney's fees in an action on a note are void, unless the debtor fails to pay such debt on or before the return day of the court in which suit is brought, means the same as filing day, or the last day on which

suits may be filed so as to be returnable to the next term. *Davenport v. Richards*, 75 S. E. 648, 649, 138 Ga. 611.

An obligation to pay attorney's fees embodied in a mortgage is collectible in the same manner as if it were contained in a note or other evidence of indebtedness. The "return day," prior to which the debt must be paid, is the "return day" of the court to which the foreclosure of the mortgage is returnable. *Sheffield v. Bainbridge Oil Co.*, 59 S. E. 725, 726, 3 Ga. App. 200.

#### RETURNABLE ACCORDING TO LAW

Rev. St. c. 83, § 94, provides that when a writ fails of sufficient service, etc., or is abated, or the action is otherwise defeated for any matter of form, the plaintiff may commence a new action within six months after the abatement or determination of the original suit. As originally enacted as section 11, c. 62, Laws 1821, it provided that any action which should be actually declared on, and in which the writ purchased therefor should fail of a sufficient service, etc., or when such writ should be abated, or the action avoided by demurrer or otherwise, for informality of proceedings, the plaintiff might commence another action upon the same demand and thereby save the limitation thereof. Section 8 of that chapter provided that any action of the case or debt, etc., which should be actually declared upon in a proper writ, returnable according to law within six years after the cause accrued, should be deemed and taken to be duly commenced within the meaning of that act. Held, that chapter 83, § 94, does not apply to a case where an action was dismissed because the writ was made returnable at a term other than the first term after its issuance, contrary to law, since the word "action," as used in section 11, had the same meaning as in section 8, where it was defined as one declared upon in a proper writ returnable according to law, which meaning has not been changed by any subsequent provision; and while the words "proper writ" did not mean one that could not be abated or defeated for any matter of form, but merely meant one adapted to the cause of action, the words "returnable according to law" were definite and explicit and not subject to judicial construction, and hence the word "writ," as used in section 94, means a writ returnable according to law. *Densmore v. Hall*, 84 Atl. 983, 984, 100 Me. 438.

#### RETURNS

See *Smelter Returns*.

The "return" by the judges of election is the evidence of the result of the election. *Graham v. Peters*, 93 N. E. 315, 316, 248 Ill. 50.

The word "returns" does not necessarily import a statement under oath. Section 6 of the oleomargarine act (Act May 2, 1902, c. 784, § 2, Stat. 197), in requiring wholesale

dealers to keep such books and render such returns as the Commissioner of Internal Revenue may by regulation require under prescribed penalties for its violation, has no relation to the tax to be assessed on such dealer, and the regulations made thereunder and in force prior to their revision in 1907, in requiring an oath to the returns, do not have the force of law in such sense that a false oath to a return subjects the maker to prosecution for perjury, under Rev. St. § 5392. *United States v. Lamson*, 165 Fed. 80, 82.

#### REUNION

When used without qualification, the word "reunion" ordinarily implies the resumption of a former relation. *Clark v. Brown* (Tex.) 108 S. W. 421, 439.

The Cumberland Presbyterian Church and the Presbyterian Church in the United States of America never having been united as churches, but, the Cumberland organization having been created by members of the other church who had departed from it, the use of the word "reunion," in the question submitted to the presbyteries as to whether they approved of the "reunion" and union of the Presbyterian Church in the United States of America and the Cumberland Church on a specified basis, did not change the legal effect of the proposition, which was in effect a union of two independent churches. *Ramsey v. Hicks*, 87 N. E. 1091, 1099, 44 Ind. App. 490.

#### REUS

The "reus or defendant" is a constituent part of every court, and is the one who is called upon to make satisfaction for the injury complained of by the plaintiff. *Accouss v. G. A. Stowers Furniture Co.* (Tex.) 83 S. W. 1104, 1105.

#### REVENUE

See *Board of Revenue; Estimated Revenue*.

An affidavit in sequestration proceedings, stating that plaintiff fears that defendant will make use of his possession to convert to his own use the fruits "or" revenues produced by the property, was not rendered indefinite or uncertain by the use of the word "or"; the words "fruits and revenues," as used in the sequestration statute, being synonymous. *Hurlbut v. Gainor*, 103 S. W. 409-411, 45 Tex. Civ. App. 588.

#### As public revenue

The city could not use such additional space to transmit electricity to use in pumping water for private use without compensation, the water rates paid being "revenue" under the ordinance; nor could it use that space to transmit electricity for power for private use, or to drive pumps or light the water.



bureau station, without compensation. *Catact Power & Conduit Co. v. City of Buffalo*, 115 N. Y. Supp. 1045, 1047, 131 App. Div. 485.

The title, "An act to provide a system of 'revenue,'" is broad enough to include provisions for special assessments. *City of Omaha v. Hodgskins*, 97 N. W. 346, 347, 70 Neb. 229.

The word "revenue," in Sess. Laws 1902, c. 3, relating to public revenue, is sufficiently broad to include all provisions having that general object in view, not only provisions for securing revenue as the result of a direct tax upon property, but revenue derived from the imposition of licenses, duties, excises, and a tax on occupations or on successions. *In re Magnes' Estate*, 77 Pac. 853, 856, 32 Colo. 527.

The word "revenue," as used in Const. art. 6, § 2, giving the Supreme Court original jurisdiction of cases relating to the revenue, civil cases in which the state shall be a party, quo warranto, and habeas corpus, has no reference to the revenues of municipal corporations, but to those only which are required for the purposes of general state administration. *Aachen & Munich Fire Ins. Co. v. City of Omaha*, 100 N. W. 137, 72 Neb. 112.

As used in Webster's lexical definition of the term "revenue" as being the "income of a nation, derived from its taxes, duties, or 'other sources,' for the payment of the national expenses," the phrase "other sources" would include the proceeds of the public lands, those arising from the sale of public securities, the receipts of the Patent Office in excess of its expenditures, and those of the Post Office Department when there should be such excess as there was for a time in the early history of the government. Indeed, the phrase would apply in all cases of such excesses. In some of them the result might fluctuate; there being excess at one time and deficiency at another. *People's United States Bank v. Goodwin*, 162 Fed. 937, 941.

## REVENUE LAW

As penal law, see Penal Law.

The term "revenue law" means a "law providing in terms for revenue." *F. J. Emerich Co. v. Sloane*, 95 N. Y. Supp. 39, 41, 108 App. Div. 330 (quoting and adopting the definition in *United States v. Hill*, 8 Sup. Ct. 308, 123 U. S. 681, 686, 31 L. Ed. 275).

"Revenue laws" are those laws only whose principal object is the raising of revenue, and not those under which revenue may incidentally arise. *Anderson v. Ritterbusch*, 98 Pac. 1002, 1006, 22 Okl. 761 (quoting and adopting definition in *The Nashville*, 17 Fed. Cas. 1176).

A "revenue law" is "any law which provides for the assessment and collection of a tax to defray the expenses of the government." *People's United States Bank v. Good-*

*win*, 162 Fed. 937, 941 (quoting and adopting the definition in *Peyton v. Bliss*, Woolw. 170, 19 Fed. Cas. 407).

"The true meaning of 'revenue laws' is such laws as are made for the direct and avowed purpose of creating and securing revenues or public funds for the services of the government." *H. A. Thierman Co. v. Commonwealth*, 97 S. W. 366, 368, 123 Ky. 740 (quoting *United States v. Mayo*, 26 Fed. Cas. 1231).

The provisions in the St. Louis city charter for the assessment of benefits to land for public improvements are not "revenue laws of this state," so as to give appellate jurisdiction to the Supreme Court, though the revenue officers of the city act under the charter for the state and the city. *State ex rel. Missouri Glass Co. v. Reynolds*, 148 S. W. 623, 625, 243 Mo. 715.

The acts of Congress relating to the embezzlement of money or property, such as fees by clerks of the federal courts, are not a "revenue law." *United States v. Mason*, 31 Sup. Ct. 28, 33, 218 U. S. 517, 54 L. Ed. 1133.

## Postal law

It is said in *Black's Dillon on Removal of Causes*, § 41, that "the post office laws of the United States are 'revenue laws,' within the meaning of this statute." In *Warner v. Fowler*, 4 Blatchf. 311, 29 Fed. Cas. 255, a suit against a postmaster for an alleged wrongful refusal to deliver a letter to the plaintiff was held removable under this statute; the court deciding that the post office laws of the United States are "revenue laws," within its meaning. In *Ward v. Congress Const. Co.*, 99 Fed. 598, 39 C. C. A. 669, it was held that a corporation, in the performance of a contract made with the Secretary of the Treasury for the building of an addition to a post office authorized by an act of Congress, is a person acting by authority of a revenue officer of the United States, given under color of his office; and a suit in the state court against the corporation to enjoin the building of such addition is removable into the Circuit Court of the United States, under Rev. St. § 643. The court said: "The provision of section 643 for the removal of causes has been liberally construed, as, for manifest reasons, it should be"—and *Warner v. Fowler*, *supra*, is quoted and approved. In *United States v. James*, 13 Blatchf. 207, 26 Fed. Cas. 577, it was held that: "While the post office laws are revenue laws, within the meaning of the statute cited, they are not laws for raising revenue, within the provision of the Constitution." *Bryant Bros. Co. v. Robinson*, 140 Fed. 321, 324, 79 C. C. A. 259.

## Reclamation act

Reclamation Act June 17, 1902, c. 1093, § 32 Stat. 388, providing for the construction of irrigation works on the public land by the United States, the cost to be repaid to it

by purchasers of the lands irrigated, is not a "revenue law of the United States" within the meaning of Rev. St. § 643, authorizing the removal of any suit brought in a state court against any officer appointed under or acting by authority of any revenue law of the United States, and such section does not apply to a suit against the officer in charge of a reclamation project because of acts done under color of his office. *City of Stanfield v. Umatilla River Water Users' Ass'n*, 192 Fed. 596, 597.

Reclamation Act June 17, 1902, c. 1093, 32 Stat. 388, by which the government advances the cost of reclamation works, and collects from purchasers of the lands benefited only sufficient to reimburse it for the expenditure, is not a "revenue law" within the meaning of Rev. St. § 643, which provides for the removal of suits brought in state courts "against any officer appointed under or acting by authority of any revenue law of the United States" on account of any act done under color of his office, and a suit against the officer in charge of reclamation work to determine water rights in a stream is not removable by him thereunder. Nor is there any reason of public policy why such suit should be transferred to the federal courts, as by the terms of the act the rights of the government as an appropriator of water are governed by the laws of the state and are no greater than those of any other user. *Twin Falls Canal Co. v. Foote*, 192 Fed. 583-585.

#### REVENUE OFFICER

To render an action against an officer of the United States removable from a state to a federal court by certiorari, under Rev. St. § 643, providing for such removal of suits "against any officer appointed under or acting by authority of any revenue law of the United States \* \* \* or against any person acting under or by authority of any such law," etc., the acts which constitute the cause of action must have some rational connection with official duties under a "revenue law," and in some way affect the revenue of the government, and such fact must appear on the face of the complaint in the action or the petition for the writ. An action for libel against the Assistant Attorney General for the Post Office Department and an inspector of such department, based on the promulgation by them of a fraud order against the plaintiff, does not meet such requirements, and is not removable under said section. *People's United States Bank v. Goodwin*, 162 Fed. 937, 942.

#### REVERSE

The term "repeal" with reference to statutes means the abrogation of a previously existing law by a subsequent statute, which either declares that the former shall be revoked, or which contains provisions so ir-

reconcilable with those of the earlier law that only one of the two can remain in force; the former being an express repeal. The term "repeal" is synonymous with "annul," "cancel," "reverse," and "abolish," so that a statute or ordinance is repealed when it is destroyed, abolished, abrogated, canceled, annulled, recalled, or rescinded by a later one. *City of St. Louis v. Kellman*, 139 S. W. 443, 445, 235 Mo. 687.

#### REVERSE OR AFFIRM WHOLLY OR PARTLY

Power to "reverse or affirm, wholly or partly," implies that part may be affirmed and part reversed, because the part not reversed must be affirmed. Thus, if in an action of ejectment for separate parcels of land, each depending upon an independent chain of title, there is a verdict for the plaintiff as to one and for the defendant as to the other, and each party appeals from the separate adjudication against himself, we see no reason why it is not within the power of the court to affirm as to one and reverse as to the other. So, when a special verdict by a jury, or separate findings by the court or referee, settle the facts as to independent causes of action, and distinct adjudications follow in the same judgment, a retrial of all the issues is not required on account of an error affecting one adjudication only. *City of Buffalo v. Delaware, L. & W. R. Co.*, 68 N. E. 587, 588, 176 N. Y. 308.

#### REVERSAL

Code Civ. Proc. § 508, providing that if a judgment, for the satisfaction of which lands are sold, shall be thereafter reversed, such reversal shall not defeat or affect the title of the purchaser, contemplates, by the word "reversal," a reversal in any proceeding in any court having authority to set aside the judgment. *Kazebeer v. Nunemaker*, 118 N. W. 646, 648, 82 Neb. 732.

Rev. St. 1899, § 639, provides that plaintiff may dismiss or take a nonsuit at any time before the suit is submitted to the jury or to the court, and not afterward. Acts 1905, p. 138, enacted in lieu of Rev. St. 1899, § 2868, provide that every action instituted under the preceding sections of the chapter shall be commenced within one year after the cause of action accrues, provided that if any action shall have been commenced within the prescribed time, and plaintiff suffer a nonsuit, or, after verdict for him, the judgment be arrested or reversed on appeal or error, plaintiff may commence a new action, from time to time, within one year after such nonsuit suffered or judgment arrested or reversed. Rev. St. 1899, § 866, authorizes the appellate courts to examine the record and award a new trial, reverse or affirm the judgment, or give such judgment as the trial court should have given. Held, that where the Supreme Court has rendered a judgment merely re-

versing the judgment for plaintiff on the law and the facts, plaintiff cannot within a year bring another action on the same cause of action; such judgment not being equivalent to a nonsuit, the "reversal" mentioned in the statute meaning a reversal in which the merits were not passed on. *Strottman v. St. Louis, I. M. & S. Ry. Co.*, 128 S. W. 187, 193, 228 Mo. 154, 30 L. R. A. (N. S.) 377.

### REVERSAL IN PART

Where a judgment for plaintiff was affirmed by the Supreme Court on the condition that he remit a certain item of damage, to show which evidence was admitted when the pleadings did not authorize its recovery, the judgment otherwise being reversed for new trial, the Supreme Court's judgment was an "affirmance in part and a reversal in part," within Comp. St. 1910, § 5126, authorizing an apportionment of the costs in such case between the parties in such manner as the court deems equitable. *Henderson v. Coleman*, 115 Pac. 439, 442, 455, 19 Wyo. 183.

### REVERSED AND SETTLED

A trustee, holding title to land for complainant's testatrix, instituted ejectment against a loan company which had a mortgage on the land, and recovered judgment, from which the company took an appeal. While this appeal was pending, an agent of the company made complainant and his testatrix a loan, and took a mortgage on certain other property to secure its payment according to a contract whereby the mortgagors agreed to quitclaim, at the mortgagee's request, their interest in the land in controversy to the loan company. This quitclaim conveyance, which was duly executed as stipulated, was to satisfy the loan if the mortgagor's judgment in the ejectment suit was affirmed on appeal, but the loan was to become due and payable if the judgment was "reversed and settled" in favor of the company. Held, the words "reversed on appeal and settled" implied that the judgment was not only to be reversed but something was to be settled by the reversal, and that was the title to the lands in question. *Bradshaw v. Gunter*, 33 South. 549, 551, 135 Ala. 240.

### REVERSED FOR PROCEEDINGS CONSISTENT WITH OPINION

Where a judgment was "reversed for proceedings consistent with the opinion" of the Court of Appeals, the mandate did not authorize the trial court to summarily enter judgment in favor of defendants, but required submission of the issues to a jury after a trial had in conformity with the opinion of the Court of Appeals, with the duty to give a peremptory instruction in case the evidence introduced on the retrial was in substance the same as that offered on the preceding trial. *Quisenberry v. Chenault* (Ky.) 97 S. W. 803.

## REVERSION

A "reversion" is a future interest remaining in the person creating estates in favor of others, after such estates are taken out, and to which the grantor or his heirs will be again entitled upon the termination of such other estates. *Brown v. Brown*, 93 N. E. 357, 359, 247 Ill. 528.

"A 'reversion' is a vested interest or estate, inasmuch as the person entitled to it has a fixed right of future enjoyment." *State ex rel. Tozer v. Probate Court of Washington County*, 113 N. W. 888, 893, 102 Minn. 268 (citing 2 Washburn, Real Prop. [5th Ed.] 801; Gray, Perpetuities [2d Ed.] 113, 113a).

A "reversion" is the residue of an estate left in the grantor and his heirs to commence in possession after the determination of some particular estate granted out by him. *Mosca Town Co. v. Wellington*, 89 Pac. 783, 785, 39 Colo. 326, 121 Am. St. Rep. 175.

"An estate in 'reversion' is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him." "A 'reversion' is the returning of land to the grantor or his heirs after the grant is over." *Frank Fehr Brewing Co. v. Johnston* (Ky.) 97 S. W. 1107, 1109 (quoting Bl. Comm. p. 175, and Sir Edward Coke, as quoted approvingly in *Alexander v. De Kermel*, 81 Ky. 345).

## REVERT

The Standard Dictionary defines "revert" to mean "to return, come or fall back." *Armstrong v. Barber*, 88 N. E. 246, 250, 239 Ill. 389.

An agreement between two sisters, who jointly owned a mortgage, that, in consideration of the one boarding the other, the property of the latter should "revert" to the former on her death does not show a completed assignment thereof; "at best, giving to the word 'revert' a nonnatural meaning, the agreement in question could not be more than an undertaking to make a will in C.'s favor." *Thompson v. West*, 40 Atl. 197, 199, 56 N. J. Eq. 660.

Where one who held the legal title to a farm, with a resulting trust to his daughter, with whose money it had been purchased, at her request conveyed the same to a third person, on condition that the grantee should provide a good and sufficient home and living for the daughter "during her natural life," but, if the daughter should see fit to marry, then the farm conveyed should "revert back" to the daughter, her heirs, etc., after marriage, provided she or they should reimburse the grantee for all the expenses of living up to the time of marriage, and for all the improvements made on the land, the words "revert back" were intended to operate as a conveyance over to the daughter, by which, in

addition to the equitable title which she had in the beginning, she would, on the contemplated contingency, be invested with the legal title to the land, and the daughter, having married and reimbursed the grantee, according to the conditions of the deed became immediately invested with the legal title. *Battey v. Hopkins*, 6 R. I. 443, 446.

In an act granting public lands to a railroad company, "the declaration that the lands 'shall revert to the United States' is practically equivalent to a declaration that the act granting such lands shall cease to be operative if the company fail to complete its road within a specified time." *Spokane & B. C. R. Co. v. Washington & G. N. R. Co.*, 95 Pac. 64, 66, 49 Wash. 280 (quoting *Bybee v. Oregon & C. R. Co.*, 11 Sup. Ct. 641, 643, 139 U. S. 663, 675, 35 L. Ed. 305).

#### As go or pass to

"Revert," as used in a will providing that on a certain contingency property should revert to testator's son or his issue, meant to go or pass to. *Goerlitz v. Malawista*, 8 N. Y. Supp. 832, 833, 56 Hun. 120.

A mother, who had inherited from her husband an undivided one-third of a farm in fee simple, contracted with her children and grandchildren, who had inherited an undivided two-thirds of the farm, the children to give the mother their interest during her life, or as long as she remained a widow, she to have the profits for her support and the improvement of the farm, and to pay all demands that might come against the estate, taxes, etc., and at her death or remarriage the farm, together with its appurtenances, was to "revert" to the legal heirs equally. Held, that inasmuch as the two-thirds interest of the children and grandchildren was theirs in fee simple, subject to the mother's life interest under the contract, the word "revert," if used solely in connection with that portion, would be unnecessary, and the parties' intention was that the farm as a whole should revert to the legal heirs equally, the word "revert" being used in the sense of "go" or "pass," and hence the mother's one-third interest could not after her death be sold to pay debts of her estate. *Warrum v. White*, 86 N. E. 959, 960, 171 Ind. 574.

#### As terminating estate

Under a conveyance of standing timber, the timber, whether cut or uncut, remaining on the land after three years to revert to the grantor, logs remaining on the land after that time became the property of the grantor, though the conditions of the agreement had been otherwise performed; the word "revert" implying a retransfer of title, and the limitation of time for removal of the timber not merely affording an action for damages for an entry after the stipulated time to remove the logs. *Dye v. East Shore Woodware Co.*, 134 N. W. 986, 987, 169 Mich. 78.

The word "revert," as used in a will providing that, if "any of my children die without issue of their body, his or her portion shall 'revert' to my estate for the benefit of the living heirs," means to come back or return, and that, if any of the children die without issue of their bodies, his or her portion should return to the estate for the benefit of the living heirs. *Cochran v. Lee's Adm'r* (Ky.) 84 S. W. 337, 338.

Testator by will "set apart for my son the Store Houses & Lots Now Occupied by him and all accts against him from me Squared This all in case of his death to revert to his children—Also all real estate to him and Elbert Share & Share alike in case of my death to them or their Children Only." Ky. St. § 4841, provides that, if a devisee dies before the testator leaving issue who survive the testator, such issue shall take the estate devised as the devisee would have done if he had survived the testator, unless a different disposition is made by the will. Held, that the word "revert" meant that, if C. was not living when the testator died, his children would take the property that would have gone under the will to their father, if living, and that C. took the fee, subject to be defeated by his death before that of the testator. *Blackwell v. Blackwell*, 143 S. W. 1010, 1011, 147 Ky. 264.

A will bequeathed to testator's wife all his household property, and devised to her the homestead for life, "at her death to revert to my estate," gave her one-third of the rents during life from land devised to testator's son, and also devised certain land to another son, and the succeeding paragraph required the "residue" of the estate to be divided, one-half to testator's wife, one-eighth to each son, etc. Held, that the will did not give a contingent remainder in the homestead to those persons who were testator's heirs at the widow's death, but the remainder interest therein fell into the "residue" of the estate, so that the widow, upon partition during her life, would be entitled to a one-half interest therein; the words "revert to my estate" ordinarily meaning "the return to the aggregate of all the property which I may leave at my death," and the word "estate" not being equivalent to the word "heirs." *Downing v. Grigsby*, 96 N. E. 513, 514, 251 Ill. 568.

#### REVERT BACK

See Revert.

#### REVERTER

See Possibility of Reverter.

#### REVIEW

See Bill of Review; Board of Tax Review; Petition for Review; Writ of Review.

Return to writ, see Return.

### As review on appeal

Sess. Acts Mo. 1901, p. 162, § 23, providing that any action or neglect of a political convention or committee, or election officer or board, with regard to the right of any person to participate in a primary election, convention, etc., shall be reviewable by the appropriate remedy of mandamus or certiorari, and that the courts shall have summary jurisdiction, upon complaint of any citizen, to "review" such action or neglect, does not authorize the courts to entertain a primary election contest. The word "review," when applied to the review by an appellate court of the action of a court of original jurisdiction, has reference to cases which are before the appellate court either on appeal, writ of error, or certiorari. But this term is inappropriate to proceedings of the election commissioners, to review whose acts no appeal or writ of error lies, and to whom the writ of certiorari is inappropriate. *State ex rel. Bentley v. Reynolds*, 89 S. W. 877, 880, 190 Mo. 578.

### REVISE

Power given to code commissioners to "revise, simplify, arrange, and consolidate" public statutes of the state did not invest them of themselves with power to enact any new statutory law, or to revive any statute or statutes not in force at the time of the revision. *Mathis v. State*, 12 South. 681, 683, 31 Fla. 291.

The act to provide for the revision and consolidation of the statute laws of the United States, approved June 27, 1866 (14 Stat. 74), authorizes the appointment of three persons as commissioners to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature, in force at the time the commissioners may make the final report of their doings. The report was made and acted on, and was entitled "An act to revise and consolidate the laws of the United States," etc. This act was approved, and the result was a book, which Congress declared "shall be designated and cited as the Revised Statutes of the United States." It is held that the enactment of the Revised Statutes by act of Congress was not the enactment of a body of laws as original legislation, but was simply the enactment of a more convenient expression of the law as it existed on December 1, 1873. It did not enact or re-enact anything as law which was not the law on that date. *United States v. Moore*, 26 Fed. Cas. 1306, 1307.

"Not only is it true that article 4, § 46, of the Constitution of 1875, does not prohibit the Legislature from doing more than is therein required to be done in regard to getting out a new Code, yet the word 'revision,' therein used, suggests that such changes as are admissible are within the purview of the

section. Definition 3, in Webster's International Dictionary, of the word 'revise' is 'to review, alter, or amend; as to revise statutes.'" *State v. Towery*, 39 South. 309, 143 Ala. 48.

Const. § 202, provides that any amendment to the Constitution may be proposed in either house of the legislative assembly, and, if agreed to by the majority of each of the houses, it may be referred to the next legislative assembly, when, if agreed to in the same manner, it shall be submitted to the people. Sections 215 and 216 locate the public institutions of the state, including two state normal schools, with a proviso that no other institution similar in character to those located shall be established without a revision of the Constitution. Held, that sections 215 and 216 may be amended to provide for the location of additional institutions by the method provided in section 202; the terms "revise" and "amend" being used synonymously in the Constitution. *State ex rel. v. Taylor*, 133 N. W. 1046, 1048, 22 N. D. 362.

### REVISION

"'Revision' of statutes implies a re-examination of them. The word is applied to a restatement of the law in a corrected or improved form. The restatement may be with or without material change. A revision is extended to take the place of the law as previously formulated. By adopting it the Legislature say the same thing in effect as when a particular section is amended by the words 'so as to read as follows.' The revision is a substitute. It displaces and repeals the former law as it stood relating to the subjects within its purview. \* \* \* The purport of the numerous cases cited is that where a statute is revised, or a series of acts on the same subject are revised and consolidated into one, all parts and provisions of the former act or acts that are omitted from the revised act are repealed." *Pratt Institute v. City of New York*, 75 N. E. 1119, 1121, 183 N. Y. 151, 5 Ann. Cas. 198 (quoting and adopting definition in *Suth. on St. Const.* [Lewis' Ed.] § 269, 270).

A "revision" of statutes is intended to take the place of the law as previously formulated. The revision is a substitute. It displaces and replaces the former law as it stood relating to the subject within its purview. *Jeffries v. Board of Trustees of Columbia Graded Common School*, 122 S. W. 813, 816, 135 Ky. 488.

A "revision" of a decree involves a re-examination of the evidence upon which it was made; and evidence used on the original trial, or which might have been presented by the exercise of due diligence, is not for that cause to be rejected. Whether justice requires a modification of a decree must be determined from all the facts in the case. *Wallace v. Wallace*, 67 Atl. 580, 581, 74 N. H. 256,

18 Ann. Cas. 293 (citing *Ela v. Ela*, 63 N. H. 116, 121, 122).

## REVIVE

### Judgments

"Revive," as applied to a dormant judgment, means to restore or bring the judgment to life. *Thornhill v. Hargreaves*, 107 N. W. 847, 849, 76 Neb. 582. See, also, *Leman v. Cunningham*, 85 Pac. 212, 214, 12 Idaho, 135.

While a "revivor proceeding" is not in one sense the commencement of a new action, it is the commencement of new and different proceedings under the provisions of the statute for the revivor of a dormant judgment. *St. Paul Harvester Co. v. Mahs*, 117 N. W. 702, 703, 82 Neb. 336.

### Will

A revocatory clause in a will destroys at once an earlier will; and such earlier will is not "revived," on the destruction of the later will, by the testator's oral declarations of an intention to revive it, but his intention must be in writing formally sufficient to satisfy the statute. *Danley v. Jefferson*, 114 N. W. 470, 472, 150 Mich. 590, 121 Am. St. Rep. 640.

## REVIVOR

See Judgment of Revivor.

## REVOCABLE

See Irrevocable.

## REVOKE—REVOCATION

See Implied Revocation.

Revocation of license as suit, see Suit for Penalty or Forfeiture.

### As regulate

To say that the words "regulate" and "restrain" do not in any sense mean "revoke" is distinctly erroneous. Under Milwaukee City Charter, as amended (Laws 1874, pp. 327, 330, c. 184, subc. 4, § 3, subsecs. 9, 40), empowering the common council to regulate and restrain the sale of milk, to tax, license, regulate, and restrain vendors of milk, and to fix and regulate the amount of license, etc., the council had power to revoke milk licenses and to vest such power in the health commissioner, with the right to exercise the same summarily and even without notice. *State ex rel. Nowotny v. City of Milwaukee*, 121 N. W. 658, 659, 140 Wis. 38, 133 Am. St. Rep. 1060 (overruling construction in *State ex rel. Sepic v. City of Milwaukee*, 109 N. W. 421, 129 Wis. 562).

### As repeal

Words "repeal" and "revoke" are synonymous. *Wilson v. People*, 85 Pac. 187, 189, 36 Colo. 418.

## Revocation of letters of administration

Rev. St. 1909, § 9, provides that the probate court, or the judge or clerk thereof in vacation, "subject to the confirmation or rejection of the court," shall grant letters of administration. Rev. St. § 289, subd. 9, gives a right of appeal from all orders revoking letters of administration, and subdivision 15 provides that the right of appeal therein provided shall extend to any heir, creditor, or other person having an interest in the estate under administration. Held, that an administrator appointed in vacation had no statutory right of appeal from an order of the probate court thereafter made in term, rejecting his vacation appointment; there being no "revocation" of any letters of administration within subdivision 9, and the vacation appointment not having vested the temporary administrator with any interest authorizing an appeal under subdivision 15. *Marshall v. Shoemaker's Estate*, 144 S. W. 1120, 1122, 164 Mo. App. 429.

## Revocation of will

There are two kinds of "revocations": One by the act of the party, and the other by operation of law. In *re Teopfer's Estate*, 78 Pac. 53, 55, 12 N. M. 372, 67 L. R. A. 315.

It is not strictly accurate to use the word "revocation" in stating that the conveyance of the subject of a devise is a "revocation" of the will, but the devise fails because, when the will becomes effective, there is no property within its terms belonging to the testator. In *re Miller's Will*, 105 N. W. 105, 106, 128 Iowa, 612.

Where a clause of a will gave testator's entire estate to his wife, C., for life, or so long as she remained his widow, and the next clause provided that upon her decease or remarriage the property should go to his sons, but before his death the testator learned that his supposed wife had a husband living, and he erased her name wherever it appeared in the will, the obliteration "revoked" the gift to C., even if the incidental effect was to increase the residue given to the sons. *Collard v. Collard* (N. J.) 67 Atl. 190.

## Same—Ademption distinguished

A particular bequest, although unrevoked, may become practically inoperative, if the testator, in his lifetime, gives to his legatee the specific thing which the will directs to be given after his death, or if the testator so deals with property which is specifically bequeathed to a legatee that, upon his death, the execution of his intention, in respect to this legatee, is impossible. In such case he is said to adeem his bequest, and the practical result necessarily involved in his act is spoken of as an ademption of the legacy. Where the law recognizes a power of implied "revocation" by acts of the testator similar to those which must result in ademption, there may, in some cases, be no distinction

between ademption and revocation; but in Connecticut, where such implied revocation is forbidden by statute, the clauses of a will containing a bequest are not revoked by acts which may operate as an ademption, but remain as the legal declaration of the testators' intention to be carried out unless the execution after his death is impossible; and so a present gift, or part only of a testamentary bequest, or a sale or conveyance to a third party of a part only of property specifically bequeathed does not prevent the execution of the testator's intention as to the remainder, and the ademption is not total but pro tanto. *Jacobs v. Button*, 65 Atl. 150, 152, 79 Conn. 360.

## REVOLVER

See, also, Pistol.

The furnishing of a Stevens 32-caliber rifle by a father to his minor son was not an offense, within Rev. St. 1898, § 4397, prohibiting any person from giving any "pistol or revolver" to a minor. *Taylor v. Sell*, 97 N. W. 498, 120 Wis. 32.

## REWARD

A "reward" is a recompense or premium offered by the government or an individual in return for special or extraordinary services to be performed, and may be made orally or in writing, either to a particular person or class, or to any and all persons complying with its terms. *Zwolanck v. Baker Mfg. Co.*, 137 N. W. 769, 772, 150 Wis. 517, 44 L. R. A. (N. S.) 1214.

### As proposition for contract

The "offer of a reward" and the acceptance of the offer by the performance of the service involved in the offer constitutes a contract which is not different from other contracts in respect to the rules of construction. In such contracts regard should not be had to the mere letter to the exclusion of the spirit. As said in *Haskell v. Davidson*, 40 Atl. 330, 91 Me. 488, 42 L. R. A. 155, 64 Am. St. Rep. 254: "An offer of a reward is a proposal. The party making it may insert his own terms, and no person can become entitled to the reward without a performance of all the terms contained in the proposal. But such performance need not be a literal compliance with the terms of the offer. It is sufficient if the party claiming the reward has substantially performed the service required by the proposal. An offer of a reward for the 'arrest and conviction' of an offender cannot be taken literally. The person who by reason of the offer is induced to make an investigation and finally obtains possession of sufficient facts to authorize the arrest of an offender, and his subsequent conviction for the crime referred to in the offer, certainly cannot himself convict the offender. The

service contemplated by a person making such an offer, and which the proposal should be construed as meaning, must be the obtaining and giving to some proper person interested, sufficient information in relation to the perpetrator of the crime, and his whereabouts, as to authorize and secure the arrest of the offender, and subsequently to procure his conviction by a court of competent jurisdiction." *McClaghry v. King*, 147 Fed. 463, 469, 79 C. C. A. 91, 7 L. R. A. (N. S.) 216, 8 Ann. Cas. 856 (distinguishing *Shuey v. United States*, 92 U. S. 73, 23 L. Ed. 697).

## RHEUMATISM

"Rheumatism" is defined by the Century Dictionary as: "The disease specifically known as acute articular rheumatism. The term including also subacute and chronic forms apparently of the same causation." Acute articular rheumatism is defined as: "An acute febrile disease, with pains and inflammation of the joints as the prominent symptoms." Plaintiff was insured by a policy of accident insurance issued by defendant, in which the latter, upon the conditions named in the policy, promised to pay insured "an illness indemnity of \$30 per month, or at that rate for any proportionate part of a month for the time, after the first week, the insured is necessarily and continuously confined by a legally qualified physician, by reason of acute illness that is contracted and begins after this policy has been in full force and effect, without delinquency, for thirty consecutive days immediately preceding the commencement of such illness." The policy also contained this clause: "Or in case of illness resulting from tuberculosis, rheumatism, paralysis, lumbago or lame back, sciatica, varicose veins, venereal diseases, dementia or insanity; then in all such cases referred to in this paragraph, the limit of the company's liability shall be one-tenth of the amount which would otherwise be payable under this policy, anything to the contrary herein notwithstanding." During the period covered by the policy, the plaintiff was sick with rheumatic fever, and was entitled, under the contract of insurance, to recover the sum of \$40, unless that amount should be reduced to one-tenth thereof by reason of the provision in the policy last quoted. Held, that the disease was one form of rheumatism, and must be considered to have been included within the meaning of the word "rheumatism," as it was used in the policy. *Holmes v. Continental Casualty Co.*, 65 Atl. 385, 102 Me. 287.

## RHINOSCOPE

The "rhinoscope" is a scientific instrument for the exploration of the nasal cavities. *Atchison, T. & S. F. R. Co. v. Palmore*, 75 Pac. 509, 510, 68 Kan. 545, 64 L. R. A. 90.

## RIBS

Where, on the trial of an action for the breach of a written agreement for the sale and delivery of a given number of pounds of "ribs," of the value at the agreed price, of more than \$50, the evidence showed that the term "ribs" is ambiguous, even to dealers in the general class of goods to which the alleged contract referred, there being several distinct kinds of "ribs" known to the trade, and that the plaintiff understood, from a parol agreement with the defendant, that the "ribs" referred to in the writing were of a particular kind and of a given average weight, the writing did not sufficiently identify its subject-matter nor contain the entire agreement, as required by the statute of frauds, and therefore the plaintiff could not recover. *Borum v. Swift & Co.*, 53 S. E. 608, 609, 125 Ga. 198.

## RICH

See Very Rich.

A married person leaving an estate valued at less than \$500 cannot be said to have died "rich," within the meaning of *Merrick's Rev. Civ. Code*, art. 2382. *Crockett v. Madison*, 43 South. 388, 389, 118 La. 728.

"Rich" as applied to land is defined as fertile, fruitful, producing or yielding abundantly; of great price or money value; abounding in desirable or effective qualities or elements; of superior quality; opposed to poor—and representations that the soil of land is rich, fertile, and very productive is a statement of a fact, unless qualified in some manner that would indicate that only an opinion or estimate was intended. *Boltz v. O'Conner*, 90 N. E. 496, 498, 45 Ind. App. 178.

## RIDE

See Continuous Ride.

The words "ride or drive," within a statute prohibiting one to "ride or drive" faster than a common pace, are not confined to animals or limited in any manner; anything capable of being ridden or driven coming within the statute. They apply to horses, bicycles, motorcycles, or automobiles, when ridden or driven. A statute providing a fine where one shall "ride or drive faster than a common pace" in cities, etc., covers the field of an ordinance declaring the penalty against one who shall drive an automobile on the public streets of a town at a greater speed than 15 miles per hour. *State v. Thurston*, 66 Atl. 580, 581, 28 R. I. 265.

## RIDE ON PLATFORM

That a passenger, in leaving a car, had stepped with one foot on the platform while the other remained in the doorway when he was injured, did not present a cause of action for injury while "riding on the platform,"

within *Burns' Ann. St.* 1908, § 5316, relieving the carrier from liability for injury to a passenger on the platform in violation of the printed regulations of the company posted in a conspicuous place inside the car. *Lake Erie & W. R. Co. v. Cotton*, 91 N. E. 253, 255, 45 Ind. App. 580.

## RIDER

See Separate Rider.

A "rider" is a foreign provision attached to a bill. To prevent such provisions from being enacted under the cloak of meritorious legislation, the Constitution requires that a bill shall embrace but one subject-matter, and declares that any matter foreign to the title of the bill shall be void; but this constitutional provision does not require that the title to an act shall be an index to all of its provisions, and, so long as the provisions are cognate, attinent, and germane to the subject-matter of the title, no violence is done to the Constitution. *Ex parte Hallawell*, 99 Pac. 490, 491, 155 Cal. 112.

The term "rider" is applied to an additional paper attached to and forming a part of an insurance policy. *Knowlton v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 62 Atl. 289, 290, 100 Me. 481, 2 L. R. A. (N. S.) 517.

## RIDING AT OWN RISK

The term "riding at his own risk," in a rule of a carrier that persons riding on the platforms do so at their own risk, means nothing less than at the risk of dangers resulting from the negligence of the carrier or its servants, and one boarding a crowded car with knowledge of the rule assumes the risk of injury resulting from his attempting to again board the car after leaving it to enable others to alight, though the carrier's servants were negligent in starting the car. *Tompkins v. Boston Elevated Ry. Co.*, 87 N. E. 488, 489, 201 Mass. 114, 20 L. R. A. (N. S.) 1063, 131 Am. St. Rep. 392.

## RIDICULE

As defined by the Century, Webster's, and Worcester's Dictionaries, the word "ridicule" conveys the idea of contempt and disparagement. *Cohen v. New York Times Co.*, 133 N. Y. Supp. 206, 210, 153 App. Div. 242.

## RIFLE

See Parts of Rifles.

As pistol, see Pistol.

As tool, see Tools—Tools of Trade.

As toy firearm, see Toys.

## RIGGING

The foreman in charge of the construction of a building directed employes who had just raised a column from the first floor to the second to bring to the first floor all the rigging, consisting of ropes and blocks and



chains. The rigging hung above a rope supporting a scaffold in use. The employes not only removed the rigging, but untied the rope, causing the scaffold to fall, injuring an employe working thereon. Held, that the foreman was not guilty of actionable negligence in giving the order, since the word "rigging," when applied to the handling of heavy loads of timber, metal, or stone, means the tackle, lines, and fastenings with which the work is accomplished, and the order did not refer to the rope supporting the scaffold. *McCullin v. James Black Masonry & Construction Co. (Mo.)* 151 S. W. 973.

#### **RIGGING (Of Ship)**

See Ship's Rigging and Apparel.

### **RIGHT—RIGHTS**

See By Right; Civil Right; Claim of Right; Color of Right; Common Right; Constitutional Right; Determined Rights; Distinguish Between Right and Wrong; Exclusive Right; Exercised the Right; Holder in His Own Right; Homestead Right; Inherent Right; Legal Right; Life Right; Marital Rights; Material Right; Mining Right; Mutuality of Legal Right; Natural Rights; Patent Right; Political Right; Preferential Right; Primary Right; Prior Right; Property Rights; Prospective Right; Riparian Right; Same Right; Substantial Right; Terms and Conditions, Rights and Privileges; Valuable Right; Vested Right; Water Right.

A "right" is defined to be that interest which a person actually has in any subject of property entitling him to hold or convey it at pleasure. *Haskins v. Ryan*, 64 Atl. 436, 438, 71 N. J. Eq. 575.

The word "right" denotes, among other things, "property," "interest," "power," "prerogative," "immunity," and "privilege"; and in law is most frequently applied to property in its restricted sense. As an enforceable legal right it means that which one has a legal right to do. *Shaw v. Proffitt*, 109 Pac. 584, 57 Or. 192, Ann. Cas. 1913A, 63 (citing 7 Words and Phrases, p. 6220).

A "right" has been defined to be a well-founded claim which means nothing more or less than a claim recognized or secured by law. Rights which pertain to persons, other than such as are termed "natural rights," are essentially the creation of municipal law, written or unwritten, and it must necessarily be held that a "right," in the legal sense, exists, when, in consequence of given facts, the law declares that one person is entitled to enforce against another a claim, or to resist the enforcement of a claim urged by another. Facts may exist out of which, in the course of time or under given circumstances, a right would become fixed or

vested by operation of existing law; but until the state of facts, which the law declares shall give a right, comes into existence there cannot be in law a right. *Mellinger v. City of Houston*, 3 S. W. 249, 251, 68 Tex. 36.

The general purpose of the several statutes relating to married women indicates the intention of the Legislature to furnish to a married woman, in her own name, all the remedies which are essential to the enjoyment and use of her property, and such as are applicable to the enforcement of all such contracts as she is authorized to make in relation to her property. The statute providing for her appropriate remedies to enforce and protect her "rights" is not to be construed as only intending to furnish separate remedies for the enforcement and protection of her separate "rights" in the property itself. The word "rights," as used in the statute, seems to include more than the mere right of property. It embraces such rights as spring out of its lawful management or as are incident to its ownership and the power of disposition. *Springer v. Berry*, 47 Me. 330, 337.

#### **As correlative with duty**

"Right" and obligation are correlative terms. *McDonald v. Bayard Sav. Bank*, 98 N. W. 1025, 1026, 123 Iowa, 413.

#### **As enforceable legal right**

A "right" is a claim or title to an interest in anything whatsoever that is enforceable by law. Thus a contract for the sale of patent rights, providing that the assignor guaranteed peaceable possession of the rights to said patent and invention in a certain county, and all expenses which may be incurred for suits for infringement or for ousting present contractors within said territory, does not stipulate for peaceable possession of the territory named, but for peaceable possession of the "rights" to said patent, which means the rights which the assignor had; and hence the assignee could sue for infringement, or oust other contractors and recover his expenses therefor, but could not recover for profits made in the county through infringements by others than the assignor. *Bailey v. Miller*, 91 N. E. 24, 25, 45 Ind. App. 475.

Where, in an action on a benefit certificate, plaintiff alleged full performance on the part of insured, a stipulation that each party reserved any "right" to show waiver did not authorize the admission of evidence to show a waiver of full performance by insured. *Victors v. National Provident Union*, 99 N. Y. Supp. 299, 300, 113 App. Div. 715.

#### **Ownership synonymous**

"Right," as defined in law, is an enforceable claim or title to any subject-matter whatever. Webster defines it as a legal claim, ownership, property. As used in a stipulation for the commencement of a suit

to test plaintiff's right to certain money, it was synonymous with "ownership." *Hathorn v. Robinson*, 56 Atl. 1057, 1059, 98 Me. 334.

#### As power

The word "rights," as used in Borough Act, § 96 (P. L. 1897, p. 329), providing that boroughs shall retain and enjoy all the rights and property heretofore possessed by them, refers to rights in the nature of property rights, and contemplates the retention of property rights, and not powers, such as a power to license inns and taverns, and which, not having been given by the act, must be deemed to have been withheld, though formerly enjoyed by certain special charter boroughs, in view of the provision of the same section that boroughs should have all the powers conferred by the act, thus excluding by implication powers not conferred. *Smith v. Borough of Hightstown*, 57 Atl. 901, 903, 71 N. J. Law, 276. See, also, *Id.*, 60 Atl. 393, 394, 71 N. J. Law, 536.

The distinction between "power" and "right," whatever may be its value in ethics, in law is very shadowy and unsubstantial. He who has legal power to do anything has the legal right. *State v. Koch*, 85 Pac. 272, 274, 33 Mont. 490, 8 Ann. Cas. 804 (citing *Kane v. Commonwealth*, 89 Pa. 522, 33 Am. Rep. 787).

"The grant of a 'right' is by reasonable construction a grant of power to do all the acts reasonably necessary to its enjoyment." *Memphis State Line R. Co. v. Forest Hill Cemetery Co.*, 94 S. W. 69, 72, 116 Tenn. 400 (quoting and adopting the definition in *Inhabitants of Springfield v. Connecticut River R. Co.* [Mass.] 4 Cush. 72).

Rev. St. 1899, § 6399, provides that on the extension of the territorial limits of a city to include any portion of another city, the corporate existence of the incorporated city should ipso facto cease, and all property and "rights" of every kind, belonging to and vested in such incorporated city, shall by operation of law vest in the city making the extension, which shall at once become liable for all debts and liabilities of the incorporated city. Held, that the word "right," as used in such section, was not limited to property rights, but included powers, privileges, etc., so that where the city of Westport, prior to its absorption in Kansas City, executed a special tax bill to complainant, which was void, owing to the mistake of the officer of that city, Kansas City, after the absorption, had power to issue to complainant a valid tax bill in lieu thereof. *Barber Asphalt Pav. Co. v. Field*, 111 S. W. 907, 908, 134 Mo. App. 663.

#### Status synonymous

The word "status," as applied to the relationship of parent and child, husband and wife, or other like relation, is not synonymous with the word "right," but is to be con-

strued as meaning "relationship," and hence the word "status" does not necessarily imply the existence of the right of inheritance. *Calhoun v. Bryant*, 133 N. W. 266, 271, 28 S. D. 266.

#### Fishery

The most favored nation clause of the Chinese treaties, providing that citizens of foreign nations shall have the same privileges and "rights," and shall not be charged any higher imposts or duties than those paid by native citizens, does not include the right to take fish from the tide waters of a state. *Leong Mow v. Board of Com'rs for Protection of Birds, Game, and Fish*, 185 Fed. 223.

#### RIGHT ACCRUED

See Accrued Right.

#### RIGHT ACQUIRED BY MARRIAGE

A right to sue for alienation of affection is a "right acquired by the marriage," within Code, § 3181, which provides that a divorce decree shall forfeit such rights of the guilty party. *Hamilton v. McNeill*, 129 N. W. 480, 481, 150 Iowa, 470, Ann. Cas. 1912D, 604.

#### RIGHT AND BENEFIT

Testator gave his brother the remainder of testator's share of his father's estate, to have full use and control of it for life, and provided that, if his brother's wife should survive him, she should have rights and benefits as long as she remained single. Held, that the gift to the brother's wife of "rights and benefits" meant not only the income, but also the corpus of the estate. A gift of "rights and benefits" so long as the legatee should remain single, with a limitation over upon her remarriage, is an absolute interest, subject to be defeated only by remarriage. *Jennings v. Reed*, 72 Atl. 939, 940, 75 N. J. Eq. 530.

#### RIGHT AND FRANCHISE

In Rev. Codes, § 1615, providing that a proposal to construct irrigation works shall state the price at which perpetual water rights will be sold to the settlers, such rights to embrace a proportionate interest in the canal or other waterworks together with the rights and franchises attached thereto, the term "rights and franchises" means water rights as well as all other rights, including dams, canals, ditches, laterals, etc. *State v. Twin Falls Canal Co.*, 121 Pac. 1039, 1043, 21 Idaho, 410.

#### RIGHT AND PROPER

The difference in language between Comp. St. 1910, § 5016, providing that upon a finding for a plaintiff in replevin who has possession of the property the jury may assess damages for the "illegal detention," and section 5017, providing that where property is taken by a writ of replevin and delivered to the plaintiff, or retained by the sheriff, the

jury, on a finding for defendant, may assess such damages as are "right and proper," cannot be held to exclude a defendant from a recovery of damages for illegal detention. The principle upon which compensatory damages are assessed is that compensation for injury shall be commensurate with loss, so that under section 5017, which provides that a defendant in replevin upon a finding in his favor may have such an assessment of damages as is "right and proper," a successful defendant is authorized to recover damages for the wrongful detention where the circumstances are such that he would not otherwise be fully compensated. *Hunt v. Thompson*, 120 Pac. 181, 183, 184, 19 Wyo. 523.

#### RIGHT AND WRONG TEST

The distinction between the doctrine of "irresistible impulse" and the "right and wrong test" is that in the latter case the person committing the act is unable, by reason of mental infirmity, to comprehend that the act is wrong, while the doctrine of "irresistible impulse" applies where the person knows that the act is wrong, but is driven by an irresistible impulse to commit it. *State v. Riddle*, 150 S. W. 1044, 1045, 245 Mo. 451, 43 L. R. A. (N. S.) 150.

#### RIGHT ARISING OUT OF AN OBLIGATION

The interest of a lessee in a lease binding the lessor to reimburse him at the end of the term for the then reasonable value of improvements placed on the premises by the lessee, as called for by the lease, is a mere "right arising out of an obligation," within Civ. Code, § 1458, or a chose in action, or a right to recover money by a judicial proceeding, within section 953, and is transferable by assignment during the term under section 954. *Belden v. Farmers' & Mechanics' Bank of Healdsburg*, 118 Pac. 449, 451, 16 Cal. App. 452.

#### RIGHT, DEBT, OR DUTY

In the phrase "right, debt, or duty," as used in the statute relating to fraudulent conveyances, the word "right" is synonymous with "debt" or "duty." *Brooks v. Clayes*, 10 Vt. 37, 51.

The expression "right, debt, or duty," as used in the statute in defining "party aggrieved," refers to such rights as are of the nature of debts, such as exist ex contractu. *Beach v. Boynton*, 26 Vt. 725, 733.

A plaintiff obtained judgment and issued execution against G., who thereupon applied to the town for support and let the overseer of the poor take his property as indemnity for his support. Held, that G. was under no "right, debt, or duty," within the meaning of Gen. St. c. 113, § 32, at the time judgment was rendered. *Fairbanks v. Benjamin*, 50 Vt. 99, 103.

#### RIGHT HEIR

Testator devised his property in trust, income to his grandson during his life, and then to his wife if she survived, and on the death of the survivor the estate was to be distributed to the "right heirs" of the grandson, according to the statute of descent. The grandson survived with issue, married again and had issue, and on his death the second wife claimed her share. Held, that "right heirs" would be construed to mean nothing more than statutory heirs, and hence the wife, being a statutory heir by virtue of Rev. Laws, c. 140, § 3, cl. 3, was entitled to her share. *Peabody v. Cook*, 87 N. E. 466, 467, 201 Mass. 218, 16 Ann. Cas. 296.

Rev. Laws, c. 154, § 7, provides that an adopted child shall take the same share of the property which the adopting parent could dispose of by will as the child would have taken if born to such parent in lawful wedlock, and he shall stand in regard to the legal descendants, but to no other of the kindred of such adopted parent, in the same position as if born to him; and section 8 declares that the word "child," or its equivalent, in a devise or bequest, shall include a child adopted by the grantor or testator, unless the contrary plainly appears by the terms of the instrument; but, if the grantor or testator is not himself the adopting parent, the adopted child shall not have, under such instrument, the rights of a child born in wedlock to the adopted parent, unless it was the testator's intention to include such adopted child. Held, that an adopted daughter of a deceased brother of the testator was not entitled to take under a will devising a remainder of certain trust property to testator's "right heirs." *Brown v. Wright*, 80 N. E. 612, 614, 194 Mass. 540.

#### RIGHT IN ACTION

The words "rights in action," as used in the statute defining embezzlement, are not the exact equivalent of choses or things in action. The word "rights," used in this connection, is a broader term. The Legislature seems to have contemplated that an agent might use a mere claim or demand in such a way as to deprive the owner of the thing claimed and to appropriate it to his (the agent's) own use, and to do this with intent to defraud without the assent of the owner is made embezzlement by the statute. *Higbee v. State*, 104 N. W. 748, 749, 74 Neb. 331.

#### RIGHT OF ACCESS

See Access.

#### RIGHT OF ACTION

As property, see Property.

Cause of action as, see Cause of Action.

The terms "right of action" and "cause of action" are equivalents. *Walters v. City of Ottawa*, 88 N. E. 651, 653, 240 Ill. 259.

**RIGHT OF ALIENATION**

See Power of Alienation.

**RIGHT OF ANOTHER**

Rev. Codes 1905, § 2086, provides that each person shall destroy mustard growing upon lands which he owns or occupies at such time and in such manner as shall effectually prevent its bearing seed. Section 2087 provides that it shall be the duty of the board of county commissioners at its regular meeting in April of each year to determine the time and manner of destroying such weed and to cause its determination to be published as provided in the act. Held, that at least until after the county commissioners have prescribed the time and manner of destruction no such duty devolves upon any person to destroy the weed upon the land he owns or occupies, as will make him liable in damages under section 6681, declaring that one must so use his own rights as not to infringe upon the rights of another; the phrase "rights of another" meaning legal rights and not embracing all rights determined by moral and ethical standards. *Langer v. Goode*, 181 N. W. 258, 259, 21 N. D. 462, Ann. Cas. 1913D, 429.

**RIGHT OF DOWER**

See Inchoate Right of Dower.

**RIGHT OF EMINENT DOMAIN**

See Eminent Domain.

**RIGHT OF ENTRY**

As chose in action, see Chose in Action.  
As estate, see Estate.

**RIGHT OF ENTRY FOR BREACH OF CONDITION SUBSEQUENT**

A "determinable fee" is an estate limited to a person and his heirs with a qualification annexed to it by which it is provided that it must determine whenever that qualification is at an end, and so long as the estate in fee remains the proprietor has the rights and privileges of a tenant in fee simple, and no right of reversion or possession remains in the grantor, and the only distinction between a "right of entry for breach of condition subsequent" and a "possibility of reverter" on a determinable fee is that in the former the estate in fee does not terminate until entry by the person having the right, while in the latter the estate reverts at once on the occurrence of the event by which it is limited. *Lyford v. City of Laconia*, 72 Atl. 1085, 1089, 75 N. H. 220, 22 L. R. A. (N. S.) 1062, 189 Am. St. Rep. 680.

**RIGHT OF FISHERY**

The "public right of fishery," as known to the common law, was the common right to take fish from the waters over which the King held dominion. *Hartman v. Tresise*, 84 Pac. 685, 689, 36 Colo. 146, 4 L. R. A. (N. S.) 872 (dissenting opinion).

**RIGHT OF INTERVENTION**

As remedy at law, see Remedy.

**RIGHT OF NAVIGATION**

The public "right of navigation" includes the government's right to facilitate and improve navigation by the erection of beacons, the removal of obstructions, the cutting and deepening of channels, etc., which right is vested in the national government by the commerce clause of the federal Constitution. *Lewis Blue Point Oyster Cultivation Co. v. Briggs*, 114 N. Y. Supp. 313, 315, 129 App. Div. 574 (citing *Gilman v. Philadelphia*, 70 U. S. [3 Wall.] 725, 18 L. Ed. 96; *Pennsylvania v. Wheeling & B. Bridge Co.*, 59 U. S. [18 How.] 421, 15 L. Ed. 435; *South Carolina v. Georgia*, 93 U. S. 4, 23 L. Ed. 782; *Shively v. Bowlby*, 14 Sup. Ct. 548, 152 U. S. 1, 38 L. Ed. 331; *Gibson v. United States*, 17 Sup. Ct. 578, 166 U. S. 269, 41 L. Ed. 996).

**RIGHT OF PRIVACY**

The constitutional "right to be let alone" refers only to the right to be free from bodily injury, or from a reasonable fear of bodily injury, at the hands of a fellow being, and does not include a right to be free from public comment. *Henry v. Cherry & Webb*, 73 Atl. 97, 100, 30 R. I. 13, 24 L. R. A. (N. S.) 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006.

The "right of privacy," though an intangible right, is a legal right for an invasion of which the law gives relief in equity by injunction, and such right extends to the unauthorized use by one person of the picture of another. *Munden v. Harris*, 184 S. W. 1076, 1080, 153 Mo. App. 652.

The "right of privacy" is embraced within the absolute rights of personal security and personal liberty. *Pavesich v. New England Life Ins. Co.*, 50 S. E. 68, 70, 122 Ga. 190, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561.

An injunction will lie to restrain the unauthorized use of one's name by another as a part of its corporate title, or, in connection with its business or advertisements, his picture and his pretended certificate that a medicinal preparation, which such other is engaged in manufacturing, is compounded according to the formula devised by him, though he is not a business competitor. There must be a limit to the so-called "right of privacy," and a man in public life may not claim the same immunity from publicity that a private citizen may. *Edison v. Edison Polyform Mfg. Co.*, 67 Atl. 392, 394, 73 N. J. Eq. 136 (citing *Corliss v. Walker Co.*, 64 Fed. 280, 31 L. R. A. 283).

**RIGHT OF PROPERTY**

"A vested right may be considered as the power to do certain acts or to possess certain things lawfully. In its latter as-

pect it is substantially a 'right of property,' and as such is protected by those provisions in the Constitution which apply to such rights, but a 'right of property' is a perfect and exclusive right and a right, therefore, to recover the amount of a judgment cannot be called a perfect or a vested right." *Lohrstorfer v. Lohrstorfer*, 104 N. W. 142, 146, 140 Mich. 551, 70 L. R. A. 621.

The "right of property" guaranteed by the Constitution is the right to acquire, possess, and enjoy property in any way consistent with the equal rights of others and the just exactions and demands of the state. *Ives v. South Buffalo Ry. Co.*, 94 N. E. 431, 439, 201 N. Y. 271, 34 L. R. A. (N. S.) 162 Ann. Cas. 1912B, 156.

A ticket of admission to a public place of amusement, when sold, is made, by Act 1893 (St. 1893, p. 220, c. 185), at least an irrevocable license to the purchaser to occupy a place therein during the performance and such a ticket, therefore represents a right, positive or conditional, as the case may be, according to the terms of the original contract of sale, and this right is clearly a "right of property," and the ticket which represents that right is also necessarily a species of property. So Act March 18, 1905 (St. 1905, p. 140, c. 140), prohibiting any person from selling tickets to theaters or other public places of amusement higher than the price originally charged by the management of such amusement places, is void as infringing on a right of property guaranteed by the Constitution. *Ex parte Quarg*, 84 Pac. 766, 767, 149 Cal. 79, 5 L. R. A. (N. S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747.

The "right of property" consists in the free use, enjoyment, and disposal of one's acquisitions, without any control or diminution, save only by the laws of the land. *Block v. Schwartz*, 76 Pac. 22, 25, 27 Utah, 387, 65 L. R. A. 308, 101 Am. St. Rep. 971, 1 Ann. Cas. 550 (citing 1 Black. Comm. 138).

#### RIGHT OF REDEMPTION

The "equity of redemption" is the mortgagor's interest before foreclosure; while his "right of redemption" is a mere personal privilege given by statute to the mortgagor after a sale under the mortgage. A sale by a mortgagor of his equity of redemption, made after a mortgage sale, is not an assignment of the "right of redemption" given by Code 1907, § 5746, and his grantee is not entitled to redeem. *Lewis v. McBride* (Ala.) 57 South. 705, 706.

"The term 'right to redeem' is appropriate to express the right, interest, or estate of a mortgagor and not a vendee. When we speak of the interest of one in or right to real estate as an 'equity of redemption,' which is synonymous with 'right to redeem,' we understand that reference is made to the status of a mortgagor, not a

vendee." A consent judgment, declaring that defendant, "has an equity to redeem" land on the payment to plaintiff of a specified sum, and, in case of the failure to pay the same within the time limited, "defendant shall stand debarred absolutely" of all equity in the premises, establishes the relation of mortgagor and mortgagee between the parties. *Bunn v. Braswell*, 51 S. E. 927, 929, 139 N. C. 135.

#### RIGHT OF REPRESENTATION

See By Right of Representation.

#### RIGHT OF SUCCESSION

See Succession.

#### RIGHT OF SUFFRAGE

See Suffrage.

#### RIGHT OF TRIAL BY JURY

See Trial by Jury.

#### RIGHT OF WAY

See Existing Right of Way.

See, also, Way of Necessity.

See Release of a Right of Way.

A "right of way" is a right to a way over lands of another. *Seery v. City of Waterbury*, 74 Atl. 908, 909, 82 Conn. 567, 25 L. R. A. (N. S.) 681, 18 Ann. Cas. 73.

A "right of way" is the right of a person to travel over a particular tract of land without any interference. *Kalinowski v. Jacobowski*, 100 Pac. 852, 854, 52 Wash. 359.

A "right of way" may be defined generally to be a right to pass over the land of another. It may be a private way or a public way, and it may belong to one or several persons or to the entire community. *Poole v. Greer* (Del.) 65 Atl. 767, 6 Pennewill, 220.

The grant of a "right of way" per se, and nothing else, may be a right of footway, or it may be a general right of way; that is a right of way not only for people on foot but for people on horseback, or people in carts, carriages, and other vehicles. Which it is is a question of construction of the grant, which construction will depend on the circumstances surrounding the execution of the instrument. *Speer v. Erie R. Co.*, 65 Atl. 1024, 1025, 72 N. J. Eq. 411.

The term "right of way" ordinarily means a strip occupied by a railroad company for its tracks, and lands directly connected therewith, though it may not be of the same width, or used in the same manner, at all points. *Rio Grande Western Ry. Co. v. Salt Lake Inv. Co.*, 101 Pac. 586, 589, 35 Utah, 523.

Where an accident policy provided that it should not cover injuries sustained while insured was on any railroad bridge or "right of way," except at established crossings of such roads with public highways, the term "right of way" should be construed as mean-

ing the way or track on which trains travel, and not the entire width of the railroad company's ground. *Starr v. Aetna Life Ins. Co.*, 83 Pac. 113, 115, 41 Wash. 199, 4 L. R. A. (N. S.) 630.

The term "right of way" has a twofold signification. It sometimes is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed. In a contract between railroad companies, providing that one party shall permit other railroads to use its right of way, the term is used in the latter sense. *Central Trust Co. v. Wabash, St. L. & P. Ry.*, 29 Fed. 546, 555. See, also, *Id.*, 144 Fed. 476, 480.

The term "right of way," as used in a statute providing that a railroad company shall be responsible to any person for damages to property by fire communicated by its locomotives or originating within its right of way, has no reference to the title of the railroad company, whether having a mere easement or a greater estate, but is intended to designate the locality within which the railroad would be liable under the statute. *Brown v. Carolina Midland Ry. Co.*, 46 S. E. 283, 286, 67 S. C. 481, 100 Am. St. Rep. 756.

The "right of way" of a railroad is the strip of land which the railroad company appropriates for its use, and upon which it builds its roadbeds, and not the intangible right to use. *Figg v. Louisville & N. R. Co.*, 75 S. W. 269, 270, 116 Ky. 135.

The term "right of way" is used even by the learned indiscriminately to describe, not only the easement which railroads may obtain by condemnation, but as well to describe the strip of land which a railroad occupies for the use of its tracks, no matter by what title it may hold the same. Possibly the greater number of people, when they speak of the right of way of a railroad company, have in their minds the ownership of such land. These "rights of way" are held by the railroad by various titles. Prior to 1868 condemnation proceedings vested in them the fee-simple title. In other cases rights were acquired by deed or lease, but perhaps in the larger number of cases the mere easement, technically known as a right of way, was acquired by condemnation proceedings. Subsequent to that date it is clear that the term, as generally used, has no exact and well-defined signification. *Kansas City, M. & O. Ry. Co. v. Littler*, 79 Pac. 114, 115, 70 Kan. 556.

A "right of way," as used in a city ordinance granting to an elevated railroad company a right to occupy the streets of a city, means the way occupied and used for the track and the operation of trains, and its width must be determined by necessity, and is no greater than the space needed for the safe and convenient operation of trains over

this track. *Peabody Coal Co. v. Northwestern Elevated R. Co.*, 82 N. E. 573, 576, 230 Ill. 214.

Acts 1895, p. 243, c. 123, § 1, provides that waterworks companies may condemn lands for the source of supplies, pumping stations, settling basins, filtering basins or tanks, storage reservoirs, supply mains, delivery reservoirs, tank or stand pipes, and delivery mains, and the necessary lines of pipe connecting them. Acts 1905, p. 398, c. 129, § 256, provides that any corporation engaged in the business of providing any city or town and its inhabitants with water, as provided for in the previous two sections, may condemn such real estate and rights of way as may be necessary for its business. Section 254, p. 396, authorizes a city or town to contract with any person or corporation to furnish it and its inhabitants with water, etc. Held, that the phrase "real estate and rights of way" means such only as may be reasonably necessary to such companies for construction and maintenance of its works, laying and maintenance of pipe lines, mains, and conduits, and for the erection and maintenance of poles, wires, and other proper structures and appliances, and not such ways of railway communication as might become expedient and desirable because of an unfavorable location of the power plant, voluntarily chosen, and hence a right of way for a stub switch connecting its plant with a railroad could not be condemned by such a company. *Kinney v. Citizens' Water & Light Co.*, 90 N. E. 129, 173 Ind. 252, 26 L. R. A. (N. S.) 195.

#### City street

Land used by a street railroad company for a right of way is railroad track, assessable only by the state board of equalization, even though the company has merely an easement in the right of way and the title is owned by another; so that the company's track in a public street was a part of its "right of way." *People v. Terre Haute & W. Ry. Co.*, 100 N. E. 173, 256 Ill. 501; *Connecticut Valley St. Ry. Co. v. City of Northampton*, 99 N. E. 516, 521, 213 Mass. 54.

#### Convenient land

Constructive notice that a railroad owns a "right of way" in certain premises means the free use of so much ground upon both sides of the tracks as is required for the convenient and customary use and maintenance of the railroad. *Day v. Atlantic & G. W. R. Co.*, 41 Ohio St. 392, 398.

#### As interest in land

As interest in land, see Interest (In property).

#### As land itself

"A 'right of way,' although commonly designated as an easement, is an interest in land of a special and exclusive nature and of a high character. In speaking of its char-

acter, the Supreme Court of the United States said: 'A railroad right of way is a very substantial thing. It is more than a mere right of passage or an easement. We discussed its character in *New Mexico v. United States Trust Co.*, 19 Sup. Ct. 128, 133, 172 U. S. 171, 183, 43 L. Ed. 407. We there said that, if a railroad's right of way was an easement, it was "one having the attributes of the fee—perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property."'*Abercromble v. Simmons*, 81 Pac. 208, 211, 71 Kan. 538, 1 L. R. A. (N. S.) 806, 114 Am. St. Rep. 509, 6 Ann. Cas. 239.

A "right of way," within Civ. Code, § 802, designating rights of way as among the land burdens which may be granted or held, although not attached to land, is real property and distinctly and necessarily local in character and situated in and upon land. *Stockton Gas & Electric Co. v. San Joaquin County*, 83 Pac. 54, 58, 148 Cal. 313, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511.

A deed purporting to convey "the right of way" over the land in question, for the purpose of constructing and maintaining any levees that may be built thereon, gives only one right of way across the land, so that, when the right of way has been selected and a levy constructed thereon, the grantee is not entitled to construct another levee across the land on a different line under such deed. *Board of Directors of St. Francis Levee Dist. v. Bowen*, 95 S. W. 993, 80 Ark. 80.

#### As mere easement

A "right of way" is an "easement." *S. E. & H. L. Shepherd Co. v. Shibbles*, 61 Atl. 700, 702, 100 Me. 314.

A "right of way" is an easement of perpetual use, a charge or burden upon the land of one for the benefit of another. *Shaw v. Proffitt*, 109 Pac. 584, 587, 57 Or. 192, Ann. Cas. 1913A, 63.

A "right of way" for an irrigation ditch is an "easement." *Blake v. Boye*, 88 Pac. 470, 472, 38 Colo. 55, 8 L. R. A. (N. S.) 418.

A "right of way" is an easement and can only be acquired by grant, either from the owner or from the state, through the exercise of the right of eminent domain, or by prescription. *Clark v. Wabash R. Co.*, 109 N. W. 309, 310, 132 Iowa, 11.

A "right of way" simply means the right to pass over the lands of another, and is an easement conferring a privilege on the grantor's estate, but which does not give the grantee a right to enjoy the estate itself by exclusive occupation. *People ex rel. Bryan v. State Board of Tax Com'rs*, 124 N. Y. Supp. 711, 713, 67 Misc. Rep. 508.

The words "right of way" may mean the ordinary easements railroads have to use land over which to run their trains or the mere intangible right to cross another's land,

and, though the use of that term in a conveyance to a railroad company will not, if the other parts of the conveyance indicate an intention to convey a greater estate prevent a greater estate from being conveyed, yet, where the purpose of the deed is obviously to convey a mere right of way, the addition to the deed of the words "together with the right to take all stone, timber and minerals" does not increase the extent of the grant, but the deed must be construed as granting a mere easement, being limited by the term "right of way," and not giving the railroad company the right to bore for oil or prospect for other minerals in the right of way. *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co. (Tex.)* 137 S. W. 171, 178 (citing 7 Words and Phrases, p. 6230).

"A 'railroad right of way' is a very substantial thing; it is more than a mere right of passage; it is more than an easement." In *New Mexico v. United States Trust Co.*, 19 Sup. Ct. 128, 172 U. S. 171, 43 L. Ed. 407, it was said that, if a "railroad's right of way" was an easement, it was "one having the attributes of the fee, perpetuity, and exclusive use and possession, also the remedies of the fee, and like it corporeal, and not incorporeal, property." *Western U. Teleg. Co. v. Pennsylvania Ry. Co.*, 25 Sup. Ct. 133, 141, 195 U. S. 540, 49 L. Ed. 312, 1 Ann. Cas. 517.

A "right of way" acquired by a railroad company by condemnation proceedings gives no right to the soil, but merely a full right of passage. The grantee of such a right of way is not the owner or occupant of the estate over which it is granted. The right of way is simply an easement. *Kansas & C. P. Ry. Co. v. Burns*, 79 Pac. 238, 239, 70 Kan. 627 (citing *Cook County v. Chicago, B. & Q. R. Co.*, 35 Ill. 400).

A "right of way" includes the easement of a reclamation district for the construction of a levee, under Pol. Code, §§ 3454, 3471, authorizing the trustees of a reclamation district to acquire, by condemnation, a "right of way" for the construction of works, including drains, canals, etc., and within Code Civ. Proc. § 1240, enumerating the private property which may be taken under the right of eminent domain, and providing that "rights of way" shall be deemed private property for the purposes mentioned. *Reclamation Dist. No. 551 v. Superior Court of Sacramento County*, 90 Pac. 545, 546, 151 Cal. 263.

One deriving title under a deed executed by an association conveying land subject to the reservation of a reasonable right of way across said lot, and also reserves to said association all springs or other streams of water arising on said lot, etc., does not obtain the right to dig trenches and lay pipe lines for the conduct of water developed on his land on the land of another claiming under a similar deed from the same grantor, since the phrase "right of way" contemplates only a right of ingress and egress to and from the

land conveyed, and since the grantee has no title to the water on his land, that being reserved to the association alone, so that he could not need a right of way across the land of the other grantee for the purpose of carrying such water. *San Rafael Ranch Co. v. Ralph Rogers Co.*, 96 Pac. 1092, 1093, 154 Cal. 76.

A deed, granting "the right of passway for a hauling road of sufficient width running" along a creek to a gap and "extending on the top of said gap enough to guarantee" to the grantee, "his heirs and vendees, land enough for a good hauling road around the top" of a cliff to a fixed point, granted a right of passway and no title to the soil or trees. *Samples v. Smythe* (Ky.) 105 S. W. 415, 416.

**As premises**

See Premises.

**As property**

See Private Property; Property.

**As railroad track**

See Railroad Track.

**As way through public land**

A grant of a "right of way" to a railroad is a grant of a limited or qualified fee, which, so long as the qualification annexed is not at an end, confers upon the railroad company the exclusive right of possession, so that a settlement upon such "right of way" is not a settlement upon public land. The estate granted is more than a mere easement. It amounts to a base qualified or limited fee, and, so long as the company maintains its line of road, it has the right to exclusive possession. *Oregon Short Line R. Co. v. Stalker*, 94 Pac. 56, 64, 14 Idaho, 362.

**As right of passage**

A "right of way" is the mere privilege of passing over the land of another in some particular line, with the implied right to make such changes in the surface of the land as are necessary to make it available for travel in a convenient manner. *Ballard v. Titus*, 110 Pac. 118, 121, 157 Cal. 673.

The very term "right of way," as designating the property of a railroad, is illustrative of the character of the right it has. It has the first right of passage. It has primarily the right to use the land for its necessary railroad purposes, and the right of the owner of the land to use crossings is secondary and subordinate to the railroad's reasonable, necessary use thereof for railroad purposes. *Townsend v. New York Cent. & H. R. R. Co.*, 106 N. Y. Supp. 381, 383, 56 Misc. Rep. 253.

**Necessary structures**

The term "right of way" should not be confined to the land over which the main track of a railroad should be constructed. The land upon which a side track, a switch, or a turnout is built, and in actual use by

the company in the business for which it was organized, for all practical purposes is as much held a right of way as the land upon which the main track is constructed. In the operation of a railroad, it is necessary that trains should pass each other, and hence the necessity of turnouts, switches, and side tracks. In the loading of cars, transfer of cars, the making up of trains, and innumerable other instances that might be named in the prosecution of its business as a common carrier, side tracks, switches, and turnouts are as indispensable to a proper transaction of its business as the main track itself. Land held and in actual use by a railroad company for side tracks, switches, and turnouts must be regarded, within the meaning of the revenue law, as a part of the right of way of the company. *Chicago & A. R. Co. v. People ex rel. Dennison*, 98 Ill. 350, 356. See, also, *Nashville, C. & St. L. Ry. Co. v. Patterson* (Tenn.) 122 S. W. 467, 476 (citing *Chicago & A. R. Co. v. People ex rel. Dennison*, 98 Ill. 356); *Chicago & M. Electric R. Co. v. Chicago & N. W. R. Co.*, 71 N. E. 1017, 1020, 211 Ill. 352.

The term "right of way," when used to describe the real estate of a railroad company, ordinarily signifies the entire strip of land which the corporation has found it necessary or convenient to acquire the right to use for railway purposes, and it is not limited to the specific part thereof secured or used for its main track or other particular improvements. *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.*, 152 Fed. 849, 852, 81 C. A. 643 (citing *Joy v. St. Louis*, 11 Sup. Ct. 243, 138 U. S. 1, 44-46, 11 Sup. Ct. 243, 34 L. Ed. 843; *New Mexico v. United States Trust Co.*, 19 Sup. Ct. 128, 172 U. S. 171, 43 L. Ed. 413; *Id.*, 19 Sup. Ct. 784, 174 U. S. 545, 43 L. Ed. 1079; *Chicago & A. R. Co. v. People ex rel. Dennison*, 98 Ill. 350, 356, 357; *Lake Erie & W. R. Co. v. Middlecoff*, 37 N. E. 660, 663, 150 Ill. 27; *Pfaff v. Terre Haute & I. R. Co.*, 9 N. E. 93, 95, 108 Ind. 144, 148); *St. Louis, K. C. & C. R. Co. v. Wabash R. Co.*, 80 Sup. Ct. 510, 513, 217 U. S. 247, 54 L. Ed. 752.

The term "right of way," in a statute, provided that no way shall be laid out through or across any right of way of any railroad used for station purposes, unless after notice, etc., was simply used by the Legislature to embrace all the property of the railroad constituting station grounds affected by the location of the way. *Appeal of Atlantic & St. L. R. Co.*, 62 Atl. 141, 143, 100 Me. 430.

A railroad company's statutory duty to fence its "right of way" does not extend to station grounds, though no depot building or agent is maintained at the place, if it receives and discharges passengers and freight there; the amount of road which may be left unfenced depending upon reasonable necessi-



ty for the accommodation of the public and the safety of employes. *Hay v. St. Louis & S. F. R. Co.*, 142 S. W. 468, 470, 161 Mo. App. 1.

#### Railroad yard

By the expression "right of way," when used in a deed by the owner of premises to a railroad company, it may be understood that an easement is granted to the railway company to construct its road over the grantor's premises, and to operate the same in the usual and ordinary way, but beyond this the court cannot determine the extent of the use to which the land may be put by the grantee. It is the limit or extent of the use that makes the grant doubtful, where the only words that imply a use is the expression "right of way purposes"; and, in determining the effect of grants of this character, the rule, that you may look to the surrounding circumstances, in order to ascertain the intention of the parties, is particularly applicable. A landowner granted to a railroad company a strip of land 50 feet wide, to be used as a "right of way," which expression is used in *Sayles' Ann. Civ. St. 1897*, arts. 4445, and 4483, in contradistinction to depots, shops, etc., and in the sense of the land required for the roadbed. Held, that the grant authorized the use of the land as a track only, and did not entitle the railroad company to use it for a switchyard. *Missouri, K. & T. Ry. Co. of Texas v. Anderson*, 81 S. W. 781, 782, 786, 36 Tex. Civ. App. 121.

#### Roadway synonymous

The term "right of way," as used in statutes relating to the taxation of railroad companies, is synonymous with the term "roadway," as used in Const. art. 13, § 10, relating to the taxation of railroad companies. *San Francisco & S. J. V. Ry. Co. v. City of Stockton*, 84 Pac. 771, 773, 149 Cal. 83.

Railroad property within a city, consisting of parcels contiguous to the 30-foot continuous right of way and within a part of the 8-rod right of way permitted to railroads by Civ. Code, § 465, subd. 4, and used for freight and passenger depots, for local business, and for spur tracks necessary for the depots, and for a fruit packing house with a spur track for convenient use, and for a park and for tracks used for the storage of tools, is not a part of the right of way within Const. art. 13, § 10, providing that the franchise roadway, roadbed, and rails of railroads operated in more than one county shall be assessed by the State Board of Equalization, and is properly assessed by the city assessor; the word "roadway" being synonymous with the phrase "right of way," which includes the continuous strip of land permitted by law on which to construct the roadbed and lay the tracks. *Atchison, T. & S. F. Ry. Co. v. Los Angeles County*, 111 Pac. 250, 251, 158 Cal. 437.

#### RIGHT OF WAY BY CUSTOM

"A 'right of way by custom' in favor of the inhabitants of a particular locality might be set up by the common law of England. It could be proved by immemorial usage. From such proof a presumption was deemed to arise that the usage was founded on a legal right. This right was not assumed to arise from a grant by an owner of land of an easement in it. \* \* \* A 'right of way by custom' appertains to a certain district of territory, but not to any particular tenement forming part of that territory." "Nor is it confined to owners of land within that territory. It belongs to the inhabitants of that territory, whether landowners or not. To a fluctuating body of that kind, no estate in lands can be granted. If, therefore, an easement be claimed to exist in their favor, a title cannot be made out by prescription, on the theory of a lost grant. It must have come, if at all, from some public act of a governmental nature. The theory of English law was that, if there had been a usage from time immemorial (that is, so far as could be ascertained, from the coronation of Richard I), affecting the use of real estate by those not able to show any paper title to warrant it, it might fairly be presumed that it arose under an act of Parliament or other public act of governing power, the best evidence of which had perished. A charter from some feudal lord or ecclesiastical corporation might be such an act. Of such charters there were no public records. That the accidental destruction of the parchment on which one was written should annul the privileges which it gave would be plainly unjust." The laws of Connecticut do not recognize personal rights of way or other easements resting on local custom. *Graham v. Walker*, 61 Atl. 98, 99, 78 Conn. 130, 2 L. R. A. (N. S.) 983, 112 Am. St. Rep. 93, 3 Ann. Cas. 641.

#### RIGHT OF WAY IN GROSS

Easement distinguished, see Easement.

#### RIGHT, PRIVILEGE, OR IMMUNITY

See, also, Rights or Privileges.

Under Revisal 1905, §§ 1571-1577, authorizing corporations maintaining lines for electric power to acquire by condemnation such rights, privileges, and easements as may be reasonably necessary to the enterprise, and section 2575 et seq. providing that such corporations may enter on such contiguous lands along their route as may be necessary to protect their property, etc., a corporation, maintaining a line in the center of a right of way 100 feet wide to convey electric power, may acquire by condemnation the right to cut trees on contiguous territory constituting a source of danger to its line; the term "rights and privileges" being broad enough to include such right. *Yadkin River Power Co. v. Wissler*, 76 S. E. 267, 270, 160 N. C.

269, 43 L. R. A. (N. S.) 483 (citing 6 Words and Phrases, p 5583).

The words "rights and privileges," in Act Ill. Feb. 6, 1865, authorizing the construction and maintenance of street railways in Chicago on such streets as the common council has authorized or shall authorize, the "rights and privileges," immunities, and exemptions to be such as the common council has prescribed or may by contract prescribe, etc., refer to such "rights and privileges" as are derived from the contracts with the city. *Blair v. Chicago*, 26 Sup. Ct. 427, 442, 201 U. S. 400, 50 L. Ed. 801.

"Rights, privileges, and immunities" secured by Const. U. S. art. 4, § 2, and Id. Amend. 14, to the inhabitants of the several states, do not include any rights in the property of the several states held in trust for their own inhabitants. *State v. Ashman*, 135 S. W. 325, 326, 123 Tenn. 654.

The words "rights, privileges, and immunities," when used in a statute relating to exemption from taxation for certain periods of the property, etc., of railroad corporations are full and ample for the purpose of granting such exemption. *Grand Canyon R. Co. v. Treat*, 95 Pac. 187, 190, 12 Ariz. 69 (citing *Phoenix F. & M. Ins. Co. v. Tennessee*, Use of Memphis, 16 Sup. Ct. 471, 161 U. S. 174, 40 L. Ed. 600).

#### RIGHT, TITLE, AND INTEREST

All right, title, and interest, see All.

The words "right, title, and interest," as used in deeds, have acquired a definite meaning, not importing ownership, but conveying whatever title the grantor has, and that alone. *Baker v. Davie*, 97 N. E. 1094, 1097, 211 Mass. 429, 37 L. R. A. (N. S.) 944.

The words "right, title, and interest" of any defendant therein," in Gen. Laws 1896, c. 253, § 10, providing how an officer commanded by an original writ or writ of mesne process to attach real estate, or the "right, title, and interest" of any defendant therein, shall make the attachment, include equitable as well as legal interests, and extend the common law of the state by making that attachable on original writ or writ of mesne process which was already subject to levy on execution. *Tucker v. Denico*, 61 Atl. 642, 645, 27 R. I. 239.

The phrase "the right, title, use, interest, and occupation," as used in the statute providing that lessees of school lands shall be vested with "the right, title, use, interest, and occupation of" the lands, must be construed as used in connection with the character of the estate which is authorized to be conveyed, which is a leasehold estate, and it conveys only such right, title, use, interest, and occupation as go with a leasehold estate. *Moss Point Lumber Co. v. Board of Sup'rs of Harrison County*, 42 South. 290, 300, 89 Miss. 448.

#### RIGHT TO BEAR ARMS

See Bear.

#### RIGHT TO BE HEARD BY COUNSEL

The constitutional "right of accused to be heard by himself and counsel" means that he shall have the right to be fully and fairly heard. Hence it is reversible error to arbitrarily limit the time for argument to one hour on a side, against defendant's objection as being too short, where, under the circumstances of the case, such limitation is too restrictive to permit a full and fair discussion of the case before the jury. *State v. Rogoway*, 81 Pac. 234, 235, 45 Or. 601, 2 App. Cas. 431 (citing *Wingo v. State*, 62 Miss. 311; *Yeldell v. State*, 100 Ala. 26, 14 South. 570, 46 Am. St. Rep. 20).

A statute providing that, when any person indicted for an offense is acquitted by reason of insanity, the jury shall so state in the verdict, and, if the discharge of the insane person is deemed dangerous to the community, he may be committed to prison, does not violate the constitutional provision guaranteeing the "right of counsel." In re *Brown*, 81 Pac. 552, 554, 39 Wash. 160, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868, 4 Ann. Cas. 488.

#### RIGHT TO CONTRACT

The "right to contract" involves the right to sue for breach of contract, and, when the law creates a new right to contract, the mere creation of such right includes an appropriate remedy by suit for its violation. *Mathewson v. Mathewson*, 63 Atl. 285, 286, 79 Conn. 23, 5 L. R. A. (N. S.) 611, 6 Ann. Cas. 1027.

#### RIGHT TO CONVEY

See Good Right to Convey.

#### RIGHT TO FREE MARKET

See Free Market.

#### RIGHT TO LIBERTY

See Personal Liberty.

#### RIGHT TO PRIVATE PROPERTY

See Impairing Right to Private Property.

#### RIGHT TO PURCHASE

Acts 29th Leg. c. 29, § 1, provides that all persons claiming rights to purchase or lease any public free school lands which have been sold or leased to any other person shall sue therefor within one year after the act takes effect, or after the award of such sale or lease, if made after the taking effect of the act, and not thereafter. Held that, where a purchaser's right to purchase school land is forfeited by the Commissioner, his right to reinstatement, if any, is a claim of right to purchase, to which the statute applies; and, unless suit to enforce such right is instituted within a year after the award, it is barred. *Nations v. Miller* (Tex.) 146 S. W. 261, 264.

**RIGHT TO PURSUE HAPPINESS**

See Pursuit of Happiness.

**RIGHT TO RECOVER MONEY**

The interest of a lessee in a lease binding the lessor to reimburse him at the end of the term for the then reasonable value of improvements placed on the premises by the lessee, as called for by the lease, is a mere right arising out of an obligation, within Civ. Code, § 1458, or a chose in action, or a right to recover money by a judicial proceeding, within section 953, and is transferable by assignment during the term under section 954. *Belden v. Farmers' & Mechanics' Bank of Healdsburg*, 118 Pac. 449, 451, 16 Cal. App. 452.

**RIGHT TO REDEEM**

See Right of Redemption.

**RIGHTFUL**

Rev. St. U. S. § 1851, provides that the legislative power of every territory shall extend to all "rightful subjects of legislation" not inconsistent with the Constitution and laws of the United States. This power is as broad as that exercised by the Legislatures of the states; the Constitutions and laws of the United States serving as the sole limitation thereon, a limitation comparable to that imposed by state Constitutions upon state Legislatures. Those are "rightful subjects of legislation" which, subject to that limitation, would be rightful subjects for state legislation. *Leatherwood v. Hill*, 89 Pac. 521, 522, 10 Ariz. 243 (quoting *Bennett v. Nichols*, 80 Pac. 392, 9 Ariz. 138).

**RIGHTS OR PRIVILEGES**

See, also, Right, Privilege, or Immunity.

The right or privilege to vote at an election for a member of the House of Representatives of the United States is "a right or privilege" secured by the Constitution of the United States, and such right is therefore within the meaning of section 5508 of the Revised Statutes of the United States. *Felix v. United States*, 186 Fed. 685, 689, 108 C. C. A. 503.

**RIM**

The contract of plaintiff to bore and complete a well for oil to the depth of 2,000 feet for 50 cents per lineal foot, the casing to be furnished by defendant, plaintiff, if it became necessary to draw the casing from the well, to be paid 5 cents a foot for such work, includes in the price of 50 cents a foot, the work of "rimming" or enlarging the bore of the well necessary for putting in the casing. *Hanna v. Smith*, 139 N. W. 256, 259, 173 Mich. 483.

**RIM BENDER**

An employé in a wheel factory, whose duty consists in putting timber of proper

sizes into a form, which timber, after it is steamed, is drawn by means of a pulley into the required shape for a felloe and fastened by means of an iron bar, so that it must remain in that shape until it is dried out, and then, when taken from the form, it retains the half-moon shape of a felloe, is known to the trade as a "rim bender." *Cotton v. Owensboro Wheel Co. (Ky.)* 97 S. W. 763.

**RIOT**

"Riot" is essentially an offense against the public peace and good order, and looks to this rather than an infraction of the personal rights of any particular individual as such. To transmute acts intrinsically lawful into a riot, the acts must be attended with both violence and tumult, both being essential to cause the reaction necessary to change the quality of a lawful act, and neither noise nor violence alone attending the performance of such an act can make a riot. Where the indictment in a prosecution for riot, in addition to charging that accused committed unlawful acts of violence, alleged that they being assembled and gathered together, and acting with a common intent, unlawfully, violently, and tumultuously did make a great noise, riot, tumult, and disturbance to the great terror of certain persons, it was not error to charge in explanation of the nature of the offense that the act need not necessarily be an unlawful act in a violent, tumultuous manner, but that, if accused in connection with others and acting with a common intent did an unlawful act or any other act in a violent and tumultuous manner, he could be convicted. *Taylor v. State*, 68 S. E. 945, 946, 8 Ga. App. 241.

Where three men assembled in front of a citizen's house at night cursing and threatening him in loud voices, repeatedly fired a gun, whereby the citizen and his family were greatly frightened, all of the participants were guilty of "riot." *Lewis v. State*, 58 S. E. 1070, 2 Ga. App. 659.

Three persons for whose arrest warrants had been issued by a federal court took refuge in a hotel and resisted arrest, and exchanged shots with the marshal's posse, and, after the women and children had left the hotel, the marshal burned it and arrested one of the three. U. S. Comp. St. 1901, § 788, provides that marshals and their deputies shall have in each state the same powers in executing the laws of the United States as sheriffs and their deputies in such state; Ky. St. § 4583 (Russell's St. § 256), provides that in executing any criminal process requiring an actual arrest the sheriff or other officer may break open the door of the dwelling or other house of the defendant, or of any other person, if necessary; and Cr. Code Prac. § 40, provides that to make an arrest an officer may break open the door of the house in which defendant may be. Held that,

while the three men resisting the arrest constituted a "riot" under the common-law definition that a riot is a tumultuous disturbance of the peace by three persons or more assembling together, of their own authority, with an intent actually to assist each other against any who may oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent manner, to the terror of the people, the marshal's posse, though it burned the hotel, did not constitute a riot, and that while the riot was the occasion of the hotel's loss by fire the direct cause of the loss was the marshal's unauthorized act, and that hence the insurer was not released from liability by the excepted risks of "riot" and "order of any civil authority." *American Central Ins. Co. v. Stearns Lumber Co.*, 140 S. W. 148, 149, 145 Ky. 255, 36 L. R. A. (N. S.) 566, Ann. Cas. 1913B, 628.

#### **Mob synonyms**

The act of persons commonly called "night riders" in burning a building constituted a "riot," and the persons engaged therein constituted a "mob," and the two terms being synonymous, within the definition of the word as given in *Bouvier's Law Dictionary*, an insurer of the building was not liable, where the policy contained a stipulation that it should not be liable in case of a destruction of the building as the result of a "riot." *Lockett-Wake Tobacco Co. v. Globe & Rutgers Fire Ins. Co.*, 171 Fed. 147, 148.

#### **Trespass or larceny distinguished**

Pen. Code, § 449, defines "riot" as follows: "Whenever three or more persons, having assembled for any purpose, disturb the public peace, by using force or violence to any other person, or to property, or threaten or attempt to commit such disturbance, or to do an unlawful act by the use of force or violence, accompanied with the power of immediate execution of such threat or attempt, they are guilty of riot." According to the common-law definition given by *Hawkins* in his *Pleas of the Crown*, a "riot" is "a tumultuous disturbance of the peace by three persons or more assembling of their own authority with an intent mutually to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful." *Greenleaf* adopts a definition evidently based upon that given by *Hawkins*, and to the effect that, to constitute a "riot," "it is necessary that there be three or more persons tumultuously assembled of their own authority with intent mutually to assist one another against all who shall oppose them in the doing either of an unlawful act of a private nature or of a lawful act in a violent and tumultuous manner." Hence, where a

crowd of young men and boys, varying in number from 8 to 30, practically demolished an unoccupied building, and on the approach of police officers the crowd immediately dispersed, and at the same time, in another portion of the police precinct, boys and men were stealing wood for bonfires, such acts constituted a trespass or larceny rather than a "riot," within the meaning of the statute making cities liable for property destroyed or injured by a riot. *Adamson v. City of New York*, 80 N. E. 937, 188 N. Y. 255, 10 L. R. A. (N. S.) 925, 117 Am. St. Rep. 863, 11 Ann. Cas. 183.

#### **Act by two persons**

To constitute the offense of "riot" under Pen. Code 1895, § 354, there must be two or more persons acting jointly in execution of a common intent in the commission of an unlawful act of violence or of some other act in a violent manner. *Croy v. State*, 61 S. E. 847, 4 Ga. App. 457; *Lewis v. State*, 63 S. E. 570, 571, 5 Ga. App. 496.

To constitute the offense of "riot," there must be not only a common intent on the part of two or more persons to do an unlawful act of violence, or some other act in a violent and tumultuous manner, but also concert of action in furtherance of such common intent. *Stanfield v. State*, 57 S. E. 953, 1 Ga. App. 532 (citing *Prince v. State*, 30 Ga. 27; *Coney v. State*, 39 S. E. 425, 113 Ga. 1060).

To constitute a "riot" there must be a common intent on the part of two or more persons to do an unlawful act, and also concert of action in furtherance of such intent; but it is not necessary that there must have been a previous plot on the part of the rioters to constitute such offense. *Jemley v. State*, 49 S. E. 292, 121 Ga. 346. See, also, *Hunter v. State*, 55 S. E. 1044, 127 Ga. 43.

#### **Any unlawful act by three or more**

According to the common-law definition, a "riot" is a tumultuous disturbance of the peace by three persons or more assembling together of their own authority with an intent mutually to assist each other against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing it in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful; and hence where a body of 100 or more men, armed and disguised, unlawfully confederated and banded together for the purpose of destroying property of the insured, and in pursuance of the unlawful conspiracy burned it, and at the same time intimidated and terrorized the inhabitants and civil authorities, the fire which burned the property was caused by a "riot" as used in the policy. *Spring Garden Ins. Co. v. Imperial Tobacco Co.*, 116 S. W. 234, 236, 132 Ky. 7, 20 L. R. A. (N. S.) 277, 136 Am. St. Rep. 164.

Gen. St. 1901, § 2269, providing that if three or more persons shall assemble together with intent to do any unlawful act with force and violence against the person or property of another, or to do any unlawful act against the peace, in effect defines "riot." *City of Cherryvale v. Hawman*, 101 Pac. 994, 995, 80 Kan. 170, 23 L. R. A. (N. S.) 645, 133 Am. St. Rep. 195, 18 Ann. Cas. 149 (citing 7 Words and Phrases, p. 6240).

Under Comp. Laws 1909, § 2497, providing that any use of force or any threats to use force, if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, is "riot," a riot cannot be committed by one person alone, or by two persons acting together, but there must be three or more persons acting together, and without authority of law. *Proctor v. State*, 115 Pac. 630, 632, 5 Okl. Cr. 553. The statutory elements of the crime of riot are the use of force or violence, or threats to use force or violence, accompanied by immediate power of execution. Unless these elements exist, there can be no riot. *Cochran v. State*, 111 Pac. 974, 975, 4 Okl. Cr. 379.

Where three or more persons, without authority of law, combine and by threats or force, with immediate power of execution, seek to accomplish any unlawful purpose, they are guilty of riot. *Crawford v. Ferguson*, 115 Pac. 278, 279, 5 Okl. Cr. 377, 45 L. R. A. (N. S.) 519.

"Riot" is a compound offense, to constitute which there must be a joint action of three or more persons. But all who aid, encourage, or promote it by words, signs, or other acts are principals and jointly guilty of the offense, and it is not necessary that a party should commit some personal violence or do some other physical act, but any act of assistance or encouragement is sufficient to make him a principal. If he guides, directs, incites, or encourages others to commit acts of violence, while the 'riot' is in progress, he is as guilty as the instrumentalities he puts in motion." Under B. & C. Comp. § 1913, defining "riot" as the use of any force or violence or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, it is not necessary that three persons should do the same identical act, but it is sufficient to constitute the offense if three persons had a common purpose to do the act complained of or were engaged in aiding or assisting one another in accomplishing such common purpose with the use of force and violence or threats without authority of law, though the individual act of each was separate from that of the others. *State v. Mizis*, 85 Pac. 611, 617, 48 Or. 165. See, also, *State v. Seeley*, 94 Pac. 37, 38, 51 Or. 131 (quoting B. & C. Comp.

Or. § 1913); *State v. Stephanus*, 99 Pac. 428, 430, 53 Or. 135, 17 Ann. Cas. 1146.

## RIPARIAN

The term "riparian" is defined as pertaining to or situated on the bank of a river. *Mobile Dry-Docks Co. v. City of Mobile*, 40 South. 205, 207, 208, 209, 146 Ala. 198, 3 L. R. A. (N. S.) 822, 9 Ann. Cas. 1229.

Land, to be "riparian," must have the stream flowing over it or along its borders. *Crawford Co. v. Hathaway*, 93 N. W. 781, 790, 67 Neb. 325, 60 L. R. A. 889, 108 Am. St. Rep. 647 (citing *Lux v. Haggin*, 10 Pac. 674, 69 Cal. 255).

"Riparian property" is property which has a water frontage. *Shepard's Point Land Co. v. Atlantic Hotel*, 44 S. E. 39, 45, 132 N. C. 517, 61 L. R. A. 937.

Lands which do not in any way border upon the water of a stream are not riparian to it. The word "riparian," from which the term "riparian" is derived, means, literally, a river bank, and therefore, in the broadest sense, all lands touching the stream are riparian, in the sense that they relate to the bank. But of necessity there must be some limitation. The extent back from the stream must be determined. The holdings of an owner, before they can be said to be riparian to a stream, must be not only within the limits of the original survey or grant by the government, but must also be within the watershed of such stream, and actually touch its waters. *Clements v. Watkins Land Co.*, 82 S. W. 665, 668, 36 Tex. Civ. App. 339.

The fact that land forms part of the wide bottom extending between higher lands on each side of a stream, and is underlaid by an underground flow, which is a part of the surface stream, does not make it part of the bed of the stream, nor prevent it being "riparian," where it has been successfully cultivated and irrigated for many years. *Anaheim Union Water Co. v. Fuller*, 88 Pac. 978, 979, 150 Cal. 327, 11 L. R. A. (N. S.) 1062.

Where a lease described a privilege granted as certain "riparian or other rights, to wit, the exclusive privilege of taking by dredging or otherwise all sand and gravel that the lessee may desire to take along the entire shores or water fronts," the lessee's rights were limited to excavation of sand and gravel between high and low water marks and did not authorize the removal of fast land from any part of the farm bordering on the stream. *Potomac Dredging Co. of Baltimore City v. Smoot*, 69 Atl. 507, 509, 108 Md. 54.

### Land beyond watershed

Land not within the watershed of a stream is not riparian thereto, and is not entitled to the use or benefit of the water from the stream, although it may be part

of an entire tract which does extend to the river. *Anaheim Union Water Co. v. Fuller*, 88 Pac. 978, 980, 150 Cal. 327, 11 L. R. A. (N. S.) 1062.

### RIPARIAN PROPRIETOR OR OWNER

A riparian owner is an owner of land bounded by a water course or lake or through which a stream flows. A license from a riparian owner to convey water from the stream by pipes for supplying licensee's residence on nonriparian land does not constitute licensee a riparian owner, entitled to all rights as such. *Stoner v. Patten*, 63 S. E. 897, 898, 132 Ga. 178.

A "riparian proprietor" is one who owns land bounded by or fronting on navigable waters, and among the rights he is entitled to as such are access to the part of the water in front of his lot, the right to make a landing, wharf, or pier for his own use or the use of the public subject to the general rules imposed by the Legislature for the rights of the public. *Mobile Dry-Docks Co. v. City of Mobile*, 40 South. 205, 207, 208, 209, 146 Ala. 198, 3 L. R. A. (N. S.) 822, 9 Ann. Cas. 1229.

The term "riparian proprietors" means owners of property along the stream which require the use of the waters thereof. *Neely v. Detroit Sugar Co.*, 101 N. W. 664, 667, 138 Mich. 469.

The expression "riparian owner," in its ordinary and popular signification, carries with it the title to the center of the nonnavigable stream upon which his land abuts. In *re Wilder*, 85 N. Y. Supp. 741, 743, 90 App. Div. 262.

Title by adverse possession for over 30 years up to the edge of a river and to the river bank creates the occupant a "riparian owner," entitled as such to protect his rights against the acts of upper riparian owners. A municipal corporation, to whom land above high-water mark of a river had been conveyed for use as a park, received from the owners of the bed of the stream below high-water mark a conveyance of "such use as is customary and legal for riparian owners," and to that end the right of access and crossing as to "any intervening lands between high-water mark and the water" of the river, and also the right to ornament such intervening land, but provided that the grantee should not divert the water of the stream or interfere with the use of such water by the grantor in its maintenance of a dam at a lower point on the stream. Held, that the deed did not, as far as upper riparian owners were concerned, convey a mere easement; but it granted a right of exclusive possession and occupation, and constituted the grantee a "riparian owner," entitled as such to prevent an unlawful diversion of the water of the stream by such upper riparian owners.

*City of Paterson v. East Jersey Water Co.*, 70 Atl. 472, 479, 74 N. J. Eq. 49.

### RIPARIAN RIGHT

As property, see Property.

A "riparian right" is defined as the right of the owner of lands upon navigable water to maintain his adjacency to it and to profit by this advantage and to preserve and improve the connection of his property with the water. Riparian rights in the nature of an easement have their origin in and are dependent upon the ownership of the upland contiguous to and attinent on the water and attach to and are appurtenant to the upland, and not to the shore and soil under the water. A "shore" is defined to be the land on the margin of the sea or a lake or river; that space of land which is alternately covered and left dry by the rising and falling of the tide; the space between high and low water marks. The "shore" and the soil under the water and "riparian rights" are entirely distinct and separate subjects, and neither includes the other. A statute entitled "An act granting to the city of Mobile the riparian rights to the river front" and giving the city of Mobile the "shore and soil" under the Mobile river within the city limits, is violative of the Constitution declaring that each law shall embrace but one subject which shall be described in the title. *Mobile Dry-Docks Co. v. City of Mobile*, 40 South. 205, 207, 208, 209, 146 Ala. 198, 3 L. R. A. (N. S.) 822, 9 Ann. Cas. 1229.

"Riparian rights," strictly and technically so called, are rights not originating in grants but arise by operation of law, and are called "natural rights," because they arise by reason of the ownership of lands upon or along streams of water, which are furnished by nature, and the lands to which these natural rights are attached are called in law "riparian lands." Riparian lands, in the language of the cases and treatises, include by nature as well the lands over as those along which the stream flows, and riparian rights are incident to lands on the bank, as well as those forming the bed of the stream. Riparian rights, as natural rights, and being incidents annexed solely by operation of law to the lands under and along the stream, differ in respect to the effect of contracts upon them, from those ordinary easements in lands whose only source is a grant (actual or presumed), and, by reason of this difference of the origin and character of the right, are not subject to that general rule relating to easements by force of which unity of ownership of the dominant and servient lands extinguishes the easement. *City of Paterson v. East Jersey Water Co.*, 70 Atl. 472, 479, 74 N. J. Eq. 49.

A "riparian right" is parcel of the land to which it attaches. It is local in its nature, and enables the owner to enjoin any injuri-

ous interference with the stream, but only when such interference affects the river where it passes his land. *San Joaquin & Kings River Canal & Irrigation Co. v. Stevenson*, 128 Pac. 924, 932, 164 Cal. 221.

"The right of a riparian proprietor' in or to the waters of a stream flowing through or along his land is not the right of ownership in or to those waters, but is a usufructuary right; a right, amongst others, to make a reasonable use of a reasonable quantity for irrigation, returning the surplus to the natural channel, that it may flow on in the accustomed mode to lands below. \* \* \* His rights are not easements nor appurtenances to his holding. They are not the rights acquired by appropriation or by prescriptive use. They are attached to the soil, and pass with it." *Anderson v. Bassman*, 140 Fed. 14, 22 (quoting and adopting the definition in *Hargrave v. Cook*, 108 Cal. 72, 77, 41 Pac. 18, 19, 30 L. R. A. 390).

"Riparian rights" are a mere incident to ownership in the soil, and while they may relate back by fiction of law to the date of settlement or filing, by virtue of the patent subsequently issued, yet they do not vest until patent issues; for up to that time the title to the land, with all its incidents, is vested in the United States, utterly beyond the power or control of the state Legislatures, and the party thereafter acquiring title from the government acquires the land with all its incidents. *Kendall v. Joyce*, 93 Pac. 1091, 1093, 48 Wash. 489.

"'Riparian rights' arise out of the ownership of land through or by which a stream of water flows, which rights cannot extend beyond the original survey as granted by the government." *Watkins Land Co. v. Clements*, 86 S. W. 733, 735, 98 Tex. 578, 70 L. R. A. 964, 107 Am. St. Rep. 653 (citing 2 *Farnham, Waters & Water Rights*, p. 1572, § 463a; *Lux v. Haggin*, 10 Pac. 674, 69 Cal. 255; *Boehmer v. Big Rock Irr. Dist.*, 48 Pac. 908, 117 Cal. 27).

"Riparian rights" exist in any body of water, whether flowing or not. The rights of a riparian proprietor, so far as they relate to any natural stream, exist *jure nature*, because his land has, by nature, the advantage of being washed by streams. The principle upon which these rights are founded is equally applicable to all bodies of water, whether large or small, tidal or nontidal. The character of the water is immaterial, and the rights attach to lakes and ponds where there is no current, as well as to streams. *Turner v. James Canal Co.*, 90 Pac. 520, 522, 523, 155 Cal. 82, 22 L. R. A. (N. S.) 401, 132 Am. St. Rep. 59, 17 Ann. Cas. 823 (quoting and adopting definition in 1 *Farnham, Waters*, § 63, p. 280).

A riparian right to the use of the flow of the stream passing through or by his land is a right inseparably annexed to

the soil, not as an easement or appurtenance, but as a part and parcel of the land; such right being a property right, and entitled to protection as such, the same as private property rights generally. Ordinarily, a riparian proprietor's right to the use of water of a stream is limited to its use for domestic purposes, and, if applied to the irrigation of riparian lands, a reasonable use for such purpose in view of an equal right to use belonging to all other riparian proprietors. The right of a riparian proprietor as such to use water for irrigation purposes is limited to riparian lands. The right cannot be extended to lands contiguous to the riparian land, nor can water be diverted to nonriparian lands which might be used on riparian lands, but is not. *Crawford Co. v. Hathaway*, 93 N. W. 781, 790, 67 Neb. 325, 60 L. R. A. 889, 108 Am. St. Rep. 647.

# RIP'IN R'G'T

An owner of lands adjoining a lake conveyed to plaintiff the portion of the land that was covered by water; the deeds reciting that it was the intention of the grantor to convey all his rights to the water and the soil under water in a lake belonging and appurtenant to the described premises. After the conveyance the lots were assessed by number, with the addition "excp't rip'in r'g't." The part conveyed to plaintiff was assessed as unplatted lands. The abbreviation "rip'in r'g't," in the assessment, clearly meant the riparian rights of the parties. *Newaygo Portland Cement Co. v. Sheridan Tp.* 100 N. W. 747, 748, 137 Mich. 475.

# RIPE FOR JUDGMENT

Generally speaking, the term "ripe for judgment" means that, according to the last entry made in a proceeding, the case seems to have been brought to a final determination and everything has been done that ought to be done before the entry of final adjudication upon the rights of the parties. *Bankr. Act July 1, 1898, c. 541, § 11, 30 Stat. 549*, enacts that a suit on a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after the adjudication or the dismissal of the petition. Defendant was defaulted, and all papers necessary to make up the judgment were filed in the case, when defendant moved for a continuance on the ground of his bankruptcy. Held, that it was error to enter judgment before the motion had been passed on. *American Wood Working Machinery Co. v. Forbush*, 79 N. E. 770, 771, 193 Mass. 455.

Where a motion to take off a default, and an appeal from an order disallowing the motion, intervenes between the default and the time when the judgment would have been entered, had the clerk entered it, it may well be said that a case is not "ripe for

judgment"; but, where nothing intervenes between the default and the judgment, it seems impossible to hold that the case is not "ripe for judgment" because prior to the default a motion is made to continue the case. At common law judgment followed a default as a matter of course. Since terms have been abolished the practice is regulated by statute and the rules of the courts. In a case governed by a statute allowing a judgment on a default, if the words "ripe for judgment" are to be understood as in the general rule, the case is "ripe for judgment" when defendant is defaulted, and the damages have been assessed, though there are motions on the files of the court which are undisposed of. So under St. 1893, c. 396, § 19, relating to district and police courts providing that, if any person duly served with process issued by said courts fails to appear and answer, his default shall be recorded, and the charge against him in the declaration taken to be true, and that the court shall enter judgment for such sum as, on inquiry, it finds plaintiff is entitled to recover, with costs, a police court has power to order a default, and enter judgment thereon, where the case has been set for a hearing, and notice given to defendant, though a suggestion of insolvency, with a motion for a continuance to await the result of the insolvency proceedings, is pending. *Dalton-Ingersoll Co. v. Fiske*, 55 N. E. 468, 470, 471, 175 Mass. 15.

## RIPE FRUIT

See Green or Ripe Fruit.

## RIPRAP

"Riprap," according to the *Encyclopedia Americana*, "is a common name applied to broken stone used for beds, walls and foundations in building and construction." *United States v. Greene*, 146 Fed. 801, 862.

## RIPSAW

A "ripsaw" machine consists of a table, in the center of which, running in a slit, is a circular saw used for cutting lumber. *Merritt v. Victoria Lumber Co.*, 35 South. 497, 498, 111 La. 159.

## RISER

Uprising wires leading to and through the roof in power houses, are commonly called "risers." *Woelfen v. Lewiston-Clarkston Co.*, 95 Pac. 493, 495, 49 Wash. 405.

## RISK

See Assumption of Risk; Extraordinary Risk; Imputed Appreciation of Risk; Incurring Risk; Necessary Risk; Obvious Risks; Open Visible Risk; Ordinary Risk; Owner's Risk; Riding at Own Risk; Shifting Risk; Speculative Risk; Usual Risk.

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Any change increasing the risk, see Any. Consent to risk, see Consent. Subject to same risk, see Subject To.

The "risk" constituting one of the ingredients of a contract of insurance means the perils or contingencies against which the assured is protected. *Physicians' Defense Co. v. Cooper*, 199 Fed. 576, 579, 118 C. C. A. 50, 47 L. R. A. (N. S.) 290.

Under Acts 31st Leg. 1st Called Sess. c. 36, § 8, as amended by Acts 31st Leg. 2d Called Sess. c. 22, § 1, providing that all benefit certificates issued by fraternal associations shall be noncontestable on account of any statement or representation made unless material to the risk assumed, the term "risk assumed" must be taken to mean the hazard of the contract determined by the perils menacing the life of the insured, and hence a false representation that defendant had never had a certain practically incurable disease was material to the risk and would avoid the policy which provided that a false answer to such question avoided the policy, even though the applicant died of a wholly different disease. *United Benev. Ass'n v. Baker (Tex.)* 141 S. W. 541, 543.

### Negligence

The risk from such proximity of a railroad's coal bin to the track, as not to leave space between it and the side of the tender of an engine for a brakeman, known to the company, as shown by one of its rules, is not an ordinary risk, which would be assumed by the brakeman, but one arising from the negligence of the company, within Acts 29th Leg. c. 163, providing that, in an action against a railroad for injury to an employé caused by its negligence, the defense of assumption of risk grounded on knowledge of the danger shall not avail where the employer knew of the defect. *Chicago, R. I. & G. Ry. Co. v. De Bord (Tex.)* 146 S. W. 667, 669.

Where, in an action for injuries to an employé, the use of the terms "risk" and "acceptance of risk" is involved, the true question is whether, in incurring the particular danger, plaintiff accepted the risk in the sense that, by continuing at his work, he agreed to relieve defendant from the possible results; and hence plaintiff not only must be shown to have known the risk, but by implication from his conduct must be found to have voluntarily assumed it. *Jellow v. Fore River Shipbuilding Co.*, 87 N. E. 906, 907, 908, 201 Mass. 464.

### RISK OF COLLISION

The term "risk of collision," as used in the Inland Rules (Act June 7, 1897, c. 5, 30 Stat. 96), has a different meaning from the term "immediate danger," as in article 27, and means "chance," "peril," "hazard," or "danger of collision"; and there is risk of collision whenever it is not clearly safe to go on. *The Philadelphia*, 199 Fed. 299, 302.



There is no "risk of collision" within the meaning of the rule requiring a vessel to slacken speed or stop, or reverse, if necessary, when approaching another, so long as two vessels by complying with their passing agreement can certainly pass in safety, and each vessel may be navigated upon this supposition until the intervention of something, which should operate as notice to an officer of skill and prudence of the presence of danger. *Lake Erie Transp. Co. v. Gilchrist Transp. Co.*, 142 Fed. 89, 94, 73 C. C. A. 313.

### RISK PECULIAR TO OPERATION OF RAILROAD

See Operate.

### RISKS INCIDENT TO BUSINESS

By the use of the expression a "risk ordinarily incident to the employment" is meant a risk of injury that does not arise or grow out of an act of negligence on the part of the defendant or its servants, and a risk created by an act of negligence on the part of a railroad company or its employés is not a "risk ordinarily incident to the employment." *Atchison, T. & S. F. R. Co. v. Mills*, 108 S. W. 480, 481, 49 Tex. Civ. App. 349 (quoting and adopting *Texas & N. O. R. Co. v. Kelly*, 80 S. W. 79, 98 Tex. 123).

In a servant's action for injuries an instruction that plaintiff assumed as matter of law all risks of injury ordinarily incident to the employment; that, if his injury resulted from risks ordinarily incident to the work, the verdict should be for defendant; that by the expression "risk ordinarily incident to the work" is meant a risk of injury that does not grow out of an act of negligence on the part of defendant or his other employés, etc.—correctly stated the law. *Freeman v. Fuller* (Tex.) 127 S. W. 1194, 1197.

"Risks which are incident to the business" must not be confounded with such as are denominated 'obvious.' The former sort comprises those which accompany or arise from the natural or usual method of conducting the particular business, and has more special relation to perils which attend the business generally, while the latter include such as are manifest to the sense of observation, open and readily discernible, whether they arise from the nature of the business, the particular manner in which it is conducted, or the use of defective and unsafe appliances." *New Omaha Thomson-Houston Electric Light Co. v. Rombold*, 106 N. W. 213, 216, 73 Neb. 259 (quoting with approval from *Stager v. Troy Laundry Co.*, 63 Pac. 645, 38 Or. 480, 53 L. R. A. 459-461).

### RIVER

See Fresh-Water Rivers; Mississippi River; North River.  
Navigable River, see Navigable.  
See, also, Stream.

"A 'river' is a running stream of water, pent in on either side by banks, shores, or walls. \* \* \* A fresh water river, like a tidal river, is composed of the alveus, or bed, and the water; but it has banks, instead of shores. The banks are the elevations of land which confine the waters in their natural channel, when they rise the highest and do not overflow the banks; and in that condition of the water the banks and the soil which is permanently submerged form the bed of the river." *State v. Faudre*, 46 S. E. 269, 270, 54 W. Va. 122, 63 L. R. A. 877, 102 Am. St. Rep. 927, 1 Ann. Cas. 104 (quoting *Gould, Waters*).

A "river" consists of water, a bed, and banks. *Dodge County v. Saunders County*, 97 N. W. 617, 619, 70 Neb. 442 (quoting definition in *Howard v. Ingersoll*, 54 U. S. [13 How.] 392, 14 L. Ed. 189).

The term "river" includes the bed of the stream up to its state of ordinary high water. *Minor's Heirs v. City of New Orleans*, 38 South. 999, 1003, 115 La. 301.

#### As thread of river

Generally, designation of a "river" as a boundary of a state means its middle, in the absence of further description. *De Loney v. State*, 115 S. W. 138, 140, 88 Ark. 311.

### RIVER BED

See Highest Above Bed of River.

The shores of a navigable river are the lands between high and low water marks, and the "bed of the river" includes the shores. *State v. Gerbing*, 47 South. 353, 356, 56 Fla. 603, 22 L. R. A. (N. S.) 337.

The "bed of the river" is that part between the banks worn by the regular flow of the water, and the expression "six feet in highest above the bed of the river," in a grant of a right to flow land by a dam of that height, means six feet above the highest point of the river bed. *Haigh v. Lenfesty*, 87 N. E. 962, 964, 239 Ill. 227.

"The bed of the river" is that portion of its soil which is alternately covered and left bare as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year without reference to the extraordinary freshets of the winter or spring or the extreme droughts of the summer or autumn." *City of Peoria v. Central Nat. Bank*, 79 N. E. 296, 299, 224 Ill. 43, 12 L. R. A. (N. S.) 687 (quoting and adopting definition in *Alabama v. Georgia*, 64 U. S. [23 How.] 505, 515, 16 L. Ed. 556).

The margin of the bed of a river which lies between high and low water mark is called the "beach" or "shore," which is actually a part of the bed of the river, and, when the river is at its full flow, whether caused by the tide or by the natural increase of waters by rains, floods, and the like, filling its natu-

ral bed to its highest reach of flow, it marks its high-water, while its lessened range of flow by summer heats shows its low-water, mark. *Sun Dial Ranch v. May Land Co.*, 119 Pac. 758, 762, 61 Or. 205.

"A 'river' is a running stream of water, pent in on either side by banks, shores or walls." "A fresh water river, like a tidal river, is composed of the alveus, or bed, and the water; but it has banks, instead of shores. The banks are the elevations of land which confine the waters in their natural channel, when they rise the highest and do not overflow the banks, and in that condition of the water the banks and the soil which is permanently submerged, form the bed of the river." *State v. Faudre*, 46 S. E. 269, 270, 54 W. Va. 122, 63 L. R. A. 877, 102 Am. St. Rep. 927, 1 Ann. Cas. 104 (quoting Gould on Waters).

## ROAD

See Common Road; Country Road; Established Road or Way; First Class Road; Hard Road; Law of the Road; Legal County Road; Military Road; Necessary Road; New Road; Post Roads and Routes; Private Road; Public Road; State Road; Summer Road; Three-Notched Road; Toll Road; Town Road; Township Road; Traveled Public Road.

Cost of road, see Cost.

Expenses of road, see Expenses.

Other roads, see Other.

Said road, see Said.

See, also, Avenue; Highway.

"Roads and highways" are words embracing all kinds of public ways, such as county and township roads, streets, alleys, township and plank roads, turnpike or gravel roads, tramways, ferries, canals, navigable rivers, and also railroads. *Strange v. Board of Com'rs of Grant County*, 91 N. E. 242, 247, 173 Ind. 640.

The word "road" in its popular sense includes overland ways of every character, but has no fixed meaning in the law; the scope to be given it depending on the context in which it appears. *Griffin v. Sandborn*, 56 S. E. 71, 127 Ga. 17 (citing *Southern Ry. Co. v. Combs*, 53 S. E. 508, 124 Ga. 1006).

A "road" intended for use in connection with a limekiln, and used mostly by those having business there, is, nevertheless, a road within Civ. Code, § 486, requiring signals where a railroad crosses any street, road, or highway. *Vance v. Atchison, T. & S. F. Ry. Co.*, 98 Pac. 41, 42, 9 Cal. App. 20.

The statute providing that telegraph wires shall be placed at a height of 25 feet above road crossings used the word "road" in its generic sense and did not limit it to public highways. *Weaver v. Dawson County Mut.*

*Tel. Co.*, 118 N. W. 650, 651, 82 Neb. 696, 22 L. R. A. (N. S.) 1189.

Under Rev. St. 1887, § 851, as amended by Sess. Laws 1893, p. 12, defining roads to be roads laid out and recorded by order of the county commissioners and roads used for five years, provided the latter shall have been worked and kept up at public expense or located and recorded by order of the county commissioners, roads used for five years that have been worked and kept up at public expense are public roads, whether recorded or not. *Meservey v. Gulliford*, 93 Pac. 780, 782, 14 Idaho, 133.

The terms "public highway" and "public road" are not synonymous. (a) The word "road" refers to the piece or strip of land taken. "Way," in legal parlance, merely denotes an easement, and that the land has been subjected to servitude. (b) "Highway" is also a generic term, which includes other uses besides the right of ordinary locomotion over land which has been subjected to public use. *Johnson v. State*, 58 S. E. 265, 267, 1 Ga. App. 195.

The words "roads, streets, and alleys," as used in Carter's Ann. Civ. Code Alaska, c. 22, § 204, subd. 3, which confers the right of eminent domain for improving streams, and for "roads, streets, and alleys," and all other public uses which may be authorized by Congress, or any other legislative authority of the district, are used independently as within the public uses defined by the statute, and relate to properties clearly made the subjects of condemnation without further legislation of Congress; the words "which may be authorized by Congress or other legislative authority of the district" qualifying only the words "and all other public uses" and not relating to "roads, streets and alleys" or to enumerated public uses, so that a city had power to condemn possessory rights in tide lands for the widening of a street. *Ashby v. City of Juneau*, 174 Fed. 737, 738, 98 C. C. A. 476.

### Bridle road

Va. Code 1904, p. 2061, § 3878, relating to offenses concerning highways, etc., provides: "In this chapter the word 'road' shall be construed to mean any turnpike, state road, or county road." Section 944a (2), p. 440, Va. Code 1904, authorizing the board of supervisors of any county to appoint viewers to examine and report on the expediency of establishing any new road, etc., provides that every road shall be 30 feet wide and that the grade of no road hereafter located shall exceed four degrees at any one point, unless the said board order a different width or grade. Held, that the authority conferred by the latter section to order a different width in establishing new roads is for the purpose of enabling the tribunal charged with that duty to meet the exigencies of exceptional cases, and must be exercised subject to the implied

limitation that the character of the way as a "road" shall be maintained, and hence the county court had no jurisdiction to establish a bridle way "for horseback travel." *Terry v. McClung*, 52 S. E. 355, 356, 104 Va. 599.

#### Highway synonymous

Many courts have treated the terms "roads" and "highways" and related descriptive words as synonymous in interpreting statutes. *Board of Revenue of Jefferson County v. State ex rel. City of Birmingham*, 54 South. 757, 759, 172 Ala. 138 (citing 7 Words and Phrases, pp. 6250-6254, 6684 et seq.); *State ex rel. City of Tuscaloosa v. Court of County Com'rs of Tuscaloosa County*, 54 South. 763, 173 Ala. 724; *City of Newton v. Board of Sup'rs of Jasper County*, 112 N. W. 167, 168, 135 Iowa, 27, 124 Am. St. Rep. 256.

The term "road" is frequently used as synonymous with highway, but it does not appear to have any fixed legal meaning. *Southern Ry. Co. v. Combs*, 53 S. E. 508, 124 Ga. 1004.

The term "public highway," as used in Acts 1905, p. 114, forbidding appearance on the public highway in an intoxicated condition, is not synonymous with "public road." *Johnson v. State*, 58 S. E. 265, 267, 1 Ga. App. 195.

#### As improved portion

The word "road" in Act Nov. 22, 1905 (Laws 1905, p. 414) § 7, providing that where any "road" has been constructed under the act providing for the improvement of roads at the expense of the property benefited thereby, and another "road" shall be thereafter constructed within four miles thereof, the amount to be assessed against all lands included within the overlapping two-mile lines of each road shall be equitably determined by the county court, on the report of the viewers and appraisers, means the portion improved, and the improvement of any other portion of the same road is another road, and lands within the overlap are protected from unequal burdens. *St. Benedict's Abbey v. Marion County*, 93 Pac. 231, 234, 50 Or. 411.

#### As mine

B. & C. Comp. § 5668, as amended by Laws 1907, p. 294, provides that, when two or more mines are claimed by the same person or persons and worked through a common shaft or tunnel or at one mill, or other reduction works, then all the mines, and all roads, tramways, trails, flumes, ditches, or pipe lines, buildings, structures, or superstructures used or owned in connection therewith, shall be deemed one mine. Held, that the words "roads, tramways, trails, flumes, ditches or pipe lines," include such appurtenances when not situated upon the mine, and that the term "upon any millsite or mill used, owned, or operated in connection with such mine," in such section, prior to its amend-

ment, had reference to the millsite or mill not situated on the mine; the section as amended necessarily including the millsite or mills connected with the mine, without being specifically mentioned, so that a miner's lien notice need not state nor the proofs show that the labor for which the lien is claimed has been done on the mill or building on the mine to subject them to the lien. *Washburn v. Inter-Mountain Mining Co.*, 109 Pac. 382, 385, 56 Or. 578, Ann. Cas. 1912C, 357.

#### Private crossing

Code, § 2072, provides that a locomotive whistle shall be sounded at least 60 rods before any road crossing is reached; and Code, § 48, cl. 5, provides that the term "road" means any public highway, unless otherwise specified. Held, that section 2072 was limited to public highways, and did not require signals at private crossings. *Nichols v. Chicago, M. & St. P. Ry. Co.*, 100 N. W. 1115, 1116, 125 Iowa, 236.

#### As public place

See Public Place.

#### Railroad

Gen. St. 1865, c. 69, § 17, authorizing bridge corporations to exercise the right of eminent domain, was amended by Laws 1871-72, p. 15, by inserting after the words "necessary to appropriate any lands of private persons or corporations," in the former act, the words "for approaches, road, foot, or wagon ways of said bridge company." Held, that the word "road," in such amendment, when applied to a structure designed for the passage of railroad trains, should be construed to mean "railroad," and authorized a railroad bridge company to condemn land for its approaches and necessary tracks to its bridge. *Southern Illinois & M. Bridge Co. v. Stone*, 73 S. W. 453, 458, 174 Mo. 1, 63 La. R. A. 301.

#### Streets and alleys

The term "street" or "avenue" commonly applies to a public highway in a village, town, or city, and the term "road" to suburban highways; but there may be roads in a city or town and streets or avenues in the country. *Ballinger's Ann. Codes & St. § 3803* (Pierce's Code, § 7854), providing that any "county road" or part thereof, which remains unopened for public use for a space of five years after the order is made or authority granted for opening the same, shall be vacated and the authority for building it barred by the lapse of time, is applicable to streets dedicated through platted land outside the limits of any incorporated city or town. *Murphy v. King County*, 88 Pac. 1115, 1116, 45 Wash. 587.

Code, § 422, subd. 16, empowers the board of supervisors to discontinue any state or territorial highway, and subdivision 17 empowers them to establish or discontinue any county highway through or within the

county. Section 751 empowers cities and towns to establish or vacate streets and alleys. Section 48, subd. 5, provides that the words "highway" and "road" include public bridges, and may be held equivalent to the words "county road," "county way," "common road," and "state road." Section 1507 provides that all public streets of villages are a part of the road. Held that, where a plat was made of land dividing it into lots, streets, and alleys prior to the incorporation of a town embracing the land platted, the streets and alleys became county roads subject to the jurisdiction of the board of supervisors, and though after the incorporation of the town the control may have passed to the city council, yet the incorporation of the town having been vacated, the control of the streets and alleys reverted to the board of supervisors. *Chrisman v. Brandes*, 112 N. W. 833, 835, 137 Iowa, 433; *Gilbert v. Brandes*, 112 N. W. 833, 137 Iowa, 433.

Under Laws 1887, p. 587, c. 72, relating to bridges on public roads over streams, the word "roads" should be taken in the sense in which it is commonly used and understood, namely, as including only rural highways, and not that portion of a highway lying within the limits of a city or village. *Central City v. Marquis*, 106 N. W. 221, 223, 75 Neb. 233.

A statute giving a telegraph company the right to erect and maintain its poles and wires along public "roads and highways" included by the quoted phrase the streets and alleys of cities. *Duluth Terminal Ry. Co. v. City of Duluth*, 130 N. W. 18, 21, 113 Minn. 459.

In view of the use of the word "road" throughout the Code of 1897, where the word "highway" previously appeared in the statute, and of Code, § 48, par. 5, providing that the words "highway" and "road" may be held equivalent to "county highway," "county road," "common road," "state road," the word "roads," as used in Code section 2158, authorizing the construction of telephone lines along the public roads of the state and the erection of the necessary fixtures therefor, is equivalent to the word "highways," as used in a similar provision of Code 1873, § 1324, as amended by Acts 19th Gen. Assem. c. 104, and includes the streets and alleys of a city or town. *East Boyer Telephone Co. v. Incorporated Town of Vall* (Iowa) 129 N. W. 298, 299.

#### ROAD AND BRIDGE TAX

See, also, Road Tax.

"Road and bridge taxes," within Hurd's Rev. St. 1911, c. 120, § 343b, providing that, if the aggregate of taxes certified to be extended against any property in any taxing district or municipality exceed 3 per cent. of the assessed valuation thereof, the county

clerk shall reduce the rate per cent. of tax levy of such taxing district or municipality in a certain way (not considering certain taxes, including "road and bridge taxes," in determining whether there is an excess of taxes, or in making the reduction), refer only to such taxes as are authorized by the statute to be levied under the express designation of "road and bridge taxes," and do not include an item of a county appropriation for road and bridge purposes included in a "county tax," or an item of a city's appropriation for streets, alleys, and sidewalks included in the "city tax"; all items of appropriation by a city or county, with certain exceptions not including said items, being, under the last proviso of the paragraph, affected proportionately, in the absence of election to the contrary. *People v. Illinois Cent. R. Co.*, 100 N. E. 212, 213, 214, 256 Ill. 332.

#### ROAD CROSSING

All road crossings, see All.

Any road crossing, see Any.

#### ROAD DISTRICT

As corporation, see Corporation.

A "road district" is not a quasi corporation. *Custer County Bank v. Custer County*, 100 N. W. 424, 426, 18 S. D. 274.

#### ROAD ENGINE

See Traction or Road Engine.

Engines which regularly run between different points on a railroad line are known as "road engines," in contradistinction to "yard engines," which perform services only in the yards. *Central of Ga. Ry. Co. v. Goodson*, 45 S. E. 680, 681, 118 Ga. 833.

#### ROAD OVERSEER

As state officer, see State Officer.

#### ROAD PRECINCT

Since the term "road precinct," as employed in Code 1896, form 75, giving a form charging an overseer of a road precinct with failure to perform his duties, and in Code 1896, §§ 2454, 2461, 2462, 2470, relating to the apportionment of road precincts, the appointment of overseers, and their duties, etc., designates any road apportioned to an overseer, so that a road overseer of a particular road is properly called overseer of a "road precinct," an indictment in the Code form, alleging that defendant, an overseer of a road precinct, failed to discharge his duties, is sufficient under the express provisions of sections 4923, 5395, and is technically accurate in designating the officer as an overseer of a road precinct. *Ward v. State* (Ala.) 39 South. 923, 924.

#### ROAD SUPERVISOR

As county officer, see County Officer.

**ROAD TAX**

Assessment of road labor, see *Tax—Taxation*.

See, also, *Road and Bridge Tax*.

The hard or rock road taxes authorized by the statute, providing that such taxes may not be levied without a vote of the people, on petition, declaring that the taxes shall be extended in a separate column on the tax books, requiring the treasurer to give a separate bond to account for such taxes before the same can be paid over to him, and directing that the taxes shall only be applied to the construction of the roads designated by the vote, are "road taxes," within the amended revenue law of 1909 (Laws 1909, p. 323, § 2), requiring the county clerk to reduce the rate per cent. of a tax levy, exclusive of state, village, levee, school building, high school building, and road and bridge taxes, so that hard or rock road taxes are properly excluded in determining the correctness of a county clerk's reduction of the taxes of a town. *People v. Cairo, V. & C. Ry. Co.*, 93 N. E. 405, 406, 247 Ill. 360.

**ROADBED**

As real estate, see *Real Estate*.

The roadbed of a railroad is "the bed or foundation on which the superstructure of a railroad rests." *Attorney General ex rel. Brotherton v. Common Council of City of Detroit*, 111 N. W. 860-878, 148 Mich. 71 (citing *Webst. Dict.*); *In re New York Bay R. Co.*, 67 Atl. 1049, 1051, 75 N. J. Law, 389 (quoting and adopting definition in *Re United New Jersey R. & Canal Co.*, 67 Atl. 1075, 75 N. J. Law, 385).

The term "roadbed," as used in Const. art. 13, § 10, relating to the taxation of railroad companies, includes only the bed or foundation on which the superstructure of the railroad rests. *San Francisco & S. J. V. Ry. Co. v. City of Stockton*, 84 Pac. 771, 774, 149 Cal. 83.

A petition in an action against a carrier which alleges negligence of servants in charge of the "railroad, train, and roadbed" alleges that the track was defective, though the word "roadbed" does not include track and ties, since the word "railroad" is broad enough to include the roadbed and the superstructure including cross-ties, rails, and fastenings. *Skiles v. St. Louis, I. M. & S. Ry. Co.*, 108 S. W. 1082, 1084, 130 Mo. App. 162.

**As entire road**

An accident insurance policy, which excluded liability for injuries received "while walking or being upon any bridge or roadbed of any railway," must have intended to except, from the risks insured against, that of being struck by moving cars or engines, so that any part of the right of way which may be swept by the moving rolling-stock is contemplated, and no recovery could be had for

an insured struck while walking outside the ends of the ties. *Osgood v. United States Health & Accident Ins. Co.*, 84 Atl. 50, 51, 76 N. H. 475, Ann. Cas. 1913C, 425.

Double railroad tracks 10 feet apart were used for the running of trains in opposite directions, and when trains passed each other the space between them was 4 feet. A person walking between the tracks got out of the way of an approaching train, and was struck by an engine running on the other track. Held, that the injuries were received while he was on the "roadbed" of a railroad within an accident policy limiting the liability of the insurer for injuries received while the insured was on the roadbed of a railroad. *McClure v. Great Western Acc. Ass'n*, 110 N. W. 466, 133 Iowa, 224, 8 L. R. A. (N. S.) 970, 119 Am. St. Rep. 598, 12 Ann. Cas. 41.

**Land used for sidings**

In a statute relating to taxation, providing that the roadbed, rolling stock, franchises, choses in action, and personal property of a railroad having no actual situs shall be known as its distributable property, and shall be valued separately from other property, the term "roadbed" includes all side tracks, and switch tracks, wherever situated, and with the rolling stock, franchises, etc., must be assessed separately as distributable property. *Nashville, C. & St. L. R. Co. v. Patterson*, 122 S. W. 467, 474, 122 Tenn. 1.

**As way for travel**

Where an owner of an automobile, on meeting a team, was compelled to steer into the grass below the level of the roadbed, and while endeavoring to return the machine was overturned, the accident was not suffered in the "roadbed," within a policy excluding insurer from liability for damages caused by striking any portion of the roadbed; the word "roadbed," in common roads, meaning the whole material laid in place and ready for travel, or the material part of the road. *Hardenburgh v. Employers' Liability Assur. Corp.*, 138 N. Y. Supp. 662, 663, 78 Misc. Rep. 105.

**ROADBED AND TRACK**

The term "roadbed and track," as used in a statute establishing a drainage and levy district in portions of certain counties lying east of a certain railway, including the track and roadbed of said railway, includes the right of way. *St. Louis Southwestern Ry. Co. v. Grayson*, 78 S. W. 777, 778, 72 Ark. 119.

**ROADWAY**

See *Central Line of Roadway; Modern Asphalt Roadway*.

The term "roadway," as used in Const. art. 13, § 16, relating to the taxation of railroads, includes simply the continuous strip of land within which the railroad is constructed. It is synonymous with "right of

way" and includes whatever space of ground the company is allowed by law in which to construct its roadbed and lay its track. The term "roadway" in this provision means the continuous strip of land upon which the railroad is constructed, and Civ. Code, § 465, subd. 4, authorizing railroad corporations to lay out their roads not exceeding nine rods wide and to construct and maintain the same with such appendages and adjuncts as may be necessary, does not broaden the meaning of the term. *San Francisco & S. J. V. Ry. Co. v. City of Stockton*, 84 Pac. 771, 774, 149 Cal. 83.

Railroad property within a city, consisting of parcels contiguous to the 30-foot continuous right of way and within a part of the 9-rod right of way permitted to railroads by Civ. Code, § 465, subd. 4, and used for freight and passenger depots, for local business, and for spur tracks necessary for the depots, and for a fruit packing house with a spur track for convenient use, and for a park and for tracks used for the storage of tools, is not a part of the right of way within Const. art. 13, § 10, providing that the franchise roadway, roadbed, and rails of railroads operated in more than one county shall be assessed by the State Board of Equalization, and is properly assessed by the city assessor; the word "roadway" being synonymous with the phrase "right of way," which includes the continuous strip of land permitted by law on which to construct the roadbed and lay the tracks. *Atchison, T. & S. F. Ry. Co. v. Los Angeles County*, 111 Pac. 250, 251, 158 Cal. 437.

The phrase "railroad track" is quite commonly used to denote the right of way of a railroad, and often means the same as "roadway" as used in P. S. 4327, relating to adverse possession of lands of a railroad company within its roadway. *Bacon v. Boston & M. R. Co.*, 76 Atl. 128, 132, 83 Vt. 421.

The term "roadway," within V. S. 3745 (P. S. 4327), providing that no person shall acquire title to lands belonging to a railroad corporation, where such lands lie within the limits of the roadway of such corporation, includes such lands taken by the corporation, contiguous to the center of its road, as shown by the record in the town clerk's office, as the corporation could lawfully take for the purposes of its roadway by condemnation proceedings. *Drouin v. Boston & M. R. Co.*, 52 Atl. 957, 959, 74 Vt. 343.

A "roadway," within Const. § 179, providing for taxation of the franchises, roadway, etc., of all railroads, includes not only the strip of ground on which the main line is constructed, but all grounds necessary for the construction of side tracks, turn-outs, connecting tracks, station houses, freight-houses, and other accommodations reasonably necessary to accomplish the object of their incorporation. *Minneapolis, St. P. &*

*S. S. M. Ry. Co. v. Oppegard*, 118 N. W. 830, 831, 18 N. D. 1.

An ordinance was entitled "An ordinance concerning the use of streets and alleys and the space under sidewalks by private persons." Section 1 prohibited such use without a permit, to be issued only as therein provided, and not transferable without the written consent of the commissioner of public works. Section 2 declared that no permit should be issued for the use of any space under the surface of "the roadway of any street or other public ground." Held, that since the word "roadway" as used in such provision was not the space between two curbs, sidewalks, or parkways, but was properly defined as the portion of the street used for horses and vehicles, which may be co-extensive with the limits of the street, the prohibition in section 2 applied to alleys, so that the commissioner of public works could not issue a permit for the use of space underneath the roadway of a public alley. *J. Burton Co. v. City of Chicago*, 86 N. E. 93, 95, 238 Ill. 383, 15 Ann. Cas. 965.

The words "roadway of any street," in Laws 1901, pp. 63, 64, c. 49, § 5859, declaring that when the council shall deem it necessary to pave or otherwise improve the roadway of any street, etc., indicate the legislative intention to discriminate between that part of the street used as a highway for general travel and that part used exclusively as a sidewalk for pedestrians. *Scss. Acts 1901, c. 49, § 5858, Rev. St. 1899 (Ann. St. 1906, p. 2062)*, relating to street improvements in certain cities, provides that the resolution declaring the paving and macadamizing necessary shall also declare that the street, etc., shall be brought to the established grade, and the cost thereof included in the special assessment for paying for each paving or macadamizing, and section 5859 (page 2064) declares that when the council shall deem it necessary to pave, macadamize, gutter, curb, grade, or "otherwise improve" the "roadway of any street," etc., or any part thereof within the limits of the city for which a special tax is to be levied, the council shall by resolution declare such work or improvement necessary and shall publish the resolution, etc. Held, that such sections did not require a resolution of necessity prior to the construction of sidewalks along a portion of a street. *City of Joplin v. Freeman*, 103 S. W. 130, 131, 125 Mo. App. 717.

## ROAST

### ROASTER

See Ore Roaster.

### ROASTING ORE

The process known as "roasting ore" is done crudely in the open air by burning wood and ore mingled in a pile. It is a preliminary step to smelting. The use of timber

taken from unsurveyed mineral land in "roasting ore" at a mine, whether "roasting ore" be considered a part of "mining" or "smelting," is authorized by the permission given by Act June 3, 1878, c. 150, § 1, 20 Stat. 88, to fell and remove such timber for "building, agricultural, mining, or other domestic purposes." *United States v. United Verde Copper Co.*, 25 Sup. Ct. 222, 223, 196 U. S. 207, 49 L. Ed. 449.

## ROB

In the statute relating to assault with intent to rob, and an indictment following its language, the term "rob," is used in its common-law sense. *Tyson v. United States*, 122 Pac. 733, 7 Okl. Cr. 433.

### In coal mining

The word "robbed," when used in connection with coal mining, means to weaken the supporting pillars of coal so that the miners may save extra labor in cutting air passages. *Lloyd v. Catlin Coal Co.*, 71 N. E. 335, 338, 210 Ill. 460.

The term "robbed," as used in coal mining operations, constitutes removing all stumps, pillars, and walls and all the coal remaining in place in entries, cross-entries, rooms, and other mining openings which had previously been made in removing the coal therefrom. *Sagamore Coal Co. v. Clark* (Ky.) 109 S. W. 349, 350.

The occupation of "robbing a mine" is that of taking out the pillars of ore or coal which have been left standing to support the roof while the mass is being taken out. *Cumberland Coal & Coke Co. v. Gray*, 152 Fed. 939, 940, 82 O. C. A. 87.

## ROBBER

A mere depredator is not a "robber," within a bill of lading exempting a carrier from liability for injury to the shipment caused by robbery. *Louisville & N. R. Co. v. Dunlap*, 41 South. 826, 148 Ala. 23.

## ROBBERY

See Assault With Intent to Rob.

See, also, Force; Force and Violence; From the Person; Hold Up; Putting in Fear.

### Common-law definition

"Robbery" is the felonious taking of personal property from the possession of another." *People v. Cleary*, 81 Pac. 753, 754, 1 Cal. App. 50.

At common law, "robbery" is the taking of a thing of value from the person or presence of another against his will, by force, or by putting him in fear. *Steward v. People*, 79 N. E. 636, 639, 224 Ill. 434 (citing *Burke v. People*, 35 N. E. 376, 148 Ill. 70; *Hall v. People*, 49 N. E. 495, 171 Ill. 540; *Schroeder v. People*, 63 N. E. 678, 196 Ill. 211).

"Robbery" at common law, as defined by text-writers, is the felonious and forcible taking from the person of another goods or money to any value, by violence or putting in fear. *State v. McAllister*, 63 S. E. 758, 760, 65 W. Va. 97, 131 Am. St. Rep. 955.

"Robbery" is the felonious taking or carrying away of the personal property of another, from his person or in his presence, by violence or by putting him in fear. *Weidner v. Standard L. & Acc. Ins. Co.*, 110 N. W. 246, 248, 130 Wis. 10.

"Robbery" is the felonious taking of personal property in the possession of another from his person, or immediate presence, and against his will, accomplished by means of force, or fear. *Ramirez v. Territory*, 80 Pac. 391, 9 Ariz. 177.

"Robbery" is defined by the statute to be the felonious and forcible taking from the person of another any article of value, by violence or by putting him in fear, and the statute thereby restates the offense at common law defined by Blackstone (2 Cooley, Bl. Comm. [4th Ed.] bk. 4, p. 242) to be the felonious and forcible taking from the person of another of goods or money to any value, by violence or by putting him in fear. *McGinnis v. State*, 91 Pac. 936, 937, 16 Wyo. 72.

### Statutory definition

Pen. Code, § 224, defines "robbery" in part as the unlawful taking of personal property from the person of another against his will by means of force or violence. *People v. Monroe*, 104 N. Y. Supp. 675, 676, 119 App. Div. 704.

"Robbery," as defined by Code, § 4753, consists in stealing and taking from another, with force or violence or by putting him in fear, property which is the subject of larceny. *State v. Atkins*, 97 N. W. 996, 122 Iowa, 161.

Code 1892, § 1284, provides that every person who shall feloniously take the personal property of another in his presence or from his person or against his will by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of "robbery." *Smith v. State*, 35 South. 178, 179, 82 Miss. 793.

"Robbery" is defined by Pen. Code, § 319, to be the "felonious taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear. Ex parte *Smith*, 78 Pac. 1035, 4 Ariz. 95.

As defined by Pen. Code, § 211, "robbery" is the felonious taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear. *People v. Modina*, 79 Pac. 842, 146 Cal. 142; *In re Myrtle*, 84 Pac. 335, 337, 2 Cal. App. 383

(quoting Pen. Code, § 211); *State v. La Chall*, 77 Pac. 3, 4, 28 Utah, 80 (quoting the definition in *People v. Chuay Ying Git*, 34 Pac. 1080, 100 Cal. 437; citing Pen. Code, § 211).

Rev. St. 1898, § 4175, defines "robbery" as the felonious taking of personal property in the possession of another from his person or immediate presence, and against his will accomplished by force or fear. An indictment for robbery failing to charge that the property taken from the prosecutor was taken by means of force or fear is insufficient. *State v. Davis*, 76 Pac. 705, 706, 28 Utah, 10.

The crime of "robbery" which is made punishable by from three to five years in the penitentiary is defined by Cr. Code, § 13, in these words: "If any person shall forcibly, and by violence or by putting in fear, take from the person of another any money or personal property, of any value whatever, with the intent to rob or steal." Held, that the statute contemplated various degrees of guilt in the crime, calling for punishment varying in time, and gave the court a large discretion in fixing the punishment, which was to be exercised according to the aggravation of the crime committed, and it was not contemplated that the extreme penalty allowed by the statute should be imposed for the first offense when any mitigating circumstances were shown. *Buckley v. State*, 112 N. W. 283, 284, 79 Neb. 86.

"Robbery" is called in the books a compound larceny, and is constituted by the unlawful and felonious taking and asportation of the personal property of another by violence, or by putting him in fear. In order to constitute the offense, it is necessary that the animus furandi or felonious intent should exist. The statutory offense prescribed in Ky. St. 1903, § 1256, imposing a fine on any person unlawfully, but not with felonious intention, carrying away property not his own, is not a degree of the common-law offense of robbery, and an accused in a prosecution for robbery could not be found guilty of such statutory offense, if the proof failed to show him guilty of robbery or any degree thereof, such as larceny. *Triplett v. Commonwealth*, 91 S. W. 281, 282, 122 Ky. 35.

An indictment for "robbery," under Code 1906, § 1361, which provides that one guilty of the felonious taking of the personal property of another, "by violence to his person or by putting such person in fear of some immediate injury to his person, shall be guilty of robbery," charged that defendant feloniously put in bodily fear and danger of his life a person named and took personal property of such person, is fatally defective for omission to allege immediate danger to the person alleged to have been robbed. *Webb v. State*, 55 South. 356, 99 Miss. 545.

Pen. Code, § 228, subd. 2, provides that an unlawful taking, if accomplished by force or fear, is robbery in the first degree, when

committed by a person aided by an accomplice actually present. Held, that an indictment alleging that L. and R., at a specified date, time, and place, "each \* \* \* being aided by an accomplice actually present," did unlawfully, etc., take certain personal property of K., against his will and by force and violence done to him by the said L. and R. by means of choking or otherwise assaulting K., sufficiently charged "robbery" by the assistance of an accomplice actually present, the clause quoted being treated as surplusage; and hence the court did not err in permitting the state to file an amendment alleging, after the quoted clause, that L. was aided by R. as an accomplice, and that R. was aided by L. as an accomplice. *People v. Roof*, 122 N. Y. Supp. 677, 678, 138 App. Div. 683.

Pen. Code, § 950, requires an information to contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended"; and section 952, subd. 8, provides that "the particular circumstances of the offense charged, when they are necessary to constitute a complete offense" must be stated. Section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." Section 240 defines an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Held, that an information under section 220, providing that "every person who assaults another with intent to commit \* \* \* robbery \* \* \* is punishable," etc., need not allege how or by what means the assault was made, nor set forth the means used to constitute force or excite fear, nor that the prosecuting witness was in possession of personal property, and that an information was sufficient which charged that the assault was made with force and violence, and that the intent was to feloniously, and by force, violence, and intimidation, steal, take, and carry away the property of the prosecuting witness, and against his will. *People v. Holden*, 109 Pac. 495, 496, 13 Cal. App. 354.

#### Force or fear

To be robbery, the one robbed must be deprived of his property by force or fear. *Brown v. Commonwealth*, 117 S. W. 281, 283, 135 Ky. 635, 135 Am. St. Rep. 471, 21 Ann. Cas. 672.

To constitute robbery, there must be actual violence, or such a demonstration or threats as will create reasonable apprehension of bodily injury if the victim resists. *State v. Donohue* (N. J.) 59 Atl. 12.

"Robbery" may and often is accomplished by the concurrence of force and fear. When it is accomplished by force, fear is the



usual concomitant. If one were not apprehensive of the force, he would not have the fear. *State v. Howard*, 77 Pac. 50, 52, 30 Mont. 518.

The gist of the offense of "robbery" is the force or intimidation and the taking from the person against his will of a thing of value and belonging to him, and the nature and value of the property taken is immaterial. *People v. Nolan*, 95 N. E. 140, 250 Ill. 351, 34 L. R. A. (N. S.) 301, Ann. Cas. 1912B, 401.

It is unnecessary to prove both violence and intimidation; and, if the fact be attended with the circumstance of terror, such threatening word or gesture as in common experience is likely to create apprehension of danger, and induce a man to part with his property for the safety of his person, it is robbery, and it is unnecessary to prove actual fear, as that will be presumed. *State v. Luhan*, 102 Pac. 260, 262, 31 Nev. 278.

To constitute robbery, the taking need not be "without the consent of the owner and fraudulently done"; a taking by putting in fear of life or bodily injury being sufficient. *Brown v. State*, 136 S. W. 265, 266, 61 Tex. Cr. R. 334.

Where an article is so attached to the person or clothes as to create resistance, however slight, or where there is a struggle to keep it, the taking is robbery. *People v. Campbell*, 84 N. E. 1035, 1036, 234 Ill. 391, 123 Am. St. Rep. 107, 14 Ann. Cas. 186.

The Pen. Code Ga. definition of "robbery" is merely declaratory of the common law. The "force," in such definition, is the same as the "violence" of the common-law definition; and the "intimidation" in such definition is synonymous with the "putting in fear" in the common law. *Johnson v. State*, 57 S. E. 1056, 1 Ga. App. 729.

To constitute the crime of "robbery" there must be violence or intimidation of such a character as that the injured party is put in fear of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and temporarily suspend the power of exercising his will. *Steward v. People*, 79 N. E. 636, 639, 224 Ill. 434.

Under a statute defining "robbery" to be the felonious taking of personalty by means of force, etc., the use of only such force as is necessary to take money without the resistance of the victim is insufficient to constitute robbery. *State v. Paisley*, 92 Pac. 566, 568, 36 Mont. 237.

Under Pen. Code, § 211, providing that "robbery" is the felonious taking of personal property in the possession of another from his person or immediate presence and against his will, accompanied by force or fear, an information charging that the property was taken from prosecutor's presence, but failing to charge that it was taken from prosecutor's

possession, was fatally defective. *People v. Ho Sing*, 93 Pac. 204, 205, 6 Cal. App. 752.

*Starr & C. Ann. St.* 1596, p. 1345, c. 38, par. 413, defines "robbery" as the felonious and violent taking of money, etc., from the person of another by force or intimidation. Held that, where plaintiff in order to steal money in the safe at a railroad station violently assaulted the watchman in charge of the station, he was guilty of an assault with intent to rob the watchman. *O'Donnell v. People*, 79 N. E. 639, 642, 224 Ill. 218, 8 Ann. Cas. 123.

The act of the General Assembly approved August 6, 1903 (Acts 1903, p. 43), amending Pen. Code 1895, § 151, defining "robbery," by adding to that section "or the sudden snatching, taking or carrying away any money, goods, chattels, or anything of value from the owner or person in possession or control thereof, without the consent of the owner or person in possession or control thereof," did not create an independent and new statutory offense, nor abolish the distinctive element which differentiates the crime of robbery from larceny, i. e., violence. Robbery, which is committed by a sudden snatching, as described in the amending act, is robbery by force, and is punishable as prescribed in Pen. Code 1895, § 152. *Pride v. State*, 54 S. E. 686, 687, 125 Ga. 748.

Where defendant snatched a watch from the person of the owner with sufficient force to break the chain, he was guilty of "robbery." *Perry v. Commonwealth (Ky.)* 85 S. W. 732.

The felonious taking of property from the person of another against his will by force, violence, or putting the person in fear is "robbery." The felonious taking of property from the person against his will, by force, or violence, however slight, constitutes the offense. Two persons met a third person. One of the two asked the third if he could change a ten dollar bill, holding out his hand containing some silver. When the third held out the bill to exchange for the silver, the other snatched it out of his hands and both of the two persons ran away. The two were guilty of "robbery." *Stockton v. Commonwealth*, 101 S. W. 298, 299, 125 Ky. 268.

"Robbery" may be committed by unlawfully, feloniously, forcibly, and without the consent of another, taking from his person his property, though he be not put in fear thereby, or by putting him in fear without using actual force or violence; but, in the latter case, there must be, upon the part of the wrongdoer, such an attempt at intimidation, threat of violence, demonstration, or offer of force, toward the person deprived of his property, for the purpose of securing its surrender, as would be reasonably calculated to put the latter in fear and cause him to part with his property. *Commonwealth v. Titworth (Ky.)* 98 S. W. 1028, 1029.

Rev. St. Mo. 1899, § 1893, declares that every person who shall be convicted of unlawfully taking property of another from his person or in his presence against his will, by violence to his person or by putting him in fear of some immediate injury to his person, shall be adjudged guilty of "robbery in the first degree"; and hence an information alleging that accused did unlawfully and feloniously make an assault, followed by the facts necessary in an information for "robbery in the first degree," is not objectionable in that it failed to charge that the assault was felonious. *State v. Calvert*, 107 S. W. 1078, 1079, 209 Mo. 280.

An instruction, in an action on an accident policy limiting the loss to one-tenth in the event of death due to injuries intentionally inflicted on insured by another, except assaults for the purpose of robbery, that the word "robbery" was used in its ordinary meaning, that to constitute the offense it was not necessary that the obtaining possession of property must be accomplished through violence or fear, but that it was sufficient if the violence or fear was concomitant with the taking, though defective for failing to more sharply point out the question whether or not the assault was committed for the sole purpose of robbery, was not erroneous. *Weidner v. Standard Life & Accident Ins. Co. of Detroit, Mich.*, 113 N. W. 50, 51, 132 Wis. 624.

"Robbery" as defined by the Oklahoma statutes is wrongful taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear. "The fear which constitutes robbery may be either: (1) The fear of an unlawful injury, immediate or future, to the person or property of the person robbed or of any relative of his, or member of his family; or (2) the fear of an immediate and unlawful injury to the person or property of any one in the company of the person robbed, at the time of the robbery." From this it is seen that force is not a necessary element in the crime of robbery. If personal property is wrongfully taken from the possession of another from his person or immediate presence and against his will, through fear of an unlawful injury, immediate or future, to the person or property of the person robbed, or of a relative of his or member of his family, such taking is just as much robbery as though it was committed by actual force. *Cochran v. State*, 111 Pac. 974, 975, 4 Okl. Cr. 379.

A "robbery" is a "felonious and forcible taking from the person of another of goods or money to any value by violence or putting in fear." An instruction that if accused by stealth got possession of money of the prosecutor by taking it from his person and before accused had secured the money the prosecutor discovered the taking, and by

force attempted to regain possession of it, and accused by physical force prevented prosecutor from retaking it, and either retained it himself or fraudulently transferred it to another, it was a taking by force, was error. *Jones v. Commonwealth*, 74 S. W. 263, 115 Ky. 592, 103 Am. St. Rep. 340 (quoting and adopting definition in *Commonwealth v. Prewitt*, 82 Ky. 240).

"The statute (Ballinger's Ann. Codes & St. Supp. § 7103) defines 'robbery' to be the forcible and felonious taking from the person of another, or from his immediate presence, any article of value by violence or putting in fear, and it is contended by the appellants that the evidence here fails to show such use of force and violence, or such putting in fear, in taking the property, as is necessary to constitute 'robbery' under the statute. The courts generally hold that it is not 'robbery' to merely snatch from the hand or person of another, or to surreptitiously take from another's pocket, money or some other thing of value, as such taking lacks the element of force, or putting in fear, one or the other of which being essential to constitute the crime of burglary. It is also generally held that where the property is obtained by some artifice or trick intended to, and which does, allay resistance and not arouse fear, such as inducing one to part voluntarily with his money or property under the belief that the taker has a lawful right to it, does not constitute 'robbery.' But, on the other hand, it is generally held whenever the elements of force or putting in fear enters into the taking and is the cause that induces the owner of the property to part with it, the taking is 'robbery' no matter how slight the act of force or the cause creating the fear may be, nor by what other circumstance the taking may be accompanied. It is enough that the force or the putting in fear employed is sufficient to overcome resistance on the part of the person from whom the property is taken, and is the moving cause inducing him to part unwillingly with his property." *Shannon v. Northern Pac. Ry. Co.*, 87 Pac. 351, 352, 44 Wash. 321.

#### Intent

An instruction defining robbery in the language of the statute, as the felonious and violent taking of money or other valuable thing from the person of another by force or intimidation, was not objectionable as omitting the element of felonious intent. *People v. Scarbak*, 92 N. E. 286, 288, 245 Ill. 435.

The intention to steal is necessary to constitute "robbery." So an instruction that if accused voluntarily took the personal property of prosecutor from his person and against his will, by violence or by putting him in fear of immediate injury, he was guilty, was erroneous for failing to state that such intention was a necessary element of the crime. *Jones v. State*, 48 South. 407, 408, 95

Miss. 121, 21 Ann. Cas. 1137 (citing 2 Bish. New Crim. Proc. [6th Ed.] § 1002; 2 Bish. New Crim. Law, § 1159; Sledge v. State, 26 S. E. 756, 99 Ga. 684; People v. Vice, 21 Cal. 344).

In a prosecution for "robbery," an instruction that if defendant, at a date and time specified, feloniously assaulted prosecutor, and did rob, steal, take and carry away from his person and in his presence and against his will the sum of \$75 in money, or any other amount, defendant was guilty as charged, was erroneous for failure to require that the money should have been taken "with the intent to deprive" prosecutor thereof. Such instruction was not cured by a subsequent instruction correctly defining the term "robbery." State v. Graves, 84 S. W. 904, 905, 185 Mo. 713 (citing State v. O'Connor, 16 S. W. 511, 105 Mo. loc. cit. 126; Kelley's Crim. Law & Prac. § 582; Bish. Crim. Law, § 1162a; State v. McLain, 60 S. W. 740, 159 Mo. loc. cit. 352).

Where, on a trial for assault with intent to rob, the court defined "robbery" as the felonious taking of the property of another from his person, whether by violence or by putting him in fear, with intent to permanently deprive the owner thereof, an instruction authorizing a verdict of guilty on finding that accused assaulted the prosecutor with intent to rob was not erroneous for failing to charge that it was necessary that accused, at the time he made the assault, did so with the intent to deprive the prosecutor of his property. State v. Bateman, 95 S. W. 413, 414, 196 Mo. 35 (distinguishing State v. Graves, 84 S. W. 904, 185 Mo. 713).

Where defendant leveled a pistol at prosecutor, and compelled him to draw a \$10 bill from his pocket, whereupon defendant had the bill changed, and returned \$2 to prosecutor, defendant was guilty of "robbery," notwithstanding prosecutor owed defendant \$8 for services, and defendant's acts were merely for the purpose of collecting his debt. Fannin v. State, 100 S. W. 916, 51 Tex. Cr. R. 41, 10 L. R. A. (N. S.) 744, 123 Am. St. Rep. 874.

#### **Larceny included**

"Robbery" includes the lesser offenses of larceny and larceny from the person. State v. Taylor, 118 N. W. 747, 748, 140 Iowa, 470.

"Robbery" involves grand larceny. It is larceny with the element of force or intimidation added. People v. Clark, 79 Pac. 434, 145 Cal. 727.

The crime of "robbery by force and violence" includes larceny from the person, and a conviction from the latter offense may be had under a charge of the former. State v. Dunn, 71 Pac. 811, 66 Kan. 483 (citing State v. Pickering, 49 Pac. 314, 57 Kan. 326).

"Robbery" is larceny by force or intimidation, and it is sufficient to charge it in either form. It is not necessary to specify

what accused intended to take, nor to aver that the accused intended to deprive the owner of its value. Nor is it necessary to allege ownership in the party assaulted. Mere possession in him is sufficient. Traver v. State, 81 S. W. 615, 72 Ark. 524.

"Robbery in the first degree" may be committed either in the day or in the nighttime. The offense of larceny from the person in the nighttime, defined by Rev. St. 1899, § 1900, is included in that of robbery in the first degree, committed in the nighttime, and a conviction of the former offense may be had under an indictment charging the same, although the evidence shows the commission of the offense of robbery in the nighttime. State v. Smith, 90 S. W. 440, 445, 190 Mo. 706.

"Robbery" is a compound or aggravated larceny, and "larceny" is only another name for stealing or theft. 2 Ballinger's Ann. Codes & St. § 6944, providing that in the prosecution of any offense committed in stealing, etc., any personal estate, it shall not be deemed a variance if it be proved that, at the time when the offense was committed, either the general or special property in the whole or in part of the personality was in the person alleged in the indictment to be the owner thereof, applied to a prosecution for robbery, and evidence that the property in question belonged to a partnership, one of the members of which was the person alleged in the indictment to have been the owner, was sufficient. State v. Fair, 76 Pac. 731, 733, 35 Wash. 127, 102 Am. St. Rep. 897.

In a prosecution for robbery and assault with intent to kill if resisted, an instruction that if the jury find from the evidence beyond reasonable doubt that defendants, or either of them, are guilty of stealing from the person of the prosecuting witness the sum described in the indictment or some part thereof, but do not find that they or either of them assaulted said witness with intent, if resisted, to kill or wound said witness, then they should find the defendants or either of them guilty of the crime of larceny from the person, is not erroneous, as robbery is larceny aggravated by the circumstance that the property taken is taken from the person of another by violence or by putting him in fear, and the greater crime necessarily embraces the lesser offense of the same class. State v. Parr, 103 Pac. 434, 437, 54 Or. 316.

#### **Larceny distinguished**

"Robbery" is larceny aggravated by the fact that the property was taken from the person of the owner by violence, or putting him in fear. State v. Smith, 90 S. W. 440, 444, 190 Mo. 706.

"Robbery" is an aggravated form of theft by means of an assault or violence, or use of firearms. The robbery or theft of community property of a husband or wife may be from which ever of them had possession of

it at the time. *Miles v. State*, 108 S. W. 854, 855, 51 Tex. Cr. R. 587.

At common law "robbery" was the felonious taking from another of goods or money of any value by violence or by putting in fear. It is but larceny with the aggravated circumstances of force and arms added. *State v. McCoy*, 59 S. E. 758, 63 W. Va. 69.

The criterion which distinguishes "robbery" from "larceny" is the violence, actual or constructive, which precedes the taking. There can be no robbery without violence and no larceny with it. *Tones v. State*, 88 S. W. 217, 220, 48 Tex. Cr. R. 363, 1 L. R. A. (N. S.) 1024, 122 Am. St. Rep. 759, 13 Ann. Cas. 455 (citing *Long v. State*, 12 Ga. 293).

"Robbery" is "the felonious and forcible taking from the person of another of goods or money to any value by violence or putting in fear." The violence must accompany the act of taking. Any resistance after the property has been taken, made in an effort to regain, does not relate back to the act of taking so as to make it robbery. One who stealthily placed her hand in the pocket of another and took therefrom, without using any force or violence, a sum of money, was guilty of larceny merely, though after the taking and while the owner made an effort to regain his property she drew a pistol and threatened violence. *Dawson v. Commonwealth* (Ky.) 74 S. W. 701 (quoting and adopting definition in *Commonwealth v. Prewitt*, 82 Ky. 240).

#### Larceny from person distinguished

If a thing of value be feloniously taken from the person of another with such violence as to occasion a substantial corporal injury, or be obtained by a violent struggle with the possessor, it is "robbery"; but if the article be taken without any sensible or material violence to the person, and without any struggle for its possession, it is merely "larceny from the person." *People v. Ryan*, 88 N. E. 170, 171, 239 Ill. 410.

Where one in an attempt to commit larceny from the person is caught by his intended victim with his hand in his pocket, and a struggle then ensues for the possession of money contained in the pocket, the former endeavoring to take the money therefrom and the latter resisting the effort, and the money is finally taken from the pocket violently and by the infliction of physical injuries, the crime is not "larceny from the person," but "robbery by force." The attempted larceny becomes robbery, when force and violence is used to complete the unlawful act. *Carter v. State*, 60 S. E. 216, 3 Ga. App. 477 (citing *Burke v. State*, 74 Ga. 372).

"Robbery" is "larceny," with the element of force or intimidation added. Larceny from the person is either by privately stealing, or by open and violent assault, which is usually called robbery. Open and violent

larceny from the person, or robbery, the rapina of the civilians, is the felonious and forcible taking from the person of another, of goods or money to any value, by violence or putting him in fear. This previous violence or putting in fear is the criterion that distinguished robbery from other larcenies. *State v. Luhano*, 102 Pac. 280, 262, 31 Nev. 278 (quoting and adopting *People v. Clary*, 72 Cal. 59, 13 Pac. 77; 2 Cooley, Bl. Comm. [4th Ed.] p. 1404).

Proof of violence is not essential to a conviction of suddenly snatching, taking, or carrying away property without the consent of the owner or person in possession or control thereof, made robbery by Pen. Code 1910, § 148; but it is only necessary to show that the person robbed was conscious that something was being taken away from him and that he was unable to prevent it, the only difference between robbery of such class and larceny from the person being that, in case of such larceny, property is extracted without knowledge of the possessor. *Williams v. State*, 70 S. E. 890, 9 Ga. App. 170.

"Robbery" is the wrongful, fraudulent, and violent taking of money, goods, or chattels from the person of another by force or intimidation, without the consent of the owner, or the sudden snatching, taking, or carrying away any money, goods, chattels, or anything of value from the owner or person in possession or control thereof without his consent. Acts 1903, p. 43, amending Pen. Code 1895, § 151. The effect of this statutory definition of robbery is to make the offense which was previously known as larceny from the person, and which was committed by the sudden snatching, taking, or carrying away of money or valuables from the owner without his consent, robbery. It is not necessary that the taking be accomplished by force or intimidation, so as to involve some show of resistance, and the distinguishing characteristics between larceny from the person and robbery as defined in the act of 1903 is the stealthiness of the act. If the taking be secret, stealthy, and without the knowledge of the owner, it is larceny from the person; but if the taking is done with the knowledge of the victim, but without his consent, and by a sudden snatching, the act is robbery. *Hickey v. State*, 53 S. E. 1026, 125 Ga. 145.

#### Ownership of property

The gist of the offense of "robbery" is the force or intimidation and taking from the person against his will of a thing of value and belonging to him, and the nature and value of the property taken is immaterial. *People v. Nolan*, 95 N. E. 140, 250 Ill. 351, 34 L. R. A. (N. S.) 301, Ann. Cas. 1912B, 401.

To constitute "robbery" it is unnecessary that the property belong to the victim, or that it be taken from his person, if it was unlawfully taken in his presence, against his will or through force or fear. *People v. Ma-*

das, 94 N. E. 857, 858, 201 N. Y. 349, Ann. Cas. 1912B, 229.

Under the statute declaring that every person convicted of feloniously taking the property of another from his person or in his presence, etc., shall be guilty of "robbery," a clerk having possession of his employer's money has a sufficient ownership thereof to support an allegation of ownership in the clerk in an indictment for robbery. *State v. Montgomery*, 79 S. W. 693, 695, 181 Mo. 19, 67 L. R. A. 343, 2 Ann. Cas. 261.

"Robbery" is a compound or aggravated larceny, and larceny is only another name for stealing or theft. 2 Ballinger's Ann. Codes & St. § 6944, providing that in the prosecution of any offense committed in stealing, etc., any personal estate, it shall not be deemed a variance if it be proved that, at the time when the offense was committed, either the general or special property in the whole or in part of the personalty was in the person alleged in the indictment to be the owner thereof, applied to a prosecution for robbery, and evidence that the property in question belonged to a partnership, one of the members of which was the person alleged in the indictment to have been the owner, was sufficient. *State v. Fair*, 76 Pac. 731, 733, 35 Wash. 127, 102 Am. St. Rep. 897.

Under Code, § 4753, making it robbery to steal and take from the person of another any property, the subject of larceny, by violence, etc., an indictment for robbery, charging that defendant "did steal and take away" a sum of money, was insufficient, for not alleging the ownership of the property. *State v. Wasson*, 101 N. W. 1125, 126 Iowa, 320.

#### **Taking from person**

To constitute "robbery" it is unnecessary that the property belong to the victim or that it be taken from his person, if it was unlawfully taken in his presence, against his will, or through force or fear. *People v. Madas*, 94 N. E. 857, 201 N. Y. 349, Ann. Cas. 1912B, 229.

While robbery is the taking of property "from the person of another," it is sufficient if the property be under the personal protection of, though not in personal contact with, the person from whom it is taken. *Hill v. State*, 40 South. 654, 655, 145 Ala. 58.

The gist of the offense of "robbery" is the force or intimidation and taking from the person against his will of a thing of value and belonging to him, and the nature and value of the property taken is immaterial. *People v. Nolan*, 95 N. E. 140, 250 Ill. 351, 34 L. R. A. (N. S.) 301, Ann. Cas. 1912B, 401.

Though there must be an actual taking of the property from the person to constitute robbery, the crime is consummated if the thief retains possession but a short time,

and it is no less robbery because ineffectual in its consequences. *People v. Campbell*, 84 N. E. 1035, 1037, 234 Ill. 391, 123 Am. St. Rep. 107, 14 Ann. Cas. 186.

Robbery is stealing property with violence from the person or personal custody of another person. It is necessary, in order to constitute that crime, that the goods shall be on the person of the owner, or the owner's agent, or shall be in his presence and in his custody. *State v. Lyons*, 58 Atl. 398, 401, 70 N. J. Law, 635.

To constitute the crime of "robbery" there must be violence or intimidation of such a character as that the injured party is put in fear of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and temporarily suspend the power of exercising his will. *Steward v. People*, 79 N. E. 636, 224 Ill. 434.

"Robbery" at common law is defined to be the "felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling." According to another definition, "robbery" is the "felonious taking of money or goods or anything of value from the person of another, or from his presence, against his will, by violence or putting him in fear." The taking must be from the person of another, but the "taking from the person" is not understood to mean that the goods are actually on the person in the strict sense of the term. At common law, if property was taken feloniously, with force and violence, or by putting in fear, in the presence of the owner, it was in legal contemplation a taking from his person. *O'Donnell v. People*, 79 N. E. 639, 642, 224 Ill. 218, 8 Ann. Cas. 123 (citing *State v. Calhoun*, 34 N. W. 194, 72 Iowa, 432, 2 Am. St. Rep. 252; *Clements v. State*, 11 S. E. 505, 84 Ga. 660, 20 Am. St. Rep. 385; *Crawford v. State*, 17 S. E. 628, 90 Ga. 701, 35 Am. St. Rep. 242; *Turner v. State*, 1 Ohio St. 422; *Hill v. State*, 60 N. W. 916, 42 Neb. 503; *Crocker v. State*, 47 Ala. 53; *Houston v. Commonwealth*, 12 S. E. 385, 87 Va. 257).

#### **Value of property**

The felonious taking of personal property in the possession of another from his person or immediate presence and against his will, accomplished by means of force or fear, is robbery, irrespective of the value of the property so taken. *People v. Stevens*, 75 Pac. 62, 63, 141 Cal. 488.

The gist of the offense of "robbery" is the force or intimidation, and the taking from the person against his will of a thing of value and belonging to him, and the nature and value of the property taken is immaterial. *People v. Nolan*, 95 N. E. 140, 250 Ill. 351, 34 L. R. A. (N. S.) 301, Ann. Cas. 1912B, 401.

**ROBBERY IN THE FIRST DEGREE**

"Robbery in the first degree" is the unlawful taking of personal property from the person or in the presence of another against his will by means of force or violence or fear of injury by a person armed with a dangerous weapon, or being aided by an accomplice actually present, or when the offender inflicts grievous bodily harm or injury upon the person from whose possession or in whose presence the property is taken. *People v. De Veau*, 94 N. Y. Supp. 225, 229, 105 App. Div. 381 (citing Pen. Code N. Y. §§ 224, 228).

**ROBBERY IN THE SECOND DEGREE**

Pen. Code, § 224, defines "robbery in the second degree" as an unlawful taking accomplished by force or fear when not under other circumstances amounting to robbery in the first degree but accomplished either (1) by the use of violence or (2) by putting the person in fear of immediate injury to his person. *People v. Monroe*, 104 N. Y. Supp. 675, 677, 119 App. Div. 704.

Two persons may be guilty of one robbery in the second degree under Pen Code, § 229 (Penal Law [Consol. Laws, c. 40] § 2126), declaring that "second degree robbery" is the unlawful taking of property, accomplished by force or fear, either by the use of violence, or by putting the person robbed in immediate fear or that of some person in his company in a case specified in section 228, but not under circumstances amounting to robbery in the first degree. *People v. Thompson*, 91 N. E. 838, 839, 198 N. Y. 396.

**ROBBERY IN THE THIRD DEGREE**

By Pen. Code, § 230, "robbery in the third degree" is any robbery not constituting the first or second degree. *People v. Monroe*, 104 N. Y. Supp. 675, 677, 119 App. Div. 704.

Pen. Code, § 230, defines "robbery in the third degree" as robbery "under circumstances not amounting to robbery in the first or second degree." "Robbery in the third degree includes the taking of personal property by means of fear of injury in the future, and it is claimed that it includes the taking of personal property by force not amounting to violence." *People v. Thompson*, 91 N. E. 838, 839, 198 N. Y. 396.

**ROCK**

See Solid Rock.

As deadly weapon, see *Deadly Weapon*.  
As instrument, see *Instrument*.

**ROCK CRYSTAL**

Manufactures of, see *Manufactures—Manufactured Articles*.

**ROCK CRYSTAL BONDILLES**

Dutiable as precious stones, see *Precious Stones*.

**ROCK IN PLACE**

See *In Place*.

**ROD**

See *Brake Rod*; *Bridle Rods*.

**ROGUES' GALLERY**

The "rogues' gallery" is one of the well-recognized methods adopted by all police authorities in large cities for the preventing and suppressing of crime, and especially the crime of larceny and receiving stolen goods. *Schulman v. Whitaker*, 39 South. 737, 115 La. 628.

**ROLL**

See *Assessment Roll*; *Cold Rolled*; *Judgment Roll*; *Phony Rolls*.

**ROLLER**

See *Dead Roller*; *Steam Roller*.

**ROLLER SKATING RINK**

As place of public amusement, see *Place of Public Amusement*.

**ROLLING CHAIRS**

Included in vehicles and other mechanical contrivances, see *Vehicles and other Mechanical Contrivances*.

**ROLLING CIGARETTES**

As manufacture, see *Manufacture*.

**ROLLING STOCK**

Locomotives, flat cars, box cars, logging trucks, hand cars, push cars, coaches, cabooses, and coal cars may be denominated "rolling stock" of a railroad. *Flanagan Bank v. Graham*, 71 Pac. 137, 141, 42 Or. 403.

St. 1894, p. 355, c. 326, providing that a conditional sale of street railway rolling stock shall not be valid against a purchaser in good faith and without knowledge, unless shown by a written and recorded instrument, and requiring each car sold by conditional sale to be plainly marked on each side with the name of the seller, followed by the word "owner," applies to completed cars, and does not require a conditional sale of trucks, motors and motor equipments to be recorded. *Lorain Steel Co. v. Norfolk & B. St. Ry. Co.*, 73 N. E. 646, 648, 187 Mass. 500.

Railroad property, included in the term "rolling stock," which is in one place to-day and another to-morrow, being continually carried along the line of the road in the actual operation thereof, owing to its character and use, has no actual situs entitling any particular subdivision through which the road runs, to have the benefit of the taxation thereof, in preference to any other subdivision. Such property is in no sense of the word "local property," and the apportionment of the total value of such property according to the length of the road, as in the case of the franchise, is the only practicable way of preventing double assessments thereof, and determining the amount to which each subdivision is

justly entitled. *San Francisco & S. J. V. Ry. Co. v. City of Stockton*, 84 Pac. 771, 774, 149 Cal. 83.

Personal Property Law N. Y. § 61, provides that, whenever any railroad equipment and rolling stock shall be sold, leased, or loaned under a contract which provides that the title shall remain in the vendor, lessor, or bailor until the price is paid, such contract shall be invalid as to any subsequent judgment creditor of or purchaser from such vendee, lessee, or bailee for a valuable consideration without notice, unless the contract is in writing, fully acknowledged, and recorded in the book in which real estate mortgages are recorded in the office of the county clerk or register of the county in which is located the principal office or place of business of the vendee, lessee, or bailee, unless there is plainly marked on both sides of the locomotive or car the name of the vendor, lessor, or bailor, followed by the words "lessor," "bailor," or "vendor," as the case may be. Held, that the words "railroad equipment" and "rolling stock," as used in such section, were equivalent to the words "rolling stock used on a railroad," and since the term "railroad" signifies a common carrier or association engaged in hauling passengers and freight for hire, excluding logging roads, construction roads, etc., such section had no application to locomotives only fit for use on temporary construction railroads, used in connection with work of internal improvement, and hence conditional sales of such locomotives were valid as against the trustee in bankruptcy of the conditional vendee, though not recorded. *In re Ferguson Contracting Co.*, 183 Fed. 880, 881.

## ROLLERMILL

The term "rollermill," in its general sense, includes any form of mill for the coarse grinding of grain for feed, and may include a mill and machinery used for the purpose of manufacturing meal, bran, and other feed products. *Capital Fire Ins. Co. v. Carroll*, 109 Pac. 535, 537, 26 Okl. 286.

## ROMAN ADOPTION

The statutes of adoption, enacted to establish, between a minor and one not his parent, the legal obligations of the natural relation of parent and child, and conferring on any person the capacity to succeed to the property of one not his parent, must be understood and applied in accordance with the terms of each statute, in view of existing conditions, and their meaning and effect are not necessarily controlled by the analogies of a "Roman adoption," deriving its significance from the principle that a father's power extended, not only to his children, but to his other descendants. *Appeal of Woodward*, 70 Atl. 453, 457, 81 Conn. 152.

## ROOF

See Board Roof.

## ROOFING

"Roofing" means the material for a roof. *City of Sylvania v. Hilton*, 51 S. E. 744, 746, 123 Ga. 754, 2 L. R. A. (N. S.) 483, 107 Am. St. Rep. 162.

## ROOM

See Poolroom; Storeroom; Waiting Room.

Where defendant occupied a booth underneath the grand stand adjoining the betting room of a race track, such booth constituted a "room," or place, within Laws 1905, p. 131, providing that any person who, being the owner, lessee, occupant, or person in charge of any room, shed, tenement, booth, or building, or any part thereof, within the state, knowingly permits the same to be used or occupied for the purpose of selling pools on races, or therein keeps, uses, or employs any device or apparatus for such purpose, shall be guilty of a felony. *State v. Oldham*, 98 S. W. 497, 501, 200 Mo. 538.

**As building**

See Building.

**As house**

See House.

**House distinguished**

Pen. Code 1895, art. 388b, makes it a felony for any person to keep any premises, building, place, or room for the purpose of being used as a place for gambling with cards; and Vagrancy Act (Acts 31st Leg. c. 59) § 1, subd. k, declares that every keeper of a house of gambling or gaming is a vagrant. Held, that there is a distinction between the offense of keeping a "room," denounced by Pen. Code 1895, § 388b, and keeping a "house," denounced under the vagrancy act, for "room" and "house" are not synonymous or convertible terms, so that the vagrancy act does not repeal the provision of the Penal Code. *Parshall v. State*, 138 S. W. 759, 764, 62 Tex. Cr. R. 177.

**As private residence**

See Private Residence.

**As public place**

See Public Place.

## ROOM OR ROOMS

The phrase "room or rooms" in Liquor Tax Law (Laws 1897, p. 234, c. 312) § 31, subd. "g," which forbids having an open or unlocked door to the "room or rooms" where any liquors are sold or kept for sale during the hours when the sale of liquors is forbidden, etc., refers to the room or rooms in which liquors are sold or kept for sale, and not to any adjoining room. An indictment which charged that on a certain Sunday defendant

admitted to a certain room certain persons named, not being members of his family nor servants, which room had an entrance into the barroom, was demurrable; the admission of persons to a room adjoining one in which the liquor was sold not being an offense under the statute. *People v. Lupton*, 103 N. Y. Supp. 172, 173, 52 Misc. Rep. 336.

## ROOSTER

The connecting appliance between the engine and first car of a logging train is commonly called a "rooster." *Gauthier v. Wood & Iverson*, 94 Pac. 654, 655, 49 Wash. 8.

## ROPE

See Snug Ropes.

As appliance, see Appliance.

## ROSARY

A "rosary" is an article of use and not worn for ornament, and is not a "jewel" or "ornament" within the statute relieving an innkeeper from liability for loss of jewels or ornaments, where he provides a safe, posts notice thereof, and the guest neglects to deposit the same in the safe. *Jones v. Hotel Latham Co.*, 115 N. Y. Supp. 1084, 1085, 62 Misc. Rep. 620.

## ROSE WATER

As medicinal preparation, see Medicinal Preparation.

## ROSSED PULP WOOD

"Rossed pulp wood" is a kind of wood chiefly poplar and spruce used for making pulp in the manufacture of paper and which has the bark, skin, and rough places of wood, removed by hand shaving or by a rossing machine, the object of the rossing being to cheapen transportation by reducing the bulk and weight of the wood. Such wood is not manufactured within the meaning of the Tariff Act. *United States v. Pierce County*, 147 Fed. 199, 200, 77 C. C. A. 425.

## ROT

See Black Rot.

## ROTARY

In Webster's Dictionary "rotary" is defined as "turning, as a wheel on its axis;" in the Century Dictionary, as "turning round and round, as a wheel on its axis." The word "rotary," used in a claim of a patent to describe an element of a combination does not necessarily imply a continuous rotation of the part, so as to make it necessary to limit the claim by reading into it as an additional element mechanism for such rotation, but is properly descriptive, if the part is capable

of being rotated by hand or otherwise. *Kipp-Armstrong Co. v. King Phillip Mills*, 130 Fed. 28, 29; *King Phillip Mills v. Kip-Armstrong Co.*, 132 Fed. 975, 976, 66 C. C. A. 45.

## ROUGH

See In the Rough.

### ROUGH HANDLING

The clauses of the charge in an action for injury to a shipment of cattle, in which the right to recover was submitted, having explicitly made such right to depend on a finding that the delays and rough handling alleged constituted negligence, and in another clause the jury being instructed that they could not allow anything for such shrinkage or damage as would be ordinary and reasonable in a shipment of cattle over such route, but in estimating the damages, if any, they would take into consideration only such as may have been sustained by the cattle by reason of unreasonable delays and rough handling, "rough handling" in such clause, as well as in one in which it was charged that if defendants transported said cattle with reasonable dispatch, and did not handle them roughly, plaintiff could not recover, is to be treated as meaning such unreasonable and negligent handling as was beyond the natural and usual way of handling such shipments. *Southern Kansas Ry. Co. of Texas v. Yarbrough*, 109 S. W. 390, 392, 49 Tex. Civ. App. 407.

### ROUGH SHADOWING

"Rough shadowing" by detectives means that those engaged in the work are not obliged to conceal the fact that the subject of surveillance is being shadowed or followed; the work being done so openly that the subject, or the general public, or both, may know of it. *Schultz v. Frankfort Marine Accident & Plate Glass Ins. Co.*, 139 N. W. 386, 389, 151 Wis. 537, 43 L. R. A. (N. S.) 520.

## ROUGHING

As applied to printed pictures, "roughing" is a separate process after the printing of a picture, which gives to it somewhat the effect of an oil painting, increases its durability, and improves its appearance. *Turner v. Osgood Art Colortype Co.*, 79 N. E. 306, 307, 223 Ill. 629.

## ROULETTE

"'Roulette' is a gambling game and a banking game." *Vasey v. Campbell*, 88 Pac. 509, 4 Cal. App. 451.

## ROUND

### ROUND STEEL WIRE

The Tariff Act provides a specific rate or duty on wire, with an additional duty where



it is manufactured into articles, also an additional rate when it is coated. Articles made from "round steel wire" coated with copper are subject to each of the latter duties, in addition to that applicable to the wire in its uncoated, unmanufactured state. *Burditt & Williams Co. v. United States*, 147 Fed. 892, 893.

### ROUND TIMBER

In Tariff Act July 24, 1897, c. 11, § 1, Schedule D, 30 Stat. 167, paragraphs 194 and 196 provide, respectively, for "round timber used in building wharves," and for electric light poles, etc.; and paragraph 699, Free List, § 2, 30 Stat. 202, enumerates "round unmanufactured timber \* \* \* not specially provided for." Held, that any round sticks which in their shape as imported are used for any of the purposes specified in said paragraphs 194 and 196, either in the rough or finished, are subject to classification under those paragraphs; rather than under paragraph 699. *Perfection Pile-Preserving Co. v. United States*, 147 Fed. 922, 923.

### ROUND UNMANUFACTURED TIMBER

See Logs and Round Unmanufactured Timber.

### ROUNDHOUSE

A railroad "roundhouse" is a repair shop within the meaning of a condition in a grant of a franchise that the grantee shall establish his "repair shop" at a certain place. *Alexandria v. Morgan's Louisiana & T. R. & S. C. Co.*, 33 South. 65, 68, 109 La. 50.

### ROUTE

See Local Route; New Route; Post Roads and Routes.

### ROYAL PREROGATIVE

A "royal prerogative" is an arbitrary power vested in the executive, a power or will which is discretionary and uncontrolled. It is often employed in the sense that it is an arbitrary power of the state, as distinguished from a sovereign power, which becomes effective in its exercise by legislation. *Zimmerman v. Chelsea Sav. Bank*, 127 N. W. 351, 352, 161 Mich. 704.

### ROYAL TITLE

A "royal title" is the highest order of title known by any law, or principle, in the province of east Florida. Titles of this description were designed to convey the fee simple to the grantee. They were usually made by the acting governors of the province in the name of the king. They recited the grant to be in perpetuity, and also the specific metes and bounds of the land. This title may be said to correspond in character with that

of a patent issued by our government. "Concessions without conditions" are understood to differ from a "royal title" only in this: That most of the latter recite the metes and bounds, whereas the unconditional concession, although definite in quantity and location of the land, is still subject to a survey, which, when made, was followed by maturing the concession by a royal title. There is also a peculiarity in the legal phraseology of a "royal title." In all the grants of this nature the legal right to the lands is asserted. *Florida Town Imp. Co. v. Bigalsky*, 33 South. 450, 453, 44 Fla. 771 (quoting from the report of the Land Commissioners of 1826).

### ROYALTY

See Advanced Royalty.

As personal property, see Personal Property.

As rent, see Rent.

The word "royalty," as used in a gas lease, generally refers to "a share of the product or profit reserved by the owner for permitting another to use the property." *Indiana Natural Gas & Oil Co. v. Stewart*, 90 N. E. 384, 386, 45 Ind. App. 554.

The word "royalty" as employed in a coal mining lease means the share of the profit reserved by the owner for permitting the removal of the coal and is in the nature of rent. *Kissick v. Bolton*, 112 N. W. 95, 96, 134 Iowa, 650.

The measure of damages for coal taken from another's land through an honest mistake is the value of the coal taken as it lay in the mine, or the usual reasonable royalty paid for the right of mining; the "royalty" being the price paid for coal as it lies in the earth. *Burke Hollow Coal Co. v. Lawson*, 151 S. W. 657, 151 Ky. 305.

As used in Milwaukee charter, c. 5, § 23, providing that the board of public works shall have power, under the authority of the common council, to make a contract with a patentee, to use any patented article, process, combination, or work, for the said city, at a stipulated "royalty" for the use thereof, the word "royalty" did not contemplate a contract whereby a sum equal to nearly two-thirds of the whole cost of the paving should go to the patentee, and thereby competitive bidding be prevented. *Allen v. City of Milwaukee*, 106 N. W. 1099, 1102, 128 Wis. 678, 5 L. R. A. (N. S.) 680, 116 Am. St. Rep. 54, 8 Ann. Cas. 392.

### RUBBEROID

The word "Ruberoïd" is not the subject of exclusive appropriation as a trade-mark for a flexible waterproof roofing, since, even though the roofing contains no rubber, the word is descriptive, and not indicative of origin or ownership. *Standard Paint Co. v.*

Trinidad Asphalt Mfg. Co., 31 Sup. Ct. 456, 457, 220 U. S. 446, 55 L. Ed. 536; *Trinidad Asphalt Mfg. Co. v. Standard Paint Co.*, 163 Fed. 977, 90 C. C. A. 195.

## RUBBLE STONE

Dimension and footing stone distinguished, see Dimension Stone.

## RUB DOWN BRICK WORK

Where the specifications of a building contract require the contractor to "rub down all brick work on street sides," the contractor cannot claim pay for cleaning street walls with acid as for extra work; the work coming within the terms of the contract. *Chamberlain v. Hibbard*, 38 Pac. 437, 438, 26 Or. 428.

## RUDE

A statement of a witness that a conductor laid his hand gently upon the shoulder of a passenger for the purpose of ejecting him from the train excludes the idea of rudeness or force. According to Webster's Dictionary, "gently" means softly, mildly, while, "rude" means rough, insulting. *Holmes v. Carolina Cent. R. Co.*, 94 N. C. 318, 323.

## RUDELY

"Willfully" is not synonymous with 'rudely.' Under Pen. Code 1895, art. 334, prescribing a punishment against those who "rudely display any pistol or other deadly weapon in a manner calculated to disturb," etc., an information charging that defendant "willfully and unlawfully" displayed a deadly weapon is sufficient. *Fuller v. State*, 87 S. W. 832, 48 Tex. Cr. R. 300.

## RUFFED GROUSE

Grouse as including, see Grouse.

## RUIN

Louisiana Rev. Civ. Code, art. 2322, declares that the owner of a building is answerable for the damage occasioned by its "ruin" when this is caused by neglect to repair it, or when it is the result of a vice in its original construction. Held, that the term "ruin," as so used, means the collapse, falling, or giving way of the whole or of some part of the building whereby some person is injured. *Frank v. Suthon*, 159 Fed. 174, 178.

## RULE

See Consent Rule; Home Rule; Six Months Rule; Under the Civil Service Rules.

Front-foot rule, see Front Foot.  
Make rule, see Make.

The word "rule" as used in common parlance has a double meaning. It may refer to an express formula of conduct, promulgated by some one having authority to prescribe or command, or to a course or practice pursued generally by one or more persons. *Schaufele v. Central of Georgia Ry. Co.*, 65 S. E. 708, 710, 6 Ga. App. 660.

The terms "rule" and "order," which are synonymous, include commands to lower courts or court officials to do ministerial acts. *Carter v. Louisiana Purchase Exposition Co.*, 102 S. W. 6, 9, 124 Mo. App. 530.

"The process by which a defective transcript on appeal is amended on suggestion of a diminution of the record is denominated a 'rule.'" *Hager v. Knapp*, 78 Pac. 671, 673, 45 Or. 512 (citing B. & C. Comp. § 594).

"It is not unfrequent to consider and speak of a regular practice under a rule, as itself forming a 'rule.' A regular course of decisions on the text of the law constitutes a rule of construction by which that text is to be applied to all similar cases; but alter the text and the rule no longer governs." *Talbot v. Seeman*, 5 U. S. (1 Cranch) 1, 36, 2 L. Ed. 15.

"Legislative power," within Const. art. 4, § 1, providing that the legislative power shall be vested in the General Assembly, is the power to make laws; a "law" is a rule of civil conduct prescribed by the supreme power of a state; a "rule" is distinguished from whim, caprice, compact, agreement, or discretion, and "prescribed" means that the rule shall be manifested and published, so as to be known as a rule of civil conduct. *Merchants' Exchange of St. Louis v. Knott*, 111 S. W. 565, 571, 212 Mo. 616.

The "rule" of the master, the violation of which renders the servant ipso facto negligent, is not the general course or practice by which the work is usually done, but an explicit promulgated regulation or mandatory instruction. *Atlantic Coast Line Ry. Co. v. McLeod*, 70 S. E. 214, 218, 9 Ga. App. 13.

The phrase "rules of the Code of Civil Procedure" as used in Street Opening Act 1903, § 6 (St. 1903, p. 378, c. 268), means the laws or provisions of that Code, and not merely the rules governing pleading and practice as prescribed therein, especially in view of section 37 providing for a liberal construction of the provisions of the act to promote the objects thereof. *City of Los Angeles v. Gager*, 102 Pac. 17, 18, 10 Cal. App. 378.

Recommendation of the executive committee adopted by the "Ocean Beach Association" chartered by Act March 13, 1873, and entered in its minutes to the effect that a block of lots be dedicated to public use, is not a "rule or regulation" within a restrictive covenant in its deed for one of such lots that the grantee shall not suffer liquor to be sold

on any of the premises conveyed, nor violate provisions in the act of incorporation or the regulations of the association, which deed also contains covenants of seisin, of quiet enjoyment, and of general warranty. *Borough of Belmar v. Prior*, 79 Atl. 1032, 1033, 81 N. J. Law, 254.

**As by-law, regulation, ordinance or law**

The word "rules" is synonymous with ordinances, regulations, and by-laws. *State ex rel. Krebs v. Huctor*, 120 N. W. 199, 200, 83 Neb. 690 (citing 6 Words and Phrases, p. 5025).

The meaning of the word "rules" is of wide and varied significance, depending upon the context; in a legal sense it is synonymous with "laws." *City of Los Angeles v. Gager*, 102 Pac. 17, 18, 10 Cal. App. 378.

A "rule" is a device in words and phrases for the control and direction of those who have something else given them to do. A regulation is a rule of law by which some right is to be exercised. They are words of a like import and import a partial restriction which does not wholly prohibit, and imply uniformity in operation, not discrimination. *Borough of Belmar v. Prior*, 79 Atl. 1032, 1033, 81 N. J. Law, 254.

Ky. St. § 4306, providing that the fiscal court shall have general supervision of the highways, and shall make rules for their proper management and repair, refers only to rules for the actual work of repair, and hence does not require rules by fiscal court that public contracts exceeding \$100 must be let to the lowest bidder, and such a rule, not being required, has not the force of a statute or an ordinance, and the court having made such a rule may abrogate it, and thus a contract for the reconstruction of a highway awarded in violation of the rule is not illegal. *Hanlon v. Cleary*, 133 S. W. 953, 954, 142 Ky. 46.

**RULE ABSOLUTE FOR NEW TRIAL**

In the Pennsylvania practice, the docket entry, "rule absolute for new trial," implies all that is meant by the words, "judgment vacated, verdict set aside, and new trial granted." *Evans v. Freeman*, 140 Fed. 419, 423 (citing *Fisher v. Hestonville*, M. & F. Pass. Ry. Co., 40 Atl. 97, 185 Pa. 602).

**RULE IN SHELLEY'S CASE**

Issue as within rule, see Issue (Descendants).

The "rule in Shelley's Case" is that, where the ancestor takes an estate of freehold by gift or conveyance and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs, in fee or in tail, the word "heirs" is a word of limitation of the estate and not a word of purchase. *Waller v. Pollitt*, 64 Atl. 1040, 1041,

104 Md. 172; *Johnson v. Buck*, 77 N. E. 163-165, 220 Ill. 226 (citing *Baker v. Scott*, 62 Ill. 86).

"The rule in Shelley's Case is that, if an estate for life, or any other particular estate of freehold, be given to one with remainder to his heirs, the first taker shall be held to have the fee, and the heirs will take by descent, and not by purchase." *Lacy v. Floyd* (Tex.) 84 S. W. 857, 859 (quoting and adopting *Tied. Real Prop.*, § 433).

The rule in Shelley's Case is as follows: "When a person takes an estate of freehold legally or equitably under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs or heirs of his body, as a class of persons to take in succession, from generation to generation, the limitations to the heirs entitles the ancestor to the whole estate." *Hubbard v. Goin*, 137 Fed. 822, 826, 70 C. C. A. 320 (citing 4 Kent's Com. 225).

The "rule in the Shelley Case" is this: "When the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, 'the heirs' are words of limitation of the estate, and not words of purchase, and the ancestor takes the same in fee or in tail as the case may be." Under a will devising certain real estate to testator's son in fee simple, and a codicil revoking the gift and providing that the property should vest in the son for life, and, at his death, the remainder in fee simple should vest in his heirs, the son took an estate in fee simple. *Lee v. Lee*, 91 N. E. 507, 508, 45 Ind. App. 645.

The "rule in Shelley's Case" is that where the ancestor takes a freehold estate, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, either in fee or in tail, the word "heirs" is a word of limitation and not of purchase; but the rule is not applicable unless the estate limited to the ancestor is of the same quality as that limited to the heirs; it being necessary that both estates be either legal or equitable. The "rule in Shelley's Case" is a rule of law and not of construction, and must control, though against testator's manifest intent, unless the word "heirs" is shown not to have been employed in its strict legal sense. While, strictly speaking, there are no equitable remainders, in determining whether an estate limited to heirs upon an equitable life estate is also equitable, so that the rule in Shelley's Case will apply, future equitable interests are usually treated as if they were remainders; the application of the rule being the same whether they are considered equitable remainders or

trusts. *Lord v. Comstock*, 88 N. E. 1012, 1013, 1015, 240 Ill. 492 (citing *Baker v. Scott*, 62 Ill. 86; *Brislain v. Wilson*, 63 Ill. 173; *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589; *Wicker v. Ray*, 8 N. E. 835, 118 Ill. 472; *Carpenter v. Van Olinder*, 19 N. E. 868, 127 Ill. 42, 2 L. R. A. 455, 11 Am. St. Rep. 92; *Pease v. Davis*, 80 N. E. 249, 225 Ill. 408; *McFall v. Kirkpatrick*, 86 N. E. 139, 236 Ill. 281; *Ward v. Butler*, 88 N. E. 189, 239 Ill. 462, 29 L. R. A. [N. S.] 1942; *Kales, Future Int. c. 3*; *Glover v. Condell*, 45 N. E. 173, 163 Ill. 566, 35 L. R. A. 360).

To bring a will within the "rule in Shelley's Case," the limitations to heirs must be by way of remainder; and it does not apply to a devise to one and his heirs, or the heirs of his body. *Sagers v. Sagers* (Iowa) 138 N. W. 911, 43 L. R. A. (N. S.) 562.

The "rule in Shelley's Case" will not be applied to the construction of a devise to a devisee for life, remainder to his heirs, where from the language of the will testator's intention to give the devisee a life estate only fairly appeared. *Westcott v. Meeker*, 122 N. W. 964, 966, 144 Iowa, 311, 29 L. R. A. (N. S.) 947.

Where a freehold estate is, either jointly, severally, or successively, given to two persons who are capable of having a common heir, with remainder to their heirs, the "rule in Shelley's Case" operates, and such persons take a joint inheritance in fee. *Walker v. Taylor*, 56 S. E. 877, 878, 144 N. C. 175 (citing 1 *Prost. Estates*, 315; *McFeely v. Moore*, 5 Ohio, 464, 24 Am. Dec. 314; *King v. Beck*, 12 Ohio, 390).

"Under that rule, if in any instrument an estate for life is given to the first taker and the remainder is limited either mediately or immediately to his heirs, the first taker takes the whole estate; if the limitation is to the heirs of his body he takes a fee tail; if to his heirs, a fee simple." The rule is an inflexible rule of property and is not intended to effectuate the intention of the parties. Where land was conveyed to a trustee to collect rents and pay them to the beneficiary during her life, and to convey to her appointee by will, or, in default of an appointment, the land to go to her heirs, the limitation to her heirs was of the same kind and quality as the life estate to her, and under the "rule in Shelley's Case" she took an equitable fee. *McFall v. Kirkpatrick*, 86 N. E. 139, 143, 147, 236 Ill. 281 (citing and adopting *Baker v. Scott*, 62 Ill. 86; *Brislain v. Wilson*, 63 Ill. 173; *Kales, Future Int. § 133*).

A deed to one, his heirs and assigns, of certain land, with a provision in the granting clause, "This deed is only to remain in full force and effect during the lifetime of [the grantor], and at her death it goes back to her heirs," does not convey a fee-simple title to the grantee, under the "rule in Shelley's

Case," but conveys only an estate for the life of the grantor. *Smith v. Tucker*, 95 N. E. 45, 47, 250 Ill. 50.

The "rule in Shelley's Case" is in force in Illinois as a rule of property, and its applicability to a given case does not turn on the quantity of the estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs. Under a will by which testator devised to his wife all of his real estate during her life, and "on the death of my wife I direct that her heirs have in fee simple, the undivided half of said real estate and my brother \* \* \* the other undivided half thereof, to him and his heirs forever," the portion of the estate which was not devised to the testator's brother falls within the rule in Shelley's Case, and testator's wife took the fee to the undivided half of the property, and the brother took the fee to the other half, subject to the wife's life estate. *Ward v. Butler*, 88 N. E. 189, 190, 239 Ill. 462, 29 L. R. A. (N. S.) 942.

Under the "rule in Shelley's Case," if an estate of inheritance be given to the ancestor, and a remainder be thereon limited to his heirs, or to the heirs of his body, such remainder is immediately executed in possession in the ancestor, so that the ancestor takes the whole estate in fee simple if the limitation be to heirs general, and in fee conditional if the limitation be to the heirs of the body. *Clark v. Neves*, 57 S. E. 614, 615, 76 S. C. 484, 12 L. R. A. (N. S.) 298 (citing *Austin v. Payne* [S. C.] 8 Rich. Eq. 10; *Williams v. Foster* [S. C.] 3 Hill, 193).

The word "children" in a will does not ordinarily mean "heirs," or "heirs of his body," so as to bring the devise under the operation of the "rule in Shelley's Case," unless the context of the will leaves no doubt of such intention. The word "heirs" is a word of limitation, and not of purchase; and, when used in a will, its legal intentment is to designate a class of persons who are to take in succession, from generation to generation, and the law effectuates this purpose by declaring a fee to pass to the first taker, or, as it is sometimes expressed, by giving a life estate to the first taker and a limitation in fee to himself. The words "sons," "daughters," "child," and "children" are not technical, legal terms to which a fixed and determined meaning must be given regardless of the sense in which they are employed; but they are flexible and subject to construction, to give effect to the intention of the testator. The "rule in Shelley's Case" often defeats the clearly expressed intention of the testator. In a devise to one for and during his natural life with remainder to his heirs in fee, the inexorable rule of the common law, from which our courts cannot escape without legislative aid, requires them to set at naught the clearly expressed intention

and decide that the testator gave a fee-simple title to the first taker, although he expressly limited it to a life estate by apt words. When, however, the testator has used other words, such as "child" or "children," the rule in Shelley's Case has no application, and the court is left free to adopt a construction which will carry into effect the intention of the testator. It is true the intention, when discovered, may lead to the same result as is reached under the rule in Shelley's Case where the word "heirs" is used, but, if this be so, it is because the intention is carried out by adopting such construction. It will never be so construed to defeat the intention, as may follow from the rigor of the rule in Shelley's Case. *Connor v. Gardner*, 82 N. E. 640, 644, 230 Ill. 258, 15 L. R. A. (N. S.) 73 (citing *Kales*, *Future Int.* § 129; *Schaefer v. Schaefer*, 31 N. E. 136, 141 Ill. 337; *Strawbridge v. Strawbridge*, 77 N. E. 78, 220 Ill. 61, 4 L. R. A. [N. S.] 948, 110 Am. St. Rep. 226).

### RULE OF CREDITS

Rev. St. § 5544, declares that the preceding section, providing the commutation to which federal convicts may be entitled for good conduct, shall apply to such prisoners only as are confined in jails or penitentiaries where no credits for good behavior are allowed; but in other cases all prisoners confined in jails or penitentiaries of any state for offenses against the United States shall be entitled to the same "rule of credits" for good behavior applicable to other prisoners in the same jail or penitentiary. Held, that Act Pa. 1901, allowing a specified commutation but making such allowance conditional on the act of the Governor of the state, approved by the board of inspectors or managers of Pennsylvania penitentiaries, did not prescribe a "rule of credits," but rather a commutation of sentence to be exercised at the discretion of state officers, and was therefore not applicable to federal prisoners. *United States ex rel. Seiple v. Byers*, 127 Fed. 993, 995.

### RULE OF LAW

As regulation, see Regulation.

### RULE OF PROPERTY

The term "rules of property," as used in the rule that courts of the United States adopt and follow the decisions of the highest court of a state where a course of those decisions, whether founded on statutes or not, have become "rules of property" within the state, mean those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto. *Kuhn v. Fairmont Coal Co.*, 152 Fed. 1013, 1015 (citing *Bucher v. Cheshire R. Co.*, 8 Sup. Ct. 974, 125 U. S. 555, 31 L. Ed. 795; *Hinde v. Vattier*, 5 Pet. 398, 8 L. Ed. 168; *Van Rensselaer v. Kearney*, 11 How. 297, 13 L. Ed. 703; *Christy v. Pridgeon*, 4 Wall. 196, 18 L. Ed. 322; *Williamson v. Suy-*

*dam*, 6 Wall. 723, 18 L. Ed. 967; *Williams v. Kirtland*, 13 Wall. 306, 20 L. Ed. 683; *Walker v. State Harbor*, 17 Wall. 648, 21 L. Ed. 744; *Townsend v. Todd*, 91 U. S. 452, 23 L. Ed. 413; *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192; *Barrett v. Holmes*, 102 U. S. 655, 26 L. Ed. 291; *Peters v. Bain*, 10 Sup. Ct. 354, 133 U. S. 670, 33 L. Ed. 696; *Randolph v. Quidnick Co.*, 10 Sup. Ct. 655, 135 U. S. 457, 34 L. Ed. 200; *De Vaughn v. Hutchinson*, 17 Sup. Ct. 461, 165 U. S. 566, 41 L. Ed. 827; *Madisonville Traction Co. v. St. Bernard Mining Co.*, 25 Sup. Ct. 251, 196 U. S. 239, 49 L. Ed. 462).

A decision involving a part of a tract of land dedicated to a city for a public landing establishes a "rule of property" with respect to another part of the tract, which must be adhered to, regardless of the merits of the original controversy. A decision adjudging that a city was the owner of property dedicated to it, and had the right to make any disposition of it authorized by its charter, though made in a suit not involving a diversion of the land to a private purpose, is a "rule of property" with respect to the rights of the city in the land. *Union R. Co. v. Chickasaw Cooperage Co.*, 95 S. W. 171, 177, 116 Tenn. 594 (citing *Wilkins v. Railroad*, 75 S. W. 1026, 110 Tenn. 442).

### RULER

Restraint of, see Restraints of Kings or Princes.

### RULES AND REGULATIONS

The words "rules and regulations," as used in Civ. Code 1895, § 4527, providing that an attachment may issue against a corporation not incorporated by the laws of the state, but transacting business therein, under the same rules and regulations as are prescribed for issuing attachments in other cases, refer to the manner of issuing attachments, and not to the grounds upon which they may issue. *Parramore v. Alexander*, 64 S. E. 660, 661, 132 Ga. 642.

"Rules and regulations," as the term is employed in Act March 23, 1906 (Laws 1906, p. 466, c. 137), regulating the racing of running horses, etc., and providing (section 3) that the state racing commission established by the act should have the power to prescribe rules, regulations, and conditions under which running races shall be conducted, and that no races shall be conducted except by a corporation or association duly licensed by it, implies uniformity, publicity, and the establishment of standards by which applicants or licensees may know in advance upon what conditions the license may be granted, or will be withheld or revoked. A rule must necessarily be of general application, and a regulation must apply impartially. *State Racing Commission v. Latonia Agricultural Ass'n*, 123 S. W. 681, 685, 136 Ky. 173, 25 L. R. A. (N. S.) 905.

Article 4, § 3, of the federal Constitution, which provides that "Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," conferred ample authority on Congress to enact the legislation authorizing the establishing of forest reserves on the public lands and the making of rules and regulations by the Secretary of the Interior "to insure the objects of such reservations," and the rules and regulations so made as contained in the compilation of October 3, 1903, relating to the grazing of stock on such reserves, are within the authority so conferred, and reasonable and valid. *United States v. Shannon*, 151 Fed. 863, 866.

### RULES OF CONSTRUCTION

There is a difference between rules governing the interpretation of wills and rules governing their construction, and rules of construction are local in origin and operation, while rules of interpretation are universal, and there can be no judicial construction of a will in a doubtful case until the interpretation of the meaning of the words thereof is ascertained as a matter of fact. In re *United States Trust Co. of New York*, 138 N. Y. Supp. 150, 158, 78 Misc. Rep. 227.

### RULES OF INTERPRETATION

Rules of construction distinguished, see Rules of Construction.

### RULING

The word "rulings," in Rev. Laws, c. 112, § 100, conferring on the Supreme Judicial Court jurisdiction in equity to compel the observance of laws governing street railway companies and regulations made in accordance with the law of the board of railroad commissioners, etc., and to review, annul, or amend the "rulings" of any state board or commission relative to street railways, when considered in its ordinary meaning and in connection with the fact that the commissioners appointed pursuant to Resolves 1896, p. 637, c. 87, providing for the appointment of commissioners to consolidate the public statutes and to suggest mistakes, omissions, inconsistencies, etc., took the section from St. 1898, p. 748, c. 578, § 25, omitting therefrom the words "of law" after the word "rulings," and, when considered in connection with the fact that a great variety of matters affecting street railways are left to state boards and commissions, means rulings of law and excludes findings on questions of fact. *Paine v. Newton St. Ry. Co.*, 77 N. E. 1026, 192 Mass. 90.

"Where issues of fact are submitted to the Circuit Court, and the finding is general, nothing is open to review, except the rulings of the Circuit Court in the progress of the trial, and the phrase 'rulings of the court in the progress of the trial' does not include the general finding of the Circuit Court nor

the conclusions of the Circuit Court embodied in such general finding." *Keeley v. Ophir Hill Consol. Mining Co.*, 169 Fed. 598, 600, 95 O. C. A. 96 (quoting and adopting definition in *Cooper v. Omohundro*, 19 Wall. 65, 22 L. Ed. 47).

### RUM

See Bay Rum.

### RUN

See Cargo Run; Constructed, Run, and Operated; Country Run Oats; Orchard Run.

In a city ordinance authorizing a street railroad company to operate its lines in certain streets and providing that if the city thereafter pave any street along which the railroad "may run" the company shall pave the space between the rails, the words "may run" mean streets whereon the track of the railroad company shall have been constructed, not streets whereon the company has the right or license to operate its road, but of which right or license it has not availed itself. *Harris v. City of Macomb*, 72 N. E. 762, 763, 213 Ill. 47.

### RUN AHEAD

The direction "run ahead of third class trains" means to pass around such trains at sidings going in the same direction. *Cogbill v. Louisville & N. R. Co.*, 44 South. 683, 684, 152 Ala. 154.

### RUN UPON EITHER SIDE

The exception in Rev. St. § 4786, providing that "extra taxes, when levied as hereinbefore provided, shall be on real and personal property within one mile on each side of the free turnpike road, except where any road improvement of free turnpike road, or any toll road, or unimproved state or county road, being unconnected with the same, 'runs upon either side' of such proposed road, within less than two miles, then the extra taxes shall only be levied upon such lands and personal property as lie within one-half the distance of such roads," applies only to roads of the specified kinds, which, being unconnected with the proposed free turnpike, run along such proposed free turnpike on either side within less than two miles, and in the same general direction as, or approximately parallel with, the proposed road. Neither a road which crosses a proposed free turnpike, and which does not run approximately parallel with such turnpike on either side; nor a road terminating or beginning at a point within less than two miles of a proposed free turnpike, and unconnected with such proposed free turnpike, is such a road as is contemplated in the exception provided for in the section; and, when the boundaries of the free turnpike district have been limited to one-half the distance of such road or roads, such district is illegal, and the construction of such free

turnpike with such boundaries will be enjoined. *Cornell v. Franklin County Com'rs*, 65 N. E. 998, 87 Ohio St. 335.

# **RUNNING**

The word "running," as used in Civ. Code 1895, § 2321, creating a presumption of negligence against a railroad company where damage is done by the running of its locomotives, cars, or machinery, does not refer so much to actual motion as it does to the general operation of its locomotives, cars, or machinery. *Smith v. Atlantic Coast Line R. Co.*, 62 S. E. 1020, 1021, 5 Ga. App. 219.

Where a trainman is injured while he is endeavoring to fasten with chains two detached portions of the train which have become separated by the pulling out of a drawhead of one of the cars, by the front part of the train being moved back upon him, the injury is caused by the "running of the train" within the meaning of Civ. Code 1895, § 2321. *Southern Ry. Co. v. Holbrook*, 53 S. E. 203, 204, 124 Ga. 679.

If a car containing passengers is stopped while in transit, and the passengers are directed by the conductor to change to another car, which is on a track parallel to the first, and if, while they are so doing, the employes of the company put out the lights of the first car, and cause it to jerk suddenly, resulting in injury to a passenger who is in the act of making the change, this would be an "injury resulting from the running of the cars" of the company, within the meaning of the statute, and would also be a "damage done by a person in the employment and service of the company," so as to raise the statutory presumption of negligence against it. *Georgia Ry. & Electric Co. v. Reeves*, 51 S. E. 610, 611, 123 Ga. 697.

Where a train pulls up to a station and stops and a passenger in alighting is injured because the step of the car is broken or wanting, technically speaking, the train is not "running" in the sense of being in actual motion at the instant when a passenger is alighting. But he is injured by the running of the train in the sense that it is being operated, and that as a part of such operation the company must allow passengers proper opportunities for alighting. *Seaboard Air Line Ry. Co. v. Bishop*, 63 S. E. 1103, 1107, 132 Ga. 71.

# **RUNNING ACCOUNT**

The term "running account," when used in a statute of limitations, means an open, mutual account. *Brock v. Wildey*, 54 S. E. 195, 125 Ga. 82.

# **RUNNING AT LARGE**

See At Large.

# **RUNNING, CONDUCTING, OR MANAGING**

An assistant station agent passing, by means of a hoop, an order from a dispatcher

to a brakeman on a moving train passing the station, pertaining to the movement of the train, is not "running, conducting, or managing a train" within Rev. St. 1909, § 5425, and, where he delivered such order, his negligence in directing a servant under him to run by the side of the train to receive the hoop is not within the statute. *Gray v. Wabash R. Co.*, 137 S. W. 324, 326, 157 Mo. App. 92.

Rev. St. 1899, § 2864, as amended by Laws 1905, p. 135, making a railroad liable for the death of an employe occasioned by the negligence of another employe, while "running, conducting, or managing any locomotive, car, or train of cars," etc., covers the operation of cars at terminal yards, and the death of an employe of a railroad engaged as a brakeman on a loaded coal car while being shunted from main switch track in a terminal yard to a side track, caused by the negligence of fellow servants in the moving of cars and the giving of signals, resulted from the negligence of an employe within the statute. *Pratt v. Missouri Pac. Ry. Co.*, 122 S. W. 1125, 1127, 139 Mo. App. 502.

Rev. St. 1909, § 5425, authorizing an action for the death of an employe caused by the negligence of a coemploye while running, conducting, or managing any locomotive, car, or train, etc., covers all cases where an employe is killed by the negligent act in moving cars of any character used on railroad tracks, regardless of the power propelling the cars, and loading a car with freight and moving the car down a track by means of bars, to facilitate the loading thereof, are within the statute, and, where an employe was killed in consequence of the negligence of coemployes loading and moving a car, the railroad company was liable. Where a car load of telegraph poles fell on a car repairer of the carrier, if no effort was being made to move the car, a right of action did not accrue under Rev. St. 1909, § 5425, authorizing an action for the death of an employe caused by the negligence of a coemploye while running, conducting, or managing any car or train. *Peters v. St. Louis & S. F. R. Co.*, 131 S. W. 917, 919, 150 Mo. App. 721.

# **RUNNING FOOT**

The term "running foot" as used in a street-paving contract, based on a petition of property owners for the improvement of a street, which should not cost the owners more than a specified amount "per running foot," meant "per running foot of property front" and not "per running foot of street." *Barber Asphalt Paving Co. v. Howcott*, 33 South. 734, 109 La. 692.

# **RUNNING FRONT FOOT**

What is meant by the expression "running front foot" is the aggregate frontage on both sides of the street. *Klein v. Nugent Gravel Co. (Ind.)* 66 N. E. 486, 489.

## RUNNING ORDER

Painting was not necessary to the completion of a mill according to the contract which bound the miller merely to put it up and in "running order." *Rhodes v. Cox*, 9 Ky. Law Rep. 895.

## RUNNING PARTS

See Tracks and Running Parts.

## RUNNING POLICY

Where, in a policy of insurance, the nature of the property to be covered and the risk to be assumed are certain, but other prescribed conditions must be observed before it attaches to specific property, the policy is known as a "running policy." *Banco de Sonora v. Bankers' Mut. Casualty Co. (Iowa)* 95 N. W. 232, 233.

## RUNNING REPAIRS

Act May 1, 1905, to provide for the protection of mechanics, etc., employed in the construction and repair of railway equipment, makes it unlawful for a railroad company or corporation, or other persons who own, control, or operate any lines of railroad in the state, to build or repair railroad equipment without first maintaining at every division point a building or shed over the repair tracks where such work is permanently done, so as to provide that all men permanently employed in the construction and repair of railroad equipment shall be under shelter during inclement weather. Held, that the phrase, "where such work is permanently done," means where constantly done, and the phrase "permanently employed" means regularly employed, and the act applies to repair tracks where the "running repairs" were made consisting of the substitution of new for broken parts on cars and supplying missing parts so as to keep the cars in transit. *St. Louis, I. M. & S. Ry. Co. v. State*, 112 S. W. 150, 151, 86 Ark. 518.

## RUNNING STREAM

The common-law rule against obstructing running streams to the injury of adjacent lands applies in Arizona to well-defined arroyos or natural channels through which surface or flood waters flow. *Kroeger v. Twin Buttes R. Co.*, 114 Pac. 553, 555, 13 Ariz. 348, Ann. Cas. 1913E, 1229.

Water which overflows the banks of a river, and then flows down a natural depression in the same general direction as the river runs, and which returns to the river upon the subsidence of the flood, is to be deemed a part of the running stream. *Riddle v. Chicago, R. I. & P. Ry. Co.*, 128 Pac. 195, 198, 88 Kan. 248.

Where a lake with its tributaries and outlet during the rainy season constituted a "running stream" of water, it was properly designated as a "running stream" subject to appropriations for irrigation, though it was

not shown that it continued to flow to the sea or to a junction with some other stream. *Duckworth v. Watsonville Water & Light Co.*, 89 Pac. 338, 342, 150 Cal. 520.

## RUNNING SWITCH

Making a "running switch" on a railroad consists in "kicking" or "shunting" cars forward in breaking or making up a train, by moving them forward at a rapid speed, detached from the engine or a portion of the train. *Vance v. Ravenswood, S. & G. R. Co.*, 44 S. E. 461, 463, 53 W. Va. 338.

"A 'running' or 'flying switch' is performed by attaching the cars to be thrown upon the other track to the engine. The train is then put in motion, running toward the switch, and before it is reached, and when sufficient momentum to answer the purpose has been acquired, the engine is detached, passes on the main track, and, after passing, the switch is changed, and the cars thus detached, by the momentum thus acquired, are carried along the side track to the point intended." *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379, 383, 384.

The method of switching known as making a "running" or "flying" switch consists in detaching the portion of the train to be switched off while the cars are in motion, the forepart of the train advancing with increased speed, while the rear portion, proceeding more slowly, is, at the proper time, switched off upon the desired track; or the engine may push forward a car or part of a train with considerable speed, and then, giving it a strong propulsion, send it off alone on the desired switch. This practice in many courts is condemned as negligent, even towards trespassers, and when the cars are suffered to run over a crossing, after being detached from the train, in making a flying switch, whereby travelers are injured, it is held negligence of an aggravated nature, and the practice is not unfrequently sharply denounced by the courts. *Lacey v. Louisville & N. R. Co.*, 152 Fed. 134, 137, 81 C. C. A. 352 (citing *Beach, Contrib. Neg.* [3d Ed.] § 217).

## RUNNING THE SHORE

The words "running the shore," as used in a description in a deed, "Beginning at a spruce tree on the shore near the head of G.'s cove so called and running across the point to the shore then southeasterly and northwardly running the shore to the point of beginning with all the privileges thereto," means running by the shore, and the flats are excluded. *Whitmore v. Brown*, 61 Atl. 985, 988, 100 Me. 410.

## RUNNING WATER

Water flowing from artesian wells on the public domain is subject to appropriation for irrigation purposes under Civ. Code, § 1410, providing that the right to the use of "running water" flowing in a river or stream



or down a canyon or ravine may be acquired by appropriation. *De Wolfskill v. Smith*, 89 Pac. 1001, 1003, 5 Cal. App. 175.

**RUNNING WITH LAND**

See *Covenant Running With the Land*.

**RURAL**

**RURAL HOMESTEAD**

Under Const. art 16, § 51, providing that a rural homestead may be one or more parcels, but that it shall be used for a home, or as a place to exercise the calling or business of the head of the family, to constitute rural land a "homestead" it must be used for some one purpose of a home, either by cultivating it, using it directly for raising family supplies, or for cutting firewood and the like. *Autry v. Reasor*, 113 S. W. 748, 102 Tex. 123.

**RURAL MAIL CARRIER**

As officer, see *Officer*.

**RURAL REAL ESTATE**

The distinction between urban property and rural property is well understood. Ur-

ban real estate is that situated in a city or a town resembling a city, while "rural real estate" is that located in the country, in an agricultural district. This distinction was recognized by the common law and is recognized by the Constitution and the decisions. Laws 1901, p. 31, c. 31, relative to the effect of a tenant of urban real estate holding over, is therefore not invalid as special legislation; this classification being proper. *Stees v. Bergmeyer*, 98 N. W. 648, 650, 91 Minn. 513.

**RUSTIC**

The word "rustic," as used in an instruction defining "vulgar" as meaning mean, rustic, rude, low, and unrefined, means, among other things, unadorned, awkward, and pertaining to the country, rural. *Raley v. State*, 105 S. W. 342, 344, 47 Tex. Civ. App. 426.

**RYE WHISKY**

See *Pure Rye Whisky*.

## S

**S. E.**

The letters "S. E." mean southeast. *Bandow v. Wolven*, 107 N. W. 204, 206, 20 S. D. 445.

**S. E. 4**

The abbreviation "S. E. 4," employed in the description of the property conveyed by a tax deed, will be interpreted as meaning "southeast quarter," when it is explicitly used in another part of the same instrument as the equivalent of these words. *Kennedy v. Scott*, 83 Pac. 971, 72 Kan. 359.

**SE QR 24**

In a description of property contained in a list of delinquent real property attached to a notice of tax sale describing it as "se qr 24," the number 24 being in a column headed "sec," the letters "se" clearly meant southeast, and the description given properly described the southeast quarter of section 24. *Bandow v. Wolven*, 107 N. W. 204, 206, 20 S. D. 445.

**S. L. C.**

The letters "S. L. C." in a contract of shipment indicate that the shipment is made on the shipper's load and account. *Nairn v. Missouri, K. & T. R. Co.*, 106 S. W. 102, 126 Mo. App. 707.

**SS.**

There is no peculiar virtue in the cabalistic character "ss," which is presumed to have been anciently symbolical of something, but nobody knows precisely what, and hence a complaint is not insufficient because the charging part is not preceded by the words, "State of Nebraska, Otoe County—ss." *Seay v. Shrader*, 95 N. W. 690, 691, 69 Neb. 235.

**SABBATH**

See, also, Sunday.

The "Sabbath" is a day of rest and worship, generally recognized as such. *State v. Duncan*, 43 South. 283, 284, 118 La. 702, 10 L. R. A. (N. S.) 791, 11 Ann. Cas. 557.

By common usage the terms "Sabbath" and "Sunday" are used indiscriminately to denote the Christian Sabbath; that is, Sunday. "Sabbath day" is synonymous with "Sunday." *Town of Winnfield v. Grigsby*, 53 South. 53, 54, 126 La. 929 (quoting 7 Words and Phrases, p. 6281).

**SACK**

"By \* \* \* 'sacks' we understand those encasements which are not usually of permanent value, and such as are ordinarily

used for the convenient transportation of their contents." *United States v. Nicholls*, 22 Sup. Ct. 918, 186 U. S. 298, 300, 46 L. Ed. 1173.

**SACK RAFT**

A federal court cannot take judicial notice of what constitutes a "sack raft," and that a particular raft is such a raft and unlawful, where the testimony shows that there is no such thing as a sack raft commonly known within its jurisdiction, there being no law of the United States or of the state describing such a raft. In this case witnesses described "sack rafts" as being round, or nearly so, in shape, the outside or boom logs fastened together at their ends with chains or ropes in a loose manner, with considerable slack, and inclosed in these boom logs are loose logs, put in without regard to position or order, with no binders of any sort, so that when the towline is made fast, and the towboat begins to pull on it, the raft becomes more or less elongated, and takes somewhat the shape of a sack or bag. *The Mary*, 123 Fed. 609, 611, 613.

**SADISM**

"Sadism" is a mental disease in which the sexual instinct is abnormal or perverted. *State v. Petty*, 108 Pac. 934, 936, 32 Nev. 384, Ann. Cas. 1912D, 223.

**SAFE**

See Fireproof Safe; Iron-Safe Clause; Not Safe; Reasonably Safe; Unsafe.

A brick structure entirely open on one side cannot be a vault or "safe," within the meaning of an ordinance regulating the storage of dangerous explosives. *Smith v. Mine & Smelter Supply Co.*, 88 Pac. 683, 685, 32 Utah, 21.

An instruction, in the language of Kirby's Dig. § 6044, defining a railroad company's duty to maintain stock guards is not objectionable because it uses the words "good" and "sufficient," while the statute uses the words "suitable" and "safe"; the words being substantially the same. *Kansas City Southern Ry. Co. v. Greer*, 119 S. W. 1121, 1123, 90 Ark. 531.

**SAFE AND DECENT ACCESS**

The phrase "safe and decent access," within the rule requiring public service corporations to afford to all such persons as have occasion to transact with them business of the nature they are holding themselves out as being accustomed to do "safe and decent access" to the places opened up for the transaction of such business, is not limited

to mere physical safety and the absence of obscenity, but the employment of the expression "safe and decent access" is intended to connote also the notion of freedom from abuse, humiliation, insult, and other unbecoming and disrespectful treatment. A member of the public is not to be deterred from transacting or offering to transact the business which the law compels a telegraph company to accept impartially from every person by reason of the fact that he cannot enter the public office without being subjected to insult and personal affront. A violation of this duty has occurred whenever a person entering the telegraph office has been met with disrespectful treatment at the hands of the company's agent. It is immaterial that the person thus injured had no interest in the message or that he was the mere agent of another; there being no requirement that one desiring to transact business with public utility corporations shall do so in person. *Dunn v. Western Union Telegraph Co.*, 59 S. E. 189, 191, 2 Ga. App. 845.

#### SAFE AND SUFFICIENT

The term "safe and sufficient," when applied to a spark arresting device, is relative. A complaint, alleging that defendant operated a railroad through a village between wooden buildings in close proximity to the track and on a day when a strong wind was blowing and when it was unusually dry, carelessly and negligently failed to use safe and sufficient spark arresters to prevent the emission of sparks, and negligently ran a locomotive under such a high and unnecessary head of steam that it threw out unusually large and dangerous sparks which set fire to and burned plaintiff's barn, sufficiently alleged negligence. *Lake Erie & W. R. Co. v. McFall*, 76 N. E. 400, 402, 165 Ind. 574.

#### SAFE AND SUITABLE APPLIANCE

In an action by a servant for personal injuries "safe and suitable" appliances mean reasonably safe and suitable, and, when used in the charge, do not require the master to furnish absolutely safe appliances, and in this sense the word "suitable," is used as meaning "safe or not defective." *Davis v. Northwestern R. Co.*, 55 S. E. 526, 528, 75 S. C. 303.

#### SAFE APPLIANCE

See, also, *Safe Place to Work*.

In an action by a servant for personal injuries, alleged to have been caused by a defective fastening in a handhold on a freight car, the trial court charged the jury that, while plaintiff assumed all the risks ordinarily incident to his employment, such assumption of risk did not begin until defendant had used ordinary care to securely fasten and maintain in safe condition the handholds on its cars. The defendant objected to this instruction, on the ground that it imposed

on it the duty to exercise ordinary care to securely fasten and maintain in safe condition the appliance in question. The appellate court, in passing on the correctness of the instruction, said: "As a matter of strict law the charge is not accurate. From the inception of his employment the plaintiff assumed the risks ordinarily incident to the service. The risk superadded by the negligence of the master did not form a part of these, unless brought to his knowledge. Applying this principle to the issue in this case, we have this result. The risks ordinarily incident to the use of the lag screw fastening plaintiff assumed, for he knew that many cars thus equipped were handled by appellant. He also assumed the risk of such defects in the appliances as would not have been disclosed to the company by an inspection conducted with ordinary care. This latter risk he assumed in any event; for, if the company had not inspected the car at all, yet, if the defect which caused the accident would not have been discovered by a proper inspection, it fell in the category of assumed risks." The court said, further, in regard to the safety of the appliance used, that it seemed to appear beyond controversy that the lag screw fastening was a safe appliance, when properly attached to sound wood, and that it might be that the ideal is absolute safety, and that ordinary care should be exercised to its attainment, but that, if an ordinarily prudent person should assume the task of exercising ordinary care to furnish a safe appliance for the use of his employes, construing the word "safe" in its absolute sense, he would direct his efforts toward the production of such an appliance as would be safe, however carelessly or unskillfully used, a standard which has nowhere been set for the master; but there was much force in the suggestion of the appellee that the words were not to be taken in their absolute sense, unless attended by a word which carries that meaning. *Galveston, H. & S. A. Ry. Co. v. Perry*, 82 S. W. 343, 345, 36 Tex. Civ. App. 414.

#### SAFE CRACKER

The term "safe cracker," as used in the title of Act Feb. 19, 1904, 24 St. at Large, p. 396, entitled "An act to provide punishment for safe crackers," has a broader meaning than one who cracks or attempts to crack a safe by the use of an explosive and may cover persons who break or attempt to break into safes through other instrumentalities. It is not essential to constitute a safe cracker that he shall be successful in his attempt to break open a safe, for one may fairly be declared to be a safe cracker who uses explosives in an attempt to break open a safe used for keeping valuables with intent to commit a larceny. Therefore a provision in the act that any person convicted of using any explosive in and about a safe with in-

tent to commit larceny or other crime shall be deemed guilty of a felony did not render the act unconstitutional as embodying a subject not expressed in the title. *State v. O'Day*, 54 S. E. 607, 608, 74 S. C. 448.

### SAFE DEPOSIT COMPANY

For the purpose of the gross receipts tax law (Code Pub. Gen. Laws 1904, art. 81, § 164), the term "safe deposit company" may be given its accepted and ordinary meaning by holding to be appropriate to such company all kinds of business which fairly fall within the powers usually found in the charters of safe deposit companies or currently conducted by them. *State v. Central Trust Co.*, 67 Atl. 267, 270, 106 Md. 268.

### SAFE DEPOSIT VAULT

As warehouse, see Warehouseman.

### SAFE HIGHWAY

The term "safe," as applied to public highways, is used in a relative sense, and one driving across a railway, the approaches to which were defectively constructed, was not negligent as a matter of law in attempting to cross, though he knew it to be unsafe for one to ride in a wagon loaded as his was and knew that the only way in which he could safely go over the crossing was to leave the wagon and walk on the ground, where he had encountered such crossing frequently before and by the observance of precautions had always safely avoided danger by driving and riding in his wagon, and on the occasion in question lightened his load by causing his family to get out, set the brakes, and locked the wheels of his wagon, and stood up the better to manage and guide his team down the embankment. *Chicago, I. & L. R. Co. v. Leachman*, 69 N. E. 253, 255, 161 Ind. 512.

### SAFE MEANS

The words "safe means," in an instruction in an action for injuries to a female passenger as she was alighting from a train that it was the carrier's duty to exercise great care in providing "safe means" for passengers to alight, and that if it negligently failed to provide "safe means," and by reason thereof the passenger was injured, she was entitled to recover, did not alone refer to the carrier's failure to provide a step for the plaintiff to alight as alleged, of which there was no proof, but was also applicable to the alleged negligence of the carrier's porter in jerking her from the train while assisting her to alight. *Texas & P. Ry. Co. v. Beezley*, 101 S. W. 1051, 1052, 46 Tex. Civ. App. 108.

### SAFE PLACE TO WORK

Reasonably safe place to work, see Reasonably Safe.

See, also, Place.

The word "safe," as applied to the master's duty to provide a safe place to work,

must be understood to be used in the sense of "safe" according to the usage, custom, and risk of the business in which the employé is engaged. An employer cannot be convicted of negligence in not providing a safe place to work, where from the very nature of the employment the risks and dangers are as apparent to the employé as to the employer. *Welch v. Carlucci Stone Co.*, 64 Atl. 392, 394, 215 Pa. 34, 7 Ann. Cas. 299.

"Safe place to work," used with reference to the rule as to the master's duty to furnish the servant with a reasonably safe place to work, is a relative term, as to which the word "reasonably" is important; and the safety of the place is to be judged by the nature of the work, and, if this is necessarily not safe, the master can only furnish a place as safe as reasonably practicable, considering the service to be performed. *Saversnick v. Schwarzschild & Sulzberger*, 125 S. W. 1192, 1193, 141 Mo. App. 509.

The place in which a servant is directed to work is safe, when all the safeguards and precautions which ordinary experience, prudence, and foresight will suggest have been taken to prevent injury to the servant while exercising reasonable care; and a place which is safe so long as machinery is not in operation, and the peril involved is in the improper method of performing the work by improperly starting the machinery, is safe within the law. *Peterson v. Chicago, R. I. & P. Ry. Co.*, 128 N. W. 932, 933, 149 Iowa, 496, 46 L. R. A. (N. S.) 766.

The word "safe," as used in the rule requiring reasonable safety as to place to work and tools furnished a servant, means reasonable safety according to the usages, risks, and dangers of the employment. An employer is only required to furnish a reasonably "safe" place in which to work and reasonably safe tools, and it is reversible error to charge that, if there is any neglect of the employer in furnishing "a safe place to work or in furnishing safe tools," the employer is liable. *Powell v. American Sheet & Tin Plate Co.*, 65 Atl. 1113, 1114, 216 Pa. 618.

The word "safe," as used in the statute requiring employers to furnish a reasonably safe place to work, does not mean a place so made and guarded as to exclude all possibility of danger. No amount of care, prudence, and foresight can produce or insure such a condition. Many employments are of themselves dangerous, and it involves no paradox to say that a place of danger may be safe in the proper sense of the word. It is safe when all the safeguards and precautions which ordinary experience, prudence, and foresight would suggest have been taken to prevent injury to the employé, while he is himself exercising reasonable care in the service which he undertakes to perform. *Martin v. Des Moines Edison Light Co.*, 106 N. W. 359, 361, 131 Iowa, 724.

**SAFE SPEED**

An instruction, assuming that the operation of a train around a curve "at an unusually high rate of speed" was negligent, is erroneous, as a speed may be safe, though unusual. *Flucks v. St. Louis, I. M. & S. Ry. Co.*, 122 S. W. 348, 143 Mo. App. 17.

**SAFEGUARD**

See Proper Safeguard.

**SAFELY**

Under the complaint in a shipper's action for damages for negligent carriage of live stock, which alleged that the cattle were not "safely" carried, and that they were damaged and injured by the negligence of the defendant, evidence was not limited to the manner in which the injury to the cattle was occasioned, but evidence as to the quality of the hay and water furnished by defendant was within the issues; the word "safely" having reference to the contractual relation between the shipper and the carrier, and not to the carrier's negligence. *Heitman v. Chicago, M. & St. P. Ry. Co.*, 123 Pac. 401, 403, 45 Mont. 406.

**SAFELY AND SECURELY**

An undertaking by a private person to carry goods "safely and securely" is no more than an undertaking to carry them without negligence, and does not amount to an insurance of the goods against losses by thieves or a taking by force. The authorities may be reconciled by the statement that when property is bailed for hire to one who is to do something with it for the bailor, such as transporting it, an agreement to do so is referred to the task to be performed and is held to mean no more than that skill and care will be devoted to that task; but when the bailee is not required to do anything with the property, yet binds himself to return it safely, the obligation is taken to be general and without exception, as no exception is named, and there is no particular undertaking in regard to the property to which the obligation to return in safety can be referred and confined. Where the defendant corporation, engaged in furniture moving, contracted to move plaintiff's furniture, etc., for a certain price, and its agent stated that defendant had previously safely moved furniture and bric-a-brac for others, was responsible, and would move plaintiff's furniture with care and deliver it safely, defendant did not thereby assume the responsibility of a common carrier, but was only liable, as a bailee for hire, for negligence of its servants. *Jamnet v. American Storage & Moving Co.*, 84 S. W. 128, 131, 109 Mo. App. 257 (citing *Hutch. Carr.* [3d Ed.] § 40; *Ames v. Belden* [N. Y.] 17 Barb. 513; *Stewart v. Stone*, 127 N. Y. 500, 28 N. E. 595, 14 L. R. A. 215, distinguishing *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Drake v. White*, 117 Mass. 10; *Harvey v. Murray*, 136 Mass. 377).

**SAFETY**

See Insure Safety.

Acts Ex. Sess. 1907, p. 25, No. 23, requires state boards to deposit their funds in one of the chartered banks within their jurisdiction offering the highest rate of interest consistent with the safety of the funds, and requires the board to advertise and let the deposits. Held, that a distant bank cannot be excluded solely by reason of any supposed or real danger resulting from its distance, provided it is otherwise entitled to the contract, "safety," as used in the statute, meaning nothing more nor less than that the funds should be safely kept and faithfully and punctually accounted for. *Louisiana State Board of Agriculture & Immigration*, 48 South. 148, 149, 122 La. 677.

**SAFETY APPLIANCES**

The word "appliances," within Const. art. 4, § 29, requiring safety "appliances" in mines, includes all things which will secure safety; and the section applies to all physical conditions existing in a mine. *Cook v. Big Muddy-Carterville Mining Co.*, 94 N. E. 90, 93, 249 Ill. 41.

**SAFETY DEVICE**

A bridge over railroad tracks when necessary to make a crossing safe for public use is a "safety device." State ex rel. *City of Minneapolis v. St. Paul, M. & M. R. Co.*, 108 N. W. 261, 266, 98 Minn. 380, 28 L. R. A. (N. S.) 298, 120 Am. St. Rep. 581, 8 Ann. Cas. 1047.

**SAID**

See At Said Time.

Said court and judges thereof, see Court and Judges Thereof.

The word "said," when used in a document, refers to something that has been mentioned above in the document. *Commonwealth v. Schweiters*, 93 S. W. 592, 594, 122 Ky. 874.

Where an indictment sets out the name of a county, and charges defendant with having committed perjury in "said county," it refers to the county set out in the preceding part of the indictment. *Moss v. State*, 83 S. W. 829, 830, 47 Tex. Cr. R. 459, 11 Ann. Cas. 710.

Where the call in the deed is for a beginning corner "at the head of the ditch on the road," and "thence running with said ditch in an eastern direction to the branch," the language "thence running with said ditch" means, by construction of law, that ditch. *Sherrod v. Battle*, 70 S. E. 834, 836, 154 N. C. 345.

The words "said children," in a will whereby testator gave his residuary estate real and personal, to his sister in trust for the maintenance and education of "my said

children" and appointing the sister trustee of the fund, to have and to hold the same as long as the trust might continue, refer to testator's two sole children theretofore named in the will, and their title is that of tenants in common. *In re De Rycke's Will*, 91 N. Y. Supp. 159, 161, 99 App. Div. 596.

Where a testator by the second clause of his will gave an undivided fourth of his property in trust for R., one of his four children, the third clause giving to each of his other three children an undivided quarter of the "said remainder" of his estate, will be construed as giving to each of them a quarter of the whole estate, remaining after payment of his debts, funeral charges, expenses, etc., it appearing that this was the intention, as otherwise part of the estate would be undisposed of by the will. *Angell v. Angell*, 68 Atl. 583, 586, 28 R. I. 592.

H., by his will, devised and bequeathed the residue of his estate to the children of his son, W., "that he now has or may or shall hereafter have, and, if his last child should be unborn at the time of his death, to include that one," in equal shares, and directed that the same should be held in trust and invested by his executors, and that, as the "said" children of his son should arrive at the age of 21 years, they should be paid their respective shares, with the interest that should accrue thereon. Held, that the grandchildren living at the death of the testator took vested interests, subject to open and let in their after-born brothers and sisters, payable to them when the entire class of takers shall be determined, and as they respectively reach the age of 21 years. *Haggerty v. Hockenberry*, 30 Atl. 88, 89, 52 N. J. Eq. 354.

Under a deed poll providing that "said wall so built shall be and remain a party wall, and that either party could add to it, doing work from his own side if the other side was built upon, the words 'said wall' here, we think, mean the wall of the height shown in the plan, so that either party might add to the wall in height, and such addition need not be a party wall." *Palmer v. Evangelical Baptist Benevolent & Missionary Soc.*, 43 N. E. 1028, 166 Mass. 143.

Where a journal entry recited the reading and signing of certain "House bills, the title of which are set out in the foregoing message from the House. The reading of said bill having been dispensed with by a two-thirds vote," etc., the use of the singular instead of the plural form does not indicate that the reading of any one of the bills theretofore mentioned was dispensed with, for the word "said" is a word of reference, and means, as there used, "before mentioned," or "aforesaid," and though "bill" is employed in the singular, it is colored by the antecedent to which "said" refers it, namely, the "House bills" mentioned. Moreover, the er-

ror is self-correcting when the phrase is considered as a whole, for the period after the word "house" will not be permitted to separate the phrase from its relation to the subject-matter to which it obviously refers. *State ex rel. Woodward v. Skeggs*, 46 South. 268-272, 154 Ala. 249.

The granting of a railroad franchise between certain points on condition that only one fare should be exacted for a single passage over "said road" has no application to any fares that shall be charged on other portions of the road not within the terminals of the franchise granted. *Byars v. Bennington & H. V. Ry. Co.*, 90 N. Y. Supp. 736, 738, 99 App. Div. 34.

The word "said" as used in a bond given by a bank and sureties to the state treasurer reciting that such treasurer would deposit certain moneys in the bank in question and that the bank should keep, etc., all "said sums so deposited or to be deposited as aforesaid," points to something previously mentioned in the instrument, and the sureties on the bond are liable for deposits in the bank at the time the bond was executed. *Kephart v. Buddecke*, 80 Pac. 501, 503, 20 Colo. App. 546.

A paragraph of a cross-complaint for divorce for cruelty alleged that for five months last past plaintiff, by a uniform course of conduct, had been cruel to defendant, and had inflicted on her, through his harsh conduct, great mental cruelty. A later paragraph alleged that, by reason of "said acts and conduct" on the part of plaintiff, defendant had suffered, and did still suffer, great physical and mental suffering. Held, that the words "said acts and conduct" comprehended the whole picture of plaintiff's dereliction as alleged in the complaint; and that the first paragraph was not objectionable, because it charged that the conduct produced "great," instead of "grievous," mental suffering. *Nelson v. Nelson*, 123 Pac. 1099, 1100, 18 Cal. App. 602.

The complaint, in an action against an insurer, alleged that it entered into a written contract of insurance with the plaintiff, whereby it insured plaintiff for \$1,500 against all direct loss or damage by fire on a stock of merchandise, consisting of leaf tobacco, burlap, etc., its own, or held by it in trust or on commission, or sold but not delivered, or for which it might be liable in case of loss or damage, and that the said property so insured by defendant by said contract of insurance, and while in the premises mentioned, was totally destroyed. Held, that the words "said property" related to the property described as insured by the contract, and that by reasonable intentment the complaint in substance alleged plaintiff's insurable interest. *Kline Bros. & Co. v. German Union Fire Ins. Co. of Baltimore*, 132 N. Y. Supp. 181, 184, 147 App. Div. 790.

A deed conveying one-sixteenth of the oil and gas under a tract of land provided that it was subject to any rights existing in the lessee under a prior lease, but if that lease had expired or becomes void, or if no such lease ever existed, then granting to the lessee all the rights and privileges of drilling and operating on the land to produce, store, and remove "said oil" and gas necessary and usually granted to the lessee in an oil and gas lease. Held, that the words "said oil" could not grammatically and did not refer to the one-sixteenth granted in fee, but referred to their next preceding antecedent, to wit, the oil and gas covered by the prior lease, and hence the new lease conveyed not only a one-sixteenth of all the oil and gas, but, subject to the prior lease, was a lease of the land to the grantee for oil and gas purposes, with exclusive rights, reserving the usual royalty and with covenants and agreements usually contained in an oil and gas lease. *Garrett v. South Penn. Oil Co.*, 66 S. E. 741, 743, 66 W. Va. 587.

The words "manufacturer," "such manufacturer," and "said manufacturer," as used in Acts 1908, p. 281, c. 189, § 15, providing that a licensed manufacturer may sell the products of his brewing at any place within the state, except where such manufactory is situated in no-license territory, but such manufacturer may sell the product of his brewing to be delivered to a common carrier to be transferred to any place where the same may be legally sold, and the said manufacturer may sell the products of his brewing in quantities not less than one gallon at the place of manufacture, except in no-license territory, mean any manufacturer, whether located in license or no-license territory; the only difference between the two classes of manufacturers intended by the statute being that the manufacturer located in license territory can sell and deliver not less than one gallon at the place of manufacture, while the manufacturer located in no-license territory can make no sale and delivery at such place. *Robert Portner Brewing Co. v. Southern Express Co.*, 63 S. E. 6, 8, 109 Va. 22, 21 L. R. A. (N. S.) 64.

#### As referring to next antecedent

Pub. St. 1901, c. 191, § 8, provides that tort actions for personal injuries shall survive to the extent stated in the five following sections. By section 9, if such an action is pending at the death of a party, it shall abate, unless decedent's administrator, if decedent was plaintiff, shall appear and prosecute the action before the end of the second term after decedent's death. By section 10, if an action is not then pending and has not become barred, one may be brought any time within two years after decedent's death. By section 11, the damages recoverable in any such action shall not exceed \$7,000. Section 12 provides that if the administrator of the deceased party is plaintiff, and the death of

such party was caused by the injury complained of in the action, the mental and physical pain suffered, reasonable expenses caused by the injury, probable duration of his life, etc., may be considered as elements of damage. Section 13 provides how the damages recoverable shall be distributed and section 14 provides that all other actions existing in behalf of or against a deceased person, except those for the recovery of penalties and forfeitures of money under penal statutes, shall survive and may be prosecuted or defended by his administrator. Held, construing section 11 in view of Pub. St. 1901, c. 2, § 14, making the words "said" and "such," when used to refer to any person or thing, apply to the person or thing last mentioned, that the words, "In such action," therein, referred to the action authorized by section 10, and not to the pending action authorized to be prosecuted by the administrator by section 9, so that damages recoverable in such action are not limited. *Piper v. Boston & M. R. R.*, 75 Atl. 1041, 1046, 75 N. H. 435.

## SAKE

"Sake" is a beverage, a product of the fermentation of rice, produced by a process similar to that employed in making beer in this country; rice being used instead of barley. An analysis of a sample of the importation in question shows it to contain 17 per cent. of alcohol, 3.874 per cent. of solids, and .064 per cent. of ash; the remaining 78.50 per cent. being water. Palariscopic and other tests disclosed the presence of maltose, which is the first product of the change of starch under the action of diastatic ferments, and indicates that the fluid was the product of a starch bearing substance. Sake is amber colored, has a sweet taste, has no head, and is always heated before being drunk. The name sake is apparently arbitrary and, not descriptive, conveys little or no intelligence to the mind. Sake resembles beer in its process of manufacture and in the presence of maltose in the extract which is a characteristic of beer, but is never found in still wines. It resembles still wines in the large percentage of alcohol, and it has many points of similarity to both wine and beer. The holding is that sake is dutiable as an unenumerated article, and not as either beer or still wine under the similitude clause. *United States v. Nishimiya*, 137 Fed. 396, 398, 69 C. C. A. 588.

"Sake" does not have a substantial resemblance to either wine or beer, so as to be dutiable as such by similitude under the provisions of Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205, but it is dutiable as an unenumerated manufactured article, under section 6, c. 11, 30 Stat. 205. *Stratton v. Komada & Co.*, 148 Fed. 125, 126 (citing *Nishimiya v. United States*, 131 Fed. 650; *United States v. Nishimiya*, 137 Fed. 396, 69 C. C. A. 588).

Sake is dutiable as still wine by similitude, being "similar" to that article in material and use within the meaning of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205, which prescribes the classification of unenumerated articles "similar \* \* \* in material, \* \* \* use," etc., to enumerated articles. The resemblance in material arises from the fact that the predominant substance in both articles is alcohol, and that there is a substantial similarity in their alcoholic strength; the percentage of alcohol being about 18 in sake and from 11 to 16 in still wine. The resemblance in use arises from the fact that both articles are drunk for purposes of exhilaration, and are capable of producing intoxication. *United States v. Komada & Co.*, 162 Fed. 465, 466, 89 C. C. A. 385.

## SALABLE VALUE

The term "salable value" is synonymous with market or actual value, and in proper cases with rental value. *Hetland v. Bilstad*, 118 N. W. 422, 423, 140 Iowa, 411 (quoting *Jonas v. Noel*, 39 S. W. 724, 98 Tenn. 440, 36 L. R. A. 862).

## SALAD OIL

"Salad oil" prima facie means olive oil, and, in the absence of evidence that the term has recently acquired a more general meaning to include other oils, its use without further explanation on packages of cotton seed oil shipped in interstate commerce constitutes a misbranding in violation of Food and Drugs Act June 30, 1906, c. 3915, § 2, 34 Stat. 768. *Brina v. United States*, 179 Fed. 373, 105 C. O. A. 558.

## SALAMANDER

"Salamander" is the unfused material which accumulates in the bottom of a furnace while it is in operation, and which must be removed periodically. *Sloss-Sheffield Steel & Iron Co. v. Ralston* (Ala.) 58 South. 260, 261.

During the operation of a blast furnace, the heavier portions of the iron, such as carbon, graphites, and silicates, collect in the bottom of the furnace, and by some chemical action the fire brick gradually disappear or fuse with the iron and become a very hard substance, called "salamander." This salamander is considered a better lining than fire brick, because it can withstand a higher degree of heat. *Illinois Steel Co. v. Saylor*, 80 N. E. 783, 784, 226 Ill. 283.

## SAL AMMONIAC

The electrolyte commonly known as "sal ammoniac" is a solution of chloride of ammonium. In re *Charles Town Light & Power Co.*, 183 Fed. 160, 165.

## SALARIED OFFICER

Under Laws 1902, p. 972, c. 380, providing that the sheriff of Ontario county shall receive as compensation for all his services and his duties appertaining thereto, which are a county charge on the county or any town therein, an annual salary, and also certain fees, such sheriff is not a "salaried officer," within Code Civ. Proc. § 3307, subd. 4, entitling sheriffs to a fee for each cause placed on the calendar for trial by jury, but declaring that it does not apply to counties wherein the sheriff is a salaried officer. *People ex rel. Flynn v. Leech*, 89 N. Y. Supp. 178, 179, 43 Misc. Rep. 435.

## SALARY

See Annual Salary; Graded Salaries.

Any salary, see Any.

Increase of salary, see Increase.

A "salary" is a periodical allowance made as compensation to a person for his official or professional services, or for his regular work. *Board of Com'rs of Teller County v. Trowbridge*, 95 Pac. 554, 555, 42 Colo. 449.

The salary of a public officer is a provision made by law for his maintenance and support during his term, to the end that, without anxiety concerning his means of subsistence, he may be able to devote himself entirely to the duties of his office. *Ruperich v. Baehr*, 75 Pac. 782, 783, 142 Cal. 190 (citing *Lewis v. City of Denver*, 48 Pac. 317, 9 Colo. App. 328).

### Allowance distinguished

Const. 1901, § 96, prohibiting the enacting of a law not applicable to all the counties, regulating "fees, commissions or allowances" of public officers, and section 104, subd. 24, prohibiting the passage of local laws creating, increasing, or decreasing "fees, percentages or allowances" of public officers, have no application to the salary of a solicitor of a judicial circuit, in view of the use of the word "salary" in the Constitution at other places; section 281 being as to increasing or diminishing the "salary, fees or compensation" of any state, county, or municipal officer during his term, and section 167 providing that a solicitor shall receive no other compensation than a salary, to be prescribed by law, a "salary" being a fixed compensation, decreed by authority and for permanence, to be paid at stated intervals, and depending on the time, and not on the services rendered, while an "allowance" is of the same nature with fees, commissions, and percentages, which are uncertain and variable in amount, and depending on the rendition of services, which may or may not be required or performed, and sometimes on the discretion of the court ordering their payment. *Brandon v. Askew*, 54 South. 605, 608, 172 Ala. 160.



**Allowance in lieu of traveling expenses**

Acts 1903, entitled "An act concerning the compensation of judges of circuit and superior courts in certain cases," provides, by section 1, that there shall be allowed to the judge of each circuit and superior court district containing more than one county, in addition to the salary now provided by law, the sum of \$300, which allowance shall be added to the salary of such judge in lieu of traveling expenses. Acts 1907, entitled "An act fixing the compensation to be paid out of the state treasury as salary to the judges of the circuit and superior courts," provides, by section 1, that there shall be paid to each of the circuit and superior judges as salary from the state annually \$3,500, provided that this act shall not be construed to repeal any law or parts of law now in force, authorizing county commissioners in certain counties to make additional allowances to the judges; but no other or different salary allowance shall be made or paid by the state. Held, in view of the executive construction of the act of 1903, as evidenced by the payment of the \$300 provided therein as "salary," and not as "traveling expenses," that such act was a salary statute, and not one allowing compensation for traveling expenses; and hence the act of 1907, which was designed as an exclusive provision as to the salary of judges, repeals the act of 1903 by implication. *State v. Billheimer*, 96 N. E. 801, 802, 178 Ind. 83.

**As annual compensation**

In the title to Act June 23, 1911 (P. L. 1123), establishing in each county a board of viewers, the term "salaries" appropriately refers to annual compensation paid to members of boards of viewers under terms of the act. In *re Reber's Petition*, 84 Atl. 587, 590, 235 Pa. 622.

Salary is an "annual compensation for services rendered; a fixed sum to be paid by the year for services." *Burrill*, Law Dict. The per annum compensation of men in official and in some other positions. *Anderson*, Law Dict. Where the word "salary" is found in a legislative act, as applied to an officer's compensation for official work done or required, it is generally understood to apply to the officer's per annum allowance, when not otherwise qualified. *State ex rel. Atty. Gen. v. Speed*, 81 S. W. 1260, 1263, 183 Mo. 186.

The word "salary" is more frequently applied to annual employment than to any other, and its use may import a factor to permanency, and the use of a sum of money, equivalent to a year's pay, in describing the amount which the employé was to receive, is a proper circumstance for consideration, in connection with other incidents, to determine whether the employment was for a year. *Maynard v. Royal Worcester Corset Co.*, 85 N. E. 877, 878, 200 Mass. 1.

**As debt**

See Debt.

**Emolument distinguished**

Ordinarily the word "salary," as applied to public officers, means a fixed compensation made by law to be paid periodically for services, whether there be any service actually rendered or not. The word "emolument" is more comprehensive than "salary." *Scharrenbroich v. Lewis & Clark County*, 83 Pac. 482, 483, 33 Mont. 250.

**As equivalent to compensation**

See Compensation.

**Clerk hire**

B. & C. Comp. § 2390, provides that the Secretary of State may employ clerks to aid in the performance of his duties, provided that the expenditure of moneys for clerk hire shall not exceed the appropriation in the Legislature therefor, and that such clerks shall be paid out of the state treasury. Const. art. 13, fixes the salary of the Secretary of State at \$1,500, and provides that he shall receive no fees or perquisites. Held that, since a "salary" is the personal compensation provided to be paid to an officer for his own personal services only, section 2390, providing for an allowance to the Secretary of State for clerk hire, is not in violation of the constitutional provision. *State ex rel. v. Dunbar*, 98 Pac. 878, 881, 53 Or. 45, 20 L. R. A. (N. S.) 1015.

**Commissions**

In a suit against an alleged principal, where the issue was agency of one who contracted the debt sued for, an instruction to find for plaintiff if the alleged agent worked for defendants on a "commission or salary" is not misleading because of use of the word "salary," though no witness used it in his evidence, as the word "salary" was used as a synonym of "commission." *W. H. White & Son v. Ballard County Bank (Ky.)* 117 S. W. 294, 296.

**As earnings**

See Earnings.

**Fees distinguished and synonymous**

The word "salary" imports a specific contract for a specific sum for a specified period of time, while "fees" are compensation for particular acts, and "wages" are compensation for services by the day or week—[quoting 7 Words and Phrases, pp. 6287-6291]. *Blick v. Mercantile Trust & Deposit Co.*, 77 Atl. 844, 846, 113 Md. 487.

Rev. St. 1909, § 1013, provides that if a prosecuting attorney is sick or absent, the court shall appoint some person to discharge the duties of the office until the proper officer resumes the discharge thereof, and section 1014 declares that the person so appointed shall possess the same powers and receive the same fees as the proper officer would if present. Held, that the word "fees," as so

used, would not be construed as synonymous with "salary," and that such section had no application to counties in which the prosecuting attorney receives an annual salary, and is required to account for and pay into the county treasury all fees received by him by virtue of his office. *State ex rel. Harrison v. Patterson*, 132 S. W. 1183, 1185, 152 Mo. App. 264.

Const. art. 4, § 28, requires the subjects of each bill to be clearly expressed in its title. Under "An act to repeal section 3240, chapter 27, article 1 of the Revised Statutes of 1899, relating to fees, and to enact a new section in lieu thereof to be known as section 3240" (Laws 1905, p. 155), the Legislature enacted what is now Rev. St. 1909, § 10,695, requiring each probate judge to keep an account of fees collected, and whenever such fees in any one year, deducting expenses, shall exceed the annual compensation provided by law for a judge of the circuit court with jurisdiction in such county, to pay such excess, less 10 per cent., into the treasury of his county for the benefit of its school fund. Held that, as the section repealed fixed the fees of probate judges, the title was broad enough to give notice of and to clearly express the subject of section 10,695; and that, as "Salaries" are the form of compensation prescribed for paying public officers for their services, the subject of salaries was also germane to the subject of fees expressed in the title. *State ex rel. Buchanan County v. Imel*, 146 S. W. 783, 785, 242 Mo. 293.

A clerk of the district court was given a stated salary, together with fees paid in civil actions by the litigants and in nearly all criminal actions by the county. When a demand for fees was presented to the board of supervisors, it was necessary to check every item and deduct erroneous charges, and extrinsic evidence was sometimes necessary to determine the correctness of particular items. Held, that a claim of such clerk against a county for fees in actions brought for the collection of delinquent taxes was not a claim for a "salary" within Civ. Code 1901, par. 989, requiring the presentation of claims against the county within six months, but providing that this requirement shall not apply to claims for official salaries made demand against the county by some express provision of law; the words "salary" and "fees" having their ordinary signification, the distinction between which is that a salary is a fixed compensation for regular work, while fees are compensation for particular services rendered at irregular periods, payable at the time the services are rendered. *Cochise County v. Wilcox*, 127 Pac. 758, 759, 14 Ariz. 234.

#### As fixed by time of service

The word "salary" may be defined generally as a fixed annual or periodical payment for services, depending on the time, and

not on the amount of services rendered. *King v. Western Union Telegraph Co.*, 65 S. E. 944, 946, 84 S. C. 73.

The word "salary" may be defined generally as a fixed annual or periodical payment for services, depending on the time, and not on the amount of the services rendered; and though, to give a statute effect, the word will sometimes be more broadly construed, this will not be done where the language of the statute forbids such construction. *Spalding v. Thornbury*, 108 S. W. 906, 907, 128 Ky. 533.

Const. art. 6, § 6, authorizes the Legislature to provide for more than one circuit judge in the circuit, including Saginaw county, and that such judges, in addition to the "salary" provided by the Constitution, shall receive such additional "salary" as may be fixed by the board of county supervisors. The word "salary" is here used with the same meaning as in section 1, art. 9, and contemplates a "fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered." *Beach v. Kent*, 105 N. W. 867, 870, 142 Mich. 347.

The system which the framers of the Constitution intended to provide by article 11, § 8, prescribing that the Legislature shall fix the compensation by salary of all county officers, was that of a fixed and established compensation by time as distinguished from the system of specific fees for specific services which had theretofore prevailed; and although the word "salary" is sometimes used to denote compensation paid for particular service, it was used in the Constitution to mean a payment dependent on the time and not on the amount of the service rendered by the officer. *State ex rel. Stratton v. Maynard*, 76 Pac. 937, 939, 35 Wash. 168 (quoting *Cox v. Holmes*, 44 Pac. 262, 14 Wash. 255).

#### Incident to office

"Salary," like an oath of office, is an incident to office merely, and not a necessary element in the determination of its character. The fact that there is no salary or emolument affixed to an office does not make it any the less a civil office. In re *Members of Legislature*, 39 South. 63, 64, 49 Fla. 269 (citing 6 Words and Phrases, p. 4924).

#### Mileage

"The term 'salary' may be and is variously applied. It is usually used as designating recompense, reward, or compensation for services rendered. Mileage may become a part of compensation. If the mileage allowance is limited to the amount actually expended in traveling, then it cannot, of course, add anything to the income of the recipient of the salary. But if the mileage is not so limited, as where a certain amount is allowed for each mile traveled, and this

amount exceeds the actual mileage charged, then the balance above such charge becomes a part of the official income or compensation the same as though it were a part of the 'salary.' As a concrete proposition, it is not controlling that such accretions to official compensation are not designated as 'salary.'" *Marioneaux v. Cutler*, 91 Pac. 355, 359, 32 Utah, 475 (citing 7 Words and Phrases, p. 6287 et seq.).

#### Permanency of employment imported

"Where a person is employed at a salary, the term itself imports permanency of employment." *White v. Koehler*, 57 Atl. 124, 70 N. J. Law, 526.

#### Wages distinguished

"Salary" refers to a superior grade of services and implies a position or office, and suggests something higher, larger, and more permanent than "wages." *First Nat. Bank v. Barnum*, 160 Fed. 245, 247.

The word "salary" imports a specific contract for a specific sum for a specified period of time, while "wages" are compensation for services by the day or week. *Blick v. Mercantile Trust & Deposit Co.*, 77 Atl. 844, 846, 113 Md. 487.

The term "wages" has a less extensive meaning than the term "salary." "Wages" is usually restricted to sums paid as hire or reward to domestic or menial servants or to artisans, mechanics, laborers, or others employed in similar occupations, while "salary" has reference to the compensation of clerks, bookkeepers, and other employes of a like class, officers of corporations, and public officers. *Spellberger Bros. v. Brandes*, 58 South. 75, 79, 3 Ala. App. 590.

"Wages," in its ordinary acceptance, has a less extensive meaning than "salary," and is usually restricted to sums paid as hire to domestic or menial servants and to artisans, mechanics, laborers, and others employed in various manual occupations, while "salary" has reference to the compensation of clerks, bookkeepers, other employes of like class, officers of corporations, and public officers. *Massie v. Cessna*, 88 N. El. 152, 154, 239 Ill. 352, 130 Am. St. Rep. 234.

#### Wages synonymous

Lexicographers and some authorities class "salary" and "wages" as synonymous. *Board of Com'rs of Teller County v. Trowbridge*, 95 Pac. 554, 556, 42 Colo. 449.

Worcester says in referring to "wages" that "in ordinary language the term wages is usually employed; the sums paid to persons hired to perform menial labor." Winfield defines the term as meaning "the compensation paid to a hired person for services. This compensation to the laborer may be a specified sum for a given term of service or a fixed sum for a specified work; that is, payment may be made by the job." It has also

been held that, "if there is any difference in the popular sense between 'salary' and 'wages,' it is only in the application of them to the more or less honorable service. *State v. Duncan*, 1 Tenn. Ch. App. 339, 341, 342 (quoting *Commonwealth ex rel. Wolfe v. Butler*, 99 Pa. 542).

Broadly, the word "salary" means a recompense or consideration made to a person for his pains or industry in another man's business. Whether it be derived from "salarium," or more fancifully from "sal," the pay of the Roman soldier, it carries with it the fundamental idea of compensation for services rendered. Indeed, there is eminent authority for holding that the words "wages" and "salary" are in essence synonymous. *Hopkins v. Cromwell*, 85 N. Y. Supp. 839, 841, 89 App. Div. 481.

## SALE

See Actual Purchase or Sale; Actual Sale; Bargain and Sale; Bill of Sale; Cash Sale; Certificate of Sale; Conditional Sale; Consummated Sale; Contract of Sale; Credit Sale; Deed of Sale; Exclusive Sale; Execution Sale; Expose for Sale; Forced Sale; For Sale; Have for Sale; Judicial Sale; Mortgage Sale; Offer for Sale; On Sale; Partition Sale; Possession for Sale; Premium Sale; Private Sale; Public Sale; Tax Sale; Time of Sale; Wash Sale.

Any sale, see Any.

Executory sale, see Executory Contract.

Expenses of sale of land, see Expenses.

Goods, wares, and merchandise, see Goods.

Keep for sale, see Keep.

Make a sale, see Make.

Memorandum of sale as contract, see Contract.

Of commodities as commerce, see Commerce.

Sale according to law, see According to Law.

Short sale, see Short.

Spot cash sale, see Spot Cash.

See, also, Sell; Sold.

"A 'sale' is a contract by which, for a consideration, one transfers to another property or interest therein." *Yick Sung v. Herman*, 83 Pac. 1089, 1090, 2 Cal. App. 633.

A "sale" is a contract by which property is transferred from the seller to the buyer for a fixed price in money paid or agreed to be paid by the buyer. *De Bary v. Dunne*, 172 Fed. 940.

A "sale" may be defined as a contract founded on a money consideration by which the absolute or general property in the subject of the sale is transferred from the seller to the buyer. *Koehler v. St. Mary's Brewing Co.*, 77 Atl. 1016, 1018, 228 Pa. 648, 139 Am. St. Rep. 1024.

A "sale" is an agreement by which one of two contracting parties, called the "seller," gives the thing, and passes the title to it for a certain price in current money. *Skirvin v. O'Brien*, 95 S. W. 696, 700, 43 Tex. Civ. App. 1.

The word "sale" is defined to be a contract for the transfer property from one person to another for a valuable consideration. *Radebaugh v. Scanlan*, 82 N. E. 544, 547, 41 Ind. App. 109 (citing *Anderson's Law Dict.*; and *Micks v. Stevenson*, 51 N. E. 492, 22 Ind. App. 475, 478, wherein the same definition from *Kent* was quoted with approval).

"A 'sale' is a contract whereby one acquires a property in the thing sold and the other parts with it for a valuable consideration." *Cole v. Laird*, 96 N. W. 744, 745, 121 Iowa, 146.

A "sale" is a transmutation of property from one man to another in consideration of some price. *Dunn v. Mayo Mills*, 134 Fed. 804, 810, 67 C. C. A. 450 (citing *Black Comm.* 446).

A "sale" is a transmutation of property, or a right from one person to another in consideration of a sum of money, as opposed to barter, exchanges, or gifts. *Lucas v. County Recorder of Cass County*, 106 N. W. 217, 220, 75 Neb. 351.

A "sale" is a transmutation of the property in a personal chattel from one to another for a quid pro quo, paid or agreed to be paid; the passing of title and possession of any property for money which the buyer pays or promises to pay. *State v. Colonial Club*, 69 S. E. 771, 772, 154 N. E. 177 (quoting 7 Words and Phrases, pp. 6291, 6292).

To constitute a sale of a chattel, there must be an intention and an offer to sell, and an acceptance of the offer and an intention to buy, and the court in determining whether title to a chattel has passed must consider the intention of the parties and the assent of both parties to a sale. *Priest v. Hodges*, 118 S. W. 253, 254, 90 Ark. 131.

To constitute a sale, there must be a consideration or price, a seller, a purchaser, and a delivery of the thing sold. *City of Iola v. Lederer*, 120 Pac. 354, 356, 86 Kan. 347.

The elements of a "sale" at common law are: mutual agreement, competent parties, money consideration, and transfer of absolute or general property in the subject-matter. *Wheless v. Meyer & Schmid Grocer Co.*, 120 S. W. 708, 712, 140 Mo. App. 572.

"To constitute a valid 'sale' there must be competent parties, mutual assent, a thing, the absolute or general property in which is transferred from the seller to the buyer, and a price in money paid or promised." *Logan v. Stephens County (Tex.)* 81 S. W. 109, 110 (quoting *Anderson, Law Dict.*); *Matthews v. Freker*, 57 S. W. 262, 265, 68 Ark. 196; *Chris-*

*tensen v. Cram*, 105 Pac. 950, 156 Cal. 633 (quoting 1 Benj. Sales, § 1, and citing 1 Mechem, Sales, § 1).

"A 'sale' is a contract founded on a money consideration, by which the absolute or general property in the subject of sale is transferred from the seller to the buyer, and the essentials of a sale are: (1) A mutual agreement; (2) competent parties; (3) a money consideration; (4) a transfer of the absolute or general property from the seller to the buyer. If any of these ingredients be wanting, there is no sale." *Clark v. Gault*, 83 N. E. 900, 903, 77 Ohio St. 497.

A contract to cut timber and saw the same into lumber and sell the lumber or deliver it to the owner is not a contract for the sale of land or any interest therein within the statute of frauds (Code 1907, § 4289, subd. 5), nor within section 3355, declaring that alienation of land must be in writing. *Simpson & Harper v. Harris & Scrandrett*, 56 South. 968, 970, 174 Ala. 430.

The word "sale" is a legal term of fixed and definite meaning. By a contract of sale, the property and the title thereto pass to the vendee. Where an adult, who employed a minor, sent him to defendant's saloon to buy intoxicating liquor for him, and the minor so informed the saloon keeper, the sale was to the employer and not to the minor. *Laing v. State*, 28 S. W. 1040, 9 Tex. Civ. App. 136, 138.

A person charged with illegally selling intoxicating liquors cannot be convicted of furnishing or conveying the same; a "sale" being defined to consist of an agreement by which the title passes from one and vests in another, a transfer of property from seller to buyer for a price in money paid or promised. *Reed v. State*, 103 Pac. 1070, 1071, 3 Okl. Cr. 16, 24 L. R. A. (N. S.) 268.

A "sale," as used in the statute prohibiting the sale of intoxicating liquors, consists of a contract by which one of the parties sells and delivers to the other intoxicating liquors, and is not made out by proof that the alleged buyer got two bottles of whisky and left \$2 in the place thereof in the absence of any showing of a prior agreement that the sale should be so made. *Lane v. State*, 92 S. W. 839, 840, 49 Tex. Cr. R. 335.

In determining whether there was a sale in violation of the liquor laws, the definition of Rev. Civ. Code, § 1299, declaring that a "sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property," was applied. *State v. Delamater*, 104 N. W. 537, 540, 20 S. D. 23, 8 L. R. A. (N. S.) 774, 129 Am. St. Rep. 907.

On a trial for violating the local option law, a charge that a sale is the transfer of property from one person to another for money or some valuable consideration, etc.,

sufficiently defines a "sale," especially in the absence of any requested charge covering any supposed omission. *Ellis v. State*, 130 S. W. 171, 173, 59 Tex. Cr. R. 630.

A "sale" of liquor in violation of the local option law consists of a transfer of intoxicating liquor to the buyer for a valuable consideration to be paid in money, or anything of value accepted in payment. *State v. Fulman* (Del.) 74 Atl. 1, 7 Pennewill, 123.

The money being paid and the liquor delivered, the "sale" is complete, so as to warrant a conviction for violation of the local option law. *Smith v. State* (Tex.) 91 S. W. 592.

A sale in violation of the local option law may be made by implication as well as by direct contract, so that no words are necessary to constitute a transaction a "sale," but passage of the property with intent to sell is enough. *Jackson v. State*, 123 S. W. 142, 57 Tex. Cr. R. 341.

Defendant ordered whisky C. O. D., and another, having ascertained the fact, procured from defendant an order on the express company and paid the C. O. D. and charges. Held, a "sale" by defendant. *Caton v. State* (Tex.) 95 S. W. 540, 541.

Where it appeared that witness went to the rear of a restaurant, where he met defendant and told him what he wanted, and that defendant turned around and went into the cook room, opened the door to a side room, where there was whisky, and that at defendant's invitation witness helped himself to whisky and paid defendant therefor, a "sale" was shown. *Robinson v. State*, 110 S. W. 905, 907, 53 Tex. Cr. R. 567.

Under the local option law, forbidding under penalty any person in prohibition territory to sell, exchange, or give away, with intent to evade the provisions of the law, any intoxicating liquors whatsoever, where intoxicating liquors were purchased by an incorporated society, and sold or distributed to the members at approximate cost, the act constituted a sale. *State v. Kline*, 93 Pac. 237, 241, 50 Or. 426.

Where a minor gave defendant an order on a firm without the state directing it to deliver a case of beer to defendant as the signer's agent, the order being on a printed form kept by defendant, and on arrival of the case defendant put the beer on ice, and the signer, on procuring a bottle, paid 20 cents for it, there was a sale, under Rev. St. 1899, § 2179, making it an offense to sell liquor to a minor. *State v. Field*, 119 S. W. 499, 500, 139 Mo. App. 20.

On a trial for pursuing the business of selling intoxicating liquors, a charge that the state was not required to show that such "business" or "occupation" was accused's principal "business" or "occupation," or that he gave the whole or the greater part of his time to such business, but that if, although

engaged in his usual occupation, he secretly sold intoxicating liquors when the opportunity presented, he would be guilty of such offense, was not objectionable on the grounds that it did not properly define "business" or "occupation," and was argumentative and restrictive and on the weight of evidence. *Dickson v. State* (Tex.) 146 S. W. 914, 918.

A liquor establishment shipped a gallon of whisky consigned to itself, and the bill of lading was sent to a bank with draft attached. The person for whom the whisky was intended declined to pay the draft and take up the bill of lading. Defendant procured from him an order on the bank for the bill of lading, and also an order on the carrier for the whisky, and collected from each of the three persons one-fourth of the amount necessary to procure the whisky, and then divided it between the other three and himself. Held, that there was a sale. *Skiles v. State*, 123 N. W. 447, 448, 85 Neb. 401.

Pub. St. 1901, c. 112, § 15, provides that if any person, not being an agent of a town to sell spirits, shall sell any spirituous liquor he shall be fined. The sale of liquor having been prohibited in L., defendant maintained an office, in charge of his brother as agent, where he pretended to take orders for a Boston liquor house for the sale of liquor, to be shipped from Boston by express. The prosecuting witness went to the office, stated to defendant's brother that he wanted to buy two quarts of whisky, paid the price, and was told that he could get the whisky at the express office in L. the next day. He went to the express office the succeeding day, paid the express charges, and received the liquor. Held, to show a "sale" of liquor in L., in violation of the statute, and not a transaction in interstate commerce. *State v. Gross*, 82 Atl. 533, 534, 76 N. H. 304.

In view of prior legislation on the liquor traffic, the word "sale" in the title of Acts 1909, c. 1, entitled an act to prohibit the "sale" of intoxicating liquors as a beverage near a schoolhouse where a school is kept, whether the school be in session or not, includes all sales without regard to their form or character; and the word "tipple," in section 1, declaring it unlawful "to sell or tipple" any intoxicating liquors as a beverage within four miles of such a schoolhouse, denotes a subdivision of the more comprehensive term "sale," as used in the title, and its equivalent "to sell" as used in the body; and the word "or," between "sell" and "tipple," is used in a disjunctive sense, the prohibition not being against tipples sales alone, but as well against any other sales; and the words "as a beverage" refer to a sale of liquor, not necessarily to be consumed by the immediate purchaser, but to be finally used, when it reached the consumer, as a beverage, so that a sale in wholesale quantities of intoxicating liquors, by a manufacturer thereof to a whole-

saler, with only a general and promiscuous purpose, includes a beverage sale, within the prohibition of the statute. *J. W. Kelly & Co. v. State*, 132 S. W. 193, 195, 123 Tenn. 516.

The uncontradicted testimony of two state agents that defendant delivered a can of adulterated milk at a lunchroom, taking a receipt therefor from the person in charge, is sufficient evidence of "sale," or "offer for sale," in violation of Consol. Laws, c. 1, § 32, making it unlawful to sell or offer for sale adulterated milk. *People v. McDermott Dairy Co.*, 122 N. Y. Supp. 294, 296.

Where a food inspector, on visiting defendant's premises, where he was carrying on a candy jobber business, informed defendant that he was an inspector to examine his candies, and after taking six samples asked defendant how much he owed him therefor, and was told "10 cents," which he paid, the transaction constituted a "sale," within New York City Sanitary Code, § 68, prohibiting the sale of any adulterated food within that city. *People v. Greenberg*, 119 N. Y. Supp. 325, 326, 134 App. Div. 599.

A condition in a grant of lands to a railroad company, that they should be sold only to actual settlers with a limitation as to quantity and price, was not waived by the government by its acquiescence in a transfer of the entire grant to a corporation organized to succeed to all the property, rights and franchises of the original grantee, which was not a sale within the meaning of the condition, but merely a substitution of grantees; the land still remaining subject to the condition in the hands of the transferee. *United States v. Oregon & C. R. Co.*, 186 Fed. 861, 887.

The sole manufacturer of a medicine made in accordance with a secret formula, but unpatented sold the same only under a system of contracts between himself and wholesale dealers to whom alone he sold at retail prices, by which they bound themselves to sell at a certain price and only to retail dealers designated by him, and between him and such retail dealers, by which in consideration of being so designated they bound themselves to sell to consumers only and at a certain price. Held, that under such a contract to call the purchaser an agent is to juggle with words, as "sale" is a word of precise legal import, and every wholesaler who orders goods under one of complainant's uniform contracts becomes a buyer, obtains the title, and may convey the title to another. *John D. Park & Sons Co. v. Hartman*, 153 Fed. 24, 38, 82 C. C. A. 158, 12 L. R. A. (N. S.) 135.

Plaintiff was a retail grocer, who prior to the passage of Act Aug. 2, 1886, c. 840, 24 Stat. 209, had sold oleomargarine. After that he ceased handling it; but, having two or three customers who desired it, at their request and for their accommodation he sent orders in their respective names to the manu-

facturer for 10-pound packages at a time, to be shipped to each customer in his care. The manufacturer shipped the same to its local branch house, addressed and billed to the customers. The branch house, which did not deliver to retail customers, left the packages at plaintiff's store, and he delivered the same, with other groceries. The customers returned the bills to him, and he remitted for the same to the manufacturer each month, charging the customers with the cash so sent. There was no fraud nor attempt at concealment, and plaintiff made no profit whatever on the transactions. Held, that such transactions were not sales of the article by plaintiff, and did not render him subject to tax as a wholesale dealer. *Grier v. Tucker*, 150 Fed. 658, 663.

Plaintiff, the owner of property insured, made an agreement to sell to H. for a specified price; possession to be given March 1, 1902. The contract, however, was conditioned on the ability of H. to raise \$5,500 on the property; it being agreed that, unless such sum was raised, the deal was off. To enable H. to raise such loan, a contract and deed were executed, and placed in the hands of loan brokers to hold, and not to be delivered without plaintiff's permission. The title being defective, an action was brought in H.'s name to cure the same, and thereafter a portion of the property was destroyed by fire before H. obtained the money or any sale was consummated. Held, that such transaction did not constitute a "sale or contract to sell" the property, within a policy providing that it should be void in case of a "sale or contract to sell" the property, or if any change or diminution other than death take place in the interest, title, or possession of insured. *Swank v. Farmers' Ins. Co. of Cedar Rapids*, 102 N. W. 429, 430, 126 Iowa, 547.

#### Actual transfer of property

A "sale" is a contract by which one transfers to another an interest in property, and in order to constitute a "sale" the contract must give and pass rights of property. *Giffen v. Selma Fruit Co.*, 89 Pac. 855, 856, 5 Cal. App. 50.

A "sale" is a contract subject to all the general principles of law relating to contracts. The mere transfer of a chattel is not a sale, nor is a contract transferring a chattel a sale, but to constitute a sale the general property in the thing, rather than the thing itself, is transferred, and it is transferred for a price measured in money or money's worth. Sale implies the price in a sum of something; a measure of value. No contract of sale can exist without a price in a sum of money, a measure of value. *Still v. Cannon*, 75 Pac. 284, 285, 13 Okl. 491 (citing *Burdick's Elements of Sale*, § 1; *Hill, Sales*, p. 169.)

#### Mutual assent.

Where the evidence shows that the minds of the parties never met at any time during

all the negotiations for the sale of certain land, and until the option was withdrawn and there was a difference of opinion as to the price to be paid and the condition of the title to be conveyed, no contract was entered into because of such misunderstanding. *Phelps v. Good*, 96 Pac. 216, 218, 15 Idaho, 76.

Usually the word "sale" denotes a completed mutually binding contract; but under contracts creating the ordinary relationship of principal and real estate broker the broker has made a sale whenever, through his influence, a person ready, able, and willing to buy on the terms proposed is brought to the principal, though through the fault of the principal no sale is consummated. *Humphries & Jackson v. Smith*, 63 S. E. 248, 249, 5 Ga. App. 340.

A "sale" is a contract for a transfer of property from one person to another for a valuable consideration; three things being essential thereto: The thing sold, which is the object of the contract, the price, and the consent of the parties. A corporation owning a street car system and franchise leased the entire concern for a term of 40 years to another corporation, composed of practically the same stockholders and governed by the same board of directors. The lease provided that, upon its termination for breach of covenant by the lessee, it should surrender all cars, appliances, etc., generally called personal property of every kind belonging to the lessor and all betterments made by the lessee. Soon after the lessee became financially involved, and it, together with the lessor and a syndicate acting as agent for both parties, and which controlled a majority of the stock in each, entered into a tripartite agreement, under which the lease was surrendered upon demand of the lessor at the order of the syndicate and the entire property turned over to the lessor. There had been no violation of the terms of the lease, and the lessor had reserved no right in the lease to cancel it, except for defaults specifically mentioned therein. Held, that the surrender of the lease did not constitute a "sale," as there was no meeting of two minds, but constituted a mere abandonment of the property under one name and the taking over of it by them under another name. *Barrie v. United Rys. Co. of St. Louis*, 119 S. W. 1020, 1052, 138 Mo. App. 557 (citing 2 Bl. Comm. § 446; 2 Kent [14th Ed.] § 468, par. 4; Benj. Sales [5th Eng. Ed. 1906] pp. 1, 2, § 1; Bouv. Law Dict.; Ward v. State, 45 Ark. 351, 353; State v. Wingfield, 22 S. W. 363, 115 Mo. 428, 436, 37 Am. St. Rep. 406; Madison Avenue Baptist Church v. Baptist Church in Oliver St., 46 N. Y. 131, 140).

#### Competent parties

Under Pen. Code 1895, § 444, making it criminal for any person to sell any minor any spirituous intoxicating liquor, the word "sell" is not to be taken in its strict technical sense, for one of the elements of a "sale" is

competent parties, and, a minor not being a competent party to obtain liquor, there can be no sale to him in the technical sense. *Newsome v. State*, 58 S. E. 71, 72, 1 Ga. App. 790.

#### Consideration

A "sale" implies, of necessity, a consideration or price. *First Nat. Bank of Concordia v. McIntosh & Peters Live Stock & Commission Co.*, 84 Pac. 535, 538, 72 Kan. 603.

A "sale" *ex vi termini* imports the transfer of personal property upon a valuable consideration, as distinguished from a gift, which imports a like transaction gratuitously or upon a merely good consideration. *Maxwell v. State*, 37 South. 266, 140 Ala. 131.

"Under a contract reciting a sale on condition that the buyer shall pay, etc., title does not pass until fulfillment of the conditions." *Kennedy v. Lee*, 82 Pac. 257, 259, 147 Cal. 596.

The essentials of a "sale" are: First, a mutual agreement; second, competent parties; third, a money consideration; fourth, a transfer of the absolute or general property in the subject of the sale from the seller to the buyer. In charging an illegal sale of intoxicating liquors, an allegation of the price or consideration is indispensable. *City of Cannelton v. Collins*, 88 N. E. 66, 67, 172 Ind. 193, 19 Ann. Cas. 692.

On an indictment for unlawfully selling liquor without a license, it was shown that accused kept a room in which he conducted a game called "stud poker"; chips were used to represent money; at the beginning of each game a player would purchase a number of these from accused and pay the money for them, and during the game accused would supply the players with beer and would take a portion of the chips, which was called a "rake-off"; at the end of the game the remaining chips in the hands of the winner were "cashed in". Held that the jury could infer that the "rake-off" was in consideration of the beer furnished the players, and that it constituted a "sale" of the beer. *State v. Collins*, 68 S. E. 268, 67 W. Va. 530, 27 L. R. A. (N. S.) 1024.

"A distinguishing feature of a 'sale' is that it is a transfer of the absolute title to a thing for a price in money or its equivalent. There can therefore be no valid sale unless the price has been determined upon by the parties themselves, either expressly or impliedly, or unless some means or method be agreed upon by the parties or established by law by which the price may be determined. Hence in the case of executory contracts where parties are negotiating in respect of a 'sale' and of the price to be paid thereon, the contract of sale cannot be deemed to be completed so long as the price remains undetermined." *Crocker-Wheeler Co. v. Bullock*,

134 Fed. 241, 248 (quoting *Mechem, Sales*, col. 1, §§ 204, 205).

#### Same—Money

The word "sale" usually imports a money consideration. *Alcorn v. Gieseke*, 111 Pac. 98, 101, 158 Cal. 396.

A "sale" means an exchange of property for money. *Ewers v. Weaver*, 182 Fed. 713, 714.

A "sale" is generally understood to mean the transfer of property for money. *Colgan v. Farmers' & Mechanics' Bank*, 114 Pac. 460, 464, 59 Or. 469 (citing 7 Words and Phrases, p. 6291).

To constitute a "sale" in violation of the Local Option Law, it is not necessary that the purchaser deliver to the seller the money for the whisky; it is only necessary that both parties assent to payment, if any is made or is to be made therefor. *Dawson v. State*, 117 S. W. 136, 55 Tex. Cr. R. 315.

While the word "sale," in transactions relating to personal property, usually has reference to a money consideration, yet it will be given a broader significance when the meaning of the law or of a private contract demands it, and the much more generally accepted definition of a sale is an exchange of an interest in real or personal property for money or its equivalent. *Mansfield v. District Agr. Ass'n No. 6*, 97 Pac. 150, 151, 154 Cal. 145.

On a trial for selling liquor without a license, it appeared that the liquor sold by accused was paid for by two metal checks issued by a company, good for 50 cents each, at the company's commissary store. Any one holding the checks could take them to the company's office and get money on them. Held sufficient to prove a sale. A "sale" is a transfer of property from one person to another for a price to be paid in current money. There is a distinction between a "sale" and an exchange or barter, in that in an exchange of property the price or value is not measured in money terms. A sale may exist without an actual payment of the consideration in money, provided the bargain is made and the value measured in money. *Duke v. State*, 41 South. 170, 146 Ala. 138 (citing *Gunter v. Leckey*, 30 Ala. 591, 596; *Ooker v. State*, 8 South. 874, 91 Ala. 92, 94).

Whether a given contract is one of "sale" which passes the property is one of construction to be determined by the court as a matter of law. There was no "sale" of wagons by plaintiff to defendant, passing the title to defendant, where plaintiff agreed to sell them for \$80, and defendant handed him \$1 to bind the trade, and said he would be up on a certain day and pay the balance, there being no proof that plaintiff agreed to sell for anything but cash, and the presumption being that he did not, so that defendant, having without plaintiff's knowledge taken and sold

the wagons, is liable for conversion. *Adair v. Stovall*, 42 South. 596, 597, 148 Ala. 465.

Land was conveyed to a district agricultural association in trust as a place for holding agricultural exhibitions, a part thereof to be sold or disposed of to the best advantage for the purpose of improving the agricultural grounds and for meeting the expenses of the trust, including the expenses of litigation. The trustees of the association thereafter deeded part of the latter tract to B. in payment of legal services rendered the association and of services to be rendered in future. Held, that the power of disposition of the tract was not limited to a sale for cash, and even giving the word "sale" the definition of Civ. Code § 1721, as an exchange of property for a money consideration, the association was also authorized to "dispose" of the property which would empower it to transfer the property itself in payment of legal expenses. *Mansfield v. District Agr. Ass'n No. 6*, 97 Pac. 150, 151, 154 Cal. 145.

"Although it has been sometimes held that the sale must be a transfer for money, and that every other transfer is an exchange or barter, the better opinion is that the transaction is still a 'sale,' although the transfer is made for something else than money provided each article is transferred at an agreed or the market value so that the one thing is received in payment of the price of the other." Where lands are valued at a certain sum, and other lands taken in payment therefor are valued at a less sum, and the difference is represented by promissory notes, it meets the criterion prescribed, which is "whether there is a fixed price, as a determination of the value at which the things are to be exchanged. If there is such a fixed price, the transaction is a 'sale,' but, if there is not, the transaction is an exchange." Where a broker procured a purchaser for the land sold by taking another piece of land for a part of the price, and these terms were accepted by the vendor, the transaction is a "sale," entitling the broker to performance of the vendor's contract to allow him all over a specified amount that he could get for the land. *Ullmann v. Land*, 84 S. W. 294, 295, 37 Tex. Civ. App. 422 (citing *Tied. Sales*, § 12; *Thornton v. Moody* [Tex.] 24 S. W. 331).

#### Delivery

An agreement to sell personal property without delivery thereof does not constitute a "sale." *Pabst Brewing Co. v. Commonwealth* (Ky.) 107 S. W. 728, 729.

An information alleging wrongful sale of intoxicating liquor was not objectionable for failure to charge its delivery, since an allegation of a sale imports a delivery. *People v. Steinhauer*, 93 N. E. 299, 248 Ill. 46.

Where there is no price paid for goods and no delivery of them, there is no "sale," but a mere contract to sell. *Gerardi v.*



Carnolo, 61 Atl. 599, 601, 27 R. I. 214 (quoting Bayley v. French, 19 Mass. [2 Pick.] 590).

Where goods were bought f. o. b. at a certain place, the carrier became the seller's agent, and there was no "sale" until delivery at the point of destination. Alabama Nat. Bank v. C. C. Parker & Co., 40 South. 987, 988, 146 Ala. 513.

It is elementary law that an offer may be accepted and a bargain struck so that a contract of "sale" becomes absolute and title passes without either delivery or payment of price. Delivery is not a material factor, and is not essential to a completed sale unless so made by the agreement. Citizens' Nat. Bank of Ft. Scott v. Bank of Commerce, 101 Pac. 1006, 1008, 80 Kan. 205.

A "sale" of personal property is a transmutation of property from one man to another in consideration of some price or recompense in value, and so one having an agency to sell wine, which he was expected to deliver, is not entitled to a commission on the mere procuring of orders, the title of the wine not passing until an actual delivery; an "order" being only an executory agreement which cannot even be deemed a "sale" for the purpose of determining the number of sales made by the agent in a given time. Hall v. French American Wine Co., 134 N. Y. Supp. 158, 160, 149 App. Div. 609.

#### Deed, conveyance, or transfer

"Sale" may be defined as a contract founded on a money consideration by which the absolute or general property in the subject of the sale is transferred from the seller to the buyer." The words "sale" and "conveyance" when applied to real estate are in common parlance, in judicial decisions, and by law-writers often used interchangeably, and a deed of conveyance of real estate therefore answers a reference to a sale of real estate, especially when the reference is used by persons unlearned in the law in the contract of a sale of real estate and the reference is otherwise substantially accurate. Crotty v. Effler, 54 S. E. 345, 347, 60 W. Va. 258, 9 Ann. Cas. 770.

Rev. Laws, c. 13, § 72, provides that a collector may disclaim and release a tax title held by a city or town which he has reasonable cause to believe is invalid for error in the assessment, sale or taking. A tax deed made by defendant town to itself was declared invalid by the land court for defects therein, and thereupon a disclaimer by the town was duly executed and recorded. Held, that it was the intent of the statute to afford a remedy, whether the failure in the title arose from errors in the assessment or in the subsequent proceedings, that the deed was a part of the "sale," which term commonly includes the passing of title, and hence that for a defect in the deed the town had author-

ity to disclaim. Nickerson v. Town of Hyde Park, 95 N. E. 794, 795, 209 Mass. 365.

Literally the "sale of a patent right" is the sale of the interest of the patentee, or one of the letters patent, and is consummated generally by a transfer of the letters patent. It is universally recognized, however, that a sale of the rights conferred by letters patent within a certain territory is a sale of the patent right, and, where the owner sells the right to use and to manufacture for sale and use during only a portion of the life of the patent and for a prescribed territory, it is a sale of a patent right. Nyhart v. Kubach, 90 Pac. 796, 797, 76 Kan. 154.

#### Giving and receiving earnest money

The original idea of "earnest," in the Roman Law, signified the conclusion of the contract, and it is that idea which obtains in the common-law jurisdiction, and under the statutes of fraud of England, and of some of the states of this Union. But now, the giving and receiving of earnest money, though evidence of a completed bargain, is considered of no importance, or of the smallest importance, in ascertaining whether property has passed by virtue of such bargain; that question being determined by the nature of the bargain concluded by the giving of the earnest. Under Justinian, the effect of the giving and receiving of "arrha" was to enable the contractants to retain the privilege of withdrawing from the contract, on certain conditions, and the same effect is attributed to the giving and receiving of the equivalents "arrhes" and "earnest," by the codes of France and of Louisiana, respectively. An agreement for the sale of real estate, therefore, which contemplates the passing of property, not immediately and by virtue thereof, but by an act to be executed at a later date and which in other respects, contains the elements essential to a sale, is a "promise of sale," and when made with the giving of earnest may be receded from by either of the parties; "he who has given the earnest, by forfeiting it, and he who has received it, by returning the double," as expressly provided by article 2463, relating to when a "promise to sell amounts to a sale." Smith v. Hussey, 43 South. 902, 904, 119 La. 32 (citing Civ. Code, arts. 2462, 2463; Elgee Cotton Cases, 22 Wall. 195, 22 L. Ed. 863; Benjamin, Sales [2d Ed.] pp. 260, 262; Howe v. Hayward, 108 Mass. 55, 11 Am. Rep. 306; Gut. Brac. [Am. Transl.] 145; Just. Inst. III. 24; Marcade, art. 1590 Code Napoleon [our Code art. 2463]; Marcade, vol. 6, p. 172; Laurent, vol. 24, p. 37).

#### Operation of law

The transmission of title to shares of stock held by a corporation, which takes place by operation of law on its consolidation with another corporation, is not a "sale" of the stock, within the meaning of a by-law forbidding stockholders to sell their stock

without first offering it to the corporation at the lowest price at which the holder will sell. *Silversmiths Co. v. Reed & Barton Corp.*, 85 N. E. 433, 199 Mass. 371.

**As conferring authority to execute necessary instruments**

The employment of a broker to sell lands—that is, to procure purchasers—does not of itself or *prima facie* confer authority to bind the owner to sell by a contract in writing, and such authority is not usually to be inferred from the use by the principal and agent in that connection of the terms “for sale” or “to sell” and the like; such words in that connection usually meaning no more than to negotiate a sale by finding a purchaser upon satisfactory terms. *Stengel v. Sergeant*, 68 Atl. 1106, 1107, 1110, 74 N. J. Eq. 20.

Under Code, §§ 1721, 1727, defining a “sale” as a contract by which one engages for a price to transfer to another a certain thing, etc., an instrument executed by an owner employing a broker to procure a purchaser of real estate, which recites that, in consideration of the services of the broker, the owner authorizes him “to sell for me in my name and receipt for deposit thereon,” for a specified time, the property described, for a price fixed, and agrees “to sell and convey by a good \* \* \* grant,” etc., gives the broker authority to contract for the sale to a purchaser procured by him. *Bacon v. Davis*, 98 Pac. 71, 73, 9 Cal. App. 83.

**Abandon distinguished**

See Abandon—Abandonment.

**Accord and satisfaction distinguished**

A “sale” differs from “accord and satisfaction” because in that contract the thing is given for the purpose of quieting a claim and not for a price. A power of attorney authorizing the attorney “to bargain, sell, and convey, \* \* \* to any person, \* \* \* and for any sum of money or other consideration as to him may seem” most to the advantage of the principal, all lands situate in a specified county, and to receive the consideration for which the sale may be made, and to execute valid deeds to the purchasers, does not authorize the attorney to make deeds in settlement of claims of persons to the land. *Skirvin v. O'Brien*, 95 S. W. 696, 700, 43 Tex. Civ. App. 1.

**Agreement to sell distinguished**

A “contract of sale” is distinguishable from a “sale,” in that the former is a promise to sell, while a sale is a transfer of title. *Silver v. Moore*, 84 Atl. 1072, 1073, 109 Me. 505.

Where there is no price paid for goods and no delivery of them, there is no “sale” but a mere contract to sell. *Gerardi v. Caruolo*, 61 Atl. 599, 601, 27 R. I. 214 (quoting *Bayley v. French*, 19 Mass. [2 Pick.] 590).

A “sale,” within the meaning of all statutes making certain sales of liquor il-

legal, is a complete sale passing title to the liquor from the vendor to the vendee, not a mere executory contract of sale. *State v. Davis*, 60 S. E. 584, 585, 62 W. Va. 500, 14 L. R. A. (N. S.) 1142 (citing *State v. Hughes*, 22 W. Va. 743; *State v. Flanagan*, 17 S. E. 792, 38 W. Va. 53, 22 L. R. A. 430, 45 Am. St. Rep. 836).

The distinction between an “actual sale” and a mere “executory agreement to sell” personal property is that in the former the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods be actually delivered to the buyer, or remain in the possession of the seller; while in the latter the goods remain the property of the seller till the contract is executed. *Idaho Implement Co. v. Lambach*, 101 Pac. 951, 955, 956, 16 Idaho, 497.

**Bailment distinguished**

A transaction is a “sale,” as distinguished from a “bailment,” when there is no obligation to return the specified article. In *re Allen*, 183 Fed. 172, 175.

A contract or lease of a certain number of sheep for a certain time, providing for payment of a certain amount of wool per head and a fixed increase per 100 head, stipulating for the payment of taxes and branding, and requiring their return at the expiration of the lease, unless it is renewed is a “bailment” and not a “sale.” *Wetzel v. Deseret Nat. Bank*, 83 Pac. 570, 571, 30 Utah, 62.

An instrument in writing by which the manufacturer of certain passenger railroad cars leased them to a railroad company which had ordered them, but was unable to pay cash for them as agreed, at a specified rental per month, with the privilege to the lessee to purchase the cars, constitutes a “bailment,” and not a “sale.” *American Car & Foundry Co. v. Altoona & B. C. R. Co.*, 67 Atl. 838, 839, 218 Pa. 519 (citing *Stiles v. Seaton*, 49 Atl. 774, 200 Pa. 114; *Lippincott v. Scott*, 47 Atl. 1115, 198 Pa. 283, 82 Am. St. Rep. 801; *Crist v. Kleber*, 79 Pa. 290).

Complainant entered into a contract by which it agreed to furnish fertilizer to defendant to be paid for by him by a certain date at a stated price. The contract provided that the fertilizer should remain the property of complainant until sold by defendant, and that complainant should then become the owner of the proceeds, whether cash or notes, which should be held for its use and benefit until it should be fully paid. Held, that such contract was not one of “bailment” but of “sale” with an attempt to retain a lien upon the property sold, and that complainant could maintain an action at law thereon if valid to recover the price when due. *Coweta Fertilizer Co. v. Brown*, 163 Fed. 162, 165, 89 C. C. A. 612.

A bankrupt was a dealer in agricultural implements and bought goods from a claimant. In the fall, out of season, he wrote for certain articles to be shown at a fair, and they were shipped, and billed to him as sold "subject to next spring's terms." In the spring, shortly before the bankruptcy, claimant made a demand for the goods, which was refused. Held, that there was nothing in the transaction to indicate a bailment, rather than a sale, or to overcome the presumption of ownership arising from the bankrupt's possession, and that claimant was not entitled to recover the property from the trustee. That goods are billed to a party as though it was a sale, while not conclusive, is of more or less persuasive force. In *re Wood*, 140 Fed. 964, 965.

Plaintiff contracted to furnish certain pumping machinery to be installed in the hull of a dredge being constructed by defendant. The contract provided that plaintiff should install the machinery at its own expense; that defendant should afford the facilities of its yards for such installation, and furnish men and material for that purpose at cost; that defendant should keep the machinery insured for the benefit of plaintiff; and that it should pay one-third of the price when the machine was delivered, one-third when it was installed on board the dredge, and the balance on completion of the test by the party for whom the dredge was being constructed. Held, that on delivery of the machinery, and payment of the first installment of the purchase price, there was a completed "sale," and not a mere bailment, of the machinery to defendant. *William R. Trigg Co. v. Bucyrus Co.*, 51 S. E. 174, 176, 104 Va. 79.

Petitioners contracted with F. prior to his bankruptcy to ship certain goods to him to be sold for their account, and to remain petitioners' property until sold. F. agreed to sell the goods at retail only, and to remit to petitioners each week the cost price of their goods sold during the previous week, and once each season to account and adjust the difference between sales and remittances. The contract also provided that, if F. violated the contract, petitioners might take their goods back and hold F. for any loss they sustained, and that the stock should be fully insured against fire through petitioners; the cost to be paid by F. Held, that such contract constituted a valid "bailment" and not a "sale" as between petitioners and F., though not recorded, and, F. having failed to make the payments agreed on, petitioners were entitled to the goods or their proceeds as against F.'s trustee in bankruptcy. In *re Fabian*, 151 Fed. 949, 950.

Goods were billed by petitioners to a bankrupt at definite prices and on fixed terms of credit and discount; the bankrupt undertaking to settle or pay for them and to be responsible for the freight. He also agreed to

give petitioners his exclusive trade and to render accounts for goods sold every six months. He was also required to hold separate and in trust all "goods unsold and all currency, open accounts, notes, liens, mortgages, or other values received for goods sold," and that, where goods were sold on credit, notes should be taken on blanks furnished by petitioners and made payable to their order; the bankrupt indorsing and guaranteeing them. Held, that the trust provision of the contract related merely to the manner of payment for the goods, and that the contract was one of "sale," and not of "bailment." In *re Heckathorn*, 144 Fed. 499, 502.

Whether a transaction by which goods are placed by one party in the hands of another to be sold is a "bailment" or a "sale" depends on its inherent character and purpose, and it is immaterial what name is given to it, or that it is an agreed condition that title shall not pass until payment is made. A bankrupt for a number of years had dealt in silk thread which she purchased from claimants. Having fallen behind in her payments, it was arranged that thereafter the goods should be "consigned" to her, and that the goods on hand should be invoiced and credited on her general indebtedness and charged to her on "consigned account." She was to report monthly the goods on hand and the amount sold, paying for the latter at the regular wholesale prices at which the goods were billed to her. It was further agreed that the goods should remain the property of claimants and subject to their order. No restriction was made on the manner of selling, or the prices to be charged by her, and she kept no separate account of receipts from the goods sold. Held, that as to her creditors the transaction was a sale, and that the goods on hand at the time of bankruptcy could not be reclaimed, whether they were on hand when the arrangement was made or received thereafter. In *re Wells*, 140 Fed. 752.

A contract for the reduction of ore between claimant and the T. Company, the bankrupt's predecessor, provided that the claimant should deliver ore to the T. Company for reduction on a schedule of treatment rates which included freight to the mill, that settlement for all ore shipped by claimant to the T. Company should be based on the latter's weights and samples, that, in case of disagreements as to assay values, the same should be submitted to certain arbitrators, and that payments for all gold ore delivered should be made by the T. Company promptly on agreement as to assay values, on a basis of \$20 an ounce for gold, less treatment charges. On delivery of ore each car was numbered and weighed, a test made to determine moisture, and samples taken and divided into three parts—one for the claimant, one for the T. Company, and a third for

the umpire in case of dispute—after which the ore was mixed with ore shipped by others, and it was then impossible to identify claimant's ore. All risk of loss through theft or failure of the ore to come up to sample value was on the T. Company, and settlements were made by check of the latter, in which it was treated as a debtor. Held, that the contract construed by the parties' method of business operated as a "sale" of ore delivered and not as a "bailment," so that claimant was not entitled to a preference in the distribution of the assets of the T. Company's bankrupt successor. *Chisholm v. Eagle Ore Sampling Co.*, 144 Fed. 670, 671, 75 C. C. A. 472.

If the identical thing delivered is to be returned, it is a "bailment," and there is no transfer of title; but if the one to whom it is delivered may return another thing of the same kind, or an equivalent in the form of money, or otherwise, it will ordinarily constitute a sale, and effect a change of possession. Mining property, consisting of real estate and personal property, was leased by the owner to another for a term of years at a stipulated royalty, and it was agreed in the lease that at its expiration the personal property, which included some that would be consumed by use, should be returned by the lessee in kind or value, according to an invoice which had been made, at the option of the lessor. Held, the transaction was in the nature of a "sale" of the personal property, and the title thereto passed to the lessee. *Scott Mining & Smelting Co. v. Shultz*, 73 Pac. 903, 904, 67 Kan. 605 (citing *Carpenter v. Griffin* [N. Y.] 9 Paige, 310, 37 Am. Dec. 398; *Lafin & R. Powder Co. v. Burkhardt*, 97 U. S. 110, 24 L. Ed. 973; *Caldwell v. Hall*, 60 Miss. 380, 44 Am. Rep. 410; *Mallory v. Willis*, 4 N. Y. 85; *Hurd v. West* [N. Y.] 7 Cow. 752; *National Car & Locomotive Builder v. Cyclone Steam Snow-Plow Co.*, 51 N. W. 657, 49 Minn. 125; *Smith v. Smith's Estate*, 51 N. W. 694, 91 Mich. 7; *Barnes v. Morse*, 38 Ill. App. 275; *Herryford v. Davis*, Use of Jackson & S. Co., 102 U. S. 235, 26 L. Ed. 160; *Jones*, Bail. § 74; *Story*, Bail. § 47).

#### **Barter distinguished**

There is a distinction between a "sale" and an exchange or barter, in that in an exchange of property the price or value is not measured in money terms. *Duke v. State*, 41 South. 170, 146 Ala. 138 (citing *Gunter v. Leckey*, 30 Ala. 591, 596; *Coker v. State*, 8 South. 874, 91 Ala. 92, 94).

"Where one commodity is exchanged for another of the same or different kind, without agreement as to price or reference to money payment, the transaction is not a 'sale,' but a 'barter' or 'exchange.'" *State v. Brown*, 102 S. W. 394, 395, 83 Ark. 44, 119 Am. St. Rep. 109 (quoting and adopting the definition in *Gillan v. State*, 2 S. W. 185, 47 Ark. 555).

#### **Contract of sale**

A "contract of sale" is distinguishable from a "sale," in that the former is a promise to sell, while a sale is a transfer of title. *Silver v. Moore*, 84 Atl. 1072, 1073, 109 Me. 505.

#### **Gift distinguished**

See Gift.

#### **Lease distinguished**

A conveyance of standing timber for saw-mill purposes is a sale of land and not a lease, within Civ. Code 1895, § 3613, declaring that on a sale of land there is no implied warranty of title, and hence a vendee of standing timber cannot defend against a suit on purchase-money notes on any plea predicated on the breach of an implied covenant of quiet enjoyment. *McLendon Bros. v. Finch*, 58 S. E. 690, 692, 2 Ga. App. 421.

An agreement to sell a machine for a certain price, installments to be paid on acceptance of the proposition and shipment of the machine, with an option of returning it within a certain time in lieu of the last payment, and giving no claim on the part paid, is a lease for experimental purposes with the privilege of completing the purchase, and not a sale within Civ. Code, § 1770, providing that one who manufactures an article under an order for a particular purpose warrants it reasonably fit therefor. *Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co.*, 96 Pac. 369, 372, 153 Cal. 725.

A contract provided that plaintiff leased from the owner of certain land a tract containing 250 acres and agreed to pay \$205 for the year 1905, with the privilege of re-renting the property on the same terms for seven successive years, and that in case of such renewals, on full payment of the rent, the owner on completion of the period would convey the property to plaintiff in consideration of \$1, and the amount, with legal interest, of taxes paid pending the contract. Held, that such contract operated as a lease, and the annual payments as rent, so long as it was executory, and on completion of the payments it became a "sale," at plaintiff's option, on his paying \$1, taxes, and interest pending the contract. *Heard v. Heard*, 41 South. 827, 828, 148 Ala. 673 (citing *Davis v. Robert*, 8 South. 114, 89 Ala. 404, 18 Am. St. Rep. 126; *Wilkinson v. Roper*, 74 Ala. 140).

#### **Option distinguished**

Where a broker, employed to sell property on specified terms, procured a person who executed an escrow agreement to purchase the property, or forfeit \$1,000, such agreement was a mere option to purchase, and not a sale, and did not entitle the broker to commissions. *Pehl v. Fanton*, 119 Pac. 400, 402, 17 Cal. App. 247.

#### **Order distinguished**

See Order (In Commercial Law).

**Pledge distinguished**

The delivery of goods by a debtor to his creditor in payment of his debt constitutes a "sale," and not a "pledge," which is a bailment to secure the payment of a debt or the performance of some other act, in which the pledgee only acquires a special property in the thing pledged. *Trenholm v. Miles*, 59 South. 930, 931, 102 Miss. 835.

**Alienation**

The word "sale," in the statute of frauds (Shannon's Code, § 3142), means alienation; and an action on a parol contract by an owner, binding him to donate land to another, is within the statute. *Bailey v. Henry*, 143 S. W. 1124, 1127, 125 Tenn. 390.

**Assignment for creditors**

Under Rev. Civ. Code, § 1299, defining a sale as a contract by which an interest in property is transferred to another for a consideration, where the owner simply transferred title to his son to enable him to close up the business and pay the proceeds to such of the father's creditors as he saw fit, the transaction was not a sale, being more in the nature of a secret trust in favor of the father. *Hall v. Keeney*, 118 N. W. 1038, 1041, 22 S. D. 541, 21 L. R. A. (N. S.) 513.

**Barter**

The word "sale" as used in the title of an act to prohibit the sale of intoxicating liquors of any and every kind upon the Island of St. Simons, in the county of Glynn, authorized legislation upon the subject of barter. *James v. State*, 52 S. E. 295, 124 Ga. 72.

According to the definitions of the word "sale" in Bouvier's Law Dictionary, "An agreement by which one of two contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who, on his part, agrees to pay such price;" in *Five Per Cent. Cases*, 4 Sup. Ct. 210, 110 U. S. 471-478, 28 L. Ed. 198, and *Northern Pac. R. Co. v. Sanders*, 47 Fed. 604-606, "A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent;" in *Rapal & L. Dictionary*, "A transmutation of property or a right from one man to another in consideration of a sum of money as opposed to barter, exchange and gifts;" and in *Century Dictionary*, "A sale in its broadest sense comprehends any contract for the transfer of property from one person to another for a valuable consideration"—the word "sale" as used in *Pol. Code 1895*, § 1548, making it an offense "to sell or barter for a valuable consideration, either directly or indirectly, or give away to induce trade at any place of business, or furnish at any other public places, any alcohol or any intoxicating liquors," is to be construed in its broad sense, and therefore includes what is commonly known as barter and exchange. *Howell v. State*, 52 S. E. 649,

650, 124 Ga. 698 (citing *James v. State*, 124 Ga. 72, 52 S. E. 295; *Chin v. Ligon*, 71 Ga. 694, 51 Am. Rep. 281).

**Exchange**

An "exchange," as distinguished from a "sale," is a contract whereby specific property is given in consideration of the receipt of property other than money. *Freeman v. Trummer*, 91 Pac. 1077, 1079, 50 Or. 287.

The common idea of commerce is reciprocal agreements by which one person delivers to another a material thing for money, which is a sale, or for another thing, which is an exchange. *International Text-Book Co. v. Lynch*, 69 Atl. 541, 543, 81 Vt. 101.

There is a distinction between a "sale" and an "exchange" or "barter," in that in an exchange of property the price or value is not measured in money terms. *Duke v. State*, 41 South. 170, 146 Ala. 138 (citing *Gunter v. Leckey*, 30 Ala. 591, 596; *Coker v. State*, 8 South. 874, 91 Ala. 92, 94).

"Where one commodity is exchanged for another of the same or different kind, without agreement as to price or reference to money payment, the transaction is not a 'sale,' but a 'barter' or 'exchange.'" *State v. Brown*, 102 S. W. 394, 395, 83 Ark. 44, 119 Am. St. Rep. 109 (quoting and adopting the definition in *Gillan v. State*, 2 S. W. 185, 47 Ark. 555).

The court, in determining whether there has been a sale or exchange of personal property, will determine whether there is a fixed price at which the properties are to be exchanged, and, if there is such fixed price, the transaction is a sale; otherwise, it is an exchange. *Fagan v. Hook*, 111 N. W. 981, 982, 134 Iowa, 381.

Under *Revisal 1905*, § 3957, providing that all cotton seed meal offered for "sale" shall have branded on the bag containing it or on a tag attached thereto the weight of the package, the ingredients, and the name and address of the manufacturer, an exchange of a ton of cotton seed for 1,333½ pounds of cotton seed meal is a sale within the statute. *State v. Southern Cotton Oil Co.*, 70 S. E. 741, 742, 154 N. C. 635.

Where a defendant disposed of stock at a fixed valuation and took other property in payment at fixed valuations, this constituted a sale, rather than an exchange, as affecting defendant's liability for a share of commissions for the sale of the stock under a partnership agreement. *Goodwin v. Mortsen (Tex.)*, 128 S. W. 1182, 1184.

Where the owner of fruit has it manufactured into liquor, receiving the product of the identical fruit furnished, the distiller is not guilty of a "sale of liquor"; but if the fruit is exchanged for liquor already manufactured, or if the distiller furnishes the owner of the fruit liquor in advance, the

transaction is a "sale." *Barnes v. State* (Tex.) 88 S. W. 805, 806.

An "exchange" of liquor for other liquor is a "sale" within the local option law. In such case there is no distinction between a sale and an exchange: that is, a sale includes an exchange. *Brown v. State*, 114 S. W. 198, 200, 121 Tenn. 186 (citing *Keaton v. State*, 38 S. W. 522, 36 Tex. Cr. R. 259).

The word "sale," as used in a statute prohibiting sale of liquors in a local option district, is used in its broader sense including barter and exchange and not in the restricted technical sense of a sale for a money price. Where a physician delivered to his patient whisky in exchange for money and said that the whisky belonged to another patient, and the understanding was that the bottle ordered by the patient should replace the one delivered, the transaction amounted to a "sale." *Daniel v. State*, 125 S. W. 37, 38, 57 Tex. Cr. R. 467 (citing *Keaton v. State*, 38 S. W. 522, 36 Tex. Cr. R. 259).

A "sale" in the ordinary sense of the word is a transfer of property for a fixed price in money or its equivalent; but, if the purchase price is paid by the transfer of other property, the transaction is more properly denominated an "exchange" or trade. Where, to acquire means of irrigating for lands so as to make them salable, they were transferred to a land and irrigation company, the owners taking stock and bonds therefor, the transaction was a consolidation of interests, and not a "sale" of the lands, within a contract entitling plaintiff to commissions for services in effecting sales of the land, and though plaintiff could not recover under a contract entitling him to commissions for effecting "sales" of lands, where they were conveyed to a corporation, the owners taking stock and bonds therefor, he could recover the reasonable value of his services in bringing about the transaction. *Close v. Browne*, 82 N. E. 629, 632, 230 Ill. 228, 13 L. R. A. (N. S.) 634.

A contract between an owner of South Dakota land and an owner of Illinois land stipulating that the former "sold" to the latter the South Dakota land at \$16 per acre, and agreed "to accept as part payment" the Illinois land at \$45 per acre, is a contract for the exchange of the lands, and not for a sale, within the Code, defining a "sale" as a contract by which for a pecuniary consideration called a price one transfers to another an interest in property, and defining an "exchange" as a contract by which parties mutually agree to give one thing for another, etc.; the price per acre being fixed in the contract to form a basis for an exchange, and no sale being intended by either party. *Steere & Ballah v. Gingery*, 110 N. W. 774, 776, 21 S. D. 183.

According to the definitions of the word "sale" in *Bouvier's Law Dictionary*, "An

agreement by which one of two contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money, to the other party, who is called the buyer or purchaser, who, on his part, agrees to pay such price;" in *Five Per Cent. Cases*, 4 Sup. Ct. 210, 110 U. S. 471-478, 28 L. Ed. 198, and *Northern Pac. R. Co. v. Sanders*, 47 Fed. 604-606, "A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent;" in *Rapal. & L. Dictionary*, "A transmutation of property or a right from one man to another in consideration of a sum of money as opposed to barter, exchange and gifts;" and in *Century Dictionary*, "A sale in its broadest sense comprehends any contract for the transfer of property from one person to another for a valuable consideration"—the word "sale" as used in *Pol. Code 1895*, § 1548, making it an offense "to sell or barter for a valuable consideration, either directly or indirectly, or give away to induce trade at any place of business, or furnish at any other public places, any alcohol or any intoxicating liquors," is to be construed in its broad sense, and therefore includes what is commonly known as barter and exchange. *Howell v. State*, 52 S. E. 649, 650, 124 Ga. 698 (citing *James v. State*, 124 Ga. 72, 52 S. E. 295; *Cain v. Ligon*, 71 Ga. 694, 51 Am. Rep. 281).

"Although it has been sometimes held that the 'sale' must be a transfer for money, and that every other transfer is an exchange or barter, the better opinion is that the transaction is still a sale, although the transfer is made for something else than money, provided each article is transferred at an agreed or the market value so that the one thing is received in payment of the price of the other." Where lands are valued at a certain sum, and other lands taken in payment therefor are valued at a less sum, and the difference is represented by promissory notes, it meets the criterion prescribed, which is "whether there is a fixed price, as a determination of the value at which the things are to be exchanged. If there is such a fixed price, the transaction is a 'sale,' but, if there is not, the transaction is an exchange." *Ullmann v. Land*, 84 S. W. 294, 295, 37 Tex. Civ. App. 422 (citing *Tied. Sales*, § 12; *Thornton v. Moody* [Tex.] 24 S. W. 331).

#### Contract for future delivery

The taking of an order for future delivery of intoxicants by one representing a foreign liquor concern, and acceptance of the price at the time the order is taken, constitutes a "sale" within an ordinance prohibiting sales of intoxicants; the order not appearing to be subject to the liquor concern's approval, and the transaction appearing to be an attempt to circumvent the law. *State v. Small* (S. C.) 60 S. E. 676, 677, 44 L. R. A. (N. S.) 451.

**Contract for manufacture**

Where the owner of fruit has it manufactured into liquor, receiving the product of the identical fruit furnished, the distiller is not guilty of a "sale of liquor"; but if the fruit is exchanged for liquor already manufactured, or if the distiller furnishes the owner of the fruit liquor in advance, the transaction is a sale. *Barnes v. State* (Tex.) 88 S. W. 805, 806.

**Contract of sale**

A "sale of property" is a contract, and, like every other contract, requires an agreement between two or more. A mere taking over of the property without any agreement with another competent to contract is not a sale. *Lowe v. Ozmun*, 86 Pac. 729, 732, 8 Cal. App. 387.

A "sale" prima facie means a sale effectual in point of law, including the execution of a contract where the law requires a contract in writing. *Brown v. Gilpin*, 90 Pac. 267, 271, 75 Kan. 773.

Where the owner of property negotiates to sell it, but the prospective purchaser does not bind himself by any contract to take the property, the arrangement is not a "sale" which would avoid the payment of commission to a broker who had previously been given the sale of the property, and who had obtained a purchaser without knowledge of the negotiations of the owner for the sale of the property. *York v. Nash*, 71 Pac. 59, 62, 42 Or. 321.

The verb "sell" and the noun "sale" vary in meaning according to the different context in which they are used. Ordinarily a sale is an executed contract—a completed transaction, binding on seller and buyer alike. In contracts creating the relationship of principal and real estate broker, however, a different meaning is generally given by construction. The broker "sells" when he finds a purchaser ready, able, and willing to buy on the terms proposed by the principal. A contract for commissions on sales entitles the broker to the specified compensation whenever through his influence such a prospective purchaser has been brought to the principal, though by reason of some fault or disinclination of the latter the sale is never completed or is consummated on terms somewhat different from those originally proposed by the principal. A contract of sale binding both the seller and purchaser is a "sale" within the meaning of the rule applicable to such relations. *Humphries & Jackson v. Smith*, 63 S. E. 248, 249, 5 Ga. App. 340 (citing *Hill & Moultrie v. Wheeler*, 58 S. E. 502, 2 Ga. App. 349; *Rice v. Ware & Harper*, 60 S. E. 301, 3 Ga. App. 579; *Lindley v. Keim*, 34 Atl. 1073, 54 N. J. Eq. 423; *Rice v. Mayo*, 107 Mass. 550).

"The word 'sale' does not necessarily, and in all connections mean that a convey-

ance must be made, or that the title must pass." But when nothing appears in the context of circumstances to control it, the word primarily means a consummated sale; that is, a sale and delivery, or a passing of the title. Thus, a complaint which alleges that plaintiff "sold" to defendant personal property for a specified sum, that defendant paid a part, and that the balance was due, owing, and unpaid, on account of the sale of the property, is an attempt to follow Code Civ. Proc. § 428, by stating the facts constituting the cause of action in ordinary language, and sufficiently alleges, after verdict, that the unpaid price was due by alleging a completed sale. *Christensen v. Cram*, 105 Pac. 950, 156 Cal. 633 (citing *Eaton v. Richer*, 23 Pac. 286, 83 Cal. 185).

There is no material variance between the petition, which alleges plaintiff's employment to procure a purchaser for a specified commission, the procurement of a purchaser, and the subsequent sale of the land to him, and the evidence, which shows that the owner and the purchaser procured by the broker entered into an enforceable contract for the sale and purchase of the land, and that the owner failed to perform, though the purchaser was ready and willing. *Sanderson v. Wellsford*, 116 S. W. 382, 384, 53 Tex. Civ. App. 637.

**Issuance of stock**

The original issuance of stock by a corporation is not within Laws 1905, p. 474, c. 241, as amended by Laws 1906, p. 1008, c. 414, imposing a tax on all "sales or transfers" of corporate stock, whether made on or shown by the books of the corporation, or by any assignment in blank, or by any delivery or any paper or other evidence of transfer or sale. *People v. Duffy-McInnerny Co.*, 106 N. Y. Supp. 878, 879, 122 App. Div. 336.

**Judicial sale**

The word "sale," in Gen. St. 1894, § 4611, limiting the time for suing to set aside a guardian's sale, means a sale under license of the probate court, evidenced by confirmation and a conveyance resting thereon, though irregular in form. *Brown v. Pinkerton*, 103 N. W. 897, 898, 95 Minn. 153, 111 Am. St. Rep. 448.

**Lease**

A lease granting oil and gas mining privileges for a term of years is not a "sale of realty" as contemplated by section 5314, Comp. Laws 1909. *Duff v. Keaton*, 124 Pac. 291, 293, 33 Okl. 92, 42 L. R. A. (N. S.) 472.

A lease of the exclusive right to sell a patented article in a specified territory and agreement by the patent owners to protect lessee in the exclusive sale of the article for a specified term is a "sale of a patent right," within Gen. St. 1901, § 4358, regulating the sale of patent rights, and imposing a penalty

for failure to comply therewith. *State v. Morey*, 105 Pac. 501, 502, 81 Kan. 149.

A mortgage by an owner of a plantation of crops grown by her or under her direction on the plantation during specified years, stipulating that, if she should abandon or sell the property before the maturity of the debt, the mortgagee might take possession, did not operate as a lien on crops raised during one of the years by the mortgagor's husband as a tenant, over and above the reasonable rent which he paid; a lease being a "sale" for a term. *First Nat. Bank of Headland v. Howell*, 51 South. 762, 763, 165 Ala. 383.

The term "sale," as used in the Constitution in reference to the disposition of school lands, means the transfer of the absolute or general property in the thing sold and a mineral lease given under Laws 1889, p. 68, c. 22, and the amendments thereof, providing for an issuance of a permit for the purpose of prospecting for the term of one year, with the right at any time to receive a mining lease of the land for 50 years for the purpose of mining, is not a sale of the land. *State v. Evans*, 108 N. W. 958, 99 Minn. 220, 9 Ann. Cas. 520.

#### Loan

Where accused let another have some whisky to be repaid in whisky, it was a "sale." *Black v. State (Tex.)* 151 S. W. 1053, 1055.

The mere lending of a bottle of intoxicants, to be returned in kind, as an accommodation, the transaction not being intended as a subterfuge, is not a "sale," violating the local option law. *Ray v. State*, 79 S. W. 535, 536, 46 Tex. Cr. R. 176.

A loan of a pint of whisky, the same amount to be returned by the borrower, constitutes a "sale," regardless of whether the person loaning it is a member of a club engaged in taking orders for whisky. *Tombeaugh v. State*, 98 S. W. 1054, 50 Tex. Cr. R. 286, 8 L. R. A. (N. S.) 937, 123 Am. St. Rep. 841, 14 Ann. Cas. 275.

Shannon's Code, § 6795, prohibits one to sell or tippie intoxicants within four miles of any schoolhouse; Acts 1899, p. 309, c. 161, § 1, replacing Shannon's Code, § 6780, substantially to the same effect, prohibits their sale without license; and Shannon's Code, § 6783, requires the provisions of the article to be construed liberally to prevent evasion. Accused loaned whisky to another under an agreement to return it in kind. Held, that the transaction was a "sale," within the meaning of that term in both statutes. *Brown v. State*, 114 S. W. 198, 200, 121 Tenn. 186.

"A 'sale' is an exchange of goods or property for money paid or to be paid." On a trial for selling liquor without a license, a witness testified that he asked accused to sell him some whisky; that accused replied that

he could not sell, but that he would loan him some; that accused let the witness have two bottles of whisky; that nothing was said as to when the same should be returned or paid for; that about an hour and a half later the witness returned and asked accused what it cost to get the whisky there, and gave accused that sum, and told him that, when he made an order for whisky, to get the witness some, and keep that in place of what he had got. Held a sale as a matter of law. *State v. Brown*, 102 S. W. 394, 395, 83 Ark. 44, 119 Am. St. Rep. 109 (quoting and adopting the definition in *Cooper v. State*, 37 Ark. 412).

"It has been a question of more or less trouble, under the local option laws in the different appellate courts of the federal Union, as to what the term 'sale' imports. In some it is held that it imports only a money consideration; in others, that the exchange of intoxicating liquors for some other commodity is a sale; and, under peculiar circumstances, that the loan of intoxicating liquors to be returned in kind is a sale. It has also been held that intoxicants delivered in the payment of a debt, or for services performed, is a sale. In Texas the broader signification of sale has been held to be correct; and if the exchange, or even the loan, of whisky was intended to cover up a sale, that would constitute a violation of our local option statute. But none of the decisions to which our attention has been called in this state has ever held that the mere loaning of a bottle of intoxicants, to be returned in kind, as an accommodation, constitutes a sale. Under the facts of the *Bruce Case*, 36 Tex. Cr. R. 53, 35 S. W. 383, and *Keaton's Case*, 36 Tex. Cr. R. 259, 38 S. W. 522, the loan or exchange was done simply to cover up a sale, and these parties were carrying on a liquor traffic in the local option territory, and the loans were simply evasions of the law, and really were sales. But it was not intended by those decisions, nor is it the meaning of the law, and the Legislature certainly did not intend to hold as a sale the mere loan by one neighbor to another of intoxicants until that neighbor could secure and return the same amount of intoxicants. That in no sense would constitute a sale under our law. It would seem that, if a mere accommodation loan would constitute a sale, there would be two sellers and no purchaser, or there would be two sales; that is, the man who loaned the whisky and the man who returned the whisky would each be a seller. Our law is not intended to cover this character of transaction. The Constitution and the law both limit the transaction to a sale. If appellant simply loaned *Riggins* a bottle of whisky, to be returned when *Riggins'* whisky came by express, and it was not intended as a subterfuge to cover a sale, he would not be guilty; and this phase of the law should have been presented to the jury." *Ray v. State*, 79 S. W. 535, 536, 46 Tex. Cr. R. 176.



**Buying liquor for others paying therefor**

Where defendant, for the accommodation of a third person, took his money and procured whisky from another person and delivered it to him, without any interest in it or profit from it, he was not guilty of a "sale." *Simpson v. Commonwealth*, 152 S. W. 255, 256, 151 Ky. 442.

One who buys liquor for another with money furnished by the other, and who neither has any interest in the liquor nor acts as agent for the seller, is not a seller of liquor, but if, in taking the other's order for such liquor, he is peculiarly interested in the transaction, it is a "sale" on his part. *Lee v. Commonwealth*, 136 S. W. 624, 143 Ky. 355.

Where a person, having secured a doctor's prescription for whisky for his own use, procured the whisky thereon for another with the other's money, his act constituted a "sale" by him within the local option law, whether he made a profit or not. *Hawkins v. State*, 114 S. W. 813, 814, 55 Tex. Cr. R. 75, 21 L. R. A. (N. S.) 1008, 131 Am. St. Rep. 790.

Where accused ordered liquor for another from a dealer without the state, receiving an amount sufficient to pay therefor, accused was an agent, and was not liable under Code 1907, § 7363, making it an offense to aid in an unlawful sale or purchase or other unlawful disposition of liquor, or to act as agent of the purchaser in procuring an unlawful purchase, etc.; the separation of accused's part of the liquor from that ordered for the other not being a "sale" or "other unlawful disposition of" liquor within the statute. *Vernon v. State*, 50 South. 57, 58, 161 Ala. 83.

An instruction that it was not necessary that a party should make a profit in his business in order to be guilty of pursuing the occupation of selling intoxicating liquors was not an improper limitation on the meaning of the words, "occupation" or "business," as used in the statute, and was proper where the evidence showed that accused would order whisky for his store customers, and charge it in their store account at cost to be paid when the rest of the account was paid, since each of these transactions constituted a "sale." *Dickson v. State (Tex.)* 146 S. W. 914, 919.

A conviction for selling intoxicating liquors without a license is not justified on a showing that defendant purchased whisky for others at their request and with their money. "If one, seeing his neighbor on his way to town, requests him to purchase for him a bottle of whisky, promising to return the purchase money when he sees him, and the neighbor does so, and leaves the bottle at the house of the one for whom he purchased, this does not render the party purchasing the whisky guilty of making a 'sale.'"

*Whitmore v. State*, 77 S. W. 598, 599, 72 Ark. 14.

**Gift of liquor**

In view of the other provisions of the prohibitory law, the section thereof which forbids the "giving" of intoxicating liquor to minors must be construed to have reference only to gifts properly so called, and not to "sales," and therefore a conviction upon an information drawn under that section cannot be sustained by proof that the defendant sold intoxicating liquor to a minor. *State v. Fletcher*, 87 Pac. 729, 730, 74 Kan. 620 (citing *Com. v. Davis*, 75 Ky. [12 Bush] 240; *Young v. State*, 58 Ala. 358; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522).

"Sale," as used in the local option law of 1887 (Laws 1887, p. 179; Rev. St. 1899, c. 22, art. 3), entitled "An act to prevent the evils of intemperance by local option in any county of the state and cities of 2,500 inhabitants or more by submitting the question of prohibiting the sale of intoxicating liquor to the voters," did not cover the mere gift of a drink of liquor by a private person, who is in no sense a dealer in liquors, to one of his friends as a mere act of courtesy or hospitality. *State v. Fulks*, 105 S. W. 733, 737, 207 Mo. 26, 15 L. R. A. (N. S.) 430, 13 Ann. Cas. 732.

**Serving liquor in club or lodge**

The distribution of intoxicating liquors among the members of a club is a "sale" within the law. *State v. Johns*, 118 N. W. 295, 299, 140 Iowa, 125.

Where an incorporated club purchased liquors in bulk with money in the treasury, a sale of the same at the usual price, though made only to its members, constitutes a "sale" within the prohibition laws. *Adams v. State (Tex.)* 145 S. W. 940, 942.

The distribution of intoxicating liquors in less quantity than five gallons by a social club to its members for a consideration, though without profit, is a "sale," within Rev. Laws 1905, § 1519, and is prohibited, unless protected by license. *State ex rel. Young v. Minnesota Club*, 119 N. W. 494, 495, 106 Minn. 515, 20 L. R. A. (N. S.) 1101.

The dispensing by a bona fide social club to its members without profit, and as incidental merely to its organization, of intoxicating liquors, is a "sale," within the statute declaring a punishment for whoever, not having a license to keep a dramshop, sells intoxicating liquors to be drank on the premises. *South Shore Country Club v. People*, 81 N. E. 805, 806, 228 Ill. 75, 12 L. R. A. [N. S.] 519, 119 Am. St. Rep. 417, 10 Ann. Cas. 383 (citing *People v. Law & Order Club*, 67 N. E. 855, 203 Ill. 127, 62 L. R. A. 884).

Transactions whereby an incorporated club issues coupon books to its members at a fixed price redeeming the coupons in liquors carried by the club constitute "sales," though

no profits result to the club, since it is no defense to a charge of unlawfully disposing of liquor that the sale was made at a loss. *Bachelors' Club v. City of Woodburn*, 119 Pac. 339, 343, 60 Or. 331.

The furnishing of liquors to the members of an incorporated club by the officers or employees thereof is a "sale," in violation of a city ordinance prohibiting the selling of intoxicating liquors, though the club is bona fide, and the directors and managers, as well as the bartender actually making the sale, are liable; the directors and managers because authorizing the sale, and the bartender because making the sale. *Lloyd v. Canon City*, 103 Pac. 288, 289, 46 Colo. 195.

The property of a social club which sold liquor to its members is owned in common by its stockholders, and the money paid for liquor goes into the corporate fund in lieu of the liquor received by him, which belonged to the corporation, and is used to support the club, so that, if there be a profit from the sales of liquor, it lessens the amount which those members not purchasing liquor from the club would have to pay. Held, that the dispensing of liquor to club members is a "sale," within San Diego City Charter, c. 2, subd. 33, authorizing the council to regulate the sale of intoxicants. In re Cutting, 121 Pac. 304, 305, 17 Cal. App. 604; *Duff v. Keaton*, 124 Pac. 291, 83 Okl. 92, 42 L. R. A. (N. S.) 472.

A steward of a club ordered beer for the members thereof, and placed it in the clubroom for them. A member stated that he paid a dollar for membership; that he got tickets, which represented his interest in beer the steward ordered; that, when the keg came, a ticket was put in the box and a glass of beer drawn, each ticket representing a glass; that the beer was ordered by the steward for the purchasers of tickets, and paid for by him. Held to establish a "sale" by the steward. *Adkins v. State*, 95 S. W. 506, 49 Tex. Cr. R. 524.

Rev. Pen. Code, § 822, provides that the word "person" includes corporations. Rev. Civ. Code, § 1299, provides that "sale" is a contract by which, for a pecuniary consideration called a "price," one transfers to another an interest in property. Held, that the exchange of liquors by an incorporated commercial club to its members for checks sold to them violated Rev. Pol. Code, §§ 2834, 2835, 2838, 2852, making the sale of liquors in quantities less than five gallons by any person, whether as owner, clerk, agent, servant, or employé, a misdemeanor. *State v. Mudie*, 115 N. W. 107, 110, 22 S. D. 41.

An Elks' club, through its board of control or its servant, kept intoxicating liquors at the clubrooms and delivered them to any member on request, for which he paid in cash, or had charged to his account, a price fixed by the board, and could consume it or

otherwise dispose of it; the money received being used to replenish the treasury or buy other liquors and supplies. Held that, when the club members authorized the board of control to dispose of liquor belonging to the club, they relinquished their right to have the club property remain intact for joint use, and the disposition of liquor to members under such circumstances was a "sale," within an ordinance imposing a fine for the sale of intoxicating liquor. *Manning v. Canon City*, 101 Pac. 978, 979, 45 Colo. 571.

Where a commercial club organized as a corporation to advance, by social intercourse and friendly exchange of views, the commercial prosperity and growth of the city and state, maintains a stock of intoxicating liquors sufficient to fulfill the wants of its members and their guests, purchased by the club, at wholesale prices and supplied to the members thereof and their guests exclusively without pecuniary profit in small quantities or in individual drinks to be consumed within the club rooms merely as an incident to the main objects and purposes of the club, such distribution is a "sale" within Rev. Codes, § 1506, making it unlawful to sell liquors without having procured a license and given bond. *Ada County v. Boise Commercial Club*, 118 Pac. 1086, 1089, 20 Idaho, 421, 38 L. R. A. (N. S.) 101.

A club was incorporated for social purposes. A manager devoted his time to the management of its affairs. A membership fee of \$1 was paid to him. The members of the club obtained beer by purchasing tickets. The beer was obtained the day after the purchase of the tickets. The manager instructed the members how to order beer by stating that, when the members wanted beer, they should put money in a box and take out a ticket for each nickel, and that the beer could be procured at the clubroom the following night. Held, that the club members, when they paid their money into the treasury, parted with it to the club, so that when it sent out the money it bought beer on its own behalf, making the manager liable for a "sale." *Feige v. State*, 95 S. W. 506, 509, 49 Tex. Cr. R. 513 (citing *Krnavek's Case*, 41 S. W. 612, 38 Tex. Cr. R. 44).

Accused was steward of a fraternal benefit association, incorporated under the state laws in good faith as such, and not merely for evading the liquor laws. Some of the local lodges served liquors to the members, while others did not; the lodge of which accused was steward being among the former. The stock of liquors, cigars, etc., was purchased by the lodge and paid for from its treasury, and only members were admitted to the lodgeroom where liquor could be obtained; it being necessary, to obtain it, for a member to purchase a card from the secretary for \$1, and have certain amounts punched from the margins of the card by the

steward in payment for liquor. The revenue derived from the sale of cards was used solely to keep up the liquor stock and pay lodge expenses. Held, that accused's dispensation of intoxicants to a lodge member was a "sale," contrary to the local option law. *State v. Robinson*, 146 S. W. 456, 163 Mo. App. 221.

An incorporated social club maintained in the club quarters containing parlors, bedrooms, dining rooms, etc., a room where liquors were furnished to members and nonresident guests. Slips were signed by the member showing the character of the liquors furnished and the cost thereof, and these slips were turned in by the employé in charge of the room to the club's bookkeeper, and were charged to the accounts of the member, and were paid by him. The liquors were purchased by the club at wholesale, and were furnished to the members and nonresident guests at the prices usually charged by retail dealers. Held, that the transaction was a sale within an ordinance prohibiting any person from selling or disposing of liquors without obtaining a license, and authorizing a person desiring to keep a barroom to apply for a license, etc.; a "sale" being an agreement by which title passes from one and vests in another, and a "barroom" being a room in which liquors are kept with the intention to furnish them to be drunk on the premises. *City of Spokane v. Baughman*, 103 Pac. 14, 16, 54 Wash. 315.

When intoxicating liquors are purchased by an unincorporated social club, to be used only by members and specially invited guests, the members paying therefor a price fixed by a club regulation not intended for making a profit, but merely to cover the outlay and replenish the stock, it is generally conceded that the members of the organization are the joint owners of the general property in all the alcoholic drinks thus kept, that the officer who, upon a request therefor, dispenses such liquor to members of the club, is their agent, and that the delivery of a quantity of such goods to a member, though for a consideration, whereby a special property is transferred, is not, in the strict sense of the term, a "sale," because the element of a bargain is lacking. Under the local option law (Laws 1905, p. 48, § 15), forbidding under penalty any person in prohibition territory to sell, exchange, or give away, with intent to evade the provisions of the law, any intoxicating liquors whatsoever, where intoxicating liquors are purchased by an incorporated society, and sold or distributed to the members at approximate cost, the act constituted a "sale." *State v. Kline*, 93 Pac. 237, 241, 50 Or. 426.

#### Mortgage

A "sale" is an agreement by which one of two contracting parties, called the seller, gives a thing and passes title to it in exchange for a certain price, and a chattel

mortgage is not within the definition. *Noble v. Ft. Smith Wholesale Grocery Co.*, 127 Pac. 14, 17, 34 Okl. 662, 46 L. R. A. (N. S.) 455.

A mortgage is not a "sale" or "alienation," within Ky. St. § 4021 (Russell's St. § 5913), providing that the lien on property for taxes shall not be defeated by sale or alienation, unless made more than five years before suit to enforce the lien; and a mortgagee, acquiring a mortgage more than five years before a suit to enforce a tax lien, is not within the statute. *Rissberger v. City of Louisville* (Ky.) 118 S. W. 319.

Under the statutes of the territory and of the state of Montana a mortgage does not possess any of the characteristics of a sale, but has always been considered a mere lien, fixed upon property by contract of the parties, to secure the payment of a particular obligation or the performance of a particular act. A "sale" passes title to the property, while a mortgage does not. Under Prob. Prac. Act, §§ 367, 369, conferring on a guardian power to sell his ward's estate for the purpose of raising funds to pay debts or to maintain the ward, the guardian cannot be authorized to mortgage the land of his ward to secure a debt contracted for the improvement of the estate. *Davidson v. Wampler*, 74 Pac. 82, 84, 29 Mont. 61.

#### Mortgage sale under power

The sale, in the exercise of a power contained in a mortgage which conveys the title of the mortgagor, is only the "sale" as completed by the execution of a deed at the expiration of the period allowed for redemption. *North Dakota Horse & Cattle Co. v. Serumgard*, 117 N. W. 453, 460, 464, 17 N. D. 466, 29 L. R. A. (N. S.) 508, 138 Am. St. Rep. 717.

A sale to himself by a mortgagee of the mortgaged property under a power of sale, without insurer's consent, was a "sale," within a fire policy provision that the policy should be void on sale of the property without insurer's assent, though the policy was made payable to the mortgagee as its interest might appear. *Boston Co-operative Bank v. American Central Ins. Co.*, 87 N. E. 594, 201 Mass. 350, 23 L. R. A. (N. S.) 1147.

#### Option

An option is not a "sale." An option to purchase does not become a contract to purchase until the privilege given by the option has been exercised by an acceptance. *Kessler v. Pruitt*, 93 Pac. 965, 971, 14 Idaho, 175 (citing *Hopwood v. McCausland*, 94 N. W. 469, 120 Iowa, 218).

A delivery of an article at a fixed price, to be paid for or returned, constitutes a "sale." *State v. Betz*, 106 S. W. 64, 66, 207 Mo. 589.

#### Order for goods subject to cancellation

An order for goods subject to cancellation by vendee is not a "sale," within a con-

tract entitling a salesman to a commission on sales. *Wolfsheimer v. Frankel*, 115 N. Y. Supp. 958, 960, 130 App. Div. 853.

**Conveyance to corporation for stock and bonds**

Where testamentary trustees conveyed factories belonging to the estate to a corporation organized for the purpose, and received stock and bonds in return, to enable them to sell the property more advantageously, the transfer did not constitute a "sale," within the meaning of the will, which directed the executors to sell the original property as soon as possible, so that the direction to sell the property was applicable to the securities received. *Bartlett v. Slater*, 97 N. E. 991, 993, 211 Mass. 334.

A "sale," in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent; but if the purchase price is paid by the transfer of other property, the transaction is more properly denominated an "exchange" or "trade." Where, to acquire means of irrigating for lands, so as to make them salable, they were transferred to a land and irrigation company, the owners taking stock and bonds therefor, the transaction was a consolidation of interests, and not a "sale" of the lands, within a contract entitling plaintiff to commissions for services in effecting sales of the land, and though plaintiff could not recover under a contract entitling him to commissions for effecting "sales" of lands, where they were conveyed to a corporation, the owners taking stock and bonds therefor, he could recover the reasonable value of his services in bringing about the transaction. *Close v. Browne*, 82 N. E. 629, 632, 230 Ill. 228, 13 L. R. A. (N. S.) 634.

**Conveyance or transfer in payment of debt**

Where money was borrowed from B. or furnished by him to defendant for the purpose of taking whisky from an express office, and the whisky was turned over to B. in discharge of such debt, it constituted a "sale." *Fields v. State*, 107 S. W. 857, 52 Tex. Cr. R. 451.

A delivery of goods to another, who was to sell them on a commission, the proceeds to be credited on notes of the owner held by the one to whom the goods were delivered, was not a "sale" and delivery of the goods to him, resulting in an obligation to pay therefor. *Collyer v. Krakauer*, 107 N. Y. Supp. 739, 740, 122 App. Div. 797.

Plaintiff sold his merchandise, fixtures, and business to K., who, being unable to pay the balance of the price, retransferred the property to plaintiff in bulk, in consideration of the satisfaction of the debt, without making an inventory or furnishing a list of his creditors and notifying them, as required by St. 1903, p. 276, c. 415, regulating sales in

bulk. Held, that such retransfer, though an accord and satisfaction of K.'s debt to plaintiff, was also, in respect to the merchandise, a "sale" within such act, and was therefore fraudulent as against K.'s creditors. *Gallus v. Elmer*, 78 N. E. 772, 193 Mass. 106, 8 Ann. Cas. 1067.

Although the word "sale" does not in the letter comprehend a transaction in which money alone passes, yet as used in a Code provision making void the "sale" of the wife's separate estate to the husband's creditors in extinguishment of the debt, and declaring invalid any "sale" by or to her husband, made without the sanction of the judge of the superior court, the transaction itself, in respect to its effect on the wife's fortune, would be the same, and that is the thing to be regarded. Payment by the wife of the husband's debt, whether made in money or other effects belonging to her, is void, if the creditor have notice of her title; and the same rule applies where, with like notice to the creditor, the payment is made by the husband with her money, whether she consents to it or not. Under this rule a transfer by a married woman to her husband of a bond for titles, on consideration that he carry out her obligations as to payment of the debt therein referred to, is a sale by her of her separate property, and is invalid, in the absence of an order of the superior court of her domicile allowing the same. *Webb v. Harris*, 53 S. E. 247, 248, 124 Ga. 723 (citing *Humphrey v. Copeland*, 54 Ga. 545).

**Promise to sell**

A "promise to sell," with some modification, is equivalent to a "sale." *Stafford v. Richard*, 46 South. 107, 108, 121 La. 76.

A "promise of sale" amounts to a "sale," and specific performance of it will be enforced. *Girault v. Feucht*, 41 South. 572, 574, 117 La. 276 (citing *McDonald v. Aubert*, 17 La. 450; *Peck v. Bemiss*, 10 La. Ann. 160).

In a "promise to sell," the thing, the price, and the consent are essentials. *Kaplan v. Whitworth*, 40 South. 723, 725, 116 La. 337.

A "promise to sell" is in effect a "sale." This is the rule when the promise is not accompanied by a conditional or binding clause; but a promise provided the title was approved was not a pure and simple "promise to sell." *Flournoy v. Miller*, 38 South. 818, 819, 114 La. 1028.

A "promise to sell" amounts to a "sale," when there exists a reciprocal consent of both parties as to the thing and the price thereof; but to have effect either between the contracting parties or with regard to other persons the promise to sell must be vested with the same formalities as are prescribed by statute concerning "sales" in all cases where the law directs that the sale shall be committed to writing. But if the promise to sell has been made with the giving of

earnest, each of the contracting parties is at liberty to recede from the promise, to wit, he who has given the earnest by forfeiting it, and he who has received it by returning the double. Civ. Code, arts. 2462, 2463. *Smith v. Hussey*, 43 South. 902, 904, 119 La. 32.

**Relinquishment**

Senate Bill No. 47, Act Feb. 8, 1911, authorizing the state land board to relinquish to the general government unsurveyed school sections in exchange for surveyed, unreserved, and unappropriated public lands within the state, equivalent thereto in area and value, in legal subdivisions and as contiguous as may be to the sections in lieu of which it is taken, is not a "sale" of school lands, within Const. art. 9, § 8, providing that no school lands shall be sold for less than \$10 per acre, and that a sale or disposal of the land must be made at public auction, but is rather a simple exchange of lands, whereby the state would be enabled to procure an equivalent area of land to which it could obtain immediate possession. *Rogers v. Hawley*, 115 Pac. 687, 690, 19 Idaho, 751.

**Sale on condition**

Where a peddler delivered goods on an understanding that title should vest in the one to whom they were delivered on payment of all the installments of "rent," the transaction amounted to a "sale," within Acts 1902-03-04, p. 484, c. 27 (Va. Code 1904, p. 2223), making sales by peddlers unlawful unless a license has been issued. *Crall v. Commonwealth*, 49 S. E. 638, 640, 103 Va. 855; *Id.*, 49 S. E. 1038, 103 Va. 862 (citing *City of South Bend v. Martin*, 41 N. E. 315, 142 Ind. 31, 29 L. R. A. 531; *Evansville & T. H. Ry. Co. v. Erwin*, 84 Ind. 457; *Lanman v. McGregor*, 94 Ind. 301).

**Sale on credit**

In order to constitute a "sale" of whisky in violation of the local option law, it is not necessary that the purchaser deliver to the seller the money for the whisky; but it is necessary that both parties assent to the sale and payment, if any is made or is to be made therefor. *Dawson v. State*, 117 S. W. 136, 55 Tex. Cr. R. 315.

A "sale" is the transfer of the property in goods to another for an agreed price, and generally the title or property in the thing transferred passes to the purchaser as soon as delivery is made according to the terms of the contract. It is not necessary that the price agreed upon be paid to constitute a sale; but credit may be extended for the agreed price, and the title will pass as fully and effectually as if the consideration had been paid before the delivery, if delivery is actually consummated, unless a different intention is manifested by agreement or otherwise. *Hill Veneer Co. v. Monroe*, 189 Fed. 834, 836.

**Traffic**

One engaged in the "traffic" of whisky is guilty of selling whisky, within the meaning of an ordinance regulating the "sale" of liquor. *State v. Small*, 63 S. E. 4, 5, 82 S. C. 93, 44 L. R. A. (N. S.) 454.

**As public traffic**

See Public Traffic.

**As public use**

See Public Use (In Patent Law).

**SALE AFTER SIX MONTHS**

An entry of judgment, providing for "sale after six months," fairly meant a decree of foreclosure and for the sale of the land described in the mortgage after a six-months stay of execution in accordance with the statute in force at the time the mortgage was given. *Brunbaugh v. Wilson*, 107 Pac. 792, 794, 82 Kan. 53.

**SALE AND DELIVERY**

For a salesman to have the goods with him at the time of a sale, and deliver them, constitutes a "sale and delivery." In *re Abel*, 77 Pac. 621, 622, 10 Idaho, 288.

**SALE AND RETURN**

See, also, Sale or Return.

A "sale and return" is a sale with the right of the buyer to return the goods at his option within a reasonable time. Where a dealer delivered jewelry to M. with the right to sell it and pay the dealer a specified sum, M. having the right to dissolve the transaction by return of the goods within a reasonable time after the transaction, no specific time being stipulated, it was a "sale and return," and the title passed to M.; the right to return the goods and dissolve the transaction being a condition subsequent. *William Frantz & Co. v. Fink*, 52 South. 131, 134, 125 La. 1013.

**SALE AS A BEVERAGE**

The fact that insured was the driver of a beer wagon for a brewing company, taking orders for beer from dealers, and delivering it to them, and collecting therefor, would not constitute the "sale as a beverage" within the meaning of a by-law avoiding the certificate of any person engaging in the sale of spirituous or malt liquors as a beverage. *Supreme Tribe of Ben Hur v. Lennert*, 98 N. E. 115, 117, 178 Ind. 122.

**SALE AT AUCTION**

See Auction.

**SALE AT RETAIL**

See Retail.

**SALE BY ADVERSE PROCESS**

"Sale by adverse process" means the divesting of title, and when the title is divested the property becomes subject to barter and trade. P. L. 1846, p. 353, chartering a ceme-

tery company and providing that the cemetery land and personal property will not be liable to be levied on and sold for debts, taxes, or otherwise while used for cemetery purposes, is not repealed by General Sewer Act April 28, 1899 (P. L. 100), giving municipalities general power to assess the costs of authorized improvements against property benefited, or by Act June 4, 1901, § 5 (P. L. 364), as amended by Act March 19, 1903, § 3 (P. L. 43), providing that places of burial not used for profit shall not be subject to tax or municipal claim, except for sewer claims or sewer connections, etc. Appeal of Union Dale Cemetery Co., 75 Atl. 835, 836, 227 Pa. 1.

#### SALE BY AGREEMENT

To constitute a "sale by agreement," there must be an intent to sell and an intent to purchase, a purpose to pass title. *Palmer v. Jordan Mach. Co.*, 186 Fed. 496, 512.

#### SALE BY RETAIL

See Retail.

#### SALE BY SAMPLE

See Selling by Sample.

"Ordinarily a 'sale by sample' is a sale of goods then in existence in bulk, but not present for examination by the buyer. Whether a sale is by sample depends upon the facts disclosing the intention of the parties." *Alabama Steel & Wire Co. v. Symons*, 83 S. W. 78, 81, 110 Mo. App. 41.

Every exhibition of a sample of goods to a purchaser at the time of a sale does not of itself amount to a representation that the sample exhibited has been taken from the bulk of the goods offered for sale, nor make the sale a "sale by sample," in the absence of an agreement to that effect. *Columbia River Packers' Ass'n v. Springfield Grocer Co.*, 108 S. W. 113, 114, 129 Mo. App. 132.

A "sale by sample" is not accomplished whenever a specimen of the thing under consideration is exhibited to the buyer or discussed during the progress of negotiations; but there must be a definite intention on the part of both buyer and seller that a definite article shall be the standard to which every delivery must conform. *In re Nathan*, 200 Fed. 379, 381, 118 C. C. A. 531.

#### SALE BY THE TRACT OR ENTIRE BODY

A "sale by the tract or entire body," as those words are used in Civ. Code 1895, § 3542, means where a tract or body of land is sold as such, and not at so much per acre according to the acres which it may contain. Thus, if a tract of land should be described in a bond for title by metes and bounds, or by some descriptive name or designation which would describe it as a whole, and the number of acres should merely be stated as an additional description, this would be a

"sale by the tract or entire body." *Strickland v. Hutchinson*, 51 S. E. 348, 123 Ga. 396.

#### SALE FOR CASH

See Cash Sale.

#### SALE IN BULK

See In Bulk.

#### SALE IN GROSS

Where a sale of land is of a specific tract by name or description, each party taking the risk of quantity, the sale is said to be a "sale in gross." *Kendall v. Wells*, 55 S. E. 41, 42, 126 Ga. 343.

Though land is described in a contract of sale by metes and bounds, the contract is for a "sale in gross." Hence the precise area in feet and inches is not of its essence. *Lighton v. City of Syracuse*, 96 N. Y. Supp. 692, 700, 48 Misc. Rep. 134 (citing 7 Words and Phrases, 638).

#### SALE IN THE USUAL COURSE OF BUSINESS

See Usual Course of Business.

#### SALE OF COMMODITIES

Where grantors of a shore front at a summer resort reserved the right to build a pier, covenanting not to permit the "sale of commodities" thereon, and to charge only an entrance fee, their covenant is not broken by charging for the use of roller skates at a rink on the pier, where all who pay the entrance fee may go to every part of the pier, including the rink. *Atlantic City v. Associated Realities Corp.*, 67 Atl. 937, 938, 72 N. J. Eq. 634.

#### SALE OF FRANCHISE AND PROPERTY

Stock Corporation Law, § 16, which is entitled "voluntary sale of franchise and property," provides that a stock corporation with the consent of the holders of two-thirds of its stock may convey its property, rights, privileges, and franchises, or any interest therein, or any part thereof, to a domestic corporation engaged in a business of the same general character, and that, before the conveyance is made, such consent shall be obtained at a meeting of the stockholders. A stock corporation having operated a calendar department and employed salesmen and kept accounts for it separate from its other business but doing the printing or lithographing for such department, sold to a corporation, organized for the purpose, its business, assets, good will, and contracts with salesmen, in all about one-thirteenth part of its whole business. Held that the sale was not an ordinary business transaction, but a sale and transfer of a part of its franchise and property, within the meaning of the section. *In re Timmis*, 93 N. E. 522, 523, 200 N. Y. 177.

**SALE OF GOODS, WARES, AND MERCHANDISE**

See Goods.

**SALE OF LIQUOR**

As labor, see Labor.

**SALE OF REAL ESTATE**

See Agreement for Sale of Real Estate.

**SALE OF TINWARE**

A sale of the exclusive right to sell a patented article in a certain territory is not a "sale of tinware," within a statute exempting from statutory provisions as to peddlers one who sells tinware, although the article, the right to sell which is sold, is of tinware. *Burns v. Sparks* (Ky.) 82 S. W. 425, 426.

**SALE ON TRIAL**

A contract to install smoke consumers containing a guaranty to prevent smoke and a stipulation for a 60-day test of the device by the buyer, and for the removal thereof on its failure to satisfy, is a contract for a "sale on trial," which has elements in common with sales known as "sale or return," and "sale if satisfactory," and the title therein would pass only sub modo, if at all. *Missouri Smoke Preventer Co. v. City of St. Louis*, 103 S. W. 513, 518, 205 Mo. 220.

In the case of "sales on trial or approval," there is no sale until the approval is given, either expressly or by implication resulting from keeping the goods beyond the time allowed for trial. In "sales on trial," the mere failure to return the goods within the time specified for trial makes it absolute. Where defendants purchased certain agricultural machinery on trial, under a warranty that it would do a certain amount of work, which it failed to do, they were bound to offer to return the machine within a reasonable time, and, having failed to make any objection thereto for more than three months, and until suit for the price, they were estopped to deny liability therefor. *McCormick Harvesting Mach. Co. v. Arnold*, 76 S. W. 323, 324, 116 Ky. 508 (citing *Benj. Sales* [4th Ed.] §§ 595, 596).

**SALE OR RETURN**

See, also, Sale and Return.

A "sale or return" is a bargain and sale upon a condition subsequent, title passing subject to the right to rescind and return. *Giordano v. Nizzari*, 115 N. Y. Supp. 719, 720 (citing *Hunt v. Wyman*, 100 Mass. 198, 200).

A contract for the sale of goods, whereby the title passes for the time being, but subject to the option of the purchaser to rescind, or return the property within the time stipulated, is a "sale or return." *Ophir Consol. Mines Co. v. Brynteson*, 143 Fed. 829, 833, 74 C. C. A. 625.

An option to purchase if one likes is essentially different from an option to return a

purchase if one should not like it, and in the one case the title will not pass until the option is determined, while in the other the property passes at once, subject to the right to rescind and return. *State v. Betz*, 106 S. W. 64, 66, 207 Mo. 589.

Where plaintiff sent rings to defendant under an agreement that she should keep them and account to plaintiff for their specified value if she was pleased with them, otherwise that she should return them to plaintiff within a reasonable time, the agreement was not a contract of "sale or return," but was a mere option to purchase or return. "An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case, the title will not pass until the option is determined; in the other, the property passes at once, subject to the right to rescind and return." *Gottlieb v. Rinaldo*, 93 S. W. 750, 751, 78 Ark. 123, 6 L. R. A. (N. S.) 273.

In the case of "sale or return," the sale becomes absolute, and the property passes only after a reasonable time has elapsed without the return of the goods. Where defendant purchased certain agricultural machinery on trial, under a warranty that it would do a certain amount of work, which it failed to do, they were bound to offer to return the machine within a reasonable time, and, having failed to make any objection thereto for more than three months, and until suit for the price, they were estopped to deny liability therefor. *McCormick Harvesting Mach. Co. v. Arnold*, 76 S. W. 323, 324, 116 Ky. 508 (citing *Benj. Sales* [4th Ed.] §§ 595, 596).

Where goods were delivered to a bankrupt on memorandum, the expectation of both parties being that, if the bankrupt signified his desire to keep the goods within 30 days from delivery, they should be charged to him, otherwise they should be returned, the transaction constituted a "sale or return," the title remaining in the seller until the expiration of the buyer's option, so that, on the buyer's becoming a bankrupt, the seller was entitled to a return of all such goods as had been delivered to the bankrupt within 30 days prior to the filing of the bankruptcy petition. *In re Schindler*, 158 Fed. 458, 459.

When goods are delivered to the buyer on a contract of "sale or return," the property therein passes immediately to the buyer, defensible by a return of the goods, within the time fixed for their return, or, if no time has been fixed, within a reasonable time. Where a pair of horses were delivered to a bankrupt a few days prior to his bankruptcy, under an agreement for their sale to him at a stated price, but subject to his right to return them if not satisfactory after trial, and he in fact never tried them, but they remained in his possession and passed to his receiver in bankruptcy, the transaction was one of sale or re-

turn by which, under the American rule, the title passed to the bankrupt, subject to be divested if the option to return should be exercised, and the seller could not reclaim the property. In *re Landis*, 151 Fed. 896-899 (quoting and adopting definition in R. M. Benjamin's *Gen. Principles of the American Law of Sales* [2d Ed.] pp. 80, 81).

Certificates of stock in defendant corporation were delivered by its agent to plaintiff pursuant to an offer to sell him the stock at a stated price. He did not pay for the stock, but agreed to visit the office of the company, when he returned the stock and refused to complete the purchase because the current price at which it was being sold was less than that stated to him. After further negotiations a written contract for the sale and purchase of the stock was entered into for a smaller price and by which the corporation and its president agreed to take the stock back and refund the money paid therefor with interest at a certain time, if plaintiff was not then satisfied to retain it. Held, that such contract was one of conditional sale only, or what is known as a "sale or return contract," by which no absolute title passed and was not ultra vires the corporation, as in violation of *Mills' Ann. St. Colo. § 485*, which prohibits the purchase by corporations of their own stock, except when forfeited for nonpayment of assessments; nor did it involve any use of corporate funds which could be detrimental to stockholders. *Ophir Consol. Mines Co. v. Brynteson*, 143 Fed. 829, 833, 74 C. C. A. 625.

#### SALE PER AVERSIONEM

There can be no "sale per aversionem," unless the object be designated by adjoining tenements, or conveyed from one fixed boundary to another fixed boundary. *Minor v. Daspl*, 54 South. 413, 414, 128 La. 33.

#### SALE UPON SUBSEQUENT CONDITION

"A 'cash sale' and a 'sale upon subsequent condition' are entirely different. In the first the payment of the purchase money and delivery of the property are concurrent acts, one and the same transaction, while the latter is a sale and delivery of the thing sold on condition subsequent, subject to be defeated by failure of the purchaser to comply with the terms of the contract of purchase. The former may be avoided by the vendor upon the failure by the vendee to pay the purchase money while the property is in his hands or in the hands of any other purchaser, unless the payment of the purchase price has been waived." *Strother v. McMullen Lumber Co.*, 98 S. W. 34, 36, 200 Mo. 647 (quoting with approval from *Johnson-Brinkman Commission Co. v. Central Bank of Kansas City*, 22 S. W. 813, 116 Mo. 558, 38 Am. St. Rep. 615).

#### SALE WITHOUT A LICENSE

Where no separate bar is maintained in a room connected with the barroom in premises licensed for sale of liquor, serving liquor in said room is not a "sale without a license." *People v. Fappiano*, 138 N. Y. Supp. 667, 670, 77 Misc. Rep. 613.

A corporation sold liquor on its premises without having a license therefor. The county commissioners had issued a liquor license to a member of the corporation authorizing a sale of liquor on such premises. The commissioners intended to enable the corporation to sell liquors at such place, but determined to issue the license to the individual member, instead of to the corporation, which was entitled to a license, and intended that the license should operate as a license to the corporation and enable it to sell liquor without violating the law. Held, that a sale of liquor by the corporation was a "sale without a license," in violation of *Gen. St. 1902, § 2690*, prohibiting a sale of liquor without a license. *Connecticut Breweries Co. v. Murphy*, 70 Atl. 450, 452, 81 Conn. 145.

#### SALES OR SHIPMENTS

Plaintiff had a contract with defendant to sell barite in certain territory, at an agreed commission on all sales or shipments, whether made direct by plaintiff or otherwise forwarded, or made direct by defendant. Held, that the words "compensation or commission" and "sales or shipments" did not mean a consummated sale, but that plaintiff was entitled to a commission on procuring a purchaser ready, willing, and able to purchase. *Concannon v. Point Min. & Mill Co.*, 135 S. W. 988, 991, 156 Mo. App. 79.

#### SALESMAN

See *Traveling Salesman*.

As managing agent, see *Managing Agent*.

As merchant, see *Merchant*.

See, also, *Selling Agent*.

Under the treaty of November 17, 1880, and the treaty of March 26, 1894, providing that Chinese persons entitled to come into the United States, when provided with the certificate prescribed by Act Cong. July 5, 1884, c. 220, 23 Stat. 115, are Chinese subjects, being officials, teachers, students, merchants, or travelers for curiosity or pleasure, and under Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8, defining the term "merchant," as used in the exclusion acts, as a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who does not engage in manual labor, a person described in his certificate as a "salesman" is not a merchant, who is entitled to remain in the United States; a "salesman," as defined by the *Standard Dictionary*, being a man who sells goods in a shop or store or by canvassing,



and being generally accepted to mean a person who sells goods for a merchant, and not to mean the merchant himself. *United States v. Gin Hing*, 76 Pac. 639, 640, 8 Ariz. 416.

Complainant contracted to solicit orders for the bankrupt for weather strips, and, when obtained, to superintend the placing thereof by workmen acting under his direction. The bankrupt paid the wages of the workmen and furnished the material, and out of the price retained the cost of the labor and material and 15 per cent. of the price additional, paying claimant whatever was left from the amount collected for his compensation. Held, that plaintiff was a "salesman," notwithstanding his duty of supervising the installation of the strips, and his compensation was "wages," within Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563, entitling wages of workmen, salesmen, etc., to priority. *In re Roebuck Weather Strip & Wire Screen Co.*, 180 Fed. 497, 498.

#### SALESMEN MAKING SALES

The term "salesmen making sales," as used in Rev. St. 1895, art. 5049, subd. 3, providing that every traveling person selling patent or other medicine shall pay the tax therein prescribed, except commercial travelers or "salesmen making sales" or soliciting trade, or salesmen engaged in the sale of drugs at wholesale, includes a person who sells and delivers the goods at the time of the contract, or, in other words, one who carries the goods with him, makes the sale, and delivers them. *Needham v. State*, 103 S. W. 857-858, 51 Tex. Cr. R. 248.

#### SALESMAN'S SAMPLES

As baggage, see Baggage.

### SALOL

"Salol" is a medicinal preparation which contains no alcohol as a component part, but in the preparation of which alcohol is sometimes used, and which may, and in some cases is, manufactured by other processes without the use of alcohol. It is dutiable as "medicinal preparations containing alcohol or in the preparation of which alcohol is used." *United States v. Schering*, 123 Fed. 65, 66, 59 C. C. A. 283, reversing *Schering v. United States*, 119 Fed. 472, 473.

### SALOON

See Occupied as Saloon.

Keeper of, see Keeper.

Regulations involving privileges and immunities of citizens, see Privileges and Immunities.

The word "saloon" has a varied meaning. It may be applied to a place for retailing spirituous liquors, or to many other kinds of places. *McMurtry v. State*, 43 S. W. 1010, 38 Tex. Cr. R. 521, 524.

The "saloon," in common parlance, is a place where intoxicating liquors are sold. *Fourment v. State*, 46 South. 266, 267, 155 Ala. 109.

"The popular idea associated with the word 'saloon' is that it is a room, rather than a building with several rooms. Webster also defines 'dramshop' as 'a shop or barroom where spirits are sold by the dram,' and therefore authority to keep a saloon at a certain street and number does not authorize the use of the whole building, but the room where licensee had his bar and ran his saloon was the place where he sold liquor, within the meaning of 'place' as used in the statute and city ordinances." *Malkan v. City of Chicago*, 75 N. E. 548, 551, 217 Ill. 471, 2 L. R. A. (N. S.) 488, 3 Ann. Cas. 1104.

A "saloon" is a building or place where liquors are kept for sale at retail, and may include more than one room. A room used by saloon keepers in connection with their saloon business is a part of the saloon, within the statute making it an offense to permit a female under the age of 21 years to remain in or about a saloon. *State v. Baker*, 92 Pac. 1076, 1078, 50 Or. 381, 13 L. R. A. (N. S.) 1040 (citing 7 Words and Phrases, p. 6310).

The sale of soda water and ice cream in a drug store does not bring the proprietor thereof within the statute providing that keepers of "eating houses, restaurants, and saloons" cannot be lawfully granted permits for the sale of liquor. *In re Henery*, 100 N. W. 43, 44, 124 Iowa, 358.

In San Jose city ordinance July 1, 1908, entitled "An ordinance establishing the limits within which retail and wholesale licenses and transfers thereof will be granted," and providing that no license for any bar, barroom or saloon, or other public drinking place should be granted, etc., the words "bar," "barroom," and "saloon" were used, according to their commonly accepted definition, to mean rooms or places where intoxicating liquors were sold, and the ordinance was therefore not objectionable because the body thereof did not in terms mention intoxicating liquors. *Richter v. Lightston*, 118 Pac. 790, 791, 161 Cal. 260.

An allegation of the answer in an action on a benefit certificate that insured while a member engaged in the sale of malt, spirituous, and vinous liquors to be used as a beverage in the capacity of proprietor, agent, and servant—"that is to say, that on or about" a certain date, insured "engaged in the occupation of bartender in a saloon in the city of B."—sufficiently alleged a breach of the by-laws providing that a member who engages in the manufacture or sale of spirituous or malt liquors to be used as a beverage in the capacity of agent or servant shall forfeit all rights of membership; a "saloon" being a place where intoxicating liquors are

sold as a beverage, and a "bartender" being one who works in a saloon serving the patrons with liquid refreshments. *Schwane-kamp v. Modern Woodmen of America*, 120 Pac. 806, 807, 44 Mont. 528.

An association of several persons, each paying a certain sum of money to one to have him procure and keep on hand a stock of intoxicating liquors, from which each might secure any quantity by paying therefor in cash, or, if the quantity did not exceed the value of \$2, by charging it against that amount advanced nominally as a "membership" fee, was a "whisky saloon," within the prohibitory law. *State v. Peak*, 72 Pac. 237, 238, 66 Kan. 701.

### SALOON BARTENDER

One employed about a restaurant and saloon, and who as an accommodation to his employer occasionally tends bar and sells liquor, though not employed or paid for that purpose, is not a "saloon bartender" or engaged in the "sale of \* \* \* liquors \* \* \* in the capacity of \* \* \* agent or servant," within by-laws of an insurance order forfeiting the certificate of a member so employed. *Stevens v. Modern Woodmen of America*, 107 N. W. 8, 10, 127 Wis. 606, 7 Ann. Cas. 566.

### SALOON KEEPER

Insured was a "saloon keeper," within a policy limiting the death benefits to be paid, though his wife was the owner of the saloon and he never served drinks, where she never had anything to do with its control, and he employed the bartenders, purchased the stock, deposited the money, made up the cash, paid the bills, performed a saloon keeper's duties, was commonly known as "Zeke," and the sign "Zeke's Place" was on the saloon. *Solomon v. American Guild*, 44 South. 387, 151 Ala. 297.

### SALOON PURPOSES

A lease of a building for "saloon purposes" does not limit to sale of intoxicants exclusively, but permits sale of soft drinks and cigars. *Hecht v. Acme Coal Co.*, 117 Pac. 132, 133, 19 Wyo. 18, 34 L. R. A. (N. S.) 773, 777, Ann. Cas. 1913E, 258.

A lease of premises for saloon purposes, made when it was lawful to sell intoxicants, and used by the lessee as a saloon for the sale of intoxicants, soft drinks, cigars, etc., until the prohibition law went into effect, is not terminated by the law so as to release the lessee from liability for future rent, for the business is not totally destroyed; the word "saloon" as used in the lease including the sale of intoxicants, but not excluding the sale of other things. *O'Byrne v. Henley*, 50 South. 83, 84, 161 Ala. 620, 23 L. R. A. (N. S.) 496 (quoting 7 Words and Phrases, pp. 6310-6311).

## SALT MARSH

Meadow as including, see Meadow.

## SALTS OF CINCHONA BARK

In Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 647, 30 Stat. 201, the provision for "salts of cinchona bark" includes derivatives of cinchona bark which preserved its essential medicinal element; and euquinine, which is such a preparation, though not chemically a salt, is within said provision. *United States v. Merck & Co.*, 168 Fed. 244, 245, 94 C. C. A. 74.

## SALVAGE

"Salvage" is compensation allowed to persons by whose assistance a vessel or her cargo or the lives of persons belonging to a vessel are saved from danger or loss. *Gonzales v. United States*, 42 Ct. Cl. 299, 310.

The underlying idea in all "salvage" allowance is a reward or bounty for services in saving property from impending danger or imminent peril of loss to the owner by one on whom no legal obligation rests to perform such service. *The Job H. Jackson*, 161 Fed. 1015, 1017.

"Salvage" is the compensation allowed to persons by whose voluntary assistance a ship at sea, or her cargo, or both, have been saved, in whole or in part, from impending sea peril, or in recovering such property from actual peril or loss, as in cases of shipwreck, derelict, or recapture. *Central Stockyard & Transit Co. v. Mears*, 85 N. Y. Supp. 795, 796, 80 App. Div. 452.

The word "salvage," as used in the maritime law, contemplates services rendered in connection with perils of the sea and to vessels or other craft and instrumentalities in use in the navigation of the sea or other waters, and there can be no lien for salvage for services rendered to a vessel while in a dry dock permanently attached to the shore for repairs in extinguishing a fire communicated to such vessel from buildings on the land; nor is a suit to enforce a claim for such services within the admiralty jurisdiction. *The Jefferson*, 158 Fed. 358, 361.

As between salvors and salvaged, "salvage" applies to the ship and cargo, if they were in imminent peril by sea, which is to be ascertained from the surrounding circumstances when the service was rendered, regardless of the cause of the peril. *Pettyjohn v. Oregon Coal & Navigation Co.*, 113 Pac. 438, 439, 58 Or. 392.

### Amount of award

"Salvage" is a reward for perilous service and skill, and not a quantum meruit for labor expended. *The Minnie E. Kelton*, 181 Fed. 237, 245.

The value of a "salvage service" performed is not to be estimated in the light of subsequent events, but of the facts which seem to surround it at the time. *The Lowther Castle*, 195 Fed. 604, 605.

"'Salvage' is a reward or bounty, exceeding the full value of their services, given to those by means of whose labor, intrepidity, and perseverance a ship or her goods has been saved from shipwreck or other dangers of the sea." *The Lottie E. Hopkins*, 133 Fed. 405, 407 (quoting and adopting the definition in the case of *The Lyman M. Law*, 122 Fed. 816).

"'Salvage' is in the nature of a bounty for extraordinary exertions, as distinguished from payment for ordinary exertions, being the outgrowth of public policy, and designed to encourage persons who are under no legal obligations to do so to go to the rescue of vessels exposed to perils beyond their own ability to subdue, by giving a reward in addition to compensation for the work done. The amount of such bounty or reward depends upon the success achieved, the value of the property saved, and the degree of danger from which it was rescued, and it is enhanced or diminished according to the skill or courage displayed, the time and labor bestowed, and the risk to persons or property encountered by the salvors. While there are many ingredients, the one essential element is that the property shall be saved from danger, either actually impending or reasonably to be apprehended. In the absence of such peril, it is not 'salvage,' however beneficial and meritorious the service may be." *The Robert S. Besnard*, 144 Fed. 992, 1002.

"Salvage" is personal in its primary character, and the ingredients of salvage service, as generally stated, are: "First, enterprise in the salvors in going out in tempestuous weather to assist a ship in distress, risking their lives to save life and property; secondly, the degree of danger and distress from which the property is rescued; thirdly, the degree of labor and skill undergone and displayed by the salvors; fourthly, the time occupied; fifthly, the respective values of the property salvaged and risked. When all these concur, a large award will be given. When none, or scarcely any, the compensation can hardly be termed a salvage compensation; but it is little more than remuneration pro opere et labore." Hence a mortgagee of a tug which had been sunk, who let lighters to the owner under hire expressly stipulated, is not a "salvor," where another raised the vessel and the lighterman whose boat was used performed no service, except as watchman, and the hire of the lighter not ranking as a salvage claim. *The Thomas Morgan*, 123 Fed. 781, 785 (quoting and adopting the definition in *Newson, Law of Salvage*, p. 1).

## SALVAGE EXPENSES

Sums paid out to avert a loss, which, if it had occurred, would have fallen upon the underwriter, may fairly be regarded as in the nature of "salvage expenses," and may be brought within the meaning of the sue and labor clause of a marine policy; and the fact that there were expenses incurred to save the cargo alone, and that these expenses were incurred on land, cannot defeat the jurisdiction of a court of admiralty of a suit for their recovery under the policy. *St. Paul Fire & Marine Ins. Co. v. Pacific Cold Storage Co.*, 157 Fed. 625, 629, 87 L. R. A. 14, 14 L. R. A. (N. S.) 1161.

## SALVAGE SERVICE

If the captors abandon a prize, a neutral bringing her into port will be entitled to "salvage." *The Two Cousins*, 42 Ct. Cl. 436, 445.

The rescue of a vessel already on fire, tied to a burning dock, an immense warehouse, filled with merchandise, giving out such heat as to drive men from decks of ships tied alongside was a "salvage service" of a high order. *The Indian*, 159 Fed. 20, 23, 86 C. C. A. 210.

A libel claiming compensation for services rendered by tugs in subduing a fire communicated from the shore to a vessel undergoing repairs in a dry dock from which all the water had been emptied states a claim for "salvage" within the admiralty jurisdiction. *Simmons v. The Jefferson*, 30 Sup. Ct. 54, 56, 215 U. S. 130, 139, 54 L. Ed. 125, 17 Ann. Cas. 907.

Libellant's steam propeller, worth \$25,000, while towing a derrick down the Hudson river, saw a pier at Hoboken on fire, and, leaving her tow, went into the adjoining slip and rescued claimant's car float, worth \$22,000, which lay outside of a barge then on fire. The float was in a position of considerable danger, and the steamer was also subjected to some risk; it being necessary to play streams of water on both vessels during the performance of the service, to prevent them from taking fire. Held, that the service was one of "salvage," for which libellant was entitled to an award of \$1,000. *The Car Float No. 19*, 138 Fed. 435, 436, 437.

### As requiring peril of property

Respondent steamship was moored to the pier of an oil company, extending from its yards in which there were a large number of tanks, when one of the tanks exploded with great violence, the oil became ignited, and created a large fire. The tank was about 1,400 feet from the vessel, but there were other tanks between and \$15,000 cases of oil on the pier awaiting loading on the ship. It was dark, and the engines of the vessel were not connected with the steam. Held, that the services of a tug which towed her away to a safe place of anchorage were "salvage serv-

ices," although the fire did not in fact reach the pier, and that the crew were entitled to recover salvage in the sum of \$600; the owner having settled his claim. *The Lowther Castle*, 195 Fed. 604, 608.

#### **Towage distinguished**

There is no generic difference between "towage" and "salvage." The same service may sometimes be called by either name; but where a court decides that the service calls for "liberality," and holds that a bonus should be given in order to encourage similar services, then such court should properly and strictly call the service a "salvage" service, for "liberality is salvage, and there is no place for liberality in an action of contract." It often becomes material to draw a distinct line between "salvage" and "towage," because a reward ought sometimes to be given to the crew of the salving vessel, and other participants in salvage services; and such reward should not be given if the services were held to be merely "towage." *The Rebecca Shepherd*, 148 Fed. 727, 730, 733 (citing *The J. C. Pfuger*, 109 Fed. 93).

If a vessel is in a position which requires "towage" service only, the mere fact that she had previously suffered injury does not change the nature of the service to one of "salvage," unless there are some circumstances of peril, immediate or to be reasonably apprehended, from which the vessel is relieved, or some hazard encountered or unusual work done by the relieving vessel. *The Robert S. Besnard*, 144 Fed. 992, 1004.

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"Towage service" is often distinguished from "salvage service" by the fact that the former is aid rendered in the movement of vessels not in distress, while salvage service is confined to aid rendered to those in distress. It is immaterial to the liability of the insurer under a marine policy whether the loss or damage to which the tug was subjected arose out of a towage or a salvage service, where the policy insured the tug against loss and damage arising from or growing out of any accident caused by collision or strand-

ing resulting from any cause whatever to any other vessel or vessels for which said steamer or its owners may be legally liable. *Ferguson v. Providence-Washington Ins. Co.*, 125 Fed. 141, 142.

"A 'salvage service' is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress of danger, either present or to be reasonably apprehended." A steamer with two barges in tow attempted to seek refuge on a dark night, with the wind blowing 75 miles an hour, and in attempting to enter the harbor a collision occurred between the two barges, and the rear one was cast adrift half a mile from a shore on which she was being driven by the wind. A tug, in response to signals from the steamer, came to her assistance, and at her request went in search of the barge, and, having found her, took a line and started with her from the harbor. After proceeding a short distance the line slipped from the towposts, and the barge again went adrift and was driven on shore; the tug being unable to render further assistance owing to insufficient depth of water. The service performed by the tug was one of salvage, and not of towage. *The S. C. Schenk*, 158 Fed. 54, 59, 85 C. C. A. 384 (quoting *McConochin v. Kerr*, 9 Fed. 50, 53).

The tug *Dauntless*, with a barge in tow, navigating Chesapeake Bay at night in a gale on the way from Baltimore to Norfolk, was signaled for assistance by another tug having five barges in tow. Anchoring her own barge in Hampton Roads, the *Dauntless* then found that four of the other tug's barges had gone adrift, and was asked to find them and take off their crews. She found three of them anchored in mid-channel a mile east of Thimble Light; the other having been sunk and her crew saved by the lightkeeper. The three were in great peril, with the sea washing over them and their masters and crews in fear of losing their lives. At their request the *Dauntless* undertook to tow them to safety, and did so, taking first one on which there were a woman and a child, then the other two. The service commenced at 11:30, and continued until 9 in the morning, during which time weather conditions improved but little, and was attended by considerable danger to the crew, who were obliged to go on board the barges. Held, that the service was not one of "towage," but of "salvage," and one of merit, and that the *Dauntless* was entitled to an award from the one first rescued equal to 12½ per cent. of the value of the vessel, cargo, and freight money, and an award of 7½ per cent. from each of the others. *The Carroll*, 163 Fed. 425, 426.

Where the nature of a service rendered was in fact salvage, the burden rests on one who claims it to have been a towage service to plead and prove a binding contract for the towage. A "salvage service" is a service which is voluntarily rendered to a vessel

needing assistance, and is designed to relieve her from some distress or danger, either present or to be reasonably apprehended, while a "towage service" is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger. Respondent steamship was moored to the pier of an oil company, extending from its yards, in which there were a large number of tanks, when one of the tanks exploded with great violence. The oil became ignited and created a large fire. The tank was about 1,400 feet from the vessel, but there were other tanks between and 15,000 cases of oil on the pier awaiting loading on the ship. It was dark, and the engines of the vessel were not connected with steam. Held, that the services of a tug, which towed her away to a safe place of anchorage, were "salvage services," although the fire did not in fact reach the pier, and that the crew were entitled to recover salvage in the sum of \$800; the owner having settled his claim. *The Lowther Castle*, 195 Fed. 604, 605, 608.

#### **Towing disabled vessel**

The services of three tugs in freeing a steamship whose anchor chain, while anchored off Staten Island, had become fouled with that of another anchored vessel after a collision between them during a high wind, which still continued, held "salvage service," and entitled to be compensated as such; also, after such tugs and others had towed the steamship across the bay to a dock which was an ordinary towage service, their further service in rescuing her, when she had been broken loose from her moorings by the gale, and in protecting her from further injury by striking against the wharf, was a "salvage service." *The Ciudad De Reus*, 178 Fed. 802, 804.

The schooner *Holden*, laden with lumber, left Willapa Harbor, Wash., for China, but when 150 miles out lost her rudder and rudder post in a storm. She jettisoned a part of her deck load and rigged a jury rudder, with which she worked her way back to the strait of Juan de Fuca, which she reached in the night after 13 days. In the morning she hoisted distress signals. During the day she sailed across the strait, but came back to the same place on the Washington side with her jury rudder wrecked and with a list of some 9 degrees by shifting of cargo. Toward night the steam schooner *Nelson* came to her assistance and agreed to tow her to Port Townsend. After considerable difficulty and danger a line was passed aboard and a start made; but during the night, which was very rough, the hawser parted three times, and it was with difficulty that the *Holden* was again picked up. At noon the next day she was left safely anchored in Port Angeles. Held, that the service was clearly a "salvage service." *The Willis A. Holden*, 174 Fed. 5, 9, 98 C. C. A. 43.

A steamship went ashore when the tide was half flood, and at high tide made an unsuccessful effort to get off. Afterwards, she pumped out some of her water ballast tanks, lessening her draft forward 2½ feet, but was unable to get loose until the following day, when a tug, having left Boston for the purpose of offering assistance and arriving at about high tide, offered her services, which were accepted, and, having made fast a hawser, the steamship was pulled off by the efforts of both vessels, whereupon she proceeded to Boston by her own steam without further injury to herself or cargo. The actual time of pulling off did not exceed 15 minutes and the tug was absent 5 hours, and was at no time in any great or unusual danger, nor was the steamship in any serious danger of injury, except from resting on the bottom. Whether she could have released herself without assistance was doubtful. Held, that the service rendered by the tug was "salvage service," for which it was entitled to compensation. *The Devonian*, 150 Fed. 831, 383.

#### **SALVOR**

A "salvor" is defined to be a person who, without any particular relation to the ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing contract that connected him with the duty of employing himself for the preservation of the vessel. *The Dumper No. 8*, 129 Fed. 98, 99, 63 C. C. A. 600 (citing *New York Harbor Protection Co. v. The Clara*, 90 U. S. [23 Wall.] 15, 16, 23 L. Ed. 150).

A "salvor" is a person who renders voluntary service to rescue a vessel or property from marine peril, and who is successful in whole or in part. He has a claim which may be enforced by a suit against the ship, or its cargo, or both; and, more than that, he is entitled to the possession of the property saved, provided it is such personalty as may be reduced to possession, and has a lien for the salvage compensation until his claim is satisfied. *Central Stockyard & Transit Co. v. Mears*, 85 N. Y. Supp. 795, 796, 89 App. Div. 452.

#### **SAME**

See Substantially the Same; With Same Effect.

Under a statute requiring every judgment to be indexed in the judgment docket in the name of each defendant, the word "same," occurring immediately below the name of a judgment debtor on the index, constituted a sufficient index of the judgment next listed against him. *Fulkerson's Adm'r v. Taylor*, 46 S. E. 309, 102 Va. 314 (citing and adopting *Cooke v. Avery*, 13 Sup. Ct. 346, 147 U. S. 375, 37 L. Ed. 209; *Willis v. Smith*, 17 S. W. 247, 66 Tex. 31).

#### **Last antecedent**

The word "same," in a real estate mortgage securing a note, otherwise negotiable,

providing that the mortgagor agrees to pay all the taxes and assessments, levied on the premises, and all taxes and assessments levied on the holder of the mortgage, for and on account of the same, does not refer to the word "premises," but discloses an intention to bind the mortgagor, not only to pay the taxes assessed against the mortgaged property, but also the taxes that the mortgagee might become liable for as owner of the mortgage, and the mortgage destroys the negotiability of the note. *Garnett v. Meyers*, 94 N. W. 803, 804, 65 Neb. 280.

Sanitary District Act (Laws 1889, p. 135) § 24, providing for the discharge of water collected in a district into the Desplaines river declared that when the drainage channel shall be completed and the water turned into the river to an amount of 300,000 cubic feet per minute, the "same" shall be a navigable stream. Held, that the word "same" referred to the channel of the sanitary district, and not to the water after it left the channel, and that the act did not therefore constitute a legislative declaration that the Desplaines river was navigable. *People v. Economy Light & Power Co.*, 89 N. E. 760, 770, 241 Ill. 290.

#### Antecedent other than last

The certificate of publication of the notice of application for judgment of sale for an assessment, reciting that the foregoing "is a list of delinquent \* \* \* lots" on which special assessments and special taxes remain due and unpaid, "with notices hereto attached, and that the same were duly published and advertised," is not ambiguous; the words "the same" applying to and including all the lists and notices thereinbefore mentioned. *Gage v. People*, 72 N. E. 1084, 213 Ill. 410.

The word "same," in a stipulation continuing a cause until the next term which stipulates that "we agree that the summons and the order of delivery was served upon the defendant \* \* \* by delivering to him a true copy of the annexed, which is by this agreement made the original order herein on said day, and defendant waives all irregularities in the same," etc., refers to the subject of the sentence in which it appears, namely, to the summons and the order of delivery, and defendant, in order to secure a continuance, agreed thereby to waive all irregularities in the summons. *Ammons v. Brunswick-Balke-Collender Co.*, 141 Fed. 570, 573, 72 C. C. A. 614.

#### SAME ACT

The words "same offense," found in the clause of the federal Constitution (Amend. art. 5), guaranteeing that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb," are not synonymous with the words "same act." In *re Stubbs*, 133 Fed. 1012, 1014.

#### SAME APPEARANCE

The object in a design patent is, not to identify the article as an article of trade, but to ornament it, so as to make it pleasing to the eye; and while "sameness of appearance" is identity of design, the test of infringement is not whether an ordinary purchaser might be deceived into buying one article for the other, but the sameness of appearance which constitutes "infringement" is the sameness of æsthetic effect on the eye of an ordinary observer. *Bolte & Weyer Co. v. Knight Light Co.*, 180 Fed. 412, 414, 103 C. C. A. 558.

#### SAME AS LAST

Plaintiff contracted to sell goods as might be required by defendant during a specified period, payment to be made the 20th of the month for the goods shipped the preceding month. After the expiration of the contract plaintiff agreed to sell a specified quantity of similar goods to be delivered at intervals and paid for on receipt of invoice and bill of lading. Subsequently defendant ordered additional goods. Plaintiff replied that he would enter the order for the additional goods, "terms same as present order," and sent a memorandum providing for cash payment on receipt of each invoice. Defendant modified the memorandum by adding "same as last," which was accepted by plaintiff. Held, that the words "same as last" referred to the second agreement, and not to the first, especially in view of the fact that the parties so interpreted the words. *Licking Rolling Mill Co. v. W. P. Synder & Co. (Ky.)* 89 S. W. 249, 251.

#### SAME AS LAWFUL WEDLOCK

The clause "the same as if born in lawful wedlock" used in Comp. Laws Nev. 1900, § 3046, providing that an illegitimate child shall be the heir of its mother, does not allow him or his issue to inherit from her lineal or collateral kindred, since such statutes are strictly construed. *Holmes v. Adams*, 85 Atl. 492, 493, 10 Me. 107.

#### SAME BUSINESS

A crew operating an engine and one who engages as a day laborer in removing a boiler from the furnace plant of the company to its coal mines for use at the latter in getting out coal to be consumed in the furnace and locomotive are engaged in the "same business," within the meaning of Civ. Code 1895, § 2610. *Georgia Coal & Iron Co. v. Bradford*, 62 S. E. 193, 195, 131 Ga. 280, 127 Am. St. Rep. 228.

#### SAME CAUSE

See Neither Party, Etc.

Code Civ. Proc. § 2050, relieving one discharged on habeas corpus from being again arrested for the "same cause," means when imprisonment is based on the same informa-

tion, and not imprisonment under a new information, followed by a lawful warrant. *Sutton v. Butler*, 133 N. Y. Supp. 936, 938, 74 Misc. Rep. 251.

An action by a passenger against a carrier for personal injuries and an action by his administrator against the carrier for his negligent death are for the same cause and between the same parties or their representatives within *Burns' Ann. St. 1908*, § 456, and a deposition of the passenger taken in the action by him is admissible in evidence in the action by the administrator. *Lake Erie & W. R. Co. v. Huffman*, 97 N. E. 434, 436, 177 Ind. 126.

### SAME CAUSE OF ACTION

The "same cause of action" is where the same evidence will support both actions, although the actions may happen to be grounded on different writs. This is the test to know whether a final determination in a former action is a bar to a subsequent action. *Jackson v. Thomson*, 64 Atl. 421, 424, 215 Pa. 209.

The injury from pollution of waters of a stream flowing through plaintiff's farm from construction, without condemnation, of a city sewer into the stream, and operation thereof, being permanent, an action therefor and a subsequent action for continuance of the injury present the "same cause of action."—injury to plaintiff's land from wrongful appropriation of the stream for a public use—within *Rev. St. 1909*, §§ 1800, 1804, authorizing pendency of another suit for the same cause of action to be pleaded in bar of a second suit. *Smith v. City of Sedalia*, 149 S. W. 597, 599, 244 Mo. 107.

A judgment upon a judgment upon a note of a firm against a partner not served nor appearing in the first action is not obtained upon the same cause of action as the note, and is no bar to a subsequent action on the note. What is meant by the "same cause of action" is where the same evidence will support both actions, although the actions may appear to be grounded on different writs. This is the test to know whether a final determination in a former action is a bar or not to a subsequent action, and it runs through all the cases in the books, both for real and personal actions. *First Nat. Bank of Albuquerque v. Lewinson*, 76 Pac. 288, 12 N. W. 147 (quoting *Rogers v. Odell*, 39 N. H. 417).

### SAME CIRCUMSTANCES

An instruction that "ordinary care" was such care as the great majority of mankind would and do exercise in the transactions of human life under like conditions and circumstances, was not erroneous because of the use of the expression "under like circumstances"; this being the equivalent of "under the same or similar circumstances,"

which is the proper standard. *Warden v. Miller*, 87 N. W. 828, 830, 112 Wis. 67.

### SAME CONDITION

Improved city real estate left in trust by a will was leased for 99 years by authority from the court; the lease providing that the lessee should maintain the property in good condition and repair, that he should not remove nor destroy the improvements, that if he should cause improvements, repairs, or changes to be made he should "replace old improvements by new ones of equal value and fully as substantial," and that he should maintain insurance on the property, payable to the trustee of the estate, "for the use and benefit" of the beneficiaries under the will. It further provided that, should there be a partial or total loss of the buildings and improvements, the insurance money collected therefrom should "be applied and expended to replace said improvements upon said property in the same condition as before said damage occurred." Held, that such provisions were intended principally to afford security for the rent and the restoration of the property in unimpaired condition at the end of the term, and should be construed together with that purpose in view, that the provision that the insurance money should be used to replace the improvements "in the same condition" as before did not require the lessee, after the buildings had been destroyed by fire, to rebuild them in the same form as the old, but that his obligation was only to replace them with new ones "of equal value and fully as substantial," for which purpose he was entitled to the insurance money; nor did such provisions warrant the trustee, after collecting the insurance, and when the lessee was proceeding to build a large hotel on the property of four or five times the value of the old buildings, in refusing to pay over the insurance money on the ground that the beneficiaries did not approve of the building. *Pike v. Cincinnati Realty Co.*, 179 Fed. 97, 99, 102 C. C. A. 391.

### SAME DEVICE

A device which is constructed on the same principle, which has the same mode of operation, and which accomplishes the same result as another by the same means, or by equivalent mechanical means, is the "same device," and a claim in a patent of one such device claims and secures the other. *Lourie Implement Co. v. Lenhart*, 130 Fed. 122, 129, 64 C. C. A. 456 (citing *Union Paper Bag Mach. Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935).

### SAME DISTANCE

While the holding in case of *Wight v. United States*, 17 Sup. Ct. 822, 167 U. S. 512, 42 L. Ed. 258, in which the court declared that section 2 of the Interstate commerce act prohibited any "rebate or other device by

which two shippers, shipping over the same line the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor," would seem to support the view that the shipment must be the "same distance," as the phrase is literally understood, still, when applied to the transportation of freight, such a construction is thought to be too narrow. The court does not say that there shall be the same mileage distance. If it is true that a place in question was regarded by the carriers as being practically in the same freight zone, then it is apparent that the ordinary signification of the phrase quoted is of latitudinal extent, and does not imply any precise space or limits between different points. *United States v. Vacuum Oil Co.*, 153 Fed. 598, 607.

### **SAME FORM**

See Same Size and Form.

Code Civ. Proc. § 407, provides that a summons must be directed to the defendant, signed by the clerk and issued under the seal of the court, and must contain the names of the parties, etc., and section 408, providing for the issuance of alias summons, requires that it shall be "in the same form as the original." Held, that section 408 meant that the alias summons should conform to the requirement of section 407, and did not preclude the insertion therein of the name of a defendant, which through a clerical error had been omitted from the original summons. *Doyle v. Hampton*, 116 Pac. 39, 41, 159 Cal. 729.

### **SAME GENERAL NEIGHBORHOOD**

A person holding himself out to the public as a physician and surgeon is bound to have and exercise such skill as physicians and surgeons in the same general neighborhood in the same general line of practice ordinarily have and exercise in like cases. The phrase "the same general neighborhood," as so used, is of much broader application than would be the phrase "the same neighborhood." *Sheldon v. Wright*, 67 Atl. 807, 813, 80 Vt. 298.

### **SAME INVENTION**

"Same invention," as used with reference to the reissue of a patent, includes whatever invention was described in the original letters patent and appears therein to have been intended to be secured thereby. The reissue, therefore, cannot be permitted to enlarge the claims of the original patent by including matter once intentionally omitted. *Franklin & Co. v. Illinois Moulding Co.*, 123 Fed. 48, 50 (quoting *Parker & W. Co. v. Yale Clock Co.*, 8 Sup. Ct. 38, 123 U. S. 99, 31 L. Ed. 100).

The question whether a reissue patent is for the "same invention," within Rev. St. § 4916, should be considered not merely as a verbal question, but as a substantial ques-

tion to be solved by reference to the structure itself as well as to the specification and claims. The reissue may properly correct insufficiency of description of what is clearly shown in drawings as an obvious feature of the structure and may add claims adequate to protect the substance of an invention or inventions that fairly appear in the original and which the inventor sought to protect. *Coldwell-Gildard Co. v. Stafford Co.*, 197 Fed. 568, 572.

### **SAME MANNER**

In Code 1906, c. 127, § 12, providing that all causes in which orders of dismissal or orders of nonsuit have been set aside and the cause reinstated shall remain on the docket and be proceeded with "in the same manner" as if the order had never been made, the quoted phrase means with all the rights preserved, the same as if a nonsuit had never been suffered. *Duty v. Chesapeake & O. Ry. Co.*, 73 S. E. 331, 334, 70 W. Va. 14.

In Rev. St. 1898, § 750, which provides that in certain cases the trial court may, by order entered in the minutes, "stating the cause therefor," appoint a suitable person to act as district attorney for the time being, and "in the same manner," and in its discretion, appoint counsel to assist the district attorney in the prosecution of criminal cases, the words "in the same manner" do not require the statement of the cause for the appointment of counsel to assist the district attorney in the record, but only require that the order be entered in the minutes as an order appointing a district attorney pro tem. is entered. *Colbert v. State*, 104 N. W. 61, 63, 125 Wis. 423.

In a will by which testator provided that on the death of one of his children one-third of the income of a trust fund should be payable in like manner for the benefit of his widow for life, and on her decease, leaving lawful issue of testator's son, then living, such one-third of the income and principal to go to such issue "in the same manner" as the other two-thirds had been decreed, the phrase "in the same manner" designated the mode in which the recipient should be benefited and did not describe the recipient. *Sterling v. Ives*, 62 Atl. 948, 954, 78 Conn. 498.

Const. pt. 2, art. 98 (99), provides for taking the sense of the qualified voters on the subject of a revision of the Constitution at meetings warned for that purpose and for a return of the votes to the general court, and if it shall appear by such return that in the opinion of the majority of the qualified voters there is a necessity for a revision, etc., the general court shall call a convention for that purpose, the delegates to be chosen "in the same manner" and proportioned as the representatives to the general court. Held, that the Legislature may provide for the election of delegates to the convention



at the annual town meetings and at special elections to be held for that purpose in cities on the same date; the words "in the same manner," not implying, in view of other constitutional provisions and of legislative construction, that the choice must be made at the same time that representatives are elected. In re Opinion of the Justices, 79 Atl. 29, 30, 76 N. H. 586.

#### **SAME MEETING**

The session of a deliberative assembly convened in pursuance of a special motion adopted at a regular meeting to adjourn the meeting to a stated time, is a continuation of the regular meeting, at which the assembly can do anything it could have done at the earlier session, and is the "same meeting," within a rule of the counsel providing that, when a motion has been once made and carries, it shall be in order for any member voting with a majority to move for a reconsideration at the same meeting. *Stiles v. City of Lambertville*, 62 Atl. 288, 73 N. J. Law, 90.

#### **SAME OFFENSE**

The words "same offense," found in the clause of the federal Constitution (Amend. art. 5) guaranteeing that no person "shall be subject for the same offense to be twice put in jeopardy of life or limb," are not synonymous with the words "same act." In re *Stubbs*, 133 Fed. 1012, 1014.

The term "same offense," as used in a statute providing for an increase in punishment where a defendant had previously been convicted of the same offense, means an offense of the same character, and not the same identical transaction. *Kinney v. State* (Tex.) 78 S. W. 225, 226; *Muckenfuss v. State*, 117 S. W. 853, 854, 55 Tex. Cr. R. 216.

Under Pen. Code 1895, art. 1014, authorizing increased punishment on a second and third conviction for the "same offense," a prior conviction for the violation of the Sunday law, without indicating the nature of the offense, is a conviction of an offense similar in character to the charge that accused opened his theater for public amusement on Sunday, authorizing increased punishment on his conviction. *Muckenfuss v. State*, 117 S. W. 853, 854, 55 Tex. Cr. R. 216.

As used in Bill of Rights, § 13, providing that no person shall for the "same offense" be twice put in jeopardy of his life or limb, the phrase quoted must be interpreted as equivalent to the same criminal act. Where one began a quarrel, and twice discharged his pistol in the street, then followed another into a store, pistol in hand, threatened to shoot, the whole affair occupying not more than ten minutes, he cannot be convicted, under Ky. St. 1899, § 1308, of flourishing and using a deadly weapon, after a conviction for shooting at random on the public highway. *Carman v. Commonwealth* (Ky.) 76 S. W. 1078, 1079.

An acquittal under an indictment charging robbery, making no reference to the crime having been committed in a place which the statute names in defining burglary, and not accusing defendant of having wrongfully entered such place, is not a bar to a prosecution for burglary with intent to murder, as defendant could not properly have been convicted under the first indictment of the offense charged in the second within the Bill of Rights, declaring that no person shall be twice put in jeopardy for the "same offense." *Nagel v. People*, 82 N. E. 315, 317, 229 Ill. 598.

Acts Tex. 1905 (29th Leg.) p. 372, c. 153, authorizing an injunction against the use of premises for keeping or exhibiting games prohibited by the laws of the state, was not in violation of the Bill of Rights, declaring that no person for the "same offense" shall be twice put in jeopardy of life or liberty, though the defendant, if he violated the injunction, might be punished for contempt and again for violating the criminal law; such offenses not being the same. In the former case he is punished for a violation of the orders of the court, and in the latter for an offense against the peace and dignity of the state. Ex parte *Allison*, 90 S. W. 870, 871, 99 Tex. 455, 2 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 653.

Within Bill of Rights, § 14, providing that no person for the "same offense" shall be twice put in jeopardy of life or liberty, nor be again put upon trial for the same offense after a verdict of guilty in a court of competent jurisdiction, the degrees of homicide are not distinct offenses, but are merely grades of one common offense, to wit, homicide; so that one may be tried upon an indictment for murder and convicted of manslaughter, and a new trial after acquittal of murder and reversal of a conviction of manslaughter is a trial de novo so far as concerns the introduction of evidence, so that evidence tending to show accused's guilt of murder is admissible, though under Code Cr. Proc. art. 762, he cannot be convicted of a higher degree than manslaughter. *Cornelius v. State*, 112 S. W. 1050, 1053, 1054, 54 Tex. Cr. R. 173 (citing and adopting *Hirshfield v. State*, 11 Tex. App. 207; *Adams v. State*, 16 Tex. App. 162).

#### **SAME PARTIES**

In the statute providing for the set-off of mutual demands, and providing that the set-off must be between the "same parties," the words "same parties" do not mean "all the parties"; and in an action against the maker and indorser of a note, joined in the same suit, the indorser may set off an individual claim against plaintiff growing out of the transaction which gave rise to the execution of the note. *Wilson v. Exchange Bank*, 50 S. E. 357, 358, 122 Ga. 495, 69 L. R. A. 97, 2 Ann. Cas. 597.

A judgment for or against a party will operate as a bar to another action against him alone, although other parties were joined with him in the first action and the subject-matter of the action adjudicated as to all such parties, the phrase "the same parties" in connection with the rule of res adjudicata not meaning that all the parties plaintiff and defendant to the first action must be joined in the later action to render the plea of estoppel available, but where the action is against a number of defendants and the merits litigated and adjudicated as to all, and the same plaintiff subsequently proceeds against one, the later action being between the "same parties" within the meaning of the rule. *Sul-sun Lumber Co. v. Fairfield School Dist.*, 127 Pac. 349, 352, 19 Cal. App. 587.

### **SAME PIECE OF WORK**

Where a railroad bridge gang, in repairing a depot platform, divided into two squads and removed cotton bales from a portion of the platform to another part on which the repairs had been made, and during the removal all the men worked together, they were engaged in the "same piece of work," within Sayles' Rev. Civ. St. art. 4560h, providing that all persons engaged in the common service of another, doing the same character of work, or working together at the "same piece of work," are fellow servants with each other. *International & G. N. R. Co. v. Still*, 101 S. W. 442, 445, 100 Tex. 499.

### **SAME RIGHTS**

Gen. St. 1906, § 1389, provides that causes of action by and against the same parties in the same rights may be joined in the same suit, with immaterial exceptions. Held, that causes of action existing in favor of one individually and as an administrator or executor of another's estate are not "in the same rights" within the statute, the recovery in the former case being in a personal capacity, and in the latter in a representative capacity, in the right of another; and the cause of action accruing to the father of a deceased minor, under Gen. St. 1906, § 3147, giving a right of action for the death of a minor from the wrongful act of another, and the cause of action accruing to the administrator of a decedent, under sections 3145, 3146, cannot be joined in the same declaration. *Pensacola Electric Co. v. Soderlind*, 53 South. 722, 723, 60 Fla. 164, Ann. Cas. 1912 B, 1251.

### **SAME SIZE AND FORM**

A patent of a circular knitting machine describes, as a substantial improvement intended to be covered, such a construction of the machine as to enable the finished work to be taken up either above or below the cylinder; an essential feature of such construction being the making of the two cylinders of the "same size and form." Held, that the term "same size and form" means substantially of the "same size and form"; "size" hav-

ing reference to the diameter of the cylinder at either the knitting ends, and "form" having reference solely to the angle of inclination of the sides of the cylinder. *Cooper v. Otis Co.*, 156 Fed. 665, 669.

### **SAME TAXES**

Where a city charter provided that the city might collect a road tax from all property in the corporation equal to that then levied by law for road purposes, and that the citizens and property within the corporation should be exempt from the "same taxes" for county road purposes (Sess. Laws 1893, pp. 551, 552, art. 4, § 2, sub-sec. 2), the words quoted referred to the character of the taxes, and not to their amount, and hence the county could not thereafter levy any taxes for road purposes within the city limits. *Tillamook City v. Tillamook County*, 107 Pac. 482, 484, 56 Or. 112.

### **SAME TRANSACTION**

Code Civ. Proc. § 127, subd. 1, provides that a counterclaim must be a claim existing in favor of a defendant and against a plaintiff, between whom a several judgment may be had in the action, and arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action. Held that, where plaintiff sued defendant on several notes given for the balance of the purchase price of a threshing outfit sold to defendant, under a contract by which plaintiff agreed to remedy any defects in the engine, etc., and defendant agreed to render plaintiff assistance while making such repairs, a claim by defendant for injuries sustained by his minor son by the negligence of plaintiff's servant while repairing the threshing engine was a cause of action arising out of the "same transaction," and was available as a counterclaim, although sounding in tort. *Advance Thresher Co. v. Klein*, 133 N. W. 51, 52, 28 S. D. 177.

Code Civ. Proc. § 484, providing that claims arising out of the "same transaction, or transactions connected with the same subject of action," may be joined in the same complaint, does not authorize the joinder in one complaint of a cause of action for breach of warranty owing to the explosion of a gun sold plaintiff and a cause of action for the wrong in putting on the market a defective and dangerous weapon. *Reed v. Livermore*, 91 N. Y. Supp. 986, 987, 101 App. Div. 254.

### **SAME YEAR**

The inn and tavern act of 1846 (2 Gen. St. N. J. p. 1794), providing in section 45 that "the freeholders required to recommend to the courts suitable persons for license to keep inns and taverns shall be such as shall not have recommended any other application for a license, \* \* \* in the same township, city, or borough for the 'same year,'" means

that a freeholder who has recommended an application for license within a year prior to the beginning of the license which he subsequently recommends is not competent to so do. The object of the statute was to prevent a freeholder from recommending any other application for a license which was to become operative, in whole or in part, during the year covered by the license granted upon any application which he had previously recommended. *Cope v. Common Council of City of Somers Point*, 64 Atl. 156, 73 N. J. Law, 376.

## SAMPLE

See Sale by Sample; Selling by Sample. Salesman's samples as baggage, see Baggage.

## SAN DOMINGO MAHOGANY

The term "San Domingo mahogany," as used in a building contract requiring such mahogany to be used in a portion of the building, is to be interpreted in the trade sense and not in the ordinary sense of the term; and the contract is complied with by the use of mahogany having the same color and texture as the genuine San Domingo mahogany, although grown elsewhere. *Snoqualmi Realty Co. v. Moynihan*, 78 S. W. 1014, 1018, 179 Mo. 629.

## SANCTION

"Every law must have its 'sanction'; that is to say, its means of enforcement. Without such it can hardly be deemed a law. Sanctions are of two kinds—those which redress civil injuries, called 'civil sanctions,' and those which punish crimes, called 'penal sanctions.'" *Commissioners' Court of Nolan County v. Beall*, 81 S. W. 526, 528, 98 Tex. 104 (quoting *Bouv. Law Dict.*).

## SAND

As mineral, see Mineral.  
Manufactures of, see Manufactures—Manufactured Articles.

"This material, which forms one of the ingredients of mortar, is the granular product arising from the disintegration of rocks." *Donaldson v. Roksament Stone Co.*, 170 Fed. 192, 193 (quoting and adopting definition in *Mahan's Civil Engineering*).

In *Tariff Act July 24, 1897, c. 11, § 2*, Free list, par. 671, 30 Stat. 201, relating to "sand, crude or manufactured," the term "sand" is inapplicable to any metalliferous mineral, though it be in comminuted fragments; and corundum ore, being a mineral of this character, is not, when ground, classifiable as "sand." \* \* \* manufactured." *F. W. Myers & Co. v. United States*, 155 Fed. 502; *Id.*, 163 Fed. 53, 89 C. C. A. 284.

## SANDWICH

As constituting meal, see Meal.

## SANE

### SANE OR INSANE

See Suicide, Sane or Insane.

Die by his own hand or act, sane or insane, see Die by His Own Hand.

## SANITY

"Sanity" is not an ingredient of crime. It is a condition precedent to all intelligent action, as well benevolent as nefarious. It is a pre-existing fact, which may be taken for granted as implied by law and general experience. We do not infer sanity from the criminal act, as we do malice and premeditation. Sanity is a premise, not a conclusion. *State v. Quigley*, 58 Atl. 905, 908, 26 R. I. 263, 67 L. R. A. 322, 3 Ann. Cas. 920.

"Sanity," within the rule that in probating a will testator's "sanity" must be proved, is used in its legal and not in its medical sense. In *re American Board of Com'rs for Foreign Missions*, 66 Atl. 215, 221, 102 Me. 72.

"Sanity" is not a disease to be diagnosed by an expert, but a normal condition so commonplace that its existence in one attracts no attention from another member of the human race. No better foundation should be required for the opinion of a sane person of normal intelligence affirming the "sanity" of another than the facts of adequate opportunity for observation, and the absence of symptoms or manifestations which attracted his attention or impressed themselves on his mind or memory. *State v. Lyons*, 37 South. 890, 898, 113 La. 959.

## SAPPHIRE

As precious stone, see Precious Stones.

## SARDINES

The fish known as "sardines" are found in the Mediterranean Sea, and on the coasts of Italy, Spain, and France, but not in American waters. In Maine, herring are packed for sardines. *State v. Kaufman*, 57 Atl. 886, 887, 98 Me. 546.

## SASH

"Sash," as used in a contract to furnish building materials, including window sashes, doors, blinds, and all inside wood and glass work required, the first payment to be made on delivery of the sash, did not mean the headlights over the doors. *Smith v. Collins*, 12 N. Y. Supp. 53, 54, 58 Hun, 608.

## SATISFACTION—SATISFY

See Accord and Satisfaction; Full Satisfaction; Fully Satisfied; If Sat-

isfied; Perfect Satisfaction; Proved Satisfactory; Reasonable Satisfaction; Reasonably Satisfy; Successful or Satisfactory.

Paid as satisfied, see Paid.

#### Cause of action

There is a clear distinction recognized by the courts between a "satisfaction" and a "release" growing out of the right of the injured party to choose whether he will seek redress against all or a less number of those jointly liable to him. On the one hand, a naked promise not to sue, an action against a part only of the joint tort-feasors, and a forgiveness of the others, or a formal release, unsupported by a consideration, will in neither case operate as a release of those not favored. In other words, a release in fact may be given to a part of the joint trespassers, although no part of the damage has been paid, and those not released held liable for the whole. On the other hand, a contract which purports to be a "satisfaction" and release of a wrongdoer jointly liable with others, to be effective, must clearly show that the injured party for a consideration has surrendered to the party in whose favor the contract runs all claim for recompense for and on account of the trespass complained of. *Cleveland, C., C. & St. L. Ry. Co. v. Hilligoss*, 86 N. E. 485, 488, 171 Ind. 417, 131 Am. St. Rep. 258 (citing and adopting *Fleming v. McDonald*, 50 Ind. 278, 19 Am. Rep. 711; *Ashcraft v. Knoblock*, 45 N. E. 69, 146 Ind. 169, 174, and *Cooley, Torts* [3d Ed.] pp. 224, 235).

#### Claim or debt

The term "satisfaction" has a distinctive significance in legal phraseology, and imports a release and discharge of the obligation in reference to which it is given, so that a statement that money was paid in satisfaction of all claims imports a release and discharge of, not only the claim on which it is written, but every other claim which the creditor then had against the debtor. *Jersey Island Dredging Co. v. Whitney*, 86 Pac. 509, 511, 149 Cal. 269.

A "technical release" is an instrument under seal or some other form of satisfaction which legally imports full payment. The difference between a "technical release" and a "satisfaction in fact" is that in one case the law regards the claim as paid and will not allow the party to deny by proof, while in the other the claim was in fact paid. *Ryan v. Becker*, 111 N. W. 426, 427, 136 Iowa, 273, 14 L. R. A. (N. S.) 329 (citing *Eastman v. Grant*, 34 Vt. 387; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Miller v. Beck*, 79 N. W. 344, 108 Iowa, 575).

The act of a creditor in accepting and collecting a check upon which was written the words "in full payment to date," following an honest dispute as to the balance due on an account, constituted a "satisfaction" of

the account. *Metropolitan Shirt Waist Co. v. Kamloner*, 138 N. Y. Supp. 1067, 1068.

#### Contracts

"Where a contractor agrees to furnish the material and to erect on the land of a municipal corporation a garbage furnace according to the plans and specifications, which are a part of the contract, and warrants its capacity to consume a named quantity of garbage, without emitting offensive odors, to be paid for when completed and tested according to the 'satisfaction' of the committee of the town council, and the contractor performs the contract according to plans and specifications, and, the test being made, the furnace is shown to have the capacity warranted and in all things to comply with the contract, the committee cannot defeat the contractor's right of recovery by capriciously and unreasonably refusing its satisfaction with the work." A declaration in a suit for the contract price, which shows these facts and alleges that the committee, without just cause or reason and moved by caprice and prejudice, has refused to declare satisfaction with such tests, although the work and tests should have fully satisfied the committee and the defendant, and would have satisfied persons of ordinary care, caution, prudence, and fairness, is not subject to demurrer, as showing no cause of action, nor to special demurrer, because it has not alleged that the furnace was tested to the satisfaction of the committee. *Parlin & Orendorff Co. v. City of Greenville*, 127 Fed. 55, 62, 61 C. C. A. 591.

Where an employé entered into a contract with his employer to continue at least three years if the former proved himself "competent and satisfactory," and agreed to perform all the duties of a first-class gardner and manager of his employer's place, to "the satisfaction" of the latter, he was subject to be discharged if the employer was dissatisfied; and this was not dependent on whether there were reasonable and sufficient grounds for such dissatisfaction. The promisor, whose satisfaction is made the test, must act honestly and in good faith; his dissatisfaction must be real not merely pretended. Thus, if a suit of clothes were agreed to be made to the satisfaction of the purchaser at a fixed price, if they were in fact satisfactory to him, he could not feign dissatisfaction in order to get out of the contract, merely because another similar suit was offered to him at a less price. This would not be dissatisfaction. It would be fraud. Some courts have held that, if a test of a reasonable character is necessary to determine fitness, the person to be satisfied must make such test or allow it to be made. So, if an employer should agree to pay for the services of an employé at a given rate if they were satisfactory to him, he should give the employé a trial. Some of the decisions which are apparently in conflict with the ruling above stated may be distinguished by reason of the

particular facts involved in them. Some may be reconciled with the general rule by taking into consideration the element of good faith or mere pretense of dissatisfaction. *MacKenzie v. Minis*, 63 S. E. 900, 903, 132 Ga. 323, 23 L. R. A. (N. S.) 1003, 16 Ann. Cas. 723 (citing 9 Cyc. 624; *Baldwin Fertilizer Co. v. Cope*, 110 Ga. 325, 35 S. E. 316).

#### Evidence

The words "to the satisfaction of the jury" in an instruction that it was sufficient to entitle a recovery if plaintiff prove to the jury's satisfaction, etc., were equivalent to "find" or "believe," and there was no error in their use. *Terre Haute Traction & Light Co. v. Payne*, 89 N. E. 413, 417, 45 Ind. App. 132.

The words "to your satisfaction," as used in an instruction that the jury must convict the accused if the state has shown "to your satisfaction" that he committed the offense, means to the satisfaction of the jury beyond a reasonable doubt. *Washington v. State*, 52 S. E. 910, 912, 124 Ga. 423.

An instruction in an action for personal injury that the burden is on plaintiff to "satisfy" the jury by a preponderance of the evidence of the truth of the allegations of his complaint before he is entitled to a verdict, and that, where he has failed to so "satisfy" the jury, the verdict must be for defendant, and that, if plaintiff has established to the "satisfaction" of the jury the truth of the allegations of the complaint, the verdict must be for him, is not open to the objection that the words "satisfy" and "satisfaction" are not equivalent to the word "find," since the word "satisfy" in an instruction that the burden of proof is on a party to "satisfy" the jury of a fact is synonymous with the word "believe," and the word "satisfy" as used in the statement that a party must satisfy the jury of a material fact means to relieve the jury from all uncertainty or doubt. *Baltimore & O. S. W. R. Co. v. Walker*, 84 N. E. 730, 735, 41 Ind. App. 588.

Where the court charged that the issues were to be determined by a preponderance of the evidence, correctly defined the term preponderance of the evidence, and stated that if enumerated facts were proved by a preponderance of the evidence, the jury should find such facts by their verdict, a charge that the burden was on plaintiff to establish by evidence to the satisfaction of the jury, the material averments of the complaint, though objectionable, if standing alone, as imposing a too high degree of proof, was not misleading, the words "to satisfaction of the jury" meaning in such event no more than "find" and "believe." *Sherman v. Indianapolis Traction & Terminal Co.*, 96 N. E. 473, 475, 48 Ind. App. 623.

In a prosecution for homicide, an instruction on insanity recited that although the jury might believe from the evidence, to the

exclusion of a reasonable doubt, that defendant shot and killed deceased, yet, if they were "satisfied" from the evidence that at the time of the shooting defendant was suffering from mental disease, and because thereof he did not know right from wrong, etc., then they should acquit. The only other instructions given related to murder, manslaughter, and reasonable doubt. Held, that the instruction was erroneous, in the use of the word "satisfied." *Wilcox v. Commonwealth*, 129 S. W. 309, 310, 138 Ky. 846.

An instruction in a criminal prosecution which requires defendant's evidence of good character to "satisfy" the jury that his reputation was good is bad, as requiring too much proof of defendant, the word "satisfy," without any qualification, being susceptible of the meaning "to convince beyond a reasonable doubt," and defendant being entitled to begin with the presumption of his good reputation, and all reasonable doubts on the subject being resolvable in his favor. *Commonwealth v. Colandro*, 80 Atl. 571, 575, 231 Pa. 343.

The word "satisfied," in an instruction requiring the jury to be satisfied from the evidence that defendant's agent had authority to act for it in the matter in controversy, was improper, since plaintiff was only required to establish such fact by a preponderance of the evidence. *Western Cottage Piano & Organ Co. v. Anderson*, 101 S. W. 1061, 1065, 45 Tex. Civ. App. 513.

An instruction by the defendant, in an action on contract, that, "if the evidence fails to satisfy you, you will find for defendant," was properly refused, as the plaintiff was entitled to recover upon a preponderance of evidence, and the word "satisfy" in an instruction to the jury means more than that the facts should be shown by a preponderance of evidence (citing *Words and Phrases*, vol. 7, pp. 6332-6336). *San Antonio & A. P. Ry. Co. v. Graves & Patterson (Tex.)* 131 S. W. 613, 614.

#### Fine and costs

There is no substantial distinction between the words "paid" and "satisfied." Under Pen. Code, § 1205, providing that a judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, a judgment fining defendant \$100 and directing his imprisonment "until said fine is paid, such imprisonment not to exceed one day for each \$20 of said fine that shall so remain unpaid," is not void for using the word "paid," instead of "satisfied," and does not deprive defendant of the right to discharge part of the fine by imprisonment for part of the time. *Ex parte Krouse*, 82 Pac. 1043, 1044, 148 Cal. 232 (citing *Ex parte Henshaw*, 15 Pac. 110, 73 Cal. 486).

#### Judgment

B. & C. Comp. § 241, amending Hill's Ann. Laws 1892, § 295, declaring that, if after

entry of judgment 10 consecutive years elapsed without an execution being issued thereon, such judgment shall be conclusively presumed to be paid and satisfied, unless an execution is issued thereon within a year from the passage of the act, applies to existing as well as subsequently recovered judgments, and the word "satisfied" was used in the sense of discharged of record or destroyed. *Bowman v. Holman*, 99 Pac. 424, 426, 53 Or. 458.

"'Satisfaction' means payment, and payment of a judgment cannot be treated as void for the purpose of attacking the jurisdiction of the court that rendered it." So, where a surety on an appeal bond paid a judgment against it which was void for want of jurisdiction, such payment could not be treated as invalid in attacking the jurisdiction of the court that rendered the judgment; the judgment having passed beyond review, in the absence of a vacation of the satisfaction. *Churchill v. More*, 96 Pac. 108, 109, 110, 7 Cal. App. 787 (quoting and adopting definition in *Morton v. Superior Court*, 4 Pac. 491, 65 Cal. 498).

#### Legacy

A general legacy may be satisfied, although not strictly speaking adeemed. It is this which distinguishes ademption from satisfaction. One depends upon the intention of the testator as inferred from his acts, and the other upon the extinction of the thing or fund granted. A general legacy will be satisfied where testator advances to the legatee even a small sum with the intent to discharge the legacy or to substitute the advancement for the bequest. But provisions in a husband's will, made before she got a divorce, giving her all the real estate, including the homestead, in fee, and all the personalty, except \$1,000 to each of the daughters, were not satisfied by provisions in the divorce decree for the support of the wife and minor child, which were based on the testator's obligation to support them. In *re Brown's Estate*, 117 N. W. 260, 262, 139 Iowa, 219 (citing *Weston v. Johnson*, 48 Ind. 1; *Cowles v. Cowles*, 13 Atl. 414, 56 Conn. 240).

A general legacy may be satisfied, though not strictly adeemed. It is this which distinguishes ademption from "satisfaction," one depending on the intention of the testator as inferred from his acts, and the other on the extinction of the thing or fund granted. A general legacy will be deemed satisfied where testator advances to the legatee even a small sum with intent to discharge the legacy or to substitute the advancement for the bequest. In *re Brown's Estate*, 117 N. W. 260, 262, 139 Iowa, 219.

#### Mortgage

The word "satisfy," in Civ. Code, § 2876, providing that where the holder of a special lien is compelled to "satisfy" a prior lien, he may enforce payment of the amount thereof as a part of the claim for which his own lien

exists, when considered in connection with section 2911, providing for a satisfaction of record, and declaring that it must be entered when any mortgage has been "satisfied," means payment or discharge, and a junior mortgagee who pays a senior mortgage satisfies it, though there is no formal release of record. *Windt v. Covert*, 93 Pac. 67, 69, 152 Cal. 350.

#### SATISFACTION OF THE COURT

The phrase "satisfaction of the court," in the federal statute, providing that the facts to justify naturalization of an applicant shall appear to the satisfaction of the court, show that a discretion is vested in the court to determine whether an alien is fit for admission; but such discretion is not arbitrary, and must be a sound judicial discretion, and if abused, is subject to review, and the discretion must be regulated according to known rules of law, and is a legal, and not a personal, discretion. *United States v. Hraskey*, 88 N. E. 1031, 1033, 240 Ill. 560, 130 Am. St. Rep. 288, 18 Ann. Cas. 279 (citing *Anderson Transfer Co. v. Fuller*, 51 N. E. 251, 174 Ill. 221; 14 Cyc. p. 384).

#### SATISFACTORY

Where articles of merchandise to be used for business purposes were ordered under an agreement that if "after a thorough trial" they were not found "to work satisfactorily" the order was to be canceled, the term "satisfactorily" meant satisfactorily to a reasonable man. *Fechteler v. Whittemore*, 91 N. E. 155, 157, 205 Mass. 6.

Under a contract for the establishment of a heating plant to work "satisfactorily" to the school board, so long as the members of the board acting reasonably are not satisfied, the prime essential to the last payment being collectible, was wanting. *Manning v. School Dist. No. 6 of Ft. Atkinson*, 102 N. W. 356, 362, 124 Wis. 84.

Where plaintiff agreed to furnish to defendant information concerning a certain vein or lead of ore within the boundaries of a lode claim, for which defendant agreed to pay a certain per cent. of the selling price of said claim, if on investigation by defendant the information should be "satisfactory" to him, he had the exclusive right to determine whether it was satisfactory, and his judgment was controlling and to be deemed conclusive, though it was to be exercised honestly and in good faith. *McCrimmon v. Murray*, 117 Pac. 73, 75, 43 Mont. 457.

Warranty that pumps sold would work in a "satisfactory manner" only obligated the seller to furnish pumps which would work satisfactorily to a reasonable person, and did not require it to furnish pumps satisfactory to a city engineer, though the seller had knowledge that they were purchased by the buyer to deliver under a contract with the

city requiring acceptance by a person to be appointed by such city engineer. *Lockwood Mfg. Co. v. Mason Regulator Co.*, 66 N. E. 420, 421, 183 Mass. 25.

The word "reasonable," as used in an instruction, means governed by reason; agreeable to reason; and its synonyms are just and honest. "Satisfactory" means relieving the mind of doubt or uncertainty, and enabling it to rest with confidence. "Probable" means capable of being proved; having more evidence for than against. And the instruction is erroneous, for accused's explanation of the possession of stolen property may or may not be reasonable, probable, satisfactory, or true, yet, if in the minds of the jury it creates a reasonable doubt of his guilt, he is entitled to an acquittal, and the burden is thrown on the prosecution to establish the falsity of it beyond a reasonable doubt. *State v. Trosper*, 109 Pac. 858, 859, 41 Mont. 442.

Plaintiff constructed a printing press, which was in the nature of an experiment for the printing of labels. He sold the same to defendant under a contract providing that, if the machine was not "satisfactory," it was to be returned free of expense to the seller. The contract also required the buyer to pay therefor after "satisfactory" trial a specified sum or its equivalent, and that on payment of the price plaintiff agreed to execute and deliver to the buyer a sufficient bill of sale, etc. Held, that the word "satisfactory" meant that defendant's decision that the machine was not satisfactory should be conclusive so that defendant, having given reasonable notice of such decision, could refuse to accept the machine without liability for the price. *Kidder Press Co. v. J. V. Reed & Co.*, 117 S. W. 950, 952, 133 Ky. 850, 134 Am. St. Rep. 450.

Under a contract to construct an equipment for melting brass, by which plaintiff was to place the outfit in operation for 60 days' trial for the approval of defendant, and, if the results obtained after the trial were in accordance with the specifications and "satisfactory" to defendant, he was to pay for it, defendant's liability was conditioned on his actual satisfaction, and dissatisfaction, though unreasonable, was sufficient to relieve him, if expressed in good faith. *Williams Mfg. Co. v. Standard Brass Co.*, 53 N. E. 862, 863, 173 Mass. 356 (citing and distinguishing *Hawkins v. Graham*, 21 N. E. 312, 149 Mass. 284, 14 Am. St. Rep. 422).

Under a contract to do work in a "satisfactory" manner, the contractor is not bound to satisfy the owner, but only do the work in a manner that ought to satisfy. *Greenberg v. Lumb*, 129 N. Y. Supp. 182, 183.

"Satisfactory," as used in a contract which provides that employment shall continue so long as it shall be satisfactory to the employer, gives such employer a discretion-

ary power, and the determination is not for a court or jury on the basis of what a reasonable man would do. *Brown v. Retsof Min. Co.*, 111 N. Y. Supp. 594, 597, 127 App. Div. 368.

It is proper to refuse to charge that the testimony of a witness who speaks from his personal knowledge is more "satisfactory" than the testimony of another who speaks of matters which lie in opinion only. The word "satisfactory," so used, means manifestly truthful, and whether both witnesses are equally credible can only be determined by the jury under all the circumstances of the case. *State v. Skillman*, 70 Atl. 83, 87, 76 N. J. Law, 464.

### SATISFACTORY DEED

A vendor's obligation to furnish a "satisfactory deed" does not require him to comply with the purchaser's whims respecting title, but the fact that title tendered might seriously interfere with selling the land or borrowing money thereon, might reasonably render such deed unsatisfactory. *Clark v. Asbury (Tex.)* 134 S. W. 286, 288.

### SATISFACTORY EVIDENCE

See Perfect and Satisfactory Title.

See, also, Clear Evidence or Proof.

"Satisfactory evidence" is that evidence which ordinarily produces moral certainty or conviction in an unprejudiced mind, such as ordinarily satisfies an unprejudiced mind beyond reasonable doubt. *Goltra v. Penland*, 77 Pac. 129, 133, 45 Or. 254 (citing *B. & C. Comp. § 688*; 1 Greenl. Ev. [14th Ed.] § 2).

An instruction in a criminal case that, where the evidence is entirely circumstantial, yet is not only consistent with the guilt of defendant, but inconsistent with any other rational conclusion, it is the duty of the jury to convict, though such evidence may not be as satisfactory to their minds as the direct testimony of credible eyewitnesses would have been, while erroneous, not only in authorizing a conviction on evidence less "satisfactory" than in the case of direct evidence, whereas Code Civ. Proc. § 1835, defining "satisfactory" evidence to be such "as ordinarily produces moral certainty or conviction in an unprejudiced mind," provides that such evidence alone will justify a verdict, but also in declaring it to be the jury's duty to convict if the "evidence" (not the facts) be inconsistent with any other rational conclusion than guilt—is harmless, the circumstantial evidence of defendant's guilt being at least "satisfactory," as defined by the Code, and being uncontradicted, and the improbability of a different result but for the instruction being such as to produce an abiding conviction to that effect. *People v. Taggart*, 82 Pac. 396, 1 Cal. App. 423.

An instruction in a civil action, that plaintiff was required to establish his case to the satisfaction of the jury, was error,

since the jury might find for plaintiff if they believed from the preponderance of the evidence that he was entitled to recover; "satisfactory evidence" or "sufficient evidence" meaning the amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt. *Brewer v. Doose* (Tex.) 146 S. W. 323, 325 (citing 7 Words and Phrases, p. 6335).

### SATISFACTORY PRICE

The words "satisfactory price," as used in a contract whereby defendant contracted to furnish logs to plaintiff's sawmill and sell the lumber, agreeing to log the mill to its capacity, limited only to the amount of lumber defendant should be able to sell at satisfactory prices, should receive a reasonable construction. A price should be construed satisfactory which would yield the defendant a reasonable profit over and above the gross cost of the lumber to it, plus the reasonable value of the timber and the cost of making sales of lumber. A fair construction of the contract would require the defendant to furnish timber from which could be manufactured salable lumber and to make reasonable efforts to put sound and salable lumber on the market; and if, by such effort, sales at reasonable profits could be made, to keep plaintiff's mill continuously running, defendant was obliged to furnish sufficient saw logs to keep it going. *Rhodes v. Holladay-Klotz Land & Lumber Co.*, 79 S. W. 1145, 1154, 105 Mo. App. 279.

### SATISFACTORY PROOF

An accident policy provided for payment on the beneficiary furnishing "satisfactory proof" to the insurer's board of directors of the death of the insured, and that his death was caused wholly and entirely by external, violent, and accidental means. The beneficiary first submitted certain proof, which was received, and defendant then submitted some additional questions to be answered by the attending physician, whose answering affidavit disclosed that another physician had been insured's regular physician and had seen him just prior to his death, whereupon defendant submitted questions to be asked of this physician, and on receipt of his affidavit rejected the claim. Held, that such additional affidavits constituted a part of the preliminary proofs furnished in accordance with the policy. *Traiser v. Commercial Travelers' Eastern Acc. Ass'n*, 88 N. E. 901, 902, 202 Mass. 292.

### SAUCES AND PICKLES

"The word 'sauce' as commonly used, designates a condiment, generally but not always of liquid form, eaten as an addition to and together with a dish of food, to give it flavor and make it more palatable, and is not applied to anything which is eaten, alone

or with a bit of bread, either for its own sake only, or to stimulate the appetite for other food to be eaten afterwards. For instance, cheese eaten with bread, or ham or chicken eaten in a sandwich, or anchovies or herrings, caviare, or shreds of salt fish, eaten, whether with or without bread, as an appetizer before a meal, would hardly be called a sauce." *Gray, J.*, in *Bogle v. Magone*, 14 Sup. Ct. 718, 152 U. S. 623, 625, 38 L. Ed. 574.

In the Tariff Act, the provision for "sauces" means for a seasoning or dressing usually placed on the table to be used with prepared food; and thick soy, which is not so used, but is employed as an ingredient of sauces, or as a flavor or color for food while cooking, is not a "sauce," and does not resemble a sauce in material, quality, texture, or use, but is classifiable as an unenumerated manufactured article, under section 6, 30 Stat. 205. *United States v. Wo On & Co.*, 167 Fed. 314, 315, 92 C. C. A. 626.

### SAUSAGE

In determining whether sausage prepared by the mixture of spices, cereals, and water with pork meat was properly described as sausage, within Pub. Acts 1895, p. 358, No. 193, as amended, the term "sausage" should be construed in its ordinary sense to mean an article of food composed of meat, salt, spices, without the addition of cereals, in accordance with the generally accepted use of the term, and not in accordance with the custom of manufacturers and dealers. *Armour & Co. v. Bird*, 123 N. W. 580, 583, 159 Mich. 1, 25 L. R. A. (N. S.) 616.

The provision in the Tariff Act, for "sausages, Bologna," does not include sausages of Chinese origin. *Wing Sing Lung & Co. v. United States*, 180 Fed. 392, 393, 103 C. C. A. 538; *Wing Sing Lung v. Same*, 171 Fed. 906.

### SAVE

#### SAVE HARMLESS

The condition of a bond to "save and keep harmless" the obligee from certain debts existing against him is not broken by the fact that the debts have passed into judgments against him. *Miller v. Fries*, 49 Atl. 674, 66 N. J. Law, 377

### SAVING BENEFIT OF PLEA

"Saving the benefit of a plea to the hearing" means that if on argument it is considered that as far as it appears the plea may be a defense, but that there may be something disclosed in the evidence that will avoid it, supposing the matters pleaded to be strictly true, the court will not preclude the question; such order being but an adjournment of the discussion. *Dietrich v. Deavitt*, 69 Atl. 661, 663, 81 Vt. 160.



**SAVING CLAUSE**

According to Bishop on Written Law, a "saving clause" in a statute "is only an exemption of a special thing out of the general things mentioned. There is no particular rule for its location or its verbal form, but it is generally near the end." The rule that that part of the statute which is later in position must prevail over a preceding part does not apply to a saving clause which is in irreconcilable conflict with the body of the act, and in such case the saving clause must be rejected as void. *Shutt v. State*, 89 N. E. 6, 7, 173 Ind. 689.

**SAVING EXCEPTION**

There is a difference between "saving exceptions" and filing them, and the statute which provides that exceptions may be filed within 20 days from the act excepted to has no reference to the time when they should be alleged. In the superior court the matter is regulated by the rule that "no exception shall be allowed by the presiding justice, unless the same be alleged and saved at the time when the opinion, ruling, direction, or judgment excepted to is given, and all exceptions to any charge to the jury shall, unless previously saved, be alleged before the jury are sent out." *Graves v. Hicks*, 80 N. E. 605, 194 Mass. 524.

**SAVINGS BANK**

The Minnesota Savings Association was incorporated under Gen. Laws 1867. By Sp. Laws 1873, c. 117, the name was changed to Savings Bank of St. Paul, and a capital stock of \$100,000 was provided; such capital to be employed in the business, and to become a guaranty fund. Held, that the association remained a "savings bank." *State ex rel. Douglas v. Savings Bank of St. Paul*, 92 N. W. 403, 404, 87 Minn. 473.

**SAVINGS BANK BOOK**

See Pass Book.

**SAVINGS DEPOSITOR**

The term "savings depositors," as used in *Mills' Ann. St. § 529*, giving preference in case of insolvency of the bank to the savings depositors, includes not only those who may deposit their money in the bank for the purpose of safe-keeping merely and receive interest thereon, but also those who deposit them upon time certificates of deposit. *Tabor v. Mullen*, 86 Pac. 1007, 1009, 37 Colo. 399.

**SAW**

See Ripsaw.

**SAW LOGS**

As timber, see Timber.

The words "saw logs" and "squared timbers," as used in a contract for the delivery of a certain number of "saw logs" and an agreement to pay therefor two cents per cubic foot for "squaring said logs," has reference to logs that will square out at least 18 cubic feet to the log. *Hinote v. Brigman & Crutchfield*, 33 South. 303, 305, 44 Fla. 589.

**SAW MACHINERY**

As tool, see Tools—Tools of Trade.

**SAW PLATES**

See Circular Saw Plates.

An article enumerated according to its use as "saw plates" includes articles intended for other uses having the qualities and characteristics of the article designated. *Hermann Boker & Co. v. United States*, 168 Fed. 573, 574.

**SAW TIMBER**

Where, at the time that a contract was entered into providing for the removal of all "saw timber" from certain land, it is shown that no cordwood was being cut on the land or in the vicinity, and that one of the contracting parties was desirous of getting the timber for his mill, and intended to set up the mill near the land, and the other parties sold him the timber with that in view, the term "saw timber" should be construed to exclude the right to cut timber for cordwood, and limited to timber suitable for being manufactured into lumber or other mill products; it not being until after the season of operation of the mill that defendant claimed the right to cut other timber. *Roots v. Boring Junction Lumber Co.*, 92 Pac. 811, 818, 50 Or. 298.

A deed of land reserved the "saw timber" for 10 years. The contract for the conveyance stipulated for a reservation of timber, and the change was made to "saw timber" at the request of the grantee, to enable him to get firewood off the land, and to give him the right to cut small trees and underbrush to clear the land, to make it better adapted to produce grass. Parol evidence showed that the term "saw timber" had a well-defined meaning, and included all kinds of timber suitable in size and length to make logs eight inches in diameter and eight feet long. Held, that the term "saw timber" referred to growing trees of all varieties which could be used to advantage in any class of manufacture or construction, so that the reservation was of all timber growing on the land that would make logs eight inches in diameter and eight feet in length. *Teachout v. Clough*, 127 S. W. 672, 675, 677, 143 Mo. App. 474.

## SAWED LUMBER

Lumber which has been subjected to a fireproofing process that largely increases its value, but which can still be applied to the ordinary uses of sawed lumber, is not dutiable as "manufacture of wood," but as "sawed lumber." *F. W. Myers & Co. v. United States*, 147 Fed. 204, 205, 77 C. C. A. 430.

## SAWMILL

Addition to, see Addition.

Operating sawmill, see Operate.

Where plaintiff purchased of defendant a sawmill and all machinery connected therewith located on certain land, reserving everything on the land, except timber, sawmill, and machinery, the term "sawmill" was limited to a machine constructed for the purpose of sawing logs, and therefore did not include the shed covering the mill. A sawmill is a machine for sawing logs, whether or not it is accompanied by a shed; and a shed covering such a mill is not a part of the sawmill, but is a part of the real estate to which it is attached. A saw is a "tool for cutting," and a "mill" is "a machine for grinding." According to the standard lexicographers, the first meaning of "mill" is a machine or device for grinding, cutting, etc. The particular purpose for which it is designed is usually designated by a prefix, such as sawmill, gristmill, etc. The term "mill" necessarily carries with it the idea of a machine, device, or tool, but it does not necessarily convey with it the idea of a shed or house. The term "mill" is frequently used to designate, not only the machine used for grinding, cutting, etc., but also in a general and comprehensive sense to designate the house or shed where such machinery may be in operation, and many lexicographers give this as the secondary meaning of the word. *Alexander v. Beekman Lumber Co.*, 95 S. W. 449, 451, 78 Ark. 169 (citing *Thesaurus Dict. Eng. Lang.* and *Worcester. Cent. Webster, and Internat. Dicts.*).

The description "one medium Rusher unmounted left-hand sawmill," in a mortgage describing separately the various pieces of machinery and material going to make a complete sawmill, does not include other complete pieces of machinery particularly described in the mortgage, but is restricted to the specific piece of machinery thereby described, though the word "sawmill" may include all of the machinery necessary in the operation of such a mill, as well as the building and the ground on which it is situated. *McGregor v. Port Huron Engine & Thresher Co. (Tex.)* 120 S. W. 1128, 1133.

## SAWMILL PURPOSES

See Suitable for Sawmill Purposes; Timber for Sawmill Purposes.

## SAY

An allegation in an indictment that defendant did falsely and maliciously impute a want of chastity to one B. by then and there, in the presence of A. P., "falsely and maliciously saying of and concerning her," etc., is sufficient under Rev. St. 1892, § 2419, providing that whoever "speaks of and concerning any woman," etc., since the word "saying," used in connection with "in the presence of and in the hearing of" in the indictment, is equivalent to the word "speaking" in the statute. *Stutts v. State*, 42 South. 51, 52, 52 Fla. 110.

## SCAFFOLD

As appliance, see Appliance.

As place of work, see Place.

Erection of scaffold, see Erect—Erection.

Webster's International Dictionary defines a "scaffold" as a temporary structure of timber, boards, etc., for various purposes, as for supporting workmen and material in building. *Caddy v. Interborough Rapid Transit Co.*, 88 N. E. 747, 750, 195 N. Y. 415, 30 L. R. A. (N. S.) 30.

The words "scaffolding" and "mechanical contrivance" include any contrivance made of parts erected or used for support in or about the particular kinds of work mentioned in the statute. *Koepp v. National Enameling & Stamping Co.*, 139 N. W. 179, 184, 151 Wis. 302.

A platform, made by planks resting on crosspieces nailed to upright timbers, for workmen to stand on while attaching iron plates to a vessel, is a "scaffold," within Labor Law § 18, requiring employers to furnish employes safe scaffolding when working on buildings or other structures. *Herman v. P. H. Fitzgibbons Boiler Co.*, 120 N. Y. Supp. 1074, 1075, 136 App. Div. 286. So where separate platforms were erected at varying heights upon upright beams in the construction of a building, each platform may be deemed a separate "scaffold" within the Labor Law, as affecting the right of a workman to recover for injury received while standing on the lower platform in removing the one above it. *Lyons v. McNulty Bros.* 136 N. Y. Supp. 39, 77 Misc. Rep. 176. The term includes a board laid across stringers of an unfloored hallway on the fifth floor of a building in course of construction for passage from room to room. *Convey v. Finn*, 114 N. Y. Supp. 864, 866, 130 App. Div. 440; a beam of timber hung from one column to another, and lashed to them by ropes, for the purpose of holding the iron girders of a steel building until the wall was erected between the beams, and also to furnish a place for the employes to walk in spacing the girders. *Welk v. Jackson Architectural Ironworks*, 90 N. Y. Supp. 541, 542, 98 App. Div. 247; a staging consisting of "painter's horses"

and planks placed on the horses about eight feet above the floor of a car repair shop, *Caddy v. Interborough Rapid Transit Co.*, 88 N. E. 747, 748, 195 N. Y. 415, 30 L. R. A. (N. S.) 30; a plank placed between brick piers for the use of a painter, *Holsapple v. International Paper Co.*, 137 N. Y. Supp. 450, 452, 152 App. Div. 606; planks laid on "horses" placed on each side of a hole in the floor above the basement of a steel building in process of construction for the use of the workmen, *Warren v. Post & McCord*, 112 N. Y. Supp. 960, 964, 128 App. Div. 572; and planks laid on arch beams in a building in process of construction for the use of employes to carry material, *Nixon v. Thompson-Starrett Co.*, 115 N. Y. Supp. 130, 131 App. Div. 152; but not ties laid on the deck of a bridge in process of construction for the purpose of accommodating a traveling derrick, and also used by a signalman as a place to stand while assisting in shifting the rails, *Brady v. Pennsylvania Steel Co.*, 119 N. Y. Supp. 75, 77, 134 App. Div. 372. This statute does not apply to ordinary staging put up in a room about five feet above the floor to facilitate the placing of fixtures; and a master is not liable for an injury to an employe from its use under the statute, where he is not liable under the common law. *Schapp v. Bloomer*, 73 N. E. 563, 564, 181 N. Y. 125.

Plaintiff, a carpenter, was employed in erecting a house. A scaffold for the work was built in sections. Two planks laid side by side rested on crosspieces, one end of a crosspiece being nailed to the house, and the other end to an upright. As the work progressed, the scaffold was raised; the planks being put on crosspieces higher up. While plaintiff was doing this, one plank being placed on the higher crosspieces, and he being on the other, the one on which he was walking broke from a defect therein. Held, that the "scaffold" was one used in erecting the building, and furnished by the employer for that purpose, within the Labor Law, so as to make the employer liable, and that plaintiff was not merely changing the scaffold, and not using it as such. *Jones v. Gamble*, 126 N. Y. Supp. 143, 145, 140 App. Div. 733.

Defendant desiring to remove certain false work in the ceiling over the bins of an elevator, stringers were laid on angle irons standing 3 feet above the floor on each side of an open bin about 20 feet apart, and loose planks were laid across the stringers. The stringers were made, under directions of defendant's assistant superintendent, out of 2x6 material which had been previously used, varying from 5 to 9 feet long. These were laid together, overlapping each other, and fastened together with nails, which did not go through more than two planks; the whole stringer being 21 feet long and 6 inches thick. Plaintiff, a laborer, laid two of the stringers

on the angle irons over one of the open bins, and while taking down the false work a piece 2x6 and 5 feet long fell on the plank, breaking one of the stringers and precipitating plaintiff to the bottom of the bin, 75 feet below. Held, that the structure was a "scaffold" within the Labor Law, which defendant caused to be furnished to plaintiff, making defendant absolutely answerable for the safety of such erection. *MacDonald Engineering Co. v. Manns*, 177 Fed. 203, 204, 101 C. C. A. 373.

## SCALDING WATER

Injuries from, as accident, see Accident—Accidental.

## SCALE

See Stumpage Scale.

## SCALE WEIGHT

"Scale weight" is the determination of the weight by what the material actually weighs in pounds. *Hale Bros. v. Milliken*, 90 Pac. 365, 369, 5 Cal. App. 344.

## SCALES

See Competent Scales.

## SCALP

### SCALPER

"Scalpers" are persons engaged in buying and selling railroad tickets as brokers. *Illinois Cent. R. Co. v. Caffrey*, 128 Fed. 770.

A "scalper," as used in an attrition mill for preventing foreign substances from getting into the mill, is a device consisting of a sieve that oscillates. It is spread under the elevator that carries the feed to the grinding mill, so that the feed passes over this before it reaches the attrition mill. The oscillation of the sieve shoves the foreign substances to one side while the fine grain goes through. It is a device to prevent spoiling the mills. *Sticht v. Buffalo Cereal Co.*, 101 N. Y. Supp. 905, 907.

## SCAMMONY RESIN

As medicinal preparation, see Medicinal Preparation.

## SCANDAL

"Scandal" in a pleading consists of any unnecessary allegation bearing cruelly on the moral character of an individual, or stating anything contrary to good manners, or anything unbecoming the dignity of the court to hear." *McNulty v. Wiesen*, 130 Fed. 1012, 1013.

"Scandal" is impertinent matter which is also criminatory or which otherwise reflects on the character of an individual, and no matter which is not also impertinent will

constitute scandal, however strong its aspersions or reflections. *Manhattan Trust Co. v. Chicago Electric Traction Co.*, 188 Fed. 1006, 1008.

"Pruriency" is an elastic term. Matter and conduct which some good people deem prurient other good people deem chaste. There is no fixed standard of pruriency. It is largely a matter of education and taste. And the same is true in respect of 'scandal' and 'shamelessness.' Hence where a critic published of a book and its author that they were a "scandal" and "shameless," and that the author was "prurient," under circumstances that would not justify the charges beyond question, it was for the jury to say whether the inferences drawn by the critic from the facts were reasonably possible, and therefore permissible. *MacDonald v. Sun Printing & Publishing Ass'n*, 92 N. Y. Supp. 37, 40, 45 Misc. Rep. 441.

### SCANDALUM MAGNATUM

The dignity of dignitaries in olden times was under especial protection, while words spoken in derogation of a common person were, at the most, mere slander; such words spoken in derogation of a peer, a judge, or other great officer of the realm were called "scandalum magnatum." *Del Ponte v. Società Italiana Di M. S. Guglielmo Marconi*, 60 Atl. 237, 239, 27 R. I. 1, 70 L. R. A. 183, 114 Am. St. Rep. 17.

### SCENIC RAILWAY

A "scenic railway" being a railway on which cars are run for the purposes only of amusement, where the track is elevated for a considerable distance at the place of beginning and built on an incline, the cars being propelled by the force of gravity, is not "such place of public amusement" as a "merry-go-round," and is not prohibited from being kept open on Sunday, by Rev. Codes, § 6825. In re Hull, 110 Pac. 256, 257, 18 Idaho, 475, 30 L. R. A. (N. S.) 465.

### SCHEDULE

See Duly Scheduled.

Since the word "schedule," as used in the statute requiring a railroad company to keep open its depots for a specified period preceding the arrival of passenger trains allowed "by schedule" to stop, implies that the operation of a train is governed by rule, an allegation, in a complaint in an action against a railroad company for injuries sustained by an intended passenger by reason of being compelled to wait out of doors for a train, that the train was due "to arrive and stop for the taking on of passengers" at a time stated, does not show a violation of the statute. *Draper v. Evansville & T. H. R. Co.*, 74 N. E. 889, 165 Ind. 117, 6 Ann. Cas. 569.

A "schedule" or "inventory" is a list or catalogue of property merely, without attempt to describe the same in detail. A "schedule" of property for taxation is a list of assessable articles without attempt to describe the same in detail. A "statement" is "a formal, exact, detailed presentation." A "statement" would contain all that would appear in a "schedule" or list, but would contain minutiae and matter of description not necessary to a "schedule" or "inventory." Section 49 of the Revenue Act (3 Starr & C. Ann. St. 1896, p. 3423, c. 120), prescribing a penalty for the failure of a railroad to file a statement with the county clerk, refers to the statement or schedule showing the property held for right of way, and the length of tracks and turnouts and tracts of land through which the road runs (which property is afterwards described as "railroad track") which is required to be filed by section 41 of the act, and cannot be extended by implication to include the failure to report the value of the railroad track annually, or to return the lists of rolling stock required to be returned by section 44, or to the failure to make the list or schedule of personal property or real estate, which is required to be listed by section 46. *Chicago, R. I. & P. R. Co. v. People*, 75 N. E. 368, 370, 217 Ill. 164.

The action of the county board of supervisors in auditing and certifying the expenses of primary elections, as required by Code Supp. 1907, § 1087a5, is a part of its proceedings, and a schedule of the items of such expenses is within Code, § 441, requiring the publication of "schedules of bills allowed." *Index Printing Co. v. Board of Sup'rs of Muscatine County*, 130 N. W. 401, 402, 150 Iowa, 411.

### SCHEDULE RATE

See Standard Schedule Rate.

### SCHEME

See Confidence Scheme; Similar Scheme. Scheme of chance, see Chance.

To constitute the offense of "using the mails to effectuate a scheme to defraud," within Rev. St. § 5480, the scheme must have contemplated the use of the post office establishment to effectuate it, and not the use of the mails as a mere incident to some fraudulent scheme. *United States v. McCrory*, 175 Fed. 802, 804.

A scheme by the owner of a saloon, to be effected by opening correspondence through the mails, to induce different persons to each purchase a half interest in his saloon as a partner, and to pay largely more than it was worth, by misrepresenting its value and the amount of its profits, and to thus obtain their money without their receiving any equivalent therefor, held a "scheme to defraud," within the meaning of Rev. St. § 5480, and to be sufficiently charged in an indictment there-

under. *Van Deusen v. United States*, 151 Fed. 989, 81 C. C. A. 175.

The elements of the offense of devising a "scheme" or "artifice" to defraud, to be effected by means of the post office establishment of the United States in violation of Rev. St. § 5480, are: (1) That defendant devised the "scheme" to defraud, as alleged; (2) that he intended to effect such "scheme" or "artifice" by opening correspondence or communication with the persons intended to be defrauded, by means of the post office establishment of the United States, or by inciting them to open correspondence with him respecting such "scheme" or "artifice"; and (3) that in the furtherance and execution of the "scheme," or in attempting to further the same, defendant deposited or caused to be deposited in the United States post office letters, papers, writings, or circulars, or took from the post office papers or writings connected with the furtherance of such "scheme." A "scheme" is a design or plan formed to accomplish some purpose. An "artifice" is an ingenious contrivance or device of some kind and, when used to defraud, corresponds with "trick" or "fraud." Hence a "scheme" or "artifice" to defraud, within the meaning of the statute, is to form some plan, device, or trick to perpetrate the fraud upon another. *United States v. Dexter*, 154 Fed. 390, 893, 896.

An indictment for using the mails to defraud, in violation of Rev. St. § 5480, by subdividing a tract of land in Louisiana of small value into lots 10 or 20 feet square, and selling certificates, each purporting to give the holder an option to purchase an interest in a lot, upon false representations that the lots were within an oil district and very valuable, and that large cash offers had been made for certain of the same, construed, and held not to charge a "lottery" or a "gambling enterprise" but a "scheme and artifice to defraud" within the meaning of the statute, which, when carried on by means of correspondence through the mails, constituted a violation thereof. *Gourdain v. United States*, 154 Fed. 453, 458, 83 C. C. A. 309.

To constitute a "scheme to defraud" to be carried out by the use of the mails, in violation of Rev. St. § 5480, as amended by Act March 2, 1889, c. 393, § 1, 25 Stat. 873, it is not necessary that the scheme should be fraudulent on its face; but, although it is apparently a legitimate business, it is within the statute if there was an intention not to conduct such business honestly, but to use it to defraud. *McConkey v. United States*, 171 Fed. 829, 832, 96 C. C. A. 501.

A scheme to induce persons to purchase stock in a corporation by false and fraudulent representations that the money paid would go into the corporation's treasury for development purposes, that the officers would not sell their shares, and believed that they

would become of enormous value, that stock held by officers was nontransferable, that only treasury stock was on the market, and that all increases on the selling of the stock was justified by the development of the business, was a "scheme and device to defraud," within Rev. St. § 5480, prohibiting the use of the mails in furtherance of a scheme or artifice to defraud, etc.; the statute being intended broadly to prevent the use of the mails to despoil the public, whether such result was intended to be accomplished by plain falsehoods, or by the most alluring and complicated contrivances. *Wilson v. United States*, 190 Fed. 427, 433, 111 C. C. A. 231.

An indictment for violating Rev. St. § 5480, as amended by Act Cong. March 2, 1889, c. 393, § 1, 25 Stat. 873, prohibiting the use of the United States mails in furtherance of a "scheme or artifice to defraud," must allege, not only that the defendant had devised a scheme or artifice to defraud, but must also plead facts showing what the artifice was, wherein the fraud consisted, and how it was to be accomplished, the words "scheme or artifice" not being equivalent to a plan or mode of effecting a fraud, but must be a plan so cunningly devised and presented as to appeal to human passion for gain, by untruthful and seductive embellishment of advantages, begetting confidence where it would not otherwise be bestowed; and hence an indictment merely charging that defendant caused another to order a diamond ring from complainant to be paid for on the installment plan, through the United States mails, with the intent not to pay for the same, did not charge a scheme to defraud, and was therefore insufficient. *Etheredge v. United States*, 186 Fed. 434, 437, 108 C. C. A. 356.

The offense of using the mails in furtherance of "schemes devised for the purpose of obtaining money or property under false pretenses," denounced by Rev. St. § 3894, includes only schemes having a similitude to the lottery and other like schemes particularly described by the particular words of the section, and does not cover the use of the mails to promote other schemes to obtain money or property by means of false pretenses, which is embraced by the provisions of section 5480, making criminal the use of the mails to carry on any scheme or artifice to defraud. Making false and fraudulent representations through the mails to prospective buyers of cattle, to promote a scheme to defraud by inducing them to come and inspect the cattle, after which inferior cattle were to be substituted in the place of those inspected and sold, is not punishable under Rev. St. § 3894, making criminal the use of the mails in furtherance of lotteries, or schemes of gain dependent upon chance, or "schemes devised for the purpose of obtaining money or property under false pretenses," but such acts constitute the offense prohibited by section 5480, of using the mails to carry on any

scheme or artifice to defraud. *United States v. Stever*, 32 Sup. Ct. 51, 53, 222 U. S. 167, 56 L. Ed. 145.

## SCHISM

A "schism" being a splitting up of a church, a schism took place in the general assembly of the Cumberland Presbyterian Church when one part of the assembly of 1905 declared that church by that name to be a thing of the past, while the other part, carrying out a previously announced purpose, met at a hall and completed the organization of the general assembly which claimed to speak for the church. *Ramsey v. Hicks*, 89 N. E. 597, 598, 44 Ind. App. 490.

## SCHOOL

See Common School; District School; Evening Schools; Free Public School; High School; Industrial School; Primary and Grammar Schools; Private School; Public School; Sectarian School.

Conducting correspondence school as interstate commerce, see Interstate Commerce.

Regular school, see Regular School or College.

See, also, Kindergarten.

"A 'school' is a place of primary instruction; an establishment for the instruction of children; as a primary school; a common school; a grammar school." *Northrop v. City of Richmond*, 53 S. E. 962, 963, 105 Va. 335.

A "school" is an institution of learning below a college or university, a place of primary instruction, and generally refers to common or public schools maintained at the expense of the public, and is a generic term, and denotes an institution for instruction or education, and is not measured by the walls of a building. *State v. Kalaher*, 129 N. W. 1060, 1061, 145 Wis. 243.

The word "schools," in Const. art. 9, § 2, providing that the general supervision of the public schools shall be vested in a board of education, and section 5 providing against the use of public funds in aid of any church or religious society to help support any school, academy, seminary, college, or other literary or scientific institution, refers to the public, free common schools generally adopted in the country, having special specific reference to the district schools throughout the state established for the training and instruction of the youth in the elementary branches of learning below the grade of academy, seminary, college, university, or other literary or scientific institution. *Pike v. State Board of Land Com'rs*, 113 Pac. 447, 451, 19 Idaho, 268, Ann. Cas. 1912B, 1344.

The word "school," except when applied to a building or place, implies plurality or

consociation. *St. John's Military Academy v. Edwards*, 128 N. W. 113, 114, 143 Wis. 551, 139 Am. St. Rep. 1123.

Act June 18, 1895 (P. L. 203), provides that persons in charge of schools shall refuse admission to children except on certificate of a physician that they have been successfully vaccinated or had smallpox. Held, that such duty is imposed upon the superintendents, principals, and teachers in charge of schools, and mandamus will not lie to compel school directors to exclude a child from school who has failed to obtain the certificate. By "school or schools" the Legislature certainly meant the places where the pupils are attending, and the daily notice to be given there can be given only to teachers, since the directors are not daily present at the "schools." *Commonwealth ex rel. Carson v. Rowe*, 67 Atl. 56, 57, 218 Pa. 168.

### College

A commercial college, teaching such branches as arithmetic, reading, penmanship, spelling, bookkeeping, geography, history, etc., is a "school," within the meaning of section 13, art. 1, c. 77, Comp. St. 1903 (*Cobbe's Ann. St. 1903*, § 10412). *Rohrbaugh v. Douglas County*, 107 N. W. 1000, 1001, 76 Neb. 679.

The word "schools" is one of broad signification, and sometimes it may appear, by the connection in which it is used, to include higher institutions of learning; but ordinarily, and without something to indicate that a wider meaning was intended to be given to the word, it will not be taken to include higher institutions of learning, such as colleges, universities, or institutions for the teaching of trades, professions, or business; and where a street railway was, as a condition to a grant of a location, required to provide to pupils in attendance upon the public schools, the state normal school of W., or any school in W., transportation at half price while going to and from school, neither a college nor a business institute in W. could fairly come within the language of the rest. *Murphy v. Worcester Consol. St. Ry. Co.*, 85 N. E. 507, 512, 199 Mass. 279.

Rev. Pol. Code, § 2859, as amended by Laws 1907, c. 175, provides that no person shall maintain any place for the sale or disposal of intoxicating liquors within 300 feet of the grounds of any public or private school. Laws 1907, c. 177, declares that no license shall be granted for the sale of intoxicating liquors at any place within one-third of a mile of any college or academy which gives instruction in regular classical and scientific courses, and that the sale of liquor within such prescribed territory may be enjoined, provided that the act shall not be construed to apply to any school or college devoted only to instruction in business methods. Civ. Code, § 2443, provides that words in use in any statute are to be under-

stood in their ordinary sense, except when a contrary intention plainly appears. Held, in an action to enjoin the maintenance of a licensed saloon within 300 feet of an institution or "business college" conducted by plaintiff in which he gave instruction in book-keeping, typewriting, stenography, commercial law, etc., that "school" meant a place for instruction in any branch or branches of knowledge, an establishment imparting education, also the institution or collective body of teachers and learners in such a place; and that, without qualification, was used of an institution for teaching children, and that, in view of the express exclusion of such institutions as that of the plaintiff by Laws 1907, c. 177, it was not such a school as was comprehended by section 2859 as amended; and hence that plaintiff was not entitled to an injunction. *Granger v. Lorenzen*, 133 N. W. 259, 260, 28 S. D. 295.

#### **Different schools in same building**

*Sanborn's St. Supp.* 1906, § 1548, subds. 5, 6, provide that no liquor license shall be granted for a saloon within 300 feet of any public or parochial school ground, whenever a list of the parents and guardians of pupils enrolled in any such school, together with a remonstrance by a majority thereof, are filed with the city clerk. There were both high school and grade school pupils in the school building in question, but the list and remonstrance did not contain a majority of the parents and guardians of children in either, but only contained a majority of parents and guardians of children enrolled in the high school building. Held, that the word "school" did not mean all the pupils in one school building, and that two schools may be conducted in one building, or one school in two buildings, and the list was therefore insufficient. *State v. Kalaher*, 129 N. W. 1060, 1061, 145 Wis. 243.

#### **Private school**

A "school," in the ordinary acceptation of its meaning, is a place where instruction is imparted to the young. If a parent employs and brings into his residence a teacher for the purpose of instructing his child or children, and such instruction is given as the law contemplates, the meaning and spirit of the law have been fully complied with. This would be the school of a child or children so educated, and would be as much a private school as if advertised and conducted as such. A parent in good faith employed a teacher formerly employed in the public schools to teach his child. It was arranged that the child should be taught in all the branches taught in the public schools. The child attended the teacher's home regularly every school day, and received instruction equal to that which could have been received at the public schools. The teacher did not advertise herself as keeping a private school, and had no regular tuition fixed nor any

school equipments, and made no arrangement to take other pupils. This was a school, within *Burns' Ann. St.* 1901, § 6033a, providing that every parent shall be required to send his child to a public, private, or parochial school each year. *State v. Peterman*, 70 N. E. 550, 551, 32 Ind. App. 665.

#### **As purely public charity**

See *Purely Public Charity*.

#### **School of dancing, riding, etc.**

A "school" within the meaning of the constitutional provision exempting certain property from taxation is a place where systematic instruction in useful branches of learning is given by methods common to schools and institutions of learning, and does not ordinarily include schools for teaching dancing, riding, etc. *People v. Deutsche Evangelisch Lutherische Jehovah Gemeinde Ungeänder Augsburgische Confession*, 94 N. E. 182, 164, 249 Ill. 132.

#### **SCHOOL ACCOMMODATIONS**

See *Suitable School Accommodations*.

#### **SCHOOL BOARD**

See *High School Board*.

As owner, see *Owner*.

#### **SCHOOL BOOK PUBLISHER**

As public agency, see *Public Agency*.

#### **SCHOOL CHILDREN**

A franchise granted an electric railroad company provides that "school children" going to and returning from school shall ride for half fare. *Rem. & Bal. Code*, §§ 4317, 4333, and 4366, speak of those attending the State University, the State College, and normal schools as "students," and in chapter 8, § 4406, where common schools are defined, the Legislature adopts the word "children." In section 4714, under the title "Compulsory Education," the law refers to "child" or "children." Held that, as the common acceptance of the words "school children" is children attending the common school, it must be considered that the parties had that in mind at the time of the granting of the franchise, so that students at the State University and of business colleges would not be entitled thereunder to ride for half fare. *State ex rel. City of Seattle v. Seattle Electric Co.*, 128 Pac. 220, 221, 71 Wash. 213, 43 L. R. A. (N. S.) 172.

#### **SCHOOL CORPORATION**

As corporation, see *Corporation*.

*Code*, § 2794, which provides that, "upon the written petition of any ten voters of a city, town, or village of over one hundred residents to the board of the school township in which the portion of the town having the largest number of voters is situated, such board shall establish the boundaries of a proposed independent district, including therein all of the city, town or village," etc., when

read in the light of the history of the school legislation, should be considered as though the words "school corporation" were substituted or "school township," and is applicable to a case where the town includes territory which was a part of one or more independent school districts. *Rural Independent School Dist. No. 10 v. New Independent School Dist.*, 94 N. W. 284, 285, 287, 120 Iowa, 119.

### SCHOOL DIRECTOR

As holding an office, see Officer.

### SCHOOL DISTRICT

See Town School District.

Any school district, see Any.

Assets of school district, see Assets.

Inhabitants of, see Inhabitant of District.

Institution as embracing school district, see Institution.

A "school district" is composed of certain contiguous territory, governed by one school board, authorized to select one school site, secure one schoolhouse, and conduct one school, except where separate schools are required for colored pupils. *Kellogg v. School Dist. No. 10 of Comanche County*, 74 Pac. 110, 117, 13 Okl. 285.

A legally constituted "school district" is the territory erected into a school district by operation of law. The board of education do not constitute the district. That is merely the method provided for its government, the machinery for managing the schools in the district. *McCarter v. Board of Education of Borough of Bradley Beach*, 63 Atl. 93, 94, 73 N. J. Law, 301.

A "school district" is not the county. It is a legal subdivision of the county, but it is a distinct entity, and is in this state a distinct municipal corporation. *Ballinger's Ann. Codes & St. § 468*, requiring prosecuting attorneys to give advice to all the county and precinct officers and directors and superintendents of common schools as to their official business, and to draw up in writing all contracts and like instruments of an official nature, for the use of said officers, does not require a prosecuting attorney to appear in court and conduct litigation on behalf of a school district without compensation other than that received in his official capacity. *Bates v. School Dist. No. 10 of Pierce County*, 88 Pac. 944, 945, 45 Wash. 498.

#### As educational corporation or society

See Educational Corporation; Educational Societies.

#### As municipality

See Municipality; Municipal Corporation.

#### As political subdivision

See Political Subdivision.

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### As quasi corporation

As quasi public corporation, see Quasi Public Corporation.

A "school district" is a quasi corporation created pursuant to legislative enactment. It can exercise only those powers which are expressly conferred by statute or which arise therefrom by necessary implication. *A. H. Andrews Co. v. Delight Special School Dist.*, 128 S. W. 361, 362, 95 Ark. 26.

A "school district" is but a quasi corporation, with limited powers, and can do only those things which the law expressly allows or implies. *Montpeller Sav. Bank & Trust Co. v. School Dist. No. 5*, 92 N. W. 439, 442, 115 Wis. 622; *Schmutz v. Special School Dist. of City of Little Rock*, 95 S. W. 438, 439, 78 Ark. 118 (citing *Memphis Trust Co. v. Board of Directors of St. Francis Levee Dist.*, 62 S. W. 902, 69 Ark. 284; 1 Dill. Mun. Corp. § 22).

### As town

See Town.

### SCHOOL FACILITIES

See Additional School Facilities; Facilities.

### SCHOOL FOR FEEBLE-MINDED

As agent, see Agent.

### SCHOOLHOUSE

The word "schoolhouse," as used in Acts 1908, c. 27, § 13 (Code Supp. 1909, c. 45, § 1571), requiring the board of education of every district to provide by purchase or condemnation suitable schoolhouses and grounds, includes the land for schoolhouses. *State ex rel. Post v. Board of Education of Clarksburg School Dist.*, 76 S. E. 127, 71 W. Va. 52.

In a statute providing that the school trustees shall have power to remove "schoolhouses" when directed by a vote of the district, the term "schoolhouse" does not mean simply the house, but refers rather to the school plant, including the general equipment, furniture, maps, charts, globes, and pupils and teacher. A school board cannot disregard the right of the people to say what shall be done with reference to the permanent location of the school. *State ex rel. Bean v. Lyons*, 96 Pac. 922, 923, 925, 37 Mont. 354 (quoting and adopting definition in *State ex rel. Jay v. Marshall*, 32 Pac. 648, 13 Mont. 136).

#### As building

See Building.

#### As dwelling

See Dwelling—Dwelling House.

#### High school

A high school is fairly included in the terms "for school purposes" and "schoolhouse or schoolhouses," in the statute declaring that the board shall decide that it is necessary to raise money for purchasing or taking



and condemning lands for school purposes or for erecting a schoolhouse or schoolhouses. *Carling v. Jersey City*, 58 Atl. 395, 397, 71 N. J. Law, 154.

#### **Nurses' training school**

Liquor Tax Law (Laws 1896, p. 51, c. 112) § 11, subd. 1, relates to the sale of liquors to be drunk upon the premises, and section 24, subd. 2, prohibits traffic under the former section in any building on the same street and within 200 feet of a building occupied exclusively as a schoolhouse. Held, that the term "schoolhouse" included all schoolhouses in which the public common schools and high schools were conducted and private and semipublic schools of the same grade, but did not include a building in which a nurses' training school was conducted. In re Townsend, 88 N. E. 41, 42, 195 N. Y. 214, 22 L. R. A. (N. S.) 194, 16 Ann. Cas. 921.

#### **As public building**

See Public Building.

#### **As public place**

See Public Place.

### **SCHOOLHOUSE SITE**

See Site.

### **SCHOOL LAND PURCHASER**

See Purchaser.

### **SCHOOL LANDS**

As public grounds, see Public Grounds.

The term "school lands" within Const. art. 9, § 8, providing that not to exceed 25 sections of school lands shall be sold in any one year which sale shall be in subdivisions of not to exceed 160 acres to any one individual, company, or corporation embraces only sections 16 and 36 in each township, and does not include lands granted by Congress to the state for specific educational purposes which were granted to the state for the use of the public free common schools. *Pike v. State Board of Land Com'rs*, 113 Pac. 447, 451, 19 Idaho, 268, Ann. Cas. 1912B, 1344.

### **SCHOOL MATTERS**

See Election Pertaining to School Matters.

### **SCHOOL NOT CONDUCTED FOR PROFIT**

See Profit.

### **SCHOOL OFFICER**

All other school officers, see All Other.  
As civil officers, see Civil Officer.

### **SCHOOL PROPERTY**

Improvement of school property, see Improvement.

Pol. Code, § 1617, subd. 4, empowering the school board to rent school property, does not mean to rent property for use of schools, because such property would not be "school property." *Mahoney v. Board of*

Education of City and County of San Francisco, 107 Pac. 584, 586, 12 Cal. App. 293.

### **SCHOOL PURPOSES**

See Building Used for; Occupied for School Purposes; Unoccupied for School Purposes.

A "high school" is fairly included in the term "school purposes," in the statute relating to raising money for acquiring land for "school purposes." *Carling v. Jersey City*, 58 Atl. 395, 397, 71 N. J. Law, 154.

### **SCHOOL TAX**

As county tax, see County Tax.

### **SCHOOL TOWNSHIP**

Code, § 2794, which provides that, "upon the written petition of any ten voters of a city, town, or village of over one hundred residents to the board of the school township in which the portion of the town having the largest number of voters is situated, such board shall establish the boundaries of a proposed independent district, including therein all of the city, town or village," etc., when read in the light of the history of the school legislation, should be considered as though the words "school corporation" were substituted for "school township," and is applicable to a case where the town includes territory which was a part of one or more independent school districts. *Rural Independent School Dist. No. 10 v. New Independent School Dist.*, 94 N. W. 284, 287, 120 Iowa, 119.

Under the express provisions of Burns' Ann. St. 1908, §§ 6404, 6405, a "school township" is a corporation, and has control of the schools, schoolhouses, and school funds. It is a distinct legal entity from that of the civil township. *Teepie v. State ex rel. Bower*, 86 N. E. 49, 51, 171 Ind. 268.

### **SCHOOL TRUSTEE**

As officer, see Officer.

As state officer, see State Officer.

### **SCHOOL YEAR**

Year as school year, see Year.

## **SCIATICA**

In an action for injuries to a passenger, where plaintiff's evidence tended to show that he was afflicted with "sciatica," which is defined as neuralgia of the sciatic nerve, and, in a popular sense, any affection of the hip or adjoining parts, a verdict for \$1,000 held excessive and reduced to \$250. *Brannon v. Yazoo & M. V. R. Co.*, 57 South. 172, 173, 129 La. 916.

## **SCIENCE**

See Christian Science.

The term "science, art, or skill," as a limitation of expert evidence, is not confined

to matters involving abstruse scientific conditions. *Schwantes v. State*, 106 N. W. 237, 247, 127 Wis. 160 (citing *Webst. Dict.*; *Page v. Parker*, 40 N. H. 47; *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153; *Heald v. Thing*, 45 Me. 392; *Lawson, Exp. Ev.* p. 229; *Whart. Law of Ev.* [3d Ed.] § 444).

### SCIENTIFIC ASSOCIATION

An incorporated school is a "scientific" or "literary" association within St. 1898, § 1038, exempting from taxation property of such associations. *Board of Trustees of Lawrence University v. Outagamie County*, 136 N. W. 619, 620, 150 Wis. 244.

### SCIENTIFIC INSTITUTION

Under Rev. St. c. 9, § 8, providing for taxation of real estate against the person in possession, a university fraternity in possession of a chapter house, built on the campus under a contract to purchase from the university, is liable for taxes assessed against the property; the fraternity not being exempt as a literary or "scientific institution" within section 6, par. 2. *Inhabitants of Orono v. Kappa Sigma Society*, 80 Atl. 831, 832, 106 Me. 320.

### SCIENTER

Guilt knowledge necessary to fraud is sometimes designated by the technical term "scienter." *Collins v. Chipman*, 95 S. W. 666, 673, 41 Tex. Civ. App. 563 (citing *Big. Fraud*, 117); *Mason v. Moore*, 76 N. E. 932, 937, 73 Ohio St. 275, 4 L. R. A. (N. S.) 597, 4 Ann. Cas. 240; *Curtley v. Security Sav. Soc.*, 89 Pac. 180, 183, 46 Wash. 50.

"A false representation, made with the knowledge of its falsity by the utterer, is 'scienter' in law, and therefore proof that the party made the false representation concerning a material fact with knowledge that it was false at the time it was made, satisfies the law in so far as 'scienter' is concerned, for, from the fact that the representation was made with knowledge of its falsity, it must be taken that it was made with an intent to deceive and the corrupt element or evil design, actual knowledge of its falsity being present, 'scienter' is thereby actually established. On an allegation under this phase of the scienter, the issue is the actual evil intent, as distinguished from honest error and innocent mistake. A second phase of the law of scienter arises when the utterer of the representation does not know it to be false, but he asserts a material fact as of his own knowledge, when in truth he has no knowledge on the subject as to whether the representation is true or false. Under this phase of the matter, the law being satisfied by proof of the party's reckless or wanton conduct in asserting positively as of his own knowledge a fact concerning which he knew nothing, raises up and supplies the scienter constructively from the reckless conduct, and,

since it would be impossible to prove that the utterer knew or believed at the time that his statement was untrue, the question of his good or bad faith in so recklessly representing facts as of his own knowledge is not an issue, for the law steps in and denounces the whole as fraudulent by supplying the scienter. It would not be competent for him to show that he believed the facts to be as stated by him at the time." *Serrano v. Miller & Teasdale Commission Co.*, 93 S. W. 810, 813, 117 Mo. App. 185.

### SCILICET

See *Videlicet*.

### SCINTILLA OF EVIDENCE

A "scintilla of evidence" is any material evidence which, if true, would tend to establish the issue in the mind of a reasonable juror. *Taylor v. Atlantic Coast Line R. Co.*, 59 S. E. 641, 643, 78 S. C. 552; *Crosby v. Seaboard Air Line Ry.*, 61 S. E. 1064, 1067, 81 S. C. 24.

The "scintilla of evidence rule" is one under which it is the duty of the trial court to submit the case to the jury if there is a scintilla of evidence to sustain the plaintiff's case, but the verdict cannot stand upon a "scintilla of evidence" against overwhelming credible evidence to the contrary. *Cincinnati, N. O. & T. P. R. Co. v. Zachary's Adm'r* (Ky.) 106 S. W. 842, 843. See, also, *Boswell v. First Nat. Bank of Laramie*, 92 Pac. 624, 635, 16 Wyo. 161.

Whether there is only a "scintilla of evidence" is for the court to determine; and, where the court so finds, it must withdraw the case from the jury, and it cannot submit the case to the jury because it finds there is more than a scintilla, and yet instruct that, if the jury find there is only a scintilla, they will not be justified in a verdict for plaintiff. *Consolidated Gas, Electric Light & Power Co. v. State, to Use of Smith*, 72 Atl. 651, 653, 660, 109 Md. 186 (citing *Baltimore & O. R. Co. v. State, to Use of Savington*, 18 Atl. 969, 71 Md. 590).

### SCIRE FACIAS

The "scire facias" is a common-law writ, and not a statutory remedy to obtain a personal judgment, and based upon the particular proceeding to which it is applicable. *Kirk v. United States*, 131 Fed. 331, 335.

"'Scire facias' is the proceeding by which a criminal bond is forfeited." *Mason v. Terrell*, 60 S. E. 4, 7, 3 Ga. App. 348.

"Scire facias" is a judicial writ at common law to revive judgments, or to obtain satisfaction thereof, from sureties upon bail or other recognizances taken in the proceedings in which the judgment is rendered.

*Egan v. Chicago Great Western Ry. Co.*, 163 Fed. 344, 350.

"Scire facias" at common law is not strictly an original writ, but is a judicial writ founded on matter of record, but, when considered as to the judicial character of the records upon which it is founded the writ is a mere continuance of the former action when the record is a judicial record—e. g., a judgment—liability being fixed by the original judgment, and not by the writ, but, when the writ is founded upon a nonjudicial record, it is of the nature of an original writ, and is the commencement of the action. *Malsberger v. Parsons* (Del.) 75 Atl. 698, 700, 1 Boyce, 254.

While "scire facias" cannot be regarded as an original action where it is used to revive a judgment, but it must be so regarded where it is based on a recognizance, but whether it be regarded as an original action or not, where it is used to enforce a recognizance, the judgment in such an action must be regarded as a finality and res judicata. *State v. Boner*, 49 S. E. 944, 57 W. Va. 81 (citing *Freeman*, Judgm. § 448; *Crawford v. Fickey*, 23 S. E. 662, 41 W. Va. 544).

A "scire facias" is a judicial writ, and ought to be founded on a record. Where the crown has unadvisedly granted anything by letters patent which ought not to be granted, the remedy to repeal the patent is by writ of scire facias in chancery. In the United States the remedy is by bill in equity for a judicial decree of nullity and an order of cancellation of a patent issued in mistake or obtained by fraud, where the government has a direct interest or is under obligation to the public respecting the relief invoked. *McCarter v. Sooy Oyster Co.*, 75 Atl. 211, 217, 78 N. J. Law, 394 (citing 8 Bac. Abr. 609; 3 Bl. C. 260; *Bouv. Law Dict.* [Rawle's Revision] 960; *United States v. Beebe*, 8 Sup. Ct. 1083, 127 U. S. 338, 32 L. Ed. 121).

A petition or complaint reciting a prior order for alimony pendente lite, nonpayment thereof, the amount of accrued and unpaid alimony, and refusal of defendant to pay the same, and praying for judgment that plaintiff have execution against the property of defendant subject to execution, is substantially a writ of "scire facias" and is unknown to our practice. *Kapp v. Seventh Judicial Dist. Court*, 107 Pac. 95, 96, 32 Nev. 264, Ann. Cas. 1912D, 177.

A "scire facias" is a writ founded on some record remaining in the court from which it is issued, and, although it is a judicial writ of execution, yet it so far partakes of the nature of an original writ that the defendant is entitled to plead to it, and, as to the judgment debtor and his heirs or personal representatives, it is a continuation of the former proceeding. As known to the common law, it was founded upon some matter of record, as judgments, recognizances,

letters patents, etc., and its object was either to obtain execution of the matter of record upon which it was based or to vacate or set it aside. *Brooks v. Preston*, 68 Atl. 294, 295, 296, 106 Md. 693 (citing *Poe*, Pl. & Prac. [3d Ed.] § 585; *Bish v. Williar*, 59 Md. 384; 19 Ency. Pl. & Prac. 262, 263; *Bridges v. Adams*, 32 Md. 580).

#### As action or suit

"Scire facias" has been regarded in law as an action or suit. *McLellan v. Lunt*, 14 Me. 254, 258.

A "scire facias" to revive a dormant judgment is in the nature of a suit, and the defendant is bound to plead all matters of defense that he has, just as he would in an ordinary suit, or else he will be, after the judgment, concluded as to any defense which could have been made the subject-matter of a plea. *Helms v. Marshall*, 49 S. E. 733, 734, 121 Ga. 769 (citing *Lewis v. Allen*, 68 Ga. 400).

While "scire facias" to revive a judgment is like a suit on a judgment in respect to parties, and in that it requires a defense, the judgment in the suit on the judgment is for the debt and damages, while that on the scire facias is that plaintiff have execution, and until the judgment debt is satisfied scire facias may be prosecuted at the same time as the action on the debt, and the pendency of the scire facias does not abate the suit on the judgment. *Dreunen v. Dunn*, 52 South. 313, 314, 166 Ala. 213, 139 Am. St. Rep. 28.

"A 'scire facias,' whether considered as an original or judicial writ, is an action and such as the defendant may plead to. It is considered both as process and declaration. It is in the nature of a declaration, and the proper course to take advantage of informalities is by demurrer." A writ of scire facias on a recognizance is considered as process and declaration. *State v. Delaney*, 70 Atl. 311, 76 N. J. Law, 547 (citing and adopting *Bac. Abr.* 624; 2 *Tidd's Prac.* 1090).

#### As action, proceeding, or suit

See Action; Civil Action—Case—Suit—Etc.; Proceeding; Suit.

#### As continuation of a proceeding

A "scire facias" to revive a judgment is a continuance of the original action, and is not a new action. A federal circuit court has power to issue its writ of scire facias to revive its judgment and to prescribe a reasonable method of service thereof without the district. The conformity act does not require the court to follow the method prescribed by a state statute in serving the writ. *Collin County Nat. Bank of McKinney, Tex.*, v. *Hughes*, 155 Fed. 389, 391, 83 C. C. A. 661.

A proceeding by "scire facias" is not, strictly speaking, an action, but a mere continuation of and ancillary to the original action. *Bick v. Dixon*, 126 S. W. 235, 147 Mo. App. 69.

"Scire facias" to revive a judgment is not a new suit, but a continuation of the old one to obtain execution which can no longer be issued as of right because of lapse of time, the writ serving the double purpose of a writ and declaration, and following the judgment to be revived as to amount, date, and parties. *White's Adm'r v. Palmer*, 66 S. E. 44, 46, 110 Va. 490.

"While a 'scire facias' has been called an action for some purposes, and by some decisions has been apparently treated as a new action, even where its object is to revive a judgment, the better opinion, and that supported by the weight of authority, is to the effect that a proceeding by scire facias to revive a judgment is not an original proceeding, but a mere continuance of the former suit. It is merely a supplementary remedy to aid in the recovery of the debt evidenced by the original judgment, and upon such proceedings the merits of the original judgment cannot be inquired into, and a judgment rendered in such a proceeding is not a new one for the debt and damages, but merely an order that execution shall issue. It may be said, however, that in all cases it is in the nature of an action, in that the defendant may plead thereto." A proceeding by scire facias to revive a judgment is in effect but the application by the plaintiff to the court for an execution on his judgment after the time when he could have demanded execution of the clerk. *Goddard, to Use of Hyde, v. Delaney*, 80 S. W. 886, 890, 181 Mo. 564 (quoting and adopting definition in 18 Ency. Pl. & Pr. 1059).

#### As original proceeding

"Scire facias" is a judicial writ used to enforce the execution on some matter or record on which it is usually founded; but though a judicial writ, or writ of execution, it is so far an original that the defendant may plead to it. As it discloses the facts on which it is founded, and required an answer from the defendant, it is in the nature of a declaration, and the plea is properly to the writ. *Hollister v. United States*, 145 Fed. 773, 779, 76 C. C. A. 337 (quoting and adopting *Winder v. Caldwell*, 55 U. S. [14 How.] 434, 14 L. Ed. 487).

## SCOLD

"Scolding" is mere clamor, railing, personal reproof. *Rahles v. J. Thompson & Sons Mfg. Co.*, 119 N. W. 289, 290, 137 Wis. 506, 23 L. R. A. (N. S.) 296.

## SCOPE

The word "scope" primarily means a "mark" or "target," and hence "design," "aim," "purpose," or "intention," and as used in Civil Service Law (Consol. Laws 1909, c. 7) § 25, prohibiting appointments from employment within the "scope" of established

rules means "intent and purpose." *People ex rel. Garvey v. Prendergast*, 132 N. Y. Supp. 115, 118, 148 App. Div. 129.

## SCOPE OF AGENCY

The "scope of an agency" is to be determined, not alone from what the principal may have told the agent to do, but from what he knows, or ought to know in the exercise of ordinary care and prudence, the agent is doing in the premises. *Law Reporting Co. v. Elwood Grain Co.*, 115 S. W. 475, 477, 135 Mo. App. 10.

## SCOPE OF AUTHORITY

"Scope of authority," "course of employment," and "authority," as used in the law relating to a master's liability for torts of his servant, are often used indiscriminately and interchangeably, and sometimes as representing, respectively, the more restricted and the more enlarged criterion of liability of the master. *Penas v. Chicago, M. & St. P. Ry. Co.*, 127 N. W. 926, 933, 112 Minn. 203, 30 L. R. A. (N. S.) 627, 140 Am. St. Rep. 470.

The terms "course of employment" and "scope of authority," as applied to a servant's acts, are not susceptible of accurate definition, since what acts are within the scope of the servant's employment so as to render the master liable therefor must be gathered from the surrounding circumstances, the master's liability depending upon his consent, express or implied, to the servant's acts. *Robards v. P. Bannon Sewer Pipe Co.*, 113 S. W. 429, 431, 130 Ky. 380, 18 L. R. A. (N. S.) 923, 132 Am. St. Rep. 394.

A servant's delegation of his personal duty is beyond the "scope of his authority." *Raible v. Hygienic Ice & Refrigerating Co.*, 119 N. Y. Supp. 138, 140, 134 App. Div. 705.

The trainer of one maintaining a stable of race horses having no authority to hire or select boys to be used in training, but his authority being restricted to use of such boys as had been employed for such purpose, his act of placing on a horse a boy not so employed was without his "scope of authority"; so that, unless it was ratified, the master was not liable for injury to the boy. *Corrigan v. Hunter*, 122 S. W. 131, 133, 139 Ky. 315, 43 L. R. A. (N. S.) 187.

## SCOPE OF EMPLOYMENT

The phrase "while in the employment" is not synonymous with "in the scope of employment." The line is not always easy to draw, but, if not drawn, the employer is made responsible for every tort committed by the employé during the time of employment. *Stewart v. Cary Lumber Co.*, 59 S. E. 545, 567, 146 N. C. 47 (dissenting opinion).

The words "within the scope of his employment" have no legal or technical meaning distinct from their ordinary meaning, and, in an action against railway company

for injuries from being struck by a piece of ice kicked from a passing train by a brakeman, it is not error to refuse to explain their meaning as used in the instructions. *Maysville & B. S. R. Co. v. Willis* (Ky.) 104 S. W. 1016, 1018.

In Code Iowa 1897, § 1750, which provides that "any officer, agent or representative of an insurance company doing business in this state who may solicit insurance, procure applications, issue policies, and adjust losses or transact the business generally of such companies shall be held to be the agent of such insurance companies, with authority to transact all business within the scope of his employment, anything in the application, policy, contract, by-laws, or articles of incorporation of such company to the contrary notwithstanding," the phrase "scope of his employment" has a more restricted meaning than "scope of his agency," and is necessarily limited by the terms of the employment; and when, therefore, an agent is employed to make contracts for his principal only in writing, a verbal contract is beyond the scope of his employment, and is not by the statute rendered binding on the company. *Mulrooney v. Royal Ins. Co. of Liverpool, Eng.*, 157 Fed. 598, 606.

"The words 'within the scope of his employment,' as applied to the liability of a master for the wrongful acts of his servant, are probably not susceptible to any satisfactory definition of general application; each case must be determined by the particular facts and circumstances surrounding it. Before the master can be held liable for the negligence or wrongful act of his servant, it must appear that the servant was engaged at the time in the performance of the duties of his employment, and if so engaged, and the wrongful act was performed in connection with such duties and in apparent furtherance of their accomplishment, the master will be liable, even though the act be in excess of the authority conferred by him or in violation of his express directions, provided, however, that it is not done in furtherance alone of the personal desires or ends of the servant. The intent with which an act is done affords a more reliable test as to whether it is within the scope of the servant's employment than do the methods of its accomplishment." A servant employed as watchman to protect railroad property and to eject trespassers has implied authority to use force when necessary, and hence, in shooting a trespasser on the property, such servant acted within the scope of his employment. *Conchin v. El Paso & S. W. R. Co.*, 108 Pac. 260, 261, 13 Ariz. 259, 28 L. R. A. (N. S.) 88.

The test of whether a servant is acting within the "scope of his employment" at the time of his negligent act is, was the act done while the servant was doing the master's work, no matter how irregularly. *Jones v.*

*Weigand*, 119 N. Y. Supp. 441, 443, 134 App. Div. 644.

A master is not liable for the torts of the servant, done while in the performance of the servant's duties, unless the act itself pertains to the service for which he is employed. The mere fact that the act is done by the servant with the intention of serving the master is insufficient to bring it within the "scope of his employment." *Shelby v. Metropolitan St. Ry. Co.*, 125 S. W. 1189, 1190, 141 Mo. App. 514.

The words "acting within the scope of his employment," used with reference to the acts of an ordinary employé, have no legal or technical meaning distinct from their ordinary meaning, so that the court's failure to define their meaning is not error. *Maysville & B. S. R. Co. v. Willis* (Ky.) 104 S. W. 1016, 1018.

## SCOTCH WHISKY

"Scotch whisky" is not made from corn, but is made from malted barley. *Levy v. Uri*, 31 App. D. C. 441, 445.

## SCOW

As vessel, see *Vessel*.

## SCOWMAN

As laborer, see *Laborer*.

## SCRAP

See *Busheling Scrap*.

Composition scrap, see *Composition Metal*.

## SCRAP IRON

The term "scrap iron" as used in a contract for the sale of scrap iron intended to be obtained from the dismantling of a building would not ordinarily include structural material in a standing building, certainly not in a building in good condition not to be dismantled. *United Rys. & Electric Co. v. Henry Wehr & Co.*, 63 Atl. 475, 478, 103 Md. 323.

The term "scrap iron," as used in the Tariff Act, providing that nothing shall be deemed scrap iron except waste or refuse iron that has been in actual use and is fit only to be remanufactured, expressly covers old iron and cannot cover anything else, and this provision is more specific than that for "junk, old," which includes an infinite variety of things of which one kind is "scrap iron." *Buehne Steel Wool Co. v. United States*, 159 Fed. 107, 109, 86 C. C. A. 297; *C. W. Sheldon & Co. v. United States*, 159 Fed. 105, 106, 86 C. C. A. 295.

Old iron chains are not "junk, old," within the meaning of the Tariff Act, but are dutiable as "scrap iron" \* \* \* fit only

to be remanufactured." *G. W. Sheldon & Co. v. United States*, 152 Fed. 318, 320.

### SCRAP STEEL

Steel rails, which are new, but by reason of defects are depreciated in value, but which have not lost their character or identity as rails, are not within the provision of the Tariff Act for "scrap steel \* \* \* fit only to be remanufactured," but are dutiable as "rails," even though they may be intended to be used as scrap iron. *Illinois Cent. R. Co. v. McCall*, 147 Fed. 925.

Old fishplates, which are so worn as to have lost their usefulness for railway purposes and are suitable for use only as "scrap steel," are not dutiable under the Tariff Act as "railway fishplates," but as "scrap steel \* \* \* fit only to be remanufactured." *R. L. Ginsburg & Sons v. United States*, 147 Fed. 531, 532 (citing *Downing v. United States*, 122 Fed. 445, 58 C. C. A. 427; *Dwight v. Merritt*, 11 Sup. Ct. 768, 140 U. S. 213, 35 L. Ed. 450).

### SCRAPBOOKS

Books or albums used for preserving collections of postal cards are dutiable as "scrap-books," under the Tariff Act. *American News Co. v. United States*, 149 Fed. 1022, 79 C. C. A. 531; *American News Co. v. United States*, 142 Fed. 786, 787.

### SCRAWL

The character or device "(L. S.)," printed or written, appearing in the usual place for the seal, opposite the signature of the maker of a note, amounts to a "scrawl," within the statute providing that a "scrawl," printed or written, affixed as a seal to any written instrument, shall be effectual as a seal. *Langley v. Owens*, 42 South. 457, 459, 52 Fla. 302, 11 Ann. Cas. 247.

### SCREEN

In Laws 1904, p. 140, c. 99, requiring the separation of white and colored races on the street cars, but permitting the use for that purpose of adjustable "screens" or "partitions," the words "partitions" or "screens" *ex vi termini* import complete separation between the races, so that passengers in one compartment would be shut out from passengers in the other. The word "screens," as well as the word "partition," imports that one race is to be shut out from any contact with the other. Signs, 8x12 inches in size, having painted thereon the words "white" and "colored," respectively, and supported on the backs of seats in street cars, were not adjustable screens, within the meaning of the law. *Southern Light & Traction Co. v. Compton*, 38 South. 629, 630, 86 Miss. 269.

### SCREW-DRIVER

As deadly weapon, see *Deadly Weapon*.

### SCRIBNER'S LOG RULE

"Scribner's log rule," as applied to logging contracts, requires that a diameter be taken at each end of the log and the sum of the two diameters be divided by two for finding the true diameter. *Des Allemands Lumber Co. v. Morgan City Timber Co.*, 41 South. 332, 339, 117 La. 1.

### SCRIP

See *Dividend in Scrip*.

In corporation parlance, "scrip" is the certificate or evidence of the right to obtain shares in a corporation. *Sweetsir v. Chandler*, 56 Atl. 584, 588, 98 Me. 145.

#### Warehouse receipt

The warehouse receipts authorized to be issued under the State Warehouse Act (Laws 1912, p. 707) are not "scrip, certificates, or other evidence of state indebtedness" within the meaning of Const. art. 10, § 7, restricting the issuance of such paper. *State v. McCown*, 75 S. E. 392, 396, 92 S. C. 81.

### SCRIPT

See *County Script*.

Receipts issued to makers of notes and receivable by the payee in lieu of cash as payments upon the notes are sometimes termed "script." *Sharp v. State*, 67 S. E. 1124, 7 Ga. App. 749.

### SCRIVENER

A "scrivener" exercised conjoint duties of a banker, broker, and an attorney; his business being to receive other men's money, and lay out at interest, and then receive it back again, and keep it in his hands, and then again lay it out at interest. *Hoffman v. Froma Realty Co.*, 138 N. Y. Supp. 935, 938, 153 App. Div. 770.

### SCRIVENER'S RULE

The "scrivener's rule," that where an agent who negotiates a loan for his principal is allowed to retain possession and control of the security taken on the loan, he has apparent authority, after maturity, to receive payment for his principal, rests upon estoppel, and requires that he should have been the agent of the lender in making the loan, and that the indicia of indebtedness shall have been intentionally left in his possession, and that the person relying on such rule must have known and relied on such agency and possession. The rule has never been extended to hold that possession of the indicia of indebtedness by the assignor of a mortgage implied authority on his part to accept pay-

ment for the assignee. As the rule cannot be applied to justify payment to a supposed agent of the creditor, except according to the strict letter of the obligation, it does not justify payment of a part for the whole. *Hoffman v. Froma Realty Co.*, 138 N. Y. Supp. 935, 938, 153 App. Div. 770.

## SCROLL

As seal, see Seal.

## SCULL

The slag, dross, and other impurities in molten iron discharged from the top of the converter and driven on the roof-shield are called "scull." *Barry v. Jones & Laughlin Steel Co.*, 83 Atl. 299, 234 Pa. 367.

## SCULPTURE

See Cast of Sculpture.

## SCYTHE

A "scythe" is a simple tool used by mankind from remote ages to the present for the cutting of grass, grain, and weeds. Its use is a simple matter of universal knowledge, about which reasonable minds do not differ, and is therefore a subject of which courts may take judicial knowledge. *Post v. Chicago, B. & Q. Ry. Co.*, 97 S. W. 233, 234, 121 Mo. App. 562.

## SEA

See Beyond Seas; High Seas; Main Sea; Perils of the Sea.

### In boundaries

An ancient patent described its southern boundary as the "sea." The two rivers which were the eastern and western boundaries flowed into a bay which was affected by the tides. The grantee never made any claim of ownership to the ocean, as the southern boundary reached, by extending eastern and western lines, some four miles to the ocean. A subsequent patent of adjacent lands used the words "sea or main ocean" as a boundary. Held, that the north shore of the bay formed the southern boundary; the word "sea," at the time of the patent and for a long time thereafter, being used as synonymous with the word "bay." *Rockaway Park Improvement Co. v. City of New York*, 124 N. Y. Supp. 1096, 1097, 140 App. Div. 160.

## SEA MILE

See Mile.

## SEA MOSS

"Irish moss" or "sea moss" is a species of sea weed whose gelatinous qualities render it valuable as an article of food. It is a marine plant of the genera *corallina*. It is a sea weed (*Chondrus crispus*) which grows abundantly along the rocky parts of the At-

lantic coasts of Europe and North America. It is collected for commercial purposes on the west and northwest of Ireland and in very large quantities on the coast of Plymouth county, Mass., U. S. It is used for food, medicine, and a thickener for printing calico and for finning beer. "Sea grass," used for making mattresses and upholstering purposes, is an entirely different article from sea moss and is not known commercially as sea moss, and is not dutiable as such under Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 81, 30 Stat. 151, but is entitled to free entry under Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 617, 30 Stat. 199, which covers "moss, seaweeds, and vegetable substances, crude or unmanufactured, not otherwise specially provided for." In re *F. W. Myers & Co.*, 123 Fed. 952, 955 (quoting and adopting definition in Worcester, Dict.; Imperial Dict.; Ency. Brit.).

## SEA SERVICE

A naval officer is not entitled to sea pay while occupied in traveling on duty partly on a merchant steamer and partly on land, and in reporting to the Navy Department, since this is not "sea service" within the meaning of Rev. St. U. S. § 1571, declaring that "no service shall be regarded as sea service except such as shall be performed at sea, under the orders of a department, and in vessels employed by authority of law." *United States v. Thomas*, 25 Sup. Ct. 102-105, 195 U. S. 418, 49 L. Ed. 259.

## SEA STORES

"Sea stores" are the supplies of different articles provided for the subsistence and accommodation of the ship's crew and passengers, and do not include coal. *United States v. Hawley & Letzerich*, 160 Fed. 734, 739.

## SEABOARD

See Atlantic Seaboard.

## SEASHORE

Land covered by highest flood tide

"Seashore" is that space of land over which the water of the sea spreads in the highest water, during the winter season." *Minor's Heirs v. City of New Orleans*, 38 South. 999, 1003, 115 La. 301.

## SEAWEED

Nori, a seaweed gathered from the ocean and sun-dried, without the addition of any other substance and without being subjected to any other process than spreading it on mats to facilitate drying is "seaweeds \* \* \* crude or unmanufactured," within the meaning of the Tariff Act. *United States v. M. Furuya & Co.*, 176 Fed. 480.

## SEAWORTHY—SEAWORTHINESS

See, also, Unseaworthy.

To be "seaworthy" a vessel must be sufficiently tight, staunch, and strong to resist

the ordinary attacks of winds and seas. *Sanford & Brooks Co. v. Columbia Dredging Co.*, 177 Fed. 878, 882, 101 C. C. A. 92. See, also, *The F. & T. Lupton*, 182 Fed. 144, 147.

A ship is "seaworthy" if it is reasonably fit to carry the cargo which it has undertaken to transport. To constitute "seaworthiness" of the hull of a vessel in respect to cargo, the hull must be so tight, staunch, and strong as to be competent to resist all ordinary action of the sea and to prosecute and complete the voyage without damage to the cargo under deck. *The Ninfa*, 156 Fed. 512, 521 (citing *Dupont de Nemours & Co. v. Vance*, 19 How. 162, 167, 15 L. Ed. 584).

The words "seaworthy," "seaworthiness," and "tight and sound," as used in reference to a vessel, mean the sufficiency of such vessel in materials, construction, equipment, and outfit for the trade or service in which it was employed. *Paddock-Hawley Iron Co. v. Providence-Washington Ins. Co. of Providence*, R. I., 93 S. W. 358, 360, 118 Mo. App. 85.

Where a vessel was bored through her waterways, through the ends of the beams and at some point into the timbers from the mainmast to the foremast, and no sound wood was found, such a frame as exhibited by such borings cannot be regarded as "seaworthy." *Morse v. St. Paul Fire & Marine Ins. Co.*, 129 Fed. 233, 235.

The term "seaworthy," as now construed, has relation to the article carried and the different compartments of the ship and their particular use, as well as to the navigability of the vessel. *The Indrapura*, 178 Fed. 591, 594.

#### As requiring proper stowage of cargo

The requirement of "seaworthiness" at the beginning of a voyage includes, not only seaworthiness in hull and equipment, but also in the stowage of the cargo. *Corsar v. J. D. Spreckels & Bros. Co.*, 141 Fed. 260, 264, 72 C. C. A. 378.

A warranty of "seaworthiness" in a charter party is absolute and not conditional, and includes a warranty of proper stowage for the voyage. *The Medea*, 179 Fed. 781, 792, 103 C. C. A. 273.

#### As requiring refrigerating apparatus

"Seaworthiness" is defined to be, "in maritime law, the sufficiency of the vessel in materials, construction, equipment, officers, men, and outfit for the trade or service in which it is employed." The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport. The furnishing of a refrigerating apparatus in good order and repair, competent for the safe transportation of a cargo of dressed beef, which a vessel has undertaken to carry, is within the obligation to use due diligence to provide a seaworthy vessel, imposed upon the owner by the Harter

Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445), as a condition precedent to the enjoyment of the benefits of that act in limiting the owner's liability as therein provided. *The Southwark*, 24 Sup. Ct. 1, 3, 191 U. S. 1, 48 L. Ed. 65 (quoting *Bouv. Law Dict.*).

## SEAL

See Common or Corporate Seal; Corporate Seal; County Seal; Official Seal; Signed, Sealed, and Delivered in the Presence of.

Element of specialty, see Specialty.

Execution as importing, see Execute.

My hand and seal, see My.

The purpose of a "seal" is to attest in a formal manner the execution of an instrument. *King v. Gwynes*, 42 South. 959, 960, 118 La. 344 (citing *Black, Law Dict.*).

Under a statute providing that any instrument of writing, to which the maker shall affix a scrawl by way of seal, shall be of the same effect and obligation to all intents as if the same were sealed, the word "seal" attached to a release opposite the signature of the person executing it, without any scrawl, stamp, impression, or mark, was sufficient to constitute the release of an instrument under seal. *Jackson v. Security Mut. Life Ins. Co.*, 84 N. E. 198, 200, 233 Ill. 161 (citing and adopting *Doe ex dem. Ankeny v. McMahon* [Ill.] 3 Scam. 12; *Lewis' Ex'rs v. Overly's Adm'r* [Va.] 28 Grat. 627).

Where a copy of a deed is offered in evidence, having a certificate of acknowledgment certified by the officer as under his official seal, and the clerk, in copying, appends to such official signature the word "seal," the word will be presumptively held to represent such officer's seal and a copy is properly admitted in evidence over such objection. *Wilson v. Braden*, 49 S. E. 409, 410, 56 W. Va. 372, 107 Am. St. Rep. 927.

#### Printed word "Seal"

"Any stamp, impression, or mark made or adopted by the signer and annexed to his signature as and for his seal will answer the purpose of sealing; as, for instance, a written or ink seal, the characters 'L. S.' or the word 'Seal,' a scroll, a scrawl inclosing the word 'Seal,' or a piece of paper in the form of a seal attached by mucilage, opposite the signature, or even a flourish or mark, however inconsiderable. In the absence of statute, however, obviating all necessity therefor, a scroll or some indicium of a seal is necessary." The Supreme Court of Pennsylvania says: "The days of actual sealing of legal documents in its original sense of the impression of an individual mark or device upon wax or wafer, or even on the parchment or paper itself, have long gone by. It is immaterial what device the impression bears, and the same stamp may serve for several parties in the same deed. Not only so, but



the use of wax has almost entirely, and even of wafers very largely, ceased. In short, sealing has become constructive, rather than actual, and is in a great degree a matter of intention." A mortgage reciting that it is executed under "hand and seal," and bearing the printed word "Seal" after the name of the mortgagor, constitutes a sealed instrument, within the statute of limitations barring actions on sealed instruments in 20 years. *Philip v. Stearns*, 105 N. W. 467, 469, 20 S. D. 220, 11 Ann. Cas. 1108 (quoting *Lorah v. Nissley*, 27 Atl. 242, 156 Pa. 329).

A mortgage reciting, "In witness whereof, the said parties of the first part have hereunto set their hands and seals," and in which the word "seal" follows the name of each mortgagor, is a "sealed instrument" within Code Civ. Proc. § 58, permitting an action on such an instrument any time within 20 years. *Green v. Frick*, 126 N. W. 579, 580, 25 S. D. 342.

#### Scrawl or scroll

The character or device "(L. S.)," printed or written, appearing in the usual place for the seal, opposite the signature of the maker of a note, amounts to a "scrawl" or "scroll," within the statute providing that a "scrawl" or "scroll" printed or written, affixed as a seal to any written instrument, shall be effectual as a seal. *Langley v. Owens*, 42 South. 457, 459, 52 Fla. 302, 11 Ann. Cas. 247.

A "scroll" is "a flourish, tracing mark, or design, used in place of a seal." A statute permitting a person to affix to a paper "a scroll by way of seal," or to adopt as his seal any scroll, etc., made thereon by another, does not require the scroll to have any particular form or to be placed at any particular point with respect to the name of the party adopting it. A scroll appearing immediately after the name of one person may be adopted by another whose name appears on the instrument below the first name. *Pardee v. Johnston*, 74 S. E. 721, 722, 70 W. Va. 347 (quoting definition in *Webst. Dict.*).

A "scroll" may be adopted and used by a corporation as its seal in the execution of a legal instrument upon which a seal is designed to be used. *W. B. Conkey Co. v. Goldman*, 125 Ill. App. 161, 166. See, also, *New York Life Ins. Co. v. Rhodes*, 60 S. E. 828, 830, 4 Ga. App. 25.

#### SEALED

Under Civ. Code 1902, § 992, providing that, where a deposition is taken by another than the magistrate authorizing it, it shall be sealed up with the title of the case indorsed, etc., a seal in its ordinary acceptation, denoting an outward imprint, is not required on the envelope; the words "sealed up" having reference to the manner in which the envelope containing the deposition is to be closed or fastened. *Jenkins v. Atlantic Coast Line R. Co.*, 65 S. E. 636, 83 S. C. 473.

In the absence of some statutory provision, a bill of exceptions will not be regarded as "sealed" unless it is identified by the certificate of the trial court. *Bostwick v. Willett*, 60 Atl. 398, 399, 72 N. J. Law, 21.

"Corked" and "sealed," when used in reference to bottles, are not synonymous. Bottles are corked before sealing, and when corked are sealed by incasing the mouth in wax, or other material used for the same purpose, sufficiently close to exclude the air. The term "sealed," as used in Act March 29, 1899 (*Laws 1899*, p. 137), providing that any person who raises grapes or berries may make wine thereof, and sell in quantities not less than one-fifth of a gallon, or in sealed bottles, without a license, when the same is properly labeled as provided by "such act," should be construed as requiring the incasing of the mouth of the bottle in wax after it has been corked, and hence the sale of wine in bottles which were corked only was a violation of the statute. *Koban v. State*, 81 S. W. 235, 72 Ark. 407.

#### SEALED INSTRUMENT

See, also, *Seal*.

An instrument denominated a "Real Estate Mortgage Coupon Bond," containing stipulations not usually found in notes, having interest coupons attached, and bearing the name and seal of the maker, is a "sealed instrument." *Gibson v. Allen*, 104 N. W. 275, 276, 19 S. D. 617.

As a general rule, "sealed instruments" within the limitation statute include all sealed contracts regardless of their nature, and an action on a sealed contract, executed in 1898, to make monthly payments for rent due, is controlled by St. 1898, § 4220, permitting actions on sealed instruments within 20 years after the action accrues. *Mariner v. Wiens*, 119 N. W. 340, 341, 137 Wis. 637.

The words "Witness ——— hand and seal," at the conclusion of an instrument, followed by the signature of the maker, with the word "Seal" in brackets annexed to the signature, are equivalent to "Witness my hand and seal," or "Signed and Sealed," and the instrument is an instrument under seal, within Civ. Code 1895, § 3765, limiting the time for an action on an instrument under seal, but providing that no instrument shall be considered under seal unless so recited in its body. *Anderson v. Peteet*, 64 S. E. 284, 6 Ga. App. 69.

The mere recital in the testimonium clause of an instrument, signed and delivered for a deed, that the parties have affixed their seals is not sufficient to make it a "sealed instrument" if no seal or scroll, mark, or word equivalent thereto is annexed to the signatures. *Comley v. Ford*, 64 S. E. 447, 450, 65 W. Va. 429.

A note, in the body of which there is no recital that it is to be a sealed instrument.

does not, under Civ. Code 1910, § 4359, become a "sealed instrument" because there is placed after the signature of the maker a scroll, or the letters "[L. S.]," or any similar device, nor because underneath the body of the note are the words, "Signed, sealed, and delivered in presence of," followed by the name of the subscribing witness. *Waterman v. Barclay*, 72 S. E. 716, 717, 10 Ga. App. 108.

A bond signed in the name of a corporation by the vice president, with the corporate seal affixed, is a "sealed instrument," though the seal is not opposite to the vice president's signature. *United States v. Mercantile Trust Co.*, 62 Atl. 1062, 1063, 213 Pa. 411.

#### **As obligation**

See Obligation.

## **SEAM**

In geology, a thin layer or stratum of rock is called a "seam." The same term is applied to coal. *Chapman v. Mill Creek Coal & Coke Co.*, 46 S. E. 262, 263, 54 W. Va. 193. See, also, *Newcomer & Lewis v. Scriven Co.*, 168 Fed. 621, 625, 94 C. C. A. 77.

## **SEAMAN**

Any seaman, see Any.

As laborer, see Laborer.

As mechanic, see Mechanic.

Rev. St. § 4536, providing that no wages due or accruing to any seaman shall be subject to attachment or arrest from any court, and that every payment of wages to a seaman shall be valid at law notwithstanding any attachment thereof, is applicable as well to a seaman operating on coastwise vessels as on merchant vessels generally, and hence it is no answer to a libel in admiralty against a tug engaged in the coasting trade for a seaman's wages earned thereon that the wages had been attached by garnishment. *The Amella*, 183 Fed. 899, 900.

Rev. St. § 2174, authorizing the naturalization of any foreign seaman who "shall have served three years on board of a merchant vessel of the United States," after having declared his intention to become a citizen, on production of his certificate of discharge and good conduct during that time, is sufficiently broad to embrace every "seaman" who has served the required time on an American vessel, coastwise or other. In re *Lind*, 192 Fed. 209, 211.

#### **Horsemen**

Horsemen, signed for service on a vessel in caring for horses during a voyage, are "seamen," for the purpose of determining the application to them of the immigration acts. *United States v. Atlantic Transport Co.*, 188 Fed. 42, 43, 110 C. C. A. 420.

## **SEARCH**

In Rev. St. 1892, § 1394, allowing the clerk certain compensation for making "searches" for unpaid taxes and tax certificates, the searches, for which the Legislature fixes the compensation at 15 cents each, mean the examination each year for the purpose of ascertaining if a tax sale was made that year, whether the search resulted in the finding of such sale or not. *Edwards v. Law*, 36 South. 569, 570, 46 Fla. 203.

Const. 1890, § 23, which provides that the people shall be secure from unreasonable "seizure or search," is not violated by Laws 1910, c. 134, giving to the state, or county a suit for penalties provided therein, which may be begun by attachment, since there is no search or seizure within the meaning of the provision; the statute merely affording a remedy by attachment for the collection of the penalty. *State v. Marshall*, 56 South. 792, 797, 100 Miss. 626.

A "search" ordinarily implies a quest by an officer of the law, and a seizure contemplates a forcible dispossession of the owner. A corporation charged with a violation of the anti-trust act of July 2, 1890, is entitled to immunity under Const. U. S. Amend. 4, from such an unreasonable "search" and seizure as the compulsory production before a grand jury, under a subpoena duces tecum, of all understandings, contracts, or correspondence between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one dozen different companies, situated in seven different states. *Hale v. Henkel*, 28 Sup. Ct. 370, 379, 201 U. S. 43, 50 L. Ed. 652.

## **SEASON**

See Busy Season; Dull Season; During Season; Foot-Ball Season; Irrigation Season.

The word "season," as used in a deed granting the right to work growing trees for turpentine purposes, which provides that the "said timber is to be boxed during the season 1905 or 1906, and providing that the right for turpentine purposes is to run for a period of four years from the time each lot is boxed, is not limited for the purpose of fixing the date at which the term should begin to one day but contemplates a longer time. The word must be construed in accordance with Pen. Code 1895, § 496, which provides that any person who shall cut turpentine boxes at any other time than from the 15th of November to the 15th of March shall be guilty of a misdemeanor, and, when so construed, the boxing season of 1905 commences November 15, 1905, and ends March 15, 1906, and is separate and distinct from the boxing sea-

son of 1906, which begins November 15, 1906, and ends March 15, 1907. *Purdom Naval Stores Co. v. Knight*, 59 S. E. 433, 129 Ga. 590 (citing 7 Words and Phrases, p. 6376).

### SEASONABLY TURN

Rem. & Bal. Code, § 5558, which provides that vehicles traveling upon a public highway shall "seasonably turn" to the right of the center of the way when passing another vehicle coming in the opposite direction, means that travelers shall turn to the right in such season that neither shall be retarded in his progress, by reason of the other occupying his half of the way, when he may have occasion to use it in passing; but a person may lawfully use what is to him the left-hand side of the street if there is no travel at that time upon that part of the way, or if the travel is not so heavy as to make it dangerous. *Segerstrom v. Lawrence*, 116 Pac. 876, 877, 64 Wash. 245.

"Seasonably turn," as used in Rev. St. c. 19, § 2, providing that when persons traveling with a team are approaching to meet on a way they shall seasonably turn to the right of the middle of the traveled part of it so far that they can pass each other without interference, means that travelers shall turn to the right in such season that neither shall be retarded in his progress by reason of the other occupying his half of the way which the law has assigned to his use when he may have occasion to use it in passing. In short, each has an undoubted right to one-half of the way whenever he wishes to pass on it, and it is the duty of each without delay to yield such half to the other. *Neal v. Rendall*, 56 Atl. 209, 211, 98 Me. 69, 63 L. R. A. 668.

### SEAT

See County Seat; Mill Seat.

#### In stock exchange

The rights and privileges of membership in a stock exchange is commonly called a "seat" in the exchange. In re Grant, 116 N. Y. Supp. 1152, 1155, 132 App. Div. 739.

### SEAT OF JUSTICE

The terms "seat of justice" and "county seat" are synonymous, and are used indifferently to express the same thing in all our statutes relating to the subject. Rev. St. 1899, § 9055, providing that the recorder shall keep his office and records at the "seat of justice" in each county, merely requires him to keep them at the "county seat," and not at the courthouse itself. *Babcock v. Hahn*, 75 S. W. 93, 94, 175 Mo. 136.

### SEC.

The letters "sec." mean "section." *Bandow v. Wolven*, 107 N. W. 204, 206, 20 S. D. 445.

## SECOND

### SECOND CLASS

"By way of explanation, it may be stated that the printing known as 'first class' is the cheapest grade of printing, and that designated as 'second class' is a much more expensive grade." *Commonwealth v. Bacon* (Ky.) 111 S. W. 387, 392.

### SECOND ELECTION

In Gen. St. 1909, § 7027, authorizing the calling of a second election to vote bonds in aid of a railroad on a petition of a majority of the legal voters, the word "second" means "another" or "subsequent" election, and the authority of a county to hold bond elections is not exhausted on the holding of a first and second election. *Garden City, G. & N. R. Co. v. Masch*, 109 Pac. 684, 688, 82 Kan. 795.

### SECOND FEET

The only reliable method by which any certain number of inches of water can be determined is on the basis of what is termed by engineers as "second feet," or the quantity of water flowing past a certain point in a given space of time; the ratio being that one inch of water under a six-inch pressure equals one-fortieth of a "second foot"—that is, 40 miners' inches furnish a flow of water equal to one cubic foot (7½ gallons) per second of time. *Gardner v. Wright*, 91 Pac. 286, 297, 49 Or. 609.

### SECOND OFFENSE

The words "second offense," as used in Rev. St. § 4364—20b, which declares that whoever shall sell liquors where sales are prohibited shall be guilty of a misdemeanor, and which prescribes the punishment for the first offense and for a second offense, mean a second conviction. Hence an affidavit which charges three separate sales to different persons on the same day, but does not allege a previous conviction, is in legal effect a charge of a first offense only. *Curey v. State*, 70 N. E. 955, 956, 70 Ohio St. 121.

The provisions of Labor Law (Consol. Laws 1909, c. 31) §§ 160—173, relating to mercantile establishments, requires several things to be done in the performance of duties under that subdivision, and Penal Law (Consol. Laws 1909, c. 40) § 1275, as amended by Laws 1911, c. 749, increasing the amount of punishment on conviction of a "second offense," does not require a conviction of the same offense, but the punishment is based on the violation of any of the provisions of such act. *People v. James Butler, Inc.*, 138 N. Y. Supp. 1068, 1069, 154 App. Div. 311.

### SECOND TIME

See Convicted a Second Time.

### SECOND WATER

The term "second water," in mining parlance, means water that has been used by a

lower proprietor after it has been used by an upper one for mining purposes. *Gold Ridge Min. Co. v. Tallmadge*, 74 Pac. 325, 327, 44 Or. 34, 102 Am. St. Rep. 602.

### SECONDARILY LIABLE

A guaranty of the payment of a note, indorsed on the back thereof, binds the guarantor to pay on default of the maker, and his liability is secondary, within Negotiable Instruments Law (Laws 1890, c. 94) § 120, providing that a person "secondarily liable" is discharged by a binding agreement extending the time of payment without his assent, and he is discharged by a binding extension of time given the maker by the holder. *Mechanics' Bank & Trust Co. v. Hood*, 150 S. W. 420, 421, 126 Tenn. 443.

Neg. Inst. Act (Pub. Laws 1896-1900, p. 84, c. 674) art. 1, § 3, provides that the person "primarily" liable on an instrument is the person who, by the terms thereof, is absolutely required to pay the same, and that all other parties are "secondarily" liable. Article 6, § 71, provides that a person placing his signature on an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates his intention to be bound in some other capacity. Article 8, § 97, provides that where a negotiable instrument has been dishonored, if notice of dishonor is not given to an indorser, he shall be discharged. Held, that persons who placed their signatures on the back of a note before delivery for the accommodation of the maker were indorsers, and could not be held as joint makers on the ground that the holder would not have taken the note without their signatures. *Deahy v. Choquet*, 67 Atl. 421, 422, 28 R. I. 338, 14 L. R. A. (N. S.) 847.

The liability of a guarantor is based on the terms of his contract, which is distinct from the terms of the instrument on which it is indorsed, and he does not agree to make the debt his own, but only to answer on his principal's default, and his contract, while it may require him to pay the note, is secondary within Rev. Codes 1905, § 6494, providing the terms for the release of a person secondarily liable. The terms "primarily liable" and "secondarily liable," as used in Rev. Codes 1905, § 6494, have reference to the remedy provided for enforcing the obligation of one signing a negotiable instrument, rather than to the character of the obligation, and the remedy against a guarantor is not primary and direct, but collateral and secondary. *Northern State Bank of Grand Forks v. Bellamy*, 125 N. W. 888, 889, 19 N. D. 509, 31 L. R. A. (N. S.) 149.

### SECONDARY BATTERY

A "primary battery" is one in which chemical action takes place directly to produce electromotive force, while in a "secondary battery" the electromotive force is pro-

duced by a chemical action set up after a current of electricity has been passed through the cell for some time. Secondary batteries are commonly called "storage batteries." In re *Charles Town Light & Power Co.*, 183 Fed. 160, 165.

### SECONDARY BOYCOTT

An organized union of employes may, by concerted action, cease dealing, either socially or in a business way, with a former employer, and this act is a "primary boycott," and such employes may, by fair oral or written persuasion, induce others interested in, or sympathetic with, their cause to withdraw their social intercourse and business patronage from the employer, and they may request another to withdraw his patronage from the employer, and may use the moral coercion of threatening a like boycott against him if he refuses to do so, and the latter act is the "secondary boycott," but any act which passes beyond moral suasion, and plays by intimidation on physical fears, is unlawful, and will be restrained. *Pierce v. Stablemen's Union*, Local No. 8,760, 103 Pac. 324, 325, 156 Cal. 70.

### SECONDARY EASEMENT

The term "secondary easement" is applied to the right to enter and repair and do those things necessary to the full enjoyment of an easement as existing; but such right does not entitle one, having an easement consisting of the right to divert, at a certain point on lands of others, water from a stream, and conduct it by a certain route and means over such lands, to divert the water at another point on such lands, and conduct it over them by a different route and different means, where the elements have rendered it impossible to divert it at the original point and conduct it by the original way and means. *White Bros. & Crum Co. v. Watson*, 117 Pac. 497, 499, 64 Wash. 666, 44 L. R. A. (N. S.) 254.

Every easement includes what are termed "secondary easements" (that is, the right to do such things as are necessary for the full enjoyment of the easement itself); but this right is limited and must be exercised in such reasonable manner as not to injuriously increase the burden upon the servient tenement. Under Pol. Code Cal. § 2631, providing that, by taking and accepting land for a highway, the public acquire only the right of way and "the incidents necessary to enjoying and maintaining it," the county has no right to bore wells in the highway and use the subterranean water for sprinkling it. *Wright v. Austin*, 76 Pac. 1023, 1024, 143 Cal. 236, 65 L. R. A. 949, 101 Am. St. Rep. 97 (quoting *North Fork Water Co. v. Edwards*, 54 Pac. 69, 121 Cal. 662).

### SECONDARY EVIDENCE

"Secondary evidence" is such evidence as from necessity in some cases is substitut-

ed for stronger and better proof. *O'Connor v. United States*, 75 S. E. 110, 111, 11 Ga. App. 246.

"'Secondary evidence' is that which is inferior to primary. Thus a copy of an instrument or oral evidence of its contents is secondary evidence of the instrument and contents." When a written contract is to be proved by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself, but the substance of the agreement must be proved satisfactorily. Proof of negotiations, conversations, and acts, of parties before, at the time of, and after the execution of a written instrument, are not competent to prove its contents where the instrument is lost. *Capell v. Fagan*, 77 Pac. 55, 30 Mont. 507, 2 Ann. Cas. 37 (quoting the definition in Code Civ. Proc. § 3107).

### SECONDARY FRANCHISE

The right or privilege to be a corporation is a franchise, often called a "primary franchise." The secondary franchise or right of making use of the purchased privilege, which the books denominate the "franchise to do," is entirely distinct and separate from the franchise to be or to exist here as a corporation. *American Smelting & Refining Co. v. People ex rel. Lindsley*, 82 Pac. 531, 534, 34 Colo. 240.

City authorities have no legal power to create corporations or to grant franchises. This can be done by the state alone; but the city can concede the right of way through her streets. Such right is not a franchise in law. The privileges conceded are "secondary franchises," instrumentalities by means of which the corporate owners granted by the charter may be exercised. *Shreveport Traction Co. v. Kansas City, S. & G. Ry. Co.*, 44 South. 457, 461, 119 La. 759 (citing *Tilton v. New Orleans City R. Co.*, 35 La. Ann. 1069; *Farmer v. Myles*, 30 South. 858, 106 La. 339; *Muntz v. Algiers & G. Ry. Co.*, 35 South. 624, 111 La. 432, 64 L. R. A. 222, 100 Am. St. Rep. 495).

### SECONDARY INVENTION

"A 'primary invention' is one which performs a function never performed by any earlier invention, while a 'secondary invention' is one which performs a function previously performed by some earlier invention, but in a substantially different way from any that preceded it." The Supreme Court of the United States has defined the legal distinctions flowing from this diversity as follows: "Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mech-

anisms which go to make up the machine." Secondary patents should receive a construction narrower than that given to primary patents. *Von Eberstein v. Chambliss*, 166 Fed. 463, 468, 469 (quoting and adopting definitions in *Walker, Patents*, 313; *Morley Sewing Mach. Co. v. Lancaster*, 9 Sup. Ct. 302, 129 U. S. 273, 32 L. Ed. 715).

### SECONDARY PATENT

The distinction between "primary and secondary patents" is now given less force than formerly by the courts, for every patent may be regarded as primary within its field; and it follows, then, that every patent should have as broad an interpretation as the courts may fairly give it and as full and fair a use of the doctrine of equivalents as the courts may fairly allow it. *Kip-Armstrong Co. v. King Philip Mills*, 130 Fed. 28, 31.

### SECONDHAND

The term "secondhand" is general and refers to articles that have been before sold and used, either one or many times. *Texas & P. R. Co. v. Wilson Hack Line*, 101 S. W. 1042, 1043, 46 Tex. Civ. App. 38.

### SECONDHAND MAN

A "secondhand man" is a dealer in secondhand goods. *Schroeder v. Reinhardt*, 100 S. W. 538, 539, 123 Mo. App. 582.

## SECRECY—SECRET

See Trade Secret.

### SECRECY OF THE BALLOT

Chapter 213 of Session Laws of 1911, providing for party enrollment of electors by assessors before primary election, and prescribing the form of affidavit to be so required of each elector to entitle him to enrollment as a partisan and to qualify him to vote at the coming primary election, construed and held, that the Legislature has the right to require nominations to be made at primary elections by the use of a ballot, and may provide that such election shall be conducted within organized political parties, and may deny the right to vote to those electors not belonging to any organized political party, and may require as a reasonable test of party fealty that the elector shall subscribe an oath stating that he belongs to an organized political party and requiring him to designate it therein by name, and that the law requiring such a test and making the required oath a condition precedent to the right of an elector to participate at the party primary election is not unconstitutional as prescribing an added franchise requirement, or as restricting the right of suffrage, or as violating the "secrecy of the ballot," within the meaning of sections 121, 122, and 129 of our state Constitution. *State ex rel. v. Flaherty*, 136 N. W. 76, 77, 23 N. D. 313, 41 L. R. A. (N. S.) 132.

**SECRET AND FRATERNAL SOCIETY**

Pub. Acts 1895, p. 595, c. 255, § 1, defines the term "secret and fraternal society" to include any corporation or voluntary association organized for the sole benefit of its members, not for profit, having a lodge system with a ritualistic form of work and a representative form of government, providing for the payment of benefits in case of death; and section 7 declares that all benefits accruing from such society are exempt from attachment. Section 11 declares that the act shall not apply to societies of Masons or Odd Fellows nor associations composed of their respective members. By Pub. Acts 1899, p. 1050, c. 117, was added to section 11 of the prior act a provision that section 11 should apply to all "fraternal societies." A mutual aid association composed of Odd Fellows having a lodge system, but not shown to have a ritual of its own, was not within the statute, and hence benefits payable therefrom were not exempt from attachment. *Wm. A. Miles & Co. v. Odd Fellows' Mut. Aid Ass'n*, 55 Atl. 607, 76 Conn. 132.

**SECRET FRATERNITY**

"Oath-bound" and "secret," as used in *St. 1909*, p. 332, prohibiting "secret, oath-bound" fraternities in the public schools, are synonymous. *Bradford v. Board of Education of City and County of San Francisco*, 121 Pac. 929, 932, 18 Cal. App. 19.

**SECRET PROCESS**

A "secret process" and the article made under it are separate and distinct things, and each is subject of ownership. *Hartman v. John D. Park & Sons Co.*, 145 Fed. 358, 378.

**SECRET PROFITS**

"Secret profits," which promoters are prohibited to make, are such profits as are made without disclosure to the real parties in interest, and obtaining their express or implied consent. *Arnold v. Searing*, 78 Atl. 762, 767, 78 N. J. Eq. 146.

**SECRETARY**

The "secretary" of a corporation is a mere servant. His position is that he is to do what he is told, and no person can assume that he has any authority to represent anything at all. *Taylor v. Sutherland-Meade Tobacco Co.*, 60 S. E. 132, 134, 107 Va. 787 (quoting and adopting the definition in 2 Cook, Corp. [5th Ed.] § 717, note).

**SECT**

The holding of morning exercises in the public schools, consisting of the reading by the teacher without comment of nonsectarian extracts from the Bible, King James' version, and repeating the Lord's Prayer and the singing of appropriate songs, in which the pupils are invited, but not required to join, does not

convert the schools into a "sect or religious society, theological or religious seminary" or a "sectarian school" within Const. art. 1, § 7, and article 7, § 5, providing that no money shall be appropriated from the treasury for the benefit of any sect or religious society, theological or religious seminary, or for the support of any sectarian school, a "sect" being a body of persons distinguished by particularities of faith and practice from other bodies, a religious society being a voluntary association of individuals or families united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines, and a theological or religious seminary being a place for the preparation of men for the ministry, or for the teaching of religious doctrines, and the word "sectarian" being defined as pertaining to, peculiar to, or devoted to the interest of a sect or denomination. *Church v. Bullock*, 100 S. W. 1025; *Id.*, 109 S. W. 115, 118, 104 Tex. 1, 16 L. R. A. (N. S.) 860.

**SECTARIAN**

A prayer offered at the opening of a public school for the aid and presence of the Heavenly Father during the day's work, asking for wisdom, patience, mutual love, and respect, looking forward to a heavenly reunion after death, and concluding in Christ's name, is not "sectarian," for a form of prayer not authorized by a particular church is not necessarily "sectarian." *Hackett v. Brooksville Graded School Dist.*, 87 S. W. 792, 794, 120 Ky. 608, 69 L. R. A. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 36.

**SECTARIAN BOOK**

"That the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, cannot make it a 'sectarian book.' The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the authorship nor mechanical composition of the book, nor the use of it, but its contents, that give it its character. \* \* \* The question is not whether the version used is canonical or apocryphal." The King James translation of the Bible, or any edition of the Bible, is not a sectarian book, and the reading thereof without comment in the public schools does not constitute sectarian instruction, within the meaning of Ky. St. 1903, § 4368, providing that no books of a sectarian character shall be used in any common school, nor shall any sectarian doctrine be taught therein. *Hackett v. Brooksville Graded School Dist.*, 87 S. W. 792, 794, 120 Ky. 608, 69 L. R. A. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 36.

### SECTARIAN INFLUENCE

A regulation of the superintendent of public instruction prohibiting teachers in public schools from wearing a distinctly religious garb while teaching therein is a reasonable and valid exercise of the powers conferred upon him to establish regulations as to the management of public schools, because the influence of such apparel is distinctly sectarian, and the prohibition is in accord with the public policy of the state, as declared in Const. art. 9, § 4, forbidding the use of property or credit of the state in the aid of "sectarian influences." *O'Connor v. Hendrick*, 77 N. E. 612, 614, 184 N. Y. 421, 7 L. R. A. (N. S.) 402, 6 Ann. Cas. 432.

### SECTARIAN INSTITUTION

Religious control exercised over incorporated institutions which are not "sectarian institutions" under their charters does not make them such within the meaning of D. C. Rev. St. § 457, and section 34 of the Maryland Bill of Rights, invalidating gifts and devises for religious purposes, unless made at least one month before the death of the donor or testator. *Speer v. Colbert*, 26 Sup. Ct. 201, 204, 200 U. S. 130, 50 L. Ed. 403.

### SECTARIAN INSTRUCTION

"The section of the Constitution which provides that 'no sectarian instruction shall be allowed in any school or institution supported in whole or in part by the public funds set apart for educational purposes' cannot, under any canon of instruction \* \* \* be held to mean that neither the Bible nor any part of it, from Genesis to Revelation, may be read in the educational institutions fostered by the state" (quoting and approving *Freeman v. Scheve*, 91 N. W. 846, 93 N. W. 169, 65 Neb. 853, 59 L. R. A. 927), and the reading of King James' translation of the Bible without comment in the public schools does not constitute "sectarian instruction," within the meaning of St. 1903, § 4368, providing that no books of a sectarian character shall be used in any common school, nor shall any sectarian doctrine be taught therein. *Hackett v. Brooksville Graded School Dist.*, 87 S. W. 792, 798, 120 Ky. 608, 69 L. R. A. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 36.

### SECTARIAN SCHOOL

A prayer offered at the opening of a public school for the aid and presence of the Heavenly Father during the day's work, asking for wisdom, patience, mutual love, and respect, looking forward to a heavenly reunion after death, and concluding in Christ's name, is not "sectarian," for a form of prayer not authorized by a particular church is not necessarily "sectarian," nor does such a prayer make the school a "sectarian school," within Const. § 189, prohibiting the appropriation of educational funds in aid of "sectarian schools." *Hackett v. Brooksville Grad-*

*ed School Dist.*, 87 S. W. 792, 794, 120 Ky. 608, 69 L. R. A. 592, 117 Am. St. Rep. 599, 9 Ann. Cas. 36.

The holding of morning exercises in the public schools, consisting of the reading by the teacher without comment of nonsectarian extracts from the Bible, King James' version, and repeating the Lord's Prayer and the singing of appropriate songs, in which the pupils are invited, but not required to join, does not convert the schools into a "sect or religious society, theological or religious seminary" or a "sectarian school" within Const. art. 1, § 7, and article 7, § 5, providing that no money shall be appropriated from the treasury for the benefit of any sect or religious society, theological or religious seminary, or for the support of any sectarian school, a "sect" being a body of persons distinguished by particularities of faith and practice from other bodies, a religious society being a voluntary association of individuals or families united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines, and a theological or religious seminary being a place for the preparation of men for the ministry, or for the teaching of religious doctrines, and the word "sectarian" being defined as pertaining to, peculiar to, or devoted to the interest of a sect or denomination. *Church v. Bullock*, 100 S. W. 1025; *Id.*, 109 S. W. 115, 118, 104 Tex. 1, 16 L. R. A. (N. S.) 860.

## SECTION

See Corresponding Theoretical Sections; Sec.

See, also, Paragraph.

### Of political party

Where a county committee was not even voted for, and made no contest for election as county committeemen at a primary election conducted pursuant to the Primary Election Law, no "section" was created or existed to give the state convention jurisdiction, within Election Law (Laws 1896, as amended), providing that election officers in the city of New York shall be appointed from lists authenticated and filed by the chairman of the executive committee of the county committee of the party, and that, if more than one list shall be submitted in the name of the same political party, only that list shall be accepted which is authenticated by the officer of the section of the party which was organized as regular by the last preceding state convention of such party. *People ex rel. McCarren v. Dooling*, 112 N. Y. Supp. 71, 75, 128 App. Div. 1.

### Of statute

Webster defines the word "section" as a distinct part or portion in a book or writing, the subdivision of a chapter, the division of a law or other writing or instrument, and says

that in laws a section is sometimes called a paragraph or article. The word "paragraph," as used in Act Cong. June 30, 1902, c. 1323, § 16, providing that land allotted to a citizen of the Creek Nation shall not be alienated within five years, and that each citizen shall select from his allotment 40 acres as a homestead inalienable for 21 years, and providing the manner of selecting homesteads for certain classes of persons, and that the homesteads of citizens shall descend to their children, etc., and concluding by declaring any agreement or conveyance violative of any provision of this "paragraph" shall be void, means "section." *Alfrey v. Colbert*, 104 S. W. 638, 646, 7 Ind. T. 338.

If the provisions of that act (Gen Acts 1911, p. 159), discriminating against foreign insurance companies, were unconstitutional, this would not affect the validity of the provision relative to the imposition of license or privilege taxes by municipal corporations, since the two provisions are separable, especially in view of the express provisions of section 34 that, if any section is declared unconstitutional, it shall not affect the remaining sections; the word "section" not meaning separately numbered clauses, but any clauses treating of different matters. *City of Montgomery v. Royal Exchange Assur. Corp. of England*, 59 South. 508, 510, 5 Ala. App. 318.

In Civ. Code 1902, § 1509, subd. 5, the provision that the citizens of Colleton county exempted from the operation of the general stock law under "this section" shall build a certain fence, the words "this section" refer to subdivision 5, so as to render it alone unconstitutional, as imposing an additional burden, and not to the whole of section 1509, as the Legislature could not have intended the citizens of the other portions of the county, also exempted by other subdivisions, to help build a strictly local fence. *Carter v. Barnes*, 68 S. E. 1054, 1055, 87 S. C. 102.

The word "section," in Act. March 3, 1887, c. 373, 24 Stat. 552, raising the limit of jurisdiction of suits in equity to \$2,000, and providing that this "section" shall not affect the jurisdiction of courts of the United States in cases commenced by direction of any officer thereof, or cases for winding up the affairs of any national bank, refers to the entire act, and the act does not deprive United States Circuit Courts of jurisdiction of a suit in equity under Act March 3, 1875, c. 137, 18 Stat. 470, brought by a receiver of a national bank, where the amount involved exceeded \$50. *Rankin v. Herod*, 130 Fed. 390, 391.

## SECTION LINE

See Half Section Line.

## SECTIONAL STEAM BOILER

In the Pratt patent, No. 439,684, and the Hoxie patent, No. 595,852, both for "sectional

steam boilers," that term is used as embracing all water-tube boilers, and not as limited to a boiler built in sections; each section being composed of a group of tubes having front and rear headers common only to the tubes of that group. *Babcock & Wilcox Co. v. North American Dredging Co.*, 151 Fed. 265, 266.

## SECULAR

### SECULAR BUSINESS

"Secular business," as used in Acts 1899, p. 1084, c. 435, § 2, subsec. 2, providing that all property belonging to educational institutions used in "secular business" competing with a like business, having paid taxes to the city, should be taxed, refers to the exercise of some secular business where the property is employed for the purpose of profit. The mere fact that a University rendered certain of its property for residential and business purposes, the income of which was used for the benefit of the University, did not amount to a use of such property "In secular business," rendering it subject to general taxation. *Vanderbilt University v. Cheney*, 94 S. W. 90, 93, 116 Tenn. 259.

### Moving picture show

A moving picture show, for which admission is charged, is not a "secular business" prohibited on Sunday by Pen. Code, § 259, providing that specified acts are prohibited as serious interruptions of the repose and religious liberty of the community, and specifying particular acts in sections 263, 265-267, 277, which did not include such shows. Nor is such show rendered a "secular business" by the fact that it required the employment of individuals, where it is not shown that such persons were not keeping another day holy, under Pen. Code, § 264, rendering such persons immune from prosecution. *William Fox Amusement Co. v. McClellan*, 114 N. Y. Supp. 594, 598, 62 Misc. Rep. 100.

### SECULAR OR BUSINESS DAY

The meaning of the phrase "days of public rest and legal holidays" is the opposite of "secular or business day" and excludes entirely and absolutely the idea of holding court. *State v. Duncan*, 43 South. 283, 287, 118 La. 702, 10 L. R. A. (N. S.) 791, 11 Ann. Cas. 557.

## SECURE

See Fasten and Secure; Property Secure.

The word "secure," when used as a verb active, signifies to protect, insure, save, ascertain. The word "securing" in the Constitution, empowering Congress to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries, refers to inventors as well as authors, but an inventor



or author has no perpetual right to sell the invention or the writing. Rev. St. § 4965, imposing a penalty for infringement of the copyright of any map, picture, work of sculpture, unlike section 4964, relating to books, does not give the proprietor a right to maintain a civil action at law to recover damages for the infringement, and, the exclusive right to property in such artistic productions being purely statutory, the remedy for infringement is limited to that prescribed by statute. *Walker v. Globe Newspaper Co.*, 130 Fed. 593, 597 (quoting and adopting definition in *Wheaton v. Peters*, 33 U. S. [8 Pet.] 591, 8 L. Ed. 1055).

### SECURE A NOTE

A promise "to secure" a note is a stipulation that it shall be paid, according to its tenor and effect. It is as strong a term as an engagement to guaranty. Where the plaintiff loaned money to A. B. at the request of the defendant, taking A. B.'s note for the amount, payable in two years, and the following special agreement of the defendant on the back of the note, viz.: "I agree to secure the within note to H. T. out of or with a deed of a piece of land and water privilege situated," etc., "given to the said [defendant] by E. H. [maker of the note]"—this constituted a guaranty, and the defendant was not entitled to notice of nonpayment. *True v. Harding*, 12 Me. 193, 195.

### SECURED BANKABLE NOTE

Where defendant undertook and agreed to sell personal property of plaintiff at public auction, the proceeds to be in cash or secured bankable notes, the phrase "secured bankable notes" meaning commercial paper immediately convertible into cash, defendant was in effect authorized only to accept cash for the purchase, and his acceptance of the unpaid notes of plaintiff was unauthorized and entitled plaintiff to recover the purchase price. *Rindles v. Bordewyk*, 139 N. W. 113, 114, 30 S. D. 439.

### SECURED CLAIM

Where plaintiff's debt was secured by the mortgage of a person non compos mentis, it was not a "secured claim" within the statute authorizing attachment, providing for attachment in an action on a contract express or implied for the payment of money not secured by mortgage, loan, or pledge on real or personal property, or, if so secured, when such has been rendered nugatory by the act of the defendant. *Bowman v. Wade*, 103 Pac. 72, 77, 54 Or. 347.

### SECURED CREDITOR

"Secured" is not a word of description; it implies an act. A creditor who takes a note for his debt is never understood to be a "secured creditor." A bond which carries nothing more than a promise to pay is no more a security than a promissory note.

When a bond or note is "secured," it must mean that there is something behind it not common to other creditors, or it means nothing. A recital in a corporate bond that it is secured by all the property and assets of the company imports that the bonds are secured by some particular lien. *Stickel v. Atwood*, 56 Atl. 687, 689, 25 R. I. 456.

A creditor of a partnership, which has been dissolved and the debts thereof assumed by one of the partners, thereby constituting him the principal debtor and the other partner surety, is not a "secured creditor," within the meaning of the bankruptcy act, and is not required to disclose the suretyship of the other partner. *Schmitt v. Greenberg*, 109 N. Y. Supp. 881, 882, 58 Misc. Rep. 570.

A creditor of a bankrupt holding a mortgage on exempt property is not a "secured creditor" within Bankr. Act 1898, § 1 (23), providing that secured creditors shall include one who has security for his debt on the property of the bankrupt of a nature to be assignable under the act, or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt, has such security on the bankrupt's assets. In re *Bailey*, 176 Fed. 990, 992.

Under Bankr. Act July 1, 1898, c. 541, § 1, subd. 23, 30 Stat. 545, providing that the term "secured creditor" shall include a creditor who has security for his debt on the property of the bankrupt of a nature assignable under the act, or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt has such security, a creditor, in order to be "secured," must either hold security against the property of the bankrupt himself, or be secured by the individual obligation of another who holds such security. *Gorman v. Wright*, 136 Fed. 164, 165, 69 C. C. A. 76.

A "secured creditor," in the sense of the United States bankruptcy laws, is one who must either hold security against the property of the bankrupt, or be secured by the individual obligation of another, who holds such security. Notes of the bankrupt, secured only by the personal indorsement of another, may be included as unsecured debts in a composition of the bankrupt with his creditors; and the confirmation of the composition by judgment of the proper court will discharge the bankrupt, as maker of said notes, without affecting the rights of creditors holding the same as against the indorsers. *Stauffer, Eshleman Co. v. Abington Hardware & Furniture Co.*, 60 South. 202, 203, 131 La. 715.

Under Bankr. Act July 1, 1898, c. 541, § 1, subd. 23, defining a "secured creditor" as one who has security for his debt on the property of the bankrupt of a nature to be assignable, etc., and section 57, authorizing the allowance of claims of secured creditors, etc., a holder of a warehouseman's receipt which is attached as collateral security of a note

executed to the warehouseman is not a "secured creditor" on the bankruptcy of the warehouseman, and his act in presenting his claim against the bankrupt's estate without surrendering the receipt, but expressing a willingness to credit all sums received on the debt, does not prevent him from suing on the bond of the warehouseman failing to surrender the goods described in the receipt. *State ex rel. First Nat. Bank of Morris, Okl., v. Federal Union Surety Co.*, 137 S. W. 613, 615, 156 Mo. App. 603.

### SECURED ON MY REAL ESTATE

A will giving testator's wife the interest on a sum of money, so long as she lives and remains unmarried, "to be left secured on my real estate," does not require the legacy to the wife to be secured by a mortgage on testator's real estate, but creates a charge on such real estate without the aid of a mortgage. *Plum v. Smith*, 62 Atl. 763, 764, 70 N. J. Eq. 602.

### SECURELY

See Safely and Securely.

### SECURELY GUARDED OR FENCED

The effect of St. 1898, § 1636j, requiring all belting, shafting, gearing, etc., so located as to be dangerous to employes in the discharge of their duties to be "securely guarded or fenced," is to prohibit the use of such machinery as is mentioned therein, unless by the exercise of ordinary care it can be rendered reasonably safe for servants in the discharge of their duties in the exercise of like care. *Willette v. Rhineland Paper Co.*, 130 N. W. 853, 865, 145 Wis. 537.

## SECURITY

See Collateral Security; Further Security; Good Security; Investment Security; Personal Security; Public Securities.

Other security, see Other.

"To be security" in a contract is to be a party to it in the character of a surety unless there is something indicating a different intention. Where a written contract is made in form between two, and signed by the parties named, and at the same time a third person adds, I agree "to be security" for the promisor in the above contract, with his signature, the latter is holden as a joint promisor. *Norris v. Spencer*, 18 Me. 324, 327.

#### Debt distinguished

See Debt.

#### As fund

See Fund.

#### As indicating a mortgage or trust deed

"Security" is a word of broad import. Certain trust deeds in real estate are recognized by our decisions, by which trust deeds the legal title passes to the trustee, with

power of sale. In all respects these deeds and transfers of title are 'security,' but they are not mortgages. A mortgage by which no title whatsoever passes, and whereby but a lien upon the property is acquired, is likewise 'security.'" *Renton v. Gibson*, 84 Pac. 186-188, 148 Cal. 650.

#### As partner

The word "security," as used in a letter from a buyer to a seller of goods stating that "Mr. B., who went my security for stock, is the cause of the countermand of order," amounted to a declaration that B. was only a security of the seller, and not a partner. *James Clark Distilling Co. v. Bauer*, 49 S. E. 160, 56 W. Va. 249.

#### Bills, bonds, notes, etc.

The term "securities" embraces promissory notes, not only in a popular sense, but in a legal sense as well. *Wagner v. Scherer*, 85 N. Y. Supp. 894, 895, 89 App. Div. 202.

Where an agreement recited that plaintiff held C.'s note and also held as "security" a mortgage and note executed by others to C., and defendant guaranteed payment of C.'s note, and plaintiff agreed on payment to assign the "security" subject to the right of the owners of the equity to pay the mortgage debt, defendant was entitled to an assignment of the note as well as of the mortgage securing it. *Griggs v. Moors*, 47 N. E. 128, 130, 168 Mass. 354.

Where a testator, who owned both stocks and bonds, of which the stocks were the most valuable, bequeathed to his wife \$25,000 in cash or securities, at her election, which securities shall be of the amount of \$25,000 at par value, the wife was entitled to take stocks of the par value of \$25,000, even though they were actually worth much more; for, while the word "securities," strictly construed, does not cover corporate stock, the term, in its broadest sense, embraces bonds, certificates of stock, promissory notes, bills of exchange, and all other evidences of debt. In *re Stark's Will*, 134 N. W. 389, 399, 149 Wis. 631.

#### Debt not synonymous

The lien which arises by operation of law on the execution of a deed to secure a debt is a legal entity distinct from the debt itself, securing the payment of the debt not only by affording evidence of its existence, but by providing for its payment, the terms debt and security not being synonymous. *McIntire v. Garmany*, 70 S. E. 198, 8 Ga. App. 802.

#### Evidence of indebtedness synonymous

In its broadest sense, the term "security" embraces all evidences of debt. In *re Stark's Will*, 134 N. W. 389, 399, 149 Wis. 631.

The word "securities," as used in 69 O. L. 173, 174, is a synonym of "evidence of in-

debtedness." *Cincinnati, H. & D. Ry. Co. v. Kleybolte*, 88 N. E. 879, 880, 80 Ohio St. 311.

#### Land

The word "securities," as used in a will whereby the testator devised property to his executor in trust to collect the rents, issues, and profits of the same, giving full power to the executors to sell or dispose of any of the securities that the testator might hold at the time of his death, does not include land. Hence the power to sell securities did not authorize the executors to sell lands, and the executors' attempted conveyance thereof was consequently void. *Pratt v. Worrell*, 57 Atl. 450, 453, 66 N. J. Eq. 194.

#### Liens

A lien on the interest of a legatee's interest in an estate for money lent to him by the executors is "security" within insolvent laws for a debt due from him to them. *Haskell v. Hill*, 47 N. E. 586, 587, 169 Mass. 124.

#### Warranty

"One definition of the word 'security' is that it is something which makes the enjoyment or enforcement of a right more secure or certain." *Rapalje & L. Law Dict.* Where the contract of sale of a piano contained a warranty of title from the seller, such covenant amounted to a "security" to the purchaser. *Coolidge v. Ayers*, 77 Vt. 448, 61 Atl. 40, 41.

## SEDUCE—SEDUCTION

"Seduction" is not a common-law offense. It is created by statute. *Kerr v. United States*, 104 S. W. 809, 811, 7 Ind. T. 486.

"Seduction" is the act of persuading a woman to surrender her chastity. *Carson v. Slattery*, 49 South. 586, 587, 123 La. 825.

The word "seduce," when used to denote the conduct of a man towards a woman, is generally understood to mean the use of some influence, promise, arts, or means on his part by which she is induced to surrender her chastity and virtue to his embraces. *Ireland v. Ward*, 93 Pac. 932, 933, 51 Or. 102.

The word "seduce," when used with reference to the conduct of a man towards a woman, is "universally understood to mean an enticement of her on his part to the surrender of her chastity, by means of some art, influence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him." *Hart v. Knapp*, 55 Atl. 1021, 1023, 76 Conn. 135, 100 Am. St. Rep. 989 (quoting and adopting *State v. Bierce*, 27 Conn. 319).

"The word 'seduced,' when applied to the conduct of a man toward a woman, has a defined and well-understood meaning; and a charge that defendant seduced, debauched, and carnally knew plaintiff is tantamount to saying that he used some undue influence, artifice, deceit, fraud, or made some promise

to induce plaintiff to surrender her chastity and virtue to him." *Peterson v. Crosier*, 81 Pac. 860, 863, 29 Utah, 235 (citing the definitions in 7 Words and Phrases, p. 6389).

A charge that in order to constitute the offense of seduction the female must be under the age of 25 years and unmarried, and have yielded her chastity and person under a promise of marriage, is a correct definition of the crime of seduction. *Knight v. State*, 144 S. W. 967, 991, 64 Tex. Cr. R. 541.

Where, on a trial for seduction, the court defined "seduction," and stated that it was to lead an unmarried woman under the age of 25 years from the paths of virtue, to entice her by means of a marriage promise to have intercourse with the man making the promise and that the woman must have been of chaste character, the instructions were not open to the objection that the court in its preparatory statement omitted to state the elements of the offense. *Carter v. State*, 127 S. W. 215, 220, 59 Tex. Cr. R. 73.

An instruction defining the term "seduce" as an inducement of a woman on the part of a man to surrender her chastity by reason of some art, influence, or deception calculated to accomplish that object, and to include the yielding of her person to him as much as if it was expressly stated, is correct. *Bost v. State*, 144 S. W. 589, 596, 64 Tex. Cr. R. 464.

In a prosecution for seduction, an instruction that seduction means an enticement of a woman on the part of a man to surrender her chastity by means of some art, violence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him, as much as if it was expressly stated, was not open to the objection that it made a deception, influence, art, or other promise sufficient to constitute the offense, regardless of the character of the deception or promise, and because under the laws of Texas the offense of seduction consists of a woman surrendering her virtue by reason of a promise of marriage. *Faulkner v. State*, 109 S. W. 199, 201, 53 Tex. Cr. R. 258.

In an action by a woman for her own seduction, an instruction defining seduction as the act of inducing a woman of previous chaste character to depart from the path of virtue by the use of arts, persuasions, and wiles, inducing her to submit her person to the sexual embraces of the person accused, was correct. *Greenman v. O'Riley*, 108 N. W. 421, 423, 144 Mich. 534, 115 Am. St. Rep. 466.

"Seduction" may be defined to be the act of persuading or inducing a woman of previous chaste character to depart from the path of virtue by the use of any species of arts, persuasions, or wiles which are calculated to have and do have that effect, and result in her ultimately submitting her person

to the sexual embraces of the person accused." *People v. Smith*, 92 N. W. 776, 777, 132 Mich. 58 (quoting and adopting definition in *People v. Gibbs*, 38 N. W. 257, 70 Mich. 425).

#### **Debauch synonymous**

Rev. St. 1889, § 3486, provided that any person who should, "under promise of marriage, seduce and debauch any unmarried female of good repute should be punished." This section was amended by Acts 1897, p. 106, entitled "An act to amend section 3486, chapter 47, article 2, of the Revised Statutes of Missouri of 1889, relating to the seduction of unmarried females under 18 years of age," and changed the section, so as to provide that any person who should, under promise of marriage, seduce or debauch any unmarried female, etc., should be punished. Held, that the words "seduce" and "debauch," though ordinarily not synonymous, were used in such section synonymously, and that the word "or" must be construed to mean "and," in order to bring the offense defined within the title, so that an instruction that the jury could convict, if they believed prosecutrix was either seduced "or" debauched by defendant under promise of marriage, was erroneous. *State v. Long*, 141 S. W. 1099, 1101, 238 Mo. 383.

#### **Debauch distinguished**

The word "seduce," when used alone, usually implies the offense of inducing an unmarried woman, under or by promise of marriage, to surrender her chastity; while the word "debauch" ordinarily imports the deflowering of a woman, whether with or without her consent, and, if with her consent, whether that consent was obtained by promise or persuasion, or followed from her own desires. *State v. Long*, 141 S. W. 1099, 1101, 238 Mo. 383.

#### **As personal injury**

See Personal Injury.

#### **Consequent pregnancy not essential**

To constitute "seduction," a child need not be begotten. *Commonwealth v. Tobin*, 130 S. W. 1116, 1119, 140 Ky. 261.

#### **Previous chastity of female essential**

Under Pen. Code 1879, arts. 814, 815, providing that one who shall, by promise to marry, seduce an unmarried female shall be punished, and declaring that the term "seduction" is used in its commonly understood sense, an unchaste woman cannot be seduced, and to seduce a woman she must be led from the path of virtue by a promise of marriage, and the carnal intercourse must occur by virtue of the marriage promise. A woman who has had intercourse with several persons, and who has become pregnant, which resulted in a miscarriage, is unchaste, and one who subsequently has intercourse with her in not guilty of seduction, within Pen. Code 1879, art. 814, defining and punishing seduction. *Sim-*

*mons v. State*, 114 S. W. 841, 844, 54 Tex. Cr. R. 619.

Under Code 1906, § 1081, providing that any person who shall seduce and have illicit intercourse with any female under the age of 18 of previous chaste character shall be imprisoned, etc., intercourse with a female who is already unchaste is not seduction, since the same person cannot seduce a female more than once. *Hatton v. State*, 46 South. 708, 709, 92 Miss. 651.

#### **Single man not essential**

To constitute "seduction," accused need not be a single man. *Commonwealth v. Tobin*, 130 S. W. 1116, 1119, 140 Ky. 261.

#### **Promise or persuasion**

"Seduction" being the carnal knowledge by a man of an unmarried woman of previously chaste character, accomplished by means of some false promise, artifice, flattery, or deception, it is not sufficient that plaintiff alone show that defendant had sexual intercourse with her. *Lauer v. Banning*, 131 N. W. 783, 785, 152 Iowa, 99.

A female is "debauched" when, by arts and blandishments, she is deceived, corrupted, and drawn aside from the right path, and she is carnally known. Every illicit connection is not "seduction." It cannot be said that a female is drawn aside from the path of virtue unless she is honestly pursuing that path when approached. If her mind is corrupt and polluted by lewd thoughts, and she is ready to submit to improper embraces, as opportunity offers, from her own lustful propensity, and without any arts or blandishments of him with whom she has sexual intercourse, in such case she cannot be said to be seduced by the party with whom she has improper sexual relations. *State v. Fogg*, 105 S. W. 618, 623, 206 Mo. 696.

The word "seduce," as used in 2 Ballinger's Ann. Codes & St. § 7066, punishing any one who shall "seduce" and debauch any unmarried female, is used in its ordinary legal meaning and implies the use of arts, persuasion, or wiles to overcome the resistance of the female who is not disposed of her own volition to step aside from the path of virtue. While promise of marriage is no doubt the most common method, any seductive arts or promises where the female involuntarily and reluctantly yields thereto are sufficient. *State v. O'Hare*, 79 Pac. 39, 40, 36 Wash. 516, 68 L. R. A. 107, 104 Am. St. Rep. 970.

#### **Promise of marriage**

To constitute "seduction," there must have been an act of intercourse induced by a promise of marriage. *McLaurin v. State* (Tex.) 146 S. W. 557, 558.

A woman who has carnal intercourse with a man under a conditional promise of marriage, the condition to happen in the future, predicated on a possible pregnancy, is not se-

duced within Pen. Code 1879, art. 814, defining and punishing seduction. *Simmons v. State*, 114 S. W. 841, 844, 54 Tex. Cr. R. 619.

Seduction means a withdrawal from the path of rectitude. It is a leading astray, and as applied to intercourse with a woman under a promise of marriage it implies that a woman of previous chaste character has been induced to consent to unlawful sexual relations by persuasion and the promise to marry. *Clemons v. Seba*, 111 S. W. 522, 131 Mo. App. 378.

Rev. Laws 1905, § 4931, provides that one who, under a promise of marriage, shall seduce and have sexual intercourse with an unmarried female of previous chaste character, shall be punished, etc. Held, that the mere fact of a promise of marriage, followed by sexual intercourse, is not sufficient to constitute seduction; but the prosecutrix must have been at the time an unmarried female of previous chaste character, and must have yielded her virtue by reason of the arts, persuasions, and promises of marriage of accused. *State v. Preuss*, 127 N. W. 438, 439, 112 Minn. 108.

"Seduction" means to lead away a female from the path of virtue, to entice or persuade her, by a promise of marriage, to surrender her virtue and have carnal intercourse with the man making such promise. To constitute the offense of seduction, it must appear that carnal intercourse with the female was accomplished by means of a promise to marry her, made prior to the illicit intercourse." *Howe v. State*, 102 S. W. 409, 410, 51 Tex. Cr. R. 174.

To constitute seduction, under Rev. St. 1909, § 4478, punishing any person who shall under or by promise of marriage seduce any unmarried female, the female must rely on the promise of marriage and submit to sexual intercourse because of such promise, which must be the inducement for her consent, and where a female consents on the man's conditional promise to marry her in the event of pregnancy there is no seduction. *State v. Thomas*, 132 S. W. 225, 227, 231 Mo. 41.

Under Code 1906, § 1372 (Ann. Code 1892, § 1298), defining seduction as the obtaining of carnal knowledge of a woman of previous chaste character through a false or feigned promise of marriage, etc., one guilty of that offense may not exempt himself from prosecution by an offer to marry the woman. *Williams v. State*, 45 South. 146, 147, 92 Miss. 70, 15 Ann. Cas. 1026.

Cr. Code, § 207, provides that any person over the age of 18 years, who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity, shall be deemed guilty of "seduction." Held, that this did not make it necessary to prove that defendant had seduced his victim in the common-law meaning of that

word; that the statute itself defines what shall be seduction; and that if defendant was over 18 years of age, and, under promise of marriage, had unlawful intercourse with a female of good impute for chastity, he was guilty of seduction without regard to whether the female so seduced was entitled to that good reputation. *Russell v. State*, 110 N. W. 380, 381, 382, 77 Neb. 519, 15 Ann. Cas. 222.

"To accomplish sexual intercourse with a virtuous woman pending a virtuous engagement to marry her may be 'seduction,' though consent be obtained without other persuasion than that which is implied (considering the past courtship and the present relations of the parties) in proposing the intercourse and repeating the promise of marriage." Of course, solicitations, even though they may include a promise to marry, whereby the woman in consideration of the promise surrenders her person, are not sufficient to make a case of "seduction." But a promise of marriage which a woman believes to be made in good faith and made as a climax to a long course of wooing, when the man has fully captured the heart of the woman, and she hearkens to the voice of love, and yields to her lover because she trusts him, implies persuasion of the strongest character. Indeed, we think that Providence, wisely intending to save the human race from moral wreck and ruin, has made the heart of woman a citadel of virtue invincible to the brutal forces of lust and capitulating only to the gentle promptings of confiding love. *Woodard v. State*, 63 S. E. 573, 574, 575, 5 Ga. App. 447.

An instruction on a trial for seduction defining "seduce" as to entice a woman to surrender her chastity by deception, and stating that seduction is not complete unless the female was at the time chaste, unmarried, and under 25 years of age, and was persuaded to surrender her chastity by reason of accused's promise to marry her, and that if accused had intercourse with prosecutrix by reason of his promise of marriage, and prosecutrix was then chaste and unmarried and under 25 years of age, he was guilty, but if she yielded by reason of her own passion he must be acquitted, is sufficient. Where, on a trial for seduction, there was no suggestion in the evidence that the intercourse was the result on prosecutrix's part of anything except the promise of marriage, unless the jury might attribute it to her own lust, and the court charged that if the intercourse was the result of her passion accused should be acquitted, the refusal to charge that, if the intercourse was induced on her part by any other motive than promise to marry, accused must be acquitted, was not erroneous. *Hinman v. State*, 127 S. W. 221, 223, 59 Tex. Cr. R. 29.

#### Sexual intercourse

The word "seduce," when used with reference to the conduct of a man towards a woman, is universally understood to mean an

enticement of her on his part to the surrender of her chastity, by means of some art, influence, promise, or deception calculated to accomplish that object, and to include the yielding of her person to him. The word "seduction," used in reference to a man's conduct towards a female, *ex vi termini* implies sexual intercourse between them. Every one understands, when it is said of a man that he has "seduced" a particular female, that he has had such intercourse with her. *Gessner v. Horne*, 132 N. W. 431, 433, 22 N. D. 60.

## SEE

The word "see," as used in a letter written by a seller to a third person, reciting that the seller would never have sold the property to the buyer, but for the assurance of the third person that the seller would get his money; that the seller never knew the buyer until introduced by the third person; that the third person stated that he would see that the seller was paid, and inquiring whether the third person would live up to what he had told the seller, indicates a collateral promise to pay the debt of another, rather than a direct promise to pay one's own debt. *Halsted v. Pelletreau*, 91 N. Y. Supp. 927, 928, 101 App. Div. 125.

## SEE YOU PAID

See I Will See You Paid.

## SEED

See Canary Seed; Grass Seed.

"The word 'seeds,' as found in paragraph 760 in the free list, is joined with 'plants, trees, shrubs, and vines,' the obvious intention being to encourage agriculture, horticulture, and arboriculture by facilitating seeding and transplanting, and the words being applicable to seeds used for seeding purposes—in common understanding, for propagation." *Sonn v. Magone*, 16 Sup. Ct. 67, 159 U. S. 417, 421, 40 L. Ed. 203.

Canary seed, which is botanically a grass seed, but is used principally as a bird seed, and which is not known commercially as grass seed, is not free of duty under the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 656, 30 Stat. 201, for "grass seeds \* \* \* not specially provided for," but is dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 254, 30 Stat. 171, covering "seeds of all kinds not specially enumerated." *Nordlinger v. United States*, 127 F. 683, 684, 62 C. C. A. 409.

## SEED COTTON

Acts 1896, p. 172, c. 156, § 16, imposes a tax on all "lint cotton" annually grown in a levee district, etc., and Acts 1904, p. 126, c. 90, § 5, makes it unlawful for any person to remove from the district any "cotton" grown therein without first paying the levee tax thereon, and declares that the levee board

may recover from the person wrongfully removing such cotton a certain penalty tax on each bale or hundredweight of "seed cotton" so removed. Held, that the words "lint cotton" in the first act and "cotton" and "seed cotton" in the second act were limited to "lint cotton" ginned by ordinary gins, and did not include "linter" or "Grabbot" cotton, obtained by reginning cotton seed and hard locks of cotton and cotton mixed with hulls, bolls, and other substances which could not be removed by ordinary ginning. *Board of Mississippi Levee Com'rs v. Refuge Cotton Oil Co.*, 44 South. 828, 829, 91 Miss. 480.

## SEEDLINGS

The word "seedlings" includes all trees or plants grown from seed, irrespective of their age. *United States v. American Express Co.*, 158 Fed. 808, 809, 86 C. C. A. 68.

## SEEK

### SEEKING TO DO BUSINESS

The phrase "seeking to do business," as used in an act creating a charter board, to which application must be made for permission to organize a domestic corporation, and to do business in the state as a foreign corporation, and which provides that other persons seeking to form a private corporation under any of the laws of this state, or any corporation organized under the laws of any other state, and "seeking to do business" in this state, shall make application to said board for permission to engage in the business as a foreign corporation, etc., means seeking to do further business as well as seeking to begin doing business. *State ex rel. Coleman v. Western Union Tel. Co.*, 90 Pac. 299, 303, 75 Kan. 609.

## SEEM

For a witness to testify that "it seems to me that he closed the door" is not subject to objection on the ground that it is opinionative; the use of the word "seems" merely stating the appearance of the incident to the witness. *Mims v. State*, 58 S. E. 499, 500, 2 Ga. App. 387.

## SEEMING DANGER

Appearances calculated to produce in a reasonable mind, and really producing, conviction of impending peril to life or limb, is what is meant by "seeming danger." *Rogers v. State*, 62 Ala. 170, 174.

## SEEPAGE

"Seepage" is water finding its way through the banks of a reservoir. *Righter v. Jersey City Water Supply Co.*, 63 Atl. 6, 73 N. J. Law, 298.

Sess. Laws, 1889, p. 215, § 1, providing that all ditches constructed to utilize the waste, seepage, or spring waters of the state

shall be governed by the same laws relating to priority of right to water in ditches constructed for the purpose of utilizing the water of running streams, if valid, is applicable only to appropriations of "waste, seepage, and spring waters" before they reach a natural stream, whether by natural surface flow or percolation, or by being artificially turned into the same; and the waters after reaching a natural stream become, in the absence of an intention by the owner to reclaim them, a part of the stream, and inure to the benefit of the appropriators of its waters. *La Jara Creamery & Live Stock Ass'n v. Hansen*, 83 Pac. 644, 645, 35 Colo. 105.

## SEINE

Any species, see Any.

A "seine," as used in the rivers and lakes, is a long net, of sufficient width to extend from the surface of the water, usually to the bottom. It is strung on two lines of rope; one, the cork line, being provided with cork or wooden floats at short intervals, to make it float, the other, or lead line, provided with leaden weights to sink it and hold it down, generally upon the bed of the stream or water, thereby spreading the net from surface to bed. It is generally used by drawing it, and surrounding and inclosing the fish. *Hilborn v. Smith*, 111 N. W. 1082, 1083, 148 Mich. 474.

A "seine" is a kind of net, but a "trammel net" is not a "seine." *Kirby's Dig. § 3600*, forbids any person to place in the waters of the state any seine net, gill net, trammel net, etc., or by any such means to catch fish, and provides further that it shall not be unlawful to use a seine with meshes not less than four inches square, and that any person using a seine with meshes less than four inches in width upon conviction shall be fined not less than \$25 nor more than \$50. Held, that an indictment, charging that defendant unlawfully caught fish with a net and seine, was void for duplicity. Under *Kirby's Dig. § 3600*, forbidding any person to place in the waters of the state any seine, net, gill net, trammel net, etc., or to catch fish by any such means, and providing further that it shall be unlawful to use a seine with meshes not less than four inches square, it is unlawful to use a trammel net, though its meshes are not less than four inches in width; the exception applying only to seines. *Rowe v. State*, 103 S. W. 613, 614, 83 Ark. 244.

## SEISED

Seised in fee simple, see Fee Simple.

The word "seised," in its technical sense, is not generally applied to personal property, but pertains to real property. *Walker v. Peters*, 124 S. W. 35, 37, 139 Mo. App. 681.

The word "seised," as used in an allegation in an action by an administrator for the conversion of goods, claimed to have been owned by intestate, that at the time of his death he was "seised and possessed" of the property, means possession and ownership. *Grant v. Hathaway*, 96 S. W. 417, 118 Mo. App. 604 (citing 7 Words and Phrases, p. 6396).

A judgment debtor who fraudulently conveyed property before rendition of the judgment is not, as to such property, "seised in law or equity," within *Mansf. Dig. § 3001* (*Ind. T. Ann. St. 1899, § 2116*), making this a necessary condition to a sale thereof on execution. *Parrott v. Crawford*, 82 S. W. 688, 691, 5 Ind. T. 103.

A testator devised land to a nephew. Thereafter he made a parol gift of the land to him, and he entered into possession with the consent of testator, and remained in the undisturbed possession until the death of the testator a few months later. The testator made no change in the will. Held, that testator was not "seised" or "possessed" of the land at the time of his death, within *Acts 1893, c. 174*, imposing a tax on property passing by will. *Bailey v. Henry*, 143 S. W. 1124, 1128, 125 Tenn. 390.

*Mansf. Dig. § 2591* (*Ind. T. Ann. St. 1899, § 1879*), provides that a widow shall be entitled, as part of her dower, absolutely in her own right, to one-third part of the personal estate, including cash on hand, etc., whereof the husband died seised or possessed. Held, that where a husband died in Indian Territory, the owner of insurance on his life, which belonged to his estate, he died "seised" of the proceeds of the policies, and his widow was entitled to be endowed of one-half of the proceeds thereof collected, or which might be collected by the executors, absolutely and in her own right; there being no children of the marriage, under the express provisions of *Mansf. Dig. § 2592* (*Ind. T. Ann. St. 1899, § 1880*). *Mansf. Dig. § 2591* (*Ind. T. Ann. St. 1899, § 1879*), provides that a widow shall be entitled, as part of her dower, absolutely in her own right, to one-third of the personal estate whereof the husband died seised or possessed. Held, that "seised," means "title" or "ownership," which carries with it the immediate right of possession. *Burdett v. Burdett*, 109 Pac. 922, 925, 926, 26 Okl. 416, 35 L. R. A. (N. S.) 964.

### Legal estate imported

The term "seised" has always been construed in its common-law sense, as applicable to legal estates only, and the statute declaring that the wife must be seised of an estate of inheritance in the lands in order to entitle her husband to curtesy has been received as a declaration only of the common-law rule of dower. In *re Grandjean's Estate*, 110 N. W. 1108, 1109, 78 Neb. 349, 15 Ann. Cas. 577.

The word "seised" in the law of dower refers to legal title or a perfect equity equivalent thereto. Where an owner of land made a deed to secure an indebtedness, and took a bond for reconveyance upon payment of the debt, and died without having paid any part of the debt, or having obtained a reconveyance, his widow was not entitled to take dower either in the land as a whole or in the equity of redemption, at least not without first redeeming the property. *Harris v. Powers*, 58 S. E. 1038, 1041, 129 Ga. 74, 12 Ann. Cas. 475.

The contract vendor of land with a lien for the purchase price retains the legal title only as security, and is not thereafter "seised," within Code, § 2912, providing that all persons owning land not held by adverse possession shall be deemed seised thereof, the vendor's interest being personalty and descending as such; and hence a devisee would take nothing under a will giving him all the "land" of which testator died seised, testator having previously sold the land and the vendee having performed the conditions of the contract to the time of testator's death. In *re Miller's Estate*, 119 N. W. 977, 978, 142 Iowa, 563.

#### SEISED AND POSSESSED

An allegation that a person was "seised and possessed" of land, *prima facie* imports seisin in fact, not mere seisin in law. *Bragg v. Wiseman*, 47 S. E. 90, 91, 55 W. Va. 330.

### SEISIN

See Actual Seisin; Covenant of Seisin; Instantaneous Seisin.

"Seisin" is a fixed right of enjoyment of the estate either immediately or at the termination of an intermediate estate. In *re Prasser's Will*, 121 N. W. 643, 645, 140 Wis. 92 (citing 1 Washb. Real Prop. [6th Ed.] § 116).

#### Freehold imported

"Seisin" is the possession of land under a claim, either express or implied by law, of an estate amounting at least to a freehold; ordinarily a possession in fee by one having or claiming a freehold interest. In *re Grandjean's Estate*, 110 N. W. 1108, 1109, 78 Neb. 349, 15 Ann. Cas. 577.

#### As ownership

Under the acts of descent in this country, the word "seisin" is equivalent to "ownership." *North v. Graham*, 85 N. E. 267, 270, 235 Ill. 178, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189 (citing *Cook v. Hammond*, 6 Fed. Cas. 399, 4 Mason, 467).

#### As possession

In the common law "seisin" signifies possession. *Bragg v. Wiseman*, 47 S. E. 90, 91, 55 W. Va. 330 (quoting *Coke*, Inst.).

"Seisin" means a claim of title accompanied with possession. *Webb v. Wheeler*,

114 N. W. 636, 80 Neb. 438, 17 L. R. A. (N. S.) 1178.

A mere constructive possession is not "seisin" within the meaning of Kirby's Dig. § 5061, providing that no action for the recovery of lands sold for taxes shall be maintained against the purchaser unless plaintiff or his predecessor in interest was seised or possessed of the lands within two years next before the commencement of the action. *Towson v. Denson*, 86 S. W. 661, 665, 74 Ark. 302.

"Seisin" and 'possession,' as now understood, mean the same thing. To constitute seisin in fact, there must be an actual possession of the land; for a seisin in law there must be a right of immediate possession according to the nature of the interest, whether corporeal or incorporeal. 1 Wash. Real Prop. 62. Under this view there can be no seisin in law where there is not a present right of entry, and where the life tenant is in possession, there being no present right of entry in the remainderman or reverser, they are not constructively seised, and neither can maintain a suit as plaintiff for partition. The authorities generally sustain this view." *Carlson v. Sullivan*, 146 Fed. 476, 478, 77 C. C. A. 32 (quoting and adopting the definition in *Savage v. Savage*, 23 Pac. 890, 891, 19 Or. 112, 116, 20 Am. St. Rep. 795).

#### Legal title or estate imported

The term "seisin," as used in the statute under which a wife is entitled to dower of lands of which her husband dies "seised and possessed," means something more than the naked legal title, and to entitle her to dower he must have been beneficially seised at the time of his death. The naked legal title is not sufficient, but that title must be accompanied by a beneficial interest, and he must not hold the title merely as a conduit through whom the title is to be conveyed to the party having the beneficial interest. So a widow is not entitled to dower in land levied on and sold under execution against her husband before his death, though he died vested with the legal title; the sheriff having failed to make a deed to the purchaser. *Rose v. Rose*, 53 Tenn. [6 Heisk.] 533, 537, 538.

"The word 'seisin' is said to have a technical meaning when used in connection with the right to dower in the lands of the husband of which he was seised during coverture, and at common law to import a feudal investiture of title by actual possession, and with us it has the force of possession under some title or right to hold the same. It is either a seisin in deed or a seisin in law; the former being the actual possession of a freehold estate, and the latter the right to the immediate possession and enjoyment of a freehold estate. It applies only to the freehold estate or to the possession of the land of a freehold tenure. 'Seisin' in fact or in



deed has also been defined to be possession with intent on the part of him who holds it to claim a freehold interest, and 'seisin' in law as the right of immediate possession according to the nature of the estate. A somewhat different and broader meaning is assigned to the word in the statutes of descent of North Carolina, where it is provided that every person in whom a 'seisin' is required by any of the rules, of descent shall be deemed to have been seised if he may have had any right, title, or interest in the inheritance." *Redding v. Vogt*, 53 S. E. 337, 338, 140 N. C. 562, 6 Ann. Cas. 312 (citing Washb. Real Prop., 33, 34; *Early v. Early*, 46 S. E. 503, 506, 134 N. C. 258).

### SEISIN IN DEED

As seisin in fact, see *Seisin in Fact*.

Curtesy is supported by seisin of the wife, either in law, which is a right of immediate possession independent of actual or constructed possession, or "seisin in deed," which is actual possession. *Majors v. Cryts*, 144 S. W. 769, 240 Mo. 386.

### SEISIN IN FACT

"'Seisin in fact' is called by Lord Coke 'seisin in deed,' and is often termed 'actual seisin.' It means a possession of the freehold actually by the *pedis positio* of oneself, or one's tenant, or by construction of law, as in case of a grant of lands from the commonwealth, by conveyance under the statute of uses, or by devise (supposing no adverse occupancy by some one else), in contradistinction to the 'seisin in law,' which exists in the heir after the descent of lands upon him before the actual entry by himself or his tenants." "Before the heir actually enters (or, in case of an incorporeal hereditament, before he actually enjoys it) by himself or his tenant for years, he is said to be seised in law. This sort of seisin for curtesy suffices only where actual seisin is impossible, e. g., in case of rent, where, after the right to it accrues to the wife, she dies before any day of payment." "In mere right of entry, or right of action, there is no curtesy for want of actual seisin." Where a warranty deed to defendant's wife, after the granting clause, excepted and reserved the rents and profits of the land during the grantor's natural life, and the grantor occupied the property until after the grantee's death, the grantee was never seised of an estate in possession so as to entitle her husband to curtesy in the property. *Dozier v. Toalson*, 79 S. W. 420, 421, 422, 180 Mo. 546, 103 Am. St. Rep. 586 (quoting and adopting definition in 2 *Minor, Inst.* pp. 103, 108, 109).

### SEISIN IN LAW

Curtesy is supported by seisin of the wife, either in law, which is a right of immediate possession independent of actual or constructed possession, or seisin in deed,

which is actual possession. *Majors v. Cryts*, 144 S. W. 769, 240 Mo. 386.

"While the mere operation of the law of descent gives the heir seisin in law upon his ancestor's death, this does not enable him to transmit the inheritance to his heirs. He must have obtained an actual seisin or possession or seisin in deed as distinguished from seisin in law"—hence possibility of reverter cannot be granted. *North v. Graham*, 85 N. E. 267, 270, 235 Ill. 178, 18 L. R. A. (N. S.) 624, 126 Am. St. Rep. 189.

At common law "seisin in deed"—that is, actual possession—was necessary for curtesy. In Missouri the common law has been so modified as to make "seisin in law"—that is, a present right to possession—sufficient. *Dozier v. Toalson*, 79 S. W. 420, 421, 422, 180 Mo. 546, 103 Am. St. Rep. 586 (quoting and adopting definition in *Minor, Inst.*, vol. 2, pp. 103, 108, 109).

## SEIZED

### SEIZED BY VIRTUE OF AN EXECUTION

The words "seized by virtue of an execution," in the chapter of the Constitution relating to executions, means such seizure, either actual or constructive, as the situation of the property permits. *Smith v. Rogers*, 73 S. W. 243, 244, 99 Mo. App. 252.

## SEIZURE

See *Constructive Seizure*; *District in Seizure*.

For violation of law as civil action, see *Civil Action—Case—Suit, Etc.*

Const. 1890, § 23, which provides that the people shall be secure from unreasonable "seizure or search," is not violated by Laws 1910, c. 134, giving to the state or county a suit for penalties provided therein, which may be begun by attachment, since there is no search or seizure within the meaning of the provision; the statute merely affording a remedy by attachment for the collection of the penalty. *State v. Marshall*, 56 South. 792, 797, 100 Miss. 626.

A search ordinarily implies a quest by an officer of the law, and a "seizure" contemplates a forcible dispossession of the owner. A corporation charged with a violation of the anti-trust act of July 2, 1890, is entitled to immunity under Const. U. S. Amend. 4, from such an unreasonable search and "seizure" as the compulsory production before a grand jury, under a subpoena duces tecum, of all understandings, contracts, or correspondence between such corporation and six other companies, together with all reports and accounts rendered by such companies from the date of the organization of the corporation, as well as all letters received by that corporation since its organization, from more than one

dozen different companies, situated in seven different states. *Hale v. Henkel*, 26 Sup. Ct. 370, 379, 201 U. S. 43, 50 L. Ed. 652.

An order issued under Laws 1906, p. 79, No. 75, directing a corporation to produce before a grand jury certain books and papers and proceedings for contempt for violating such order, were not an infringement of Const. art. 11, as a "seizure," because no tender was made to cover the fees and expenses for appearing in court with the books and documents. In *re Consolidated Rendering Co.*, 66 Atl. 790, 794, 80 Vt. 55, 11 Ann. Cas. 1069, judgment affirmed *Consolidated Rendering Co. v. State of Vermont*, 28 Sup. Ct. 178, 207 U. S. 541, 52 L. Ed. 327.

Under Civil Damage Act (Code 1906, c. 32) § 26, providing that if a landlord's property be "seized or taken" for any fine, etc., by reason of his tenant's unlawful acts, such landlord may recover damages and costs, a "lien" upon a landlord's property, being defined as a hold or claim which one has upon the property of another as a security for some debt or charge, does not constitute a "seizure or taking" of his property within the meaning of the statute. *Brown v. United States Fidelity & Guaranty Co.*, 74 S. E. 863, 869, 70 W. Va. 613.

#### **Taking possession required**

As ordinarily understood by lawyers, the "seizure" of property by "process of court" has reference to the taking possession thereof by an officer under attachment or execution or other appropriate writ or order of a court. Where plaintiff performed labor for deceased within 90 days of the appointment of an administrator upon his estate, which was found to be wholly insolvent, plaintiff was not entitled to any preference, under Code, § 4019, providing that, when the property of any person shall be seized upon by any process or placed in the hands of a receiver, trustee, or assignee, for the purpose of paying debts, the debts owing to employes for labor performed within 90 days past will have priority, the section not referring to administration; the term "seizure of property by process of court" referring to such writs as attachment, execution, and the like. *Moss v. Williams*, 133 N. W. 120, 152 Iowa, 686.

## **SELECT—SELECTION**

#### **Accept not synonymous**

An allegation that defendant "selected" certain cattle sold did not constitute an allegation of a delivery and acceptance within the statute of frauds; the words "selected" and "accepted" not being synonymous. *McMillan v. Heaps*, 123 N. W. 1041, 85 Neb. 535.

#### **Alternative implied**

To "select" is to pick out or choose. It signifies a choice of one out of more than one. *Petersburg School Dist. of Nelson County v. Peterson*, 103 N. W. 756, 758, 14 N. D. 344.

A mortgage of a specified number of cattle on a certain farm is good, to the number specified, against a purchaser from the mortgagor, although there are more cattle of the same description on the farm, which fact is not disclosed by the mortgage, since the mortgagee is permitted, by what is called the doctrine of selection or election, to select the specified number from the whole number. *Sparks v. Deposit Bank*, 78 S. W. 171, 115 Ky. 461.

#### **As identification**

"The word 'selection' is not an apt word to describe the identification of certain lands according to evidence presented of their character." *Brewer, J. Michigan Land & Lumber Co. v. Rust*, 18 Sup. Ct. 208, 168 U. S. 589, 601, 42 L. Ed. 591.

#### **Provide distinguished**

Act March 15, 1906, p. 432, c. 248 (Code 1904, § 1433), defining the powers and duties of the state board of education, was amended so as to declare that such board should "select" text-books, school furniture, and educational appliances for the public schools of the state, etc. Two days after, at the same session, Code 1904, § 1458, was amended by Acts 1906, pp. 513, 515, c. 293, and re-enacted, subsection 10 of which declared that the school board of a city should have power, and that it should be its duty, to "provide" schoolhouses with proper furniture and appliances, and to care for and manage and control the school property of the city. Held, that such acts were in pari materia, and should be construed together, and that under them a city school board had only power to provide such school furniture for the public schools of the city as had been selected by the state board of education; the words "select" and "provide" in such provisions not being synonymous, "provide" being used in the sense of "to furnish or supply," while "select" means "chosen" or "picked out." *Commonwealth v. School Board of City of Norfolk*, 63 S. E. 1081, 1082, 109 Va. 346.

#### **Homestead**

As defined by Webster, the term "selected" means "to choose and take from a number; to take by preference from among others. In Sess. Laws 1896, p. 213, c. 71, § 11, providing that, "if the debtor be the head of a family, there shall be a further exemption of a homestead, to be selected by the judgment debtor, consisting of lands and appurtenances, which may be in one or more pieces in different localities," etc., not exceeding in value a certain sum, the term "selected" is not used in its general sense where the head of the family owns several parcels of real estate which are of less value than the limit of value fixed by the statute. He can make no selection within the strict meaning of that term, unless he should select less than the statute permits. So that where a judgment debtor owns real estate which does not ex-

ceed in value the amount of homestead exemption, the occupation and use of the real estate for the benefit of the family is a sufficient selection under the statute. *Kimball v. Salisbury*, 56 Pac. 973, 975, 19 Utah, 161 (citing *Kimball v. Salisbury*, 53 Pac. 1040, 17 Utah, 381; *Beecher v. Baldy*, 7 Mich. 488).

#### Lien land

Under the Forest Reservation Act, Act Cong. June 4, 1897, c. 2, 30 Stat. 11, providing that, whenever the United States reserves land for forest purposes, all those persons owning the land within the boundaries of such forest reservation, upon surrendering the same to the government, shall be entitled to select in lieu thereof an equal amount of other public vacant land open to settlement. "When a locator under the act files his selection in compliance with the rules and regulations of the land department, and accompanies it with proof that the lands of which he makes selection are vacant and open to settlement, and these facts are true, the Commissioner of the General Land Office has no arbitrary right to reject the selection, but must approve it, and upon such approval the right of the selector to the land takes effect by relation as of the date of his original selection. When such an approval is had by the commissioner, the locator becomes the full equitable owner in the land selected, but it by no means follows that until then he had acquired no interest or right in the land by virtue of his selection. On the contrary, we are satisfied that he did. He was possessed of the right under the act to acquire public land, had exercised that right to become the owner of the particular land on which he filed the "selection," and had done all that was required by him to do under the act in order to obtain a perfect title. Under these circumstances, if he acquired nothing more, he acquired at least an inchoate equitable right, a right which was capable of being enlarged into a complete title by the approval of the Commissioner of the General Land Office, and was a right which the land department itself, in effect, recognizes may be sold and assigned after such selection is filed. *Farnum v. Clarke*, 84 Pac. 166-169, 148 Cal. 610.

### SELECTMAN

As state officer, see State Officer.

### SELF

Webster defined the word "self" as a person, as a distinct individual; a being as having a personality; and that self is united to certain personal pronouns and pronominal adjectives to express emphasis or distinction. As used in a description of a lot in a petition in an action to foreclose a lien of a special tax bill as "a certain lot bounded north by Sanders, south and east by self and west by Euclid avenue," it is impossible to tell to whom "self" refers, so that the petition is

insufficient to give the court jurisdiction over the lot as described. *Bell v. Johnson*, 105 S. W. 1039, 1040, 207 Mo. 281.

#### SELF ANCHOR

The term "self anchors" was used in the specification of a patent to mean anchors capable of self-adjustment by having at all times free play, because not attached to their sockets nor moving with the bottom section to which the sockets were attached, thus sufficiently explaining the difference between the word "anchor" as commonly used and "self anchors" as used in the description of the patented apparatus. *Cammeyer v. Newton*, 94 U. S. 225, 233, 24 L. Ed. 72.

#### SELF-CONTAINING CONVERTIBLE CAR

A "self-contained" or "self-containing convertible car" is one which somewhere within it has the storage for the panels when removed from the sides, either by pushing them up or down or sidewise, or removing them from the sides entirely, so as to form the necessary openings. A convertible car (truly such) must have end entrances as usual in cars. Otherwise (unless it should be provided with a side door) the passengers would be boxed up and imprisoned—"shut in"—should it be converted into a closed car while they were inside, and would be prevented from entering at all when outside; that is, "shut out" when the car is being used as a closed car. *O'Leary v. Utica & M. V. Ry. Co.*, 139 Fed. 330, 333.

#### SELF-CONTRADICTION

There must be a real inconsistency between two assertions of a witness in order to constitute "self-contradiction." It is not a mere difference of statement, nor is an absolute oppositeness essential. It is an inconsistency that is required, and the inconsistency is to be determined, not by individual words and phrases alone, but by the whole impression or effect of what has been said or done. *Holder v. State*, 104 S. W. 225, 235, 119 Tenn. 178 (citing *Wigmore on Evidence*, vol. 2, § 1040).

### SELF-DEFENSE

See Justifiable Self-Defense.

"Self-defense" or self-preservation is a law of nature which accompanies a man from the cradle to the grave. He is born with the knowledge and it goes with him through life. It is a law of instinct which the lower animals possess to a greater or less extent. *Courtney v. Kneib*, 110 S. W. 665, 667, 131 Mo. App. 204.

"Self-defense" is extended to the defense of the person and of the domicile. Intentional homicide may not be justified completely beyond this scope." *Reed v. State*, 106 N. W. 649, 652, 75 Neb. 509 (citing *Bish. New Cr. Law*, vol. 1, § 867).

A person's right of self-defense does not depend on his belief, in the exercise of reasonable judgment, that it is necessary to use the force that he does. It is enough that it is in fact necessary, or that in the exercise of a reasonable judgment it appears to him to be necessary, though, as a matter of fact, it is not necessary. *McKinney v. Commonwealth* (Ky.) 82 S. W. 283, 284.

"Homicide in self-defense" is that committed to avoid immediate suffering, certain to result from waiting for the assistance of the law, and which cannot be otherwise escaped. *State v. Watson* (Del.) 82 Atl. 1086, 1087.

Homicide in "self-defense" occurs where one is assaulted on a sudden affray, and in defense of his person, where certain and immediate suffering will be the consequence of waiting for the assistance of the law and there is no other probable means of escape, he kills his assailant. *State v. Blackburn* (Del.) 75 Atl. 536, 539, 7 Pennewill, 479.

"Self-defense" exists where one is suddenly assaulted, and in the defense of his person, where an immediate and great bodily harm would be the apparent consequence of waiting for the assistance of the law and there is no other probable means of escape, he kills the assailant." *State v. Lilliston*, 54 S. E. 427, 428, 141 N. C. 857, 115 Am. St. Rep. 705 (citing 1 Whart. Cr. Law [9th Ed.] § 306).

No more force may be used than is necessary to repel or resist an assault, since, if greater force is used, the person assaulted becomes the aggressor. *State v. Borrelli* (Del.) 76 Atl. 605, 607, 1 Boyce, 349.

A person assaulted is justified in resisting, though neither the taking of life nor the infliction of serious bodily injury is threatened. Merely seeking a person for the purpose of provoking a difficulty does not deprive one of the right of "self-defense" if nothing is actually done to provoke a difficulty. *Price v. State*, 79 S. W. 540, 541, 46 Tex. Cr. R. 80.

The right of "self-defense" is founded upon necessity. A party who would invoke it must avoid the attack if he can do so without danger or peril to himself, and no threat to kill or inflict great bodily injury without an overt act indicating a design to carry the purpose into immediate effect will justify the taking of a human life; it being the duty of one threatened to so act that he will not precipitate the attack, and thus himself bring on the necessity for taking life which he could safely avoid. *State v. Remington*, 91 Pac. 473, 477, 50 Or. 99.

The essential elements of self-defense are that accused was free from all fault, that he did not say or do anything to provoke a difficulty, that there was a present impending peril to life or danger of great bodily harm, either real or so apparent as to create a bona

fide belief of an existing necessity, and that there was no convenient or reasonable mode of escape by retreat or by declining the combat. *Robinson v. State*, 45 South. 916, 917, 155 Ala. 67; *McBryde v. Same*, 47 South. 302, 304, 156 Ala. 44.

The law gives to every man the right of "self-defense." This means that a man may defend his life and person from great bodily harm, he may repel force by force, and may resort to such force as under the circumstances surrounding him may reasonably seem necessary to repel the attack upon him even to the taking of the life of his assailant. The right of one to take the life of an assailant in self-defense can only be exercised to defend his own life or his person from great bodily harm. Danger of a battery alone will not be sufficient. *State v. Gray*, 79 Pac. 53, 54, 46 Or. 24.

"In repelling or resisting an assault no more force may be used than is necessary for the purpose, and, if the person assailed use in his defense greater force than is necessary for that purpose, he becomes the aggressor. \* \* \* No one may take the life of another, even in the exercise of the right of 'self-defense,' unless there is no other available means of escape from death or great bodily harm." *State v. Powell*, 61 Atl. 966, 972, 5 Pennewill (Del.) 24.

Merely because a man is the physical inferior of another does not require him to submit to a public horse-whipping, and it is a necessary "self-defense" to resist, resent, and prevent such humiliating indignity, and, if not provided by nature with the means of such resistance, he may use a weapon for such purpose. *State v. Bartlett*, 71 S. W. 148, 152, 170 Mo. 658, 59 L. R. A. 756.

The law accords to every one the right to protect his person from assault and injury by opposing force to force, and he is not obliged to wait until he is struck by an impending blow; for, if a weapon be raised in order to shoot or strike, or the danger of other personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow for the purpose of repelling and preventing the attempted injury. But the opposing force or measure of defense must not be unreasonably disproportionate to the requirements of the occasion. Although so much force as is reasonably necessary may be used, yet, if the violence used is greater than was necessary under the circumstances to repel the assault or avert the peril, the party using it is himself guilty; for the law recognizes the right of "self-defense" for the purpose of preventing, but not revenging, an injury to the person of the accused. *State v. Wilson* (Del.) 62 Atl. 227, 231, 5 Pennewill, 77.

"The right of 'self-defense' is based upon the broad ground of necessity which is evidenced by a real or apparent exhibition of

force, superinducing a reasonable apprehension of imminent danger which justifies the use of force to repel the force, but without such necessity the right to resort thereto does not exist." On a prosecution for felonious assault, where the evidence showed that defendant went out of his way and began to strike the prosecuting witness, called him vile names, and drew his pistol, and that the latter arose, laid aside a knife with which he had been whittling, and, reaching for the weapon, followed defendant, who stepped backward and fired, it was not error to instruct that one cannot claim the benefit of the law of self-defense after he has intentionally put himself where he knows or believes he will have to invoke its aid; that circumstances justifying assault must be such as to render it unavoidable; and that, if defendant could have avoided any conflict, it was his duty to do so, and so render a resort to the law of self-defense unnecessary. *State v. McCann*, 72 Pac. 137, 139, 43 Or. 155 (citing and adopting *State v. Morey*, 35 Pac. 655, 36 Pac. 573, 25 Or. 241; *State v. Smith*, 71 Pac. 973, 43 Or. 109).

Mr. Bishop states the doctrine of "self-defense" as follows: "If the person assaulted, being himself without fault, reasonably apprehends death or great bodily harm to himself unless he kill the assailant, the killing is justifiable." There is another rule of law, well settled, applicable to homicides, and that is that whatever one may do for himself he may do for another. That is to say, a guest in the house may defend the house, or the occupant may assemble his neighbors for its defense. There is also a rule of law that, in cases of self-defense, the party is not required to know the real fact, but he may act upon a reasonable and well-founded appearance and apprehension, and, whenever a man exercises the right of self-defense, he is understood to act on the facts as they reasonably appeared to him, or as they would appear to a reasonable man, similarly situated; and if, without fault or carelessness on his part, he is misled concerning the facts, and defends himself according to what he reasonably supposes the facts to be, he is justifiable, though in truth the facts as they were reasonably supposed did not exist, and in fact he had no occasion for the extreme measure. Mr. Wharton has stated the law applicable to this case as follows: "A man may repel force by force in the defense of his person, habitation, or property against one or many who manifestly intend or endeavor, by violence or surprise, to commit a known felony on either. In such cases he is not obliged to retreat, but may pursue his adversary until he finds himself out of danger, and if, in the conflict between them, he happeneth to kill, such killing is justifiable." "The right of self-defense in such cases is founded on the law of nature, and is not one that can be superseded by any law of society, and where a known felony is

attempted on a person, be it to rob or murder, the party assaulted may repel force by force, or even his servant attendant upon him or any other person present may interpose for the purpose of preventing the mischief, and, if death ensue, the party so interposing will be justified." *Suell v. Derricott*, 49 South. 895, 900, 161 Ala. 259, 23 L. R. A. (N. S.) 996, 18 Ann. Cas. 636.

"Self-defense" as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law, particularly, it is held an excuse for breaches of the peace, nay, even for homicide; but care must be taken that resistance does not exceed the bounds of mere defense and prevention, for then the defendant would become the aggressor. But the right of self-defense, though inalienable, is and should to some extent be subordinated to the rules of law regulating its proper exercise, and so the law has wisely provided. It may be divided into two general classes, to wit, perfect and imperfect right of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong—if he was himself violating the law—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon him which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. \* \* \* But a person cannot avail himself of a necessity which he has knowingly and willfully brought upon himself." Where defendant, informed by his wife that decedent had insulted her, armed himself with a view of meeting decedent to abuse him, and on meeting decedent cursed and abused him, and decedent walked away from defendant, who continued to use vile epithets, and decedent turned on defendant with a knife, whereupon defendant began to shoot him, and continued while decedent was running away, defendant was not entitled to the perfect right of self-defense, and he was civilly liable for the killing to the wife and children of decedent. *Gray v. Phillips*, 117 S. W. 870, 873, 54 Tex. Civ. App. 148 (citing *Reed v. State*, 11 Tex. App. 511, 40 Am. Rep. 795; 1 Bish. Cr. L. 865).

On a prosecution for murder, it appeared that deceased, at the time of the killing, was accompanied by his uncle, and there was evidence tending to show a conversation between them before the killing showing a design against defendant. The court instructed that defendant, if he had reasonable cause to apprehend a design on the part of deceased to take his life, and that to avert such danger he shot, he should be acquitted on the ground

of "self-defense," and in another instruction stated that any threats made by either the deceased or his uncle against defendant should be considered in arriving at a verdict. Held, that the instructions were not erroneous on the theory that they did not embrace the right of defendant to defend against both deceased and his uncle. *State v. McCarver*, 92 S. W. 684, 686, 194 Mo. 717.

A statement in an instruction that the claim of "self-defense" implies—presupposes—that deceased was intentionally killed, and that it is plain that, when one kills another in self-defense, he intends to do it, is not supported by any presumption of law, and is not true as a matter of fact. It is perfectly evident that one may kill another in self-defense yet without any intention or expectation that his assailant shall be killed. A blow with the fist, or any slight weapon, struck in self-defense, may result fatally, without any such intention or expectation upon the part of the one who strikes. It is not even true where a deadly weapon, such as a pistol, is used, though in such a case the evidence of an intention to kill is, of course, usually much stronger. *Foley v. State*, 72 Pac. 627, 629, 11 Wyo. 464.

In a prosecution for homicide, an instruction that if, at the time of the stabbing of deceased, defendant had good cause to believe that deceased, either alone or with others, was about to kill defendant or to do him great bodily harm, and that it was necessary to stab deceased to prevent such apprehended danger, the jury should acquit on the ground of "self-defense," was not objectionable as limiting defendant's right of "self-defense" to assaults made by deceased alone, and as leaving out of consideration defendant's right to use a weapon, if necessary, to protect himself from others acting in concert with deceased. *State v. Price*, 84 S. W. 920, 921, 186 Mo. 140.

In a prosecution for murder, the charge that a person has the same right to use such force as may be reasonably necessary to protect himself from great bodily harm as would be required to prevent his life being taken was properly given, as it did not attempt to define self-defense, but instructed only that the same force may be used to protect oneself from great bodily harm as may be used to protect one's life. *Twitty v. State*, 53 South. 308, 311, 312, 168 Ala. 59.

On a prosecution for murder, the court instructed that the law of "self-defense" is emphatically the law of necessity to which the party may have recourse under certain circumstances to prevent any reasonably apprehended great injury which he may have reasonable cause to believe is about to fall upon him, and that if defendant had reasonable cause to believe that deceased on a design to commit felony upon defendant or do him great bodily injury, and that there was

reasonable cause to apprehend immediate danger of the consummation of the design, and defendant cut deceased and killed him to prevent the accomplishment of such design, the killing was justifiable. Held, that the instruction was not erroneous because of the use of the phrase "that the law of 'self-defense' is emphatically the law of necessity." *State v. Maupin*, 93 S. W. 379, 383, 196 Mo. 164.

In a prosecution for stabbing, the trial judge, in stating the contentions of the defendant to the jury, used the following language: "The defendant, on the other hand, claims that, while he cut the prosecutor, \* \* \* it was done in self-defense, or under circumstances of justification. He claims that the prosecutor \* \* \* made an attack on him with a large stick; that his life was in danger; that they fell, the prosecutor on top; that the prosecutor \* \* \* continued to strike him after they were down; that it was under these circumstances that he cut the prosecutor, after the assault was made on him by the prosecutor \* \* \* with this stick; that he cut the prosecutor, \* \* \* therefore, in self-defense, and only so long as the prosecutor was on him and striking him," etc. Held, that the word "self-defense," especially as used in the context quoted above in the excerpt from the charge, was an apt word to convey the meaning that the assault defended against must be such as to endanger defendant's life or limb, whereas defendant's justification need not go to this extent; *Pen. Code 1895, § 112*, punishing persons guilty of stabbing except in self-defense "or other circumstances of justification." *Edmondson v. State*, 57 S. E. 947, 948, 1 Ga. App. 116, 118.

In a prosecution for homicide, an instruction that "the law of 'self-defense' is this: Wherever a party is without fault in bringing on the difficulty, and is attacked or assaulted by another, then the law gives him the right to take care of himself. He being without fault in bringing on the difficulty, he can use whatever amount of force is necessary for his complete self-protection. And where a man is without fault in bringing on the difficulty, and is assaulted or attacked by another under such circumstances as in the opinion of the jury who try the case would justify or warrant a man of ordinary reason and firmness in believing he was in actual danger of loss of life or of sustaining serious bodily harm, from which he has no provable means of escape, by retreat or otherwise, then under circumstances of that sort he has a right to defend himself, even to the extent of taking the life of his assailant," was correct. *State v. Williams*, 56 S. E. 783, 786, 76 S. C. 135.

In a prosecution for homicide, the evidence showed that it occurred upon a road on the lands of the defendant who was driving there with his wife, and that he was

stopped by the decedent who was in liquor, and had a knife in his hand, and that the defendant got out of the vehicle and was behind it when he shot him. Upon the question of "self-defense," the judge charged that the right of self-defense does not exist until the one expecting to be attacked has used reasonable means to avoid the difficulty, and that if he has two paths, one leading to and the other away from the difficulty, he must, if necessary, take the one leading from the attack, in order to rely on the right of self-defense, and, if having two courses open, the one to and the other from the difficulty, his action in taking the one leading to the attack and placing him where he has to defend himself, destroys his right of self-defense. There was no showing that the attack was anticipated, nor any issue as to defendant's right to travel on the road. Held, that the charge was proper, and did not convey to the jury that a man should not go about his usual business or travel his customary road if he had reason to believe that it might result in an attack, the word "paths" being used figuratively, and not as to the defendant's right to be upon the road, this being made plain by a subsequent portion of the charge that, if the defendant drove upon the road and accepted or sought a threatened attack which he could reasonably have avoided, he could not plead self-defense. *State v. Babb*, 70 S. E. 309, 311, 88 S. C. 395.

On a trial for a homicide instructions on the subject of "self-defense," that if at the time defendant shot deceased he had reasonable cause to apprehend a design on the part of deceased to take his life or do him some great personal injury, and if there was reasonable cause for him to apprehend immediate danger of such design being accomplished, and if to avert such apprehended danger he shot deceased, and if at the time he had reasonable cause to believe and did believe it was necessary to shoot and kill in order to protect himself from such apprehended danger, the jury should acquit on the ground of self-defense, that it was not necessary that the danger should have been actual or real or impending or about to fall, but that all that was necessary was that accused had cause to believe and did believe these facts, but that, on the other hand, it was not enough that defendant should have so believed, but he must have had reasonable cause to believe, and whether or not he had reasonable cause was for the jury to determine under all the facts and circumstances given in evidence; that when a person has reasonable grounds to apprehend that some one is about to do him great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may act upon appearances and kill his assailant if necessary to avoid such apprehended danger, and the killing will be justifiable, although it afterwards

turns out that the appearances were false and that there was in fact neither design to do him serious injury nor danger that it would be done; that, in passing upon the question whether accused had reasonable grounds for believing that there was imminent danger that deceased was about to kill him or do him some great bodily harm, the jury should determine the question from the standpoint of accused at the time he acted and under his surroundings at the particular instant of time and may also take into consideration threats, if any made by deceased against accused; that a person who has not wrongfully provoked an assault is under no obligation to retreat, but when wrongfully assailed may stand his ground and, if it reasonably appears necessary to protect himself from death or great personal injury, lawfully kill his assailant, and if deceased made an assault and attack upon accused, and accused had reasonable grounds to believe that he was in danger of being killed or receiving great bodily harm, he had a right to take such steps as to him under the circumstances reasonably seemed necessary to save his own life or save himself from great bodily harm even to the taking of deceased's life; that if accused at the time he shot deceased had reasonable cause to apprehend and did apprehend that deceased was about to kill him or do him great bodily harm and that danger of his doing either was imminent, and accused shot to avert such apprehended danger, the shooting was justifiable; that if accused acted in a moment of apparently impending danger from an assault by deceased it was not necessary for him to nicely measure the proper quantity of force necessary to repel the assault; and that the jury should not determine what they thought was necessary for accused to have done or not done; but that the question was what defendant might have reasonably believed was necessary for him to do under all the circumstances—fully covered the question of "self-defense," and the refusal of another instruction, that, if deceased made an assault or attack upon accused, accused was justified in acting upon the facts and circumstances as they reasonably appeared to him at the time, and if he honestly believed that he was in danger of losing his life or receiving great bodily harm at the hands of deceased he was justified in acting on such belief and taking such steps as seemed necessary to protect his own life or save himself from receiving great bodily harm, even if as a matter of fact he was mistaken in believing he was in such danger and as a matter of fact he was in no danger at all, was not error. *State v. McMullin*, 71 S. W. 221, 228, 170 Mo. 608.

#### Apprehension of danger

A reasonable apprehension of imminent danger to life or limb may give the right to act in "self-defense." *State v. Clark*, 77 Pac. 287, 290, 69 Kan. 576.

It is not sufficient that "circumstances are apparently dangerous to a reasonable man" to justify a person in shooting in "self-defense." *Dawson v. State*, 41 South. 803, 804, 148 Ala. 672.

To justify killing in "self-defense," the prisoner must have reasonably believed that he had no other means of escape from death or bodily harm. *Commonwealth v. Johnson*, 62 Atl. 1064, 213 Pa. 432 (quoting and adopting definition in *Commonwealth v. Mitchka*, 58 Atl. 474, 209 Pa. 274).

To maintain a plea of self-defense, there must be an actual physical attack or hostile demonstration of such a nature as to afford reasonable ground to believe that the design is to destroy life or inflict great bodily harm. *State v. Halliday*, 36 South. 753, 112 La. 846.

The law does not justify homicide upon the theory of "self-defense" unless two facts exist: (1) There must be reasonable ground to apprehend a design on the part of the person slain to do some great personal injury to the slayer; (2) there must be imminent danger of such design being accomplished. *People v. Rodawald*, 70 N. E. 1, 7, 177 N. Y. 408.

In charging on "self-defense" and, in that connection, on threats made by deceased against defendant, the criterion of apparent danger is as the situation is viewed from the standpoint of the defendant, and not as to the belief of danger by the jury. *Adams v. State*, 84 S. W. 231, 234, 47 Tex. Cr. R. 347.

If, in addition to unwarrantedly ejecting accused from decedent's house, accompanied by kicks, decedent made a movement to draw a pistol just before accused killed him, the killing was in "self-defense." *Holcomb v. State*, 113 S. W. 754, 756, 54 Tex. Cr. R. 486.

In order to justify a killing as committed in "self-defense," the danger must have existed, or have reasonably appeared to exist, at the very time defendant fired the fatal shot; defendant's belief that the danger was about to become imminent, or that it would become imminent in the future, being insufficient. *People v. Taylor*, 87 Pac. 215, 216, 217, 4 Cal. App. 31.

If a slayer, first attacked, had reasonable cause to believe, and did believe, he was in imminent danger of death or great bodily harm, and to avoid and prevent the same had no other reasonable means, the killing would be a justifiable act of "self-defense"; but if the attack was trifling, and manifested no purpose or intent to inflict serious injury, repelling it with a deadly weapon likely to produce death would not be justifiable. *State v. Borrelli* (Del.) 76 Atl. 605, 607, 1 Boyce, 349.

Where one is attacked by another and from the character of such attack has reasonable cause to believe, and does believe, that he is in imminent danger of death or great bodily harm, and has no reasonable means

of avoiding or preventing his death or great bodily harm, other than by killing his assailant, and under such circumstances killed his assailant, the act is a justifiable act of "self-defense." *State v. Tilghman*, 63 Atl. 772, 774, 6 Pennewill (Del.) 54.

Where one is attacked, and from the character of such attack has reasonable cause to believe and does believe that he is in imminent danger of death or great bodily harm, and has no other reasonable means of avoiding or preventing death or great bodily harm, then the killing of the assailant is a justifiable act of "self-defense." *State v. Cephus*, 67 Atl. 150, 152, 6 Pennewill (Del.) 160.

An instruction, on a trial for homicide, that the right of "self-defense" is to be measured by what a reasonable person would have done under like circumstances, sufficiently conforms to Pen. Code, § 361, declaring that the circumstances to justify self-defense must be sufficient to excite the fears of a reasonable person. *State v. Houk*, 87 Pac. 175, 176, 34 Mont. 418.

The right to kill in "self-defense" is founded on necessity, real or apparent, and can only be resorted to when the circumstances are such as to warrant a reasonable belief in him assaulted that the killing is necessary to preserve life or to protect himself from great bodily harm. *State v. Doherty*, 98 Pac. 152, 154, 52 Or. 591.

Though the necessity for taking life is not actual, present, and urgent, the right of "self-defense" may be exercised if one assailed has reasonable ground to believe and in good faith does believe, from the conditions present, that death or the infliction of great bodily harm is imminent. *State v. Miller*, 74 Pac. 658, 660, 43 Or. 325.

To constitute "self-defense" "it is sufficient if the defendant honestly believed, without fault or carelessness on his part, that the danger was so urgent and pressing that the killing was necessary to save his own life, or prevent great bodily harm," and it is not essential that the killing should appear to the jury to have been necessary. *Long v. State*, 91 S. W. 26, 76 Ark. 493.

The law of "self-defense" is emphatically the law of necessity, to which a party may have recourse under certain circumstances to prevent any reasonably apprehended great personal injury which he may have reasonable grounds to believe is about to fall upon him. It is not necessary that the danger should be real or actual, or that it should be impending and immediately about to fall. *State v. Tooker*, 87 S. W. 487, 490, 188 Mo. 438.

"The whole matter of 'self-defense' is founded on necessity. There must be some real or apparent necessity for taking human life. The party must be actually in imminent danger or he must believe he is in imminent danger before he can strike. It is



immaterial whether the danger was real or not if the party actually, honestly believed at the time that he was in danger of receiving serious bodily harm or suffering death at the hands of the party slain." *State v. Miller*, 53 S. E. 426, 428, 73 S. C. 277, 114 Am. St. Rep. 82.

In ordinary cases of one person killing another in "self-defense," it must appear to the defendant that the danger was so urgent and pressing that, in order to save his own life or prevent his receiving great bodily injury, the killing was necessary. And if it does so appear to him and he acts in good faith under such belief without fault or carelessness, he will be excused, though it should turn out that he was mistaken in the belief of danger. But to justify the defendant he must act with due circumspection, and if there was no such danger, and his belief in the existence thereof be imputable to his own fault or carelessness, he is not excused, however honest the belief may be. *Hoard v. State*, 95 S. W. 1002, 1004, 80 Ark. 87 (quoting and adopting definition in *Smith v. State*, 26 S. W. 712, 59 Ark. 137, 43 Am. St. Rep. 20; *Magness v. State*, 50 S. W. 554, 59 S. W. 529, 67 Ark. 594; *Bish. New Cr. Law*, § 305; *Palmore v. State*, 29 Ark. 248).

Where one is attacked by another with a deadly weapon, the party attacked may, if he does so honestly and in good faith, safely act in the light of his surroundings, and on the appearances to him at the time. Where, in a prosecution for homicide; accused relied on "self-defense," an instruction that the jury should say from the evidence whether it was necessary for accused to kill decedent to protect himself, in order to make the killing justified, was erroneous, since accused could defend himself against attack to the extent of killing decedent if it appeared to him at the time, acting as a reasonable man, that it was necessary to kill decedent to prevent injury to himself. *Owens v. United States*, 130 Fed. 279, 282, 64 C. C. A. 525.

The right of "self-defense" can be lawfully exercised only in a bona fide effort to preserve oneself from an impending danger. It is not necessary that the danger should in fact exist. It may be only apparent and not real; but a party, in order to avail himself of such right to defend under such circumstances, must not only honestly believe himself in immediate danger, but have reasonable ground for such belief. The employment in which a street car conductor was engaged at the time he was charged to have assaulted a passenger did not deprive him of the right of self-defense; he being entitled, if assaulted, to repel the assault and prevent injury to himself, provided his defense did not become offensive and exceed the bounds of prevention. *Dallas Consol. Electric R. Co. v. Pettit*, 105 S. W. 42, 44, 47 Tex. Civ. App. 354.

Where the killing was the culmination of decedent's hostile attitude towards accused, manifested by numerous insults and threats, which, in connection with the declarations and actions of decedent at the time of the killing, were reasonably calculated to induce accused to believe that he was in imminent danger, an instruction that if accused, in the exercise of a reasonable judgment, believed and had reasonable grounds to believe, from the facts proven, that decedent, just preceding the firing of the first shot by accused, was about to make an attack on him, and that by reason thereof he, in the exercise of reasonable judgment, believed and had grounds to believe that he was in danger of loss of life or great bodily harm, and that it was necessary, or believed by him in the exercise of reasonable judgment to be necessary, to kill decedent to avert such danger, accused should be acquitted on the ground of self-defense, was correct. *Commonwealth v. Boyd (Ky.)* 112 S. W. 605, 606.

In a prosecution for murder, an instruction that one may kill in self-defense when he should suppose from his situation and surroundings that he was in imminent danger was properly refused, for using the word "suppose," instead of "bona fide believe." *Twitty v. State*, 53 South. 308, 311, 312, 168 Ala. 59.

In a prosecution for murder, a charge that, to justify homicide on the ground of self-defense, an actual danger to the life or person of the party killing is not necessary, if there be an appearance of danger caused by the acts or demonstration of the party killed, so as to produce in the mind of the party slaying a reasonable expectation or fear of death, or serious bodily injury, was properly refused as not asserting that the "appearance of danger" was to life or great bodily harm, or that it was such as to reasonably impress a man that such danger existed. *Twitty v. State*, 53 South. 308, 311, 312, 168 Ala. 59.

In an instruction on "self-defense" authorizing acquittal of accused if he believed at the time of shooting deceased that either he or others were threatened with danger to their lives or great, serious bodily harm, the word "great" should have been omitted; it being sufficient if he apprehended serious bodily harm. *Jones v. State*, 71 S. W. 962, 963, 44 Tex. Cr. R. 405.

An instruction that if defendant was where he had a right to be, and deceased advanced upon him in a threatening manner or induced him to believe that he was in danger of life or limb, he need not retreat, but had a right to defend himself; that when a man is where he has a right to be, and deceased so acts as to induce in him a reasonable and fixed ground for apprehension that he is in danger of life or limb, he may at once use necessary force to prevent the

threatened blow, even to the extent of taking life—was properly qualified by further instruction that, though defendant may have been where he had a right to be and deceased was advancing toward him in a threatening manner, still he would have no right to take the life of deceased, without warning him to desist from his attack, unless defendant was justified in believing that he had not time to give such warning. And the court also properly instructed that a man need not wait until the blow is actually struck before he has a right to act upon appearances and defend himself; that it is enough if he honestly believe, and has reason to believe from the attitude, conduct, and manner of the deceased, that he was in danger of his life or of great bodily harm. *State v. Stockhammer*, 75 Pac. 810, 811, 812, 34 Wash. 262.

In a prosecution for homicide, an instruction that if defendant's co-indicttee struck deceased with some weapon, causing his death, and at the time had good reason to believe, and did believe, from the conduct or appearance of deceased, that deceased was about to inflict upon him some great bodily harm, and struck him for the purpose of averting such apprehended danger, then such co-indicttee killed deceased in "self-defense," etc., and that in such case it is not necessary that the danger should have been real and about to fall, as all that is necessary is that such danger existed, and that, on the other hand, it was not enough that such co-indicttee believed in the existence of such danger, but he must have had good cause for so believing, was faulty, in saying that all that was necessary was that such danger existed; the law being that, whether the danger really existed or not, if he had good reason to believe and did believe, it to exist, he had the right to act on appearances, although it might thereafter have turned out that the appearances were false. *State v. Darling*, 100 S. W. 631, 634, 202 Mo. 150.

#### Duty to retreat

"Self-defense" does not justify a homicide unless the person guilty of killing retreated, if retreat were practicable, and did everything in his power, consistent with his safety, to avoid the danger and avert the necessity of killing his assailant. *State v. Fraga*, 97 S. W. 898, 900, 199 Mo. 127.

In a prosecution for murder, a charge stating when one may kill in self-defense was properly refused, where it failed to include the duty to retreat. *Twitty v. State*, 53 South. 308, 311, 312, 168 Ala. 59.

"A man may repel force by force in defense of his person, habitation, or property against one who manifestly intends or endeavors by violence and surprise to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat, but may pursue his adversary until

he has secured himself from all danger, and, if he kill him in so doing, it will be justifiable 'self-defense.'" Such being the only justification of homicide, no one may take a human life directly or indirectly, as by setting a spring gun, to prevent a mere trespass, or a theft of property. *State v. Marfaudille*, 92 Pac. 939, 941, 48 Wash. 117 (citing *Swifts' Dig.* vol. 2, p. 283).

#### Defense of father by son

Where defendant gave evidence that the killing was in "self-defense" of himself and his son, an instruction limiting the defense to the killing being in his own self-defense is error. *Thacker v. Commonwealth (Ky.)* 71 S. W. 931, 932.

### SELF-DESTRUCTION

See Involuntary Self-Destruction; Voluntary Self-Destruction.

See, also, Suicide.

A benefit certificate conditioned to be void if the member dies by self-destruction, whether sane or insane, is avoided if the member was conscious of the physical nature of his act when he inflicted the wounds on himself causing his death. *Brown v. United Moderns*, 87 S. W. 357, 358, 39 Tex. Civ. App. 343.

The phrase "self-destruction or suicide," as used in a certificate of membership in a benefit association declaring that the contract for benefits does not include assurance against self-destruction or suicide, whether the member be sane or insane, does not prevent a recovery on the certificate where the member's death was due to his voluntary taking of carbolic acid, not with intent to cause death, but to frighten his wife into giving him money. *Courtemanche v. Supreme Court I. O. O. F.*, 98 N. W. 749, 750, 136 Mich. 30, 64 L. R. A. 608, 112 Am. St. Rep. 345.

### SELF-EXECUTING

A constitutional provision is "self-executing" when it is complete without any legislation for its enforcement. *Eau Claire Nat. Bank v. Benson*, 82 N. W. 604, 606, 106 Wis. 624.

A constitutional provision is "self-executing" if it enacts a sufficient rule by means of which the right given may be enjoyed and protected. *Stevens v. Benson*, 91 Pac. 577, 578, 50 Or. 269.

A constitutional provision is self-executing when it prescribes a rule, the application of which puts it into operation. *Acme Dairy Co. v. City of Astoria*, 90 Pac. 153, 154, 49 Or. 520 (citing *Cooley's Const. Lim.* [5th Ed.] 100).

A constitutional provision is "self-executing" if it supplies a sufficient rule by means of which the right given may be enjoyed and

protected or the duty imposed enforced. It is not self-executing when it merely indicates principles without laying down rules by means of which these principles may be given the force of law. *Ex parte McNaught*, 100 Pac. 27, 28, 1 Okl. Cr. 260; *Griffin v. Rhoton*, 107 S. W. 380, 384, 85 Ark. 89 (quoting from *Jones v. Jarman*, 34 Ark. 323, approving the definition by Judge Cooley); *Robertson v. City of Staunton*, 51 S. E. 178, 180, 104 Va. 73 (quoting and adopting definition in Cooley, *Const. Lim. p. 121*).

Const. art. 18, § 3, subds. "a," "b" (Bunn's Ed. §§ 413, 414), providing for a general election in cities of a board of freeholders to prepare and propose a charter for adoption by the said city, is self-executing, without additional legislation to put the same into force. *State ex rel. Reardon v. Scales*, 97 Pac. 584, 587, 21 Okl. 683.

## SELF-INDUCTION AND RESISTANCE

The terms "self-induction and resistance" are used to signify means of hindering or delaying the current in circuits, as contradistinguished from "induction" proper, which consists in taking off, in part, the current of the circuit by placing a conductor in proximity to such circuit, and within its influence, which is thereupon transmitted over another line or circuit. *Dayton Fan & Motor Co. v. Westinghouse Electric & Mfg. Co.*, 118 Fed. 562, 568, 55 C. C. A. 390.

## SELF-PRESERVATION

"Self-preservation" has been termed the first law of nature. It is of the most ancient origin; it antedates all constitutions and statutes made by man. It is the law under which we live, move, and have our being. It is a law governing all persons, natural and artificial. High and low, rich and poor, wise and foolish, old and young, are subject to its inexorable sway. Obedience to it is rewarded, while disobedience to it is inevitably punished. Out of its observance arises the doctrine of the survival of the fittest. It is an attribute of all corporations, from the state itself down to the least of its creatures. Upon it depends the police power of the state, which, in its broadest acceptation, means the general power of a government to preserve and promote public welfare by prohibiting all things hurtful to the comfort, safety, and welfare of society, and by establishing such rules as may be conducive of public benefit. *Del Ponte v. Societa Italiana, Di M. S. Guglielmo Marconi*, 60 Atl. 237, 239, 240, 27 R. I. 1, 70 L. R. A. 188, 114 Am. St. Rep. 17.

"We know of no more universal instinct than that of 'self-preservation'—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death." *Baltimore, etc., R. Co.*

*v. Landrigan*, 24 Sup. Ct. 137, 191 U. S. 461, 474, 48 L. Ed. 262.

Because the natural instinct of "self-preservation" generally prompts men to acts of care and caution when approaching or in the presence of danger, there is, in the absence of credible evidence of the actual fact in any instance, a presumption of the exercise of due care and caution; but, like other presumptions of fact arising from the ordinary or usual conduct of men, rather than from what is invariable or universal, this presumption is disputable, and cannot exist where it is incompatible with the conduct of the person to whom it is sought to apply it, which may be shown by the testimony of eye-witnesses to his movements, or by evidence of the physical surroundings and other conditions at the time. *Wabash R. Co. v. De Tar*, 141 Fed. 932, 934, 73 C. C. A. 166, 4 L. R. A. (N. S.) 352.

## SELF-SUPPORTING IRON WALL

Walls consisting of an "outer frame of timber or studding upon which is nailed a sheathing of corrugated iron" is not a "self-supporting iron" wall within an ordinance requiring the walls of buildings within the fire limits, if of iron, to be self-supporting. *Lane-Moore Lumber Co. v. City of Storm Lake*, 130 N. W. 924, 928, 151 Iowa, 130.

## SELL

See *Grant, Bargain, and Sell*.

Keep as meaning, see *Keep*.

See, also, *Sale*; *Sold*.

In common parlance "to sell" is often used as meaning to negotiate or arrange for a sale. *Adams v. Carlton*, 95 Pac. 390, 391, 77 Kan. 546 (citing *Brown v. Gilpin*, 90 Pac. 267, 75 Kan. 773).

The verb "sell" and the noun "sale" vary in meaning according to the different context in which they are used. Ordinarily a sale is an executed contract—a completed transaction, binding on seller and buyer alike. In contracts creating the relationship of principal and real estate broker, however, a different meaning is generally given by construction. The broker "sells" when he finds a purchaser ready, able, and willing to buy on the terms proposed by the principal. A contract for commissions on sales entitles the broker to the specified compensation whenever through his influence such a prospective purchaser has been brought to the principal, though by reason of some fault or disinclination of the latter the sale is never completed or is consummated on terms somewhat different from those originally proposed by the principal. A contract of sale binding both the seller and purchaser is a "sale" within the meaning of the rule applicable to such relations. *Humphries & Jackson v. Smith*, 63 S. E. 248, 249, 5 Ga. App. 340 (citing *Hill & Moultrie v.*

Wheeler, 58 S. E. 502, 2 Ga. App. 349; Rice v. Ware & Harper, 60 S. E. 301, 3 Ga. App. 579; Lindley v. Kelm, 34 Atl. 1073, 54 N. J. Eq. 423; Rice v. Mayo, 107 Mass. 550).

"Though the word 'sell' itself in transactions touching personal property usually has reference to a pecuniary or money consideration, yet courts have never hesitated to give the word a broader significance when the meaning of the law or of a private contract seemed to call for it, and the much more generally accepted definition of a sale is the exchange of an interest in real or personal property for money or its equivalent." *Mansfield v. District Agr. Ass'n* Number Six, 97 Pac. 150, 151, 154 Cal. 145 (citing and adopting *Webst. Dict. Unab.* and *Stand. Dict.* *Borland v. Nevada Bank of San Francisco*, 33 Pac. 737, 99 Cal. 89, 37 Am. St. Rep. 32; *Howard v. Harris*, 90 Mass. [8 Allen] 297; *Western Massachusetts Ins. Co. v. Riker*, 10 Mich. 279; *Speigle v. Meredith*, 4 Bliss, 120, 22 Fed. Cas. 910; *Stokes v. Stokes*, 6 South. 155, 66 Miss. 456; *Thurmond v. Faith*, 69 Ga. 833; *Hughes v. Washington*, 72 Ill. 84; *People ex rel. Davis v. Middleton*, 14 Cal. 540).

The expression "to sell" and the expression "to transfer property for a price in money" are convertible; and, as a consequence, it is no more possible to sell without transferring ownership than it is possible to sell without selling, or to transfer ownership without transferring ownership, or to do any other thing without doing it. When a sale is made under a suspensive condition, there is no sale until the condition has been fulfilled. There is merely a contract that there shall be a sale when the condition is fulfilled. *Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 46 South. 193, 197, 121 La. 152.

In a written contract, whereby one party agreed to sell to the other property in process of growth or manufacture to be delivered in the future, the word "sell" will be construed as meaning "offers to sell" or "agrees to sell," and the contract will be deemed an option or an offer, unless it affirmatively appears that it has been accepted, which acceptance may be shown by proof that the one to whom the offer was made paid a portion of the price. *Luke v. Livingston*, 70 S. E. 596, 597, 9 Ga. App. 116.

An agreement "to sell" land binds the party to execute a proper deed of conveyance. *Smith v. Haynes*, 9 Me. [9 Greenl.] 128, 131.

In the absence of evidence to the contrary, to "sell" means to sell for cash, and an agent authorized to sell has no authority to receive other goods in part payment. *Lindow v. Cohn*, 90 Pac. 485, 486, 5 Cal. App. 388 (citing *Taylor & Farley Organ Co. v. Starkey*, 59 N. H. 142).

The word "sell" is included by implication in the words "execute and deliver," in a

resolution by corporate directors authorizing the president and secretary to execute and deliver bonds to be issued, and the resolution authorizes a sale of the bonds. *McCormick v. Unity Co.*, 87 N. E. 924, 926, 239 Ill. 306.

The use of the words "dispose" or "sell," or their derivatives, is not necessary to confer a power of disposal on the devisee of a life estate. *Herring v. Williams*, 69 S. E. 140, 142, 153 N. C. 231, 138 Am. St. Rep. 659.

That the words "sell" and "dispose," as used in a will, were synonymous, was indicated by the words "either at public or private sale" appearing after the direction for the executrix to "sell or dispose" of the property as she might think best. *Rutledge v. Crampton*, 43 South. 825, 826, 150 Ala. 275.

Selling a bank bill or piece of money is, in common parlance, passing the bill or money. *State v. Harroun*, 98 S. W. 467, 470, 199 Mo. 519 (citing *State v. Watson*, 65 Mo. 115).

Authority to a real estate agent to "sell" real estate does not authorize him to sign a written contract of sale. *Brandrup v. Britten*, 92 N. W. 453, 455, 11 N. D. 376 (citing *Duffy v. Hobson*, 40 Cal. 240-245, 6 Am. Rep. 617).

The employment of the word "sell" in the memoranda of the initiatory part of a contract which was the result of several conferences and conversations is not conclusive as a matter of law as to the nature of the contract. The word is often used interchangeably as indicating a present sale or a contract to "sell," and it has no peculiar significance which the court could declare as matter of law. *Pacific Export Co. v. North Pac. Lumber Co.*, 80 Pac. 105, 109, 46 Or. 194.

To "sell" property is, according to the strict signification of the word, to transfer it from one to another in consideration of a price paid or agreed to be paid in current money. Since there must be a valuable consideration to constitute a sale, the words "to sell," as used in *Pol. Code 1895, § 1548*, providing that if a majority of the votes cast at any election held, as by this chapter provided, shall be against the sale of intoxicating liquors, it shall not be lawful for any person within the limits of the county "to sell" intoxicating liquors, considered by themselves, necessarily mean to transfer the liquor for valuable consideration. *Howell v. State*, 52 S. E. 649, 650, 124 Ga. 698.

Under the statute making it an offense to "sell" liquors to a minor, the word "sell" cannot be construed to mean something different from its ordinary legal import. *State v. McNeal*, 66 S. E. 512, 513, 66 W. Va. 411, 135 Am. St. Rep. 1038.

A saloon keeper who, while in a town in which the local option law was in force, received from a person there 50 cents, and agreed to forward to him there a pint of

whisky, and who forwarded the same, was guilty of selling liquor in the local option town. *McDermott v. Commonwealth* (Ky.) 100 S. W. 830.

Under Pen. Code 1895, § 444, making it criminal for any person to sell any minor any spirituous intoxicating liquor, the word "sell" is not to be taken in its strict technical sense, for one of the elements of a sale is competent parties, and, a minor not being a competent party to obtain liquor, there can be no sale to him in the technical sense. *Newsome v. State*, 58 S. E. 71, 72, 1 Ga. App. 790.

The word "sell," as used in Rev. Codes, § 1506, making it unlawful for any person to sell liquors without having procured a license and given a bond, has its ordinary and common meaning, namely, to transfer title by valid agreement from one party to another for some consideration. *Ada County v. Boise Commercial Club*, 118 Pac. 1086, 1089, 20 Idaho, 421, 38 L. R. A. (N. S.) 101.

The word "sell," as used in an ordinance providing that license to sell spirituous, vinous, or malt liquors in the city shall be \$500 per annum, etc., does not purport to relate to traffic in liquor by retail alone, but "its language is as broad and ample as is necessary to include both wholesale and retail transactions without tautology." *Cofer v. Commonwealth* (Ky.) 87 S. W. 264.

By merely delivering liquor to a minor, with notice that it is to be carried to an adult, a person does not "sell liquor" within a statute prohibiting sale of liquor to minors. Hence, where a minor purchases liquor, not for his own consumption, but for the use of another who sent him to buy it, whose money pays for it, to whom it is delivered, and to whom the sale may be lawfully made (the seller being so informed), it is not a "sale" to a minor within the meaning of said statute. In re *MacRae*, 106 N. W. 1020, 1021, 75 Neb. 757, 121 Am. St. Rep. 829 (citing *Monaghan v. State*, 6 South. 241, 66 Miss. 513, 4 L. R. A. 800).

Under Rev. Pol. Code, § 2838, making it unlawful for any person to engage in any business requiring the payment of a license under section 2834 without paying the license, which section requires a license for the business of selling intoxicating liquors, the offense of "engaging in the business without a license" is the same as that of "selling without a license." *State v. Ely*, 118 N. W. 687, 688, 22 S. D. 487, 18 Ann. Cas. 92.

As used in the Oleomargarine act of August 2, 1886, c. 840, 24 Stat. 210, providing that any person that "sells" vends, or furnishes oleomargarine for the use and consumption of others, except to his own family table, without compensation, who shall color such oleomargarine to look like butter, shall be held to be a manufacturer, the term "sell"

implies sale for a consideration. *Morris v. United States*, 161 Fed. 672, 679, 88 C. C. A. 532.

The word "sell," in G. S. 1863, p. 396, § 39, cl. 6, giving the probate court power to authorize the executor to sell part of the estate, imports that the whole title is to be parted with, and not that the estate is to be incumbered. *Brown v. Van Duzee*, 44 Vt. 529, 531.

The words "sell, transfer or assign" as used in section 83, added to chapter 54 of the Code of 1899 by chapter 35, p. 93, Acts 1901, authorizing a corporation to sell, transfer, or assign corporate property, do not authorize the corporation to trade or barter away for anything other than money. The word "sell" usually applies to tangible property. It is a technical term applicable to the alienation of that kind of property and especially to personal property. "Transfer or assign" are applicable to choses in action, rights, and privileges, rather than tangible property, and are almost, if not quite, identical in meaning. None of these terms, except the word "sell," indicate what the nature of the consideration shall be. Neither "assign" nor "transfer" is broad enough to cover the consideration. They in no sense define the contract under which they pass title, but simply define the nature of the act by which the title passes. They are more limited than the word "sell," which necessarily involves a price or consideration; but they stop short of indicating whether the property may be disposed of by sale or barter, and hence do not confer a power to trade. *Germer v. Triple-State Natural Gas & Oil Co.*, 54 S. E. 509, 519, 60 W. Va. 143.

The word "sells" is more apt in describing the passing of title of personal, than of real, property. When used in a contract relating to land, it is not decisive, since it may manifest an intent to convey the title to property named, whether real or personal; but, when the purpose of the transaction is stated, the word will ordinarily have no more effect upon the title than is necessary to accomplish the purpose. No transfer of title is effected by an instrument reciting that the party of the first part "sells" certain mining claims to the party of the second part for a specified consideration, and "upon the terms and consideration following," and which, in its subsequent provisions, authorizes the party of the second part to sell and negotiate the mines for any sum above \$45,000, and retain out of the purchase price seven-eighths of the excess; the party of the first part agreeing to execute any conveyance thereafter necessary to convey a good title, and the party of the second part assuming no obligations except a general one by which both parties mutually agree to aid each other in the negotiation and sale. Such document is not a deed, but simply a power of attorney,

and, as such, subject to revocation. *Taylor v. Burns*, 27 Sup. Ct. 40, 42, 203 U. S. 120, 51 L. Ed. 116.

The words "to sell" or "to make a sale," as used in a communication from the owner of real estate to a broker with respect to the sale thereof, are often used as meaning to negotiate or arrange for a sale. *Brown v. Gilpin*, 90 Pac. 267, 271, 75 Kan. 773.

The employment of a broker to sell lands—that is, to procure purchasers—does not of itself or prima facie confer authority to bind the owner to sell by a contract in writing, and such authority is not usually to be inferred from the use by the principal and agent in that connection of the terms "for sale" or "to sell" and the like; such words in that connection usually meaning no more than to negotiate a sale by finding a purchaser upon satisfactory terms. *Stengel v. Sergeant*, 68 Atl. 1106, 1110, 74 N. J. Eq. 20.

Though the expression "to sell" is sometimes used in the sense of an executed contract of sale, or an agreement to sell as defined by Civ. Code, § 1727, the expression, when used in a contract giving a real estate broker the exclusive right "to sell" real estate, has acquired a restrictive meaning, and standing alone the words "to sell" are not sufficient to authorize the broker to enter into a contract of sale binding the owner. *Bacon v. Davis*, 98 Pac. 71, 73, 9 Cal. App. 83.

According to the settled construction, the employment of a professional broker "to sell" or "close a bargain" concerning real estate merely authorizes him to find a purchaser at the specified price, and does not authorize him to execute a contract of sale in the name of his principal or to sign his principal's name to any contract of sale. *Lichty v. Daggett*, 121 N. W. 862, 867, 23 S. D. 380.

Defendant wrote certain brokers a letter, asking them to assist in selling certain real estate until a sale was made, continuing, "I hereby authorize you to sell same, and agree to pay you when it is sold, for your services," and to furnish the purchaser a good title and complete abstract. Held, that the words "to sell" did not authorize the brokers to make a binding contract of sale, but merely to find a purchaser, and the brokers had no authority to bind defendant by signing a contract of sale. *Jones v. Howard*, 84 N. E. 1041, 1042, 234 Ill. 404.

#### SELL AND CONVEY

The words "sell and convey," in a deed of real estate, mean, in the absence of appropriate expressions in the instrument itself limiting and restricting such general acceptance of the meaning of the words, a conveyance in fee. *St. Louis Land & Building Ass'n v. Fueller*, 81 S. W. 414, 417, 182 Mo. 93.

"Power to sell and convey" does not confer the power to mortgage. "A trust

with power to sell out and out will not authorize a mortgage, and a trust for sale with nothing to negative the settlor's intention to convert the estate absolutely will not authorize the trustee to execute a mortgage." *Stump v. Warfield*, 65 Atl. 346, 348, 104 Md. 530, 118 Am. St. Rep. 434, 10 Ann. Cas. 249 (quoting *Tyson v. Latrobe*, 42 Md. 325; 2 *Perry, Trusts*, § 768).

#### SELL AND DISPOSE OF

The words "sell" and "dispose," as used in a power in a will authorizing the sale and disposition of property, are synonymous when accompanied by a further statement authorizing the sale or disposition to be made either at public or private sale, since such words limit the method of disposition to a conveyance. *Rutledge v. Crampton*, 43 South. 822, 826, 150 Ala. 275.

#### SELL, BARTER, OR LOAN

Ky. St. § 2557, provides that any person who shall "sell, barter, or loan," directly or indirectly, any intoxicating liquors in a local option district, shall be punished. Held, that the act was not intended to prevent the giving of spirituous liquors by one person to another, and where a physician gave whisky to the prosecuting witness for the witness' sick child, without an agreement that it should be returned, and the physician did not request its return, he was not guilty of violating the statute because the witness thereafter returned it. *Commonwealth v. Abbott*, 145 S. W. 373, 147 Ky. 686.

#### SELL, GIVE AWAY, OR OTHERWISE DISPOSE OF

See Otherwise Dispose of.

#### SELL IN PRINCIPAL'S NAME

To "sell in the principal's name," as used in a writing giving authority to brokers, implies the conclusion in the principal's name of the agreement negotiated by the brokers. *Golden v. Claudel*, 118 Pac. 77, 78, 85 Kan. 465.

#### SELL OR RETAIL

Rev. St. Mo. 1899, § 2243 (Ann. St. 1906, p. 1421), making it a misdemeanor to "sell or retail" intoxicating liquor on Sunday, prohibits the sale of intoxicating liquors on Sunday in any quantity, whether at wholesale or retail. *State v. Wahl*, 119 S. W. 453, 454, 137 Mo. App. 651.

#### SELL SHORT

See Short.

#### SELLER

One assisting in procuring money from certain persons to pay the charges on whisky shipped to a third person, C. O. D., and aiding one of such persons to get his share of the whisky, is not a "seller" of liquor in violation of the local option law. *Hiltebrand v. State*, 91 S. W. 587, 588, 49 Tex. Cr. R. 342.

**SELLER'S LIEN**

A "seller's lien" on chattels for the price exists at common law, without any express agreement, and is an implied part of every contract for the sale of personal property, being defined as the right to retain possession of the chattels until the price is paid, and continuing until delivery, unless divested by an agreement, express or implied, or is waived by a sale on credit, except when the purchaser becomes insolvent before payment, when the lien revives, provided the rights of bona fide third purchasers have not intervened. *Willis v. Glenwood Cotton Mills*, 200 Fed. 301, 305.

**SELLING AGENT**

See, also, Salesman.

A "selling agent," "factor," or "commission merchant" is one who sells goods which another person has delivered to him for that purpose and receives compensation for his services by a commission or otherwise. *Omnien v. Talcott*, 188 Fed. 401, 403, 112 C. C. A. 239.

**SELLING AT RETAIL**

See Retail.

**SELLING BY SAMPLE**

See, also, Sale by Sample.

The words "selling by sample," as used in Ky. St. 1903, § 4218, which provides that "agents for selling by sample" shall not be considered as peddlers, mean taking orders for future delivery, as the commercial traveler does. *Commonwealth v. Standard Oil Co.*, 112 S. W. 902, 903, 129 Ky. 744.

**SELLING FOR FUTURE DELIVERY**

"Selling for future delivery" has a well-defined meaning on the board of trade and in the business world, and means that he has any day during some specified month in the future in which to make such delivery. *John Miller Co. v. Klovstad*, 105 N. W. 164, 165, 14 N. D. 435.

**SELLING TO ARRIVE**

"Selling to arrive" has a well-defined meaning on the board of trade and in the business world, and means that the vendor had 14 days in which to make delivery of the warehouse receipts. *John Miller Co. v. Klovstad*, 105 N. W. 164, 165, 14 N. D. 435.

**SELLING VALUE**

The "selling value" of an article is often equivalent to its actual value. Where defendant refused to accept stoves manufactured for him by plaintiff, and plaintiff elected to treat the stoves as his own and sued for damages, it appearing that the stoves were of an unusual make, so that they had no market value, the reasonable value of the stoves at the time and place of delivery under the contract should be ascertained by evidence as to the sales of the stoves actually made by the

seller, the frequency of the sales, and the testimony of expert witnesses familiar with the stove trade. In such case an instruction on the measure of damages, authorizing the jury to award the plaintiff the "reasonable selling value," was not erroneous. *St. Louis Steel Range Co. v. Kline-Drummond Mercantile Co.*, 96 S. W. 1040, 1043, 120 Mo. App. 438.

**SEMAPHORE**

A "semaphore" is a mechanical device for displaying signals to convey information to a distant point. The etymological definition of the word is "sign bearer." The railroad "semaphore" consists of a mast 25 feet or more in height surrounded by a movable platform, with an iron rod to which is secured a lantern with convex lenses on four sides. On the two opposite sides the glass is red, and on the other two opposite sides it is green. This lantern is used for night signals, while a board target or arm attached to the same platform is used for the day signal. The red light exhibited by the lantern at night indicates danger and the green light indicates safety. The horizontal position of the board target is the day signal for danger, and a vertical position of it is the signal for safety. A cable is stretched from the "semaphore" to the station of the watchman or "semaphore" tender, and the lantern and target are both operated by a windlass and lever. *Tillson v. Maine Cent. R. Co.*, 67 Atl. 407, 409, 102 Me. 463.

Near the scene of the collision between two railroad trains causing the damages sued for was what is known as a "semaphore" used to denote when the railroad track was clear or otherwise. When the arm stood horizontally to the upright on which it was placed, it indicated that the track was not clear, and when it was depressed it indicated the contrary. *Missouri Pac. R. Co. v. Chicago G. W. R. Co.*, 71 S. W. 1081, 1082, 98 Mo. App. 214.

**SEMICONVERTIBLE CAR**

A semiconvertible car is one where the lower panel is not removable; that is, it forms an integral part of the car. It may be higher or lower, but the construction is such that in a semiconvertible car the side of it is not open to the floor when the movable panels are removed so as to make an open car. *O'Leary v. Utica & M. V. Ry. Co.*, 139 Fed. 330, 333.

**SEMINARY**

See Religious Seminary; Theological or Religious Seminary.

**SEMI WEEKLY**

A newspaper issued every day of the week, except Sunday, is a "daily newspaper,"

within a statute requiring notice of foreclosure sales to be published in daily newspapers; the term "daily newspaper" being employed in such statute in contradistinction to the term "weekly," "semiweekly" or "tri-weekly" newspaper. *Wilson v. Petzold*, 76 S. W. 1093, 116 Ky. 873.

## SENATE

See *De Facto President of Senate*.

## SENATOR

As judicial officer, see *Judicial Officer*.

## SEND

"Sending a telephone message" means usually that the persons in communication be afforded the means of talking to each other. Defendant telephone company and plaintiff telephone company contracted to connect their lines by extending them to a point midway between two cities, in one of which defendant maintained an exchange, and in the other of which plaintiff maintained an exchange; and it was provided that each company should have the right to send messages over the extended lines between the two cities, and, for more than eight years after the extension was made, messages originating elsewhere than in the two cities were received and passed over such lines. Held, that in view of the situation, and the practical construction given the contract by the parties, it should be construed as calling for the transmission of messages, irrespective of whether they originated in either of the two mentioned cities. *Campbellsville Tel. Co. v. Lebanon, L. & L. Tel. Co.*, 80 S. W. 1114, 1116, 118 Ky. 277.

The constitution of a benefit society, which provides that printed notices of assessment "shall be made and sent," as the society may provide, and that the official organ of the society, appearing on the first day of each month, shall be an official notice of assessment to each member, requires that a notice of assessment be sent to a member, and publishing a notice of assessment in the official newspaper, does not amount to sending a notice. *Grand Legion of Illinois Select Knights of America v. Beaty*, 79 N. E. 565, 567, 224 Ill. 346, 8 L. R. A. (N. S.) 1124, 8 Ann. Cas. 160.

### Mailing

Testimony that witness "sent" her address to another is not sufficient to show that she did this by letter duly mailed, so as to raise the presumption of its receipt and consequent knowledge of the address. *Ward v. Morr Transfer & Storage Co.*, 95 S. W. 964, 965, 119 Mo. App. 83.

## SEND BY MAIL

An official recital by an officer that he had "sent a written notice by mail" imports that

he affixed the usual stamp, thus prepaying the postage (that being his official duty), as well as that he deposited the document in the post office receptacle. *Cutting v. Harrington*, 71 Atl. 374, 377, 104 Me. 96, 129 Am. St. Rep. 373.

## SEND ON YOUR PAPER

Where a bank, to a telegraphic inquiry, "Will you pay T's check on you, \$22,000," replied by telegram, "T. is good, send on your paper," its answer cannot be construed as a mere statement that T. was good for the amount mentioned, but it amounted to a promise to pay the check; the words "send on your paper" inviting action on the part of the person addressed and not constituting a mere expression of opinion. *First Nat. Bank of Atchison v. Commercial Sav. Bank*, 87 Pac. 746, 749, 74 Kan. 606, 8 L. R. A. (N. S.) 1148, 118 Am. St. Rep. 340, 11 Ann. Cas. 281 (citing *North Atchison Bank v. Garretson*, 51 Fed. 168, 2 C. C. A. 145).

## SEND OUT

The words "send out," in Acts 1907, p. 18, c. 11, known as the "Full Crew Act" § 3, declaring that any railroad doing business in the state who shall "send out" on its road, or cause to be sent out, any train not manned in accordance with sections 1 and 2 of the act, shall be guilty of a misdemeanor, did not limit the act to trains originating within the state, but such words were used in the sense of "operate" or "run over its road," so that the act was applicable to all trains while being operated within the state, though they originated in another state and passed through Indiana to points beyond. *Pittsburgh, C., C. & St. L. Ry. Co. v. State*, 87 N. E. 1034, 1039, 172 Ind. 147.

## SENILE DEMENTIA

As applied to testamentary capacity, the term "senile dementia" is merely inability from old age, and, as the words indicate, it is that diminution and weakness of the mental faculties which result from old age. *Graham v. Deuterman*, 91 N. E. 61, 62, 244 Ill. 124.

"Senile dementia" is a "progressive condition attendant in some cases upon advancing age, and a condition which, if existing, affords opportunity for the exercise of influence by way of direction and suggestion which does not attend, to such degree, at least, most forms of dementia," and to one who is afflicted with it no test can well be applied to determine lucidity and disposing power at any particular time or during any particular interval. *Hibbard v. Baker*, 104 N. W. 399, 400, 141 Mich. 124.

"That 'senile dementia' differs greatly both in process and progress of decay is freely admitted by all writers on the subject. Medical observers say that it cannot be de-



scribed by any positive characters; that, in its gradual advance to incompetency, it embraces a wide range of infirmity, varying from simple lapse of memory to complete inability to recognize persons or things; 'that often the mental infirmity of the aged is by no means as serious as might be supposed at first sight, and that, to use a figure of speech, the mind may be superficially rotted while it is sound at the core.' It is generally said that one of the surest symptoms of mental decay is the loss of memory, and especially in respect of names and dates; but it is fully recognized in the authorities that, while an old person may appear oblivious in such matters, his mental grasp of the relations he sustains to others, and more especially to the immediate members of his family, and to others who would be the natural objects of his bounty, and of his own interest and affairs, his capacity and solid understanding may still remain firm. Failure of memory is not alone enough to create testamentary incapacity, unless it extends so far as to be inconsistent with the 'sound and disposing mind and memory' requisite for all wills. 'Great age alone does not constitute testamentary disqualification,' and 'there is no presumption against a will because made by a man of advanced age, nor can incapacity be inferred from an enfeebled condition of mind or body.' The law wisely sustains wills made by persons of impaired mental and bodily powers, provided it appears that the will is the uninfluenced act of the testator, and he has the requisite intelligence to comprehend the condition and extent of his property and remember the persons who would ordinarily be his beneficiaries. In an English case it was held that, though mental power be reduced in old persons below the ordinary standard, yet, if the testamentary act is understood and appreciated in its different bearings, if the mental faculties retain enough strength to comprehend the transaction entered upon, the power to make a will remains. In other words, to constitute 'senile dementia,' there must be such a failure of the mind as to deprive the testator of intelligent action. Such is the rule of our own cases, and the rule established by the great weight of authority." *Gates v. Cole*, 115 N. W. 236, 237, 238, 137 Iowa, 613 (citing *Townsend v. Townsend*, 105 N. W. 110, 128 Iowa, 621; *Fothergill v. Fothergill*, 105 N. W. 377, 129 Iowa, 93; *Perkins v. Perkins*, 90 N. W. 55, 116 Iowa, 253; *Lingle v. Lingle*, 96 N. W. 708, 121 Iowa, 133).

## SENIOR

The suffixes "Jr." or "Sr." are no part of a man's name and, except in a few instances, may be disregarded. *Ross v. Berry*, 124 Pac. 342, 343, 17 N. M. 48.

The affixes "Sr." and "Jr." do not form part of a name, but are descriptive merely; hence in legal contemplation their presence or absence is immaterial. *State v. Lewis*,

83 Atl. 692, 693, 83 N. J. Law, 161; *Windom v. State*, 72 S. W. 193, 194, 44 Tex. Cr. R. 514.

The word "senior," added to the name of a person referred to in an indictment, is mere matter of description, constituting no part of the name, and need not be proved when proof of the name is necessary. *State v. Simpson*, 76 N. E. 544-546, 1005, 166 Ind. 211 (citing *Allen v. State*, 52 Ind. 486; *Geraghty v. State*, 11 N. E. 1, 110 Ind. 103).

The addition of the word "junior" or "senior" to a name is mere matter of description and not a part thereof, so that the fact that the suit was brought by plaintiff as administratrix of C. G. "Jr.," deceased, and judgment was rendered against the administratrix under that name, while the assignment of errors omitted "Jr." from decedent's name, was not ground for dismissal of the appeal. *Guthell v. Dow*, 97 N. E. 426, 177 Ind. 149.

## SENIOR TEACHER

The position of senior teacher, within the rules of the board of education of the city of New York, relating to additional compensation for teachers acting as senior teachers in charge of schools, is not an independent position, within *Laws 1897*, p. 399, c. 378, § 1103, and *Laws 1901*, p. 472, c. 466, § 1090, providing for appointments to positions on the teaching staff; but the position is that of a regular teacher who, under the direction of the principal of the school, is performing special duties—the word "senior," as applied to a teacher, not relating to the age or period of service, but to particular duties which such teacher is called on to perform. *Dildine v. Board of Education of City of New York*, 117 N. Y. Supp. 578, 133 App. Div. 261.

## SENSUALITY

"Lewdness" is synonymous with "impurity," "unchastity," "licentiousness," "sensuality." *Janison v. State*, 94 S. W. 675, 678, 117 Tenn. 58 (citing *Cent. Dict.*).

## SENTENCE

See Cumulative Sentence; Successive Sentences; Suspended Sentence; Suspension of Sentence.

Mitigation of sentence, see Mitigate—Mitigation.

See, also, Punishment.

In Penal Law (*Consol. Laws 1909*, c. 40), § 1692, relating to rescue, the terms "commitment," "conviction," and "sentence" relate to a case where an officer or another holds a prisoner under lawful custody after he has been judicially held under a commitment, conviction, or sentence for misdemeanor. *People v. Marks*, 135 N. Y. Supp. 523, 525, 75 Misc. Rep. 404.

"The date fixed by a 'sentence' for the punishment to commence is directory merely, and forms no part of the sentence itself; hence, if from any cause it is not carried into effect at the period named, the party may be brought before the court again upon motion, and a new period be prescribed." The time fixed for executing a judgment and sentence or for the commencement of its execution is not one of its essential elements, and, strictly speaking, is not a part of the "judgment and sentence." The essential part of the judgment is the punishment, and the amount thereof, without reference to the time when it shall be executed. Except in cases where the defendant has been convicted of two or more offenses before judgment on either, the order of the court in reference to the time when the sentence shall be executed is not material. The judgment is the penalty of the law, as declared by the court, while the direction with respect to the time of carrying it into effect is in the nature of an award of execution. Where the penalty is imprisonment, the sentence of the law is to be satisfied only by the actual suffering of the imprisonment imposed, unless remitted by death or by some legal authority. The expiration of time without imprisonment is in no sense an execution of "sentence." *Ex parte Eldridge*, 106 Pac. 980, 981, 3 Okl. Cr. 499, 27 L. R. A. (N. S.) 625, 139 Am. St. Rep. 967 (quoting and adopting definitions in *Ridley v. State*, 106 Pac. 553, 3 Okl. Cr. 350, 26 L. R. A. [N. S.] 110, and *In re Collins*, 97 Pac. 188, 8 Cal. App. 367).

#### Conviction distinguished

Revisal 1908, §§ 5416a-5416q, establishing the Stonewall Jackson Training and Industrial School for delinquent, etc., children, is not unconstitutional as amounting to a deprivation of liberty within the declaration of rights, the restraint being of parental nature and not as a punishment for crime, though only persons under 16 years of age, who have been "convicted" of a criminal offense, can be admitted, and "sentence" of such persons is required; the word "convicted" referring to a verdict of guilty, and the word "sentence" being broad enough to include any judgment of a criminal court, though in its ordinary acceptation it refers to a judgment of imprisonment. *Ex parte Watson*, 72 S. E. 1049, 1054, 157 N. C. 340.

#### SENTENCE SUSPENDED

The words "sentence suspended" amount to a declaration that no punishment ought to be inflicted. *Blazier v. Keffer*, 75 Atl. 439, 440, 79 N. J. Law, 252.

#### SENTIMENTS

The word "sentiments," as used in the constitutional provision that any person may speak, write, or publish his sentiments on all subjects, being responsible for the abuse of

that liberty, is used in the sense of thoughts, ideas, opinions. *Pavesich v. New England Life Ins. Co.*, 50 S. E. 68, 73, 122 Ga. 190, 69 L. R. A. 101, 106 Am. St. Rep. 104, 2 Ann. Cas. 561.

#### SEPARABLE

##### SEPARABLE CONTRACT

Generally, a contract which by its terms, nature, and purpose contemplates that each and all of its parts and the consideration shall be common each to the other and interdependent, is entire, while a contract which is in its nature and purpose susceptible of division and apportionment is, generally, separable, and the question whether a contract is entire or separable is largely one of intention to be determined from the language and the subject-matter of the agreement. *Quarton v. American Law Book Co.*, 121 N. W. 1009, 1015, 143 Iowa, 517, 32 L. R. A. (N. S.) 1.

##### SEPARABLE CONTROVERSY

See, also, *Severable Controversy*.

Under Judicial Code, § 24, authorizing removal of certain causes to federal courts where there is a controversy wholly between citizens of different states which can be fully determined as between them notwithstanding the presence of other parties, a "separable controversy" does not exist so as to authorize removal, unless the whole subject-matter of the suit is capable of being fully determined as between citizens of different states, and complete relief afforded as to the separate cause of action without the presence of others originally made parties. *In re Silvie's River*, 199 Fed. 495, 502.

For a case to present a "separable controversy" within the statute relative to the removal of causes to the federal court, "it must be capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more states on one side, and the citizens of other states on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun. But the language quoted, and other language which resembles it, is not to be taken as declaring that a controversy is separable merely because the given plaintiff could have prosecuted his cause of action against the defendant seeking to remove without the joinder of any other defendant. Though a separable controversy exists so as to authorize the removal of a cause, notwithstanding the joinder of a defendant whose citizenship is the same as that of the plaintiff, with a non-citizen defendant, when the case is one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side and citizens of another state on the

other, which can be fully determined without the presence of any of the other parties to the suit as begun, or where two or more causes of action are united in one suit, and there can be a removal of the whole suit on the petition of one or more of the defendants interested in the controversy which, if it had been sued on alone, would be removable, the controversy does not necessarily become separable merely because the plaintiff could have prosecuted its cause of action against the defendant seeking to remove without the joinder of any other defendant." *Regis v. United Drug Co.*, 180 Fed. 201, 204 (citing *Fraser v. Jennison*, 1 Sup. Ct. 171, 174, 106 U. S. 191, 194, 27 L. Ed. 131; *Geer v. Mathieson Alkali Works*, 23 Sup. Ct. 807, 809, 190 U. S. 428, 432, 47 L. Ed. 1122; *Alabama Great Southern Ry. Co. v. Thompson*, 26 Sup. Ct. 161, 200 U. S. 206, 50 L. Ed. 441, 4 Ann. Cas. 1147).

To constitute a "separable controversy" "the action must be one in which the whole subject-matter of the suit can be determined between the parties to the 'separable controversy,' without the presence of the other parties to the suit." *Moon*, Rem. of C. § 140. The question whether the controversy in an action by a citizen of the state against another citizen of the state and a citizen of a sister state is separable, so as to authorize the latter to remove the cause to the federal court on the ground of diversity of citizenship, must be determined by the complaint, and the petition for removal cannot be considered. A suit by a citizen of the state against a foreign and a domestic railroad company for damages for interference with his easements in streets on which his property abuts caused by the operation of trains thereon pursuant to an agreement between the companies, and for an injunction to prevent further interference, presents a controversy which is not separable, and the foreign company is not entitled to remove the cause to the federal court on the ground of diversity of citizenship within Removal Act (Act Cong. Aug. 13, 1888). *Staton v. Atlantic Coast Line R. Co.*, 56 S. E. 794, 144 N. C. 135 (citing *Chesapeake & O. R. Co. v. Dixon*, 21 Sup. Ct. 67, 179 U. S. 131, 45 L. Ed. 121; *Powers v. Chesapeake & O. R. Co.*, 18 Sup. Ct. 264, 169 U. S. 92, 42 L. Ed. 673; *Bellaire v. Baltimore & O. R. Co.*, 13 Sup. Ct. 16, 146 U. S. 117, 36 L. Ed. 910; *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449; *Winchester v. Loud*, 2 Sup. Ct. 311, 108 U. S. 130, 27 L. Ed. 677; *Black, Dillon*, Rem. of C., § 146; *Pirie v. Tredt*, 5 Sup. Ct. 1034, 1161, 115 U. S. 41, 29 L. Ed. 331; *Sloane v. Anderson*, 6 Sup. Ct. 730, 117 U. S. 275, 29 L. Ed. 899; *Little v. Gilles*, 7 Sup. Ct. 32, 118 U. S. 596, 30 L. Ed. 269; *Torrence v. Shedd*, 12 Sup. Ct. 726, 144 U. S. 527, 36 L. Ed. 528).

In order that a "separable controversy" exist, the whole subject-matter of the suit must be capable of being finally determined

as between the parties on each side, and complete relief afforded as to the separate cause of action, without the presence of other parties originally brought in. In a condemnation proceeding instituted by a railroad company, under Rev. St. Wis. 1898, § 1845 et seq., by the filing of a petition in a circuit court of the state against numerous property owners, upon which the statute provides for a hearing as to petitioner's right to condemn, and, if such right is sustained, for the appointment of a commission, which, on request of the company or the owner, shall appraise any piece of the property described, from which appraisal an appeal may be taken to the court, and tried to a jury as in ordinary law actions, there is a single controversy only presented as to the right to condemn, to be determined between the petitioner, on one side, and all of the parties joined as defendants, on the other; and the mere fact that a defendant is the owner of part of the lands sought to be taken in severalty does not create a "separable controversy" between him and the petitioner, which entitles him to remove the proceedings into a federal court on the ground of diversity of citizenship. *Perkins v. Lake Superior & S. E. Ry. Co.*, 140 Fed. 906, 910 (citing *Torrence v. Shedd*, 12 Sup. Ct. 726, 144 U. S. 527, 530, 36 L. Ed. 528; *Miller v. Clifford*, 133 Fed. 880, 67 C. C. A. 52; *Hanrick v. Hanrick*, 14 Sup. Ct. 835, 153 U. S. 192, 38 L. Ed. 885; *Geer v. Mathieson Alkali Works*, 23 Sup. Ct. 807, 190 U. S. 428, 47 L. Ed. 1122; *Fraser v. Jennison*, 1 Sup. Ct. 171, 106 U. S. 194, 27 L. Ed. 131).

Under Act March 3, 1875, c. 137, § 2, 18 Stat. 470, providing that the party removing a cause must show, not only that he is a citizen of another state, but that it is "a controversy which is wholly between citizens of different states and which can be fully determined as between them," and that he is "actually" interested in such controversy, the "separable controversy" must be "such that complete relief may be afforded the parties (of diverse citizenship) interested therein without the presence of any of the resident defendants." Under the statutes of New Jersey, which make both owner and mortgagee indispensable parties to a suit to condemn land for public use, the cause is not removable by the owner on the ground of diversity of citizenship where the mortgagee is a citizen, since the cause is not a "separable controversy" contemplated by the federal statutes. *Fishblatt v. Atlantic City*, 174 Fed. 196, 198.

The question whether there is no "separable controversy" in a suit in equity, within the meaning of the removal statute (Act March 3, 1887, c. 373, 24 Stat. 552, § 2, as corrected by Act Aug. 13, 1888, c. 866, 25 Stat. 433), providing that such controversy must be one "wholly between citizens of different states" and must be such as "can be fully determined as between them," is to be

determined from the allegations of the bill alone, which, for the purpose of a motion to remand, are taken as confessed, and independent of any allegations in the petition for removal or of answers filed after removal. *Elkins v. Howell*, 140 Fed. 157, 158.

Where a bill against numerous defendants for the foreclosure of a mortgage alleged that certain property nominally owned by a defendant other than the mortgagor was within complainant's mortgage, under a clause covering after-acquired property, in which claim some, but not all, of the defendants were interested, such claim created a "separable controversy," which rendered the cause removable by the defendant claiming ownership of the property; the requisite diversity of citizenship being shown between the parties interested therein. *New England Water Works Co. v. Farmers' Loan & Trust Co.*, 136 Fed. 521, 525, 69 C. C. A. 297.

Where the declaration in an action in a state court against several defendants states a cause of action for a joint tort, the action cannot be held to be one involving a "separable controversy" for the purposes of removal. *Heffelfinger v. Choctaw, O. & G. R. Co.*, 140 Fed. 75, 76.

Where a petition in a state court in an action for injuries to a servant against the master and a servant alleged concurring acts of negligence of a master and the servant, and the servant was of the same citizenship as plaintiff, the case did not present a "separable controversy" between plaintiff and the master, and was not therefore removable to the federal court. *Roberts v. Shelby Steel Tube Co.*, 131 Fed. 729, 65 C. C. A. 589.

A case in which plaintiff, in good faith, has elected to sue jointly in tort a foreign corporation and its servants whose misconduct caused the injury complained of, does not—even though such joinder may be improper—present a "separable controversy" between plaintiff and the corporation, which, under the act of March 3, 1875, as amended, can be removed from a state to a federal Circuit Court without regard to the citizenship of the individual defendants. *Alabama G. S. Ry. Co. v. Thompson*, 26 Sup. Ct. 161, 166, 200 U. S. 206, 50 L. Ed. 441, 4 Ann. Cas. 1147.

In a suit for an undivided half interest in a single tract of land alleged to be wrongfully withheld by the two defendants, there is no "separable controversy," so as to allow removal to the federal Circuit Court, though the citizenship of plaintiffs and of only one of defendants is diverse. *Knight v. Litcher & Moore Lumber Co.*, 136 Fed. 404, 406, 69 C. C. A. 248 (citing *Moon, Removal of Causes*, 406, § 143, and cases cited in note 3).

An action to recover damages for a death from negligence, in which plaintiff has, in good faith, exercised his right under the state laws to proceed jointly against a rail-

way company and its employé whose negligence caused the accident, cannot be converted into a "separable controversy" for the purpose of removal to a federal Circuit Court because of diversity of citizenship between the plaintiff and the railway company. *Cincinnati, N. O. & T. P. Ry. Co. v. Bohon*, 28 Sup. Ct. 166, 168, 200 U. S. 221, 50 L. Ed. 448, 4 Ann. Cas. 1152.

Where the petition in an action against a railroad company and an engineer of one of its trains for negligently causing the death of plaintiff's intestate is based on the Iowa statute giving a right of action for wrongful death, which has never been construed by the courts of the state to create a joint liability in such cases, and alleges acts of negligence on the part of the railroad company with which its codefendant had no concern, and which are essential to make out a cause of action under the state law, a "separable controversy" is disclosed, and the cause is removable on petition of the railroad company showing diversity of citizenship, and alleging that the joinder of defendants was for the fraudulent purpose of preventing a removal. *Henry v. Illinois Cent. R. Co.*, 132 Fed. 715.

In a suit in equity brought in a state court on behalf of all of the creditors of an insolvent bank in Colorado against a number of stockholders to enforce their double liability under the Colorado statute, by requiring them each to pay the full amount of such liability to a master, to be applied pro rata, together with such sums as may be collected from other stockholders, on the debts of the bank—the remainder, if any, to be returned to defendants—there is no separable controversy with a single defendant which entitles him to remove the cause into a federal court. *Miller v. Clifford*, 133 Fed. 880, 886, 67 C. C. A. 52, 5 L. R. A. (N. S.) 49.

Where, in an action for death of a passenger, plaintiff joined the railroad company, a nonresident corporation, with certain of its employes, operating the colliding trains which caused the accident, who were of the same citizenship as plaintiff, but the only negligence averred was that of the servants in control of the trains, the corporation's liability being based wholly on the fact that the acts of the servants were within the scope of their employments, and bound the company, the complaint did not charge a joint tort, and hence the corporation was entitled to remove the cause to the federal court. *Sessions v. Southern Pac. Co.*, 134 Fed. 313, 315.

Though, in a suit against two or more defendants, one of whom is a nonresident, there may be charges of concurrent negligence against all, yet, if there be also a distinct charge of negligence against the nonresident defendant alone, sufficient in and of itself to constitute a cause of action, the case is one involving a "separable controversy" between citizens of different states, and is therefore

removable to the federal courts. Where a complaint against a nonresident railway company and certain of its employes in charge of the train by which deceased was killed, who were of the same citizenship as plaintiff, alleged that, in violation of the rules of the railway company, "defendants negligently, willfully, and maliciously, by their joint, concurrent acts," gave certain box cars a high, unusual, and dangerous rate of speed, uncoupled them from the engine, turned a switch, and permitted them to roll down a steep grade over a crossing, by which plaintiff's intestate was knocked down and killed, and also charged defendants jointly with negligence in maintaining such steep grade and closely adjoining switch at such place, in not providing a switchman at the crossing, in not providing a brakeman in charge of the cars, and in that the railway company's employes were incompetent, and that they were retained in its employ with knowledge that they were accustomed to violate its rules, such acts of negligence were not joint, but the complaint alleged a "separable controversy," entitling the railway company to remove the cause to the federal courts. *McIntyre v. Southern Ry. Co.*, 131 Fed. 985, 986, 988.

The petition alleged that plaintiff's deceased husband became a passenger on defendant's train, and that the conductor carelessly and negligently signaled the train to move before decedent had time to board it, knowing that he was in the act of boarding it and was in a place of danger; that while the train was standing at the platform, such conductor, also a defendant, negligently signaled for the train to start while there was a large freight truck within six inches of the edge of the platform, in front of the passenger coach, from which the station agent had not had time to remove all the freight, and that the position of the truck when the conductor signaled the train to start made it dangerous for passengers boarding the train; that while decedent was standing on the lower step of the coach the conductor told him in a loud voice to get off and took hold of him and pulled him backwards and forwards, causing him to sway on the step and strike the freight truck and rebound and strike it again, and that on account of the joint negligence of the conductor and the railroad company deceased was caused to lose his balance upon the step and fall under the train. *Rev. St. 1899, § 2864 (Ann. St. 1906, p. 1637; Rev. St. 1909, § 5425)*, provides that when any one dies from any injury resulting from the negligence of an employe while running or managing any train, etc., the owner of the railroad shall forfeit \$5,000. *Rev. St. 1899, § 2865 (Ann. St. 1906, p. 1644; Rev. St. 1909, § 5426)* imposes a liability generally for death by wrongful act or neglect, and *Rev. St. 1899, § 2866 (Ann. St. 1906, p. 1646; Rev. St. 1909, § 5427)*, provides that damages accruing under the preceding sections may be recovered by the

same parties and in the same manner as provided in section 2864, and the jury shall give such damages, not exceeding \$5,000, as they deem just. Held, that the petition alleged a cause of action based on the joint negligence of the railroad company and the conductor, and hence one under sections 2865 and 2866, and not under section 2864, so that there was no "separable controversy" so as to authorize the transfer of the case to the federal court. *State ex rel. Iba v. Mosman*, 133 S. W. 38, 44, 231 Mo. 474.

#### **Separate and distinct controversy distinguished**

There is a clear distinction between controversies which are merely "separable," within the meaning of the removal statute, and those which are wholly "separate and distinct," and only joined in one suit by express statutory permission, as in case of proceedings for condemnation of a railroad right of way in which as permitted by statute owners of different tracts of land are joined in the same proceeding, and in such a case a removal of the cause by the owner or owners of one tract does not carry with it the proceedings as against other owners. *Deepwater Ry. Co. v. Western Pochontas Coal & Lumber Co.*, 152 Fed. 824, 830 (citing *Barney v. Latham*, 103 U. S. 214, 26 L. Ed. 514).

## **SEPARATE**

### **SEPARATE BALLOT**

Primary Election Law (Laws 1907, p. 157, c. 109), § 13, provides that party candidates for United States Senator shall be nominated in the manner provided for candidates for state offices, that the candidate receiving the highest number of votes at the primary shall be the nominee at the succeeding session of the Legislature, but that, if no candidate shall receive 40 per cent. of all the votes of his party for United States Senator, then the two candidates of each party who receive the highest number of votes at the primary shall be placed upon a separate ballot, to be voted for at the general election following, that such ballot shall be prepared in the same manner as the general election ballot, that the candidates of each party shall be placed upon such ballot under their proper party heading, and that the name of each candidate shall be placed upon such ballot in the same manner as the candidate for state offices, and shall be voted for in the same manner. Held, that the word "separate" does not mean separate from the general ballot, but means separate as to each political party, so that the candidates for United States Senator of each political party are to be placed on separate party ballots. *State v. Blaisdell*, 118 N. W. 141, 147, 18 N. D. 55, 24 L. R. A. (N. S.) 465, 138 Am. St. Rep. 741.

**SEPARATE CAUSES**

Separate trials under one indictment against several defendants are "separate causes" within the meaning of Rev. St. § 828, prescribing the docket fees which the clerk of a federal court may charge in a cause. *United States v. Keatley*, 27 Sup. Ct. 404, 405, 204 U. S. 562, 51 L. Ed. 618.

**SEPARATE CONSUMER**

Where a tenant and a subtenant occupied a store building divided by a partition, and each used water separately from the other, each was a "separate consumer" within the meaning of an ordinance providing for the installation of a water meter by the water company for the water consumed by each when demanded by any consumer, and the water company was not required in such case to furnish a meter for their joint use. *Nogales Water Co. v. Neumann*, 100 Pac. 794, 795, 12 Ariz. 306.

**SEPARATE CONTRACT**

Contract distinguished, see *Contract*.

**SEPARATE CONTROVERSY**

There is a clear distinction between controversies which are merely "separable," within the meaning of the removal statute, and those which are wholly "separate and distinct," and only joined in one suit by express statutory permission, as in case of proceedings for condemnation of a railroad right of way in which, as permitted by statute, owners of different tracts of land are joined in the same proceeding, and in such a case a removal of the cause by the owner or owners of one tract does not carry with it the proceedings as against other owners. *Deepwater Ry. Co. v. Western Pochontas Coal & Lumber Co.*, 152 Fed. 824, 830 (citing *Barney v. Latham*, 103 U. S. 214, 26 L. Ed. 514).

**SEPARATE ELECTION**

Though the submission of a change in county boundaries is made at a general election, it is, in a strict legal sense, a "separate election," held in connection with and as a part of the general election. *State v. Blaisdell*, 119 N. W. 360, 364, 18 N. D. 31.

**SEPARATE ESTATE**

The "married woman's separate estate" was one of the remedial measures proposed and enacted in the Constitution to eradicate the evils of the common law under which marriage was a spoliation of the woman and investiture of the man with her personal property. Section 6 of the Constitution authorized the Legislature to provide for the protection of the rights of women acquiring and possessing property, real, personal, and mixed, separate and apart from the husband and for their equal rights in the possession of their children. *Cross v. Benson*, 75 Pac. 558, 560, 68 Kan. 495, 64 L. R. A. 560.

The term "separate estate," as used in Rev. St. 1845, c. 109, § 1, conferring on a married woman power to make a valid will as to her separate estate, does not include an estate acquired from her husband, except where it was settled upon her by him before marriage or after marriage in pursuance of an antenuptial contract providing for such settlement. *Thompson v. Minnich*, 81 N. E. 336, 339, 227 Ill. 430 (citing 2 Kent, Comm. 173).

The term "separate estate," as used in Acts 1897-98, p. 519, c. 490, amending Code 1887, § 492 (Code 1904, p. 252), providing that if the property is the "separate" property of a person over 21 years of age, or a married woman, it shall be listed and taxed to the trustee, if any, and if there is no trustee, to the owner thereof, imports separate ownership by the persons designated in contradistinction to an equitable "separate estate" or the legal "separate estate" of a married woman under our statute. *Selden v. Brooke*, 52 S. E. 632, 633, 104 Va. 832.

**Earnings**

Where a widow, suing the administrator of her deceased husband for household furniture, showed that she had conducted business in her own name without interference from her husband, and that the furniture was bought by her with funds earned in the business there was evidence that the property was her separate estate within Civ. Code, §§ 158, 159, authorizing a husband to relinquish to the wife his interest in her earnings. *Larson v. Larson*, 115 Pac. 340, 342, 15 Cal. App. 531.

The presumption as to the character of property arising from the fact that a married woman engages in business is overcome by the fact that the property was purchased with funds derived from moneys owned by her before her marriage or acquired afterward by gift or bequest constituting her separate estate within Civ. Code, § 162, and hence the property is her separate property. *Oldershaw v. Matteson & Williamson Mfg. Co.*, 125 Pac. 263, 265, 19 Cal. App. 179.

**Insurance**

The laws of an insurance society, in which plaintiff's deceased husband was insured, provided that no policy should be written except to blood relatives, the affianced wife or husband or a person dependent on the insured, and that in the event of the death of one or more of the beneficiaries, and in the absence of a further disposition, etc., the benefit should be paid to deceased's heirs, in accordance with the laws of the state where the deceased died. Held that, where a widow took the proceeds of her husband's insurance in such society because she was his sole heir, such fund was not a part of her separate estate "at the time of the death of her husband," within Ann. Code 1892, § 4499, providing for the distribution of the husband's estate in case the widow elected not

to take under his will. *O'Reilly v. Laughlin*, 45 South. 19, 21, 92 Miss. 1.

#### **Spendthrift trust distinguished**

Testator's will provided that a share of his estate should be held in trust for a daughter, a married woman, to "her sole and separate use" during her life, so that she might enjoy the net income free from the control of any husband, that she should have power to dispose of the principal fund by will, and that, in default of such will, it should go to her heirs. Held, that neither the principal nor the income of the fund could be subjected to the claim of her attorneys for services in advising her in relation to the management of the fund, the fund being in possession of the court, and neither the principal nor income being a "separate estate," but the will created a mere "spendthrift trust." *Castree v. Shotwell*, 68 Atl. 774, 775, 73 N. J. Eq. 590.

### **SEPARATE EXAMINATION**

#### **As private**

"Private" and "separate" mean substantially the same thing. The word "separate," when used in a certificate of acknowledgment, imports that the acknowledgment of the grantor was taken by a private examination. *Timber v. Desparois*, 101 N. W. 879, 881, 18 S. D. 587.

### **SEPARATE GENERAL VERDICT**

The expression "separate general verdict," as used in the Code, authorizing the court in its discretion to direct the jury to find a separate general verdict, means that the verdict is separate as to the particular issue, as distinguished from any other issue in the case, and general as to the particular issue, and it was intended to apply in cases where there is more than one issue; and hence, where there was only one issue before the jury, the trial court did not abuse its discretion by refusing to submit interrogatories for a separate general verdict. *Jones & Co. v. Moore* (Ky.) 99 S. W. 286, 287.

### **SEPARATE LABOR**

"Separate labor," as used in Rev. St. 1899, § 4340, entitling a wife to the wages of her separate labor as her sole and separate property, is not the labor expended by her for the performance of her household duties, but labor entirely disconnected with those duties, and performed for the purpose of earning money wages. *Kroner v. St. Louis Transit Co.*, 80 S. W. 915, 916, 107 Mo. App. 41.

The phrase "separate labor," in Ann. St. 1906, p. 2382, cutting off the husband's rights to certain of the wife's property, including her separate labor, is not to be construed to refer only to services performed by the wife for a stranger, but to mean labor other than domestic service, and for which she would be entitled to receive compensation; and

where a family consisted of the husband, wife, and a grown daughter, who lived over a grocery store conducted by the husband, and the wife had performed the work of a clerk in the store, injuries to the wife, which deprived her of her ability to perform the duties of the clerk, was an injury to her for which she alone could maintain an action. *Kirkpatrick v. Metropolitan St. Ry. Co.*, 107 S. W. 1025, 1026, 129 Mo. App. 524.

### **SEPARATE OFFENSE**

Rev. Pol. Code, § 2834, requires every person engaged in selling liquors to annually pay certain sums for license. Section 2837 requires the county treasurer to deliver to the person making the payment a receipt and notice which shall be at all times displayed in the room where the business is carried on. Section 2839 requires a bond of the liquor seller. Section 2838 makes it a misdemeanor to engage in business requiring a license under section 2834 without having paid the license, and without having the receipt and notice posted up, and provides that each violation of any provision of the article shall be construed to be a "separate and complete offense." Held, that an indictment charging defendant with engaging in selling liquors without having paid the required license, and without having the receipt and notice posted, charges only one offense within Rev. Code Cr. Proc. § 224, providing that an indictment must charge but one offense, and section 272, making it a ground of demurrer where more than one offense was charged. *State v. Mudie*, 115 N. W. 107, 108, 22 S. D. 41.

Each mailing or taking from the post office of a letter pursuant to a scheme to defraud constitutes a "separate offense," under Rev. St. § 5480, which provides that if any person, having devised or intended to devise any scheme or artifice to defraud, to be effected by correspondence, shall in and for executing such scheme or artifice, or attempting to do so, place or cause to be placed any letter in any post office, or shall take or receive any such therefrom, he shall, on conviction, be punished, etc. *Francis v. United States*, 152 Fed. 155, 156, 81 C. C. A. 407 (citing *In re Henry*, 8 Sup. Ct. 142, 123 U. S. 373, 31 L. Ed. 174; *In re De Bara*, 21 Sup. Ct. 112, 179 U. S. 320, 45 L. Ed. 207).

Where a crime constitutes a continuing offense, each day during which it is continued constitutes a "separate offense," and will support a separate prosecution, provided the information or indictment alleges such specific day, and the state confines its proof to the date alleged. When an appeal is taken to this court, it is the duty of counsel for appellant in his brief to point out the specific alleged error upon which he relies, and to make the best argument he can to show that the trial court erred in the matter complained of, and that by this error his client was de-

prived of a substantial right, to his injury. When a defendant is clearly proven to be guilty, this court will not reverse a conviction upon any technicality or exception which did not affect the substantial rights of the defendant. This court is not required to prepare written opinions in misdemeanor cases, unless in its judgment this should be done. See Session Laws 1910, c. 13. It is our custom in misdemeanor cases, when we find that no substantial error has been committed in the trial of a cause and that the evidence clearly shows that the appellant is guilty, to affirm a conviction in an oral opinion. This court has never made any distinction as to circumstantial evidence, or in its application of the principles of law, between misdemeanor and felony cases, or between classes of misdemeanor cases. Except in cases where time is of the essence of an offense, it may be alleged in the information or indictment, and proven upon the trial, at any time prior to the institution of the prosecution, and the state is not bound by the date alleged in the information or indictment. *Ostendorf v. State*, 128 Pac. 143, 145, 146, 8 Okl. Cr. 360.

### SEPARATE PROPERTY

Control of separate property, see Control.

The term "separate property of a married woman," at the time of the adoption of Pub. Acts 1880, p. 525, c. 57, providing that the taxable estate of married women other than separate property shall be set in the lists of their husbands, had an established meaning, and was such estate only, whether real or personal, as was settled on her for her separate use, without any control over it on the part of her husband. *Union School Dist. v. Bishop*, 58 Atl. 13, 14, 76 Conn. 695, 66 L. R. A. 989.

Civ. Code, §§ 162, 163, define the separate property of the spouses as that owned by them, respectively, before marriage, and that acquired afterwards by gift, bequest, devise, or descent, and section 164 declares that all other property acquired after marriage by a husband or wife or both is community property. This section was amended in 1889 (St. 1889, p. 328, c. 219) by the addition of a provision that, whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title vests in her as her separate property. Held that, prior to the amendment, the presumption was that the property conveyed to either husband or wife after marriage by a conveyance other than a deed of gift vested the title in the community. *Nilson v. Sarment*, 96 Pac. 315, 316, 153 Cal. 524, 126 Am. St. Rep. 91.

The "separate property of the wife" is defined by Civ. Code, § 162, as being all property owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits

therefrom, but does not include property conveyed to the husband for a consideration paid out of community funds and later conveyed by the husband to the wife for a nominal consideration in fraud of his creditors. *Bekins v. Dieterle*, 91 Pac. 173, 174, 5 Cal. App. 690.

### Cause of action for personal injuries

Under Acts 1902, No. 68, damages resulting from personal injuries to the wife are her "separate property," recoverable by herself alone. *Cartwright v. Puissigur*, 51 South. 692, 693, 125 La. 700.

### SEPARATE PUBLIC EMOLUMENTS OR PRIVILEGES

"Separate public emoluments or privileges" which the Legislature is forbidden by the Constitution to bestow on any man or set of men, refer mainly to political privileges, and were intended to prevent any infringement of the great principle of equality of political rights. The section may likewise be extended to prohibit the granting of any privileges to any set of men, to which all others in the same circumstances would not be entitled. A statute giving the remedy of attachment to particular classes of creditors is not within the prohibition. *Peck v. Critchlow*, 8 Miss. (7 How.) 243, 247.

### SEPARATE REPORT

Under Greater New York Charter (Laws 1906, c. 658, § 985), relating to acquisition of land for streets, etc., and providing that the commissioners of estimate and assessment may, when authorized by a majority vote of all members of the board of estimate and apportionment, make and file a preliminary abstract of their estimate of damages, embracing either the entire lands or successive sections thereof, and ascertain and estimate the compensation to be made thereon, and make a separate report with reference thereto, and providing that such separate and partial report shall be made in the same form and manner, and such proceedings shall be had in respect thereto, as in respect to the report of the commissioners relative to the entire lands to be taken, and that in such cases the final partial abstract and report as to awards, and the final abstract and report as to assessment for benefits, shall be made up and filed and brought on for confirmation at the same time and place, where the board of estimate and apportionment authorizes the commissioners to make a "separate or partial report" of the awards, a report embracing all of the awards to be made may be confirmed before the local assessment is before the court for confirmation. In re West 162d St., 109 N. Y. Supp. 950, 953, 125 App. Div. 485.

### SEPARATE RIDER

The word "separate," as used in Rev. St. c. 49, § 4, providing for riders to be attached to policies, "on separate slips or rid-



ers" was used to express the idea of something separate from or not physically a part of the policy; something originally distinct, apart from the policy, to be attached thereto. *Rolfe v. Patrons' Androscoggin Mut. Fire Ins. Co.*, 76 Atl. 879, 106 Me. 345.

### SEPARATE USE

The word "separate," as used in a trust for the benefit of a woman, has a fixed meaning and excludes marital rights. A devise to a niece, "to and for her separate use," creates a separate trust for her benefit, though the word "sole" is not used. *Wilson v. Bryn Mawr Trust Co.*, 73 Atl. 1070, 1071, 225 Pa. 139.

### SEPARATELY

"Separately," as applied to facts set out in findings, refers to pleadable or pleaded facts, each being required to be covered by a finding confined thereto. *Calumet Service Co. v. City of Chilton*, 135 N. W. 131, 136, 148 Wis. 334.

The words "separately printed," in a claim covering a printing machine, whereby numerals type and pointer type may be "separately printed" on a ticket, mean independently printed. *Wilson v. Calculagraph Co.*, 144 Fed. 91, 99, 75 C. C. A. 249.

## SEPARATION

See Legal Separation; Voluntary Separation.

Of races as within police power, see Police Power.

### As desertion

If a wife leaves her husband because of his adultery, even if it be committed elsewhere than at their dwelling, the separation thus created is constructive desertion by him for the purpose of enabling her to compel him to support her; that is, it amounts to the abandonment or "separation" (whatever the difference) by him from her without justifiable cause, within Divorce Act (P. L. 1907, p. 482) § 26. *Suydam v. Suydam*, 80 Atl. 1057, 1058, 79 N. J. Eq. 144.

### As divorce

"Separation from bed and board" and "divorce" are not convertible terms under our law. They are kept distinct and separate in the Code and in all our legislation. Divorce includes separation from bed and board, but the converse is not true; separation from bed and board does not include divorce. The broad distinction between the two is that divorce puts an end to the marriage, whereas separation from bed and board does not. *Connell v. Connella*, 38 South. 690, 114 La. 950.

"The words 'separation from bed and board' are the substantial equivalent of the ancient divorce a mensa et thoro, sometimes designated a 'limited divorce,' in contradis-

inction from divorce a vinculo, otherwise denominated an 'absolute divorce.'" *Sellman v. Sellman*, 100 N. Y. Supp. 770, 771, 52 Misc. Rep. 9.

The common law granted no divorce which dissolved the marital tie between the parties; the divorces awarded by the ecclesiastical courts being merely what are known in this country as "separations." *Wilson v. Hinman*, 75 N. E. 236, 237, 182 N. Y. 408, 2 L. R. A. (N. S.) 232, 108 Am. St. Rep. 820.

### SEPARATION OF JURY

There is a marked difference between a separation of the jury during the progress of the trial and a separation after final submission of the case. Where, after a criminal case has been submitted to a jury, which was in charge of a bailiff directed to keep them together until they had agreed or been discharged, the bailiff divided the jurors into three groups at night, and put them into three rooms, each on a different floor or story of the hotel, where they were kept locked up for eight or nine hours, such act constituted a "separation of the jury," prohibited by Pen. Code Cal. §§ 1128, 1136, which vitiated their verdict. *People v. Adams*, 76 Pac. 954, 143 Cal. 208, 66 L. R. A. 247, 101 Am. St. Rep. 92.

On a criminal trial, the jury was impaneled just at noon, and, before any witness had been sworn, was taken in charge by the sheriff. One of the jurors, in leaving the courthouse, became separated from the rest; he being ignorant of what was required of him. Immediately upon discovering his absence, the sheriff and balance of the jury hunted him up. Held, that this was a "separation of the jury," within the contemplation of the statute inhibiting the same, and constituted reversible error. *Neal v. State*, 99 S. W. 1012, 1013, 50 Tex. Cr. R. 583.

## SEPTIC TANK

A "septic tank" is any tank or receptacle which permits the ingress and egress of flowing material, and the formation of a pool of such material therein and retention of such pool secluded from light and air and agitation until the anaerobic bacteria have sufficiently developed to convert the solids into fluids. *Cameron Septic Tank Co. v. Village of Saratoga Springs*, 151 Fed. 242, 249.

"The fundamental condition which characterizes the 'septic tank,' and which differentiates it from the ordinary settling tank, is that the sewage shall remain in the tank for a considerable period of time in order that the bacteria of putrefaction may manifest their destructive activity, and so accomplish their work of decomposition and liquefaction. The second essential condition which marks the septic tank is that the contents of the tank must either be practically cut off from all contact with the atmosphere, or the

surface of the sewage must remain quiescent for a sufficient length of time to permit the accumulation of a thick scum on the top, which operates to exclude the air and light. In other words, the tank must be built either airtight, or so constructed with respect to its inlet and outlet pipes that the brown scum may be allowed to form on the exposed top surface. The necessary absence of air from the tank is due to the fact that the bacteria of putrefaction are destroyed by oxygen." *American Sewage Disposal Co. v. Pawtucket*, 138 Fed. 811, 816, 71 C. C. A. 177.

## SEQUESTER

P. S. 496, subd. 6, exempts from taxation real and personal estate sequestered or used for public, pious, or charitable uses. Plaintiff, a Methodist evangelist, acquired full title to two lots of land, one of which he set apart and used exclusively for camp meeting purposes, under the auspices of no particular denomination, but open to persons of such denominations as he wished to have there, and on which, with the aid of voluntary contributions of labor and money, he erected cottages, a boarding hall, preacher's stand and seats, a dormitory for preachers, several church tents, and a barn, and during camp meeting, as an incident thereto and without profit, he charged for the use of cottages, including board, for meals, and for feed and shelter of horses, the income from which was used for carrying on the camp meetings. From the other tract, not connected with the camp ground, he sold timber in payment of a note for money borrowed for improvements upon the camp ground. Held, that the word "sequester" meant to set apart, to put aside, to separate, and that a "camp meeting" meant a religious gathering, held usually by Methodists, for conducting a series of religious services in the open air or in a tent, lasting for several days, during which those present lodged in tents or temporary houses; and that the lot not connected with the camp ground was taxable, but that the camp meeting ground and its improvements were exempt; the charges for board, etc., not operating to deprive the property of such exemption. *Johnson v. Jones*, 83 Atl. 1085, 1086, 86 Vt. 167.

## SEQUESTRATE

### SEQUESTRATION

"A 'sequestration' is in the nature of a deposit, and is so treated in the old law, as well as in the Civil Codes of France and Louisiana. \* \* \* One of the first rules relating to a deposit is that the depositary cannot use the thing deposited. \* \* \* A sequestration, if gratuitous, is subject to all the rules which apply to a deposit." *Baldwin v. Black*, 7 Sup. Ct. 326, 119 U. S. 643, 649, 30 L. Ed. 530 (Bradley, J., dissenting).

## SERGEANT AT ARMS

As municipal officer, see *Municipal Officer*.

## SERIES

See *Uniform Series*.

## SERIOUS

### SERIOUS AILMENT

Other serious ailment, see *Other*.

### SERIOUS BODILY HARM OR INJURY

The word "serious" has no fixed or technical meaning in the law, but is rather general and indeterminate in its signification, and, when applied to an assault, may include one made with intent to kill or to inflict great bodily harm, or one committed without such intent. *State v. Rowe*, 71 S. E. 332, 336, 155 N. C. 436.

A petition alleging that plaintiff received "serious, painful and permanent bodily injuries," and endured great physical pain and mental anguish; that her head, face, neck, shoulders, arm, eye, and breast were burned; that she was rendered unconscious for a long time; that her nervous system was severely shocked, etc.—is sufficient to include an injury to her hearing; the quoted clause being a general averment not restricted by the particular injuries subsequently alleged. *Southern Telegraph & Telephone Co. v. Evans*, 116 S. W. 418, 421, 54 Tex. Civ. App. 63.

In a prosecution for aggravated assault and battery, an instruction that by the term "serious bodily injury" is meant such injury as gives rise to apprehension—an injury which is attended with danger—was proper. *Bagley v. State (Tex.)* 150 S. W. 773, 774; *Shelton v. Same*, 150 S. W. 940, 941.

"Serious bodily injury" means such an injury as to give rise to apprehension; an injury which is attended with danger. Thus where one was confined to his bed, because of his injury, for two or three days, and entirely recovered in eight or nine days, there was not such "serious bodily injury" as to justify conviction of aggravated assault. *Head v. State*, 107 S. W. 829, 830, 52 Tex. Cr. R. 488 (citing *Webst. Dict.*; *George v. State*, 17 S. W. 351, 21 Tex. App. 315).

Evidence of a blow on the head with the butt end of a billiard cue about 2½ feet long, and weighing about a pound, in the hands of a man weighing 190 pounds, cutting the scalp to the bone, shows a serious wound, requiring a charge on serious bodily injury, in a prosecution for assault with intent to murder. The word "serious" means an injury that is grave, not trivial, not slight, and it does not mean an injury that might eventuate in death, or probably cause death. *Housley v. State*, 116 S. W. 816, 817, 55 Tex. Cr. R. 372 (citing *Bruce v. State*, 51 S. W. 954, 41 Tex. Cr. R. 27).

The words "serious bodily injury" are words of ordinary significance, and should not be defined by a charge, as they would be as well understood by any jury of ordinary intelligence as any language by which they might be defined. *Thomas v. State*, 116 S. W. 600, 602, 55 Tex. Cr. R. 293.

A charge that accused might defend himself against unlawful attack, reasonably threatening injury to his person, by the use of all necessary and reasonable force, but no more than circumstances reasonably indicated to be necessary, that homicide is justified by law when committed in defense of one's person against unlawful and violent attack, made so as to produce a reasonable expectation of death or some serious bodily injury, that a reasonable apprehension of death or great bodily harm would excuse accused in using all necessary force to protect his life or person, and that it was not necessary that there should be actual danger, provided he acted upon a reasonable apprehension or appearance of danger, as it appeared to him from his standpoint at the time, was not misleading in the use of the term "great bodily harm" as well as the statutory phrase "serious bodily injury," the terms as used being identical in meaning. *Ward v. State*, 126 S. W. 1145, 1147, 59 Tex. Cr. R. 62.

The words "mortal injuries," as used in an indictment for murder, alleging that defendant inflicted certain mortal injuries, must be taken as the equivalent of "serious bodily injuries," as used in Cr. Code Ariz. § 215, providing that an aggravated assault is committed when a serious bodily injury is inflicted upon the person assaulted, and such indictment justifies a conviction for an aggravated assault. *Mapula v. Territory*, 80 Pac. 389, 391, 9 Ariz. 199.

"Serious personal injury," justifying passion so as to reduce homicide from murder to voluntary manslaughter, means an injury greater than a provocation by mere words and less than a felony. *Harris v. State*, 58 S. E. 680, 681, 2 Ga. App. 487.

The words "serious injury," as used in Pen. Code 1895, § 72, making it justifiable homicide to kill a person who forcibly attacks or invades the property or habitation of another after the failure of persuasion, remonstrance, or other gentle measures, providing such killing be absolutely necessary to prevent such attack and invasion, and that a "serious injury was intended or might accrue to the person, property or family of the person killing," are not limited to a felony. Though no exact definition of the words has been made, they clearly do not authorize the taking of human life because of every mere trespass upon property, or because of mere insulting words. *Freeney v. State*, 59 S. E. 788, 792, 129 Ga. 759.

In instructing the jury on the law of voluntary manslaughter, it was error to charge that a "serious personal injury," referred to in Pen. Code 1895, § 65, meant "an injury which may deprive of life, and which must be prevented by resistance of a like sort." *Smarrs v. State*, 61 S. E. 914, 916, 131 Ga. 21.

The term "serious personal injury," as used in Pen. Code 1895, § 65, defining "voluntary manslaughter," and providing that to constitute it there must be some actual assault upon the person killing, or an attempt by the person killed to commit a "serious personal injury" upon the person killing, etc., does not necessarily contemplate an injury that will deprive of life. *Burley v. State*, 60 S. E. 1006, 1008, 130 Ga. 343.

### SERIOUS DISEASE

An instruction using the words "serious disease," instead of "serious illness," is not objectionable as misleading; both expressions having practically the same meaning. *Modern Order of Praetorians v. Hollmig* (Tex.) 103 S. W. 474, 476.

Where a life policy provides that it shall be void if the insured has been attended by a physician for any "serious disease or complaint," such a disease must be one entailing permanent or material impairment of health; and, notwithstanding proof that insured prior to the application had malaria, congestion of the kidneys, and endometritis, a finding that she had not been attended by a physician for any serious illness is not ground for reversal, where there is no testimony that any of the diseases named might reasonably be expected to result in a permanent impairment of the health of the insured. *Metropolitan Life Ins. Co. v. Little*, 149 S. W. 998, 999, 149 Ky. 717.

### SERIOUS ILLNESS

An instruction using the words "serious disease," instead of "serious illness" is not objectionable as misleading; both expressions having practically the same meaning. *Modern Order of Praetorians v. Hollmig* (Tex.) 103 S. W. 474, 476.

The word "serious," used with reference to physical condition for rejecting any life insurance, is not generally used to signify dangerous, but rather to define a grave, important, or weighty, trouble. *French v. Fidelity & Casualty Co. of New York*, 115 N. W. 869, 875, 135 Wis. 259, 17 L. R. A. (N. S.) 1011.

The term "serious illness," as used in an application for life insurance, means such illness as permanently or materially impairs, or is likely so to do, the health of the applicant. *Eminent Household of Columbian Woodmen v. Prater*, 103 Pac. 558, 560, 24 Okl. 214, 23 L. R. A. (N. S.) 917, 20 Ann. Cas. 287.

"A 'serious illness,' which will avoid an insurance certificate for the misrepresentation of the insured that he had never been affected by such an illness, must be one which permanently impairs the constitution and renders the risk more hazardous." *Daniel v. Modern Woodmen of America*, 118 S. W. 211, 213, 53 Tex. Civ. App. 570 (quoting and adopting definition in 1 May, Ins., § 296).

Insured applied for insurance October 10, 1906, and in his application warranted that he had not had any serious illness or disease, except diseases incident to childhood. It was proved that in 1901 he was so ill that his physicians expected him to die. He suffered from acute pains in the abdomen, and was for some time in a state of collapse, was attended by two physicians and a trained nurse, and recovered after five or six weeks. This sickness followed a chronic stomach trouble with which on several occasions he had been ill. Held, that such sickness was a "serious illness," and constituted a breach of warranty. *Equitable Life Assur. Society of United States v. Kelper*, 165 Fed. 595, 600, 91 C. C. A. 433, reversing *Kelper v. Equitable Life Assur. Soc. of United States*, 159 Fed. 206.

#### SERIOUS SICKNESS

"Serious sickness," justifying cancellation of a contract of employment, must be sickness for a long period, sufficient to substantially interfere with the interests of the employer, a malady lasting or likely to last for such length of time as it would be unreasonable to require the employer to wait for the restoration of his servant's health. Thus, where defendant employed plaintiff for three months as a millinery trimmer, he was not justified in discharging her because of a temporary illness incapacitating her for a day and a half. *Gaynor v. Jonas*, 93 N. Y. Supp. 287, 288, 104 App. Div. 35.

#### SERIOUSLY

An instruction that the conductor of a railroad train is not justified in expelling a passenger of known bad and turbulent character, "so long as such person is not guilty of conduct seriously annoying or dangerous to other passengers," is erroneous, since the word "seriously" is to be construed as qualifying the words "annoying" and "dangerous," and a passenger does not have to be in serious danger before the duty of the conductor to protect him arises, and, if the word is to be considered as qualifying the word "annoying" only, it is still of doubtful propriety. *Hillman v. Georgia R. & Banking Co.*, 56 S. E. 68-70, 126 Ga. 814, 8 Ann. Cas. 222.

#### SERVANT

See Competent Servant; Domestic Servant—Domestics; Fellow Servant; Superior Servant Rule.

A "servant" is one employed by another and subject to the control of his employer.

*Messmer v. Bell & Coggeshall Co.*, 117 S. W. 346, 348, 133 Ky. 19, 19 Ann. Cas. 1; *Tipton v. State*, 43 South. 684, 686, 53 Fla. 69.

A "servant" is a person who works for wages, whose labor is directed and controlled by the employer, either in person or by an intermediate agent. *Texas & N. O. R. Co. v. Parsons (Tex.)* 109 S. W. 240, 247 (citing *Jensen v. Barbour*, 39 Pac. 906, 15 Mont. 582).

A "servant" is one employed to render personal services to his employer, otherwise than in the pursuit of an independent calling, and who remains under the control of the master. The relation of master and servant exists when the master not only has the right to select his servant, but has power to remove and discharge him with or without cause, and to direct what work shall be done and the manner of doing it. *McColligan v. Pennsylvania K. Co.*, 63 Atl. 792, 793, 214 Pa. 229, 6 L. R. A. (N. S.) 544, 112 Am. St. Rep. 739.

The test by which to determine whether a person is acting as the "servant" of another is to ascertain whether, at the time when the injury was inflicted, he was subject to such person's orders and control and was liable to discharge by him for disobedience of orders or misconduct. *Indiana Iron Co. v. Cray*, 48 N. E. 803, 807, 19 Ind. App. 565; *United States Board & Paper Co. v. Landers (Ind.)* 92 N. E. 203, 204.

In strictness, a "servant" is one who, for a consideration, engages in the service of another and undertakes to observe his directions, and the relation does not depend on whether the master was to pay anything, or whether the service was permanent; the right to control the action of the servant, which implies the power to discharge, being the essential element. *Kiser v. Suppe*, 112 S. W. 1005, 1007, 133 Mo. App. 19.

Whether parties engaged in doing work for another are his "servants" depends upon the control and direction that he can rightfully exercise over them. If they are at his command, and bound to obey his orders and directions in regard to the work, and can be, at any time, discharged by him, then they are his "servants." *Bentley, Shriver & Co. v. Edwards*, 60 Atl. 283, 287, 100 Md. 652.

The relation of master and servant exists where the employer has power to direct the nature of the work and the manner of doing it, with power to employ and discharge, and a switch tender, employed and controlled by defendant, but one-third of whose wages was paid by plaintiff's company, which ran over defendant's tracks at the switches, was not a "servant" of plaintiff's company, nor was defendant its servant; the latter only having the right to complain to defendant as to the manner of performing his duties. *Yeates v. Illinois Cent. R. Co.*, 89 N. E. 338, 341, 241 Ill. 205.

The main function of a "servant" is to execute his master's orders. A "servant" represents his master in the performance of an operative or mechanical act of service, not resulting in the creation of a voluntary primary obligation, but which may result, intentionally or inadvertently, in the breach of an existing one. A servant performs acts not primarily intended or adapted to cause a change in the legal relations of third persons to his master. *State v. Levine*, 66 Atl. 529, 531, 79 Conn. 714, 10 L. R. A. (N. S.) 286 (citing *Huffcutt*, Agency, § 4).

The manager of a branch office of a broker in another city is not a "workman, clerk, or servant," within the meaning of the Bankruptcy Act, and his claim for wages is not entitled to priority on the bankruptcy of his employer. "Workmen" is possibly a wider phrase than "operative," and "servant" is undoubtedly wider than "house servant." In *re Albert O. Brown & Co.*, 171 Fed. 281.

The terms "agent," "servant," or "clerk," as used in Gen. St. 1906, § 3311, denouncing embezzlement, contemplate one who has undertaken to transact some business or manage some affair for another by the authority and on the account of the latter and to render an account of it, or who is subject to the immediate direction and control of his master, so that a boy employed by the agent of an express company, whose salary was paid by the agent, is not a "servant," "clerk," or "agent" of the company, within the contemplation of the statute. *Tipton v. State*, 43 South. 684, 686, 53 Fla. 69 (quoting and adopting the definitions in 2 Bish. New Cr. Law, § 233; 1 Clark, Cr. Law, p. 274).

Civ. Code, § 2009, provides that a "servant" is one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who, in such service, remains entirely under the control and direction of the latter. *Giacomini v. Pacific Lumber Co.*, 89 Pac. 1059, 1060, 5 Cal. App. 218.

#### Agent

One employed by a refining company to sell and distribute oil to customers, being paid by a commission on the amount of sales, is an agent or "servant" of the company, which is liable for acts of negligence in the conduct of the business on the part of the agent or others employed by him. *Riggs v. Standard Oil Co.*, 130 Fed. 199, 201.

Civ. Code, § 2295, defines an agent as one who represents another in dealings with third persons. Section 2009 defines a "servant" as one employed to render personal services to his employer and who remains entirely under the control and direction of the latter. Held that, where defendant agreed to devote his entire time and attention to the interests and business of plaintiff, a real estate broker, defendant's compen-

sation to be a specified percentage of commissions, the relation between the parties was that of master and servant and not that of principal and agent. *Sumner v. Nevin*, 87 Pac. 1105, 1106, 4 Cal. App. 347.

Rev. St. 1899, § 2586, provides that eight hours shall constitute a day's labor for all "coal miners and laborers," etc. Section 2587 declares that the word "day," in all contracts between any owner, lessee, or operator of any mine with any such miner or laborer, shall mean eight hours, and section 2589 declares that any owner, lessee, or operator, his or its agent, employé, or servants violating any of the provisions of the chapter shall be fined, etc. Held, that the words "employé" or "servants," used in section 2589, should be construed to mean employé or servants of the mine owner occupying positions of "agents," and not to include miners and laborers, so that a miner was not subject to punishment under the penal provision for working more than eight hours a day. *State v. Thompson*, 87 Pac. 433, 434, 15 Wyo. 136 (citing *Lewis' Suth. Stat. Con.* [2d Ed.] § 521).

#### Child

Defendant owned an automobile which his daughter, about 19, was accustomed to drive when she desired, asking permission when defendant was at home, but sometimes taking it without permission when he was not. While driving the automobile for her own pleasure, with personal friends, defendant's daughter collided with plaintiff and injured him. It did not appear that she was actually employed by defendant to operate the machine. Held, that defendant's daughter was not his "servant" in driving the automobile so as to render him liable for the injury. *Doran v. Thomsen*, 71 Atl. 296, 297, 76 N. J. Law, 754, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677.

#### Employé—synonymous

The word "employé," used in Pen. Code 1895, art. 199, which makes the proprietor of any place of public amusement, or the agent or employé of any such person, who shall permit it to be opened for the purpose of public amusement on Sunday subject to fine, is synonymous with servant, a "servant" being a person employed to labor for the pleasure or interest of another, or as a legal term, one employed to render service or assistance in some trade or vocation, but without authority to act as agent, in place of his employer; and, while an "agent," in the broadest sense of the word, may be construed to have the same power of authority as his principal, no such inference can be drawn from the term "employé"; and by the use of such terms it was intended to include any subordinate, though without the authority of his principal or the proprietor, who, in any way, acted together with the proprietor in

the commission of the offense. *Oliver v. State* (Tex.) 144 S. W. 604, 616.

The word "servant" in a legal sense has a broad significance, embracing all persons of whatever rank or position who are in the employ and subject to direction or control of another in any department of labor or business, and is ordinarily synonymous with "employé." *Texas Life Ins. Co. v. Roberts*, 119 S. W. 926, 929, 55 Tex. Civ. App. 217.

#### As family servant

The word "servant," as used in Civ. Code 1895, § 3817, making every person liable for the torts committed by his servant by his command or in the scope of his business, can have no other meaning than a domestic servant, and no other duties than those which appertain to such servant; and it is not necessary, in an action in justice court, to allege special facts showing the servant to be a domestic servant and to set forth the duties of such servant with particularity. *Patterson v. Sams*, 59 S. E. 18, 2 Ga. App. 755 (citing *Lockett v. Pittman*, 72 Ga. 817).

The word "servant," as used in Civ. Code 1895, § 3817, providing that every person shall be liable for torts committed by his wife and for torts committed by his child or servant by his command, etc., is not restricted to mere domestic servants, for a corporation, under this definition, might not have a single servant. A domestic servant, according to Webster's International Dictionary, as well as Bouvier's Law Dictionary, is a house servant; a household assistant; one who lives in the family of another. The term "domestic servant" does not extend to workmen and laborers out of doors. *Toole Furniture Co. v. Ellis*, 63 S. E. 55, 57, 5 Ga. App. 271.

#### Independent contractor distinguished

"Although, in a general sense, every person who enters into a contract may be called a 'contractor,' yet the word, for want of a better one, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details; the true test of a 'contractor' appearing to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." Counts averred, in the alternative, that the negligence complained of was that of the "agent or contractor" of defendant, and on demurrer the court held that the complaint did not allege that the acts were the acts of the servants or agents of the defendant, so as to fix the liability on it, saying that a distinction is clearly drawn between a "servant" and a "contractor," as, in

the general acceptance of the term, a "servant" is not a "contractor," nor is a "contractor" a "servant." *Caldwell v. Atlanta, B. & A. R. Co.*, 49 South. 674, 161 Ala. 395 (citing 2 Words and Phrases, pp. 1534, 1535).

One who agrees to furnish or pay for labor for the benefit of another is a "contractor," not a "servant" or laborer, within the terms of the Georgia Labor Contract Act Aug. 15, 1903 (Acts 1903, p. 90). *Coleman v. State*, 65 S. E. 46, 6 Ga. App. 398 (citing *Johnson v. State*, 54 S. E. 184, 125 Ga. 243).

A "servant" is one who is employed by another and is subject to the control of his employer, while an "independent contractor" is one who is independent of his employer in the doing of his work, and may work when and how he prefers. The right to control the conduct of another implies the power to discharge him from the service or employment for disobedience; and, accordingly, the power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists. In determining whether the relation is that of master and servant or that of proprietor and independent contractor, the courts have sometimes taken into consideration the manner of payment; whether payment was to be made by the day, week, month, etc., with a reservation of the power to discharge; or whether there was to be a payment by the piece or by the entire job. But the mode of payment is not a decisive test by which to determine this question. The test lies in the question whether the contract reserves to the proprietor the power of control over the employé. One employed by defendants to squeeze boxes for them in their factory with their machinery as and when directed by their foreman and paid by the box, with the right to hire and pay his own assistant, was not an independent contractor, and for his negligence in operating the box machine, whereby his assistant was injured, defendants were liable. *Messmer v. Bell & Coggeshall Co.*, 117 S. W. 346, 348, 133 Ky. 19, 19 Ann. Cas. 1 (quoting and adopting definition in 1 Thomp. Neg. §§ 579, 629).

"The true test \* \* \* by which to determine whether one who renders service to another does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished." Hence, where plaintiff, an experienced paper hanger and painter, contracted to do certain decorating for defendant at a specified price, to be paid on completion of the work, plaintiff to furnish all the materials and appliances and employ his own help, he was an "independent contractor," and not a "servant" of defendant. *Southwestern Telegraph & Telephone Co. v. Paris*, 87 S. W. 724, 725, 39 Tex.

Civ. App. 424 (quoting and approving *Cunningham v. International R. Co.*, 51 Tex. 503, 32 Am. Rep. 632).

Where the operator of a cornsheller employed the owner of a traction engine to assist in shelling corn and to furnish power for the work at a specific sum per day for the use of the engines and for his services, the owner being subject to the orders of the operator and liable to be discharged at any time, the owner was not an "independent contractor," but was the "servant" of the operator, for whose acts the operator was liable. *Steger v. Barrett* (Tex.) 124 S. W. 174, 176.

One who undertook to construct a building for defendant was not an independent contractor, but defendant was his master, liable for his negligence and that of his employes; the contract reserving to defendant the right to direct "the manner in which the work shall be carried out"; requiring defendant to furnish important portions of the material for constructing the appliances and facilities for carrying on the work; declaring all purchases and prices of materials and supplies subject to its approval; and reserving to it the right to select, control, and discharge the labor employed, and fix the prices paid the same. *Beal v. Champion Fibre Co.*, 69 S. E. 834, 835, 154 N. C. 147.

An "independent contractor" is one who contracts to do a specific piece of work furnishing his own assistants and executing the work either entirely with his own ideas or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter as to the details of the work; but, where the one for whom the work is done personally interferes with or undertakes to control the work, the relationship of independent contractor is destroyed, and the relationship of master and servant exists. *Madisonville, H. & E. R. Co. v. Owen*, 143 S. W. 421, 423, 147 Ky. 1.

When a person lets out work to another, reserving no control over the work or workmen, the relation of contractor and contractee exists, and not that of master and servant, and the contractee is not liable for the negligent execution of the work by the contractor. *Laffery v. United States Gypsum Co.*, 111 Pac. 498, 500, 83 Kan. 349, 45 L. R. A. (N. S.) 930, Ann. Cas. 1912A, 590.

"One who contracts to do a specific piece of work, furnishing his own assistants and executing the work entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor and not a 'servant.'" One having a contract with a railroad company to handle

for it the fuel necessary to meet its needs at a large number of stations on the company's road in several states and territories at a monthly compensation, he to furnish the labor, the company having no control over his employes unless the work is not done to its satisfaction, is an independent contractor. *Atchison, T. & S. F. R. Co. v. Dickens*, 103 S. W. 750, 753, 7 Ind. T. 16 (quoting and adopting the definition in *Shear. & R. Neg.* § 165).

Defendants, the occupants of a store, contracted with T., an awning manufacturer, to put defendants' awning in proper condition, agreeing to pay what it was reasonably worth. Defendants did not undertake to direct how the work was to be done, and during the performance of the work plaintiff, a pedestrian, was injured by the fall of an awning roller. Held, that T. was an independent contractor, and not defendants' "servant." *McHarge v. M. M. Newcomer & Co.*, 100 S. W. 700, 701, 117 Tenn. 595, 9 L. R. A. (N. S.) 298 (citing *Powell v. Virginia Const. Co.*, 13 S. W. 691, 88 Tenn. 697, 17 Am. St. Rep. 925; *Thomp. Neg.* §§ 621, 622; *Bennett v. Truebody*, 6 Pac. 329, 66 Cal. 509, 56 Am. Rep. 117).

The mere retention by the owners of the right to inspect work as it progressed for the purpose of determining whether such work complied with the plans and specifications does not operate to create the relation of master and servant between such owners and those engaged upon such work. *Vacker v. Yeager*, 151 Ill. App. 144, 153.

A written contract between defendant hotel company and one D. provided that D. and five men should be employed by defendant, D. to be head porter, at a certain salary, and to comply with all instructions given him by defendant's manager. Held, that D. was a "servant," and not an independent contractor, and that defendant was liable to one injured through the negligence of D. or of a porter employed by him. *Pearson v. M. M. Potter Co.*, 101 Pac. 681, 682, 10 Cal. App. 245.

If an employé submits himself to his employer's directions, both as to details of the work and the means by which it is performed, he is a "servant," and not an independent contractor, but if he contracts to do work, furnishing his own means, and doing it according to his own ideas, pursuant to an original plan of his employer, without being subject to the latter's direction as to details, he is an independent contractor, and where plaintiff and his sons were employed to draw pillars in a coal mine at a certain amount per ton, which was the same way the other employes were paid, and worked under the same rules and control as the others, he was a servant, and not an "independent contractor." *Allen v. Bear Creek Coal Co.*, 115 Pac. 673, 679, 43 Mont. 269.

The owner of a factory agreed to run it entirely for the manufacture of defendant's work for a specified time, to keep it in repair, to pay all expenses, to do the work as directed by defendant, and defendant agreed to repay to the owner all expenses for supplies, etc., but it was not agreed that defendant should hire, pay, or discharge employes. It was provided that the owner should follow defendant's directions as to the number of men employed, what work they should do, and the rate of wages to be paid. Held, that the relation of master and "servant" did not exist between the owner and defendant, but the owner was an independent contractor. *Kirby v. Lackawanna Steel Co.*, 95 N. Y. Supp. 833, 835, 109 App. Div. 334.

One employed under an entire contract for a gross sum, to do a specified thing, and who is not subject to the direction of his employer, is not a "servant," within Civ. Code § 1476, defining a "servant" as one who is employed to render personal service to his employer, otherwise than in the pursuit of an independent calling, and who in such service remains entirely under the control and direction of the latter, who is called his master. *Cockran v. Rice*, 128 N. W. 583, 585, 26 S. D. 393, Ann. Cas. 1913B, 570.

"One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work entirely in accordance with his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor and not a 'servant.'" *Atchison, T. & S. F. R. Co. v. Dickens*, 103 S. W. 750, 753, 7 Ind. T. 16 (quoting and adopting the definition in *Shear. & R. Neg.* § 165).

If a contractor submits himself to the direction of his employer as to the details of the work, fulfilling his wishes, not merely as to the result, but also as to the means by which that result is to be attained, the contractor becomes a "servant" as to that work. In most instances the distinction is easily observed. Thus one who contracts to do a specific piece of work, furnishing his own assistants, and executing the work either entirely according to his own ideas, or in accordance with a plan previously given to him by the person for whom the work is done, and without being subject to the orders of the latter in respect to the details of the work, is clearly a contractor and not a servant. The fact that such an employé is paid by the day, or that, in all the work, he consults and defers to the wishes of his employer, makes no difference, although an express contract to pay by the job is always strong evidence that the relation of master and servant does not exist. Where the superintendent of an electric power company engaged a carpenter to do work upon a sub-

station, and directed him to get another carpenter to help him, and the former understood that they were to be paid by the hour, and the officers of the company pointed out the work to be done and furnished the material and the general plans, and the carpenters submitted themselves to the control of the company in all details of the work, and did not use their own means or methods except so far as they contributed their special knowledge and experience as carpenters, they were "servants," and not independent contractors. *Poor v. Madison River Power Co.*, 99 Pac. 947, 953, 38 Mont. 341 (citing *Shear. & R. Neg.* §§ 164, 165; *Jensen v. Barbour*, 39 Pac. 906, 15 Mont. 582).

In determining whether the relation between a proprietor and one doing work for him is that of master and servant, or proprietor and independent contractor, while the court may take into consideration the manner of payment, whether by the day, week, month, etc., with a reservation of the right to discharge, or whether there was to be payment by the piece or entire job, yet the mode of payment is not a decisive test by which to determine the question. The test lies in whether or not the contract reserves to the proprietor the power of control over the employé. The mere fact that the work being performed by an employé at the time he was injured was done by the piece or job, as by payment of a stated price per ton for shoveling coal into an engine tender, does not deprive him of the character of an employé, where he was a mere "servant" carrying out his employer's will and instructions. *Chicago, R. I. & P. Ry. Co. v. Bennett*, 128 Pac. 705, 706, 36 Okl. 358.

The term "contractor," in the law of master and servant, does not include one who, though having some experience in breaking horses, but was not engaged in such business as a vocation, as the result of a casual solicitation of employment, agreed to take a horse and drive it during the daytime, returning it to the owner's stable at night. *Mullich v. Bocker*, 97 S. W. 549, 551, 119 Mo. App. 332.

#### Laborer—synonymous

Code 1907, § 6849, provides that one who entices, decoys, or persuades any apprentice or servant to leave the service or employment of his master shall be fined a certain sum, etc. Section 6850 provides that one who knowingly interferes with, hires, employs, entices away, or induces to leave the service of another, any laborer or servant, who has contracted in writing to serve such other for a given time, before the expiration of the time contracted for, shall be fined, etc. Held, construing the sections so as to permit each to operate, that section 6849 applies to employes of a cotton mill and not merely to menial servants; the word "servant" being synonymous with "laborer" as so used.



*Abingdon Mills v. Grogan*, 52 South. 596, 598, 187 Ala. 146.

**Manager, foreman, or superintendent of corporation**

A foreman in a manufacturing corporation, although he may not perform any manual labor, is a "servant" of the corporation, within Rev. St. 1878, § 1769, relating to the liability of stockholders for debts of the corporation owing to clerks, servants, and laborers for services performed. *Sleeper v. Goodwin*, 31 N. W. 335, 341, 67 Wis. 577.

Acts 1903, c. 237, regulates the operation of mines, and requires the employment of a certificated mine foreman under penalty, and confers on such foreman control of the mine with reference to the duties specified in the act, independent of the mine owner, securing the faithful discharge of such duties by the imposition of penalties. Held, that the relation of master and servant did not exist between the mine owner and his certificated foreman with reference to the duties imposed on such foreman by the statute, and that the master was therefore not liable for injuries to a miner, caused by the foreman's negligence in the performance of such duties. *Sale Creek Coal & Coke Co. v. Priddy*, 96 S. W. 610, 612, 117 Tenn. 168, 10 Ann. Cas. 745.

**Musician**

"A 'servant' is one who is employed to render personal services to his employer otherwise than in the pursuit of an independent calling, and in any such service remains entirely under the control and direction of the latter." Thus musicians, employed at regular wages to play in a theater or other place, are "servants," within the meaning of Bankruptcy Act, and entitled to priority of payment from the estate of the employer in bankruptcy for their wages earned within three months. *In re Caldwell*, 164 Fed. 515, 516.

**Nurse**

The wages of a sick nurse are prescribed by Civ. Code 1870, art. 3534, in one year; she being a "servant" within such section. *Succession of Dolsen*, 56 South. 514, 515, 129 La. 577.

A trained nurse, performing her usual duties and exercising the skill which is the result of training in that profession, does not come within the definition of a "servant," but rather is one who renders personal services to an employer in the pursuit of an independent calling, and the employer is not liable as master for her acts. *Parkes v. Seasongood*, 152 Fed. 583, 584, 585.

**Physician**

The term "servant" is not "restricted to persons engaged in menial or even domestic service. It is applicable to any relation in which, with reference to the matter out of which an alleged wrong has sprung, the person sought to be charged had the right to

control the action of the person doing the alleged wrong; and this right to control is the conclusive test by which to determine whether the relation of master and servant exists." The relation of master and servant subsists between an accident insurance company and its medical adviser in the exercise of the right of examination of injured persons entitled to indemnity. *Tompkins v. Pacific Mut. Life Ins. Co.*, 44 S. E. 439, 444, 53 W. Va. 479 (quoting and adopting definition in *Thomp. Neg.* § 578).

**Public officer distinguished**

Municipal tree wardens, for whose appointment provision is made by St. 1910, c. 363, and by Rev. Laws, c. 53, §§ 12, 13, as amended by St. 1908, c. 296, §§ 2, 3, are public officers, and not "servants" or "agents," within Rev. Laws, c. 171, § 2, as amended by St. 1907, c. 375, which authorizes recovery for negligent death caused by a person or corporation or their "agents or servants." *Donohue v. City of Newburyport*, 98 N. E. 1081, 1082, 211 Mass. 561, Ann. Cas. 1913B, 742.

"\* \* \* An officer appointed or elected by a municipal corporation, in obedience to law, to perform a public service in which the corporation has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, is not regarded as a 'servant' or 'agent' for whose negligence or want of skill in the performance of his duties a municipal corporation is held liable, although the service is one which the corporation is bound to see performed in pursuance of a duty imposed by law for the general welfare." Under Laws 1893, p. 25, c. 29, § 3, as amended by Laws 1897, p. 59, c. 67, § 1, giving the highway agent of a town, under direction of the selectmen, charge of the construction and repair of highways within the town and empowering him to employ men and teams, the highway agent and selectmen are public officers of the state, and not private agents of the town, so far as their duties in connection with the construction and repair of highways are concerned. Under that statute, a laborer employed by the highway agent or selectmen to work upon the highway does not become the "servant" of the town in such sense as to impose upon it the duties of a master towards him, although it is required by statute to pay him his wages, and although it has power to employ him under Pub. St. 1901, c. 40, § 3, authorizing towns to make any contracts necessary for the transaction of public business. *O'Brien v. Town of Derry*, 60 Atl. 843, 847, 73 N. H. 198 (quoting and adopting the definition in *Wakefield v. Town of Newport*, 62 N. H. 624, 625).

"The distinction is plainly taken between a person acting as a 'servant' or 'employé,' who does not discharge independent duties but acts by the direction of others, and an 'officer' empowered to act in the discharge of

a duty or legal authority in official life." Where a fireman, wrongfully discharged from the fire department of the city of New York pending reinstatement, accepted a position as sergeant at arms to the council of the municipal assembly, he was a mere "employee" of the city, and not an "officer," within New York City Charter (Laws 1897, p. 543, c. 378, § 1549), prohibiting "municipal officers" from holding two offices. *Padden v. New York*, 92 N. Y. Supp. 926, 928, 45 Misc. Rep. 517 (quoting and adopting definition in *Olmstead v. City of New York*, 42 N. Y. Super. Ct. 481, and citing *People ex rel. Gilchrist v. Murray*, 73 N. Y. 535).

#### Railroad conductor

It was not error to modify a charge that if the jury believed that plaintiff purchased a ticket to a certain station, but remained on the train and did not get off there, and did not communicate his intention to get off at a place further on, to the conductor, and if the conductor did not know that plaintiff intended to leave the train when he did, they should find for defendant, by substituting "defendant's servants" for the word "conductor," where first used, and "such servant" for "conductor" where it later appeared; there being no substantial difference between the words; "servants" including "conductor." *Cornell v. Chicago, R. I. & P. R. Co.*, 128 S. W. 1021, 1024, 143 Mo. App. 598.

#### Wife

Ordinarily the relation of master and servant involves such a right of control as implies a right to discharge from the service or employment for disobedience. For the purpose of charging the defendant, as a master, with injury of the plaintiff through negligent use of the defendant's property by a third person, it is not enough that such third person was at the time in possession of the property with the assent of the defendant; but he must have been in the employment or service of the defendant, and under his control therein. Where the wife is engaged in the use of her husband's personal property in the performance of her duty as a wife, in domestic service for herself and her family, including her husband, not in his presence, he is not liable for a personal injury inflicted by her, not by his direction, but by her trespass through her negligent use of such property. In her conduct in the management of the affairs within her proper domestic sphere, while she is performing her duties as wife, much the same as at common law, she acts with a discretion which does not belong to one standing in the relation of a "servant," and is liable for her torts therein as if sole, and her husband is not liable. And so a complaint alleging that P., as the servant of A., was driving his team, that P., who was A.'s wife, was so driving as his servant, that she, as such servant, she being the wife of A., so negligently drove it that it

struck plaintiff, does not show that P. was in the service of A. so as to make him liable. *Radke v. Schlundt*, 65 N. E. 770, 771, 773, 774, 30 Ind. App. 213.

### SERVE

The word "serve," as used in Code Civ. Proc. § 210, declaring that the persons whose names are returned as provided in the preceding section for selecting jurors shall be regular jurors and shall serve for one year, refers to the time during which they may be drawn for actual jury service, and has no reference to the life of the grand jury drawn from their number. *Halsey v. Superior Court, of City and County of San Francisco*, 91 Pac. 987, 990, 152 Cal. 71.

### SERVED

See Duly Served; Personally Served.

A sheriff's return of a writ "served" does not necessarily mean a legal service, and is not conclusive as to time and place of service, which may by affidavit be shown to be illegal. *Chapman v. Cumming*, 17 N. J. Law, 11.

Rev. St. 1898, § 3049, requiring that the notice of appeal be "served" on the clerk of the lower court, does not require that the notice be directed to such clerk. In *re Geith's Estate*, 109 N. W. 552, 554, 129 Wis. 498.

In an action on a liquor dealer's bond for damages for the sale of liquor to plaintiff's husband after notice not to sell, an allegation that M., a constable, served the notice on defendant was sufficient, though it did not state that he delivered it to him; it being in the language of the statute, and service by delivery being what was meant by the word "served." *Birkman v. Fahrenthold*, 114 S. W. 428, 431, 52 Tex. Civ. App. 335.

A statute relating to elections, which provides that, on a petition to strike from the list of voters the name of any fictitious person, etc., summons shall be "served" at his place of residence, means that the summons shall be left at his place of residence. *Carter v. Applegarth*, 62 Atl. 710, 711, 712, 102 Md. 341.

Civ. Code 1895, § 5381, which requires a writ of scire facias to "be 'served' by the sheriff of the county in which the party to be notified may reside, twenty days before the sitting of the court," contemplates personal service. Service by leaving a copy at the most notorious place of abode of the defendant is not sufficient. *Atwood v. Hirsch Bros.*, 51 S. E. 742, 123 Ga. 734.

#### As including appearance

Acts 1902 (P. L. p. 503, § 4, par. 1) confers jurisdiction to grant a divorce where either of the parties resides within the state at the time of the adultery charged and at

the time of filing the bill; but paragraph 7 confers jurisdiction in all cases except desertion, when either of the parties is a resident of the state at the time of the filing of the bill, and the defendant is served with process within the state. Section 6 provides for like process and procedure, as in cases under the chancery act, which (Revision 1902 [P. L. p. 511, § 6]) declares that a written appearance by a solicitor shall have the same force and effect as if defendant had been originally served with process by an officer. Held, that the phrase "served with process within the state," in section 7, included an appearance by a solicitor, so that, where a nonresident wife filed a bill in New Jersey for a divorce against her husband for adultery, he was entitled to a divorce on a cross-bill for her adultery committed while both parties were residents of another state. *Storms v. Storms*, 64 Atl. 700, 702, 71 N. J. Eq. 549.

#### In Civil War

Midshipmen at the Naval Academy during the Civil War, being liable to be called into active service, and in some instances having been actually called into service, must be deemed officers of the Navy "who served during the Civil War" within the intent of Navy Personnel Act March 3, 1899, c. 413, § 11, 30 Stat. 1007, and entitled to be retired with the rank of the next higher grade. *Jasper v. United States*, 40 Ct. Cl. 76, 77.

#### SERVING

Under a city ordinance, providing for compensation of police officers "serving as patrolmen" at \$100 per month, the word "serving" did not require actual rendition of services during the continuance of the term, as a condition to drawing of salary, being equivalent to the phrase "for services as patrolmen." *Peterson v. City of Butte*, 120 Pac. 483, 484, 44 Mont. 401, Ann. Cas. 1913B, 538.

#### SERVICE

See Actual Service; Broker's Services; Business Service; Civil Service; Continue in Service; Divine Service; Domestic Service; Entire Business Service; Extraordinary Services; For His Services; Good of the Service; Legal Services; Mariner's Service; Personal Services Rendered; Present Service; Professional Services; Public Service; Religious Services; Salvage Service; Sea Service; Unclassified Service; Unserviceable.

Engaged in services requiring his presence, see Engaged.

In full for services, see In Full.

That one is in the actual "service" of another implies compensation. *Wilkes v. Buffalo, R. & P. R. Co.*, 65 Atl. 787, 789, 216 Pa. 355.

Where defendant agreed to pay for plaintiff's "services" in caring for, harvesting, and warehousing certain hops, the term "services" was not limited to plaintiff's personal labor, but included expenditures necessary in harvesting the crop. *Meyer v. Livesley*, 107 Pac. 476, 478, 56 Or. 383.

#### As merchandise

See Merchandise.

#### As property

See Property.

#### Of carrier

The railroad commission may require a railroad company to maintain an agent at the depot to enable the public to transact business with him; the word "service" as used in the act including the maintenance of a station agent. *State v. Corvallis & E. R. Co.*, 117 Pac. 980, 986, 59 Or. 450.

In a statute making any common carrier, who shall receive from any person a greater or less compensation for any "service rendered" in the transportation of passengers or property than it charges or receives from any other person for doing a like service, guilty of unjust discrimination, the term "service rendered" refers to the physical service of carriage. *Pennsylvania R. Co. v. International Coal Min. Co.*, 173 Fed. 1, 3, 97 C. C. A. 383.

#### Of employé

"The distinctive characteristics prescribed by the statute as essential to be found concurring and common to two or more employés in order to constitute them fellow servants are: First. They must be 'engaged in the common service.' As here used, 'service' means the thing or work being performed for the employer at the time of the accident, and out of which it grew, and 'common' means that which pertains equally to the employés sought to be held fellow servants, and therefore 'common service' means the particular thing or work being performed for the employer at the time of the accident, and out of which it grew, jointly, by the employés sought to be held fellow servants. The members of a crew running a train, though each be in the performance of different acts in reference thereto, are all 'engaged in the common service,' for they are jointly performing the thing or work of managing the train for the employer; but they would not be 'engaged in the common service' with the members of a crew running another train for the employer over the same road, for one crew would be jointly performing the thing or work of managing one train, while the other would be jointly performing the thing or work of managing the other train." *Meyers v. San Pedro, L. A. & S. L. R. Co.*, 104 Pac. 736, 742, 36 Utah. 307, 21 Ann. Cas. 1229 (quoting and adopting definition in *Gulf, C. & S. F. Ry. Co. v. Warner*, 35 S. W. 364, 89 Tex. 475).

**Of military officer**

An army officer is not discharged from "service" by his retirement, or out of the service, within Acts Feb. 27, 1877, c. 69, 19 Stat. 244, May 26, 1900, c. 586, 31 Stat. 210, and March 2, 1901, c. 803, 31 Stat. 902. *United States v. Gillmore*, 189 Fed. 761, 763.

**Of officer**

Under Bal. Ann. Codes & St. § 7218, providing that if any officer, whose fees are stated by law, shall corruptly exact any "greater fees for any services" than by law are stated, the expression "greater fees for any services" means services actually rendered by the officer in the line of his official duties, and cannot cover a payment to a coroner for not holding an inquest. *State v. Wainwright*, 97 Pac. 51, 52, 50 Wash. 225.

Burns' Ann. St. 1901, §§ 7945, 8194, make it the duty of the sheriff to keep the jail and take care of the prisoners therein. Section 6426 (Acts 1895, p. 322, c. 145, § 21) provides that sheriffs shall be entitled to receive for their "services" the "compensation" specified in the act and no other "compensation." Section 6444 (Acts 1895, p. 325, c. 145, § 89) provides a sheriff's "salary." Section 6540 (Acts 1895, p. 358, c. 145, § 136) provides that nothing in the act shall be so construed as to allow the salary and also the fees required to be taxed, except as otherwise provided. Sections 6530, 6532 (Acts 1895, pp. 355, 356, c. 145, §§ 124-126), require the sheriff to turn over to the county treasurer fees collected, which, in a measure, shall determine his salary. Section 6528 (Acts 1895, p. 352, c. 145, § 122) provides for the taxation by the sheriff, on account of "services" performed by him, of the fees provided by law, which shall belong to the county. In the itemization following, he is authorized to tax for every person committed to jail, to be paid by the county, 25 cents; for discharging each person from jail, to be paid by the county, 25 cents. Held that, while such provision of section 6528 was practically a re-enactment of a former provision, construed to give the sheriff such sums as his own, and while mileage and the cost of boarding prisoners, probably intended to be given to the sheriff personally, were other items included in such section, yet, in view of the abolishment of the fee system by the act of 1895, the word "services" in such section must be held to include the admission and discharge of a prisoner so as to bring such item within those belonging to the county. *Starr v. Board of Com'rs of Delaware County*, 79 N. E. 390, 392, 40 Ind. App. 7.

**Of wife**

"The term 'service,' as used at common law in relation to the labor performed and aid rendered by a wife, does not properly represent the dignity of the wife's work as a member in the matrimonial partnership in Texas. She no more owes service to the hus-

band than he to her. Her duties are those of the wife and are not to be valued as that of a servant or hireling." *San Antonio & A. P. Ry. Co. v. Jackson*, 85 S. W. 445, 446, 38 Tex. Civ. App. 201 (quoting and adopting definition in *Gainesville, H. & W. Ry. Co. v. Lacey*, 24 S. W. 269, 86 Tex. 244).

In an action for the death of plaintiff's wife, owing to defendant's negligence, testimony of the husband that he considered a certain sum the reasonable value of his wife's domestic services was not objectionable on the ground that it was irrelevant, hearsay, and had no tendency to prove any fact in issue, and that there was no evidence that the witness had any knowledge of the fact. "The term 'service,' as used at common law in relation to the labor performed and aid rendered by a wife, does not properly represent the dignity of the wife's work as a member of the matrimonial partnership in Texas. She no more owes service to the husband than he to her. Her duties are those of a wife, and are not to be valued as that of a servant or hireling. The fruits of her labor belong to the community, as does that of the husband, and the same rules that apply to the one under like circumstances apply to the other. The husband usually follows a pursuit which makes a return in money, and the value of his labor can be ascertained by a comparison with that of other men in like employment with like ability. The wife's labor, while equally valuable in the community, does not command a price in the market, and therefore cannot be proved by experts, as can that of the husband." *Chicago, R. I. & G. R. Co. v. Groner*, 95 S. W. 1118, 1120, 43 Tex. Civ. App. 264 (quoting and adopting definition in *Gainesville, H. & W. Ry. Co. v. Lacy*, 24 S. W. 269, 86 Tex. 244).

In an action by a husband for loss of the services of his wife through personal injury, the word "services" ordinarily signifies wifely services such as are due from her, and includes the idea of her society. *Indianapolis & M. Rapid Transit Co. v. Reeder*, 85 N. E. 1042, 1043, 42 Ind. App. 520.

The word "services," in the rule allowing a husband to sue for personal injuries to his wife, included any pecuniary injury suffered from the loss of her aid, society, and companionship; and, while the damages from the loss of services, society, and companionship are not susceptible of direct proof, yet, when the facts are shown, the assessment of compensation must be left to the sound discretion of the jury. *Indianapolis Traction & Terminal Co. v. Menze*, 88 N. E. 929, 930, 173 Ind. 31.

"The term 'services,' when employed to indicate the ground on which the husband is allowed to maintain an action, is used in a peculiar sense, and fails to express to the common mind the exact legal idea intended

by it. Whatever may have been the case formerly, or may now be the case in some states of society, service, in the sense of labor or assistance, such as a servant might perform or render, is not always given by or expected from the wife; and, if an action were to put distinctly in issue the loss of such services, it might, perhaps, be shown in the most serious cases that there was really no loss at all. But it could not be reasonable that the wrongdoer should escape responsibility because the family he has wronged were in such circumstances, moved in such circles, and were subject to such claims, by reason of public position or otherwise, that physical labor by the wife was neither expected nor desired. The word 'service' has come to us in this connection from the times in which the action originated, and it implies whatever aid, assistance, comfort, and society the wife would be expected to render to or bestow upon her husband, under the circumstances and in the condition in which they may be placed, whatever those may be." *Womach v. City of St. Joseph*, 100 S. W. 443, 448, 201 Mo. 467, 10 L. R. A. (N. S.) 140 (quoting and adopting definition in 1 Cooley, Torts [3d Ed.] p. 470).

#### **SERVICE (In Practice)**

See Direct Service; Inadequate Service; Personal Service; Personally Served.

The "service of a subpoena" is but the delivery of a paper to a party, and there is no element of trespass or force in it. It does not disturb the possession of property. *Hale v. Henkel*, 26 Sup. Ct. 370, 381, 201 U. S. 43, 50 L. Ed. 652.

The word "service," as used with reference to summonses and other legal processes, means the reading thereof to the person to be served, or the delivery to such person of the original or a copy thereof, and the phrase "service of a notice," without qualification, means a personal service of a written notice. *Clemmons v. State*, 113 Pac. 238, 239, 5 Okl. Cr. 119. Wherever a statute requires notice to be served in a legal proceeding, a written notice capable of legal service, of proof and return, and of being filed is intended, especially where service and proof thereof are jurisdictional. The expression "service of notice," without qualification of any kind, means a personal service of a written notice. The word "service," when used with reference to summonses, notices, and other legal processes, means the reading of the same to the person to be served or the delivery of the original or a copy thereof. *Ensley v. State*, 109 Pac. 250, 252, 4 Okl. Cr. 49.

"When notice is required by a statute, and no manner of 'service' is pointed out, personal service is meant." *Dalton v. St. Louis, M. & S. E. R. Co.*, 87 S. W. 610, 612, 113 Mo. App. 71.

#### **Service by mail**

Under Rev. Code Civ. Proc., § 554, providing that "service by mail" may be made where the person making the service and person on whom it is to be made reside in different places, between which there is a regular communication by mail, the service is completed from the time the paper to be served is deposited in the post office, properly addressed and stamped, though never received. *Griffin v. Board of County Com'rs of Walworth County*, 104 N. W. 1117, 1119, 20 S. D. 142.

The test in determining whether "service by mail" suffices is whether or not the paper actually came into the hands of the person to be served. If by reason of the presence of a return card on the envelope, or by reason of shortage of postage, the papers do not actually come into the possession of the party on whom it is sought to serve them, there is not service; but, if such causes do not in fact prevent the actual receipt of the papers, they become immaterial defects and do not invalidate the service. Under Code Civ. Proc. § 797, authorizing service of papers in an action by mail by depositing them postpaid in the post office, a counterclaim sent by mail, not fully prepaid, to plaintiff's attorneys, who paid the postage due without objection, and after learning the nature of the package returned it to defendant, was legally served. *Appeal Printing Co. v. Sherman*, 91 N. Y. Supp. 178, 179, 99 App. Div. 533.

#### **Service by telephone**

Under Code Cr. Proc. 1895, art. 515, declaring that a subpoena is served by reading the same in the hearing of a witness, etc., reading a subpoena to a witness by telephone is not a valid "service." *Ex parte Terrell* (Tex.) 95 S. W. 536, 537.

#### **SERVICE BRAKE**

What is known as the "service brake" differs from the emergency brake only in degree. If the full force of air is turned upon the brake, that is an "emergency brake." In ordinary cases less than the full force is turned on, and that is the "service brake." In other words, there is only one set of brakes, and the difference consists in the amount of air pressure which is applied. *Norfolk & W. R. Co. v. Dean's Adm'r*, 59 S. E. 369, 391, 107 Va. 505.

#### **SERVICE CONNECTED WITH TRANSPORTATION**

Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384, as amended by Act June 18, 1910, c. 309, § 12, 36 Stat. 551) provides that if the owner of property transported under the act directly or indirectly renders any service connected with the transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reason-

able, and the commission may, after hearing on a complaint, or on its own initiative, determine what is a reasonable charge, etc. Held, that cartage of sugar from refinery to cars did not constitute "transportation," nor a "service connected with transportation," within such act, for which the carrier was justified in making an allowance under section 15; and that such allowance constituted an illegal rebate. *American Sugar Refining Co. v. Delaware, L. & W. Ry. Co.*, 200 Fed. 652, 656.

### SERVICE IN SWITCHING

Employment as fireman on a railway yard switching engine is "service in switching cars," within a life policy provision exempting insurer from liability on insured entering such service. *Diseker v. Equitable Life Assur. Soc. of United States*, 60 S. E. 153, 154, 87 S. C. 187.

### SERVICE PIPE

The term "service pipe" or wires, as used in Laws 1890, c. 566, p. 1148, § 65, providing that no corporation shall be compelled to lay service pipes or wires through frozen ground, or such as shall otherwise present serious obstacles to laying the same, means the connection from the street main or wire to the house, and usually the expense of laying that is borne by both the company and the owner in proportions agreed upon by them. *Moore v. Champlain Electric Co.*, 85 N. Y. Supp. 37, 39, 88 App. Div. 289.

### SERVICE STOP

An "emergency brake" on a train is adapted and used in instances of emergency, as its name implies, while a "service stop" is used in ordinary cases where a stoppage of the train can be accomplished by a gradual application of the brakes. *Benedict v. Chicago G. W. R. Co.*, 78 S. W. 60, 61, 104 Mo. App. 218.

### SERVICES ACTUALLY RENDERED

Where one appears on the pay rolls of the city of New Orleans and receives pay for services rendered the city by another, acting on his behalf, he does not violate Act 155 of 1888, which provides "that any person who shall knowingly permit his name to be carried on the pay rolls of any state, parish, municipal or other political corporation, as employé, and receive salary, or pay for the services not actually rendered" shall be guilty of a crime, as the services have been "actually rendered," and the act is violated only when the services are "not actually rendered." *State v. Farrell*, 57 South. 898, 130 *Law* 228.

### SERVIENT ESTATE OR TENEMENT

When one part of an estate is dependent for enjoyment by some use in the nature of an easement in the other part, and the owner conveys either part without express provision

on the subject, the part so dependent, thence called the "dominant estate," carries or reserves with it an easement of such use in the other, thence called the "servient estate." *Cherry v. Brizzolara*, 116 S. W. 668, 671, 89 Ark. 309, 21 L. R. A. (N. S.) 508.

### SERVILE LABOR

As used in Gen. St. 1894, § 6514, providing that it is a defense to a prosecution for doing "servile labor" on the first day of the week that the defendant uniformly keeps another day as holy, on which he does not labor, the term "servile labor" is infelicitous. By no construction, however, can it be perverted into a definition which would apply to a groceryman, publicly selling his wares, to be defined as a servile laborer. *State v. Weiss*, 105 N. W. 1127, 1128, 97 Minn. 125, 7 Ann. Cas. 932.

### SERVITUDE

See Additional Servitude; Continuous Servitude; Involuntary Servitude; Personal Servitude; Urban Servitude. Discontinuous servitude, see Discontinuous Easement.

The "servitude" of the civil law has a much wider signification than the easement of the common law, comprehending many rights which in the latter fall under the division of profits à prendre. The owner of an entire tract of land, or of two or more adjoining parcels, may so employ a part thereof as to create a seeming servitude in favor of another portion to which the use becomes appurtenant. Such use is tantamount to an easement at will, so long as the unity of ownership continues, and is described as a "quasi easement." *German Savings & Loan Society v. Gordon*, 102 Pac. 736, 737, 54 Or. 147, 26 L. R. A. (N. S.) 331 (citing *Kleffer v. Imhoff*, 26 Pa. 438, 442).

### SESAME OIL

The provision for "sesame oil" in the Tariff Act held to include ground sesame seed in the form of pulp, from which the oil has not been removed, the article being known commercially as sesame oil. It is immaterial that there is another and more refined product known and dealt in under the same name. *F. Zaloom & Sons v. United States*, 140 Fed. 31, 32.

### SESSION

See Annual Session; Church Sessions; First Regular Session; In Session; Joint Session; Last Session; Next Session; Special Session.

Under County Law, Laws 1892, p. 1750, c. 686, § 23, providing that each supervisor shall receive \$4 per day for attending sessions of the board, and mileage for once going

and returning between his residence and the place of meeting for each regular and special session, and section 10 (page 1745), providing that the board shall meet annually, may hold special meetings, and may adjourn from time to time, the terms "annual meeting" and "regular session" are synonymous, and a "regular" or "special" session is measured by its actual duration; each day not being a session, within section 23, so as to entitle the supervisors to mileage for each day's actual attendance at sessions of their boards. *Wallace v. Jones*, 107 N. Y. Supp. 288, 290, 122 App. Div. 497.

The meaning of the word "session" largely depends upon the connection in which the word is used, and may mean one thing in one section or paragraph of a law and something else in another. Under a city charter declaring that the city council shall meet upon a stated time in each year, and continue in "session" 120 days, and no longer in each year, with the provision that the council may arrange its sittings so that the same may be held continuously or otherwise, the council may continue in session for 120 days, and no longer, in each year, but it does not prohibit the council from continuing the consideration, during the second year of the two-year term for which its members are elected, of an ordinance introduced and partly disposed of during the first year. *Bond v. Mayor*, etc., of Baltimore, 74 Atl. 14, 17, 111 Md. 364.

#### Of court

"The term 'session,' when applied to courts, means the whole term. In legal construction, the whole term is construed as but one day, and that day is always referred to the first day or commencement of the term." *Cresap v. Cresap*, 46 S. E. 582, 583, 54 W. Va. 581 (quoting *Dew v. Judges of Sweet Spring District Court*, 3 Hen. & M. [13 Va.] 27, 3 Am. Dec. 639).

"Session," as applied to courts, means an entire term, and, in legal construction, the whole term is construed as a single day. *Risher v. Wheeling Roofing & Cornice Co.*, 49 S. E. 1016, 1018, 57 W. Va. 149 (citing *Dunn's Ex'rs v. Renick*, 22 S. E. 66, 40 W. Va. 349; *Dew v. Judges of Sweet Spring District Court*, 3 Hen. & M. [13 Va.] 27, 3 Am. Dec. 639).

A court is defined as "the persons officially assembled under authority of law at the appropriate time and place for the administration of justice," while the word "term," when used with reference to a court, signifies the space of time during which the court holds a session. A "session" signifies the time during the term when the court sits for the transaction of business; therefore there is a clear distinction between "the adjournment of court" and the "adjournment of the term." *Parrott v. Wolcott*, 106 N. W. 607, 608, 75 Neb. 530 (citing *Webst. Dict.*; *Black, Law Dict.*).

#### Same—As synonymous with term

The word "session" is defined as "the time, period, or term during which a court, council, Legislature, etc., meets daily for business, or the space of time between the first meeting and the prorogation or adjournment; thus a session of Parliament is opened with a speech from the throne and closed by prorogation. The session of a judicial court is called a "term." So where plaintiff filed an affidavit for an appeal without bond, as required by Rev. St. 1895, art. 1401, whereupon the court made an order certifying that plaintiff, by presenting such affidavit "within term time," has made proof of his inability to pay the costs of appeal or give security therefor, and is permitted to prosecute his appeal on said affidavit in lieu of a cost bond on appeal, and such certificate was dated May 12, 1904, and showed that the term of court began March 7th and ended May 14, 1904, it was held that such certificate sufficiently showed that the proof on which it was issued was made while the court was actually in session. *Emerson v. Missouri, K. & T. R. Co. of Texas*, 82 S. W. 1060, 37 Tex. Civ. App. 110 (citing *Webst. Int. Dict.*).

The word "session" does not have a single, fixed, and definite meaning, but is variously used in statutes and constitutions. In Rev. St. § 1038, providing that any District Court may, by order entered on its minutes, remit any indictment pending thereon "to the next session of the Circuit Court for the same district," and thereon the proceedings in such case shall be the same in the Circuit Court as if such indictment had been originally found and presented therein, the word "session" is used as meaning an actual sitting of the court for transaction of business, and not in the sense of "term," and the Circuit Court has jurisdiction to proceed with a case so remitted at the then current term. *United States v. Dietrich*, 126 Fed. 659, 660.

In the act of the Legislature of 1909, entitled "An act providing for holding county court at the town of Prague, in Lincoln county," the words "term" and "session" are used interchangeably. *Rakowski v. Wagoner*, 103 Pac. 632, 633, 24 Okl. 282.

Local Option Law (Laws 1905, p. 47, c. 2) § 10, provides that the county court 11 days after election, or as soon thereafter as practicable, shall hold a "special session," and, if a majority of the votes are for prohibition, the court shall immediately make an order declaring the result of the vote and absolutely prohibiting the sale of intoxicating liquors, etc. Held, that the court, by announcing the result of the election at a special session called during general term, did not invalidate the proceedings, the words "special session," as used in the act, not being synonymous with "special term" (the word "term" signifying "the space of time

during which the court holds a session"), and the word "session," as used, referring to a temporary sitting of the court, for the transaction of special business assigned to them, which may occur either during a general or special term; and, if all members are present for such purpose, it is immaterial as to how it was called, or when, providing the time prescribed by the act for such special sitting has elapsed. *State v. Edmunds*, 104 Pac. 430, 432, 55 Or. 236 (quoting and adopting definition in *Bouv. Law Dict.*).

The word "term," as used in Acts 1878, No. 30, p. 56, § 1, means the session during which the court is actually open, as distinguished from the "continuous session" of ten months provided for by Const. art. 117. *State v. Vicknair*, 43 South. 635, 637, 118 La. 963.

Laws 1905, p. 47, §§ 10, 11 (L. O. L. §§ 4929, 4930), provides for the holding of local option elections and the making of returns to the county court, and then declares that the court, on the 11th day after the election, or as soon thereafter as practicable, shall hold a special "session," and if the majority of the votes in the county as a whole, or in any subdivision thereof, etc., are for prohibition, the court shall make an order declaring the result and absolutely prohibiting the sale of liquor, etc. Held, that the word "session," as applied to the court, while usually referring to an actual sitting and transaction of business, yet, as used in such provision, might be construed to mean the legislative appointment of a term of the county court for the special purposes of the act. *State v. Maddock*, 115 Pac. 426, 428, 58 Or. 542.

### SESSION LAWS

Under Const. art. 19, § 2, providing that proposed constitutional amendments shall be published with the "Session Laws," and that the Secretary of State shall "also" cause the amendments to be published in newspapers for four successive weeks previous to the next general election, the publication for four weeks previous to the next general election relates only to newspapers and not to Session Laws, since the word "also" is used in the sense of "besides," and "further," and means "in like manner," and since the "Session Laws" is not a serial publication or one that is made at a fixed period or at regularly recurring intervals, but is published only once as a permanent memorial for its designated contents. *Pearce v. People*, 127 Pac. 224, 226, 53 Colo. 399.

## SET

### Precious stones

In the provision of the Tariff Act for "diamonds and other precious stones advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process, and not set," the word "set"

has a well-known and well-defined trade meaning in connection with precious stones, which will not include the insertion of an agate bearing in a scale. The provision is intended to cover only precious stones intended for jewelry purposes, and not such as are fitted for use as bearings. *Smith v. Computing Scale Co.*, 147 Fed. 890, 891 (citing *Erhardt v. Hahn*, 55 Fed. 273, 5 C. C. A. 99; *Hahn v. United States*, 100 Fed. 635, 40 C. C. A. 622; *Hahn v. United States*, 121 Fed. 152).

### Tool

A "set" or "snap" is a tool used to receive the blows of the sledge in riveting the plates of metal beams. The ordinary rule of the nonliability of an employer for injury sustained by an adult employé of ordinary discretion through the voluntary use of a defective tool, when the facts and the danger were within the comprehension of any ordinarily intelligent and prudent man, and were as completely within the knowledge and appreciation of the servant as of the master, is here applied to the case of a man who lost an eye by being struck by a sliver of steel from a "set" or "snap" used to receive the blows of the sledge in riveting I-beams. *Gillaspie v. United Iron Works Co.*, 90 Pac. 760, 761, 76 Kan. 70.

### SET APART

Under Code Civ. Proc. § 1468, providing that, when property is "set apart" to the use of the family of a decedent, one-half shall belong to the widow and the remainder to the children, and also providing for an allowance for the family, which by section 1467 is made a charge against the estate, a widow, to whom a family allowance has been paid, is not accountable to the children after their majority for shares not expended for their support; section 1468 applying to tangible property, such as exempt property or a homestead, and not to a family allowance. *Bell v. Bell*, 83 Pac. 814, 2 Cal. App. 338.

### SET ASIDE

#### Dividend

Text-writers, in using the terms "set aside," "set apart," and "actually set apart," with reference to dividends, proceed on the theory that the act of declaring a dividend, operating, as it does, as an actual severance of the dividend from the stock and corpus of the corporate property, is ipso facto, in and of itself, the setting apart, setting aside, and segregating such dividend in the sense that it creates an immediate right of the stockholder to demand and recover the same when due. The doctrine is that by the mere declaration the dividend becomes immediately separated and segregated from the stock and exists independently of it; that the right thereto becomes at once immediately fixed and absolute in the stockholder, and from thenceforth the right of each individu-



al stockholder is changed from that of partner and part owner of the corporate property to a status absolutely adverse to every other stockholder and to the corporation itself, in so far as his pro rata proportion of the dividend is concerned. *McLaren v. Crescent Planing Mill Co.*, 93 S. W. 819, 822, 117 Mo. App. 40.

#### SET FIRE TO

Revisal 1905, § 3346, which provides that if any person shall "set fire to any woods" on his own property, without notice to adjoining landowners, and without taking effectual care to extinguish the fire before it reach adjoining lands, he is liable in an action to any one injured, refers to setting fires upon woodland, and does not apply unless the firing is voluntary or intentional; and hence has no application to the case of a manufacturing company, burning off its right of way, where straw, tree tops, etc., had accumulated, and negligently allowing the fire to escape to land of an adjoining owner. *Mizzell v. Branning Mfg. Co.*, 73 S. E. 802, 803, 158 N. C. 265.

#### SET FOR HEARING

Within chancery practice rule 28, providing that a dismissal of the bill, caused by complainant "after the cause is set down to be heard," is a bar to another suit for the same matter, a cause being at issue, as it is when answer is filed, stands on the docket to be called and heard as a matter of course at the next term, and if it then "comes on to be heard," and is continued to the next term, this is a "setting down to be heard" at the next term. *Boon v. Riley*, 54 South. 997, 998, 171 Ala. 657.

#### SET FOR TRIAL

A stipulation filed in court, signed by the counsel of the parties, agreeing that the cause should be "set down for trial" for a certain day of a certain term, means a trial on the merits, and is an unlimited appearance by the defendant, waiving a right to plead to the jurisdiction. *Markey v. Louisiana & M. R. R. Co.*, 84 S. W. 61, 64, 185 Mo. 348.

#### SET FORTH

See Substantially as Set Forth.

In section 5086, Rev. St., providing that a copy of the account may be set forth in an action founded upon an account, the term "set forth" means placing or putting a copy in the proper place. *Buffalo Forge Co. v. Cleveland Steam Fitting & Supply Co.*, 92 N. E. 238, 240, 82 Ohio St. 199.

#### SET MY HAND AND SEAL

See My Hand and Seal.

#### SET OFF

##### As separate

The term "set off," as used in a statute requiring that the return of an officer on

an execution shall state that the appraisers appraised and "set off" the premises, means to separate or assign for the purpose of satisfying the execution and officer's fees so far as an appraised value of the land will go, and a return which adopts the return of the appraiser, but which does not follow the directions specifically of the statute, is sufficient. *Brackett v. McKenney*, 55 Me. 504, 506.

#### SET-OFF

See, also, Counterclaim; Recoupment.

A "set-off" is not technically a matter of defense and does not sound in damages, but is a money demand by defendant against plaintiff, arising on contract and constituting a debt independent of and unconnected with the cause of action set forth in the complaint. *J. S. Wood & Bro. v. M. E. Jones & Son*, 73 S. E. 1099, 1100, 10 Ga. App. 735; *Krausse v. Greenfield*, 123 Pac. 392, 394, 61 Or. 502.

A "set-off" is a final demand arising from an independent transaction, liquidated or unliquidated, not sounding in damages, subsisting between the parties at the commencement of the suit. *Theo. Poull & Co. v. Foy-Hays Const. Co.*, 48 South. 785, 786, 159 Ala. 453.

A "set-off" is in the nature of a cross-demand and, being incomplete at the impetration of the writ, is not available to the defendant. *Pocono Spring Water Ice Co. v. American Ice Co.*, 64 Atl. 398, 400, 214 Pa. 640.

"A 'set-off' is a counter demand, generally of a liquidated debt, growing out of an independent transaction for which an action might be maintained by the defendant against the plaintiff." "A 'set-off' means a cross-claim for which an action might be maintained against the plaintiff and is very different from a mere right to a deduction from or reduction of his demand on account of some matter connected therewith, and which may be given in evidence under the general issue, such as payment on account, etc." *Sawyer v. Van Deren*, 66 Atl. 396, 398, 74 N. J. Law, 673 (quoting and adopting definition in 2 Saund. Pl. & Ev. 786).

A "set-off" is a counter demand, generally of a liquidated debt, growing out of an independent transaction for which an action might be maintained by the defendant against plaintiff, exhibited by the defendant to counterbalance the plaintiff's recovery either in part or in whole, and, as the case may be, to recover a judgment in his own favor for the balance. A set-off is not cognizable in admiralty except so far as it relates to the particular transaction which is the subject of the action and goes to reduce or overcome libellant's demand. *Hastorf v. Degnon-M'Lean Contracting Co.*, 128 Fed. 982, 983.

Whether a claim is of a nature connoted by the term "set-off," and whether, as to its

liquidated or unliquidated character, capable of being the subject of set-off, is to be determined by applying the test, Will an action of indebitatus assumpsit lie thereon? If so, it is liquidated within the legal meaning of the word "set-off." *Links v. Mariowe*, 84 Atl. 1056, 1057, 83 N. J. Law, 389.

Unliquidated damages for breach of contract cannot be a "set-off" within the meaning of the statute providing that, in actions against joint obligors, any debt or demand due from plaintiff to defendant, or to all the obligors in the contract sued on may be set off against the demand of plaintiff; a set-off being a debt. *National Handle Co. v. Huffman*, 120 S. W. 690, 692, 140 Mo. App. 634.

"The right of set-off does not attach to the debt itself, nor depend upon the mutual-ity of the debts in their origin as an inherent quality belonging to such debts, but upon the situation and rights of the parties between whom it is sought to be enforced. It is a privilege attaching to the remedy only." *Wabash R. Co. v. Bowring*, 77 S. W. 106, 108, 103 Mo. App. 158 (citing *Greene v. Darling* [U. S.] 10 Fed. Cas. 1144; *Waterman, Set-Off*, § 17). "The right of set-off is not an equity which the original debtor may, at all events, assert against the assignor or assignee of the debt, whether he has or has not notice of its existence. There is no such equity to have debts set off against each other which attaches to the debts themselves and travels with them into whatsoever hands they may come, though it is doubtless true that where there are mutual subsisting debts, and either an express or implied agreement of stoppage pro tanto or mutual credit, the court of equity will enforce it against his assignee with notice." *Wolcott v. Sullivan* [N. Y.] 1 Edw. Ch. 399. A plaintiff's right to have his judgment against defendant set off against defendant's judgment against plaintiff is not affected by defendant's equitable assignment of half of his judgment, plaintiff not assenting thereto, or by the assignment of all of it, the assignee taking with knowledge of plaintiff's prior judgment. *Wabash R. Co. v. Bowring*, 77 S. W. 106, 108, 103 Mo. App. 158.

A "set-off" filed in an action is, by the express provisions of Rev. St. 1899, § 4499, an independent action brought by defendant against the plaintiff, and the dismissal or discontinuance of plaintiff's action does not affect the set-off, but defendant may, notwithstanding such discontinuance or dismissal of the plaintiff's action, prosecute his set-off to final judgment. *Cornell v. King*, 94 S. W. 822, 823, 118 Mo. App. 191.

#### Answer distinguished

See Answer.

#### As cross claim or action

The plea of "set-off" is a cross-action, and after it is filed defendant is entitled to

prove his case and have judgment against plaintiff, if authorized by the evidence, which right plaintiff cannot defeat by dismissing his case. *Handley v. McKee*, 70 S. E. 94, 95, 8 Ga. App. 570; *E. E. Forbes Piano Co. v. Hixon*, 68 S. E. 487, 8 Ga. App. 51.

#### As cause of action upon a contract, judgment, or award

In an action in the nature of express assumpsit, the claim of the holder of the legal title of land against the holder of the equitable title for taxes paid, being purely a statutory claim, is not a proper subject of set-off, under a statute defining a "set-off" as a cause of action arising upon a contract, judgment, or award in favor of a defendant against a plaintiff. *Montgomery v. Montgomery*, 78 S. W. 465, 119 Ky. 761.

A "set-off" is a cause of action arising upon a contract, judgment, or award in favor of a defendant against a plaintiff, or against him and another; and it cannot be pleaded except in an action on a contract, judgment, or award. Civ. Code Prac. § 96. A claim of a judgment debtor against the judgment creditor, which arose before the assignment of the judgment, is a lawful set-off against the judgment in the hands of the assignee. *Clark v. Raison*, 104 S. W. 342, 343, 126 Ky. 486. See, also, *Snowden v. Snowden* (Ky.) 96 S. W. 922, 923.

A "set-off" may be pleaded in an action founded on a contract, and must be, as declared by Code Civ. Proc. § 104, a cause of action arising upon contract, or ascertained by the decision of the court. In an action to recover a sum subscribed by defendant to aid plaintiff in holding a street fair in a city, defendant answered, and alleged that he paid to plaintiff a certain sum for the privilege of operating his usual place of business in the city, and for the purpose of feet frontage, which plaintiff unlawfully forced him to pay under threats of prosecution; that, when defendant paid said amount to plaintiff, plaintiff expressly agreed that no further saloons or other places for the sale of intoxicating liquors, other than those established, would be allowed to do business in such neighborhood; that the midway of said street fair was situated near the place of business of defendant, which fact was held out as an inducement for him to pay said amount to the plaintiff, as plaintiff then told him no intoxicating liquors would be sold therein; that plaintiff breached his agreement, thereby damaging defendant in a specified sum, for which amount he asked judgment. The contract or transaction set forth in the answer was wholly different from that set forth in the petition, and was in no way connected therewith, but the cause of action which defendant pleaded was one arising upon contract, and, though for unliquidated damages, was a proper subject of set-off.

*Mullins v. South Omaha Street Fair Ass'n*, 99 N. W. 521, 522, 5 Neb. (Unof.) 572.

**As debt**

See Debt.

**As demand arising out of an independent transaction**

A "set-off" to the whole or part of plaintiff's claim is a distinct cause of action, which may be made, and, if sustained, affords a legal reason why a defendant should not be called upon to pay the demand sued on, and is not in the nature of a defense thereto. *Tilton v. Goodwin*, 66 N. E. 802, 803, 183 Mass. 236.

Under Burns' Ann. St. 1908, §§ 352, 353, authorizing a defendant to set forth in his answer a set-off, in actions for a money demand on contract, and providing that the set-off must consist of matter arising out of debt, duty, or contract, a "set-off" may embrace matter which is not germane to the action, but which constitutes an independent cause of action, subject to the qualification that the demands must be mutual. *Wainwright v. P. H. & F. M. Roots Co.*, 97 N. E. 8, 12, 176 Ind. 682.

A "set-off," which was unknown to the common law, but is permitted by Burns' Ann. St. 1908, § 353, requiring a set-off to consist of matter arising out of debt, duty, or contract held by defendant when the suit was commenced, etc., is a counterdemand growing out of an independent transaction for which defendant may sue plaintiff, and pleaded by defendant to counterbalance plaintiff's recovery in whole or in part and to recover judgment in his own favor, but a set-off is not an answer in its ordinary meaning as a statement of a defense to plaintiff's cause of action, for it impliedly admits the cause of action. *Duffy v. England*, 96 N. E. 704, 707, 176 Ind. 575.

Under Gen. St. 1902, § 612, the term "counterclaim" refers to all manner of permissible counter demands, more particularly those so connected with the matter in controversy under the original complaint that its consideration is necessary for the full determination of the rights of the parties, or, if it is of a wholly independent character, is a claim upon the plaintiff by way of set-off, and not a claim against a codefendant; and the term "set-off" embraces equitable set-off. *Downing v. Wilcox*, 80 Atl. 288, 289, 84 Conn. 437.

**As applicable only to mutual demands, debts, and credits**

"Set-offs" must be mutual demands, and one partner cannot make use of a partnership demand as a set-off against a demand against himself individually. *Western Coal & Min. Co. v. Hollenbeck*, 80 S. W. 145, 146, 72 Ark. 44.

A "set-off" obtains between persons occupying the relation of debtor and creditor and between whom there exist mutual demands. Mutuality is essential to the validity of a set-off, and, in order that one demand may be set off against another, both must mutually exist between the same parties. Accordingly, it is settled that a bank can claim no lien upon the deposit of one partner, made on his separate account, in order to apply it on a debt due from the firm; nor can the joint and several note of three persons be paid out of the individual deposit of one, unless he be the principal and the others sureties, or unless it becomes necessary in order to do complete equity or avoid irremediable injustice. *O'Grady v. Stotts City Bank*, 80 S. W. 696, 697, 106 Mo. App. 366.

A mutual account implies a reciprocity of dealing between the parties to the account, and is made up of matters of set-off wherein each party has a right of action against the other; and a "set-off" can be pleaded only when the right of action is against the plaintiff in the same capacity as that in which he is prosecuting his claim; and an individual obligation is not a matter of set-off to a partnership claim or to a claim by the plaintiff in a representative capacity; nor can a partnership debt be a set-off to a claim by one of the members of the partnership; and, on a general payment on an open account between them, the account would not for that reason have been rendered mutual, since the mere payment of money upon an account does not have that effect, but operates simply as a reduction pro tanto of the claim. *Flynn v. Seale*, 84 Pac. 263-265, 2 Cal. App. 665.

The right to have the debt of the legatee or distributee charged to him in the adjustment of the legacy or the distributive share is inaccurately called a right of "set-off" or of "retainer," since the right rests not so much upon any rule of set-off or of retainer, as upon the broad principles of equity. *Oxsheer v. Nave*, 40 S. W. 7, 9, 90 Tex. 568, 37 L. R. A. 98.

The mutual accounts between a bankrupt and his bank of deposit are closed by operation of law at the time the petition in bankruptcy is filed, and no right of "set-off," under Bankruptcy Act July 1, 1898, c. 541, § 8a, 30 Stat. 565, exists in the bank as to deposits made after that time, even though neither party knew of the filing of the petition when the deposit was made. In *re Michaelis & Lindeman*, 196 Fed. 718, 719.

An answer, in a suit to confirm a tax title, which alleges that the sale was void because the purchaser at the tax sale was the clerk who made the sale and executed the deed, is not a "counterclaim" or "set-off" within Kirby's Dig. § 6108, and a reply is unnecessary to require defendant to prove the allegations thereof. *Senter v. Greer*, 142 S. W. 178, 101 Ark. 301.

**Recoupment distinguished**

As defined by Civ. Code, § 3757, a "set-off" is distinguishable from recoupment in that a set-off includes all mutual debts and liabilities, while recoupment is confined to the contract on which plaintiff sues. *Weaver v. Roberson*, 67 S. E. 662, 666, 134 Ga. 149.

"Recoupment" goes to show that the amount claimed is not due the plaintiff, while "set-off" is a defense which goes, not to the justice of the plaintiff's demand, but sets up a demand against the plaintiff to counterbalance his in whole or in part. It does not attack or deny plaintiff's claim, but admits it. As set-off does not go to show that the amount claimed by plaintiff is not due or owing by the defendant, it is not available as defense by affidavits of illegality to the foreclosure of a chattel mortgage. *Arnold v. Carter*, 54 S. E. 177, 179, 125 Ga. 319.

Recoupment is distinguished from "set-off" in these particulars: First, it arises out of matters connected with the transaction or contract in which the plaintiff's cause of action is founded; second, it matters not whether it be liquidated or not; third, it is not dependent on any statutory regulation, but is controlled by the principles of the common law. *Hayes v. Sildell Liquor Co.*, 55 South. 356, 358, 99 Miss. 583.

In an action for the price of a stock of millinery goods, a plea termed by the defendant a plea of "recoupment," claiming a sum had and received by plaintiff, which the defendant offers as a set-off against the demands of the plaintiff, and claims judgment for the excess, was not demurrable, being good as a "set-off," though not as a plea of recoupment. *Thomas v. Thomas*, 41 South. 141, 142, 146 Ala. 533.

**As statutory right**

"Set-off" did not exist at common law, but is founded on Stat. 2 George II, c. 24, § 4, which provided that, where there were mutual debts between the parties, one debt might be set against the other. *United Transportation & Lighterage Co. v. New York & Baltimore Transp. Line*, 180 Fed. 902, 904.

The right of "set-off" is a creation of statute, applicable even where there are different contracts. *American Bridge Co. of New York v. City of Boston*, 88 N. E. 1089, 1090, 202 Mass. 374.

"A 'set-off' is a creation of statute. It is an independent claim, which the statute allows the defendant to consolidate with the plaintiff's action by pleading it, if he chooses, subject to substantially the same defenses as if he had sued upon it separately." *Downes v. Worch*, 65 Atl. 603, 28 R. I. 99 (quoting and adopting the definition in *Goldthwait v. Day*, 21 N. E. 359, 149 Mass. 185).

**SET SCREW**

As shafting, see Shaft.

**SET UP**

See Specially Set Up.

Set up claim to real estate, see Claim to Real Estate.

**Gaming device or table**

The operation of a table, with a "take-off" slot in the center covered by cloth, in a room in a hotel, by defendant and another, who divided their winnings and the "take-off" and permitted divers persons to play upon it for money or property, was a "setting up and keeping of a gaming table," within Rev. St. 1899, § 2194 (Ann. St. 1906, p. 1404), as amended by Acts 1901, p. 130, prohibiting the setting up and keeping of gaming tables or devices. *State v. Hall*, 128 S. W. 745, 747, 228 Mo. 456.

**SET UPON**

In an instruction that if a passenger was "set upon" by the conductor, etc., "set upon" can only mean "assault," and inescapably implies unwarranted attack. *Yazoo & M. V. R. Co. v. Williams*, 39 South. 489, 490, 87 Miss. 344.

**SETTLE—SETTLEMENT**

See Actual Settlement; At Settlement; Direct Settlement; During Progress of Settlement; Family Settlement; Final Settlement; Legal Settlement; Monthly Settlement; Power to Audit, Adjust, and Settle; Practically Settles; Reversed and Settled; Social Settlement; Voluntary Settlement.

Offer of settlement distinguished from admission, see Admission.

The word "settle" is defined by Webster to mean "to liquidate; to balance; to close up." *Abe Block & Co. v. Largent (Tex.)* 135 S. W. 1078, 1080.

The word "settle" has a double meaning and denotes an adjustment and payment. *City of Longview v. Capps (Tex.)* 123 S. W. 160, 162 (citing 7 Words and Phrases, pp. 6446-6450).

The term "settlement" does not necessarily mean payment or satisfaction, though it may mean that; it frequently meaning adjustment, arrangement. *Beall v. Hudson County Water Co.*, 185 Fed. 179, 182.

A promise by a debtor to pay a debt when her father's estate is settled, if constituting an acknowledgment of the debt to avoid the defense of limitations, is conditional on the settlement of the estate, and mere proof that the debtor has received from her father's estate a sum sufficient to pay the debt, in the absence of evidence of the amount of the bequest to her, is not proof of performance of the condition, and the defense of limitations is not avoided; the

word "settlement" involving a finality, and to "settle" a debt meaning to discharge it. *Francis v. Rycroft*, 132 N. Y. Supp. 14, 16, 148 App. Div. 65.

An assignment of claim against a corporation to the contesting stockholders, or their representatives, for a cash consideration, was a "settlement," within the meaning of a covenant between the claimant and another, having a claim against the corporation, that any settlement which might be made of the assigned claim should include the other claim. *Negley v. Simpson*, 26 Atl. 1014, 55 N. J. Law, 396.

The word "settled," in a statement by an agent of plaintiff to defendant's attorneys that the case was "settled" and all over, does not necessarily mean that the claim had been adjusted, but means that the claim would not be prosecuted further. A matter is frequently spoken of as "settled" when the meaning is simply that it would not be pressed any further and is no longer ground for controversy. Where affidavits in support of defendant's motion for new trial, in an action in which no answer had been filed, alleged that defendant had employed an attorney to file an answer, but that the answer was not filed because the papers in the case were lost, and that, on the day before the trial, plaintiff's agent told defendant's attorney that the case was "settled," and that defendant's attorney did not know that the papers had been found or the case set for trial, and the answer tendered with the affidavits showed a good defense, the defendant was entitled to a new trial. *Head v. Ayer & Lord Tie Co.* (Ky.) 70 S. W. 55, 56.

The report made and recorded by commissioners appointed by the fiscal court pursuant to St. 1903, § 4146, to make a "settlement" with the sheriff, which was made in the absence of the sheriff, and after he had absconded, cannot be treated as a "settlement" binding on the sheriff and his sureties. *Fidelity & Deposit Co. of Maryland v. Logan County*, 84 S. W. 341, 344, 119 Ky. 428.

#### As adjust

The varied meaning of the word "settlement" has doubtless created some confusion in the minds of many in construing the word as employed in a statute regulating and fixing fees of county clerks for making settlement of each account with the county. Among other meanings, the word "settlement" means an adjustment of accounts, and also the payment of a debt. As here used, it means an adjustment of accounts, the meaning of which presupposes some work or labor of the clerk made a duty by law for him to perform. *Greene County v. Light*, 77 S. W. 915, 916, 72 Ark. 41.

Where plaintiff, who was a member of a trade exchange, and another member thereof, executed, bought, and sold notes, which pro-

vided that the sale was subject to the rules of the exchange, by which plaintiff agreed to deliver wheat on a certain date, and the buyer, on plaintiff's refusal to deliver on that date, without consulting plaintiff, retained a part of the money deposited by him as security for delivery, as damages for plaintiff's breach of contract, on the basis of the value of wheat as fixed by the exchange on the day of delivery, but plaintiff claimed that the price fixed was fictitiously created by the buyer and others by cornering the wheat market, and instituted suits to establish his claim, there was no "settlement" between the parties so as to require plaintiff to surrender the contracts with the buyer under an alleged implied rule of the trade exchange requiring the parties to surrender contracts upon a "settlement"; that term implying an accounting and adjustment and a liquidation in regard to accounts and involving the idea of mutuality. *Albers v. Merchants' Exchange of St. Louis*, 120 S. W. 139, 142, 140 Mo. App. 446 (quoting and adopting definition in *Stand. Dict.*).

A showing that plaintiff having a cause of action against defendant and another railroad company for personal injury "settled" an action against the other company does not show such release of liability as discharges defendant, as the word was evidently used in the colloquial sense to indicate that he had adjusted his difference with the other company; the term being loosely used to describe all sorts of compromises, as well as technical discharges and releases. *Walsh v. New York Cent. & H. R. R. Co.*, 97 N. E. 408, 410, 204 N. Y. 58, 37 L. R. A. (N. S.) 1137.

#### As agree to pay

A letter written by defendant to plaintiff with reference to a proposed settlement of their differences, requesting a meeting "to settle" the same, did not constitute such a written acknowledgment of the indebtedness as to start limitations anew; the words "to settle" not being equivalent to an agreement to pay, it not being an unqualified acknowledgment. *Parker v. Carter*, 120 S. W. 836-839, 91 Ark. 162, 134 Am. St. Rep. 60.

#### Court's approval required

While a cross-bill cannot be maintained in a suit after it has been "settled," a tenant in common, who has been impleaded in a suit between the cotenants to establish the interest of each and obtain partition, and whose interest is admitted by the pleadings, cannot be deprived of the right to file a cross-bill therein at any time it may become necessary to protect his interest in the property by a settlement between his cotenants. *Ulman v. Jaeger's Adm'r*, 155 Fed. 1011, 1015.

#### As discontinuance

The marking of a cause "settled" is equivalent to a discontinuance of the action.

*Pomeranz v. Marcus*, 87 N. Y. Supp. 941, 93 App. Div. 552.

#### **Fixed conviction or purpose implied**

Refusal of a requested charge that, if, after considering all the evidence, the minds of the jury remain in an unsettled state on the issue, the verdict must be for defendant is not erroneous; the word "settle" implying that the mental state, to which it is applied has become fixed, permanent, and not subject to change. *Robinson v. Crotwell*, 57 South. 23, 175 Ala. 194.

In an instruction that one is competent to make a will when he has "will, mind, and memory to sufficiently understand that he is selecting the person or persons whom he wishes to have his property, and to know his property and the natural objects of his bounty, and his duties to them and the persons upon whom his property is bestowed by the testamentary paper which he signs, and to make such disposition in accordance with a then settled purpose of his own," the words "settled purpose of his own" sufficiently indicate that testator must have had a fixed purpose. *Bramel v. Bramel*, 39 S. W. 520, 522, 101 Ky. 64.

#### **As limitation**

"In conveyancing, 'settlement' is the limitation of real or personal property or the enjoyment thereof to several persons in succession, prescribing the mode of holding, enjoying, and disposing of it." *Phinlzy v. Wallace*, 71 S. E. 896, 901, 136 Ga. 520.

#### **Mutual consent implied**

The word "settle" implies a mutual adjustment of accounts between different parties, and an agreement upon the balance. Thus, where it is shown that defendant and his daughter had figured the accounts constituting defendant's claim, but it does not appear that plaintiffs were either present or had in any manner been consulted, or that the matter was talked over with them, no settlement is shown. *Phipps v. Willis*, 96 Pac. 866, 869, 870, 53 Or. 190, 18 Ann. Cas. 119 (citing *Baxter v. State*, 9 Wis. 38; *Jackson v. Ely*, 49 N. E. 792, 57 Ohio St. 450).

There is not a "settlement or recovery," within an agreement of a plaintiff with his retiring attorney to pay him a certain sum, in case of a settlement or recovery of the claims sued on, where the defendant in the action, not acknowledging the validity of the claim, made a certain payment merely for the purpose of terminating the litigation and disposing of the annoyance from its prosecution. *Randel v. Vanderbilt*, 78 N. Y. S. 124, 75 App. Div. 313.

#### **As pay**

The brother of an embezzler of a certain sum from a bank inclosed his note in a letter to the bank, stating that the note was in settlement of the brother's indebtedness.

Held that, while the word "settlement" may mean the ascertainment or adjustment of a disputed account, it means payment when used in connection with an ascertained debt or liability, and was so used in the letter, and hence there was a consideration for the note. *Lomax v. Colorado Nat. Bank*, 104 Pac. 85, 87, 46 Colo. 230.

A letter by the maker of a past-due note, in response to a request for payment, which recites that property has not been turned over, that as soon as it is turned over he intends to "settle," and which expresses regret in not being able to do so at the present time, is evidence of a new promise to pay the note; the word "settle" meaning to adjust, to liquidate, to pay, as to settle a bill. *Mowry v. Saunders*, 80 Atl. 421, 425, 33 R. I. 45, Ann. Cas. 1913A, 1344.

A guaranty provided that if the debtor should fail to pay any notes when due, given in "payment" of the debt, the guarantors would make good the amounts which might be due the creditor in accordance with his contract with the debtor. Thereafter the creditor sent a letter acknowledging the receipt of two notes, and continuing, "Inclosed please find statement in settlement." The statement set forth the amount due and credited the debtor with receipt of two notes. To the statement was added, "Settled as above." Held, that it was incumbent on the guarantors to establish the fact that the words "in settlement" in the letter and statement were used in a different sense than the word "payment" in the guaranty. *Providence Mach. Co. v. Browning*, 52 S. E. 117, 120, 72 S. C. 424.

In a suit to enforce a judgment, the word "settled," as used in an allegation in the answer that the judgment had "long since been settled, and should be released and marked satisfied," is to be construed as meaning payment and satisfaction and such settlement as would extinguish the judgment. *Lilly v. Cox*, 56 S. E. 900, 901, 61 W. Va. 547 (citing 7 Words and Phrases, pp. 6446, 6447).

The word "settlement," as used in a receipt for payment of annual life insurance premiums, means payment in full. *Hoar v. Union Mut. Life Ins. Co.*, 103 N. Y. Supp. 1059, 1064, 118 App. Div. 416 (citing *Stewart v. Union Mut. Life Ins. Co.*, 49 N. E. 876, 155 N. Y. 257, 42 L. R. A. 147).

#### **Bill of exceptions or case**

"Settlement" of a bill of exceptions means an agreement upon the bill between the trial judge and appellant. *Tapla v. Williams*, 54 South. 613, 614, 172 Ala. 18.

The phrase "settled, allowed, and signed," in a certificate to a case-made, reciting that the case-made contains all the suggestions of amendments and is "by me settled, allowed, and signed," imports examination

and consideration by the judge, and includes the judicial operation of the mind of the judge, by which he determines that the statements in the case-made are true. *Hill v. Territory*, 79 Pac. 757, 759, 15 Okl. 212.

#### **Separate property**

Where a life insurance policy was payable to insured's wife, for her sole use and benefit, if she survived until time of payment, her interest in the policy was "settled" upon her as separate property, within a statute permitting married women to dispose of their separate estate, settled upon them for their separate use, and hence a pledge of her interest therein was enforceable. *Troendle v. Highleyman*, 113 S. W. 812, 814.

#### **SETTLED ACCOUNT**

See Account Stated.

#### **SETTLED ESTATE**

"The meaning of a 'settled estate,' whether in legal or popular language, contradistinguished from an estate in fee simple, is understood to be one in which the powers of alienation, of devising, and of transmission, according to the ordinary rules of descent, are restrained by the limitations of the settlement. It would be a perversion of language to apply the term 'settled' to an estate taken out of settlement, and brought back to the condition of a fee simple." *Phinlzy v. Wallace*, 71 S. E. 896, 901, 136 Ga. 520 (citing *Bouv. Law Dict.*).

#### **SETTLEMENT (In Poor Laws)**

As to paupers the word "settlement" is used exclusively in relation to dispensing public charity. *City of Augusta v. City of Waterville*, 76 Atl. 707, 709, 106 Me. 394 (citing 7 Words and Phrases, p. 6451).

One acquired a "settlement," within the Poor Law, in a town where he had resided for a year without requiring support, though, for six years prior to his removal to such town, he had resided and supported himself without public aid in another town. In re *Kelly*, 95 N. Y. Supp. 53, 56, 46 Misc. Rep. 548.

The poor law (Laws 1896, p. 136, c. 225) defines a "poor person" as one unable to maintain himself. Section 40 provides that every person of full age, who is a resident of a town for one year, and the members of his family, who have not gained a separate settlement, are deemed settled in such town, and shall so remain until he shall have gained a like settlement in some other town, or shall remove from the state and remain therefrom a year. A wife, with her children, went to S., February 13, 1907, from A., where she had resided for more than five years. Her husband, also a resident of A. for five years preceding September 11, 1906, left his family there on that date and went to another state. February 5, 1907, he met his wife at S., and she returned to A., and got her children and

belongings, and went to S. as stated, where she resided with her husband until May 23d, when he left her without support and she applied to S., two days later, for assistance, which was given her. When her husband left her at A., she was unable to maintain herself and children, and applied for public assistance, which she received on November 3 and December 5, 1906, and January 4, 1907; the orders received by her being for necessities and paid by A. Held, that the wife had a "settlement" in A., and was a "poor person" there when she went to S., and that the city of A. remained and was liable for the support furnished by the city of S. *Onondaga County v. City of Amsterdam*, 117 N. Y. Supp. 1121, 1123, 64 Misc. Rep. 181.

#### **SETTLEMENT (Public Lands)**

The "settlement" or "improvement" upon land with a view to receiving water for agricultural purposes, as provided for in section 5, art. 15, of the Constitution, means an actual settlement or an actual improvement thereon, and a constructive settlement will not meet the purpose or requirements of the Constitution. *Mellen v. Great Western Beet Sugar Co.*, 122 Pac. 30, 32, 21 Idaho, 353, Ann. Cas. 1913D, 621.

The word "settle," in Act Cong. May 2, 1890, c. 182, § 20, 26 Stat. 91, creating the territory of Oklahoma, and providing that all persons who shall "settle" on land in the territory under the provisions of the homestead laws and of the act shall be required to select the same in square form, and no person who shall at the time be seised in fee simple of 160 acres of land in any state or territory shall be entitled to enter land in the territory, as applied to the initiation of a right to public lands, has a well-defined and settled meaning, and he who "settles" on public land, under the provisions of the homestead law, must select the same in square form, and he who is seised in fee simple of 160 acres of land in any state or territory shall not be qualified to enter land in the territory. *Gourley v. Countryman*, 90 Pac. 427, 430, 18 Okl. 220.

Where an application to purchase several sections of school land had written below the description the words "settlement" is on No. 4," it was not sufficient to indicate that that was the applicant's home section, and that he was residing thereon at the time of application. *Goethal v. Read*, 81 S. W. 592, 594, 35 Tex. Civ. App. 461.

To "settle" upon land means to fix one's place of residence thereon. An unmarried man who went on school land for the purpose of making it his home, taking with him all his household goods and means of living, and treating his covered wagon as his place of abode until he constructed a house, was an actual settler. *Smith v. Florence*, 96 S. W. 1096, 1097, 43 Tex. Civ. App. 557 (quoting

and adopting definition in *Bratton v. Cross*, 22 Kan. 673).

### SETTLER

See Actual Settler.

The word "settlers," in the regulations of the General Land Office authorized by Rev. St. § 2478, is defined to be persons who have attached themselves permanently to the soil. An indictment which charges accused with having feloniously and falsely made, forged, and uttered a certain affidavit purporting to be the affidavit of a person named, a pretended "settler" on unsurveyed public lands, and which sets out the affidavit in which it is stated that affiant is such "settler," has made improvements, and then charges that it was so made by accused with intent to file the same in the office of a surveyor general of the United States to be used as a basis for letting a contract for surveying said lands described therein, and with a further intent that it should be transmitted to the General Land Office for the purpose of obtaining the approval of and payment for said survey, charges an offense of forging a writing for the purpose of obtaining or enabling others to obtain money from the United States. *Meldrum v. United States*, 151 Fed. 177, 180, 80 C. C. A. 545, 10 Ann. Cas. 324.

A "settler" upon land is one who resides thereon. An unmarried man who went on school land for the purpose of making it his home, taking with him all his household goods and means of living, and treating his covered wagon as his place of abode until he constructed a house, was an actual settler. *Smith v. Florence*, 96 S. W. 1096, 1097, 43 Tex. Civ. App. 557 (quoting and adopting definition in *Bratton v. Cross*, 22 Kan. 673).

### SETTLING OF DIFFERENCES

An intention to "settle by the payment of differences," "betting on future prices," or "closing up without delivery by the payment of differences" is equivalent to and means an intention by one who has sold for future delivery to buy on the same board for the same delivery, and to offset the purchase against the sale and receive or pay the difference. *Carson v. Milwaukee Produce Co.*, 113 N. W. 393, 395, 133 Wis. 85.

### SEVERABLE CONTRACT

See Entire Contract.

A "severable contract" is one in its nature and purpose susceptible of division and apportionment, having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other, nor is it intended by the parties that they shall be. *Cantwell v. Crawley*, 86 S. W. 251, 254, 188 Mo. 44 (quoting and adopting definition in *Wooten v. Walters*, 14 S. E. 734, 736, 110 N. C. 251); *Packard &*

*Field v. Byrd*, 51 S. E. 678, 679, 73 S. C. 1; *Sterling v. Gregory*, 85 Pac. 305, 306, 149 Cal. 117 (quoting and adopting the definition in *Wooten v. Walters*, 14 S. E. 734, 736, 110 N. C. 251).

The question whether a contract is entire or severable is primarily one of intent, but, as a general rule, where the part to be performed by one party consists of several distinct items and the price to be paid is apportioned to each item according to the value thereof, and not as a part of a round sum, the contract will be regarded as "severable." *Barlow Mfg. Co. v. Stone*, 86 N. E. 306, 307, 200 Mass. 158.

A "severable contract" is one, the consideration of which is, by its terms, susceptible of division and apportionment. There is, in such contract, no entirety of consideration on either side constituting a condition of the agreement, and neither party can claim more than equivalent for the actual consideration on his part. *Bradford & Carson v. Montgomery Furniture Co.*, 92 S. W. 1104, 1109, 115 Tenn. 610, 9 L. R. A. (N. S.) 979.

A contract to furnish brick required by a contractor to construct sidewalks for a city, the price to be paid monthly for those furnished during the month, as they were used, is "severable," and the failure of the purchaser to pay an installment does not release the seller from the contract. *Iowa Brick Mfg. Co. v. Herrick*, 102 N. W. 787, 788, 126 Iowa, 721 (citing and following *Myer & Dostal v. Wheeler & Co.*, 21 N. W. 692, 65 Iowa, 390; *Osgood v. Bauder & Co.*, 39 N. W. 887, 75 Iowa, 550, 1 L. R. A. 655; *Hansen & Linehan v. Consumers' Steam Heating Co.*, 34 N. W. 495, 73 Iowa, 77).

In case of a contract naturally and accurately severable, such as a contract for the sale of a bill of goods at certain prices for each article, courts incline to hold the contract "severable," and to grant a recovery for that portion of the goods actually delivered, less damages for the nondelivery of any portion not delivered; but, if it appears by express terms or necessary implication that the intent was to make payment of the consideration depend on delivery of all the articles, the contract will be held "entire," though the consideration may be measured by units and be actually severable. Contracts for the sale of goods naturally severable, like the sale of a quantity of gloves of different kinds at fixed prices, will not be held entire, in absence of express or implied provision to that effect, or persuasive circumstances showing such is the intent. The entirety of a contract of sale is a question of intent, which severability of the subject-matter and measurement of consideration by units may assist in determining, but not necessarily determine. *National Knitting Co. v. Bouton & Germain Co.*, 123 N. W. 624, 625, 141 Wis. 63.



## SEVERABLE CONTROVERSY

Plaintiff corporation instituted suit against defendant railroad company, a non-citizen, and against the railroad company's engineer, a citizen of the same state as plaintiff, alleging the burning of plaintiff's warehouse by the joint negligence of the railroad company and the engineer, and that the fire was caused by the engineer's operation of an engine equipped with an improper spark arrester, also alleging that the engineer was negligent in handling the engine at the time and place alleged, so as to cause a great and unnecessary amount of sparks to be emitted. Held, that the engineer was not a necessary party to the determination of the controversy between plaintiff and the railroad company, the substantial defendant, since, if the locomotive had been equipped with a proper spark arrester, no conduct of the engineer could have caused the emission of sufficient sparks to cause a fire; and hence the controversy between plaintiff and the railroad company was "severable" and removable to the federal courts. *Bainbridge Grocery Co. v. Atlantic Coast Line R. Co.*, 182 Fed. 276, 279.

## SEVERAL

According to Webster, the word "several" means "separate," "distinct." *Commonwealth v. Jones* (Ky.) 84 S. W. 305, 307.

### As each

Power given by Const. art. 3, § 5, to the "several" counties to assess and impose taxes for county purposes, permits the authorization of a single county by a special act. *Kroegel v. Whyte*, 56 South. 498, 499, 62 Fla. 527.

### As more than one

"Several" is defined as being of an indefinite number, more than one or two, yet not large, divers. *Black v. Brooks* (Tex.) 129 S. W. 177, 178.

The word "several," when used to express time by the hour, as in the phrase "several hours before" an event, does not mean a fractional part of an hour, but means an uncertain number of hours, not less than two. *Western Union Tel. Co. v. De Andrea*, 100 S. W. 977, 979, 45 Tex. Civ. App. 395.

### As more than two

The word "several" means more than two, but not very many. *Lunt v. Post Printing & Publishing Co.*, 110 Pac. 203, 204, 48 Colo. 316, 30 L. R. A. (N. S.) 60, 21 Ann. Cas. 492.

One who alleges that slanderous words were spoken in the presence of "divers" persons, must prove that the words were spoken in the presence of at least three persons; the word "divers" meaning "several," which means any number more than two. *Day v. Becker* (Tex.) 145 S. W. 1197, 1199.

### As respective

'Under a will providing that, in case of failure of all the objects of the several trusts created by the will, then all the then remaining property in the several trusts shall vest in and be distributed to the persons who, for the time being, shall be entitled to the same under the intestate law, the word "several" means "respective," so that, as each trust shall respectively fail in its object, the trust fund to which it applies shall go to the next of kin of testatrix at the time of the failure. *Brown v. Hawkins*, 59 Atl. 78, 79, 26 R. I. 400.

## SEVERAL OBLIGATION

"A 'several obligation' is one by which one individual, or, if there be more, several individuals, bind themselves separately to perform the engagement." *United States v. Green*, 136 Fed. 618, 647 (quoting 2 Bouv. Law Dict.).

## SEVERALLY

See Jointly and Severally.

### As respectively

The power to call a term was conferred originally upon the justices of the Supreme Court, not acting collectively or together, but "severally"; that is, upon each individual acting as circuit judge in his respective district, and in reference to the court over which he had authority to preside, and not in respect to the circuit court of some other district of which he was not primarily ex officio the judge. "Severally" has been construed to be equivalent in meaning to "respectively." *Hanley v. City of Medford*, 108 Pac. 188, 192, 56 Or. 171.

## SEVERALTY

Share and share alike as creating tenancy in severalty, see *Share and Share Alike*.

## SEVERANCE FROM FREEHOLD

See *Malicious Severance from Freehold*.

## SEVERE

See *Very Severe*.

The expression of a nonexpert witness that the jerk or jolt of a train was "severe" has no probative value. *Hawk v. Chicago, B. & Q. R. Co.*, 108 S. W. 1119, 1121, 130 Mo. App. 658 (citing and adopting *Guffey v. Hannibal & St. J. R. Co.*, 53 Mo. App. 462; *Hedrick v. Missouri Pac. R. Co.*, 93 S. W. 268, 195 Mo. 104, 6 Ann. Cas. 793); *Young v. Missouri Pac. R. Co.* (Mo.) 84 S. W. 175, 177.

## SEVERE ILLNESS OR SICKNESS

Whether attacks of biliousness and indigestion constitute a "severe illness," within the meaning of an interrogatory, in an application for life insurance, is a question

for the jury and not for the court. *Col-lins v. Catholic Order of Foresters*, 88 N. E. 87, 89, 43 Ind. App. 549.

## SEW

The term "sewed," as a method of book-binding, contemplates the folding and placing of one "signature" (a sheet of paper to be folded into 4, 8, or 16 pages) on another until the back is completed, then the cutting of grooves in the back in which cords are inserted, and the sewing of each signature to such cords. *State v. Young*, 110 N. W. 202, 294, 134 Iowa, 505, 13 Ann. Cas. 345.

## SEWAGE

A city constructed an underground tile drain that collected surface water and drainage from houses, which ran from the drain into an open ditch and thence into a gully near the corner of plaintiff's residence property, which was low ground. The water in plaintiff's well, which was within 16 feet of the gully, was affected by the condition of the water in the ditch. Held, that water is "sewage," and the city may be enjoined from discharging it into the gully, although the water in plaintiff's well at its best is not good. *Ulmen v. Town of Mt. Angel*, 112 Pac. 529, 530, 57 Or. 547, 36 L. R. A. (N. S.) 140.

Whatever may be the true and definite meaning of the word "sewage," if it has one, either generally or when ascertained from its use in any given connection, it was held that dyestuff and feculent matter from open water-closets washed into a river by the surface drainage do not constitute "sewage," within Revisal 1905, § 3051, prohibiting the discharge of sewage into any stream from which a public drinking supply is taken. *City of Durham v. Eno Cotton Mills*, 57 S. E. 465, 466, 144 N. C. 705, 11 L. R. A. (N. S.) 1163.

## SEWER

See New Sewer; Public Sewer; Storm Sewer.

A "sewer" is defined to mean a large and generally, though not always, underground passage (or conduit) for fluid and feculent matter from a house or houses to some other locality, usually the place of discharge, and also to mean a closed or covered waterway for conveying and discharging filth, refuse, and foul matter, liquid or solid, while ditches are drains which are or may be open and so arranged as to take away surface water. *City of Durham v. Eno Cotton Mills*, 57 S. E. 465, 466, 144 N. C. 705, 11 L. R. A. (N. S.) 1163 (citing *State Board of Health v. City of Jersey City*, 35 Atl. 835, 55 N. J. Eq. 116; 7 Words and Phrases, p. 6457 et seq.). See, also, *Mound City Land & Stock Co. v. Miller*,

70 S. W. 721, 724, 170 Mo. 240, 60 L. R. A. 190, 94 Am. St. Rep. 727.

### As improvement

See Improvement; Internal Improvement.

### As public use

See Public Use (In Eminent Domain).

### As public utility

See Public Utility.

### As public work

See Public Work.

## SEWER CONNECTION

As paving, see Pave—Pavement.

## SEWERAGE

System of sewerage, see System.

## SEXUAL CRIMES

The term "sexual crimes" includes the crime of rape. *Cecil v. Territory*, 82 Pac. 654, 655, 16 Okl. 197, 8 Ann. Cas. 457.

## SEXUAL INTERCOURSE

As crime, see Crime.

Refusal of as cruelty, see Cruelty.

Seduction implying, see Seduce—Seduction.

See, also, Unlawful Intercourse.

In an action for breach of promise of marriage, where seduction was not pleaded, an instruction not to consider as an element of damages the "result" of any "sexual relations" between the parties was not objectionable as only excluding the result of "sexual intercourse," viz., conception and birth of an illegitimate child; but as "sexual relations" is not synonymous with "sexual intercourse," but the latter may be regarded as a result of the former, the instruction excluded all consideration of "sexual intercourse." *Herriman v. Layman*, 92 N. W. 710, 711, 118 Iowa, 590.

## SHAD FISH

Any shad fish, see Any.

## SHADE TREES

Oak and hickory trees standing on the border of a public highway and on the land of an owner abutting on the highway are "shade trees" within Ky. St. 1903, § 1257, punishing the cutting down of shade trees. *Russellville Home Tel. Co. v. Commonwealth*, 109 S. W. 340, 33 Ky. Law Rep. 132.

## SHADOWGRAPH

A "shadowgraph" is a silhouette taken by the photographic process. *Frankel v. German Tyrolean Alps Co.*, 97 S. W. 961, 962, 121 Mo. App. 51.

## SHADOWING

See Rough Shadowing.

## SHAFT

See Line Shaft; Main Shaft.

### As mine shaft

A shaft in process of completion is not within the meaning of the term "shaft," as used in the miner's act, prescribing certain equipment for every mine shaft. *Cox v. Mount Olive & Staunton Coal Co.*, 127 Ill. App. 24, 25.

In an action under the mining act (*Hurd's Rev. St. 1908, c. 93*), for the death of an employé by defendant's violation of section 4 in failing to have flanges on the drum of a hoisting engine used in sinking an air shaft, special findings that death was caused during the construction work preparatory to opening a coal mine, and that the shaft was not in use in connection with the mining of coal or for ventilating in coal mine or for an escapement shaft, do not bring defendant's property within section 34, defining "mine" and "coal mine" as all parts of the property of a mining plant which contribute directly or indirectly to the mining of coal, and defining "shaft" as any opening which is or may be used for ventilation or escapement, or for hoisting men in connection with mining, and are therefore so inconsistent with a general verdict for plaintiff that judgment for defendant is proper. *Moore v. Dering Coal Co.*, 89 N. E. 674, 675, 242 Ill. 84.

### As part of bone

Technical words, such as the word "shaft," used as referring to a part of a human bone, are to be interpreted as usually understood by persons in the profession or business to which they relate. *Peterson v. Modern Brotherhood of America*, 101 N. W. 289, 290, 125 Iowa, 562, 67 L. R. A. 631.

### As part of machine

The word "shaft" is defined as an axle, mandrel, arbor, or other long and usually cylindrical bar, especially if rotating, and subject to torsional stress; a lengthy shafting. *Cole v. North American Lead Co.*, 112 S. W. 753, 754, 130 Mo. App. 253; *Id.*, 144 S. W. 855, 240 Mo. 397.

The word "shaft," as used in connection with or applied to factories, is a revolving bar to convey the force which is generated by some prime mover to the different working machines, and a "line or main shaft" is a bar of considerable length, and usually bearing a number of pulleys by which power is transmitted to countershafts. *Hohenstein-Hartmetz Furniture Co. v. Matthews*, 92 N. E. 196, 199, 46 Ind. App. 616.

### Same—Conveyor

A conveyor, consisting of a long, cylindrical, rotating rod, to which flanges are attached, is a "shafting" or machinery, within

the factory act (*Acts 1899, p. 234, c. 142, § 9*; *Burns' Ann. St. 1901, § 7087i*), providing that all "shafting" and machinery shall be guarded. *United States Cement Co. v. Cooper (Ind.)* 82 N. E. 981, 983.

### Same—Countershaft

*Burns' Ann. St. 1908, § 8029*, providing that "all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description" shall be properly guarded, includes countershafts under the general term "shafting." *Hohenstein-Hartmetz Furniture Co. v. Matthews*, 92 N. E. 196, 198, 46 Ind. App. 616.

### Same—Knives

The knives of the head of a machine used to surface different sized moldings are not within *St. 1898, § 1636j*, requiring the guarding of "shafting and gearing," and the statute does not require the master to guard such knives. *Kruck v. Wilbur Lumber Co.*, 133 N. W. 1117, 1119, 148 Wis. 76.

*Rev. St. 1899, § 6433*, requiring the belting, shafting, gearing, and drums in all manufacturing establishments, when so placed as to be dangerous to employes while engaged in their ordinary duties, to be safely guarded, when possible, does not apply to the working parts of a machine, but only to the parts used to transmit power, such as shafting, etc.; hence the rotating cylinder or axle on which the knives of a planing machine are fixed is not "shafting," so as to require it to be guarded; that term ordinarily meaning a system of rods or shafts, usually cylindrical, used for communicating power from an engine to machines, sometimes being different in meaning from "shaft," which may mean any axle or other long and usually cylindrical bar, especially if rotating. *Cole v. North American Lead Co.*, 144 S. W. 855, 240 Mo. 397; *Id.*, 112 S. W. 753, 130 Mo. App. 253.

### Same—Pulley

*Burns' Ann. St. 1908, § 8029*, requiring shafting to be properly guarded, applies to pulleys running on the "shafts." *Hohenstein-Hartmetz Furniture Co. v. Matthews*, 92 N. E. 196, 198, 46 Ind. App. 616.

### Same—Set screw

A set screw, by which a circular knife is attached to a shaft in a paper mill, is a part of the shafting, within the meaning of *St. 1898, § 1636j*, providing that all shafting, etc., so located as to be dangerous to employes in the discharge of their duties shall be securely guarded or fenced by the owner or manager thereof. *Van de Bogart v. Marinette & Menominee Paper Co.*, 112 N. W. 443, 447, 132 Wis. 367.

## SHALE

As mineral, see Mineral.

**SHALL****As permissive or mandatory**

May construed as shall, see *May*.

Shall as permissive or mandatory when used in statutes, see *Shall* (In Statutes as Permissive or Mandatory).

In a contract providing that, if the parties are unable to agree as to the amount due, the same shall be referred to arbitrators, the word "shall" does not mean that a submission to arbitration would be a condition precedent to action on the contract. *Adams v. Haigler*, 51 S. E. 638, 640, 123 Ga. 659.

Complainant owned a coal yard, through which defendant operated a switch track. The railroad claimed to own the rails and ties, and, complainant refusing to concede that such was the fact, negotiations were entered into for the execution of a contract, in which complainant should concede to the railroad company a right of way and its ownership of the track, in consideration of which the railroad company should maintain the track and afford complainant service. Complainant having refused to route all possible traffic over defendant's road, further negotiations resulted in a contract by which, in consideration of a dollar paid by the railroad company, complainant admitted that it was the lawful owner of the track, agreeing that defendant, its successors and assigns, "shall and may have the right" to maintain and operate the side track until complainant, his heirs and assigns, shall serve on the railway company 60 days' notice to remove the same. This contract was signed only by complainant and certain trustees under a mortgage deed to the property, and not by the railroad company. Held, that the words "shall and may" as so used should not be construed as implying an absolute obligation on the part of the railway company, and that complainant was not entitled to restrain the railroad company from refusing to maintain the track. *Brown v. Southern Ry. Co.*, 187 Fed. 481, 484, 109 C. C. A. 333.

**As indicating future, present, or past**

Rev. Laws, c. 80, § 6, providing that all persons who are absent from the commonwealth for ten consecutive years "shall" lose their settlements, is not retroactive. The use of the word "shall" in the clause in question is in contrast with the words "are hereby defeated and declared to be lost," found in the earlier clause of the section which deals with past settlements. In other words, so far as language goes, the two clauses are not similar, but are in contrast with each other, and there is nothing to take this section out of the general rule that, even in a pauper settlement act, the word "shall" prima facie refers to the future. *City of Lawrence v. Town of Methuen*, 73 N. E. 860, 187 Mass. 592 (citing *City of Worcester v. Inhabitants of Barre*, 138 Mass. 101).

Act July 1, 1905 (Laws 1905, p. 320) § 3, providing that no person, unless previously registered or licensed to practice dentistry, "shall begin" the practice of dentistry without obtaining a license, is applicable to one who continued, after the act took effect, the illegal practice of dentistry previously begun. *Kettles v. People*, 77 N. E. 472, 473, 221 Ill. 221.

**SHALL (In Statutes as Permissive or Mandatory)**

Generally the word "shall" is mandatory in its legal acceptance. *Mau v. Stoner*, 83 Pac. 218, 219, 14 Wyo. 183.

The word "may," in every act imposing a duty, means "shall." *State ex rel. Purdin v. Gault*, 105 Pac. 242, 243, 56 Wash. 140.

"Shall" ought undoubtedly to be construed as meaning "must," for the purpose of sustaining or enforcing an existing right; but it need not be for creating a new one." *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, 103, 24 L. Ed. 71.

"The word 'shall' may be held to be merely directory when no advantage is lost, when no right is destroyed, when no benefit is sacrificed, either to the public or the individual, by giving it that construction. But, if any right to any one depends upon giving the word an imperative construction, the presumption is that the word was used in reference to such right or benefit. But, where no right or benefit to any one depends upon the imperative use of the word, it may be held to be directory merely." *Montgomery v. Henry*, 39 South. 507, 509, 144 Ala. 629, 1 L. R. A. (N. S.) 656, 6 Ann. Cas. 965 (quoting and adopting definition in *Wheeler v. City of Chicago*, 24 Ill. 105, 76 Am. Dec. 736; *Hickok v. Thayer*, 49 Vt. 372).

Words like "may," "must," "shall," etc., are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed. *Fields v. United States*, 27 App. D. C. 433, 440.

The mandatory word "shall" may often be treated as merely permissive, when necessary to sustain a statute or accomplish its purpose. *People ex rel. Barone v. Fox*, 129 N. Y. Supp. 646, 144 App. Div. 611.

Statutes which, when literally construed, are mandatory may be held directory, and vice versa, so that the word "shall" or "must" may under some circumstances be construed as "may." In *re Chadbourne's Estate*, 114 Pac. 1012, 1014, 15 Cal. App. 363 (citing *In re Ballentine's Estate*, 45 Cal. 699; *Hayes v. Los Angeles County*, 33 Pac. 766, 99 Cal. 74; *Suth. St. Const.* 634; *Wallace v. Feely* [N. Y.] 61 How. Prac. 225; *Merrill v. Shaw*, 5 Minn. 148 [Gil. 113]; *In re Thurber's Estate*, 56 N.

E. 631, 162 N. Y. 244; *Stone v. Pratt*, 35 N. Y. Supp. 519, 90 Hun, 39; *First Nat. Bank of Seneca v. Lyman*, 53 Pac. 125, 59 Kan. 410; *Cooke v. Spears*, 2 Cal. 409, 56 Am. Dec. 348; *People ex rel. Chipperfield v. Sanitary Dist. of Chicago*, 56 N. E. 953, 184 Ill. 597).

The presumption is that the word "shall" in a statute is used in an imperative, and not in a directory, sense. If a different interpretation is sought, it must rest upon something in the character of the legislation or in the context which will justify a different meaning. *Haythorn v. Van Keuren & Son*, 74 Atl. 502, 504, 79 N. J. Law, 101; *Board of Finance of School City of Aurora v. People's Nat. Bank of Lawrenceburg*, 89 N. E. 904, 905, 44 Ind. App. 578.

The word "shall," as generally used in statutes, is mandatory, but since the intention of an act will prevail over the literal sense of its terms, the word as used in Act June 21, 1895 (Laws 1895, p. 113, § 20), providing that a loan association may be reorganized at a meeting of its stockholders for that purpose, and that "notice of such a meeting shall be given," etc., is merely directory: the essential object of the law being that the reorganization should not take place without the assent of the stockholders. *Holmes v. Royal Loan Ass'n*, 107 S. W. 1005, 1007, 128 Mo. App. 329.

*Levee Act*, § 17b (Hurd's Rev. St. 1909, c. 42), in so far as it declares that a jury impaneled to spread an assessment of benefits by drainage improvements shall return a verdict which "shall" produce the total sum of the estimated cost of the proposed work, is not unconstitutional as requiring the jury to assess an arbitrary sum, regardless of benefits, since the word "shall" should be construed as though used in the sense of "may," rendering the statute directory only. *Spring Creek Drainage Dist. v. Elgin, J. & E. R. Co.*, 94 N. E. 529, 542, 249 Ill. 260.

Under Hurd's Rev. St. 1903, c. 32, § 3, relative to the organization of corporations, and providing that notice of the first meeting of subscribers to capital stock, for the purpose of electing directors, etc., shall be given by depositing in the post office a written or printed notice addressed to each subscriber, at least 10 days before the time fixed for the meeting, and section 4 requiring a copy of the notice to be included in the report made to the Secretary of State, the failure to give such notice, where all the subscribers to stock waived it in writing, did not render the organization of the corporation defective, so as to bring the board of directors within section 18, declaring that if directors of any corporation assume to exercise corporate powers, or use the name of the corporation, without complying with the act, they shall be personally liable for all debts incurred by them in the name of the corporation. The mere fact that the word "shall" is used in the stat-

ute in providing for the notice does not render the provision mandatory. *J. W. Butler Paper Co. v. Cleveland*, 77 N. E. 99, 100, 220 Ill. 128, 110 Am. St. Rep. 230.

The word "shall," in *Tenement House Act* N. Y. (Laws 1901, p. 902, c. 334, § 56), is mandatory in every instance, and denotes that the house shall be maintained in all respects according to the mandate. *People ex rel. Ungrich v. Crain*, 95 N. Y. Supp. 906, 908, 47 Misc. Rep. 281.

In an act providing for the establishment of drainage districts, the word "shall" can properly be read as "may." *Sisson v. Board of Sup'rs of Buena Vista County*, 104 N. W. 454, 461, 128 Iowa, 442, 70 L. R. A. 440.

In Rev. St. 1909, § 7109, providing that fraternal beneficiary associations, doing business on a lodge system, shall pay death benefits to the families, heirs, blood relatives, affianced husband or affianced wife of, or to persons dependent on, the member, the word "shall" was not intended in a mandatory sense so as to require beneficial associations to include all the classes of beneficiaries specified; and hence such an association was authorized to limit the payment of its benefits to blood relatives and members of the family of the insured, and to persons dependent on him. *State ex rel. v. Knights of Father Matthew*, 144 S. W. 896, 164 Mo. App. 361.

In Code Supp. 1910, p. 619, providing that, in the case of benefit societies, payment of death benefits shall be to families, heirs, blood relatives, affianced husband or wife, or to persons dependent on the member, as may be designated by him, or to such other beneficiaries as may be permitted by the laws of the state in which the society is chartered, etc., the word "shall" should be construed "may," so that the statute did not extend the class of persons capable of receiving benefits under the charter of an association, providing that benefits should be paid to the nearest relative, or such other dependent of the member as might be designated according to the society's by-laws, etc. *Pettus v. Hendricks*, 74 S. E. 191, 193, 113 Va. 326 (citing Words and Phrases, "shall").

The word "shall," as used in a statute providing that certain offices shall be declared vacant on the failure of the official to file a bond within a month after his election, will be construed to mean "may." In re *Supervisor of Nether Providence Tp.*, 64 Atl. 443, 444, 215 Pa. 119.

*Burns' Ann. St. 1901*, § 7087e, provides that it shall be the duty of factory owners to inclose elevator shafts and install automatic trapdoors, if, in the opinion of the chief inspector, safety requires it, and declares that the inspector shall inspect the cable, gearing, or other apparatus of elevators in the establishments and require that the same be kept in safe condition with proper safety devices.

Held, that such section, in so far as it provides for the installation of safety devices, is not mandatory because the word "shall" is used, and a factory owner is not bound to install safety devices on elevators, unless required to do so by the inspector. *Reliance Mfg. Co. v. Langley*, 82 N. E. 114, 116, 41 Ind. App. 175.

Rev. St. 1898, § 1952, provides that life insurance companies whose members are entitled to share in the surplus cumulations "may" make distribution thereof annually or once in two, three, four, or five years, and in determining the amount of surplus to be distributed there "shall" be reserved an amount equal to the net value of the outstanding policies. The section is the same as Laws 1870, p. 107, c. 59, § 14, the purpose of which, as appears from instructions to the legislative committee which reported the bill, was to afford proper "protection to policy holders" by safeguard against insolvency of insurance companies by requiring the cumulation of the reserve fund. Held, that the use of the word "shall" in the section in relation to the reserve fund is imperative, while "may" in relation to distribution of the surplus is permissive, and having been so construed by the state officials and insurance companies for more than 30 years, the license of an insurance company will not be revoked for deferring the distribution of the surplus more than five years. *Equitable Life Assur. Soc. v. Host*, 102 N. W. 579-583, 584, 124 Wis. 657, 4 Ann. Cas. 413.

#### Judicial duties and proceedings

The provision of Code, § 242, that the record of the proceedings of the district court "shall be signed by the judge," is directory only. *Donnelly v. Smith*, 103 N. W. 776, 777, 128 Iowa, 257.

Under Rev. St. 1899, § 4422, providing that the judge "shall" allow a reasonable fee to the attorney bringing suit, there is no discretion in the matter except as to the amount of fees to be given. *Whitsett v. Wamack*, 69 S. W. 24, 25, 95 Mo. App. 296.

The Legislature, by using the term "shall grant a change of judge" in Sess. Laws 1907-08, c. 68, art. 1, § 10, p. 592, instead of the term "may on application of either party, change the place of trial to some county where such objection does not exist," in view of the construction of the word "may" in the case of *Kansas Pacific Ry. v. Reynolds*, 8 Kan. 630, did not render the statute in that respect any more mandatory, and there can be no special significance in the use of the word "shall" instead of the word "may." *State ex rel. Smith v. Brown*, 103 Pac. 762, 765, 24 Okl. 433.

"Shall," as used in Gen. St. 1902, § 237, providing that, when any person having property shall be found incapable of managing his affairs, the court of probate shall appoint

a conservator of such person, etc., does not exclude a reasonable discretion on the part of the court of probate or of the superior court on appeal in the appointment of such conservators. *Appeal of Wentz*, 56 Atl. 625, 626, 76 Conn. 405.

Act No. 56, p. 135, of 1904, provides that, in cases appealed to the wrong courts, the judges "shall have the right" to transfer the appeals to the proper tribunals, instead of dismissing them. If the lawmakers had intended that the transfers, in such cases, should be obligatory, they would no doubt have so expressed themselves. As the law reads, it lies within the sound discretion of the court to which the appeal is taken to transfer or dismiss it. In the instant case, the latter is found to be the proper course to pursue. *Samuel Israelite Baptist Church v. Thomas*, 41 South. 564, 565, 117 La. 253.

In Code 1904, § 2544, providing that a person interested in a testator's estate may within two years proceed by bill in equity to impeach or establish the will, on which bill a trial by jury shall be ordered, the word "shall" should be construed in the sense of "may," and hence the section did not prevent a waiver of trial by jury by the parties. *Meade v. Meade*, 69 S. E. 330, 331, 111 Va. 451.

Kirby's Dig. § 2256, provides that upon an indictment being found, if the defendant is not in custody or on bail, the court shall forthwith make an order for process to be issued thereon, designating whether for arrest or summons, and if for arrest, and the offense is bailable, the bail shall be fixed. Preceding sections provide that process on an indictment consists of writs for arresting or summoning the defendant, and that a process of arrest may be issued by the clerk upon the order of the court. Subsequent sections prescribe the form of bench warrant and the summons, and that the summons shall only be issued on indictments for misdemeanor, where the court has not ordered a bench warrant. Section 2264 provides that the court may order a bench warrant to be issued on any indictment. Section 7817 provides that all proceedings under the Code and its provisions shall be liberally construed. Held, that the language in section 2256 "the court shall forthwith make an order for process to be issued thereon" is not mandatory upon the circuit court, but is directory merely. *State v. Grace*, 136 S. W. 670, 98 Ark. 505.

Code Civ. Proc. § 134, as amended March 19, 1907 (St. p. 681, c. 358, § 1), provides that no court other than the Supreme Court "must" be open on any of the holidays mentioned in section 10, except to give instructions to juries on their request, to receive a verdict or discharge a jury, or for the exercise of the powers of a magistrate in a criminal action, and that injunctions and writs of prohibition may be issued on any day.

Previous to the amendment of 1907 the section read no court "shall" be open nor shall any judicial business be transacted, etc., provided that the Supreme Court and the superior courts shall always be open for the transaction of business, and that injunctions and writs of prohibition may be issued on any day. Among the holidays mentioned in section 10 is any day appointed by the Governor for a holiday. Section 133 provides that courts of justice may be held and judicial business transacted on any day except as provided in section 134. Section 135 provides that, if any day mentioned in section 134 happens to be the day appointed for the holding of a court or to which it is adjourned, it shall be deemed appointed for or adjourned to the next day. Held, that section 134 as amended March 19, 1907, still means what it has always meant, that the superior court shall not on a legal holiday transact any judicial business outside of the constitutional and statutory exceptions, notwithstanding the substitution of the word "must" for "shall"; and hence a sentence pronounced on a day appointed by the Governor as a legal holiday was void. *Ex parte Smith*, 93 Pac. 191, 193, 194, 152 Cal. 566.

The words "shall" and "may," as used in the Utah Constitution, providing that certain officers "shall be conservators of the peace, and may hold preliminary examinations," are used advisably, and each is to be understood in its usual and ordinary sense, and a statute conferring jurisdiction on other officers to act as committing magistrates is not in conflict with the Constitution. *State v. Shockley*, 80 Pac. 865, 868, 29 Utah, 25, 110 Am. St. Rep. 639 (quoting and adopting 8 Cyc. 586).

Rev. St. 1898, § 4222, subd. 5, requiring, as a condition precedent to an action for injuries, that a notice of the injuries, etc., "shall" be served on one claimed to be responsible in the manner required for service of summons in courts of record, is mandatory, and service on the claim agent of the railroad company is insufficient; the word "shall" not meaning "may." *Smith v. Chicago, M. & St. P. Ry. Co.*, 102 N. W. 336, 337, 124 Wis. 120.

In Gen. St. 1894, § 7181, providing that the court shall not excuse from service, upon either the grand or petit jury, any person duly drawn and summoned, except upon the ground that the person seeking to be excused is either physically or mentally unable or unfit, in the opinion of the court, to attend or serve as a juror, or by reason of serious sickness of some immediate member of the family of the person so summoned, the word "shall" is to be construed as if it were permissive rather than mandatory, as there are many reasons why a juror may be excused by authority of the court in cases not men-

tioned. *State v. Strait*, 102 N. W. 913, 914, 915, 94 Minn. 384.

The word "shall," as used in Acts 1903, p. 341, c. 193, § 8, providing that the Supreme and Appellate Courts shall carefully consider and weigh the evidence in all cases not now or hereafter triable by jury, is used in the sense of "may." *Parkison v. Thompson*, 73 N. E. 109, 111, 164 Ind. 609, 3 Ann. Cas. 677.

Administration Act (1 Starr & C. Ann. St. 1896, p. 269, c. 3) § 1, providing that, when a will has been duly proved, the county court "shall" issue letters testamentary thereon to the executor named in the will, is mandatory when the person named as executor accepts the trust, gives bonds to discharge the same, and is legally competent. *Clark v. Patterson*, 73 N. E. 806, 808, 214 Ill. 533, 105 Am. St. Rep. 127.

The word "shall," as used in Act No. 108, p. 155, of 1898, providing that appeals in criminal cases shall be taken by motion, either verbally or in writing, in open court within three days after sentence has been pronounced, is not used to give discretion, but to require, peremptorily, that all appeals shall be taken three days after sentence. The statute adopted a positive and absolute rule in which public interest is concerned and which cannot be waived under any of the defining powers given to the prosecution. *State v. Vicknair*, 43 South. 635, 637, 118 La. 963 (citing *State v. Moore*, 26 South. 1001, 52 La. Ann. 606).

Rev. St. 1899, § 1264, providing that, in proceedings to condemn land, the owners of all such parcels as lie within the county or circuit shall be made parties defendant, providing that it shall not be necessary to make any persons parties defendant unless they are either in actual possession of the premises to be affected or have a title appearing of record, is mandatory, and not to be construed as merely directory, in order to harmonize with section 1267, providing that any number of owners resident in the same county or circuit may be joined in one petition. The word "necessary" indicates that the lawmakers intended "shall be" to mean an imperative command. *Kansas City Interurban R. Co. v. Davis*, 95 S. W. 881, 884, 197 Mo. 669, 114 Am. St. Rep. 790.

The phrase "shall not be made," in Wilson's Rev. & Ann. St. 1903, § 4624, providing that an order to revive an action in the names of the representatives or successors of the plaintiff may be made forthwith, but shall not be made without the consent of the defendant after the expiration of one year from the time the order might have been made, is peremptorily prohibitive. It imposes an absolute prohibition against the granting of an order after the lapse of one year after the time when it might have been made. At the

expiration of that time the right ceases to exist. *Glazier v. Heneybuss*, 91 Pac. 872, 874, 19 Okl. 316.

#### Legislative duties

Const. art. 2, § 20, declaring that "the style of the laws of this state shall be," etc., is mandatory, and must be complied with; the word "shall" being equivalent to "must." *State ex rel. v. Burrow*, 104 S. W. 526, 529, 119 Tenn. 376, 14 Ann. Cas. 809.

The word "shall," in Const. art. 2, § 18, providing that every bill shall be read once on three different days, and passed each time in the House where it originated, before transmission to the other, that no bill shall become a law until it shall have been read and passed on three different days, until it shall have received on its final passage in each House the assent of a majority of all the members to which that House shall be entitled under the Constitution, until it shall have been signed by the respective speakers in open session, to be noted on the journals, and until it shall have received the approval of the Governor, or passed without it, as otherwise provided for, is the equivalent of the word "must," making the provision mandatory, but the provision that the fact of the signature of the Speaker of the respective Houses shall be noted on the journals is directory only. Therefore an act bearing the signature of the Speakers of the House and Senate and approved by the Governor will be treated as properly passed, though the journal of the House does not show that it was signed by the Speaker in open session. *Home Tel. Co. v. City of Nashville*, 101 S. W. 770, 773, 118 Tenn. 1, 11 Ann. Cas. 824.

#### Official duties

Where a charter of a city confers power on it to be exercised for the public good, the exercise of the power is imperative, and the words "the council shall have power to" mean duty and obligation. *Cavender v. City of Charleston*, 59 S. E. 732, 734, 62 W. Va. 654.

The word "shall" should be construed to mean "may" in *Comp. Laws*, § 479, as amended by St. 1895, p. 35, c. 37, providing that the commissioners, on the presentation of a petition for the vacation of a public road, shall within 30 days thereafter vacate the road. *State ex rel. Dangberg v. Board of Com'rs of Douglas County*, 77 Pac. 984, 986, 27 Nev. 469.

The word "shall" is frequently construed as not mandatory when the provision in which it is found does not confer a private right and the public interest does not demand such construction. *Rev. St. art. 3387*, relative to local option elections, which provides that the clerk of court shall post five copies of the order of election at different places at least 12 days prior to the day of election, although mandatory in terms, does not invalidate an election because of a mere

failure to post one of the notices until nine days prior to the day of election. *Norman v. Thompson*, 72 S. W. 64, 66, 30 Tex. Civ. App. 537 (quoting *Davis v. State*, 12 S. W. 957, 962, 75 Tex. 420).

*Denver City Charter*, art. 7, § 31, providing that the city council shall pass an assessing ordinance after recommendations of the council for improvements have been reviewed by the board of public works, is to be construed as meaning that the council "may" pass such an ordinance. *City of Denver v. Londoner*, 80 Pac. 117, 121, 33 Colo. 104 (citing *Board of County Com'rs of Pueblo v. Smith*, 45 Pac. 357, 22 Colo. 534).

The word "shall," when used in a statute, is presumed to have been used in its imperative sense. As used in *Burns' Ann. St. 1908*, § 7541 (Acts 1907, p. 391, c. 222, § 21), providing that, when two or more banks propose to become depositories, the board of finance shall impartially select as many of such banks as tender satisfactory security, etc., it is imperative, and the act gives the board no discretion in the selection of the banks or trust companies. *Board of Finance of the School City of Aurora v. People's Nat. Bank of Lawrenceburg*, 89 N. E. 904, 905, 44 Ind. App. 578.

A statute providing that a treasurer "shall" "give bond with sufficient securities to be approved by the Legislature" is directory as to such approval, and its nonobservance cannot affect the validity of the instrument. *State v. Sooy*, 38 N. J. Law, 327, 334.

In *Civ. Code 1910*, § 387, providing that the proper officers shall cause courthouses, bridges, etc., to be built or repaired by letting out the contract therefor to the lowest bidder, the word "shall" is not to be construed as "may," but the statute is mandatory. *Garrison v. Perkins*, 74 S. E. 541, 547, 137 Ga. 744.

*Act 1907*, c. 209, §§ 24, 25, providing that a special court for the trial of misdemeanors is established to be known as the "recorder's court of Rocky Mount," and providing that it shall be presided over by a recorder, who shall be a resident and qualified voter of the city, and "shall" be elected by the aldermen of the city at a certain meeting, was one concerning the public interest, and hence the word "shall" was not to be construed as equivalent to "may," but that the act was mandatory and imposed an absolute duty on the board to elect a recorder to preside over such court. *Battle v. City of Rocky Mount*, 72 S. E. 354, 355, 156 N. C. 329.

In *Act May 13, 1901* (P. L. 191), authorizing the taking of abutments and other property of a bridge company in the building of a free bridge by two counties, the provision that if the commissioners of the counties shall neglect to act on the petition of property owners and taxpayers in the city, borough,



or township in which the bridge was located, which petition shall set forth fully all the facts supported by the affidavit of five of the property owners and taxpayers, the court of common pleas on hearing "shall" issue a mandamus to the commissioners means that the court in each of the counties shall have jurisdiction over the commissioners in its own county, that the commissioners are first authorized to use their discretion as to whether a bridge shall be built, but that this discretion is expressly subject to review by the common pleas of the respective counties; and if, on review, the court decides that the commissioners should exercise their authority, it can compel action by mandamus; the word "shall" in the statute being construed as "may." *Lewisburg Bridge Co. v. Union and Northumberland Counties*, 81 Atl. 324, 329, 232 Pa. 255.

The power to determine whether or not a quo warranto proceeding shall be instituted is vested in the Attorney General or prosecuting attorneys by the statute providing that, in case any person usurps any office, the Attorney General or prosecuting attorneys "shall" exhibit an information in the nature of a quo warranto, and the officers have discretion whether to proceed or not; the word "shall" not being mandatory. *Black, State ex inf. Dorian ex rel. v. Taylor*, 106 S. W. 1023, 1026, 208 Mo. 442.

Const. 1901, § 222, authorizes the Legislature to pass general laws authorizing cities and towns to issue bonds, but forbids bonds to be issued unless first authorized by a majority vote by a ballot of the qualified electors, and provides a form of ballot to be used, declaring that the ballot "shall" contain the words, etc. Held, that such provision, in so far as it prescribed the form of ballot, was mandatory, and that a failure to use the form prescribed invalidated the election. *Coleman v. Town of Eutaw*, 47 South. 703, 704, 157 Ala. 327.

Code, § 1530, provides that the board of county supervisors of each county have charge of the collection of the county road fund and the expenditure thereof, but that so much of the fund as arises from property within any city shall be expended on the streets of the city or on the roads adjacent thereto under the direction of the city council. Held, that the part of the road fund collected within a city must be expended on the roads in and about the city as directed by the city council, since the word "shall," when addressed to public officers, is mandatory. *City of Newton v. Board of Sup'rs of Jasper County*, 112 N. W. 167, 168, 135 Iowa, 27, 124 Am. St. Rep. 256.

#### SHALL BE CONTRACTED

See Contract.

#### SHALL BE INDISPENSABLE

Under St. 1903, § 3212, providing that, for the execution of a contract by the board of education of a city, the concurrence of a majority of its members "shall be indispensable, and, on a call for the yeas or nays, to be entered of record," the vote must in all cases be on call of the yeas and nays, and not merely where so demanded by a member. *Board of Education of City of Newport v. Newport Nat. Bank*, 90 S. W. 569, 571, 121 Ky. 775.

#### SHALL BE INTENDED TO BE OR SHALL BE CARRIED

New York Building Code, § 22, provides that, whenever an excavation shall be intended to be or shall be carried to the depth of more than 10 feet below the curb, the person or persons causing such excavation to be made shall preserve from injury and support the walls of adjacent buildings. Held, that the words "shall be carried," in addition to the words "shall be intended," indicate a legislative intention not to exempt an owner merely because his excavation was not intended to be more than 10 feet, if in fact it should be carried below that depth; and hence the fact that specifications for defendant's building only required a 10-foot excavation did not relieve defendant from liability for injuries caused to the wall of plaintiff's adjoining building by the act of an independent contractor in excavating to a greater depth. *Rosenstock v. Laue*, 122 N. Y. Supp. 525, 67 Misc. Rep. 251.

#### SHALL BE LAWFUL

The words "it shall be lawful" import a discretion. It is only where the subject-matter imperatively requires it that they can receive a different construction. *People ex rel. Comstock v. City of Syracuse*, 12 N. Y. Supp. 890, 894, 59 Hun, 258.

The words "it shall be lawful" are peremptory, when used in a statute, where the public or an individual has a right de jure, that the powers conferred by the act should be exercised. *Graham v. City of Tusculumbia*, 42 South. 400, 402, 146 Ala. 449 (quoting and adopting *Tarver v. Commissioners' Court of Tallapoosa County*, 17 Ala. 527).

Where permissive words, such as "it shall be lawful," are used in a statute in respect to courts and officers, such words will be regarded as imperative in cases where the public or individuals have a right to demand the exercise of the power conferred. *Ex parte Young*, 95 S. W. 98, 102, 49 Tex. Cr. R. 536 (citing *Lewis' Southerland*, Stat. Cons. § 636; *Tarver v. Commissioners' Court of Tallapoosa County*, 17 Ala. 527; *Mitchell v. Duncan*, 7 Fla. 13; *David v. Levy*, 119 Ala. 241, 24 South. 589; *Smith's Petition*, 5 Pa. Dist. R. 465).

#### SHALL HAVE

Laws 1907, p. 1682, c. 721, § 1, subd. 3, amending Laws 1896, p. 795, c. 908, which

repeals Laws 1880, p. 402, c. 269, provides that when a tax shall have been levied and collected in any school district on a property assessment valuation ascertained from the town assessment roll, which assessment shall have been adjudged by order of the court to have been erroneous, the trustees of the school district shall audit and cause to be paid to the person paying the tax the amount paid by him in excess of what the tax would have been in case the assessment had been made as adjudged, together with interest from the date of the payment. The act further provides that where the certiorari, on which the excessiveness of the tax was adjudged, was issued pursuant to Laws 1880, p. 402, c. 269, and such tax shall not have been already refunded, the application for audit and allowance must be within three years from the passage of the act, and that, when the writ of certiorari was issued under the provisions "of this act," the application must be made within three years, after the entry of the final order adjudging the assessment to be erroneous. Held, that though the phrase "shall have been," as used in the clause, "when a tax shall have been levied and collected," is a future perfect tense, and contemplates an event completed in the future without reference to the past, and though the act amends a general law, still it clearly indicates a legislative intent that it should be retrospective, as well as prospective, as appears from the provision which expressly authorizes the presentation of claims based upon a reduction made pursuant to a certiorari issued under the act of 1880, which reduction must have been made previous to the repeal of the act by the act of 1896. *People ex rel. Eckerson v. Town Board of Education, etc., of Haverstraw*, 110 N. Y. Supp. 769, 771, 126 App. Div. 414.

Rev. St. 1899, § 2868, repealed by Laws 1905, p. 138 (Ann. St. 1906, p. 1652), provides that if any action under chapter 17 (pages 1637-1658), relating to damages for torts, shall have been commenced within one year after the cause of action shall accrue and plaintiff suffer a nonsuit, etc., he may commence a new action within one year after the nonsuit, etc. Held, that the phrase "shall have been commenced" includes pending as well as future actions, especially in view of section 4160 (page 2252), requiring that words and phrases shall be taken in their ordinary sense, and, where a death action was commenced within a year after the death and before section 2868 took effect, and a nonsuit was suffered after it was in force, plaintiff could recommence suit within a year after the nonsuit. *Clark v. Kansas City, St. L. & C. R. Co.*, 118 S. W. 40, 44, 219 Mo. 524.

The phrase "shall have testified," as used in a statute providing that no person shall testify for himself as to any verbal statement of, or any transaction with, one who is dead,

unless the decedent or representative of an interest in the estate shall have testified against such person with reference thereto, means has previously testified, so that defendant's testimony as to verbal statements of or transactions with her father prior to his death to prove her title to property in controversy was not rendered competent by the subsequent testimony of defendant's sister as to other declarations made by decedent in defendant's absence. *Foley v. Dillon (Ky.)* 105 S. W. 461, 463.

### SHALL STAND SUSPENDED

See Suspend—Suspension.

### SHAM

"Sham," the adjective, is defined as false, counterfeit, pretended, feigned, unreal; and the noun is given the primary meaning of that which deceives expectation, any trick or fraudulent device that disappoints, a make-believe, imposition, humbug. *Williams v. Territory*, 108 Pac. 243, 245, 13 Ariz. 27, 27 L. R. A. (N. S.) 1032.

### SHAM ANSWER

A sham answer is one that is false and untrue; the word "sham" being construed by the courts as synonymous with "false." *State ex rel. Engelhard v. Weber*, 105 N. W. 490, 492, 96 Minn. 422, 113 Am. St. Rep. 630.

A "sham" answer is one good in form but false in fact, and not pleaded in good faith. *Continental Building & Loan Ass'n v. Boggess*, 78 Pac. 245, 247, 145 Cal. 30 (citing *And. Law Dict.*); *White v. Calhoun*, 94 N. E. 743, 83 Ohio St. 401.

A "sham answer" is one which is false, and which the court is authorized to strike out by Code Civ. Proc. § 538. *Arnold v. Arnold*, 119 N. Y. Supp. 451, 134 App. Div. 758.

### SHAM PLEADING

A "sham pleading" is one which is manifestly false in fact. *Oregonian Ry. Co. v. Oregon R. & Nav. Co.*, 22 Fed. 245, 248.

When a pleading is attacked by motion and affidavit as being "sham," and upon examination is found to be a declaration wholly at variance to the experience of all men, the court would be justified in declaring it to be a sham and fictitious plea, and order that it be stricken from the records for that reason. *St. Louis & S. F. R. Co. v. Bradford*, 88 Pac. 1050, 1052, 18 Okl. 154.

### SHAMELESSNESS

"Pruriency" is an elastic term. Matter and conduct which some good people deem prurient other good people deem chaste. There is no fixed standard of pruriency. It is largely a matter of education and taste. And the same is true in respect of 'scandal' and 'shamelessness.'" Hence where a critic published of a book and its author that they

were a "scandal" and "shameless," and that the author was "prurient," under circumstances that would not justify the charges beyond question, it was for the jury to say whether the inferences drawn by the critic from the facts were reasonably possible, and therefore permissible. *MacDonald v. Sun Printing & Publishing Ass'n*, 92 N. Y. Supp. 87, 40, 45 Misc. Rep. 441.

## SHAMROCK

Artificial shamrock dutiable as artificial leaves, see Artificial Flowers.

## SHANTY

As business office, see Business Office.

A double-boxed, stripped house, about 30 by 15 feet, with an ell attachment, and four or five appurtenant buildings, such as a smokehouse, two or more privies, and an old stable or woodhouse, are "shanties," within the meaning of a covenant in a deed to a railroad company not to erect shanties on the land conveyed. *Grubbs & Kirk v. Louisville & N. R. Co.* (Ky.) 123 S. W. 1195.

## SHAPE

See Sheared Shape.

Construing Tariff Act July 24, 1897, c. 11, § 1, Schedule C, pars. 135, 137, 193, 30 Stat. 161, 167, which paragraphs provide, respectively, for "steel in all forms and shapes," for articles made from wire, and for manufacturers of steel, held, that steel wool is dutiable under the first of these provisions, rather than either of the other two. The word "shape," as used in the statute, has a technical meaning, and is applied to certain standard structural steel material, such as tees, angle bars, bulbs, etc. *United States v. Buehne Steel Wool Co.*, 154 Fed. 93, 94.

## SHARE

See Bank Shares; Distributive Share; Equal Shares; Just Share; Legal Share.

"Share" is one of the whole number of equal parts into which the capital stock of a trading company or corporation is or may be divided, as shares in a bank or shares in a railway. *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945, 963.

"Many of the English, and nearly all the American, cases \* \* \* consider a 'share' of an estate, consisting of both realty and personalty, given over on a contingency to the 'survivor,' as clear evidence that the testator did not intend an indefinite failure of issue." *Abbott v. Essex Co.*, 59 U. S. (18 How.) 202, 216, 15 L. Ed. 352.

When used to mark out an inheritance in an estate, the words "the share" do not

import that there is something more, to be otherwise and elsewhere pointed out, but indicate totality. *Jones v. Gane*, 91 N. E. 129, 130, 205 Mass. 37.

Where a grantor by deed of trust provided that at her death one-fourth of her estate should go to each of three children, and the other one-fourth should go to the trustee for the benefit of the fourth child during his life and at his death to his children free of the trust, and the deed of trust made advancements to each child a charge on his "share," advancements to the fourth child were a charge only on his equitable life estate, and not on the "share" of his children. *Jacob Tome Institute v. Shipley*, 62 Atl. 1042, 1044, 102 Md. 642.

Under Rev. St. 1899, § 2944, providing that, when the husband shall die leaving a child or children or other descendants, the widow, if she has a child or children by such husband living, may, in lieu of dower of the one-third part of the lands for life, elect to be endowed absolutely in a share of such lands equal to the "share of a child" of such deceased husband, the "share of a child" referred to means its share in the real estate, not its interest in the personalty, and the widow's exercise of her election to take a child's portion does not affect her right to the bounty provided by section 107, when it is applied for in the time prescribed by section 108. *Hill v. Evans*, 91 S. W. 1022, 1023, 114 Mo. App. 715.

Where a testator bequeathed legacies to each of his two nieces and to his sister, which legacies were to be held in trust during their lifetime, with the provision that, in case of the death of either without issue, then the share of such decedent should go over, the word "share" had reference to the principal of the trust, and disposed of it. In re *Hoffman's Will*, 94 N. E. 990, 201 N. Y. 247.

### Part synonymous

The words "share" and "part," as used in a bequest of a store business, reciting that "the 'share' or part so belonging to my estate to be taken by my executors hereinafter named as part of its general assets" are to be treated as synonymous and refer to testator's "share" of the existing stock in trade, and the word "share" does not refer to future profits. *Oram v. Peirce*, 67 Atl. 1053, 1054, 73 N. J. Eq. 391.

## SHARE AND SHARE ALIKE

A will giving property to testatrix's children for their lives, "with remainder to the child or children of any child as may leave issue upon their death, share and share alike," gave each of testatrix's children a life estate, his part going to his children on his death; the words "share and share alike" qualifying the estate given the children, and not the remainder to the grandchildren.

White v. White, 150 S. W. 388, 389, 150 Ky. 283.

#### As per capita

Testator provided by will that, on the death of either of his daughters after decease of testator's wife, the trustee under the will should pay over a proportion of the principal of a fund for their benefit, "equal to the proportion of the income thereof which such daughter so dying shall at her decease be entitled to receive, to her lawful issue, share and share alike; and in case of either or both dying without such issue living at her decease, then to my then heirs at law, in either and all cases to have and to hold to them, their heirs and assigns to their own use and behoof forever." The provision was one of several provisions contained in the ninth clause, in which testator provided for the disposition of the remainder in the shares given for life to his three children. Each of such shares was to go to the issue of the life tenant after his decease. There were four paragraphs providing for different contingencies as to the order of decease, etc.; all indicating a scheme that issue should take by right of representation. In two paragraphs it was expressly provided that the issue were to take by representation, while in two others, without any apparent reason for making a distinction, those words did not appear. Held, that the provisions and scheme of the will indicate that testator intended, if one of his children should die, leaving several children and also grandchildren, who were children of one of the living children, that they should take per stirpes and not per capita. The term "share and share alike" in such will does not necessarily mean that each of such issue shall have an equal share with every other, but such direction is satisfied if all such issue share in a division which is equal as between living children and the issue of deceased children, taking per stirpes. *Coates v. Burton*, 77 N. E. 311, 312, 191 Mass. 180 (citing *Hall v. Hall*, 2 N. E. 700, 140 Mass. 267).

#### As creating tenancy in common

Testatrix disposed of the whole of the income of her residuary estate in aliquot parts, bequeathing to a brother and his son one-fourth each for life, and the remaining two-fourths, to three beneficiaries, "share and share alike" (that is, one-third of two-fourths for each during all their life), and on the decease of her brother "his one-fourth to go" to her nephew, "making his share of the income two-fourths for life," and on the nephew's decease testatrix directed the principal of her estate to be divided one-half to the heirs of her nephew and the other to a certain friend, or his heirs and assigns. Held, that on the death of one of the three beneficiaries of the two-fourths interest in the income, a contention by the survivors that they took deceased's share, because they

were survivors of a class to whom the portion was given as an entirety during their joint lives, was untenable, in view of the direct provisions of the will disclosing an intention to make them tenants in common. *Colville v. Kinsman* (N. J.) 60 Atl. 939, 962.

#### As creating tenancy in severalty

In a deed of trust providing that if a husband and wife, the beneficiaries, shall both die leaving issue of their marriage, "then in trust to convey said separate property to the said issue living at the time of the death of the survivor of them share and share alike," the use of the words "to convey" and "share and share alike" indicates an intention that there should be distribution among the children, and also conveyances to them by the trustee in severalty. *Jones v. Rountree*, 76 S. E. 55, 56, 138 Ga. 757.

The phrase "share and share alike," in a will providing that testator's wife and two children should each have one-third of the proceeds of certain property to be paid in semiannual installments, but that no part of the principal should be paid to either of the children, and, if the wife died before the children, then her shares should be added and counted as belonging to the two children. Share and share alike is wholly inconsistent with a joint tenancy with a right of survivorship, and, upon the death of one of the children, the whole income could not go to the other. *Kellogg v. Burnett*, 69 Atl. 196, 197, 74 N. J. Eq. 304 (citing *Stoutenburgh v. Moore*, 37 N. J. Eq. 63; *Stoutenburgh v. Stoutenburgh*, 38 N. J. Eq. 281; *Woolston v. Beck*, 34 N. J. Eq. 74).

Though the words "share and share alike," in a residuary clause giving a legacy to children who naturally form a class by reason of their relation to each other, tend toward a construction thereof as intending a gift to the individuals and not to them as a whole, they are not in any event conclusive, and do not overcome a general intent not to be intestate. Where a clause in a will read: "I give and bequeath the balance of my real estate and personal property to my heirs as follows to the eight children of my nephew A. W. H. eight shares to the eight children to my niece F. F. eight shares and my said niece one share and to G. A. H. son or my grand nephew A. H. one share, making eighteen shares share and share alike"—one of the niece's children having predeceased the testator, leaving no children, the eight shares of the residuum given to her children should be divided equally among the seven surviving. *Smith v. Haynes*, 89 N. E. 158, 159, 202 Mass. 531.

#### SHARE CAPITAL

The words "share capital" may mean either the capital subscribed, the share capital, or the capital paid in the actual assets

with which the company does business, and in 1904, p. 275, providing that the directors of a corporation shall not divide, withdraw, or pay to the stockholders any part of the capital stock, etc., they seem to be used in both senses; and, when the Legislature forbids the dividing, withdrawing, or paying to the stockholders any part of the capital stock, it means the capital actually invested; when it forbids the reduction of the capital stock, it means the share capital subscribed or the authorized capital. *Goodnow v. American Writing Paper Co.*, 69 Atl. 1014, 1016, 73 N. J. Eq. 692.

### SHARE EQUALLY

See Equally Divided.

### SHARE OF STOCK

A "share of stock" is a proportional part of certain rights in the management and profits of a corporation during its existence and in the assets on dissolution. *Markle v. Burgess*, 95 N. E. 308, 309, 176 Ind. 25 (citing 1 Cook, Corp. § 12).

A "share" of the capital stock of a corporation is the interest or right which the owner has in the management of the corporation, in its surplus profits, and, upon dissolution, in all of its assets remaining after the payment of its debts. *Lipscomb's Adm'r v. Condon*, 49 S. E. 392-395, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938 (citing *Clark Corp.* 1141).

"A 'share of stock' is an incorporeal intangible thing. It is a right to a certain proportion of the capital stock of a corporation—never realized except upon the dissolution and winding up of the corporation—with the right to receive in the meantime such profits as may be made and declared in the shape of dividends." *Mann v. German American Inv. Co.*, 97 N. W. 600, 604, 70 Neb. 454 (quoting definition in *Neiler v. Kelley*, 69 Pa. 403).

"Share of stock," strictly speaking, is a right to participate in a certain proportion in the immunities and benefits of the corporation; to vote in the choice of their officers, and the management of their concerns; to share in the dividends of profits; and to receive an aliquot part of the proceeds of the capital on winding up and terminating the active existence and operations of the corporations. *Alphin v. Wade*, 116 S. W. 667, 668, 80 Ark. 354 (quoting and adopting definition in *Fisher v. President, etc., of Essex Bank*, 71 Mass. 373, 378 [5 Gray]).

A "share" of capital stock is the right to partake, according to the amount put into the fund, of the surplus profits, and, upon dissolution of the corporation, of the fund remaining after payment of debts; the right to participate in the profits or in a final distribution of the corporate property pro rata.

Within Rev. St. 1898, § 1751, providing that capital stock of a corporation divided into shares shall be deemed personalty, and that certificates thereof may be transferred by indorsement and delivery, and section 1753 (Laws 1899, c. 193, § 1) providing that no corporation shall issue any stock or certificate of stock except in consideration of money, etc., received, equal to the par value thereof, and that all stock issued contrary to such provision shall be void, the words "issue any stock" and "all stocks issued" refer to certificates of stock or "shares," as distinguished from the stock itself, so that stockholders for less than par might have equitable relief against promoters who had defrauded the corporation. *Pietsch v. Krause*, 93 N. W. 9, 11, 116 Wis. 344 (quoting and adopting *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *Field v. Pierce*, 102 Mass. 261; *Van Brocklen v. Smeallie*, 35 N. E. 415, 140 N. Y. 78).

### Capital stock distinguished

The term "shares of capital stock," as used in Rev. St. U. S. § 5219, is not the same as the term "capital stock," which means the actual money or property paid in and possessed by the corporation, and there is no authority under the statutes of the United States nor the revenue laws of Idaho to tax the capital stock of national banks. *Weiser Nat. Bank v. Jeffreys*, 95 Pac. 23, 25, 14 Idaho, 659.

"Shares of stock" represent the right of the holder to vote at corporate meetings and to receive his portion of dividends and the residue of the property of the corporation upon its dissolution. Capital stock and shares of capital stock represent different property rights, one belonging to the corporation and the other to the shareholders, and both may be taxed without violation of any established principle of law. *Judy v. Beckwith*, 114 N. W. 565, 569, 137 Iowa, 24, 15 L. R. A. (N. S.) 142, 15 Ann. Cas. 890.

### Certificate thereof distinguished

"Shares of stock" in a corporation are the aliquot parts of the corporation's capital, and merely give to the owner the right to a share of the profits of the corporation while a going concern and in its assets in case of dissolution. They give the owners no right in the property of the company as such, and the share certificates are a mere symbol or evidence of property, standing on the same footing as other muniments of title. *Prenall v. Stockyards Nat. Bank (Tex.)* 151 S. W. 873, 876.

Generally speaking, a "share of stock" in a corporation "may be defined as a right which its owner has in the management, profits, and ultimate assets of the corporation. The right which a shareholder in a corporation has, by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits

of the corporation on division, and ultimately on its dissolution, in the assets remaining after payment of its debts." Shares of stock represent an interest in the earnings and property of the corporation. A certificate is not stock itself, but only a convenient representation of it, as one may be a stockholder without having a certificate issued to him. A share of stock may represent an interest in either real or personal property. A non-resident owner of the shares of stock in a domestic corporation has an interest in the property of the corporation which is subject to the collateral inheritance tax. In *re Culver's Estate*, 123 N. W. 743, 744, 745, 145 Iowa, 1, 25 L. R. A. (N. S.) 384 (citing *Cook, Corp.* [2d Ed.] § 5; *Faxton v. McCosh*, 12 Iowa, 527; *Commonwealth v. Standard Oil Co.*, 101 Pa. 148; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Judy v. Beckwith*, 114 N. W. 565, 137 Iowa, 24, 15 L. R. A. [N. S.] 142, 15 Ann. Cas. 890).

A "share certificate" is merely the paper representative of an incorporeal right, and stands on a footing similar to that of other muniments of title. It is not in itself property, but is merely the symbol or paper evidence of property; hence the proprietary right may exist without a certificate, the certificate being nothing more than evidence of its existence and of title to the share in the holder, it may be assigned without a certificate. Code 1899, c. 106, § 9, giving the plaintiff, in an attachment proceeding, a lien on the personal property of the debtor from the time of the levying of the attachment or serving a copy thereof on the garnishee, on all the personal property, choses in action, and other securities of the defendant in the hands of the garnishee, and on any real estate of the debtor levied on by virtue thereof, from the suing out of the same, includes shares of corporation stock in the terms "personal property, choses in action, and other securities." *Lipscomb's Adm'r v. Condon*, 49 S. E. 392-395, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938 (citing 10 Cyc. 588; *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217, 222, 26 L. Ed. 1039; *Crumlish's Adm'r v. Shenandoah Val. R. Co.*, 22 S. E. 90, 40 W. Va. 627; *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 234, 11 Sup. Ct. 984, 35 L. Ed. 702; *First Nat. Bank of Davenport v. Gifford*, 47 Iowa, 575; *Brigham v. Mead*, 92 Mass. [10 Allen] 245; *Curtis v. Crossley*, 45 Atl. 905, 59 N. J. Eq. 358, 361; *Agricultural Bank v. Burr*, 24 Me. 256 [11 Shep.]; *Rio Grande Cattle Co. v. Burns*, 17 S. W. 1043, 82 Tex. 50, 56).

**As chattel**

See Chattel.

**As credits**

See Credits.

**As goods or goods, wares, and merchandise**

See Goods.

**Stock certificate synonymous**

The term "stock certificates" and the term "shares of stock" may be treated as synonymous. *Newman v. Mercantile Trust Co.*, 88 S. W. 2, 11, 189 Mo. 423.

**As property or evidence thereof**

See, also, Personal Property; Property.

"Shares of stock" in a corporation are the property of the holder thereof, separate and distinct from the property of the corporation itself, and, in the absence of any more specific definition by the Legislature, would be held to be subject to taxation as personal property. *Hasely v. Ensley*, 82 N. E. 809, 810, 40 Ind. App. 598.

"Shares of stock" were not subject to attachment or levy at common law; they were considered neither a specific chattel nor a debt. "They have more resemblance to choses in action, being merely evidence of property." *Fowler v. Dickson* (Del.) 74 Atl. 601, 604, 1 Boyce, 113 (quoting *Howe v. Starkweather*, 17 Mass. 240, 243).

"A 'share of stock' may be defined as a right which its owner has in the management, profits, and ultimate assets of the corporation." *Cook, Stock & Stockh.*, § 5. "With reference more particularly to the essential nature of shares of stock, it has been well settled that such property is personalty, and not realty. It is said that a share of stock is not real estate; has nothing to give it the character of real estate; is not land, nor a hereditament, nor an interest in either of them." *Id.* § 6. "It is now a well-established principle that the shares of the capital stock of corporations are personal property. And this applies equally to all corporations, including those whose property consists of real estate, although attempts were formerly made to give to the stock of those companies the character of an interest in real estate. Sales of stock are therefore excluded from the provisions of the statute of frauds regulating conveyances of real estate or interests in real estate." *Beach, Priv. Corp.* § 612. "A stockholder has no legal title to the corporation, property, or to any separate part thereof, until a division is made on the winding up or dissolution of the corporation; and prior to that time he has no right to take any of the corporate property for his own purpose." "The assets of a private corporation, whether consisting of real estate or personal property, belong to the corporate body, and the stockholders are not in any sense the owners thereof. We think this proposition so well established that the citation of authorities in support of it is unnecessary." Hence a mere stockholder of a corporation owning land is not within the exception of *Hurd's Rev. St.* 1903, c. 61, § 25, giving the owners of farm lands, etc., the right to hunt and kill on their farms. *Cummings v. People*, 71 N. E. 1031, 1033, 1034, 211 Ill. 392.

**SHAREHOLDER**

See Preference Shareholder.

See, also, Stockholder.

A "shareholder" is one who holds or owns a share or shares in a joint-stock or incorporated company in a common fund or in some property, as a shareholder in a railway, mining, or banking company. *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945, 963.

The holder of preferred stock is a "shareholder" in the corporation. He is not a corporation creditor, and has no rights as such. *Grover v. Cavanagh*, 82 N. E. 104, 107, 40 Ind. App. 340.

A general statute imposing liability on "shareholders" includes married women. *Dickinson v. Traphagan*, 41 South. 272, 147 Ala. 442 (citing 10 Cyc. p. 682, § 11; In re Reciprocity Bank, 22 N. Y. 9; *Dreisbach v. Price*, 19 Atl. 569, 133 Pa. 560).

Where defendant's son-in-law, promoting a consolidation of corporations, was financially embarrassed, and procured a loan on the note of the new corporation, secured by bonds underwritten or guaranteed by defendant under an agreement providing that a block of stock in the new corporation should be placed in his hands as security for the son-in-law's performance of his agreement to procure other parties to underwrite the loan so as to take up defendant's obligation, but the stock was in fact issued directly to defendant as a stockholder, and resignations of the officers of the corporation were placed in his hands, but he refused to act as a stockholder, and did not act upon the resignations, defendant was a "pledgee," and not a "shareholder," and was not subject to a stockholder's liability. *Colonial Trust Co. v. McMillan*, 87 S. W. 933, 940, 188 Mo. 547, 107 Am. St. Rep. 335.

**SHAREJOBBER**

An individual, who makes it his continuous occupation or life business to buy and sell securities is called a "stockjobber" or "sharejobber." *Vanderbilt University v. Cheney*, 94 S. W. 90, 93, 116 Tenn. 259.

**SHARING PROFITS**

See Profit Sharing.

**SHAVE**

As used in Acts 1901, p. 219, c. 128, § 4, providing for a privilege tax for shaving notes, accounts, judgments, or other evidences of indebtedness, the word "shave" means simply the buying of such paper at a discount, without reference to the question whether any such paper was created for the purpose of being discounted. *Trentham v. Moore*, 76 S. W. 904, 905, 111 Tenn. 346.

**SHAWL**

As wearing apparel, see Wearing Apparel.

**SHE**

That a magistrate, in an order fixing bail, in two instances used the pronoun "he" for the pronoun "she" did not affect the magistrate's jurisdiction previously exercised in deciding that the evidence was sufficient to satisfy him that a crime had been committed and that there was sufficient cause to believe that defendants had committed it, and to issue a commitment thereon. *People ex rel. Wilson v. Warden of City Prison*, 107 N. Y. Supp. 1103, 1104, 123 App. Div. 288.

**SHEARED SHAPE**

In construing the provision for "sheared shapes" found in paragraph 135, Schedule C, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 161, held, that the quoted phrase was intended to cover something not in general stock, but sheared to a particular or given shape, and that certain sheets of metal, cut according to a sketch, and for a special purpose, to a specific shape, varying very slightly from a rectangle, are within such terms. In re *F. B. Vandegrift & Co.*, 139 Fed. 790, 791.

**SHED**

See Mill Shed.

As house, see House.

**SHEEP**

In the taxation of "sheep" for state and county purposes, unweaned lambs are excluded. *Ex parte McCoy*, 101 Pac. 419, 431, 10 Cal. App. 116.

**SHEEP DIP**

Sheep wash synonymous, see Sheep Wash.

Thymo-Cresol, a sheep dip which is used also as a disinfectant, and otherwise, is, by reason of such other uses, excluded from the provision for "sheep dip, not including compounds or preparations that can be used for other purposes," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 657, 30 Stat. 201. *Shallus v. Stone*, 150 Fed. 605.

In Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 657, 30 Stat. 201, providing for "sheep dips," except "compounds or preparations that can be used for other purposes," the application of this exception is not to be determined by the rule of chief or predominant use of an article as sheep dip; and Cannon's dip, a preparation advertised as fit for various other purposes, and presumably having commercial value for such purposes, is not covered by the paragraph. *Moody v. Patterson*, 153 Fed. 830.

**SHEEPSKINS**

Cabretta skins are "sheepskins," within the meaning of the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 664, 30 Stat. 201, relating to raw skins "except sheepskins with the wool on," and the growth thereon is subject to duty, as provided in paragraph 360 (Schedule K, § 1, 30 Stat. 183), for "wools on the skin." *Lawrence Johnson & Co. v. United States*, 140 Fed. 116.

**SHEEP WASH**

"Sheep wash" is synonymous with "sheep dip," which is a substance used to destroy parasites, vermin, etc., and cure the sores which affect the skin of sheep; a thick fluid known as "Thymo-Cresol," which is a compound of coal tar. *Shallus v. Stone*, 150 Fed. 605.

**SHEET**

See Iron Sheets.

A piece of steel 15 feet long, 4 feet 2 inches wide, 6½ inches thick, and weighing over 6 tons, with a geometrical design engraved on one side, a completed article ready for use in the manufacture of glass, is a "slab" and not a "sheet" or plate, and hence is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161, as a "sheet" or plate, but under paragraph 193 as "steel in all forms and shapes not specially provided for in this act." *Theo. W. Morris & Co. v. United States*, 174 Fed. 656, 657, 98 C. C. A. 410.

The term "sheets \* \* \* commercially known as tin plates," in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 134, 30 Stat. 160, means rectangular sheets, and does not include small disks. *Shallus v. United States*, 162 Fed. 653, 655, 89 C. C. A. 445.

In construing Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 185, 30 Stat. 166, relating to nickel, nickel oxide, and nickel alloy, "in pigs, ingots, bars, or sheets," held (1) that only nickel in one of the forms enumerated is included; (2) that the provision for "sheets," therefore, does not include anodes consisting of nickel plates about 12 inches long, 6½ inches wide, and less than a half inch thick, a "sheet" being broad, thin, and expanded; and (3) that such anodes are dutiable as manufactures of nickel under paragraph 193, 30 Stat. 167. *Hermann Boker & Co. v. United States*, 152 Fed. 589; *Id.*, 157 Fed. 1003, 85 C. C. A. 678.

Small copper plates, completely finished for engravers' use, are not within the provision for copper "sheets," in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 176, 30 Stat. 165. *United States v. B. F. Drakenfeld & Co.*, 178 Fed. 258, 259, 101 C. C. A. 618.

**SHEET COATED WITH METALS**

See Coated.

**SHEET STEEL IN STRIPS**

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161, for "sheet steel in strips," does not include long, narrow, thin, cold-rolled steel strips, because they are not sheet steel, nor stripped from sheet steel, nor commercially known as sheet steel in strips. *Hermann Boker & Co. v. United States*, 154 Fed. 174; *United States v. Hermann Boker & Co.*, 158 Fed. 396, 86 C. C. A. 32.

**SHELL****SHELL-BAND**

A "hub-band" is an iron ferrule attached to the ends of a vehicle hub for the protection of the ends, and shielding the nut which holds the wheel on the axle. "Shell-bands" are thin metal cylinders, intended to be placed around the outer end of the hub-band for the purpose of ornamentation and also to keep out moisture and prevent rusting of the iron parts. The use of such "shell-bands" is very old, and there are many patents, some for the hub-band and shell and some for the band alone and many for metal shells, differing mainly in the mode of holding the "shell-band" in place. In some cases it is secured by brazing or soldering, in others by self-securing devices, such as spurs, spring clips, interlocking lugs, screw threads, bayonet locks, etc., and in others by screws or rivets. The Higgin patent for a shell having an annular groove for gripping the band and holding the shell in place is void for want of utility and also for lack of invention. *Higgin Mfg. Co. v. Murdock*, 132 Fed. 810, 812, 65 C. C. A. 466.

**SHELLEY'S CASE**

See Rule in Shelley's Case.

Issue as within rule, see Issue (Descendants).

**SHERIFF**

Deputy sheriff as officer, see Officer.

The words "the sheriff," in Code Civ. Proc. § 1362, directing that execution must be directed to the sheriff, means the sheriff of the county to which the execution is issued. *Fisher v. Young*, 85 N. Y. Supp. 115, 117, 41 Misc. Rep. 552.

The sheriff referred to in Gen. Stat. 1901, § 4946, relating to sales made subject to redemption, providing that, if defendant in execution failed to redeem, the sheriff must at the end of the redemption period execute a deed to the person who is entitled to the certificate of purchase, is the person holding the office of "sheriff" at the time the certificate is produced and the deed demanded. *Armstead v. Jones*, 80 Pac. 58, 58, 71 Kan. 142 (citing *Conger v. Converse*, 9 Iowa, 554).

A "sheriff" is a public officer. His emoluments consist of fees fixed by law for the



performance of his official duties. Among these duties are serving process, collecting judgments, boarding prisoners, taking convicts to the penitentiary, and other like duties, for many of which the fees receivable depend upon whether a judgment is recovered by the plaintiff or a conviction secured by the territory, because of the manifest impropriety of service by a sheriff as a juror. The sheriff has power to appoint deputies entitled to receive a percentage of the fees of the sheriff's office. *Wilson's Rev. & Ann. St. Okl. 1903, § 3308*, which disqualifies sheriffs from performing jury service, applies as well to deputies as to the principal sheriff. *Robinson v. Oklahoma*, 148 Fed. 830, 831, 78 C. C. A. 520.

A "sheriff" is a public officer, a mere creature of law created by the sovereign power in the state for public purposes connected with the execution of the law and the administration of justice, as the agent of the body politic, to give effect to its sovereignty and carry into effect its will. His office is a mere civil institution, established for public political purposes, and may be regulated or changed by society. The mere creature of the law, he holds not by contract, and his duties change with the law. He is the mere agent of the public, under a naked authority to perform duties prescribed to him by law, the expression of the public will for the public benefit, and all that can be claimed to be granted to him is the mere authority to be such agent. *Ex parte Corliss*, 114 N. W. 962, 982, 16 N. D. 470.

#### As a generic term

An undersheriff is a person who "holds and exercises the office of a sheriff," within the meaning of *Gen. St. 1895, p. 3118, § 36*, which provides that no person shall exercise any other civil office during the time that he holds and exercises the office of a sheriff. *Westcott v. Briant*, 73 Atl. 66, 67, 78 N. J. Law, 228.

The words "sheriff, deputy, or coroner," as used in *Rem. & Bal. Code, § 4003*, providing "that no sheriff, deputy sheriff, or coroner shall be liable for neglecting or refusing to serve any civil process, unless his legal fees and an indemnity bond, if he requires one, are first tendered to him," are used in a generic sense, and are intended to apply to all officers charged with the duty of serving process requiring the seizure of property, and hence include a constable serving an execution issued out of a justice court. *Canfield-Caulkins Implement Co. v. Cowden*, 127 Pac. 216, 217, 70 Wash. 587.

#### As peace officer

See Peace Officer.

#### SHERIFF'S DEED

As color of title, see Color of Title.

## SHIFT—SHIFTING

One is not guilty of practicing a "shift" or device to evade the Local Option Law (*Laws 1907, p. 302*) § 12, making it an offense to sell intoxicating liquors in antisaloon territory, within section 13, declaring the practicing of such a shift or device to be a selling, where a person from "dry" territory arranged with him in "wet" territory that he might telephone orders from dry territory and have them filled, and subsequently telephoned such an order, which was filled by delivery to an express company in wet territory. *People v. Young*, 86 N. E. 589, 591, 237 Ill. 196.

An ordinance prohibiting a railroad running through the city from "shifting" cars—that is, cutting out and putting in cars in the making up of a train—within certain four blocks in the heart of the city, except between 6:30 and 8:30 a. m. and between 4:30 and 6:30 p. m., or from allowing any car to stand for longer than five minutes within such space, is a valid reasonable exercise of the police power. (Per an equally divided court.) *Atlantic Coast Line R. R. v. City of Goldsboro*, 71 S. E. 514, 516, 517, 155 N. C. 356.

#### SHIFT BOSS

The word "shift-boss," as used in *Rev. Codes, § 5248*, making the operator of a mine liable for injuries caused by the negligence of a shift-boss, is formed by uniting the words "shift" and "boss." The word "shift" means a set of workmen working in turn with other sets, or the time during which a particular set of men work; and the noun "boss" means a master workman or superintendent, a director or manager, one who oversees or gives direction. So the compound word as used in the act means a master workman who directs the work of a set of men engaged on a particular shift. *Johnson v. Butte & Superior Copper Co.*, 108 Pac. 1057, 1060, 41 Mont. 158.

#### SHIFTER

See Proper Belt Shifter; Slate Shifter.

#### SHIFTING RISK

Under "floating policies" or "shifting risks," "the property insured is the property of a class and kind described, in the place described which the insured may have on hand at the time of the fire, whether it is or is not identical in items with that which he had on hand at the time the insurance was written." *Bloch v. American Ins. Co.*, 112 N. W. 45, 48, 132 Wis. 150.

## SHIMS

"Shims" are metallic wedges of different thickness, employed to raise to the legal standard drawbars, which originally constructed of standard height, have become

lowered as the natural effect of proper use. *St. Louis, I. M. & S. R. Co. v. Taylor*, 28 Sup. Ct. 616, 620, 210 U. S. 281, 52 L. Ed. 1061.

## SHIP

See *Ex-Ship*.

The term "ships," used in a broad sense, includes all navigable structures intended for transportation. *Fredericks v. James Rees & Sons Co.*, 135 Fed. 730, 733, 68 C. C. A. 368 (citing *Cope v. Vallette Dry-Dock Co.*, 7 Sup. Ct. 336, 119 U. S. 625, 30 L. Ed. 501).

The term "ship or vessel" cannot be construed to include a dry dock, a floating bridge, a meetinghouse moored to a wharf, a lighted buoy, or a steamboat which has been dismantled and fitted up as a hotel. *Gonzales v. United States*, 42 Ct. Cl. 299, 311.

Civ. Code, § 3060, providing that debts of at least \$50 contracted for the benefit of ships are liens, construed in connection with Code Civ. Proc. § 813, giving a lien for materials and services furnished for the construction of vessels, contemplates an existing completed vessel, and refers only to such debts as are contracted for the benefit of a completed vessel, and section 813 gives a lien for construction work, regardless of the amount. Everything originally done in making a vessel complete and ready for use as an instrument of commerce or navigation is construction work, and a structure becomes a "ship" within the maritime law only when construction work has been fully completed. *Jensen v. Dorr*, 116 Pac. 553, 554, 159 Cal. 742.

### Equipment and supplies

The word "vessel," as used in Chinese Exclusion Act May 6, 1882, c. 126, § 10, 22 Stat. 61, providing that "every vessel whose master shall knowingly violate any provisions of this act shall be liable to seizure and condemnation," etc., is broad enough to include the vessel's tackle, apparel, furniture, and "appurtenances." A chronometer supplied on account of the owners of a schooner as a necessary part of her equipment for a special service, although not in general a necessary part of her equipment, is to be regarded as "appurtenant" to the "ship," and as included in the term "vessel." *The Frolic*, 148 Fed. 921, 922 (citing *Abbott, Merchant Ships & Seamen* [14th Ed.] pp. 33, 34, 280; *Richardson v. Clark*, 15 Me. 421; *The Witch Queen*, 3 Sawy. 201, 30 Fed. Cas. 396).

Indispensable instruments, without which the ship cannot execute its mission and perform its functions, may be included under the term "ship." A traveling derrick upon a scow belonging to her owner, and the use of which was indispensable to enable her to perform the duties in which she was engaged at the time of the commission of a negligent act, is a part of her apparel, tackle,

and furniture to be appraised as a part of her in proceedings for limitation of liability on account of such act. *The Buffalo*, 148 Fed. 331, 332.

### As merchandise

See *Merchandise*.

### Rigging and furniture

A "ship," although afloat, is not a "ship," if her original construction, rigging, and furnishing remain incomplete. *Bowers Hydraulic Dredging Co. v. Federal Contracting Co.*, 148 Fed. 290, 292 (citing *McRae v. Bowers Dredging Co.*, 86 Fed. 344, 346).

## SHIP (Verb)

One who delivers game birds to a carrier for transportation to a point out of the state violates Code, § 2555, providing that no person shall ship any game birds out of the state, though they were taken from the carrier by the state authorities while in the state; the word "ship" meaning delivery to a carrier for the purposes of being transported. *State v. Carson*, 126 N. W. 698, 699, 147 Iowa, 561, 140 Am. St. Rep. 330.

## SHIP CANAL

See *Line of Ship Canal*.

As county purpose, see *County Purpose*.

## SHIP CHANNEL

The question, "What did the Legislature mean by the use of the term 'ship channel'?" in the grant of the lands lying between high tide and ship channel, is a question of local law, and where the Supreme Court of the state determines it as comprising waters left free to navigation and the definite natural boundary of such navigable waters as the line of low tide, its decision will be followed by the United States Circuit Court. *Southern Pac. Co. v. Western Pac. Ry. Co.*, 144 Fed. 160, 185.

## SHIP TO

An order by defendant to "ship to" him, at a specified place and over a route named, 50 cars of coal of a certain grade and price, f. o. b. mines, to be shipped during a week named, did not indicate an intention that defendant should control the coal in transit; and hence the fact that the shipper shipped the coal in his own name did not necessarily, as a matter of law, disclose an intent to retain title after delivery of the coal to the carrier. *Hoffman v. Gosline*, 172 Fed. 113, 116, 96 C. C. A. 318.

## SHIPMENT

See *Closed Shipment*; *Contract for through Shipment*; *Port of Shipment*; *Sales or Shipments*.

Where a buyer, in letters to the seller, referred to coal as bought for "prompt shipment," it was apparent that he meant "prompt delivery." *Pittsburgh & Ohio Min.*

Co. v. Scully, 108 N. W. 503, 504, 145 Mich. 229.

Where plaintiff's assignor purchased from defendants 300 tons of English ferromanganese iron by a written order providing for "shipment," 100 tons each in September, October, and November, and defendants immediately contracted with an English concern to ship the ore, their contract with plaintiff providing for "shipments," as distinguished from "deliveries," in September, October, and November, their contract with the English sellers requiring deliveries in New Orleans in October, November, and December, the word "shipment," as used in the contract of sale, did not mean "delivery," and, that shipment of 100 tons having been made in September, there was no breach of contract by failure to deliver such amount in that month. *Southern Steel & Iron Co. v. Hickman, Williams & Co.*, 190 Fed. 888, 890.

The word "shipment," used in joint congressional resolution of March 14, 1912, providing that whenever the President shall find in any American country conditions of domestic violence, which are promoted by munitions of war from the United States, and shall make proclamation thereof, it shall be unlawful to export any shipment of such material, means the actual export of materials declared to be unlawful. *United States v. Chavez*, 199 Fed. 518, 521.

#### SHIPPING BUSINESS

The words "doing a shipping business," as used in the statute declaring that flour mills doing a shipping business are public warehouses, refer to milling concerns engaged in shipping grain to terminal points. The statute does not include concerns engaged solely in the manufacture of flour, and an officer of such a concern is not guilty of larceny for neglect to deliver wheat delivered to it. *Ex parte Bellamy*, 114 N. W. 376, 377, 17 N. D. 140.

#### SHIPSIDE

A railroad company issued to plaintiff a bill of lading for shipment of cotton to plaintiff at a certain point "shipside." The ordinary signification of the word "shipside" in such a contract is a direction to deliver the cotton at some wharf accessible to the railroad's track. *R. A. Lee & Co. v. St. Louis, I. M. & S. R. Co.*, 48 S. E. 809, 810, 136 N. C. 533.

#### SHIPS' RIGGING AND APPAREL

"A 'ship's launch' is comprised in the rigging and apparel of the ship, because it is absolutely necessary for the navigation." *Dennis v. Home Ins. Co.*, 136 Fed. 481, 482 (quoting *Emerigon, Ins.* 1850 [Boston Ed.] 144).

#### SHIPS' TACKLE, APPAREL, AND FURNITURE

An engine placed on a gas launch to furnish her motive power, and which was essential to her equipment, became a part of her "tackle, apparel, and furniture," and subject to liens against her for repairs or supplies, notwithstanding a reservation of title in the seller until payment of the purchase price, of which reservation those furnishing the repairs and supplies were not chargeable with knowledge or notice. *The Hope*, 191 Fed. 243, 245.

#### SHIPPER'S PASS—SHIPPER'S TICKET

A "shipper's pass" or "shipper's ticket" is a pass entitling a shipper of stock to accompany them to market, and is designed to enable the shipper to properly care for the stock and not to relieve the carrier from any liability. *McCully v. Chicago, B. & Q. Ry. Co.*, 110 S. W. 711, 720, 212 Mo. 1 (dissenting opinion of Woodson, J.).

#### SHIRE

The word "county" signifies the same as "shire"; county being derived from the French, and shire from the Saxon. Both these words signify a circuit or portion of the realm into which the whole land is divided for the better government thereof and the more easy administration of justice. *State ex rel. Milton v. Dickenson*, 33 South. 514, 519, 44 Fla. 623, 60 L. R. A. 539, 1 Ann. Cas. 122 (dissenting opinion, citing 1 Bouv. Law Dict. [Rawle's Rev.] p. 450).

#### SHOCK

To "shock" is to cause to tremble; to recoil; to stun. The phrase "shock the conscience" means causing the moral sense to be stunned; to recoil. *Mangold v. Bacon*, 141 S. W. 650-656, 237 Mo. 496.

The word "shock" may mean the collision or concussion of two physical bodies, or it may mean simply a surprised or disgusted state of the emotions, which momentarily disappears. The *Century Dictionary* defines the word used pathologically as a condition of profound prostration of voluntary and involuntary functions, of acute onset, caused by trauma, surgical operation, or excessive emotional disturbance (mental shock). *Pankopf v. Hinkley*, 123 N. W. 625, 626, 141 Wis. 146, 24 L. R. A. (N. S.) 1159.

#### SHOCK OF HAY

A "stack" of hay is a large pile gathered after the hay has been seasoned, as distinguished from a "cock" or "shock," which is a small pile into which hay is gathered after being mowed, and thus permitted to remain until seasoned. *People v. Doyle*, 110 Pac. 458, 459, 13 Cal. App. 611.

**SHOE**

The "shoe" of a clincher tire is the outer cover which attaches to the rim and serves to protect and retain the inner tube on the rim. *Boston Woven Hose & Rubber Co. v. Pennsylvania Rubber Co.*, 156 Fed. 787, 788.

**SHOOT—SHOOTING**

See Did Shoot.

Shooting as accidental means of death, see Accident—Accidental.

To strike with anything shot; to hit with a missile; often to kill or wound with a firearm; followed by a word denoting the person or thing hit, as an object. *State ex rel. Kotilinc v. Swenson*, 99 N. W. 1114, 1115, 18 S. D. 196.

The word "shoot," as used in an information charging that accused did shoot, etc., with intent to kill, necessarily implies the existence of a weapon, a load, its discharge, and the act of discharging. *Deen v. State*, 122 Pac. 941, 942, 7 Okl. Cr. 150.

The word "shoot" means to let fly, or cause to be driven, with force, as an arrow, bullet, or other missile, from a bow, sling, gun, or the like; to discharge. *Flowers v. State*, 111 Pac. 675, 676, 4 Okl. Cr. 320.

"The crime of 'shooting' is limited to the 'intention to kill.'" *State v. Fairbanks*, 39 South. 443, 444, 115 La. 457.

A person is guilty of the offense of "shooting" at another, when, without justification, he shoots at another without the intent of committing murder. *Fallon v. State*, 63 S. E. 806, 807, 5 Ga. App. 659.

"Shooting" at an officer without killing him to prevent an illegal arrest is *prima facie* not an assault with intent to murder, but the crime of shooting at another defined by Pen. Code 1895, § 113, or assault and battery. *Jenkins v. State*, 59 S. E. 435, 437, 3 Ga. App. 146.

The offense of "shooting in sudden affray or in sudden heat and passion" is completely defined by Ky. St. § 1242, providing that, if any person shall in sudden affray or in sudden heat and passion, without malice and not in self-defense, shoot at another, he shall be punished as therein provided. If the Legislature had intended that this definition should be qualified by the expression "and under circumstances reasonably calculated to incite his passion beyond his power of self-control," it would have included it within that section, and, not having done so, it was error to so qualify the definition in an instruction. *Hardin v. Commonwealth*, 71 S. W. 862, 114 Ky. 722.

**Kill synonyms**

"The word 'shoot' is synonymous with 'kill,' and is frequently, perhaps usually, em-

played in that sense." *Bader v. New Amsterdam Casualty Co.*, 112 N. W. 1065, 1066, 102 Minn. 186, 120 Am. St. Rep. 613.

**SHOOTER**

In blasting rocks, etc., one in charge of the dynamite is called a "shooter," and it is his duty to place the dynamite in holes previously prepared for the purpose at stated times during the day. *Kopf v. Monroe Stone Co.*, 95 N. W. 72, 77, 133 Mich. 286.

In coal mining, it is the business of "shovelers" and "shooters" to bore holes in the face of the coal, which holes are loaded with powder, and the coal blown down by the explosion of the powder, after which the shovelers remove it by loading it into cars. It is also the duty of these shovelers and "shooters" to pull down any loose, overhanging slate, and to carry it out of the room, so that it will be out of the way. It is their duty to observe whether the slate is about to fall, or in danger of falling, and this they do by tapping it with picks or shovels, judging by the sound as to whether there is any immediate danger of its falling. If there is it is their duty to pull down the slate so as to prevent its falling on the miner operating the machine. *Smith's Adm'r v. North Jellico Coal Co.*, 114 S. W. 785, 131 Ky. 196, 28 L. R. A. (N. S.) 1266.

**SHOOTING AT RANDOM**

Shooting at a target upon or along a public highway is not a "shooting at random" on a public highway. *Callahan v. Commonwealth*, 99 S. W. 296, 124 Ky. 445.

**SHOOTING COAL**

By the phrase to "shoot the coal on the solid," in relation to coal mining, is meant blasting the coal by putting holes straight into the wall or face of the coal and using therein large charges of dynamite or powder. When the coal is cut under before blasting, a much smaller charge is required to blow it down, which is called "shooting on the free." *Andricus' Adm'r v. Pineville Coal Co.*, 90 S. W. 233, 234, 121 Ky. 724.

**SHOOTING CRAPS**

The vernacular descriptive of the game of craps is "shooting craps." The word "shooting," as applied to the game of craps, is synonymous with the word "playing." Indeed, the word "playing," as used in the statute relating to gaming, is simply a generic term. To shoot craps is to play craps. To roll tenpins is to play tenpins. *Sims v. State*, 57 S. E. 1029, 1 Ga. App. 776.

**SHOOTING WITH INTENT TO KILL**

"Maiming is not a necessary element of the crime of shooting with intent to kill. In stating the facts constituting the last-mentioned crime, it is in no case necessary to show maiming. Maiming may, and often does, result from shooting, but it is a dis-

inct offense, under no circumstances forming part of the consummated crime of 'shooting with intent to kill.'" *State v. Mattison*, 100 N. W. 1091, 1093, 13 N. D. 391.

## SHOP

See Bucket Shop; Closed Shop; Dram-shop; Grogshop; Junkshop; Open Shop; Repair Shop; Tippling House or Shop; Working in a Shop; Work-shop.

Although a room kept open by a common victualer merely as a dining room is not a "shop," within the meaning of a statute prohibiting the keeping open of shops on Sunday, it was not error to refuse a ruling that, if one keeping open such a dining room on Sunday sold cigars in the course of business, she had not violated the law, since, if one of the purposes in keeping open the shop was the sale of cigars, she was guilty, and the question of such purpose was for the jury. *Commonwealth v. Graham*, 56 N. E. 829, 830, 176 Mass. 5.

Where intoxicating liquors are kept in a dwelling house and sales are made therein, it may properly be regarded as a "shop" or place of public resort within Laws 1907, p. 363, c. 173, § 8, providing that no warrant shall be issued to search a private residence occupied as such unless it or some part of it is used as a store, shop, hotel, or boarding house, or unless such residence is a place of public resort. *State v. Madison*, 122 N. W. 647, 650, 23 S. D. 584.

Where, on a trial for burglary, it appeared that accused and a third person went to the building of a company, broke into it, and took some tools, and the witnesses spoke of the building as a "shop," the court properly charged that the building was a shop within the statute punishing one breaking into and entering any shop with intent to commit larceny; the building being a shop within the "common and approved usage of language." *Comp. Laws*, § 50. *People v. Wycoff*, 114 N. W. 242, 150 Mich. 449.

### Store synonymous

A "store" is defined as any place where goods are sold, either by wholesale or retail, and the word "shop" could have no broader meaning in Rev. St. c. 6, § 14, excepting from the general rule that personal property is taxable only at the residence of the owner, all personal property employed in trade, in the erection of buildings, or vessels, or in the mechanic arts, which was to be taxed in the town where so employed, provided the owner, his servant, subcontractor, or agent occupied any store, shop, mill, etc., for the purposes of such employment. A cotton broker engaged in buying and selling cotton, who occupied a desk and desk room in an office, kept his account books and papers there, but made no sales and kept no goods except sam-

ples, the sales being made by taking the samples and exhibiting them to purchasers at their places of business, did not occupy a store or "shop," within the meaning of the statute. *Martin v. City of Portland*, 17 Atl. 72, 73, 81 Me. 293.

## SHOP CARD

Cards placed on crippled cars showing that they were injured, and their destination, were called "shop cards." *Shuster v. Philadelphia, B. & W. R. Co. (Del.)* 62 Atl. 689, 690, 6 Pennewill, 4.

## SHOP COST

Plaintiff, a bridge building company, and defendant entered into agreements whereby plaintiff turned over to defendant certain uncompleted contracts. Plaintiff guaranteed that the contracts so turned over would net defendant a clear profit of not less than 15 per cent. of the "shop cost" of performing the contracts. It was stipulated that the term "shop cost" should include labor, material, and general shop expenses, f. o. b. cars at plaintiff's works. Before entering into the agreements, plaintiff had works of its own in Connecticut, and had begun to establish works in Pennsylvania. By the agreements these works were to be turned over to defendant. Before the agreements, plaintiff, in order to perform the uncompleted contracts, had made contracts with third persons having works of their own to furnish materials to be sent directly to the places where the uncompleted contracts were to be performed. The defendant claimed that under the head of "shop cost," as used in these three contracts, "shipments of structural iron and steel work direct from mills to sites of erection, and also all subcontracts for carrying out the transferred contracts, should be included in determining the amount of shop cost of the contracts transferred to the defendant, and that the expression 'f. o. b. cars at works of the party of the first part' was to be considered as a provision that freight was not to be included in shop cost." The trial court overruled this claim, and held in effect that "shop cost," as used in these three contracts, meant shop cost only at the works of the plaintiff in this state and in Pennsylvania, and not at the works of other parties. We think this ruling was correct. *Berlin Iron Bridge Co. v. American Bridge Co.*, 55 Atl. 573, 577, 76 Conn. 1.

## SHOP DRAWING

The phrase "detailed drawings," as used in a contract under which a party furnished steelwork for a building, meant a plan showing the position of each column, beam, etc., and not "punching sheets" or "shop drawings." *New York Architectural Terra Cotta Co. v. Williams*, 92 N. Y. Supp. 808, 809, 102 App. Div. 1.

**SHOPKEEPER**

The "keeper of a fruit stand," from which fruit was sold on Sunday, was a "shopkeeper" engaged in selling merchandise on Sunday, within Code 1906, § 1367, providing that a merchant, shopkeeper, or other person shall not keep open his store on Sunday for the purpose of dispensing of any wares or merchandise. *City of Gulfport v. Stratakos*, 43 South. 812, 90 Miss. 489, 13 Ann. Cas. 855.

A "shopkeeper" is one who keeps a shop for the sale of goods, a trader who sells goods in a shop or by retail, as distinguished from a merchant who sells by wholesale. *State v. Cohen*, 63 Atl. 928, 929, 73 N. H. 543.

**SHORE**

See Running The Shore; Seashore.

A "shore" is defined to be land on the margin of the sea or a lake or river; that space of land which is alternately covered and left dry by the rising and falling of the tide; the space between high and low water marks. The "shore" and soil under the water and "riparian rights" are entirely distinct and separate subjects, and neither includes the other. "Riparian rights" are appurtenant to the upland and not to the shore and bed of the river. A statute entitled "An act granting to the city of Mobile the riparian rights to the river front," and giving the city of Mobile the "shore and soil" under the Mobile river within the city limits, is violative of the Constitution declaring that each law shall embrace but one subject which shall be described in the title. *Mobile Dry-Docks Co. v. City of Mobile*, 40 South. 205, 207, 208, 209, 146 Ala. 198, 3 L. R. A. (N. S.) 822, 9 Ann. Cas. 1229.

**Beach synonyms**

An ordinance prohibiting the removal of stone, sand, or earth from the beach, or from the water within 300 feet of high-water mark along a navigable lake between the northern and southern city limits, does not assume to prohibit interference above high-water mark, but prevents such removal from the beach, or from the water within 300 feet of high-water mark along the shore of the lake; the word, "beach" being synonymous with "shore," and meaning that portion of the shore or lake between ordinary high and low water mark. *C. Beck Co. v. City of Milwaukee*, 120 N. W. 293, 296, 139 Wis. 340, 131 Am. St. Rep. 1061.

**Harbor distinguished**

A statute incorporating a township and fixing its boundaries as "on the southeast by New York Harbor," etc., fixes the boundaries of the township so as to include lands under the water of the harbor to the boundary line of the state, since a harbor is a recess in the coast line of a body of water in which ships can be sheltered, and it may extend to a line inside of which vessels may find protection,

and the word has a more extended meaning than "shore," which when applied to a tide water bay usually means the part between ordinary high and low water marks. *Leary v. Jersey City*, 189 Fed. 419, 428.

**As land between high and low water**

"Shore" is the space between high and low water mark. *Southern Pac. Co. v. Western Pac. Ry. Co.*, 144 Fed. 160, 199 (citing *Dutton v. Strong*, 1 Black, 23, 17 L. Ed. 29; *Dana v. Jackson St. Wharf Co.*, 31 Cal. 118, 89 Am. Dec. 164).

The "shore" of navigable water is the ground lying between ordinary high-water and low-water mark. *Dalton v. Hazelet*, 182 Fed. 561, 572, 105 C. C. A. 99.

Section 1 of the Wharf Act of 1851 defined "shore" as the land between the limits of ordinary high and low water. *Attorney-General v. Central R. Co. of New Jersey*, 59 Atl. 348, 353, 68 N. J. Eq. 198.

The word "shore," as used in conveyancing when applied to tidal waters, both in the common and civil law, means the space between high and low water marks. *Potomac Dredging Co. of Baltimore City v. Smoot*, 69 Atl. 507, 509, 108 Md. 54.

The "shores of a navigable river" are the spaces between high and low water marks, and the bed of a river includes the shores. Tideland is that daily covered and uncovered by water by the ordinary ebb and flow of normal tides. *State ex rel. Ellis v. Gerbing*, 47 South. 353, 356, 56 Fla. 603, 22 L. R. A. (N. S.) 337.

The margin of the bed of a river which lies between high and low water mark is called the "beach" or "shore," which is actually a part of the bed of the river, and, when the river is at its full flow, whether caused by the tide or by the natural increase of waters by rains, floods, and the like, filling its natural bed to its highest reach of flow, it marks its high-water, while its lessened range of flow by summer heats shows its low-water, mark. *Sun Dial Ranch v. May Land Co.*, 119 Pac. 758, 762, 61 Or. 205.

The word "shore" is of doubtful meaning, when used as a boundary, as it means in one case the sea side and in another case the land side of the "shore." The meaning to be attached to the word, when used in a deed, must depend upon the instrument in which it occurs, taken as a whole, and upon surrounding circumstances. It does not include the space between high and low water mark, if the word is used in its technical sense. *Haskell v. Friend*, 81 N. E. 962, 963, 196 Mass. 198 (citing *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155).

The "shore" of a stream is in law "the space between ordinary high-water mark and low-water mark" (quoting and approving definition in *Century Dict.*). The old distinction between "shore" and "bank," as found in

tide water, is not applicable to fresh water, and, though the terms have often been used interchangeably, neither term has been used to designate the top of an accretion 50 or 60 feet above the ordinary water line in a fresh water river, and when the subject under discussion was the division of accretions beginning at the bank or shore, and while the word "bank" might be properly used to designate such an accretion along a river, the word "shore" could hardly be so used. The term "shore" does not mean the meander line, as the meander line is frequently run on the top of the bank. *City of Peoria v. Central Nat. Bank*, 79 N. E. 296, 299, 224 Ill. 43 (citing *Kehr v. Snyder*, 2 N. E. 68, 69, 114 Ill. 313, 316, 55 Am. Rep. 866; *Child v. Starr* [N. Y.] 4 Hill, 369; *Jones on Real Property*, § 488; *Freeman v. Bellegarde*, 41 Pac. 289, 108 Cal. 179, 49 Am. St. Rep. 76; *Gould, Wat.* [3d Ed.] § 41, note 2; *Dutton v. Strong*, 66 U. S. [1 Black] 23, 17 L. Ed. 29; *Stone v. City of Augusta*, 46 Me. 127; *Lacy v. Green*, 84 Pa. 514; *Handly's Lessee v. Anthony*, 18 U. S. [5 Wheat.] 376, 5 L. Ed. 113).

#### As low-water mark

The word "shore," as contained in a statute defining the boundary of a county, is the edge of the water at low-water mark; and, using the word in its strict sense, it should be applied to a strip of land fronting on tide water between high and low water marks. *People v. Kyser*, 138 N. Y. Supp. 801, 802, 78 Misc. Rep. 68 (citing 7 Words and Phrases, p. 6496).

#### SHORE LAND

Laws 1897, p. 230, c. 89, § 4, defines "shore lands" to be those bordering on the shores of navigable lakes or rivers below the line of ordinary high-water mark and not subject to tidal overflow. *Van Siclen v. Muir*, 89 Pac. 188, 189, 46 Wash. 38.

Laws 1897, p. 230, c. 89, § 4, defines "shore lands" as lands bordering on the shores of navigable waters below the line of ordinary high water and not subject to tidal flow. In a suit by an owner of uplands bordering on navigable waters for the removal of obstructions in front of the lands, it appeared that the state had not established harbor lines, and the obstructions consisted of piles driven below the line of low water and a boathouse. It did not appear whether the water was of sufficient depth for ordinary navigation. Held, that the owner could not maintain the suit based on his preference right to purchase the shore lands in front of the uplands. *Muir v. Johnson*, 94 Pac. 899, 49 Wash. 66.

#### SHORE LINE

"Shore line" does not mean the meander line, as the meander line is frequently run on the top of the bank, often many feet above the usual water line reached by the river during ordinary seasons. This term has usually

been used to mean, in natural fresh water rivers, low-water mark, and grants bounded by the shore extended to that line, making the water's edge at low water the boundary. *City of Peoria v. Central Nat. Bank*, 79 N. E. 296, 299, 300, 224 Ill. 43 (citing *Child v. Starr* [N. Y.] 4 Hill, 369; *Jones, Real Prop.* § 488; *Freeman v. Bellegarde*, 41 Pac. 289, 108 Cal. 179, 49 Am. St. Rep. 76; *Gould, Wat.* [3d Ed.] § 41, note 2; *Dutton v. Strong*, 66 U. S. [1 Black] 23, 17 L. Ed. 29; *Stone v. City of Augusta*, 46 Me. 127; *Lacy v. Green*, 84 Pa. 514; *Handly's Lessee v. Anthony*, 18 U. S. [5 Wheat.] 376, 5 L. Ed. 113).

#### SHORE OR WATER FRONT

The expression "shores or water fronts," as used in a lease describing a privilege granted as certain riparian or other rights, to wit, the exclusive privilege of taking, by dredging or otherwise, all sand and gravel that the lessee may desire to take along the entire "shores or water fronts" of a certain farm, were words of description which must, in the absence of qualifying expressions, be taken to refer to the then existing condition of the property, and cannot be enlarged, by mere implication or construction, to mean every receding shore whose recession would be caused by the lessee's own action exercised at his volition to the detriment of the lessor, and the lessee's rights were limited to the excavation of sand and gravel between high and low water marks, and the lessee was not authorized to remove fast land from any part of the farm bordering on the stream. *Potomac Dredging Co. of Baltimore City v. Smoot*, 69 Atl. 507, 509, 108 Md. 54.

#### SHORT

An authority to brokers to sell stock "short" is authority to sell on plaintiff's account stock which he did not have, and which the brokers would be compelled to borrow for him. *Armstrong v. Bickel*, 66 Atl. 326, 327, 217 Pa. 173.

"Short sale" is usually applied to sales of stocks and bonds where the seller has not the stock he assumes to sell, but borrows it and expects to replace it when the market value has declined. Such sales are perfectly valid, provided the parties contemplate an actual purchase or actual sale by or through the broker and not a mere settlement by a payment of differences. *Hurd v. Taylor*, 73 N. E. 977, 181 N. Y. 231.

A sale of stock "short" by a broker on his own account does not necessarily imply a conversion by the broker of stock purchased for a customer; a short sale being of that which the vendor has not at the time, but which he expects to acquire subsequently for delivery at a lower price. *Lamprecht v. State*, 95 N. E. 656, 659, 84 Ohio St. 32.

The statement that one is "short" in his account does not necessarily impute to him

the crime of larceny after trust, where, according to the meaning of the statement and the language accompanying it, the offense would not be complete unless there was a refusal to pay for or deliver the property which it might be inferred had been appropriated; the word "short" not of itself implying a crime, but being a term of common use in the stock and produce markets, implying that one has less of a commodity than may be necessary to meet obligations, and not implying that the commodity cannot or will not be supplied upon demand. *Whitley v. Newman*, 70 S. E. 686, 690, 9 Ga. App. 89.

### SHORT FORM

The term "short form," as used in Acts 1898, p. 92, in referring to the "short form" of bills of exceptions in that act, as contrasted with bringing up the case "in the usual form," refers to excepting to the judgment, decree, or verdict, segregating a certain ruling, assigning error on it, and bringing it up as a necessarily controlling ruling in the brief mode set out in the statute. The "usual form" referred to means some form or methods for bringing cases to the reviewing court, which were usual before the enactment of the statute. *Lyndon v. Georgia R. & Electric Co.*, 58 S. E. 1047-1050, 129 Ga. 353.

The so-called "short form decision" was authorized by that part of section 1022 of the Code of Civil Procedure of New York which permitted a court or referee to "file a decision stating concisely the grounds upon which the issues have been decided." *Miller v. New York & N. S. R. Co.*, 75 N. E. 1111, 1112, 183 N. Y. 123.

### SHORT PRICE

Tobacco in bond is sold in two ways: At the long price, which denotes that the duty does not come in question, but that the goods are sold at a flat price, without reference to duty; and "short price" is that the merchandise and the duties are separated. *Friend v. Rosenwald*, 108 N. Y. Supp. 701, 702, 124 App. Div. 226.

### SHORT RATES

See Usual Short Rate.

### SHORT TIME

An instruction that if you believe from the evidence that the conductor of defendant requested of plaintiff his fare or ticket a short time after leaving the depot in Ocala, as testified by witnesses of defendant, and that he thereafter again requested the plaintiff to produce his ticket or pay his fare, and that he failed to do so, whereupon he was required to leave the train, you will find for the defendant is faulty, since a "short time" after leaving the depot in Ocala might mean one second, five minutes, or more, being a relative term, and might be either a reason-

able time or not, and so the word "thereafter" might mean immediately or any subsequent time after the first demand. *Seaboard Air Line R. v. Scarborough*, 42 South. 706, 712, 52 Fla. 425.

Code 1907, § 7347, requires prosecutions for misdemeanors to be commenced within 12 months after their commission. Accused was indicted for a misdemeanor in illegally selling whisky. The prosecuting witness testified that he purchased the whisky "a short time before" the grand jury returned the indictment. Held that, in view of the connection in which the expression was used, "a short time" must be held to be less than 12 months, and hence the prosecution was not barred. *Wilson v. State*, 56 South. 114, 115, 2 Ala. App. 203.

### SHORTAGE

Reference to a "shortage" in one's accounts does not necessarily impute larceny. *Whitley v. Newman*, 70 S. E. 686, 690, 9 Ga. App. 89.

Under a contract providing for the sale of coal from a designated mine, and that if there should be "a shortage of cars," the shipment should be divided in fair proportion with other orders, the term "shortage of cars" means that the car supply at the mine from which the coal is produced is short. *Phillips v. Pilling*, 64 Atl. 396, 398, 215 Pa. 64.

### SHORTHAND

As writing, see Write—Writing.

### SHORTLY

In a contract for the sale of personal property to be delivered "shortly," it is the duty of the seller to tender delivery within a reasonable time, and, if he tenders delivery after such time, the buyer may reject. *Cincinnati Glass & China Co. v. Stephens*, 60 S. E. 360, 361, 3 Ga. App. 766.

### SHOT

See Missed Shot; Pop Shots; Slung Shot; Spring Shot.

### SHOT GUN

As deadly weapon, see Deadly Weapon.

### SHOT GUN CARRIAGE

Where the saw carriage, used in a mill, moved back and forth upon a track past the saw by means of steam power applied directly to the piston attached to the carriage, and the steam was applied by means of a lever operated by a head sawyer, and this lever was equipped with a device which, when used, held the lever when not in use, so as to prevent the admission of steam into the piston, it was of the kind commonly known as a "shot gun" or "steam feed" carriage. *Eldner v. Three Lakes Lumber Co.*, 88 Pac. 326, 45 Wash. 323.



## SHOULD

Where a contract for construction work for a railroad stipulated that the railroad would pay a specified sum for the work, with the option of paying the same in its bonds and stocks authorized by the Railroad Commission, and, in case the Commission "should not authorize an amount of bonds and stocks" equal to such sum, the contractor would accept in full satisfaction such an amount as the Commission authorized, etc., the contractor could demand no more stocks and bonds than the Commission authorized, provided the Commission was justified in refusing to authorize a further issue, and the amount authorized must then be received by the contractor in full satisfaction, the word "should" in the quoted phrase evidently meaning such an amount as the Commission elected to authorize. *United States & Mexican Trust Co. v. Delaware Western Construction Co. (Tex.)* 112 S. W. 447, 458.

### Command implied

The word "should," as used in Laws 1901, p. 387, c. 106, § 3, providing that, on proof of certain facts to the county court, it shall be determined whether territory should be disconnected from a city, does not authorize the court to do as it pleases; the statute is mandatory. *Town of Edgewater v. Liebhadt*, 76 Pac. 366, 367, 32 Colo. 307.

### Duty and obligation implied

The word "should," as used in instructions, may convey to the jury the sense of duty and obligation. *State v. Connor*, 87 Pac. 703, 74 Kan. 898.

### As must

The words "there should be," as used in a rule providing that there should be at least one telegraph office between those at which opposing trains received meeting orders, do not mean that "there must be." It is a reasonable inference from the adoption of the phrase "there should be" that while, under ordinary circumstances, there should be an intervening office, yet the circumstances may be such at times as to justify the sending of a meeting order to stations between which there is no telegraph office. *Wallace v. Boston & M. R. R.*, 57 Atl. 913, 917, 72 N. H. 504.

### As ought

In a prosecution for homicide, an instruction that the jury need not believe the testimony of the accused, and should not do so, if after fairly and impartially considering all the evidence, they believe that accused willfully and knowingly testified falsely to any material matter, is erroneous because improperly directing the jury to disregard defendant's testimony; the word "should" being equivalent to "ought to." *People v. Barkas*, 99 N. E. 698, 702, 255 Ill. 516.

An instruction that, when a criminal charge is to be proved on circumstantial evi-

dence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with any other rational conclusion, is not erroneous in failing to make that condition mandatory; the word "ought" meaning to be bound in duty or by moral obligation, to be necessary or becoming, and to be synonymous with "should." *State v. Blaine*, 124 Pac. 516, 517, 45 Mont. 482.

### As would

An instruction that the care required of a person approaching a railroad crossing is such as an ordinarily prudent person "would exercise" was equivalent to such as an ordinarily prudent person "should exercise," the words "would" and "should" in that connection being synonymous. *Southern Ry. Co. v. King*, 160 Fed. 332, 336, 87 C. C. A. 284.

## SHOULD THEY LEAVE ISSUE

Where a will directed that the income of testator's residuary estate be divided equally between his son and daughter, for their sole and individual benefit and use, and at their decease, should they leave issue, to descend in fee to such issue, or, in case only one of them left issue, then the whole in fee to such issue, but, should neither child leave issue, then to testator's heirs at law in his line, at which time the trust created should cease, on the death of the daughter leaving issue, the trust as to one-half of the property terminated, and that half descended to her issue per stirpes; and a son of the daughter, who died before his mother, did not take a vested interest in the trust estate, which descended to his mother on his death, since his interest depended, not only on the contingency that his mother should leave issue at her death, but also that he should survive her; "the words 'should they leave issue' meaning if they respectively leave issue. \* \* \* " *Gardner v. Savage*, 65 N. E. 851, 852, 182 Mass. 521.

## SHOULDER

"A 'shoulder' is a prominent or projecting part below the top." Hence a bottle, the neck of which is merely in the shape of an inverted cone and which flares into the bottle, has no "shoulder" within the meaning of the term when used to designate a ridge on the neck of the bottle on which was fastened a sealing device. *Imperial Bottle Cap & Machine Co. v. Crown Cork & Seal Co. of Baltimore City*, 139 Fed. 312, 324, 71 C. C. A. 442 (quoting and adopting the definition in *Cent. Dict.*).

## SHOVEL CAR

As car, see *Car*.

## SHOVELER

In coal mining, it is the business of "shovelers" and "shooters" to bore holes in the face of the coal, which holes are loaded

with powder, and the coal blown down by the explosion of the powder, after which the shovelers would remove it by loading it into cars. It is also the duty of these "shovelers" and shooters to pull down any loose, overhanging slate, and to carry it out of the room so that it will be out of the way. It is their duty to observe whether the slate is about to fall, or in danger of falling, and this they do by tapping it with picks or shovels, judging by the sound as to whether there is any immediate danger of its falling. If there is, it is their duty to pull down the slate so as to prevent its falling on the miner operating the machine. *Smith's Adm'r v. North Jellico Coal Co.*, 114 S. W. 785, 131 Ky. 196, 28 L. R. A. (N. S.) 1266.

## SHOVING THE Y

The expression "shoving the Y," used with relation to making up a train, meant that an engine would be attached to the cars standing on the Y, so as to move and connect them with the train to be made up. *McGuire v. Quincy, O. & K. C. R. Co.*, 107 S. W. 411, 412, 128 Mo. App. 677.

## SHOW

The mere fact that plaintiff urged B. to look at defendant's farm, concerning which he already had full knowledge, did not constitute a "showing" of the farm to B., within the provisions of a contract obligating defendant to pay commissions in case of a sale to any person to whom plaintiff had shown the land. *Winthrop Land Co. v. Utley*, 125 N. W. 164, 146 Iowa, 310.

A provision of the contract requiring plaintiff to furnish defendant a true report, showing the "substance encountered," should be construed only to require plaintiff to disclose the substance encountered by the kind of exploration and development adopted by the parties to test the same. *Cleveland-Cliffs Iron Co. v. East Itasca Min. Co.*, 146 Fed. 232-235, 76 C. C. A. 598.

### As prove

The term "show," as used in Street Opening Act, § 28, providing that the notice of intention to apply for a deed of land sold for delinquent assessments must be served on the owner; provided, if he cannot be found after due diligence, it may be posted, and that to warrant the execution of a deed on such constructive service due diligence must be shown, contemplates the making apparent or clear by evidence, and a mere statement that due diligence was used is insufficient. *Hennessy v. Hall*, 113 Pac. 350, 352, 14 Cal. App. 759 (citing *Meadow Val. Min. Co. v. Dodds*, 7 Nev. 143, 8 Am. Rep. 709; *Coyle v. Commonwealth*, 104 Pa. 117).

The language of the rule that an applicant for the issuance of a subpoena for pro-

duction of books and papers must "show" that they are material implies something more than the mere allegation of affiant's belief that the books contain material entries, as facts must be shown on which the court can see, at least presumptively, that the books and papers contain material entries. *In re Lee*, 85 N. Y. Supp. 224, 227, 41 Misc. Rep. 642.

Under the Kansas statute providing that, before service can be made by publication, an affidavit must be filed stating that service cannot be made on the defendant or defendants within the state and showing that the case is one mentioned in the preceding section, the purpose of the statute is to require such a description of the cause of action as will enable the court to determine upon inspection whether the action mentioned in the affidavit is one in which service by publication may be given; that being the only significance of "show" as used in this act. *Roberts v. Fagan*, 92 Pac. 559, 560, 76 Kan. 536.

## SHOWN

See Cause Shown.

There is no material difference between the expressions "shown by the defendant" and "established by the defendant." *Wisstrom v. Redlick Bros.*, 92 Pac. 1048, 1050, 6 Cal. App. 671.

The words "shown" and "appear," as used in instructions in a criminal case, that "it must be shown beyond a reasonable doubt," or "it must appear beyond a reasonable doubt," are synonymous with the word "prove" or "proven," and do not exact a less degree of proof than would have been exacted if the word "prove" or "proven" had been used. *State v. Crofford*, 110 N. W. 921, 925, 133 Iowa, 478.

Ballots marked in a voting booth, either by the clerk of election or in his presence, are "shown to another person," within St. § 1474, and are illegal. *Major v. Barker*, 35 S. W. 543, 544, 99 Ky. 305.

In a prosecution for rape, the instruction that one accused of a crime "is presumed to be innocent until the contrary is shown and his guilt established by the evidence," was not defective in the use of the word "shown," which plainly meant "proved," nor because of the failure to repeat "beyond a reasonable doubt," as the jury was repeatedly told this in other portions of the charge. *People v. Davenport*, 110 Pac. 318, 320, 13 Cal. App. 632.

The court defined "contributory negligence," and charged that the burden was on defendant to show contributory negligence by a fair preponderance of the evidence, but if the evidence as a whole, by whomsoever produced, established contributory negligence, it would bar recovery. He further charged

that it was a passenger's duty to use reasonable care in alighting; that she should not attempt to alight while the car was in motion, if dangerous to do so; and that if she did so she assumed any additional risk attendant on such attempt. The court also charged that if plaintiff attempted to alight while the car was in motion, and her injury was caused thereby, she could not recover. Held, that under such instructions the further charge that plaintiff was entitled to recover in a certain event, unless it had been "shown" that plaintiff was herself negligent, was not objectionable as implying that the proof of plaintiff's negligence must be such as to amount to a demonstration, instead of establishing the fact by a preponderance of the evidence. *Indianapolis Traction & Terminal Co. v. Miller*, 82 N. E. 113, 114, 40 Ind. App. 403.

## SHOWCASE

As furniture, see Furniture.

## SHOWERING

"Showering," as a manner of watering stock during transportation, is usually done by holding a pipe from an elevated tank with one end flattened, so that the water is thrown through the openings in the cars as they slowly pass, thereby sprinkling and cooling the animals within. The duty of "showering" was not imposed on a shipper by a clause in the freight contract, providing that the animals were to be "watered, fed, and cared for" by the shipper or his agent. *Peck v. Chicago Great Western R. Co.*, 115 N. W. 1113, 1114, 138 Iowa, 187, 16 L. R. A. (N. S.) 883, 128 Am. St. Rep. 185.

## SHOWS

See Common Show; Public Show.  
Other shows, see Other.

The word "theater," as used in section 8369, Rev. Codes, making it a misdemeanor to keep open and maintain a theater on Sunday, means a theatrical performance or entertainment and does not include all shows, though a "show" includes a theatrical performance. *State v. Penny*, 111 Pac. 727, 730, 42 Mont. 118, 31 L. R. A. (N. S.) 1155.

The term "shows," as used in Rev. Laws 1905, § 4981, which prohibits certain sports and other exercises and shows on the Sabbath Day, refers to out of door amusements, and a moving picture exhibition, designed to illustrate moral subjects, for the entertainment of the public, when conducted in an orderly manner within a building, is not within Rev. Laws 1905, § 4981. *State v. Chamberlain*, 127 N. W. 444, 445, 112 Minn. 52, 30 L. R. A. (N. S.) 335.

Pen. Code, § 265, prohibits all shooting, hunting, fishing, playing, horse racing, gam-

ing, or other public sports, exercises, or shows, and all noise disturbing the peace of the day, on Sunday; and section 277 provides that the performance of any tragedy, comedy, opera, ballet, farce, negro minstrelsy, negro or other dancing, wrestling, boxing, sparring contest, trial of strength, or any part or parts therein, or any circus, equestrian or dramatic performance or exercise, or any performance or exercise of jugglers, acrobats, club performances, or rope dancers on Sunday, shall constitute a misdemeanor. Held, that section 265 relates only to public outdoor exhibitions, and that the word "shows," as there used, did not include a combination lecture and moving picture show, accompanied by musical selections, in a theater on Sunday. *Keith & Proctor Amusement Co. v. Bingham*, 108 N. Y. Supp. 205, 207. An exhibition of stereopticon pictures cast on a canvas on Sunday, and a lecture, consisting of the names and descriptions of the pictures, etc., did not constitute a violation of Pen. Code, § 265. *People v. Lynch*, 108 N. Y. Supp. 209. An exhibition of a stereopticon and pictures operated by an automatic slot machine device, together with certain other machines which, on the insertion of money in the slot, communicated certain musical selections to the operator, audible to him alone, did not constitute a violation of Pen. Code, § 265. *People v. Flynn*, 108 N. Y. Supp. 208. Where defendant owned a confectionery store, and operated a moving picture exhibition in a room adjoining, in which soda water, ice cream, etc., was served during the performance, it constituted a "show," the operation of which on Sunday is prohibited by the express provision of Pen. Code, § 265. *Economopoulos v. Bingham*, 109 N. Y. Supp. 728, 729. A moving picture exhibition is a "show," within Pen. Code, § 265. *Gale v. Bingham*, 110 N. Y. Supp. 12, 13.

A company giving an entertainment consisting of panoramic reproductions of battles of the Anglo-Boer war, with portrayal of military maneuvers, but with no circus rings, trapeze acting, wild beasts, or clowns, is assessable with a license tax, under Acts 1902-03, p. 205, c. 148, § 108, providing for the assessment of a license tax upon "theatrical performances, panoramas, etc.," and not under section 111, providing for a license tax upon "shows, circuses, and menageries." *Boer War Spectacle v. Commonwealth*, 60 S. E. 85, 86, 107 Va. 653.

## SHUNT

See Electric Shunt.

A railroad car is "kicked" or "shunted" when it is set in motion by the engine and then detached to travel forward. *Lang v. Missouri Pac. R. Co.*, 91 S. W. 1012, 1013, 115 Mo. App. 489.

## SHUT DOWN

The words "shut down," as commonly used in relation to manufacturing plants, refer to the stopping of the machinery and the mechanism in general by which the manufacture is effected, and is similar in significance to the word "idle." An occasional shipment or handling of shingles, the mere output of the plant, cannot be said to include the idea of activity in the movement of manufacturing appliances such as was evidently intended by the words in an insurance policy requiring notice to the company should the property be idle or "shut down" for more than 30 days at any one time. Such provision in the policy refers to more than the mere lack of occupancy, and where the machinery of a manufacturing plant was not running for over 30 days at one time without the insurer's consent, the mere fact that some work was being conducted on the premises would not save a forfeiture of the policy. *Brehm Lumber Co. v. Svea Ins. Co.*, 79 Pac. 34, 35, 36 Wash. 520, 68 L. R. A. 109.

A fire policy on a sawmill and electric light plant, requiring that at all times when the property remained "idle or inoperative" a constant day and night watchman should be kept on duty, and that, if the property was idle or "shut down" for more than 30 days at a time, permission should be obtained and indorsed on the policy. Held, that the words "idle or inoperative" should be construed as synonymous with "shut down," to mean a cessation of operation from the ordinary running of the plant, and not merely the usual shutting down for the night, or over Sunday, or on a holiday; and hence the policy was not broken by the insured's failure to keep a watchman on duty while the plant was temporarily shut down over Sunday. *Tillamook Lumbering Co. v. Liverpool & London & Globe Ins. Co.*, 175 Fed. 508, 510; *Liverpool & London & Globe Ins. Co. v. Tillamook Lumbering Co.*, 178 Fed. 161, 101 C. C. A. 481, 21 Ann. Cas. 844.

## SHUTTLE GUARD

A "shuttle guard" is a device in general use in cotton mills. It prevents the shuttle from flying up, while the loom is in operation. No shuttle guards are ever used on the best and on the most modern types of looms used in the manufacture of hose and belting duck, but in place of the shuttle guard there is used what is called a "reed-cap," projecting above the race board of the shuttle, and occupying, with reference to the shuttle, the place of the shuttle guard. *Vinson v. Willingham Cotton Mills*, 58 S. E. 413, 2 Ga. App. 53.

## SIC UTERE TUO UT ALIENUM NON LÆDAS

"Sic utere tuo ut alienum non lædas" is defined as meaning that "one cannot use

his own property so as to injure the rights of others, nor can he use it in such a manner as to offend against public morality, health, or peace and good order." The Legislature may prohibit acts of commission and omission by an owner the result of which is to invade the rights of others or of the people. *Laws 1908*, p. 1221, c. 429, prohibiting pumping of mineral waters for the purpose of extracting the gas therein as a commodity, is valid. *People v. New York Carbonic Acid Gas Co.*, 90 N. E. 441, 448, 196 N. Y. 421.

"*Sic utere tuo ut alienum non lædas*" is an old maxim which has a broad application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. Such a rule could not be enforced in civilized society. Persons living in organized communities must suffer some damage, annoyance, and inconvenience from each other. For these they are compensated by all the advantages of civilized society. If one lives in the city he must expect to suffer the dirt, smoke, noisome odors, noise, and confusion incident to city life." Where one operates a factory emitting foul or noisome smells and owns or controls all the land within the area traversed by them in sufficient strength to be nauseating or substantially discomforting, no one has just cause to complain. But to foist impure and disgusting odors upon others in their homes is a different matter, and, save in localities generally devoted to a business of a character to produce such or equally offensive smells, or unless by virtue of grant, license, estoppel, or prescription, is not to be tolerated. *United States v. Luce*, 141 Fed. 385, 415 (quoting and adopting definition in *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567).

The maxim, "*Sic utere tuo ut alienum non lædas*," extends to all damages for which the law gives redress, but no further. *Carroll v. Rye Tp.*, 101 N. W. 894, 897, 13 N. D. 458.

The maxim, "*Sic utere*," etc., as applied to nuisances, does not mean that one must not annoy, but that one must not injure. *Peck v. Newburgh Light, Heat & Power Co.*, 116 N. Y. Supp. 433, 435, 132 App. Div. 82.

## SICK

Where a complaint for personal injuries alleged that as an effect of the injury plaintiff was "thereby made sick," evidence that plaintiff suffered from pleurisy caused by the hurt, which developed into pneumonia, was admissible without any further allegations specifically defining the diseases or hurts received by plaintiff. *Lauder v. Currier*, 84 Pac. 217, 218, 3 Cal. App. 28.

## SICK AND UNABLE TO WORK

Where the by-laws of a fraternal benefit society provide for the payment of sick ben-

efits where a member is "sick and unable to work," sick benefits are payable where a member has not been restored to full health and is substantially unable to do such work as he was accustomed to do prior to his sickness. *Plattdeutsche Grot Gilde von de Vereinigten Staaten von Nord Amerika v. Ross*, 117 Ill. App. 247, 252.

### SICKNESS

See *During Last Sickness; Last Sickness; Serious Sickness*.

"Sickness" is defined as the state of being sick or suffering from disease; a diseased condition of the system; a particular kind of disorder; and a disordered or enfeebled state of anything. *Kane v. Chicago, B. & Q. R. Co.*, 132 N. W. 920, 921, 90 Neb. 112, 36 L. R. A. (N. S.) 1145, Ann. Cas. 1913A, 764.

In an action for personal injuries, a charge to allow plaintiff compensation for any sickness, physical or mental pain, that he suffered, and for the reasonable value of any time he has lost was erroneous, because the term "sickness" embraces physical and mental pain and loss of time, and the charge was calculated to cause a finding for double damages. *Texas & P. R. Co. v. Barnwell (Tex.)*, 133 S. W. 527, 528.

The terms "sickness" and "disease" do not mean a trifling illness, nor an occasional physical disturbance resulting from accidental causes not permanent in their effects nor a temporary illness which readily yields to professional treatment and leaves no permanent injury or disorder calculated to or having a tendency to shorten life. *Logan v. Provident Sav. Life Assur. Soc. of New York*, 50 S. E. 529, 533, 57 W. Va. 384 (citing *Joyce Ins. § 1848*).

### Blindness

A railway night switchman becoming color blind is thereby disabled by sickness within the meaning of his employer's contract that it will pay him sick benefits for a limited time while he is disabled by sickness. *Kane v. Chicago, B. & Q. R. Co.*, 132 N. W. 920, 921, 90 Neb. 112, 36 L. R. A. (N. S.) 1145, Ann. Cas. 1913A, 764.

A bite by a dog, causing the eye to swell, so that plaintiff could not wear glasses, preventing him from working at his trade, was not "sickness," within a benefit society by-law. *Villone v. Guardia Peticara*, 114 N. Y. Supp. 801, 802, 62 Misc. Rep. 257.

### SIDE

See *Run Upon Either Side; Water Side*.

The word "sides" does not always include the marginal parts of a surface. It may be used as to all of the bounding surfaces of a body or as excluding such parts as may be called top, bottom, edge, or end. *Koerner v. Deuther*, 143 Fed. 544, 545.

The somewhat comprehensive term "side" includes the ribs, shoulder, and hip. *Ft. Worth & D. C. R. Co. v. Partin*, 76 S. W. 236, 237, 33 Tex. Civ. App. 173.

### SIDE HEAD

The "sticker machine" is designed for the purpose of receiving strips of rough lumber at one end and turning it out at the other as a complete molding finished on all sides by a single operation. Such a machine consists usually of an iron table or platform, over which the material passes, about 8 feet in length, 3½ feet in height, and the same in width, open on the sides. At the south end is the countershaft, power pulley, and pulleys to operate the feed and knives. The operator stands at the south end, and feeds the unfinished strips into the machine through guides. It passes first through the feed rolls, immediately after which it is operated on by the first set of knives, fastened to what is called the "top head." There are four of these heads, called, respectively, the "top head," the two "side heads," and the "lower head." These heads are blocks of iron or steel, about 8 inches long and 4 inches square, on two corners of which are set knives. They are attached to a short shaft, on the other end of which is a pulley, on which is the belt running to the power pulley. The top head is necessarily above the table with its shaft and pulley. After passing the top head, the material passes along the guide, and is operated upon first by one side head and then by the other. These side heads are of the same construction as the top head, but they necessarily are in a vertical position, projecting above the table; the pulley being beneath. The material then passes to the under head, which with its pulleys is under the table, the knives being allowed to project slightly above the table through an opening therein, which may be made to vary in width from 2½ to 6 inches. The finished material then passes out at the rear of the machine. The power is applied to and removed from the feed rolls and heads by means of levers at the right of the operator at the south end of the machine, one lever operating the feed rolls and another the heads. *Gardner v. Paine Lumber Co.*, 101 N. W. 700, 702, 123 Wis. 338.

### SIDE LINES

"Public roads and highways, also railroads, are regarded as having three lines: The center line, which is usually the line surveyed when the road is laid out, and on each side of which the road is laid; the two "side lines," at equal distances from the center line, and between which lies the territory covered by the road. When, in a conveyance of real estate adjoining a highway, such highway is referred to as constituting a boundary, the center line will be held to be the boundary so referred to, unless the language used in so referring to it shows clear-

ly that a side line, instead of the center, was intended." *Couch v. Texas & P. Ry. Co.*, 107 S. W. 872, 873, 49 Tex. Civ. App. 188 (quoting and adopting definition in *Maynard v. Weeks*, 41 Vt. 617).

## SIDE TRACK

As railroad, see Railroad—Railway.

As turnout, see Turnout.

The tracks in a yard may properly be termed "side tracks," and include the ground necessary for the convenient and safe movement of cars, and for loading and unloading them. *Nashville, C. & St. L. R. Co. v. Patterson*, 122 S. W. 467, 477, 122 Tenn. 1 (citing from the dissenting opinion of *MacFarland, J.*, in *State ex rel. Hayes v. Hannibal & St. J. R. Co.*, 37 S. W. 532, 135 Mo. 618).

An approach to the Ohio River Bridge of the Illinois Central Railroad, consisting of the tracks leading to the bridge and the embankment and steel structure upon which they rest, used in connection with its charter lines to connect with the Mobile & Ohio Railroad, is not a branch or lateral line, but a switch or "side track" which it is empowered to acquire by section 1 of its charter (Acts Feb. 10, 1851, § 1; Priv. Laws 1851, p. 61) as needful to carry into effect its purposes, and falls within sections 18 and 22, imposing a tax on gross receipts and exempting its charter lines from other taxation. *State Board of Equalization v. People ex rel. Alexander County*, 82 N. E. 324, 334, 229 Ill. 430.

As used in decisions holding that when the train stops elsewhere than at a station—as at a water tank or upon a side track—when the stop is made for the purpose of the railroad alone, and the passenger leaves the car, he acts at his peril, and that his negligence will prevent a recovery, the term "side track" refers to a switch or side track other than one situated at a station, used in connection therewith, and for the transaction of the railway company's business at such station. *Texas Midland R. R. Co. v. Ellison*, 87 S. W. 213, 216, 39 Tex. Civ. App. 172.

## SIDEWALK

"While the term 'street' in ordinary legal signification includes all parts of the way—the roadway, the gutters, and the sidewalk—yet the term 'sidewalk' has come to be generally used in this country for the purpose of designating a footway for passengers at the side of a street or road." *Marion Trust Co. v. City of Indianapolis*, 75 N. E. 834, 836, 37 Ind. App. 672.

While the word "sidewalk" is often used in a context which imports a paved way, a footway does not necessarily have to be entirely improved to be a sidewalk, which is the space left on the side of a street, and usually along its borders and inside of the curbing, for foot passengers. *Asphalt &*

*Granitold Const. Co. v. Haeussler (Mo.)* 80 S. W. 5, 7 (citing *Knapp, Stout & Co. v. St. Louis Transfer Ry. Co.*, 28 S. W. 627, 126 Mo. 26; *Challiss v. Parker*, 11 Kan. 384).

A cinder sidewalk with a wooden curb and berm constructed on each side of the walk, the latter to be flush with the surface and six inches in width at the top, is a "sidewalk," with a statute dispensing with a public hearing in proceedings for constructing a "sidewalk." *City of Chicago v. Bassett*, 87 N. E. 384, 385, 238 Ill. 412.

While a street crossing may be considered in a sense as a part of the sidewalk, one passing over such crossing may more reasonably expect obstructions, and should exercise a greater degree of care than when on the sidewalk, strictly so called. *City of Richmond v. Schonberger*, 68 S. E. 284, 285, 111 Va. 168, 29 L. R. A. (N. S.) 180.

Where the sidewalk becomes unsuitable, another part of the street, between the curb and the lot line, made constant use of by the public for foot passage, is a sidewalk, within the usual meaning of the term; and an allegation in a complaint in a personal injury action that defendant city negligently permitted a wooden peg projecting above the surface of the ground and of planks laid thereon, "and in and about the middle of the traveled portion of said sidewalk," to remain there, was supported by proof that the peg was in the space between the sidewalk and the curb. *Rea v. Sioux City*, 103 N. W. 949, 950, 127 Iowa, 615.

Where a petition alleged that plaintiff's decedent was killed by an obstruction on the sidewalk on the west side of C. street in defendant city, and that the sidewalk was in a dangerous condition by reason of such obstruction, and had been so for a long time, and the proof showed that the obstruction was on the parkway between the paved walk and the curb, and not elsewhere, there was no fatal variance, since the word "sidewalk," in general, means that part of the street intended for pedestrians, and includes all the space between the building line and the curb; pedestrians being entitled, as of right, to use all such space unless specially restricted by ordinance. *Woodson v. Metropolitan St. R. Co.*, 123 S. W. 820, 824, 224 Mo. 685, 30 L. R. A. (N. S.) 931, 20 Ann. Cas. 1039.

Under Ky. St. § 3094 (Russell's St. § 1205), authorizing the general council of cities of the second class to control streets and sidewalks, and, under section 3096 (section 1207), to provide for the construction of sidewalks at the cost of the abutting property, an ordinance, requiring the construction of a sidewalk consisting of cement or artificial stone five feet wide and on each side thereof sodded ground five feet wide, is not void on the theory that the sodding is purely a matter of ornament, the cost of which could not be assessed against the abut-

ting property; the word "sidewalk," as used in the statutes, meaning the space between the property line and the street curbing, and the sod being useful to prevent earth and other substances from being washed upon the cement walk. *Holmes v. Heeter & Son*, 142 S. W. 210, 211, 38 L. R. A. (N. S.) 935, 146 Ky. 52.

#### **Approach to bridge**

A highway at the approach to a bridge was 35 feet wide, with a stone walk used generally by pedestrians on one side and a cinder path separated from the main part of the highway by a gutter on the other side; such path having been constructed apparently for the use of bicyclists, though there was no showing of compliance with the law so as to relieve the highway commissioners from caring for that part of the approach. Held, that the path was not a "sidewalk" so as to defeat recovery from the town for injury to a bicyclist who, while riding upon it, collided with a pedestrian and was thrown down an unguarded embankment, on the ground that he was improperly on a sidewalk. *Schell v. Town of German Flatts*, 108 N. Y. Supp. 219, 220, 123 App. Div. 197.

#### **As building**

See Building (In Lien Laws).

#### **As improvement of land**

See Improvement.

#### **As part of the street**

A "sidewalk" is a part of the street, and the duty to repair it is as obligatory on the city as the duty to keep the carriage-way in proper condition. *Gillard v. City of Chester*, 61 Atl. 929, 212 Pa. 338 (citing 2 Dill. Mun. Corp. [4th Ed.] §§ 1008, 1012).

A "sidewalk" is simply a part of the street, which the town authorities have set apart for the use of pedestrians. The abutting proprietor has no more right in the sidewalk than in the roadway. His rights are simply that the street, including roadway and sidewalk, shall not be closed or obstructed so as to impair ingress or egress to his lot by himself and those whom he invites there for trade or other purposes. *Hester v. Durham Traction Co.*, 50 S. E. 711, 713, 138 N. C. 288, 1 L. R. A. (N. S.) 981 (citing *City of Ottawa v. Spencer*, 40 Ill. 217; *City of Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640).

"To constitute a sidewalk a portion of a public street by dedication, both dedication and acceptance must appear; but both these elements may be shown by implication. To bind the city, the acceptance must be made by the public authorities. If a formal acceptance be relied upon, this can be shown only by the minutes of the council. If implied acceptance be relied upon, it may be shown by proof that the street or walk was used or worked as a highway under the authority of the council. Mere use by the members of

the public is not sufficient." *Mayor and Council of Americus v. Johnson*, 58 S. E. 518-520, 2 Ga. App. 378.

#### **As street**

See Street.

### **SIGHT**

See Plain Sight.

### **SIGHT DRAFT AGAINST PAPERS**

The phrase "sight draft against papers" in an order for apricots strongly suggested that the seller was to ship the fruit, and should be entitled to payment only on presentation of papers showing such shipment; in other words, upon presentation of shipping receipt or bill of lading. Under Code Civ. Proc. § 1870, subd. 12, providing that usage is admissible only where necessary to explain the character of a contract and for that purpose, the usage of the trade was admissible to show that a sale of apricots "sight draft against papers" meant that the seller should ship the goods and receive payment only on presentation of shipping receipt or bill of lading showing shipment. *Ellsworth v. Knowles*, 97 Pac. 690, 691, 8 Cal. App. 630.

### **SIGN—SIGNATURE**

See About to Sign; Countersign; Duly Signed.

Make signature, see Make.

Signed at the end, see End.

"Sign" means to write one's name on paper or to show or declare assent or attestation by some sign or mark. *Attorney General ex rel. Cannon v. Clarke*, 59 Atl. 395, 396, 26 R. I. 470 (quoting *James v. Patten*, 6 N. Y. 9, 55 Am. Dec. 376).

"In legal contemplation 'to sign' means to attach a name or cause it to be attached by any of the known methods or impressing a name on paper with the intention of signing it." *Lamaster v. Wilkerson*, 136 S. W. 217, 218, 143 Ky. 226 (citing 7 Words and Phrases, p. 6512).

Ordinarily to "sign" an instrument indicates the signing with one's own hand. *Hansen v. Owens*, 64 S. E. 800, 803, 132 Ga. 648.

A "signature" is whatever mark, symbol, or device one may choose to employ as representative of himself. *Griffith v. Bonawitz*, 103 N. W. 327, 329, 73 Neb. 622.

The "signature" evidences the agreement of the parties to be bound by the instrument, and it sounds somewhat inconsistent to speak of a written contract which must be proved to be an agreement at all, by a resort to parol evidence. *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.*, 55 S. E. 330, 334, 126 Ga. 380, 7 Ann. Cas. 1134.

Signature of the judge to orders allowing and settling bills of exceptions do not constitute a "signing" of the bills within Act

Cong. June 6, 1900, c. 786, § 223, 31 Stat. 366, providing that the statement of the exceptions when settled and allowed shall be signed by the judge and filed with the clerk, etc. *Dalton v. Hazelet*, 182 Fed. 561, 568, 105 C. C. A. 99.

A will is "signed" by testator, as required by Gen. Laws 1896, c. 203, § 13, where not signed by another by his express direction, where he, after being assisted to a bureau, on indicating that he would there sign, finds himself physically unable to do so alone, and another guides his hand while he signs it. *Wood v. Rhode Island Hospital Trust Co.*, 61 Atl. 757, 758, 27 R. I. 295.

Where an information for forgery of a check described it as containing the word "signed" before the name of the drawer, and charged that the entire instrument so set out was false and forged, the information should be construed as alleging that the word "signed" was a portion of the original instrument, and hence the information did not show that the instrument set out therein was a mere copy, which could not have damaged the person receiving it. *People v. Crane*, 87 Pac. 239, 240, 4 Cal. App. 142.

#### Autograph synonymous

To sign, in the primary sense of that expression, means to make a mark, and the signature is the sign thus made. By long usage, however, signature has come ordinarily to be understood to mean the name of a person attached to something by himself, and therefore to be nearly synonymous with "autograph." This signification is derivative, however, and not inherent in the word itself. *Cummings v. Landes*, 117 N. W. 22, 23, 140 Iowa, 80.

#### Execution distinguished

See Execution.

#### In bookbinding

The term "signature," as used in bookbinding, means a sheet of paper to be folded into 4, 8, or 16 pages. *State v. Young*, 110 N. W. 292, 294, 134 Iowa, 505, 13 Ann. Cas. 345.

#### As requiring intent

A "signature" consists both of the act of writing one's name and of intention thereby to finally authenticate the instrument. *Lee v. Vaughan's Seed Store*, 141 S. W. 496, 498, 101 Ark. 68, 37 L. R. A. (N. S.) 352; *Kirkpatrick v. Board of Canvassers*, 44 S. E. 465, 468, 53 W. Va. 275.

A "signature" is said to consist of two parts—the act of writing the name, and the intention of thereby finally authenticating the instrument. This, however, relates to the signature of an individual to papers of a private nature, and, when its sufficiency is put to the test, he is estopped from denying that it is his signature by proof of the fact that he directed it to be written for him, and that

it was done in his presence. From this proof the act and intent on his part are sufficiently made out. *Walker v. Mobley (Tex.)* 105 S. W. 61, 62 (citing 2 Greenl. Ev. 674).

#### Mark

Independent of statute, a signing by mark is a "written signature" and is the subject of expert testimony. Handwriting includes a mark made by a person unable to write and all writing done by a person able to write, whether his usual hand and signature or not. *Ausmus v. People*, 107 Pac. 204, 212, 47 Colo. 167, 19 Ann. Cas. 491 (citing *Lawson, Exp. Ev. p. 296*).

The word "signature" includes a mark, and the making of his mark by the testator in his will with the intention of authenticating it if he is unable to write is a signing thereof within the meaning of the statute relating to the execution of wills. In *re Tierney's Estate*, 114 N. W. 838, 839, 103 Minn. 286.

To "sign," in the primary sense of that expression, means to make a mark, and the signature is the sign thus made. By long usage, however, signature has come ordinarily to be understood to mean the name of a person attached to something by himself, and therefore to be nearly synonymous with "autograph." This signification is derivative, however, and not inherent in the word itself. *Cummings v. Landes*, 117 N. W. 22, 23, 140 Iowa, 80.

Kirby's Dig. § 7799, provides that the signature includes a mark when the person cannot write; his name being written near it, and witnessed by a person who writes his own name as witness. Section 3108 provides that, where a writing purporting to have been executed by one of the parties is referred to in and filed with a pleading, it may be read as genuine against such party, unless he denies its genuineness by affidavit before trial. Held, that a note signed by the maker's mark and witnessed was sufficient as against an unsworn answer denying its execution without the introduction of other evidence to show its execution. *Hall v. Rea*, 107 S. W. 1176, 1177, 85 Ark. 269.

A note executed by an illiterate promisor by his mark is sufficient, and need not be attested. Civ. Code 1896, § 1, defining "signature" or "subscription" as including mark when one cannot write, his name being written near it and witnessed by one who writes his own name as a witness, is inapplicable to the execution of notes; and a note is validly executed by one who cannot write his name by his affixing thereunto an X-mark between an initial of his own name and his surname, written by the payee, the name of witness, who also could not write his name, being written by the payee. *McGowan v. Collins*, 46 South. 228, 229, 154 Ala. 209.



"Signature" or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness." Where a married woman acknowledges an instrument in due form, and at the time of such acknowledgment her name is affixed to such

her  
instrument as follows, "Jennie X Glenn,"  
mark

but her signature by mark is not witnessed by any person writing his name as a witness thereto, held, that by such acknowledgment she adopted and approved the signature as her own, and thereby acknowledged the execution of the same as her act, and the officer's certificate of her acknowledgment, attached thereto, is a sufficient witnessing of her signature by mark, and constitutes a compliance with Rev. St. 1887, § 16, which provides that "signature" or subscription includes mark, when the person cannot write; his name being written near it, and witnessed by a person who writes his own name as a witness. First Nat. Bank of Hailey v. Glenn, 77 Pac. 623, 626, 10 Idaho, 224, 109 Am. St. Rep. 204.

Under Statutory Construction Act N. Y. § 12 (Laws 1892, p. 1487, c. 677), providing that the term "signature" includes any memorandum, mark, or sign, written or placed upon any instrument or writing with intent to execute or authenticate such instrument or writing, a petition for the appointment of a

her  
guardian ad litem, signed Ellen X Conroy,  
mark

and a consent to the appointment signed simply by an "X," the instrument being duly acknowledged before a commissioner of deeds, was sufficient for the purpose of the prosecution of an action. Conroy v. Bigg, 109 N. Y. Supp. 914, 915.

Under sections 2965 and 6492 of Comp. Laws 1909, in order for one, who cannot write, to execute a written instrument by mark, the person who writes the name of the maker must also write his own name on the instrument as a witness to the signature, except in the case of a paper executed before a judicial officer; and when the name of the maker is written by one person, and a wholly different person writes his name as a witness, this does not constitute a "signature." Sims v. Hedges, 123 Pac. 155, 156, 32 Okl. 683.

#### Signature of part of name

The initials of the name of a district judge written beneath an order of appeal cannot be regarded as his official "signature" or as sufficient evidence of the granting of such order. Conery v. His Creditors, 40 South. 173, 174, 115 La. 807 (citing Origet v. United States, 125 U. S. 240, 8 Sup. Ct. 846, 31 L. Ed. 743).

Under the statute requiring a petition for an appropriation to aid in the construction of a railroad to be "signed" by 25 free-

holders, the fact that many of the signers of such petition signed their Christian names by the initials only does not render the proceeding void. Good v. Burk, 77 N. E. 1080, 1082, 167 Ind. 462.

#### Signature written by another

Where the "signature" of the assessor to the oath required to be appended to the tax rolls was written by a clerk at his request, it was his signature, and as effective as if written by himself. Reed v. City of Cedar Rapids, 116 N. W. 140, 141, 138 Iowa, 366.

The "signature" of a contract to sell land by the vendor's agent was sufficient where the firm name under which he did business was typewritten and followed by his initials, written by himself. Degginger v. Martin, 92 Pac. 674, 675, 48 Wash. 1.

In the cases of private contracts, it is undoubtedly true that a person may have his name written by another in his presence and thereby bind himself. In those cases, however, the act of the party evidenced by his signature is the material and important thing, and the signature is intended only as a memorial of the act. Here the great office of the signature is identification of the paper. A "signature" is said to consist of two parts—the act of writing the name, and the intention of thereby finally authenticating the instrument. This, however, relates to the signature of an individual to papers of a private nature, and, when its sufficiency is put to the test, he is estopped from denying that it is his signature by proof of the fact that he directed it to be written for him, and that it was done in his presence. From this proof the act and intent on his part are sufficiently made out. Walker v. Mobley (Tex.) 105 S. W. 61, 62 (quoting and adopting definition in Kirkpatrick v. Board of Commissioners, 44 S. E. 465, 53 W. Va. 275, citing 2 Greenl. Ev. 674).

#### Place of signing

The word "subscribed," as used in section 74, c. 73, Comp. St. 1903 (Cobbey's Ann. St. 1903, § 10,258), relating to contracts between real estate brokers and landowners, is synonymous with the word "signed," and does not require the signature to be at the foot of the instrument. Myers v. Moore, 110 N. W. 989, 990, 78 Neb. 448 (citing In re Walker's Estate, 42 Pac. 815, 110 Cal. 387, 30 L. R. A. 460, 52 Am. St. Rep. 104; California Canneries Co. v. Scatena, 49 Pac. 462, 117 Cal. 447).

In neither ordinary nor legal language is the word "sign" or "signature" confined to the writing of the name at the bottom of the paper. Where a lease provided for renewal on notice to the lessor, and within the time specified a member of the lessee firm forwarded to the lessor by registered mail a letter inclosed in one of the firm's business envelopes, with the firm name and address in the corner, reciting a description of the lease,

and stating that H. Graff & Co., as the lessee firm, "elects to avail itself of the renewal privilege and requests the continuance of the lease for a new term," such notice was sufficient, though no signature was subscribed thereto. *Wiener v. H. Graff & Co.*, 95 Pac. 167, 169, 7 Cal. App. 580.

An injured employé gave a notice under the employer's liability act (Consol. Laws 1909, c. 31, §§ 200-204), which stated that the undersigned gave notice, etc., and, after stating the accident and its causes, demanded that \$10,000 be paid to his attorney, whose name and address were given. The notice consisted of two typewritten pages and a cover, on which a printed form of verification had been filled out and signed by the claimant. Held, that the verification was properly a part of the notice, and hence that the notice, was "signed" within the meaning of the employer's liability act. *Connor v. Acme Engineering & Contracting Co.*, 132 N. Y. Supp. 782, 783, 148 App. Div. 518.

#### **Printed, stamped, or typewritten signature**

A name merely printed in an instrument where, according to its purport, the name should be mentioned in the recitals, is not a signature within the statute of frauds. *Lee v. Vaughan's Seed Store*, 141 S. W. 496, 498, 101 Ark. 68, 37 L. R. A. (N. S.) 352.

The word "signature" being defined as "the act of putting down a man's name at the end of an instrument to attest its validity" (Bouv. Law Dict. Tit. "Signature") and writing, as "words traced with a pen, or stamped, printed, engraved or made legible by any other device" (And. Law Dict. Tit. "Writing"), it was held that, an attorney in fact being authorized to sign a remonstrance against the issue of a liquor license, it was immaterial that he did so by typewriter. *Ardery v. Smith*, 73 N. E. 840, 841, 35 Ind. App. 94 (citing *Hamilton v. State*, 2 N. E. 299, 103 Ind. 96, 98, 53 Am. Rep. 491).

There was a sufficient compliance with Ky. St. § 4481 (Russell's St. § 5758), requiring due notice of an election to determine whether bonds shall be issued by a common graded school district to erect a building to be given by the trustees by written or printed posters signed by them, stating the time and place of the election, if the original notice prepared by the trustees from which the posters were printed contained their official signatures, or if they authorized the printing of their names upon the posters and adopted them as their signatures; "to sign" meaning, in law, to attach a name, or cause it to be attached with the intention of signing it, by any of the known methods of impressing a name on paper. *Lamaster v. Wilkerson*, 136 S. W. 217, 218, 143 Ky. 226 (citing *Words and Phrases*, p. 6512).

In a statute requiring an original notice to be signed by plaintiff or his attorney to

authenticate it as coming from the plaintiff, the word "signed" means no more than that the name of plaintiff or his attorney must be attached to the notice by any of the known modes of impressing a name on paper, namely, by writing, printing, or lithographing, provided the same is done with the intention of signing or be adopted in issuing the original notice for service, so that, where a plaintiff presented a notice containing the printed signature of his attorney to the court and procured a decree to be entered thereon, it would be assumed, in the absence of a showing to the contrary, that he had adopted such printed signature. *Cummings v. Landes*, 117 N. W. 22, 23, 140 Iowa, 80.

#### **Subscribed synonymous**

The word "subscribed," as used in section 74, c. 73, Comp. St. 1903 (Cobbey's Ann. St. 1903, § 10.258), relating to contracts between real estate brokers and landowners, is synonymous with the word "signed," and does not require the signature to be at the foot of the instrument. *Myers v. Moore*, 110 N. W. 989, 990, 78 Neb. 448 (citing *In re Walker's Estate*, 42 Pac. 815, 110 Cal. 387, 30 L. R. A. 460, 52 Am. St. Rep. 104; *California Canneries Co. v. Scatena*, 49 Pac. 462, 117 Cal. 447).

#### **SIGN (Noun)**

See Sky Sign.

As structure, see Structure.

Under Act Feb. 20, 1905, c. 592, §§ 1, 16, 33 Stat. 724, 728, authorizing the registration of trade-marks by filing an application specifying the merchandise to which the trade-mark is appropriated, a description of the trade-mark, and a statement of the mode in which the same is applied and affixed to goods, and authorizing an action for the wrongful use of a trade-mark by the use of signs, labels, etc., intended to be used in connection with the sale of merchandise, a trade-mark is only valid when actually affixed to a commodity, and one may not acquire a trade-mark in a sign placed on a building, the word "sign" being used to indicate a mark, symbol, token or emblem affixed to the article sold. *Diederich v. W. Schneider Wholesale Wine & Liquor Co.*, 195 Fed. 35, 37, 115 C. C. A. 37.

#### **SIGN OF INJURY**

See Visible Sign of Injury.

#### **SIGN OFF**

T. & T. agree to pay all the indebtedness of T. & R. when R. "signs off" all his rights and title, and all property that has been made in said business lands, etc. The condition to "sign off" would, as to all tangible personal property and negotiable paper payable to bearer, be satisfied by a delivery of the same to T. & T. so as to place the same in their full possession and control, and an acceptance of the same, unless written evi-

dence of the transfer was specially requested; but, if demanded, T. & T. had a right to written evidence of the transfer. As to contracts, accounts, choses in action, etc., there must be a written assignment and a delivery. As to lands, there must be a deed of conveyance properly executed, acknowledged, and delivered. *Thompson v. Richards*, 14 Mich. 172, 186.

#### SIGNED AND ACKNOWLEDGED

A certificate of acknowledgment to a petition for an election, stating that signers "executed the above instrument and severally acknowledged the execution of the same," sufficiently shows the petition was "signed and acknowledged," as required by Liquor Tax Law (Laws 1896, p. 57, c. 112) § 16; the word "executed" being an attestation that it was "signed." In re Livingston, 115 N. Y. Supp. 269, 270, 62 Misc Rep 334.

#### SIGNED AT THE END

See End.

#### SIGNED BY THE OWNER

An ordinance imposing a penalty for failure to file with the secretary of the board of health a plan of contemplated plumbing work, "signed by the owner," imposes the liability for violation of the ordinance of the owner and not on a plumber engaged by the owner to do the work. *Board of Health of Borough of Glen Ridge v. State*, 50 Atl. 585, 586, 67 N. J. Law, 103.

#### SIGNED BY THE PARTIES TO BE CHARGED

The "party to be charged," within the meaning of the statute of frauds, is the person against whom it is sought to enforce the contract. *Miller v. Carolina Monazite Co.*, 68 S. E. 1, 2, 152 N. C. 608; *Lee v. Vaughan's Seed Store*, 141 S. W. 496, 498, 101 Ark. 68, 37 L. R. A. (N. S.) 352.

The phrase "to be charged," in the provision of the statute of frauds requiring that the party "to be charged" only need subscribe a memorandum of sale, applies to the vendor in case of a sale. *Bailey v. Leishman*, 89 Pac. 78, 79, 32 Utah, 123, 13 Ann. Cas. 1116 (citing *Browne*, St. Frauds [2d Ed.] §§ 365, 366).

Under the statute of frauds, the "party to be charged" in the case of the sale of real estate is the vendor; and if the memorandum in writing be signed only by the vendor it is sufficient. *Wren v. Cooksey*, 145 S. W. 1116, 1119, 147 Ky. 825.

Under the statute of frauds, providing that no action shall be brought to charge any person on any contract for sale of land, unless some memorandum or note thereof be in writing and signed by the "party to be charged," the vendor of real estate is the party to be charged, and not the purchaser; and hence a vendor, verbally agreeing to sell land to a

city, cannot sue for breach of the agreement though the city spread the acceptance of the agreement on the minutes. *City of Murray v. Crawford*, 127 S. W. 494, 496, 138 Ky. 25, 28 L. R. A. (N. S.) 680.

Under the statute of frauds, requiring contracts to convey, etc., to be evidenced in writing and signed by the party to be charged therewith, or by some one authorized by him, a contract need not be subscribed, and a memorandum reduced to writing by a third person under authority of the parties thereto reading, "\$5,000 Jan. 2, 1911, \$5,000 Jan. 2, 1912. J. A. Horn to pay the above to E. A. Wellman, when he makes deed to Horn for Wellman's home place 3 Oct. 1910," is sufficient to charge Horn as purchaser. *Wellman v. Horn*, 72 S. E. 1010, 1011, 157 N. C. 170.

Under the statute of frauds requiring the memorandum to be signed by the party to be charged, it has frequently been held that "signing," whether in the caption or body or at the end of the instrument, will suffice, but that it must be signed with intent to enter into it. A printed signature will also answer the requirements of the statute, if there be sufficient evidence of its adoption as such by the party to be charged. In analogy to the law of "signing" as applied to the statute of frauds, under the statute a contract of fire insurance must be in writing and signed by the insured, or some person authorized to sign for him, and the usual and proper place for the signature is at the end of the matter which it attests, but in strict law it will suffice if, with the intent to constitute a signing, it is inserted in the writing in another place. *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.*, 55 S. E. 330, 334, 126 Ga. 380 (quoting and adopting definition in *Donnell Mfg. Co. v. Repass*, 75 Mo App. 420).

Civ. Code, § 1091, provides that an estate in real property, other than an estate at will or for a term of years not exceeding one year, can be transferred only by operation of law, or by a written instrument subscribed by the party disposing of the same or his agent. Code Civ. Proc. § 1971, provides that no such estate can be created, granted, etc., otherwise than by operation of law or a written instrument subscribed by the party creating, granting, etc., the same or by his agent. Code Civ. Proc. § 1973, and Civ. Code, §§ 1624, 1741, in effect declare that contracts for the sale of real property are invalid, unless they or some memorandum thereof be in writing and subscribed by the party to be charged or by his agent. Held, that the words "party to be charged" do not mean the vendor or the vendee, but the person charged in court with performance of the obligation. *Harper v. Goldschmidt*, 104 Pac. 451, 452, 156 Cal. 245, 28 L. R. A. (N. S.) 689, 134 Am. St. Rep. 124.

Under the provisions of section 6009, Rev. Codes, some of the contracts referred to therein require the signature of only one par-

ty, the party charged, and other contracts the consideration for which is the mutual promises of the parties to the contract, and, where no part of the contract has been performed, the memorandum referred to in said section must be signed by the parties to such agreement or contract in order to take the same out of the provisions of said section and bind both parties. *Houser v. Hobart*, 127 Pac. 997, 1001, 22 Idaho, 735, 43 L. R. A. (N. S.) 410.

### SIGNED JUDGMENT

The term "signed judgment" is synonymous with "took judgment." *Risher v. Wheeling Roofing & Cornice Co.*, 49 S. E. 1016, 1018, 57 W. Va. 149.

### SIGNED, SEALED, AND DELIVERED IN THE PRESENCE OF

See, also, Presence of the Testator.

As to the matter of the attestation of a deed, our statute does not require any particular form of words for the attestation clause of a deed. The phrase commonly used in this state to denote that the persons signing are witnesses is, "Signed, sealed, and delivered in the presence of;" but any phrase which clearly denotes that the persons signing were witnesses will be valid. Where a deed has the names of two persons written in the place where the names of subscribing witnesses are usually placed, and the letters "Wit" are written above the names of the two persons, and where the testificandum clause is "In witness whereof we hereunto set our hands and seals this the 4th day of May, 1903," other facts showing delivery, the attestation of the deed is sufficient. *Richbourg v. Rose*, 44 South. 69, 72, 53 Fla. 173, 125 Am. St. Rep. 1061, 12 Ann. Cas. 274.

Where a deed had the names of two persons written in the place where the names of subscribing witnesses were usually placed, and the words "in the presence of" were written above the names of such persons, that is a substantial compliance with the requirement of Rev. St. 1892, § 1950, providing that no estate or interest of freehold shall be created, granted, transferred, or released except by deed in writing "signed, sealed, and delivered in the presence of" at least two subscribing witnesses. *East Coast Lumber Co. v. Ellis-Young Co.*, 45 South. 826, 829, 55 Fla. 256.

### SIGNAL

See Back-up Signal; Highball Signal; Kick Signal, Move Slow Signal; Stock Signal.

Given by conductor, see Given by the Conductor.

Signal points, see Point.

See, also, Telltales.

Switch targets are not "signals," within a statute making a railroad company liable

for injury caused by the negligence of an "employé" having charge of any signal, etc.; the statute being applicable only to such signals as are complete within themselves, and not subsidiary parts of another device, and so operated that by the negligence of the operator they may be made to speak falsely. *Chicago, I. & L. R. Co. v. Barker*, 83 N. E. 369, 374, 169 Ind. 670, 17 L. R. A. (N. S.) 542, 14 Ann. Cas. 375.

The complaint alleged that it was defendant's custom to stop its street cars at a certain street, and that, when a car approached the corner in charge of its motorman and conductor, or plaintiff, being in full view of the motorman and conductor, signaled the car to stop, and it had almost stopped, when plaintiff took hold of the support and was boarding the car, when it suddenly started forward without warning before plaintiff had obtained a footing, so as to jerk him so violently as to prevent him from getting on, whereby he was dragged, etc. Held to sufficiently allege that the motorman saw plaintiff and understood the signal to stop; the word "signal" meaning to communicate by means of an understood sign, and sufficiently showed that the injury was caused by the want of care of defendant's servants. *Nilson v. Oakland Traction Co.*, 101 Pac. 413, 415, 10 Cal. App. 103.

### SIGNAL AND PRECAUTIONS

Under an instruction that it is the duty of the defendant's engineer or fireman to ring the bell or sound the whistle or to give suitable and sufficient signals and warnings of the approach of its train, while moving its trains in its yards, and to use all proper and reasonable efforts to avoid injuring any party who may be in its yards on legitimate business, and if the jury find from the greater weight of evidence that the defendant failed to give such signal and take such precautions, and the said acts on the part of the defendant resulted in the killing of the plaintiff's intestate, they should answer the first issue "Yes," a contention that the instruction is contradictory, because the first part of the instruction is in the alternative, "ringing or sounding the whistle," and in the second part "giving the signal and take such precautions," is not tenable because the latter part says "signal and precautions," which is merely the equivalent of the alternative "signal" and "proper and reasonable effort" to avoid injury to others mentioned in the first part of that instruction. *Edwards v. Carolina & N. W. R. Co.*, 52 S. E. 234, 235, 140 N. C. 49.

### SIGNAL MAN

One whose duty it is to inspect and keep in proper order the automatic electric block signals and bells along the section of a railroad is called a "signal man." *Lynch v. Chicago & A. R. Co.*, 106 S. W. 68, 69, 208 Mo. 1.

**SIGNAL POINT**

The employer's liability act, making railway companies liable for injury to an employé caused by the negligence of any person in charge of any "signal points," etc., is a literal copy of the English statute using the words "signal points," designating an apparatus for giving signals, called "points." In the original statute the word "signal" was used, without "points." The present statute covers cases of negligence of persons having charge of signals generally; "points" referring to apparatus used in giving signals, and not merely localities. *Cogbill v. Louisville & N. R. Co.*, 44 South. 683, 685, 152 Ala. 154.

**SIGNAL TORPEDO**

"Signal torpedoes" are devices used by railroads in signaling, being fastened to the rails and containing an explosive. *Obertoni v. Boston & M. R. R.*, 71 N. E. 980, 981, 186 Mass. 481, 67 L. R. A. 422.

**SIGNIFY**

To "signify" is "to make known." *Goodwin v. Hodgkins*, 77 Atl. 711, 712, 107 Me. 170.

Where a lease entitled the lessees to a renewal, provided they signified their acceptance in writing to the lessor on or before September 1, 1904, such provision only required the lessees to make known, manifest, notify, or express in writing their acceptance or desire to continue the lease, such terms being synonymous with "signify," as used in the lease, any writing adequate for that purpose being sufficient to operate as an election to renew. *Wiener v. H. Graff & Co.*, 95 Pac. 167, 168, 7 Cal. App. 580.

**SIGNS****Dollar sign**

The symbol "\$" denotes one or more dollars, and with figures indicating the number expresses the denomination of federal coins and the amount. *Mayson v. Sheppard* (S. C.) 12 Rich. 254, 257.

The mark commonly used to denote dollars (\$) is not part of the English language, within the statute of this state, which requires declarations and other pleadings to be drawn in the English language; and a declaration in assumpsit upon a promissory note in which the amount for which the note was given was only expressed in figures with the mark for dollars prefixed (thus, \$226.15), was held insufficient on demurrer. *Clark v. Stoughton*, 18 Vt. 50, 51, 44 Am. Dec. 361.

The mark "\$" for dollar may be used in designating the amount under statutes for the collection of taxes. *Jackson v. Cummings*, 15 Ill. 449, 452, 453.

**SILENCE**

*Estoppel by silence*, see *Estoppel in Pais*.

**SILHOUETTE**

A "silhouette" is defined to be "a representation of the outlines of an object filled in with a black color; a profile portrait in black such as a shadow appears to be," and also as: "(1) Originally, a portrait in black or some other uniform tint sometimes varied as to the hair or other parts by lighter lines or a lightening of shade, showing the profile as cast by a candle on a sheet of paper, hence any opaque portrait, design, or image in profile. (2) Opaque representation or exhibition in profile, the figure made by the shadow or shadowy outline of an object; shadow." Where a contract granting one the privilege within a certain concession at an exposition of taking and selling photographs, provided that the lessor would not grant like or "similar" privileges to any one else and the privileges so granted to another to cut "silhouettes" with scissors and paste them on cards, it was held not an infringement on the exclusive privileges, though a silhouette made in such manner cannot be distinguished by an ordinary person from a photographic silhouette which is in the nature of a photographic novelty, and the only means of distinction is by the paper ordinarily used by photographers. *Frankel v. German Tyrolean Alps Co.*, 97 S. W. 961, 962, 121 Mo. App. 51 (citing *Webst. Dict. and Cent. Dict.*).

**SILICA**

As mineral, see *Mineral*.

**SILK**

See *Carded Silk*; *Combed Silk*; *Imitation Silk*; *Nearsilks*.

As wearing apparel, see *Wearing Apparel*.

*Raw silk*, see *Raw*.

A "powder made from raw silk," which is used in the manufacture of wall paper and artificial flowers, is dutiable under a provision of the Tariff Act relating to manufactures of silk. *W. W. Thomas & Co. v. United States*, 145 Fed. 1023, 74 C. C. A. 682, affirming judgment 140 Fed. 93.

So-called remanit, in the form of ropes, braids, and mats, which has been manufactured from silk produced by carbonizing rags containing silk, is a manufacture of "silk," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, par. 391, Schedule L, 30 Stat. 187. *Frank v. United States*, 143 Fed. 702.

Ribbons composed chiefly of silk, but in part of cotton, are not "ribbons \* \* \* of cotton, \* \* \* whether composed in part of india rubber or otherwise," under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 320, 30 Stat. 179; for the word "otherwise" is there used with the meaning of "not," and not as relating to other materials

than india rubber. Such ribbons are properly assessed as manufactures of silk, under paragraph 391 of Schedule L. *Gartner, Sons & Co. v. United States*, 154 Fed. 957, 958.

### SILK BRAID

Horsehair braids are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 390, 30 Stat. 187, as "silk braids" by similitude. *John A. Paterson & Co. v. United States*, 159 Fed. 320.

### SILK COCOONS

Paragraph 661, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201, enumerating "silk cocoons and silk waste," includes those articles only when not manufactured at all. *Fawcett v. United States*, 146 Fed. 83.

### SILK TRIMMINGS

Silk ribbons, of which some were, and others were not, in the nature of trimmings, but which, however used for trimmings, are required to be further fashioned for such use, and which are not in fact or commercially within the class of goods known as "trimmings," are not dutiable as "silk trimmings," under paragraph 390, Tariff Act 1897, c. 11, § 1, Schedule L, 30 Stat. 187, but as manufactures of silk not specially provided for, under paragraph 391 of said act (30 Stat. 187). *Gartner & Friedenheit v. United States*, 131 Fed. 574, 575.

### SILK WASTE

Silk organzine, damaged in dyeing, is not by reason of the damage removed from the provision for "organzine," in Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 385, 30 Stat. 185, and is classifiable as such, rather than as "silk waste," under section 2, Free List, par. 661, 30 Stat. 201. *Cohen v. United States*, 180 Fed. 634.

Paragraph 661, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201, enumerating "silk cocoons and silk waste," includes those articles only when not manufactured at all. Combed silk that has fallen from or been caught in the machines in which it was undergoing further operations is dutiable under the provision in paragraph 384, Tariff Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 185, for silk not further manufactured than combed, and is not subject to the provision for "silk waste" in paragraph 661, § 2, Free List, 30 Stat. 201. *Fawcett v. United States*, 154 Fed. 1003, 83 C. C. A. 197, 146 Fed. 83.

### SILLO

A "silo" is a receptacle intended to preserve and store forage in edible condition. *Ryder v. Schlichter*, 128 Fed. 487, 488, 61 C. C. A. 469.

### SILVER

See Cotton Silver; Sterling Silver.

### SILVER CERTIFICATE

As pecuniary obligation, see Pecuniary Obligation.

### SILVERWARE

As household furniture, see Household Furniture.

### SIMILAR

See Substantially Similar.

The primary meaning of the word "similar" as given by Webster is exactly alike. *Krakowski v. United States*, 161 Fed. 88, 89, 88 C. C. A. 252.

"Similar" means: "(1) Exactly corresponding, resembling in all respects, precisely like. (2) Nearly corresponding, resembling in many respects, somewhat alike, having a general likeness. (3) Homogeneous, uniform." *Frankel v. German Tyrolean Alps Co.*, 97 S. W. 961, 962, 121 Mo. App. 51.

Under Code 1907, §§ 1070-1074, 1125, authorizing the annexation of territory to a city, and providing that after an election for annexation, under that or any "similar" law, no subsequent election shall be ordered for such territory or any part thereof within six months, an election under section 1073, to annex territory to a city, within six months after an election for the annexation of such territory and other territory to the city, under Act Aug. 8, 1907, authorizing the annexation of territory to the city on the act being approved by the voters at an election, is invalid; the word "similar" not meaning "precisely alike," but meaning "with more or less resemblance." *Sigsbee, State ex rel. v. City of Birmingham*, 48 South. 843, 845, 160 Ala. 196.

Pol. Code, § 4867, makes it the duty of the county clerk to make a duplicate assessment book for each city in the county; and section 4869 provides that the county clerk must deliver such duplicate book to each city treasurer after having attached thereto an affidavit similar to the one set out in Pol. Code, § 3845. This section requires the county clerk to state that he has made certain additions, calculations, and extensions in the book, which are, under section 4869, to be done by the city treasurer. Held, that the word "similar," in section 4869, does not require the county clerk to make an affidavit identical with the one required by section 3845, but merely requires an affidavit covering all the facts showing that the clerk has done his duty in making the copy required by section 4867 et seq. *State ex rel. City Council of Butte v. Weston*, 74 Pac. 415, 418, 29 Mont. 125.

Rev. St. 1899, § 1423, providing that Laws 1897, p. 132, relating to fraternal beneficiary associations, shall not apply to or affect grand or subordinate lodges of Masons, Odd Fellows, or similar orders paying only

sick, disability, or funeral benefits, or any association not working on a lodge system, etc., does not exclude from the operation of such act the uniformed rank of the Knights of Pythias, which is a "similar order" paying death benefits. *Tice v. Supreme Lodge, Knights of Pythias*, 100 S. W. 519, 526, 123 Mo. App. 85.

Section 19, c. 98, p. 127, Acts 1888, extending the limits of Baltimore city by including parts of Baltimore county, provided that after the year 1900 the property, real and personal, in the territory annexed should be liable to taxation in the same manner and form as "similar" property within the limits of the city at the time of the passage of the act. Held, that the section, in the absence of any proviso limiting its operation, would render all property, real and personal, in the annexed territory, liable to taxation at the full city rate in the same manner as other real and personal property in the city; the word "similar" not referring to property improved in any particular way or located in any particular locality in the city, but to real and personal property within the limits of the city. *City of Baltimore v. Gail*, 68 Atl. 282, 284, 106 Md. 684.

As used in Baltimore City Charter, § 37, as amended, requiring grants of franchises to use streets to be by ordinance, referred to the board of estimates and providing that the right to use streets for bay windows, hitching posts, areaways, planting trees, storm doors, drains and drainpipes, stands, or other such temporary "or similar uses," may be granted by the board of estimates, the phrase "or similar uses" covered the erection of an awning with an iron frame covered with iron and luxfer prisms. *Preston v. Likes, Berwanger & Co.*, 62 Atl. 1024, 1026, 103 Md. 191.

In Interstate Commerce Act Feb. 4, 1887, c. 104, § 2, 24 Stat. 379, prohibiting discrimination between shippers under "substantially similar circumstances and conditions," such phrase relates to the circumstances and conditions of carriage only, and does not include matters affecting individual shippers; and a railroad may not charge one shipper of coal a lower rate than is charged another shipper between the same terminals, because the former is shipping under contracts extending over a term of years, based on lower rates which were in force when such contracts were made, while the other shipper has no such contracts. *Pennsylvania R. Co. v. International Coal Mining Co.*, 173 Fed. 1, 4, 97 C. C. A. 383.

Differences with respect to competition between coal intended for railway consumption and other coal, and with respect to the manner of delivery, depending upon a difference in the facilities possessed by the railroads and other consignees, do not make the interstate traffic therein dissimilar in

circumstances and conditions, within the meaning of the interstate commerce act of February 4, 1887, § 2, so as to justify the giving of a lower rate for the transportation of railway fuel coal than is given to shippers of other coal between the same points. *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 32 Sup. Ct. 742, 746, 225 U. S. 326, 56 L. Ed. 1107.

#### In tariff law

The term "of similar description," in tariff acts by which import duties are levied on certain classified goods and goods "of similar description," is not a commercial term, as the tariff acts do not contemplate that goods classified under it shall in all respects be the same. *Frankel v. German Tyrolean Alps Co.*, 97 S. W. 961, 962, 121 Mo. App. 51 (quoting *Greenleaf v. Goodrick*, 101 U. S. 278, 25 L. Ed. 845).

Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 504, 30 Stat. 196, relating to books, libraries, furniture, and "similar household effects," does not include automobiles, because they are not "similar" to libraries, furniture, etc. *United States v. W. R. Grace & Co.*, 166 Fed. 748, 749, 92 C. C. A. 590.

In Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205, relating to articles "similar" to other articles, the term quoted is used in the sense of nearly corresponding, resembling in many respects, somewhat like, or having a general resemblance. Tariff Act July 24, c. 11, § 7, 30 Stat. 205, relating to articles "similar" to other articles "either in material, quality, texture, or the use," does not require that similitude should exist in all four of the respects specified. One of these resemblances will suffice. Sake is dutiable as still wine by similitude, being "similar" to that article in material and use within the meaning of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205, which prescribes the classification of unenumerated articles "similar \* \* \* in material, \* \* \* use," etc., to enumerated articles. The resemblance in material arises from the fact that the predominant substance in both articles is alcohol, and that there is a substantial similarity in their alcoholic strength; the percentage of alcohol being about 18 in sake and from 11 to 16 in still wine. The resemblance in use arises from the fact that both articles are drunk for purposes of exhilaration, and are capable of producing intoxication. *United States v. Komada & Co.*, 162 Fed. 465, 468, 89 C. C. A. 385.

Within the meaning of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205, ramie silver resembles cotton silver (1) in "material," because it is a vegetable fiber; (2) in "quality," because it has reached the same degree of purity, or freedom from objectionable substances; (3) in "texture," because the fibers are in the same form; and (4)

in "use," because, like cotton sliver, it is spun into yarn and thread, so as to be manufactured into fabrics. Ramie sliver is dutiable as cotton sliver by similitude, under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 302, 30 Stat. 175. *F. B. Vandegrift & Co. v. United States*, 164 Fed. 65, 173 Fed. 609, 611, 97 C. C. A. 469.

Horsehair braids, used exclusively in the manufacture of hats, are dutiable by similitude, as "braids \* \* \* wholly of straw, \* \* \* suitable for making or ornamenting hats," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 409, 30 Stat. 189. To apply the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205, it is not necessary that all the particulars of resemblance mentioned should exist; but the presence of one of the qualities is sufficient. Where an unenumerated article has a very vague and questionable resemblance to some enumerated article, and is exactly identical with another enumerated article, its status under the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205, is fixed by the latter condition; the former being disregarded. There is no substantial resemblance between a horsehair hat braid and a silk braid in material, quality, and texture, within the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205. While there is probably a greater similarity to braids of silk than to braids of straw, it is too remote to be considered. *John A. Paterson & Co. v. United States*, 166 Fed. 733, 92 C. C. A. 524.

#### SIMILAR SCHEME

An indictment charging misuse of the mails in furtherance of a lottery or similar scheme charged that defendants, having acquired certain land, conceived the idea of platting it into lots of unequal value and on a certain number of the lots erecting houses, rendering the inequality greater, then selling the lots at \$140 each, the particular lot secured by a purchaser, however, not to be known or identified at the time of purchase, but that, after all the lots were sold, there was to be a drawing under defendants' supervision by which the lots were to be parceled out by lot or chance to each purchaser and deeded in accordance with the drawing. Held, that such scheme was in all respects similar to a lottery, and that the furtherance thereof by means of letters and circulars sent through the Post Office Department constituted a violation of Criminal Code (Act March 4, 1909, c. 321, § 213, 35 Stat. 1129), prohibiting the use of the mails in furtherance of a lottery or similar scheme. *United States v. Ridgway*, 199 Fed. 286, 290.

#### SIMILARITY

The "similarity" required by the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205, is a real or substantial

similarity. *United States v. Komada & Co.*, 162 Fed. 465, 468, 89 C. C. A. 385.

#### SIMILITUDE

See *Similar*.

#### SIMONY

A magic healer who takes the money of the sick is engaged in a fraudulent practice. If he had any divine power and was selling it, he was guilty of the common-law offense of simony. *Bennett v. Ware*, 61 S. E. 546, 551, 4 Ga. App. 293.

#### SIMPLE

##### SIMPLE ADDITION

"Simple addition" is the process of uniting independent amounts in one sum. In re *Manhattan Bridge No. 3 in City of New York*, 108 N. Y. Supp. 366, 367.

##### SIMPLE APPLIANCE

A pine stick, three feet long, an inch wide, and half an inch thick is within the rule that it is not the master's duty to inspect "simple appliances" furnished. *Masich v. American Smelting & Refining Co.*, 118 Pac. 764, 767, 44 Mont. 36.

##### SIMPLE ASSAULT

"Simple assault" is an unlawful attempt by violence to do injury to the person of another; the person making the attempt having the present ability to commit such injury. *State v. Mills* (Del.) 69 Atl. 841, 842, 6 Pennewill, 497.

##### SIMPLE BOND

At common law a "simple bond" was an obligation to pay a certain sum of money to a named obligee on demand or on a day certain. *Burnside v. Wand*, 71 S. W. 337, 347, 170 Mo. 531, 62 L. R. A. 427.

##### SIMPLE CONTRACT DEBT

The consideration stated in a deed, no vendor's lien being reserved, is a "simple contract debt" within the statute of limitations. *Harris v. Shield's Ex'r*, 69 S. E. 933, 934, 111 Va. 643.

##### SIMPLE DOUBT

A "simple doubt," as contradistinguished from an "intricate" or "complicated" doubt, may be such a "reasonable doubt" as would require an acquittal; indeed, every reasonable doubt may be accurately said to be a simple doubt, and it is error to instruct a jury that it must not acquit if it has a simple doubt. *Hampton v. State*, 39 South. 421, 429, 50 Fla. 55.

##### SIMPLE LARCENY

Code, § 4831, defines "simple larceny" as the act of stealing, taking, and carrying away



the goods or chattels of another, and provides a maximum penalty therefor. Section 4832 increases the penalty for larceny in a building in the nighttime, and section 4833 increases the penalty for larceny in a building in the daytime, where the value of the property stolen does not exceed \$20. Held, that these sections do not define different crimes of larceny as to which there are no degrees, but that the same effect is obtained by varying the punishment according to the circumstances, and so if an indictment alleges with reasonable certainty that the accused feloniously took, stole, and carried away the goods or chattels of another, it charges the offense defined by section 4831, and if in addition it charges facts increasing the penalty provided in another section, that punishment may be imposed, but if the additional allegation is insufficient for that purpose, and a verdict of guilty is returned, the conviction is valid as for simple larceny, and accused is not prejudiced by the insufficiency of the matter in aggravation. *State v. Carter*, 121 N. W. 694, 695, 144 Iowa, 280.

If a person, fraudulently intending to get possession of the money of another and appropriate the same to his own use, by false representations induces the owner to deliver the money to him for the purpose of being applied for the owner's use or benefit, and then appropriates it in pursuance of the original intent, he is guilty of both larceny after trust delegated and simple larceny, and may be prosecuted for, and convicted of, either offense. *Martin v. State*, 51 S. E. 334, 123 Ga. 478.

#### SIMPLE LICENSE

A contract by a patentee giving to the grantee a right to make or use, or vend, or to make, use, and vend, the invention within a specified district, is a "simple license," and conveys no interest in the patent itself, and such a licensee's rights cannot be affected by any infringements of the patent within the specified district. The patentee or his assigns may, by instrument in writing, assign, grant, and convey either (1) the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or (2) an undivided part or share of that exclusive right; or (3) the exclusive right under the patent within and throughout a specified part of the United States. Rev. St. § 4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone. Any assignment or transfer short of one of these is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. An exclusive license is one which does not amount

to an assignment by reason of something reserved to the patentee. A conveyance by a patentee to another of the sole and exclusive right and license to use and to build for use within territory described the machines of the patent, with certain express exceptions, and also reserving to the patentee the right to build machines in said territory for use outside thereof, is not an assignment, but is in the nature of an exclusive license, and the grantee cannot maintain a suit for infringement of the patent in his own name unless against the patentee, nor is he a necessary party to such a suit in equity by the patentee, although he is a proper party if his interests will be affected by the decree, and on seasonable objection by the defendant may be made a party in the discretion of the court. *Bowers v. Atlantic, Gulf & Pacific Co.*, 162 Fed. 895, 898 (citing *Waterman v. Mackenzie*, 11 Sup. Ct. 334, 138 U. S. 252, 34 L. Ed. 923; *Hammond v. Hunt*, 11 Fed. Cas. 391).

#### SIMPLE MELANCHOLIA

"Simple melancholia" is a kind of insanity, and some of its pronounced characteristics are an indifference to life and to worldly interests and affairs, and, as it develops, delusions will develop, and the usual outcome is a suicidal tendency; but one afflicted with simple melancholia may converse apparently rationally, write apparently intelligently, and converse with friends, so that the affliction will not be noticed. The main condition is a change in the emotions and disposition. The mere fact that one is suffering from simple melancholia does not show testamentary incapacity, but to establish testamentary incapacity the insanity and the delusions must have directly affected the testamentary act. *In re Dolbeer's Estate*, 86 Pac. 695, 703, 149 Cal. 227, 9 Ann. Cas. 795.

#### SIMPLE TOOL

An implement having a wooden handle about three feet long, inserted in an iron cross-head, having a hammer face on one end and a pick point on the other end, is a "simple tool," which the master need not inspect. *Lehman v. Chicago, St. P., M. & O. Ry. Co.* 122 N. W. 1059, 1061, 140 Wis. 497.

A "cant hook," consisting of a large handle of wood, over which an iron cuff is slipped and fastened a few inches from the bottom, into which cuff a hook is fastened by a bolt, and which is operated by hand by the operator catching hold of the handle, and placing the hook on a log, and using the implement as a lever, is not a "simple tool"; and the servant is not negligent in using it, unless he knows of defects therein, or ought to have known thereof by the use of ordinary care. *Parker v. W. C. Wood Lumber Co.*, 54 South. 252, 253, 98 Miss. 750, 40 L. R. A. (N. S.) 832.

**SIMPLE TRUST**

A dry or simple trust is one as to which the trustee has no duties to perform and the cestui que trust has the entire management of the estate. It is a simple separation of the equitable and legal estates which can be united at the option of the cestui que trust. It is not to be confounded with those trusts which are created upon a declared condition which has passed away by the cessation of the reason for the continuance of the trust, as, for instance, a trust established for the benefit of a married woman who becomes discover, thus discontinuing the trust. *Carpenter v. Carpenter's Trustee*, 84 S. W. 737, 738, 119 Ky. 582, 68 L. R. A. 637, 115 Am. St. Rep. 275 (citing *Woolley v. Preston*, 82 Ky. 415; *Thomas v. Harkness*, 76 Ky. [13 Bush] 23).

**SIMPLY**

Civ. Code, § 1336, providing that "words in a will referring to death or survivorship simply relate to the time of the testator's death unless possession is actually postponed, when they must be referred to the time of possession," has no application to the construction of a will containing words of limitation upon a death coupled with a contingency such as dying without issues; this not being death "simply." In *re Carothers' Estate*, 119 Pac. 926, 928, 161 Cal. 588.

**SIMPLEX OBLIGATIO**

St. 4 Anne, c. 16, § 13, like Rev. St. Mo. 1899, § 864, relative to tender of the amount actually due on a penal bond, covers bonds for a penalty with a condition or defeasance by which they shall become void upon the payment of a lesser sum, but it also covered actions for debt brought upon any single bill or upon any judgment, in which case the defendant may discharge himself by paying in to court the full amount of the debt, bond, or judgment with interest and costs. The Missouri Statute contains no such provision. Such bonds are not treated by the Missouri courts as falling within the same class as penal bonds, but are treated like any other agreement to pay money where the plaintiff is entitled to recover what he can prove was actually due at the time the suit was brought. In other words, such a bond is properly a "simplex obligatio," whereas a bond for the payment of money upon a condition is denominated a double or conditional bond. *Burnside v. Wand*, 71 S. W. 337, 342, 170 Mo. 531, 62 L. R. A. 427.

**SIMULATION**

In French law "collusion," or "simulation," is "a fraudulent arrangement between two or more persons to give a false or deceptive appearance to a transaction in which they engage." *Sere v. Darby*, 43 South. 255, 258, 118 La. 619.

Where a petition shows that a judgment debtor bought immovable property through an interposed person, in whose name title was taken in order to screen and cover it from the pursuit of his creditors, and that the vendor of the property was not a party to the scheme to defraud, and sold in good faith, believing the interposed person the real purchaser, the sale itself not being attacked, and the only object of the suit is to have it decreed that the judgment debtor is the true owner, and not the interposed person, the action is one in declaration of simulation, not to annul the sale, but to expose the real vendee. *Hoffmann v. Ackermann*, 35 South. 293, 294, 110 La. 1070.

**SIMULTANEOUS**

The word "simultaneous" may be used according to the subject-matter to which it refers in a sense that does not imply absolute synchronism, and, while the word may be thus used to imply absolute synchronism, the use of the word in the making of wire glass refers only to the laying of the wire and rolling the first sheet of glass, and not to the whole operation. *Highland Glass Co. v. Schmertz Wire Glass Co.*, 178 Fed. 944, 963, 966, 967, 102 C. C. A. 316.

**SIMULTANEOUSLY**

The word "simultaneously," within the rule that to warrant the joinder of several persons in a bill for relief the wrongful act must be of such a character as to necessarily call upon all the orators "simultaneously," affecting all in the same manner, though not necessarily to the same extent, means not at the very same instant, but substantially the same time. *Cloyes v. Middlebury Electric Co.*, 66 Atl. 1039, 1042, 80 Vt. 109, 11 L. R. A. (N. S.) 693.

The word "simultaneously" means at the same time and, as applied to an alleged infringement of a patent, if the machinery in question at any time during the operation moves "simultaneously" as does the machinery of the alleged infringed patent, such alleged infringing machinery is within the claim, though its respective movement may begin and end at different times. *United Shirt & Collar Co. v. Beattie*, 149 Fed. 736, 742, 79 C. C. A. 442.

The word "simultaneously," used in a patent to describe the operation of the parts of a machine which in fact operate progressively to complete the article produced, must be construed to mean that the parts operate unitedly, harmoniously, and in concord, and not at the same instant of time. *E. J. Manville Mach. Co. v. Excelsior Needle Co.*, 167 Fed. 538, 540, 93 C. C. A. 216.

**SINCE**

"Since" means "after," "from the time of." An allegation that a condition has ex-

isted "since" a certain date does not include that date. *Lawver v. Great Northern R. Co.*, 105 N. W. 1129, 97 Minn. 36.

The Primary Election Law. (Laws 1899, p. 970, c. 473, § 3, subd. 1), relating to the enrollment of voters at primary elections, requires each voter to declare that he "has not enrolled with or participated in any primary election or convention of any party since the first day of last year." Such law also provides that such declaration shall be made on the regular registration days preceding elections, and shall be deposited in the ballot boxes, which shall remain unopened until the Tuesday following the next succeeding day of the general election. The ballots are then opened, the blanks examined, and there is set opposite the name of each elector in the enrollment book the number designated by him on the enrollment blank. This must be done before the 15th of December and the enrollment books thus made up go into effect on the 1st day of January following, and remain in force until the 1st day of the following January, when they are superseded by new books. Held that, though the declaration is made in October, it should be treated as if made on January 1st following, when it becomes effective, and the statements that the voter has not enrolled "since the first day of last year" must be considered as referring to the day on which it takes effect. In re Duffy, 109 N. Y. Supp. 979, 981, 125 App. Div. 406.

#### As applicable to future

The word "since" is not always limited in meaning to the time between the present and a certain past event or a space of time between two certain past events, but sometimes reaches beyond the present and embraces future time, and, when used as a preposition, may mean "during or within the time after; ever after, or at a time after; from and after the time, occurrence, or existence of." Const. art. 13, § 6, provides for the forfeiture for taxes of 1,000 acres or more for failure to enter them on the land books for any five successive years after the year 1869. Laws 1882, c. 130, § 39, making it the duty of a landowner to have his land entered on the land books of the county, and cause himself to be charged with the taxes thereon, and pay them, provides that, when for any five successive years since the 9th day of April, 1873, the owner of a tract of land less than 1,000 acres in extent shall not have been charged on such books with state taxes on the land, it shall be forfeited by operation of law and the title thereto vested in the state. Held, that the phrase "since the 9th day of April, 1873," means all time after such date, and not merely the period between such date and the time of enactment of the act of 1882. *State v. Mathews*, 69 S. E. 644, 650, 68 W. Va. 89.

#### As subsequent

It has been held, in a bill for infringement of letters patent alleged to have been issued in 1879 and assigned to the complainant in 1880, that an averment of an infringement of the latter's rights "since" the date of the patent will be construed as meaning after or subsequent to the date of the patent and not "ever since" that time. *Edison Electric Light Co. v. Equitable Life Assur. Soc. of United States*, 55 Fed. 478, 480.

## SINGLE

See Unmarried.

## SINGLE BOND

See Simplex Obligation.

## SINGLE CAMERA

A claim of a reissued patent of "a camera having a single stationary lens" is the same as a claim in the original patent "a single camera," and a single sensitized tape-film is "a tape-film." *Edison v. American Mutoscope & Biograph Co.*, 144 Fed. 121, 123.

## SINGLE COMPONENT MATERIAL

The Tariff Act, providing that the "component material of chief value" in imported merchandise shall be held to be that component material which shall exceed in value any other "single component material" of the article, and the value of the component material shall be determined with reference to the value of the components in their condition as found in the article, means the state which the materials are in when put together, without regard to their value after being advanced to completion; and articles of cotton covered with varnish, in which, before combination, the latter is of less value, should be regarded as composed in chief value of cotton, irrespective of the fact that subsequent labor in applying the varnish may render it the component of chief value in the completed articles. *United States v. Johnson & Johnson*, 154 Fed. 39, 83 C. C. A. 151, reversing 146 Fed. 148.

## SINGLE CORDS

See Single Strands or Cords.

## SINGLE DWELLING HOUSE

The use of a dwelling house as an asylum in which to treat patients for the liquor, opium, tobacco, and morphine habits is not a violation of a provision in the deed thereof that no building other than one, "single dwelling house" shall be erected, placed, or maintained on said lot, since doubts should be resolved in favor of the grantee, when the meaning is not plain. *Stone v. Pillsbury*, 45 N. E. 768, 167 Mass. 332.

## SINGLE FARE

See Passenger Paying Fare.

**SINGLE IMPROVEMENT**

Where one improvement district is formed for the making of two improvements, the two improvements must be treated as one within Kirby's Dig. § 5683, limiting the cost of a "single improvement." *Bateman v. Board of Com'rs of Improvement Dist. No. 1 of City of Clarendon*, 143 S. W. 1062, 1063, 102 Ark. 306.

**SINGLE-LINE RATES**

The distinction in Laws 1905, c. 353, establishing rates for transportation of oil, between "single-line rates" and "double-line rates," is between rates for shipment over a single line and for shipment over more than one line. *Tucker v. Missouri Pac. Ry. Co.*, 108 Pac. 89, 90, 82 Kan. 222.

**SINGLE OBLIGATION**

"A 'single obligation' is one without any penalty, as where I simply promise to pay you \$100." *United States v. Green*, 136 Fed. 618, 647 (quoting 2 Bouv. Law Dict. 254).

**SINGLE PERSON**

As family, see Family.

**SINGLE RAILROAD**

For the purposes of chapter 227 of the Acts of 1872-73, as well as chapter 41 of the Acts of 1907, two railroads, operated in connection with one another, under a lease of one by the other, or otherwise, constitute a "single railroad." *Coal & Coke Ry. Co. v. Conley*, 67 S. E. 613, 632, 67 W. Va. 129.

**SINGLE ROOM**

As dwelling house, see Dwelling—Dwelling House.

**SINGLE-STAMP SPIRITS**

"Single-stamp spirits," within St. 1909, § 4114A et seq., imposing a tax on the business of compounding, rectifying, adulterating, or blending distilled spirits known and designated as single stamped spirits, is not confined to whisky, but includes any distilled alcoholic spirits used as a beverage whether single or double stamped. *Dr. C. Bouvier Specialty Co. v. James*, 118 S. W. 381, 133 Ky. 580.

**SINGLE STRANDS OR CORDS**

The provision in the Tariff Act, relating to gloves stitched with more than three "single strands or cords," does not include gloves having but three points each, each point having three distinct rows of stitching, though the stitching shows nine chains of embroidery on the outside of the backs of the gloves and nine single rows of stitching on the inside. *United States v. La Fetra*, 172 Fed. 297, 298.

**SINGLE SUBJECT**

Where all the provisions of a statute fairly relate to the same subject, have a nat-

ural connection with it, or are the incidents or means of accomplishing it, the subject is single within Const. art. 4, § 28. *State v. Smith*, 135 S. W. 465, 467, 233 Mo. 242, 33 L. R. A. (N. S.) 179.

**SINGLE TRAIN**

A freight train scheduled to run regularly between points in different states is a "single train" throughout such run and at all times subject to the provisions of Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531, as amended, although some of the cars composing it may have been left and others taken on at different stations, and although after entering the second state the engine, caboose, and train crew may have been changed. In such case, if at any one or more points in the run a sufficient number of the cars composing the train are not equipped with air brakes to meet the requirement of the act, the railroad company is liable to the penalty imposed for its violation, but to one penalty only. *United States v. Chicago Great Western Ry. Co.*, 162 Fed. 775, 776, 780.

**SINGLE TRANSACTION**

See Jeopardy.

**SINKING**

As used in Rev. Codes, § 8536, requires the use of steel cages equipped with doors in mine shafts over 300 feet deep, provided that, when such cage is used for slinking only, it need not be so equipped, the term "sinking" was not technical, but meant to descend, to go down, to excavate downward without substantial deviation from a straight line, extending from the point of beginning toward the center of the earth, and, hence, did not include the cutting of stations so as to relieve the operators from providing doors to the cages during such operations. *Osterholm v. Boston & Montana Consol. Copper & Silver Mining Co.*, 107 Pac. 499, 503, 40 Mont. 508.

**SINKING FUND**

The object of every "sinking fund" is to diminish the debt whose existence warranted its foundation. *Levy v. McClellan*, 89 N. E. 569, 573, 196 N. Y. 178 (quoting *Bank for Savings v. Grace*, 7 N. E. 162, 168, 102 N. Y. 313-326).

"A 'sinking fund' may be, and generally is, intended as a cumulative security for the payment of the debt with which it is connected." *Tennessee Bond Cases*, 5 Sup. Ct. 974, 1098, 114 U. S. 663, 698, 29 L. Ed. 281.

The city of Spokane attempted to issue bonds the proceeds of part to be used for public improvements, and of part to be placed in a fund for retiring the bonds at their maturity. *Rem. & Bal. Code*, § 7507, subd. 5, authorizes the city to issue bonds in place of or to supply means to meet maturity bonds or

for the consolidation or funding of the same. Held, that as a sinking fund contemplated by the statute is one arising from particular taxes imposed or duties which are appropriated toward the payment of a public debt, and can by no contrivance be created as part of the debt itself, and as the payment of interest upon the funding bonds would consume all their earnings, such issue was invalid, it being apparent that the nature and purposes of law as well as the character of a sinking fund was utterly misconceived. *Murphy v. City of Spokane*, 117 Pac. 476, 480, 64 Wash. 681.

### SINKING FUND TAX

A "sinking fund tax" is raised to be applied to the payment of the principal and interest of a public loan or obligation. *Brooks v. Incorporated Town of Brooklyn*, 124 N. W. 868, 872, 146 Iowa, 136, 26 L. R. A. (N. S.) 425.

### SISTER

#### As legitimate relation

The words "child," "children," "brother," or "sister," in *Burns' Ann. St.* 1908, §§ 2992, 2993, 2996, relating to descent, mean legitimates only, so that on the death of an intestate leaving neither children nor other descendants, nor husband, father, or mother, but a brother of the full blood, and the descendants of two illegitimate half-brothers, the surviving brother took the entire estate. *Truelove v. Truelove*, 86 N. E. 1018, 1020, 88 N. E. 516, 172 Ind. 441, 27 L. R. A. (N. S.) 220.

#### Half blood

In England it has long been settled that whenever the word brother or "sister" is used in a statute without limitation it includes half brothers or sisters, respectively. Under *Gen. St.* 1902, § 296, providing that, where a legatee being a brother of the testator shall die before him, the issue of the legatee shall take the estate bequeathed, the issue of the half-brother designated as a beneficiary in a will who predeceased the testatrix, are entitled to the legacy; the word brother in the statute including half-brother. *Seery v. Fitzpatrick*, 65 Atl. 964, 965, 79 Conn. 562, 9 Ann. Cas. 139.

Ky. St. 1909, § 1219, makes it incest for any one to carnally know his sister. Section 2090, prohibiting a man from marrying his sister, makes no distinction between those of the whole and the half blood, nor does section 1393, subsec. 3, governing descent and distribution save that the sister of the whole has twice the share of the sister of the half blood. Held that, in view of those statutes, it is incest for one to carnally know his half-sister. *Burdue v. Commonwealth*, 138 S. W. 296, 297, 144 Ky. 428.

Ky. St. § 2064 (Russell's St. § 3841), provides that where a devise is made to several

as a class, and one or more shall die before, and another or others shall survive, testator, the share or shares of those dying shall go to his or their descendants, or, if none, to the surviving devisees. Section 4841 (section 3964) provides that if a devisee dies before testator, or is dead at the making of the will, leaving issue who survive testator, such issue shall take as the devisee would have done. Testator devised the remainder, after a life estate in land, to his brothers and sisters. He had one sister who died without issue, before he did, and a half-sister who died before the will was made, leaving issue who survived him. Held, that the will must be construed to mean "sisters" as a class, which being the case, the devise was controlled by section 4841, and the descendants of the half-sister took the share she would have had she survived testator. *Barnhill v. Sharon*, 121 S. W. 983, 984, 135 Ky. 70.

### SISTER HOOK

A "sister hook" is defined as "a pair of hooks so mounted that they face and overlap each other; match hooks." *Louden Machinery Co. v. Janesville Hay Tool Co.*, 141 Fed. 975, 985 (quoting and adopting definition in *Stand. Dict.*).

"Clip hooks" are "two regular iron hooks having one side flat, suspended (reversed to one another) from a small iron thimble. By overlapping, these two shapes form one complete inclosing hook. These are also known as "sister hooks." *Louden Machinery Co. v. Janesville Hay Tool Co.*, 148 Fed. 686, 693, 78 C. C. A. 548 (quoting and adopting the definition in *Patterson's Nautical Encyc. "Clip Hooks"*).

### SITE

See *County Site*.

In *Rev. Codes* 1899, §§ 701, to 703, providing for the selection of a schoolhouse site, the word "site" does not of itself necessarily mean a place or tract of land fixed by definite boundaries. *Petersburg School Dist. of Nelson County v. Peterson*, 103 N. W. 756, 758, 14 N. D. 344.

A notice of election for the removal of a county seat is not objectionable in using the word "site" in respect to both building and offices. The word "location" is used in the statute in respect to offices, and while it may be preferable, both words are frequently employed in the same sense, and no confusion could have resulted. *Stanton v. Board of Sup'rs of Essex County*, 96 N. Y. Supp. 840, 842, 48 Misc. Rep. 415.

### SITIO DE GANADO MAYOR

Under Spanish or Mexican grants, a "sitio de ganado mayor" was a square league, and appears to have been the only unit in

estimating the superficies of land. *Corrigan v. State*, 94 S. W. 95, 100, 42 Tex. Civ. App. 171.

## SITTING

The word "sitting," as used in *Hurd's Rev. St. 1901*, c. 38, § 132, which provides that any person who shall at any time or "sitting," by playing at cards lose to any person so playing any money amounting to \$10, and shall pay the same, may sue and recover the money by action in assumpsit, is construed to include "all that transpires in playing the game of draw poker from the time certain players begin playing together on any one occasion until they cease playing together on that occasion, no matter how many hands are played." *Zellers v. White*, 70 N. E. 669, 672, 208 Ill. 518, 100 Am. St. Rep. 243.

A decision or "sitting" of the circuit court is over after the final discharge of the jury for the term, though no formal adjournment is had until the next ensuing term begins, and special sittings are held after the discharge of the jury. According to the practice throughout the state, the circuit courts meet on the first day of the term, and continue their sessions from day to day until they have disposed of all the cases on their several dockets. These sittings are those that are referred to in the rule by the use of the words 'the sittings of the term,' but they do not include special sittings held after 'the sittings of the term' for the purpose of keeping the court in session during the term for the transaction of such business as may arise from time to time after the regular sitting has ended." *Hays v. Philadelphia, W. & B. R. Co.*, 58 Atl. 439, 441, 99 Md. 413 (quoting *Gaines v. Lamkin*, 33 Atl. 459, 82 Md. 129).

## SITUATE

### Corporations .

The word "situated," in *Laws 1851*, c. 95, § 9, providing that penalties imposed on an insurance company for doing business in the state without a certificate may be recovered by the district attorney of the county in which the company or agent is situated, refers to the place where the agent is when he does the business or act complained of—the place which he makes his office for that business. *People v. Imlay* (N. Y.) 20 Barb. 68, 78.

As used in a statute providing for actions against a corporation, to be brought in the county in which it is "situated" or has its principal office or place of business, the term "situated" contemplates more than the mere temporary presence of an agent in the county, for the purpose of transacting the company's business. The fact that an agent of the corporation receives and answers correspondence, and keeps blank supplies in his

residence in a county, is not sufficient to show that the corporation maintains an office there. *Security Mut. Life Ins. Co. v. Ress*, 106 N. W. 1037, 1039, 76 Neb. 141.

A domestic life insurance corporation is "situated," within Code Civ. Proc. § 55, authorizing such a corporation to be sued in the county in which it is situated, in any county in which it maintains an agent or servant engaged in transacting the business for which it exists. *Bankers' Life Ins. Co. of Lincoln v. Robbins*, 73 N. W. 269, 270, 53 Neb. 44; *Id.*, 75 N. W. 585, 586, 55 Neb. 117. See, also, *Western Travelers' Acc. Ass'n v. Taylor*, 87 N. W. 950, 62 Neb. 783.

## SITUATION

See *Dangerous Situation*.

## SITUS

See *Business Situs*.

The word "situs" means site, situation, location; a place where a thing is. *Greene County v. Wright*, 54 S. E. 951, 953, 126 Ga. 504.

"Situs" or situation imports fixedness of location, and while in its natural signification the term is applicable only to landed estates which are really fixed and immovable, it is also applied to personal property as annexing it to the individual to whom it belongs. *Callender Navigation Co. v. Pomeroy*, 122 Pac. 758, 761, 61 Or. 343.

The "situs" of personal property of every description is the domicile of the owner. *Commonwealth v. Union Refrigerator Transit Co.*, 80 S. W. 490, 491, 118 Ky. 131.

"In the absence of some statute regulating the 'situs' of property for taxation, it is governed by the common law in regard to actual situs. It is competent, however, for the Legislature to give thereto for the purpose of taxation any situs it sees fit, subject to the rule of uniformity and to the limitation that there must be some appreciable relation between the municipality exacting the tax and the person upon whom the burden is cast, either directly or by reference to the property taxed, from which there can reasonably be seen reciprocal duties to accord benefits on the one hand, and to respond therefor on the other. Whether that relation does or does not exist in any given circumstance is so conclusively a legislative question that nothing short of manifestly capricious action, amounting to a taking of property for a public use without just compensation, will justify judicial interference." *Chicago & N. W. R. Co. v. State*, 108 N. W. 557, 589, 128 Wis. 553.

### Of franchise

"Under the statutes of this state, franchises must be classed as property subject to taxation. The franchise so assessable may be classified as creative and special. The

creation of a corporation, the grant of power to exist and act as such, is, in itself, a franchise, and it has been distinctly decided that such franchise is assessable as property. This creative franchise is inseparable from the being or personality of the corporate body, and hence it must have its situs wherever the corporate entity has its domicile or residence, and this, in law, is the place where its principal place of business is situated." This being true, it follows under the express mandate of the statutes that such franchises must be assessed and taxed in the county where its principal place of business is located. *San Joaquin & K. R. Canal & Irrigation Co. v. Merced County*, 84 Pac. 285, 286, 2 Cal. App. 593.

## SIX MONTHS RULE

The rule that, if a public service corporation diverts its income from the payment of current expenses to the improvement of the mortgaged property, so that the current expenses remain unpaid when a receiver is appointed, the court may, out of the income accruing during the receivership, apply to the unpaid claims for current expenses the amount so diverted, has been limited by so many courts to claims arising within six months before the receivership, that it has become known as the "six months rule." *Title Ins. & Trust Co. v. Home Telephone Co. of Puget Sound*, 200 Fed. 263, 264.

## SIX SUCCESSIVE WEEKS

See Successive.

## SIXTEEN

Sixteen years of age or under, see Years of Age.

## SIZE

See Cutting Size; Same Size and Form.

## SIZED AND SUPER-CALENDERED PAPER

"Sized and super-calendered paper," as known to the trade, is a glazed paper torturing to the human eye by gas or electric light and out of place in brief work. *Jackson v. Grissom*, 94 S. W. 263, 264, 196 Mo. 624.

## SKELETON BILL

Bills of exceptions commonly called "skeleton bills" are well recognized by the law; that is, where the court or judge prepares or signs the bill containing only the formal parts and provides by parenthetical instructions to the clerk to copy into the bill certain documents or evidence. This class of the bills of exceptions is of great use and labor saving to the profession and the courts,

and, since our statute has provided for stenographers to take down the evidence upon the trial in shorthand and to furnish a transcript thereof, the evidence thus taken by the stenographer can be made a part of the record by such skeleton bill of exceptions; but in doing so, as in all other cases, the evidence must have been actually before the judge because under our statute the judge of the trial court is required to certify the evidence by proper bills of exceptions. *Tracy's Adm'x v. Carver Coal Co.*, 50 S. E. 825, 826, 57 W. Va. 587 (citing Code 1899, c. 131, § 9).

## SKELETON TRACK

Where the spaces between railroad ties are not filled to the tops of the ties, and about one-half of the ties are exposed, it is called a "skeleton track." *St. Louis & S. F. R. Co. v. Ames (Tex.)* 94 S. W. 1112, 1114.

## SKELPING TONGS

In the Simpson patent for apparatus for skelping or tube welding, which covers a combination of a welding table pivoted at the rear end, provided with an endless traveling chain and "skelping tongs" having a hook to engage the chain, the term "skelping tongs" does not restrict the invention to a pair of tongs used in combination with the other elements for the purpose of skelping, but was manifestly used, although possibly inaptly, to describe tongs for either skelping or butt welding. *National Tube Co. v. Spang, Chalfant & Co.*, 132 Fed. 318-320.

## SKID

As Appliance, see Appliance.

## SKILL—SKILLFUL

See Assumption of Skill; Best Skill and Discretion; Game of Skill; Labor and Skill; Utmost Care and Skill.  
Game of skill as lottery, see Lottery.

The word "skill," as a limitation of expert evidence, must be regarded in its broadest signification, not applied necessarily only to mechanical or professional knowledge. It includes every subject susceptible of special and peculiar knowledge derived from experience. *Schwantes v. State*, 106 N. W. 237, 247, 127 Wis. 160.

A contract to construct buildings in a "good, workmanlike manner" meant that it was to be constructed with fair average skill, considered in relation to the character of the work, and not with the highest skill known to the carpenter trade; "workmanlike" meaning worthy of a skillful workman, well-executed, skillful, and "skillful" being defined as having ability in a specified direction, experienced, practiced. *Holland v. Rhoades*, 106 Pac. 779, 780, 56 Or. 206.

A definition of ordinary care as that degree of care usually exercised by ordinarily prudent and "skillful" men, etc., is not erroneous because of the use of the word "skillful." *Cumberland Telephone & Telegraph Co. v. Warner* (Ky.) 79 S. W. 199, 200.

The word "skillful," used in an instruction defining ordinary care as that degree of care which ordinarily prudent and skillful men usually exercise under circumstances and in occupations similar to those proven in the case in question, is not commonly used in the definition of "ordinary care," but it is hard to distinguish the difference between the instruction as given by the court and the meaning of the ordinary definition. By this instruction no special skill was required. Ordinary skill is supposed to be possessed by ordinary men in conducting the business in which they are engaged. The word "skillful" as used did not add a new, distinct, or different standard, but only required what should be required of ordinary men in the business in which they are engaged. It would have been better if the court had conformed to the ordinary definition, but it cannot be said that the instruction as given was erroneous; and, if erroneous, it was only technically so and not prejudicial. *Southern R. Co. in Kentucky v. Otis' Adm'r* (Ky.) 78 S. W. 480, 482.

#### SKILLFUL AND CAREFUL MINING

Where defendant owned coal under land, the surface of which was owned by another, and conveyed his coal to a third person, giving an obligation to indemnify the grantee for any damages resulting to the surface of the land by reason of skillful and careful mining, the words "skillful and careful mining" related to the manner of working the coal, and did not impose on plaintiff, the grantee, in operating the coal, the duty of leaving proper and sufficient supports for the surface; and, where the grantee exercised skill and care in its mining operations, he could remove all the coal, and the grantors were bound to indemnify him against any damage resulting from injury to the surface which he might be compelled to pay to the owner thereof. *Youghiogeny River Coal Co. v. Allegheny Nat. Bank*, 60 Atl. 924, 927, 211 Pa. 319, 69 L. R. A. 637.

#### SKILLFUL AND EXPERIENCED MEN

An instruction, in an action for injuries to a passenger, imposing on the carrier the very high degree of care and foresight of skillful, careful, and practical railroad operatives under the same or similar circumstances, is not different in meaning from one imposing on the carrier the obligation to use the highest degree of care practicable among prudent, "skillful, and experienced men" in the same kind of business; there being no difference between "practical railroad operatives" and "skillful and experienced men." A practical railroad operative must be one

of experience in that line. *Loftus v. Metropolitan St. R. Co.*, 119 S. W. 942, 944, 220 Mo. 470.

#### SKILLFULNESS

See Unskillfulness.

#### SKIMMED MILK

See Condensed Skimmed Milk.

#### SKIN

The game of "skin" is as general and popular with the negroes of the South as the game of poker is with the whites of the entire country, and the Court of Appeals will judicially recognize that both games are played with cards. *McClendon v. State*, 69 S. E. 37, 8 Ga. App. 398.

#### SKINNED

See Fish Skinned or Boned.

#### SKINS

See Cabretta Skins.

"Hides" are separated from "skins" by weight. If more than 12 pounds in weight, they are known as "hides"; if less, they are known as "skins." *United States v. Helmrath*, 145 Fed. 36, 37, 75 C. O. A. 261.

#### SKY SIGN

Building Code of City of New York, § 144, provides that any sign or advertising device supported or attached over or above any building, etc., shall be deemed a "sky sign," and prohibits such signs from being constructed more than nine feet above the front wall of a building at any part. Relator seeks to erect a sky sign on a building to a greater height than permitted by an ordinance enacted pursuant to the building code, having leased the right to erect signs on the building, and respondent refused to issue a permit on the ground that its erection would violate the ordinance. Held that the ordinance constituted a "taking of property" without compensation, in that it arbitrarily limited the erection of signs above the height stated, and it was not justified as a police regulation. *People ex rel. M. Wineburgh Advertising Co. v. Murphy*, 113 N. Y. Supp. 855, 857, 129 App. Div. 260.

#### SLAB

"Slabs" are not within the statute giving a lien on the "lumber and timber" for services in cutting logs. *Engl v. Hardell*, 100 N. W. 1046, 1048, 123 Wis. 407.

A piece of steel 15 feet long, 4 feet 2 inches wide, 6½ inches thick, and weighing over 6 tons, with a geometrical design engraved on one side, a completed article ready for use



in the manufacture of glass, is a "slab" and not a sheet or plate, and hence is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161, as a sheet or plate, but under paragraph 193 as "steel in all forms and shapes not specially provided for in this act." *Theo. W. Morris & Co. v. United States*, 174 Fed. 656, 657, 98 C. C. A. 410.

## SLACKEN

The word "slacken" means to lose rapidity; to become more slow. *Badovinac v. Northern Pac. Ry. Co.*, 104 Pac. 543, 544, 39 Mont. 454 (citing *Webst. Int. Dict.*).

## SLANDER

Malice in slander, see *Malice*.  
See, also, *Jactitation*.

"Slander" or "defamation" is anything which tends to blacken or injure one's character or reputation. *Dungan v. State*, 57 South. 117, 118, 2 Ala. App. 235.

A "slander" is an oral utterance by an individual of defamatory matter. *Duquesne Distributing Co. v. Greenbaum*, 121 S. W. 1026, 1027, 135 Ky. 182, 24 L. R. A. (N. S.) 955, 21 Ann. Cas. 481.

An order of arrest which states the ground as "defamation of character of plaintiff" sufficiently states the ground of arrest to be "slander" within General Rules of Practice No. 13, providing that an order of arrest shall state the ground on which it is granted. *Juskovitz v. Rafsky*, 130 N. Y. Supp. 839, 840.

"An essential element of 'slander' is that the slanderous words should have been spoken in the presence of persons other than plaintiff, for without this there could be no tendency to injure or disgrace the person of whom the words are spoken." *Knipe v. Brooklyn Daily Eagle*, 91 N. Y. Supp. 872, 874, 101 App. Div. 43 (citing 9 Bacon, Abr. 32; 13 Enc. of Pl. & Prac. 42, 43; *Terwilliger v. Wands*, 17 N. Y. 54, 59, 72 Am. Dec. 420).

Civ. Code, § 46, subd. 3, defines "slander" as a false and unprivileged publication other than libel, which tends directly to injure another in respect to his office, profession, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit. Under such Code a statement that a master mariner is in the habit of getting drunk is actionable, since such charge includes his conduct while on voyage. *Swan v. Thompson*, 56 Pac. 878, 880, 124 Cal. 193.

"Slander" is "the speaking of base and defamatory words which tend to the preju-

dice of the reputation, office, trade, business, or means of getting a living of another." An action by a depositor against a bank for refusal to honor checks is not an action of slander. *James Co. v. Continental Nat. Bank*, 58 S. W. 261, 263, 105 Tenn. 1, 51 L. R. A. 255, 80 Am. St. Rep. 857 (citing *Cooley, Torts*, 229, 235; *Newell, Defam.* 40; *Townsh. Sland. & L.* § 3; *Rap. & L. Law Dict.* 1198; 3 Black, Com. 183; *Pollard v. Lyon*, 91 U. S. 225, 23 L. Ed. 308; *Harrison v. Burem*, 1 Tenn. Cas. 94; *Webst. Dict.*).

"Slander" or oral defamation consists: First, in imputing to another a crime punishable by law; and, second, charging him with having some contagious disorder or being guilty of some debasing act which may exclude him from society; or, third, in charges made on another in reference to his trade, office, or profession calculated to injure him therein; or, fourth, any disparaging words productive of special damage flowing naturally therefrom." It is slander to falsely impute a bad character to a female schoolteacher. *Nicholson v. Dillard*, 73 S. E. 382, 384, 137 Ga. 225 (quoting and applying Civ. Code 1910, § 4433).

"Slander," for which a civil action is authorized, is defined in section 46 of the Civil Code, subd. 1, declaring that a publication other than libel, which falsely charges any person with crime, constitutes slander. Under such definition a statement that "I have a man to prove that H. struck S. in front of his place of business, that he had two witnesses who had tracked the blood stains from H.'s shop to where S. fell, and that he had proof that H. was guilty of the murder of S.," were slanderous per se as charging a crime, but there was a failure of proof where the proof showed only that defendant, in addition to saying that he had witnesses who saw H. strike S., said to one person "H. might have killed him anyhow," and to another, "If you will follow up H. pretty close, you will find that this man's death came that way," and "he might have something to do with it," and to another, "The S. case was a murder." *Haub v. Freiermuth*, 82 Pac. 571, 1 Cal. App. 556.

### As felony

See *Felony*.

### As personal injury

See *Personal Injury*.

## SLANDER BY WRITING OR SPEAKING

In Rev. St. Me. 1903, c. 88, § 1, which provides that "all personal actions except those of detinue, replevin, actions on the case for malicious prosecution, for slander by writing or speaking and for assault and battery may be commenced by trustee process," the words "slander by writing or speaking" are used in a comprehensive sense and include libel, and under such provision an action for libel cannot be commenced by trustee

process. *Macurda v. Globe Newspaper Co.*, 165 Fed. 104, 106.

### SLANDER OF TITLE

"Slander of title" is an actual intrusion upon one's property in the nature of a trespass; a real action to protect title. *Labarre v. Burton-Swartz Cypress Co.*, 53 South. 113, 116, 126 La. 982.

"Slander of title" differs from slander of person in that it may be the result of written as well as of spoken words. There must be a defamation of title by language before an action for slander of title will lie. *Rhoades v. Bugg*, 129 S. W. 38, 39, 148 Mo. App. 707.

### SLANDEROUS WORDS

Words are "slandrous" per se which impute to the person mentioned the commission of a crime, or that he is affected with a contagious disorder which would render him obnoxious to society, or which would tend to injure his business. *Farley v. Evening Chronicle Pub. Co.*, 87 S. W. 565, 568, 113 Mo. App. 216.

Words, to be a slander per se, must charge a criminal offense, or, failing of that, must be spoken of a person in reference to his business, and be of such character that they must necessarily injure him in his business, as that a tailor was a botch, or his clothes were misfit, or that he was insolvent, and the like. *Hume v. Kusche*, 87 N. Y. Supp. 109, 110, 42 Misc. Rep. 414.

Under Acts 1888, p. 723, c. 444, declaring all words spoken falsely and maliciously touching the character or reputation for chastity of any woman shall be deemed "slander," the statement that "[plaintiff's] youngest child was born of another man. \* \* \* It would have been impossible for her husband to have been the father of it. Yes, it is true, and everybody knows it"—was "actionable per se," and proof thereof entitled plaintiff to recover without proof of damage. *Cairnes v. Pelton*, 63 Atl. 105, 107, 103 Md. 40.

"The language of some of the writers of the common law shows that the phrase 'slandrous words' was sometimes made to apply to spoken words and sometimes to words either spoken or written. \* \* \* I cannot escape the conclusion that the Legislature of Maine, both in the original use of the phrase 'slandrous words' and the later use of the words, 'slander by writing or speaking,' intended to include libel. \* \* \* In Me. Rev. St. 1903, c. 88, § 1, which provides that 'all personal actions, except those of detinue, replevin, actions on the case for malicious prosecution, for slander by writing or speaking, and for assault and battery may be commenced by trustee process,' the words 'slander by writing or speaking' are used in a comprehensive sense and include libel. *Macurda v. Globe Newspaper Co.*, 165

Fed. 104, 107, 108 (citing *McDonald v. Green*, 57 N. E. 211, 176 Mass. 113, and *Bouvier & Rapalje*, Law Dict.).

### SLANT

See House Slant.

### SLATE

#### SLATE SHIFTER

In the operation of a coal mine, in which there are many entries and a large number of railroad tracks in certain of the entries, crosscuts, and rooms, the person whose duty it was to clear away the fallen slate and debris from both sides of the track wherever there was sufficient room for a driver to go in case of danger is denominated a "slate shifter." *Muren Coal & Ice Co. v. Howell*, 68 N. E. 456, 457, 204 Ill. 515.

### SLAVE

#### SLAVEHOLDER

A person whose only interest in slaves consists of an undistributed share of an estate composed of slaves is not a slaveholder within the terms of a statute requiring a certain proportion of the jurors to be slaveholders in certain cases. *Spence v. State*, 17 Ala. 192, 193.

### SLAVERY

The word "slavery," as used in the thirteenth amendment to Const. U. S. § 1, providing that neither "slavery" nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, means a condition of enforced, compulsory service of one to another; "slavery" being defined in Webster as a "state of entire subjection of one person to the will of another." *Hodges v. United States*, 27 Sup. Ct. 6, 8, 203 U. S. 1, 17, 51 L. Ed. 65.

### SLEEPING CAR

"A 'sleeping car' is obviously a public means of transportation." *Allen v. Pullman's Palace Car Co.*, 24 Sup. Ct. 39, 191 U. S. 171, 183, 48 L. Ed. 134.

### SLICK-EAR

"Slick-ear," as applied to cattle, means that the ownership thereof is unknown." *State v. Eddy*, 90 Pac. 641, 46 Wash. 494.

### SLIGHT

The word "slight" is of indeterminate meaning. It usually implies unimportance. *Moxley v. Hertz*, 30 Sup. Ct. 305, 308, 216 U. S. 344, 54 L. Ed. 510.

**SLIGHT CARE**

Civ. Code, § 2175, prohibiting a carrier from limiting its liability for injuries resulting from gross negligence, was a part of Civ. Code 1872, which by sections 16 and 17 declared that there are three degrees of care and diligence, "slight," "ordinary," and "great," and three degrees of negligence, "slight," "ordinary," and "gross." "Slight care" was defined as that which is such as persons of ordinary prudence usually exercise about their own affairs of slight importance, and "gross negligence" was defined as that which consists in the want of slight care and diligence. These sections were repealed in 1874. Held, that such repeal cannot affect the construction of the words "gross negligence" as used in section 2175, as the intention of the Legislature at the time of the adoption of the latter section must control, and there is no warrant for holding that such words were intended to mean other than as the term is defined in the repealed sections. *Walther v. Southern Pac. Co.*, 115 Pac. 51, 54, 159 Cal. 769, 37 L. R. A. (N. S.) 235.

The better doctrine is that care or the want of it is not to be measured arbitrarily according to fixed definitions as "slight care," "ordinary care," or "extraordinary care," or "slight negligence," or "gross negligence," although all these phrases are used somewhat loosely by courts and law-writers, but it is to be measured by reasonableness, under all the circumstances of the particular inquiry. The only true measure is "reasonable care," and that expression has been declared by the courts in England and elsewhere to be synonymous with "ordinary care." "Reasonable care" is a relative term, and what is reasonable care in a given case depends upon many considerations. What would be reasonable care under some conditions would clearly be negligence in others. Reasonable care and vigilance vary according to the exigencies which require vigilance and attention. They relate to the work to be done, to the instrumentalities to be used, to the dangers that may result from their use, to the varying duties owed by those who supply or use them. And in all cases reasonable care means such care as reasonable and prudent men used under like circumstances. *Caven v. Bodwell Granite Co.*, 59 Atl. 285, 287, 99 Me. 278 (citing *Fletcher v. Boston & M. R.*, 83 Mass. [1 Allen] 9, 79 Am. Dec. 695; *Bigelow v. Reed*, 51 Me. 325; *Palmer v. Lumber Ass'n*, 38 Atl. 108, 90 Me. 193; *Sawyer v. J. M. Arnold Shoe Co.*, 38 Atl. 333, 90 Me. 369; *Cayzer v. Taylor*, 76 Mass. [10 Gray] 274, 69 Am. Dec. 317; *Cunningham v. Hall*, 86 Mass. [4 Allen] 268; *Holly v. Boston Gaslight Co.*, 74 Mass. [8 Gray] 123, 69 Am. Dec. 233).

**SLIGHT NEGLIGENCE**

"A failure to exercise the highest degree of care is 'slight negligence.'" *Dolphin v.*

*Worcester Consol. St. R. Co.*, 75 N. E. 635, 636, 189 Mass. 270.

"Slight negligence" is not incompatible with the exercise of ordinary care. *Malott v. Schlosser*, 119 Ill. App. 259, 261.

"Slight negligence" is characterized by such slight inadvertence that, in case of its being the fault of the injured person, it does not militate against his recovering for his loss, and, if it is the fault of the injurer, the result is *damnum absque injuria*. There are no subdegrees of slight or ordinary negligence. *Astin v. Chicago, M. & St. P. R. Co.*, 128 N. W. 265, 268, 143 Wis. 477, 31 L. R. A. (N. S.) 158.

Want of ordinary care is "negligence," but want of extraordinary care, or that care which is customarily exercised by extraordinarily careful people, is "slight negligence," and the latter does not affect the rights of parties injured. *Hackett v. Wisconsin Cent. Ry. Co.*, 124 N. W. 1018, 1022, 141 Wis. 464.

The words, "slight," "ordinary," and "gross," as applied to negligence, are not used in the decisions with the same meaning, or any definite and well-understood meaning. The words "gross negligence" are often used as the antithesis of "slight care," but in many relations the law only requires the exercise of slight care, and the failure to exercise it cannot be different in degree from the failure to exercise a very high degree of care where it is demanded by the law. The absurdity for such a standard for determining supposed degrees of negligence is manifest. It has been noted that "slight negligence" is not regarded as inconsistent with due care, and, if due care is exercised, there is no actionable negligence, and therefore, in a legal sense, no negligence at all. *Chicago, R. I. & P. R. Co. v. Hamler*, 74 N. E. 705, 709, 215 Ill. 525, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187, 3 Ann. Cas. 42 (citing *Bloor v. Town of Delafield*, 34 N. W. 115, 69 Wis. 273; *Decker v. McSarley*, 93 N. W. 808, 116 Wis. 643; *Rideout v. Winnebago Traction Co.*, 101 N. W. 672, 123 Wis. 297, 69 L. R. A. 601).

The better doctrine is that care or the want of it is not to be measured arbitrarily according to fixed definitions, as "slight care," "ordinary care," or "extraordinary care," or "slight negligence," or "gross negligence," although all these phrases are used somewhat loosely by courts and law-writers, but it is to be measured by reasonableness, under all the circumstances of the particular inquiry. *Caven v. Bodwell Granite Co.*, 59 Atl. 285, 287, 99 Me. 278 (citing *Fletcher v. Boston & M. R.*, 83 Mass. [1 Allen] 9, 79 Am. Dec. 695; *Bigelow v. Reed*, 51 Me. 325; *Palmer v. Lumber Ass'n*, 38 Atl. 108, 90 Me. 93; *Sawyer v. J. M. Arnold Shoe Co.*, 38 Atl. 333, 90 Me. 369; *Cayzer v. Taylor*, 76 Mass. [10 Gray] 274, 69 Am. Dec. 317; *Cunningham v. Hall*, 86 Mass. [4 Allen] 268; *Holly v. Boston*

Gaslight Co., 74 Mass. [8 Gray] 123, 69 Am. Dec. 233).

## SLIGHTER

In an action under Laws 1907, p. 495, c. 254, defining the liabilities of railroads for injuries to employes, for the death of a brakeman, the use of the words "less or greater" instead of the statutory words "slighter or greater," in determining decedent's negligence as a contributing cause in comparison with that attributable to the railroad, was not erroneous, as the word "less" conveyed the idea conveyed by the word "slighter," as used in the statute. *Boucher v. Wisconsin Cent. R. Co.*, 123 N. W. 913, 914, 917, 141 Wis. 160.

## SLIP

"The escape of dust from blast furnaces into the atmosphere is, and always has been, incident to their operation. It escapes at all times, but in larger quantities when what is known as a 'slip' occurs in the furnace. In the operation of all blast furnaces, 'slips' occur from time to time. These are occasioned by the caking or incrusting of the ore in the stack of the furnace, and the falling away of the ore, fuel, and limestone beneath the crust by reason of the continued combustion and the liquefaction of the iron, thus forming a chamber or vacant space into which the incrusted ore at the top drops, occasioning an explosion, the violence of which depends upon the extent of the cavity produced and the amount of gas accumulated therein." *Sullivan v. Jones & Laughlin Steel Co.*, 57 Atl. 1065, 1066, 208 Pa. 540, 66 L. R. A. 712.

## SLOT MACHINE

As banking game, see Banking Game.

As gambling device, see Gambling Device.

As musical instrument, see Musical Instrument.

As property, see Property.

"Slot machines" are mechanical gamblers, and, being impassive and having no sensations of any sort, they are more likely to win than gambling games which are run by gamblers, who have all of the human passions and feelings. Playing against a slot machine is a struggle between a man and a machine—a man with nerves and emotions; a machine with no nerves and no emotions. *Territory v. Jones*, 99 Pac. 338, 340, 14 N. M. 579, 20 L. R. A. (N. S.) 239, 20 Ann. Cas. 128.

A clock maintained in a drug store, so arranged that by placing a nickel in a slot music was played and a red, white, blue, or green light would automatically appear, in which case the person depositing the nickel would be entitled to 5, 10, 15, or 25 cents' worth of merchandise, according to the light appearing, there being no blanks, was a "slot machine," within Acts 27th Leg. p. 267, c. 103,

declaring that, if any person should keep or exhibit for purposes of gambling any slot machine, etc., he should be punished. *Lytle v. State (Tex.)* 100 S. W. 1160, 1161.

A statute (Laws 1903, p. 9, c. 5106, § 19) licensing "lung testers, striking machines, weighing machines, chewing gum stands, automatic penny in the slot machines, or any other device of similar nature," under a Constitution prohibiting lotteries, will not be construed to license the operation of a machine in which the element of chance largely predominates. Such machine can by no possible construction be considered as *ejusdem generis* with lung testers, striking machines, weighing machines, chewing gum stands, or automatic penny in the slot machines. The generic term "slot machine" evidently has reference to that numerous class of catch-penny contrivances, of more or less real use or amusement, where, by depositing a penny or other small coin, one may secure the identical object advertised. *State v. Vasquez*, 38 South. 830, 49 Fla. 126.

## SLOUGH

As water course, see Water Course.

## SLOW

See Move Slow Signal.

## SLOW COMBUSTION

A "constant pressure engine" is one in which the cylinder pressure remains the same during the outward travel of the piston while the volume of flame increases. The pressure is applied continuously. This mode of operation is also called "slow combustion" and "nonexplosion." *Columbia Motor Car Co. v. C. A. Duerr & Co.*, 184 Fed. 893, 904, 107 C. C. A. 215.

## SLOWLY

"'Slowly' is a relative term when applied to a moving object, and must be measured according to the ordinary speed of the person or thing in question." In an action for injuries sustained by a passenger who was attempting to alight from a street car moving at the rate of three miles an hour when the car suddenly started forward, the use in an instruction of the word "slowly," with reference to the speed of the car, was not erroneous, especially where other instructions fully and correctly submitted the issue of contributory negligence. *Dawson v. St. Louis Transit Co.*, 76 S. W. 689, 691, 102 Mo. App. 277.

The word "slowly" has a relative meaning. As applied to a slow-going animal in comparison with a race horse, the movement of the former would be called slow, but, compared with its own movements under different conditions, it would be considered rapid. An electric car moving at a speed of two miles an hour would be moving slowly com-

pared with its usual and ordinary speed. Where, in an action against a street railway company for injuries to a passenger while alighting from a car in consequence of the sudden starting thereof, plaintiff's evidence showed that the car stopped at a crossing for passengers to alight, and that, while he was in the act of alighting, the car was suddenly started, causing him to be thrown on the pavement, and defendant's evidence showed that the car did not stop at the crossing, but was moving at the rate of from two to four miles an hour, an instruction that if, when the car either stopped or was moving very slowly, plaintiff was proceeding to alight therefrom and had stepped down from the front platform to the car step, and that defendant's employes in charge of the car saw plaintiff, etc., was not open to the criticism that there was no evidence that the car was moving slowly, but properly submitted the question whether the car was moving slowly. *Ghio v. Metropolitan St. R. Co.*, 103 S. W. 142, 143, 125 Mo. App. 710.

## SLUE

The word "slue" may mean to pull a box on a car to one side to keep it from catching on the entry to a mine. *Henrietta Coal Co. v. Campbell*, 71 N. E. 863, 866, 211 Ill. 216.

## SLUICE

A tile drain consisting of an opening or a channel through which water flows is a "sluice," and "culvert" includes "sluice." *Herrick v. Town of Holland*, 77 Atl. 6, 11, 83 Vt. 502.

## SLUICEWAY

A gutter beside a roadway, by reason of defects in which ice gathered in the roadway causing plaintiff's injury, was not a "sluiceway" within Laws 1893, p. 47, c. 59, § 1, providing that towns are liable for damages to any person traveling on a sluiceway by reason of any defect which renders it unsuitable for traveling thereon. *Drew v. Town of Bow*, 65 Atl. 831, 74 N. H. 147.

## SLUMBER

See Profound Slumber.

## SLUNG SHOT

A stick about eight inches long, consisting of an ordinary round chair round, smaller at one end than the other, the small end having a hole bored through it and a string running through it, which may be hung on the wrist, and the larger end having holes bored in it and apparently filled with some kind of metal, and not being covered with anything, is not a "slung shot"; a slung shot being a metal ball of small size, with a string attached, used for striking, though the stick is a

dangerous weapon. *Geary v. State*, 108 S. W. 379, 53 Tex. Cr. R. 38.

## SLUSH

"Slush" is a colloquial expression for a mixture of snow and water. *Maxfield v. Maine Cent. R. Co.*, 60 Atl. 710, 711, 100 Me. 79.

## SLUT

See Dirty Slut.

The word "slut," according to Webster, means an untidy woman; a slattern. The word "slut" is defined in the Century Dictionary to mean: (1) A careless, lazy woman, a woman who is uncleanly as regards her person or her home, a slattern, often used as a name of contempt for a woman; (2) a young woman, a jade, a winch, used lightly; (3) an awkward person, animal, or thing; or (4) a female dog. According to the usual, popular, and natural signification, the words "dirty slut," when spoken of a woman, do not of themselves impute unchastity. *Cooper v. Seaverns*, 105 Pac. 509, 510, 81 Kan. 267, 25 L. R. A. (N. S.) 517, 135 Am. St. Rep. 359.

## SMALL

"It is true that generally the word 'small' is a comparative term, denoting things of little size, as compared with other things of the same class." *Gage v. City of Chicago*, 66 N. E. 374, 376, 201 Ill. 93.

## SMALL BREW

"'Malt beverage,' 'small brew,' and 'near beer,' are, as it would seem, synonymous terms, and are used to designate a class of beer, the sale and distribution of which is sought to be regulated and controlled by section 23½ of the Byrd Liquor Law, and in that act are put among the class of 'mixtures, preparations, and liquids' in which alcohol appears in varying proportions with other ingredients, and which may or may not be used as beverage, or may or may not contain alcohol in such proportion with the other ingredients that the stomach can bear enough of the mixture to produce intoxication; malt liquors being classified as within or without the ardent spirits class, according as they will or will not produce intoxication." *Commonwealth v. Henry*, 65 S. E. 570, 572, 110 Va. 879, 26 L. R. A. (N. S.) 883.

## SMALL CONCRETE

Under a paving ordinance providing that the binder course shall be 1½ inches thick, when completed, and shall be composed of broken limestone, of a size known as "small concrete," although it is true that generally the word "small" is a comparative term, denoting things of little size, as compared with other things of the same class, it is not necessary that the broken pieces of granite or lime-

stone should be of exactly the same size, in order to render the description definite and sufficient, since, in a course of  $1\frac{1}{2}$  inches of concrete and cement, the broken pieces would necessarily be much smaller in dimensions than the thickness of the completed pavement. *Gage v. City of Chicago*, 66 N. E. 374, 376, 201 Ill. 93.

### SMALL GENERAL CHARGE

By the general usage in the mackerel fishery, the amount of the cook's wages is always included in the "small general charge," so called, and is to be deducted from that portion of the proceeds of the voyage which is apportioned to the master and crew, and not from that portion retained by the owners of the vessel. This does not, however, exempt the owners from their liability for the cook's wages. *Harding v. Souther*, 66 Mass. (12 Cush.) 307, 317.

### SMALL LIMITATIONS

The expression "small limitations," when used in regard to the power of the Legislature to limit rights incident to property, necessarily varies in meaning and must be determined with reference to the exigencies of the particular situation. The actual destruction of private property under the police power is in some cases held proper, while very little interference in others might be held improper. *Bonnett v. Vallier*, 116 N. W. 885, 888, 136 Wis. 193, 17 L. R. A. (N. S.) 486, 128 Am. St. Rep. 1061.

### SMALL LOT

A township which had been surveyed for sale into lots, mostly of 670 acres each, fell within the statute empowering the land agent to select for public uses 1,000 acres of land to average in quality and situation in each township which is or may be surveyed into "small lots" for sale or settlement. *Stetson v. Grant*, 66 Atl. 480, 482, 102 Me. 222.

### SMART MONEY

See, also, Exemplary Damages; Punitive Damages.

"Smart money" is an amount in addition to compensatory damages awarded as a lesson to defendants to prevent a repetition of the misconduct for which the damages are awarded. *Shallcross v. West Jersey & S. R. Co.*, 67 Atl. 931, 75 N. J. Law, 395.

"Smart money" is synonymous with "punitive damages." *Louisville Gas Co. v. Kentucky Heating Co.*, 111 S. W. 374, 377, 132 Ky. 435.

The sum assessed by a jury additional to compensation for damages, by way of punishment for wrongdoing, is termed "smart money," or "exemplary," "vindictive," or "punitive" damages. *Farrow v. Hoeffcker* (Del.) 79 Atl. 920, 921, 7 Pennewill, 223.

While the damages to which a plaintiff may become entitled, in an action of tort to the amount of his expenses in litigation in addition to his actual damages, are in fact and in effect "compensatory damages" and not punitive, they are in practice variously termed "exemplary," "punitive," "vindictive," or "smart money," and, in an action for personal injuries in which plaintiff was entitled to recover such additional damages, it was not error to refer to them as "exemplary." *Hull v. Douglass*, 64 Atl. 351, 353, 79 Conn. 266.

"Smart money" may be given as damages only where the defendant in the act complained of acted with malice, and whether it is wise to punish defendant for public reasons may not enter into the consideration of the question whether such damages should be awarded. *Magagnos v. Brooklyn Heights R. Co.*, 112 N. Y. Supp. 637, 638, 128 App. Div. 182 (citing *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44, 15 Am. Rep. 375; *Voltz v. Blackmar*, 64 N. Y. 440; *Muckle v. Rochester Ry. Co.*, 29 N. Y. Supp. 732, 79 Hun, 32; *Craven v. Bloomingdale*, 64 N. E. 169, 171 N. Y. 439; *East v. Brooklyn Heights R. Co.*, 101 N. Y. Supp. 364, 115 App. Div. 683).

"Smart money" is only awarded in actions of tort against a telegraph company for failure to properly transmit a message, where the failure was the result of intention or gross negligence. *Western Union Telegraph Co. v. Reeves*, 126 Pac. 216, 219, 34 Okl. 468 (quoting *Atchison, T. & S. F. Ry. Co. v. Chamberlain*, 4 Okl. 542, 46 Pac. 499).

In actions of tort, the jury, in addition to the sum awarded by way of compensation for the injury, may award "exemplary, punitive, or vindictive damages," sometimes called "smart money." In an action against a master to recover for an illegal arrest caused by his servant, an instruction that the jury had the power, if it thought proper, in addition to compensatory damages, to award punitive damages, without further instructing them that defendant was not liable for such damages unless there was evidence that the acts of the servant were wanton or malicious, and that the master was implicated with the servant therein, or had authorized or ratified such acts, was erroneous. *Craven v. Bloomingdale*, 64 N. E. 169, 171, 171 N. Y. 439.

### SMELTER RETURNS

The phrase "smelter returns," in a deed reciting that certain royalties on smelter returns of all ores removed should be paid to the owners, means returns from the ore, less the smelting charges, without deducting the charges for hauling, freight, and switching. *Frank v. Bauer*, 75 Pac. 930, 932, 19 Colo. App. 445.

**SMOKE**

"Smoke" is defined in Webster's International Dictionary as follows: "The visible exhalation, vapor, or substance that escapes or is expelled from a burning body, especially from burning vegetable matter, as wood, coal, peat, or the like." *City of St. Paul v. Haugbro*, 100 N. W. 470, 471, 472, 93 Minn. 59, 66 L. R. A. 441, 106 Am. St. Rep. 427, 2 Ann. Cas. 580.

**SMOKED HERRING**

"Smoked herring," though salted before being smoked, are not dutiable as "herrings, pickled or salted," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 260, 30 Stat. 171, being a commodity distinct therefrom both commercially and in common speech. *Mattlage v. United States*, 139 Fed. 704.

**SMOKEHOUSE**

As outhouse, see *Outhouse*.

**SMOKELESS COAL**

"Smokeless coal" is a trade or commercial term applied to a grade of soft coal in which the volatile matter runs from 16 to 21 per cent. *State v. Chicago, M. & St. P. Ry. Co.*, 130 N. W. 545, 547, 114 Minn. 122, 33 L. R. A. (N. S.) 494, Ann. Cas. 1912B, 1030.

**SMOKERS' ARTICLES**

Articles used chiefly for the convenience of smokers, consisting of tables on the top of which are affixed smokers' accessories, and of an ornamental miniature automobile for the use of smokers, are dutiable as "smokers' articles" under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 459, 30 Stat. 194, and not as "house or cabinet furniture of wood," under paragraph 208, Schedule D, of said act, 30 Stat. 168. *A. Steinhart & Bro. v. United States*, 126 Fed. 443, 444.

**SMOKING TOBACCO**

"Cigarettes consist of 'smoking tobacco,' similar in all respects to that used in pipes. The circumstance that a longer 'cut' than that commonly used in pipes is most convenient for cigarettes is not important, nor that the tobacco is smoked in paper instead of pipes. It may be used for either purpose, and is all embraced in the term 'smoking tobacco.'" *American Tobacco Co. v. Polacsek*, 170 Fed. 117, 121 (quoting and adopting definition in *Carroll v. Ertheller*, 1 Fed. 688).

**SMUGGLE**

Section 2865, Rev. St., making it criminal to "smuggle or clandestinely introduce" merchandise into the United States, does not include a case where merchandise is fraudulently entered at the customhouse. *United States v. Six Hundred and Forty Six Half-Boxes of Figs*, 164 Fed. 778, 780.

**SMUGGLING**

"Smuggling" is defined as the fraudulent taking into a country, or out of it, merchandise which is lawfully prohibited. *United States v. Mitchell*, 141 Fed. 666, 670 (citing *Dunbar v. United States*, 15 Sup. Ct. 325, 156 U. S. 186, 39 L. Ed. 390).

To constitute the offense of "smuggling," there must be a secret introduction of dutiable goods with intent to defraud the government. *San Antonio Light Pub. Co. v. Lewy*, 113 S. W. 574, 582, 52 Tex. Civ. App. 22.

A fraudulent entry of merchandise at the custom house cannot be classified as "smuggling" nor brought within the words "clandestinely introduced," in Rev. St. § 2865, making it criminal to smuggle or clandestinely introduce merchandise into the United States. *United States v. Six Hundred and Forty Six Half-Boxes of Figs*, 164 Fed. 778, 780.

A person arriving in the United States omitted from his declaration made to the customs officials on shipboard any mention of a package of emeralds contained in his clothing, and at the time of the examination of his baggage on the dock falsely stated to such officers that he had no precious stones in his possession. Said emeralds were then seized under Rev. St. § 2865, providing for the forfeiture of smuggled goods. Held, that the act of "smuggling" was complete when he had passed from the vessel to the shore, and that it was immaterial that he had not gone beyond the customs lines established on the dock for convenience in examining baggage. *United States v. 218½ Carats Loose Emeralds*, 153 Fed. 643, 647 (citing *United States v. One Pearl Necklace*, 111 Fed. 165, 49 C. C. A. 287, 56 L. R. A. 130; *One Pearl Chain v. United States*, 123 Fed. 374, 59 C. C. A. 499; *United States v. One Pearl Chain*, 139 Fed. 517, 71 C. C. A. 500; *United States v. Five Packages of Tapestry*, 114 Fed. 496).

An indictment, alleging that accused at Sault Ste. Marie, Mich., did unlawfully, knowingly, and fraudulently import and bring into the United States certain merchandise, to wit, 3½ yards of black woolen suiting cloth of the value of \$10, contrary to law—that is, clandestinely and without entering the same at the United States Customs Office and port of entry with the United States Collector of Customs and paying the duty thereon—the same being foreign merchandise subject to an import duty as provided in Act July 24, 1897, c. 11, 30 Stat. 151, sufficiently charged "smuggling," denounced by Rev. St. § 2865, providing that if any person shall knowingly and willfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce into the United States, any goods, wares, or merchandise subject to duty by law, and which should have been invoiced, without paying or ac-

counting for the duty, or shall make out or pass, or attempt to pass, through the customhouse, any false, forged, or fraudulent invoice, etc., shall be guilty of a misdemeanor. *Rogers v. United States*, 180 Fed. 54, 58, 103 C. C. A. 408, 31 L. R. A. (N. S.) 264.

## SNAP

A "set" or "snap" is a tool used to receive the blows of the sledge in riveting the plates of metal beams. The ordinary rule of the nonliability of an employer for injury sustained by an adult employé of ordinary discretion through the voluntary use of a defective tool, when the facts and the danger were within the comprehension of any ordinarily intelligent and prudent man, and were as completely within the knowledge and appreciation of the servant as of the master, is here applied to the case of a man who lost an eye by being struck by a sliver of steel from a "set" or "snap" used to receive the blows of the sledge in riveting I-beams. *Gillaspie v. United Iron Works Co.*, 90 Pac. 760, 761, 76 Kan. 70.

## SNAPPER

An assistant to a motorman in a mine, whose duty it is to throw switches, make couplings, and keep a general lookout ahead on the track, is a "snapper." *Burns v. Vesta Coal Co.*, 72 Atl. 800, 802, 223 Pa. 473.

## SNATCH BLOCK

"Snatch block" is an appliance made of iron and wood inclosing a pulley, with a hook to fasten it to a post. *O'Leary v. Michigan State Telegraph Co.*, 109 N. W. 434, 435, 146 Mich. 243.

A "snatch block" was described as a heavy block of wood attached to an upright or stanchion by a line used to draw the grain into the leg extending from the hold of the boat to the elevator, and up which the grain was drawn. *Connors v. Great Northern Elevator Co.*, 85 N. Y. Supp. 644, 645, 90 App. Div. 311.

## SNUB ROPES

Guide lines used to steady beams in their descent from a derrick platform are called "snub ropes." *Bryson v. Gallo*, 180 Fed. 70, 75, 103 C. C. A. 424.

## SO

### As relating back

The word "so," as used in a bond given by a bank and sureties to the state treasurer, reciting that such treasurer would deposit certain moneys in the bank in question, and that the bank should keep, etc., all "said sums so deposited or to be deposited as aforesaid," points to something previously men-

tioned in the instrument, and the sureties on the bond are liable for deposits in the bank at the time the bond was executed. *Kephart v. Buddecke*, 80 Pac. 501, 503, 20 Colo. App. 546.

Where a mechanic's lien recited that, during the progress of work contract, defendant ordered certain extra work and agreed to pay therefor the reasonable value of the materials furnished and labor performed, that the reasonable value of said labor and material "so done and furnished" was and is the sum of \$21.84, it is reasonably plain that the expression "so done and furnished" means done and furnished in accordance with the order and agreement of W. previously referred to, and the allegation is sufficient to show that the order and agreement for the extra work was that of defendant. *Newell v. Brill*, 83 Pac. 76, 77, 2 Cal. App. 61.

## SO DYING

See Not So Dying.

## SO FAR AS APPLICABLE

Between the adoption of Const. art. 20, an amendment disincorporating the former city of D. and several other municipal corporations, and merging them into the new city and county of D., and the adoption by the new municipality of a charter and ordinances, it possessed not merely the ordinary general governmental powers of a city necessary to its preservation and perpetuity, but special powers, so that it could create sidewalk districts, and assess the cost of building sidewalks; the new corporation, by Const. art. 20, § 1, succeeding to all the rights of the former city, section 3 making certain existing officers and boards of the former city, officers and boards of the new corporation, to hold till their successors were elected and qualified, and section 4 providing that the charter and ordinances of the old city, as they shall exist when such amendment of the Constitution takes effect, shall, for the time being only, and as far as applicable, be the charter and ordinances of the new corporation, "for the time being" meaning the aforesaid interim, and "so far as applicable" having reference to said article 20, and meaning so far it does not make said charter and ordinances inapplicable. *Hallett v. City and County of Denver*, 104 Pac. 1038, 1039, 46 Colo. 487.

## SO FAR AS PRACTICABLE

A requirement in a city charter that the location of a defect in a street shall be stated "so far as practicable" in a notice thereof as affecting a claim for resulting injuries means that a reasonable degree of accuracy shall be used. A notice, stating that claimant was walking on the south side of a certain street between two certain other streets in the city, when she stepped upon a loose



plank, the end of which had become rotten, and which had rotten stringers underneath, was held sufficient. *Mulligan v. City of Seattle*, 84 Pac. 721, 722, 42 Wash. 264.

### SO LONG AS

The phrase, "so long as . . . the contract remains in force," used in a contract whereby a party bound himself to continue a third person in charge of the interests of the parties "so long as" he was connected with him "and the contract remains in force," does not refer to a possible breach, but means so long as the contract continues in force if performed according to its terms. *Magnolia Metal Co. v. Gale*, 75 N. E. 219, 220, 189 Mass. 124.

A devise to a widow "so long as she remains my widow" gives her no more than a life estate, the words quoted being words of limitation and not of condition, and only a life estate passes unless an intent to give a greater one affirmatively appears. *Beatty v. Irwin*, 73 N. E. 926, 927, 35 Ind. App. 238.

Where a testator devised all his estate of every kind to his wife and her heirs and assigns forever, "so long as she remains my widow," the quoted condition is equivalent to saying "provided she remains my widow," which does not cut down the estate, but merely attaches a condition which makes it defeasible in toto on a breach, and the widow, having died without having remarried, died seised of an estate in fee simple. *Scott v. Murray*, 67 Atl. 47, 218 Pa. 186.

### SO UNDERSTOOD

See *It Was So Understood*.

### SOAP PENCILS

Not dutiable as pencils, see *Pencil*.

### SOBER

It may well be doubted whether the term "sobriety" is susceptible to any accurate definition for practical purposes. It sufficiently defines itself. *Midland Valley R. Co. v. Hamilton*, 104 S. W. 540, 542, 84 Ark. 81.

### SOCIAL

#### SOCIAL CLUB

An association organized, as shown by its certificate of incorporation, for social fellowship, with the privilege of providing for its members refreshment, etc., is a "social club," within Acts 1902-04, p. 461, c. 270, subc. 4 [Code 1904, § 1105d], authorizing the incorporation of societies without capital stock, etc., and is not a "business corporation," within chapter 1, p. 437, of the act providing for the incorporation of corporations for the transaction of any lawful business. *Hanger v. Commonwealth*, 60 S. E. 67, 68, 107 Va. 872.

### SOCIAL DEMOCRATIC

The name "Social Democratic Party" is neither the "same nor substantially the same" as the name "Democratic Party," within Election Law (Laws 1896, c. 909, p. 922, § 56), declaring that no political party may assume a name "the same or substantially the same" as that of a party with the right to its use established. In re Social Democratic Party, 93 N. Y. Supp. 1023, 1025, 105 App. Div. 243.

### SOCIAL SETTLEMENT

The term "social settlement" is incapable of exact definition, not having yet found its way into the dictionary, though it may be understood in the sense of an abiding place of a group of persons concerning themselves with questions relating to public health, education, morals, etc., but Laws of 1902, p. 1758, c. 605, § 1, exempting from assessment for water supply any social settlement which shall own or lease for a term of not less than three years a building devoted exclusively to the purpose of such settlement, does not exempt a building adjoining, owned, and used by a church in part for its own purposes and in part for social settlement conducted therein by its officers. *People ex rel. Trustees of Amity Baptist Church v. Monroe*, 81 N. Y. Supp. 972, 40 Misc. Rep. 286.

### SOCIETY

See *Benevolent Society*; *Educational Societies*; *Missionary Societies or Corporation*; *Religious Society*; *Secret and Fraternal Society*; *Terminating Society*.

"Society," as used in connection with a person's social relations with his fellow men, means the class with which he mingles, the class from which, if he marries, he selects his wife, the class of people with whose children his children go to school. *Flood v. News & Courier Co.*, 50 S. E. 637, 639, 71 S. C. 112, 4 Ann. Cas. 685.

The words "society" and "social" are not arbitrary signs, but are descriptive, with commonly understood meanings in the terms "society events," "social events," "society gossip," and "social gossip"; and hence the use of such words in the name of a book, such as "Social Register," "Society List," etc., could not constitute a valid trade-mark. *Social Register Ass'n v. Murphy*, 128 Fed. 116, 120.

### SOCIETY OF JESUS

The "Society of Jesus" is a religious order known as the Jesuit Order. It is composed of missionary and teaching priests of the Roman Catholic Faith. There is no legally incorporated body, but the members are bound only by their vows of poverty, chastity, and obedience, and, after the second novitiate, by a fourth vow requiring

them to go wherever the pope may send them for missionary duty. They are governed by a general, and the society has been established in the United States for many years. A bequest to the society for the purposes of education or religion is invalid as not to an identified or ascertainable object. *Coleman v. O'Leary's Ex'r*, 70 S. W. 1068, 1070, 114 Ky. 388.

## SODOMY

See, also, Crime Against Nature.

The common-law crime of "sodomy" included only an act committed per anum. *State v. Whitmarsh*, 128 N. W. 580, 582, 26 S. D. 426.

"Sodomy" may be committed by the mouth, or otherwise than per anum. *White v. State*, 71 S. E. 135, 136 Ga. 158; *Id.*, 71 S. E. 499, 9 Ga. App. 307; *Herring v. State*, 48 S. E. 876-881, 882, 119 Ga. 709 (citing 3 Russ. Cr. [6th Ed.] 250; 1 Whart. Cr. Law [10th Ed.] § 579; Pac. Abr. tit. "Sodomy"; Clark, Cr. Law [2d Ed.] 367).

"Sodomy," within Code Supp. Iowa, § 4937, defining "sodomy" as the carnal copulation in any opening of the body except sexual parts, with another human being, or carnal copulation with a beast, follows the generally accepted definition of sodomy, and an indictment substantially following the language of the statute is sufficient. *State v. Gage*, 116 N. W. 596, 139 Iowa, 401.

"Sodomy" is derived from Sodom, where the crime was prevalent, and its carnal copulation by human beings against nature with penetration, but penetration of the mouth is not sufficient, and consent does not affect its criminality, but makes the consenting party an accomplice; and buggery is the same offense between a man and a beast. *Commonwealth v. Poindexter*, 118 S. W. 943, 944, 133 Ky. 720.

Copulation against the order of nature is "sodomy," whether the person with whom had was a man or woman. *Adams v. State*, 86 S. W. 334, 48 Tex. Cr. R. 90, 122 Am. St. Rep. 733.

The fact that one of the parties used the mouth of the other did not constitute the crime of "sodomy." *Mitchell v. State*, 95 S. W. 500, 49 Tex. Cr. R. 535 (citing *Prindle v. State*, 21 S. W. 360, 31 Tex. Cr. R. 551, 37 Am. St. Rep. 833; *People v. Boyle*, 48 Pac. 800, 116 Cal. 658; 1 Whart. Cr. Law, § 579; *McClain*, Cr. Law, § 1153).

## SOFT DRINKS

What are commonly known as "soft drinks" contain only an appreciable amount of alcohol, not enough to produce intoxication, however much is drunk as a beverage. *Roberts v. State*, 60 S. E. 1082, 1086, 4 Ga. App. 207.

The term "soft drinks," as the words are popularly known, include not only such non-intoxicating beverages as lemonade, soda water, mineral waters, etc., but also those alcoholic decoctions invented to take the place of intoxicating drinks, such as malt mead, near beer, etc. *Bradford v. Jones*, 135 S. W. 290, 291, 142 Ky. 820.

## SOFT GROUND

The term "soft ground," as used in mining, refers to selvage, decomposed rock, or soapstone. When exposed to the air soapstone becomes brittle and is likely to crack and slough off. *Spencer v. Bruner*, 103 S. W. 578, 126 Mo. App. 94.

## SOJOURN

See Place of Sojourn.

## SOLAR TIME

See Apparent Solar Time.

Mean solar time, see Mean Time.

## SOLATIUM

The word "solatium," as used by the courts in stating that for a particular injury "solatium" will be allowed, means "a compensation as a soothing to the affections, or wounded feelings, and for loss of the comfort and social pleasure there is in the association between members of a family. 'Solatium' is sentiment, love, or affection, as distinguished from a property loss." The declaration in *Rev. St. 1899*, § 2866, that, in an action for a death, the jury may give such damages as they may deem fair and just, with reference "to the necessary injuries resulting from" such death, is equivalent to limiting the recovery to pecuniary injury, and therefore the statute by necessary implication excludes "solatium." *Marshall v. Consolidated Jack Mines Co.*, 95 S. W. 972, 973, 119 Mo. App. 270.

## SOLD

See Bought and Sold; This Day Sold.

The word "sold" imports not a mere proposition to sell, but a consummated contract of sale. Where a contract recited, "We have sold to a certain person certain land," describing it, the vendors by such words declared and acknowledged that they had sold the premises, and such declaration or acknowledgment was binding on them. *Forthman v. Deters*, 69 N. E. 97, 100, 206 Ill. 159, 99 Am. St. Rep. 145.

"It is true that in a technical sense, and where a due regard to the intention of the parties using the word 'sold' is had, it may mean a transfer of the title of property for a money consideration. Yet it has other meanings \* \* \* when it is obvious that such was the intent of the party using the phrase."

*Culver v. Uthe*, 10 Sup. Ct. 415, 133 U. S. 655, 659, 33 L. Ed. 776.

To speak of property as having been "sold" does not necessarily mean that it has been paid for. *Hathaway v. Burr*, 21 Me. 567, 571, 38 Am. Dec. 278.

The use of the words "bought and sold" in a written contract of sale does not necessarily import a present sale, but are frequently used to express a mere agreement to sell. *Waltl v. Gaba*, 116 Pac. 963, 964, 160 Cal. 324.

One who has given trading stamps in connection with merchandise sold has "sold" such stamps, since the transaction consists in the transfer to the customer of certain merchandise then and there delivered and the transfer of an assignable order for certain other merchandise. *Sperry & Hutchinson Co. v. Hertzberg*, 60 Atl. 368, 372, 69 N. J. Eq. 264.

Under a contract for a sale of agricultural implements, providing that those not "sold" by a specified time should be returned, implements resold by the buyer under contracts reserving title until payment of the price are "sold," but other implements, which were consigned by the buyer to third parties for resale under contracts which did not require the buyers thereunder to pay for the implements, unless they sold them, are not "sold." *Doylestown Agr. Co. v. Brackett, Shaw & Lunt Co.*, 84 Atl. 146, 149, 109 Me. 301; *Buffalo Fertilizer Co. v. Aroostook Mut. Fire Ins. Co.*, 84 Atl. 1078, 1081, 109 Me. 483.

Under *Burns' Ann. St.* 1908, § 343, providing that the complaint shall contain a statement of the facts constituting the cause of action in plain language, so as to enable a person of common understanding to know what is intended, a complaint which alleges that defendants are jointly indebted to plaintiff in a specified sum for hay "sold" and delivered by plaintiff to defendants, during a specified time, and which includes an itemized statement of account, is sufficient when attacked for the first time on appeal; the word "sold" implying a contract of sale of an article for a specified sum. *Pennsylvania Elevator & Supply Co. v. Fosnotte*, 95 N. E. 586, 587, 48 Ind. App. 166.

A contract which requires the licensee under a patent to pay a royalty on each machine "sold or delivered" covers machines delivered by the licensee to customers, but which were returned, and not paid for. *Confectioners' Machinery & Mfg. Co. v. Panoualias*, 134 Fed. 393, 67 C. C. A. 391.

Where a contract is executory, the word "sold" means contracted to sell, and does not imply a change of title. *Pittsburgh, C., C. & St. L. R. Co. v. Knox*, 98 N. E. 295, 298, 177 Ind. 344.

A complaint which alleges that plaintiff "sold" to defendant personal property for a specified sum, that defendant paid a part,

and that the balance was due, owing, and unpaid, on account of the sale of the property, is an attempt to follow Code Civ. Proc. § 426, by stating the facts constituting the cause of action in ordinary language, and sufficiently alleges, after verdict, that the unpaid price was due by alleging a completed sale, for the word "sold" describes a completely executed transaction, though the word is often used to indicate an executory agreement only, and the word "sale" does not necessarily, and in all connections, mean that title must pass. *Christensen v. Cram*, 105 Pac. 950, 156 Cal. 633 (citing *Blackwood v. Cutting Packing Co.*, 18 Pac. 248, 76 Cal. 212, 9 Am. St. Rep. 199; *Eaton v. Richerl*, 23 Pac. 286, 83 Cal. 185; *Pettinger v. Fast*, 25 Pac. 680, 87 Cal. 461; *Shainwald v. Cady*, 28 Pac. 101, 92 Cal. 83).

#### Change of title implied

In a recital in an agreement that real property is sold, the word "sold" does not conclusively show a present conveyance. Thus an agreement reciting that real property was sold, and reciting the deposit of a sum of money on account of the purchase price to be returned if the sale was not consummated according to the conditions of the agreement, the purchaser's signature being preceded by the words "I agree to purchase," pursuant to which the purchaser went into possession and the seller executed a deed and placed it in a bank to be delivered on the performance of conditions by the purchaser, was an agreement of sale, and not a conveyance. *In re Goetz's Estate*, 109 Pac. 145, 146, 13 Cal. App. 198.

"In common parlance, the word 'sold' does not necessarily include the idea that the necessary writing has been executed to transfer the legal title, but rather that the terms and conditions of the sale have been agreed upon." Thus where a mortgagee, who loaned money on the security of a mortgage of real property, the deed to which the mortgagor had forged, was, through her attorney, aware the day before the loan was made that the owner had not conveyed his land to the mortgagor, she and her attorney could not have relied on a previous statement of the owner that he had "sold" his land to the mortgagor, and the owner was not estopped by his statement from asserting his right to have the mortgage declared void as a cloud on his title. *Williams v. Ketcham*, 77 N. E. 285, 289, 37 Ind. App. 506.

In the absence of a contrary showing, land is "sold," within a parol contract authorizing a broker to sell land for another in consideration of a stipulated commission, when the broker produces a purchaser willing and able to comply with the terms of the sale, and an agreement is entered into between the purchaser and the vendor which terminates in an actual transfer of the title, or when the agent has performed the services required of him, and the vendor and pur-

chaser enter into an enforceable contract; the word "sold" not necessarily meaning that a conveyance must be made or that the title must pass. *Sanderson v. Wellsford*, 116 S. W. 382, 384, 53 Tex. Civ. App. 637.

#### Consideration implied

The word "sold" imports a consideration or price. *Howell v. State*, 52 S. E. 649, 650, 124 Ga. 698.

The word "sold" imports a contract of sale for a valuable consideration. *Radebaugh v. Scanlan*, 82 N. E. 544, 547, 41 Ind. App. 109.

#### Order of court implied

To say that land was "sold by the administrator" is to say that it was sold under the order of the court, for in no other way could the administrator have sold it. *Gutter v. Dallamore*, 79 Pac. 383, 384, 144 Cal. 665.

#### SOLD AND CONVEYED

A clause in a policy of insurance that, if the property insured shall be "sold or conveyed," the policy shall be null and void refers to a sale or conveyance of it by the assured, determining his interest in the subject of insurance, and not to a sale or conveyance to him, to increase his interest. *Heaton v. Manhattan Fire Ins. Co.*, 7 R. I. 502, 507.

#### SOLD NOTE

"Sold notes" are written memoranda of a sale of goods delivered to the party thereto by the broker negotiating the sale. Generally that delivered to the buyer is the "bought" note, and that delivered to the seller is the "sold" note, but some authorities hold that the "sold" note is that delivered to the buyer and the "bought" note to the seller. *Eau Claire Canning Co. v. Western Brokerage Co.*, 73 N. E. 438, 439, 213 Ill. 561 (citing *Saladin v. Mitchell*, 45 Ill. 79).

#### SOLDIER

In army regulations, par. 981, reading, "When soldiers awaiting result of trial or undergoing sentence commit offenses for which they are tried, the second sentence will be executed on the expiration of the first," the word "soldiers" embraces officers as well as enlisted men. *Kirkman v. McClaughry*, 160 Fed. 436, 440, 90 C. C. A. 86; *Id.*, 152 Fed. 255, 261.

An enlisted man of the Ohio National Guard is a soldier "of the organized militia" of the United States, as defined by Act Cong. Jan. 21, 1903, c. 196, 32 Stat. 775 (U. S. Comp. St. Supp. 1907, p. 328), as amended by Act Cong. May 27, 1908, 35 Stat. 399, c. 204, and as such liable to be tried and punished by court-martial, as the code of regulations of the Ohio National Guard and the articles of war of the United States as adopted in the code provides. *McGorray v. Murphy*, 88 N. E. 881, 80 Ohio St. 413, 17 Ann. Cas. 444.

U. S. Comp. Stat. § 1342, provides that "the word 'soldier' shall be understood to include noncommissioned officers, musicians, artificers, and privates and other enlisted men." *Hartigan v. United States*, 25 Sup. Ct. 204, 206, 196 U. S. 169, 49 L. Ed. 434.

#### SOLDIERS' HOME

As asylum, see Asylum.

#### SOLE

Under a rule adopted by the Commissioner of Patents, an applicant for a patent, if he was the inventor, must make oath or affirmation stating whether he is the "sole" or joint inventor of the invention. The word "sole," as used in the rule, is a shorter way of saying that the applicant does not know and does not believe that the invention was ever known before or used. *United States v. Patterson*, 172 Fed. 241, 247.

#### Separate distinguished

The word "separate," as used in creating a trust, has a fixed and technical meaning, and excludes the marital rights, whereas the same meaning is not attributable to "sole." *Wilson v. Bryn Mawr Trust Co.*, 73 Atl. 1070, 1071, 225 Pa. 139.

#### SOLE AND EXCLUSIVE

In *Ex parte Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513, it was decided that Act Cong. March 3, 1885 (23 St. 385), conferring upon the territory of Arizona and her courts full jurisdiction of the offense of murder committed on an Indian reservation by an Indian, did not take away from the courts of the United States jurisdiction over the offense there committed by one other than an Indian, conferred by Rev. St. U. S. § 2145, on the ground that the United States, by yielding up a part of her jurisdiction over the offense, lost all. The court said: "Congress may provide for the punishment of one class of offenses in one court, and another class in a different court. Section 2145 extends to the Indian country the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except as to crimes the punishment of which is otherwise expressly provided for. The words 'sole and exclusive,' in section 2145, do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it." The Supreme Court of Oklahoma has held that the district courts of the territory of Oklahoma, when sitting with and exercising the powers and jurisdiction of a United States court, have exclusive jurisdiction of all crimes punishable by the laws of the United States, when committed by persons other than Indians upon an Indian reservation occupied by Indian tribes, and to which reservation the Indian title

has not been extinguished. *Herd v. United States*, 75 Pac. 291, 292, 13 Okl. 512.

### SOLE AND UNCONDITIONAL OWNERSHIP

See, also, Entire, Unconditional, and Sole Ownership; Sole Ownership; Unconditional and Sole Ownership.

The interest of a purchaser of property, which he has unqualifiedly agreed to buy, and which the former owner has absolutely contracted to sell to him upon definite terms, is the "sole and unconditional ownership," within the true meaning of the ordinary clause upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs. *Phenix Ins. Co. v. Hilliard*, 52 South. 799, 801, 59 Fla. 590, 138 Am. St. Rep. 171 (citing *Ins. Co. of North America v. Erickson*, 39 South. 495, 50 Fla. 419, 2 L. R. A. [N. S.] 512, 111 Am. St. Rep. 121, 7 Ann. Cas. 495; *Phenix Ins. Co. of Brooklyn, N. Y., v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; *Rumsey v. Phoenix Ins. Co.* [C. C.] 1 Fed. 396; 8 Words and Phrases, 7154; 2 Cooley, Ins. 1375; *Rich. Ins.* [3d Ed.] 336).

To be "unconditional and sole," within the meaning of such phrase as used in an insurance policy, the interest or ownership of insured must be completely vested; not contingent or conditional, nor in common or jointly with others, but of such nature that insured must alone sustain the entire loss if the property be destroyed, whether the title be legal or equitable. The "unconditional and sole ownership" of property, within the meaning of such phrase in an insurance policy, is in those on whom the loss insured against would certainly fall, not as a matter of mere contract obligation, but as the result of real bona fide rights in the insured property. *Phenix Ins. Co. v. Hilliard*, 52 South. 799, 801, 59 Fla. 590, 138 Am. St. Rep. 171.

A vendee, in possession of property under a parol agreement by which he unconditionally bound himself to buy and pay for the property, is the "sole and unconditional owner," within the meaning of that term as used in fire insurance policies, and may truthfully represent himself as such in an application therefor. *Milwaukee Mechanics' Ins. Co. of Milwaukee, Wis., v. B. S. Rhea & Son*, 123 Fed. 9-12, 60 C. C. A. 103.

Where the purchaser of gin machinery took possession and gave purchase-money notes, which were recorded and reserved title in the seller, and all of the price had not been paid when the policy on the machinery was issued, the buyer was the sole and unconditional owner of the machinery within a stipulation in the policy for sole and unconditional ownership; such a stipulation merely contemplating that the property is not

held jointly with others. *Lancaster v. Southern Ins. Co.*, 69 S. E. 214, 216, 153 N. C. 285, 138 Am. St. Rep. 665.

A clause in a policy making it void if the insured is not the "sole and unconditional owner" relates to ownership when the policy was issued. A vendor in a written land contract who has admitted the vendee into possession and received from him large payments on the purchase money is not a sole and unconditional owner, although he retains the legal title. *Rosenstock v. Mississippi Home Ins. Co.*, 35 South. 309, 313, 82 Miss. 674.

The insured was the "unconditional and sole owner" in fee simple within a policy containing a stipulation that it was to be void if the interest of the insured be other than unconditional and sole ownership, where the interest of the insured was a life estate in property or its proceeds, united with the absolute right as a testamentary trustee to dispose of the same as she saw fit for the purposes of the trust. *Security Ins. Co. of New Haven v. Kuhn*, 69 N. E. 822, 823, 207 Ill. 166.

The giving of a chattel mortgage does not deprive the owner of "sole and unconditional ownership," within a provision of an insurance policy that it should be void if such was not his interest in the property, where the policy contained a separate provision against chattel mortgages. *Lancashire Ins. Co. v. Monroe*, 39 S. W. 434, 436, 101 Ky. 12.

### SOLE CAUSE OF DEATH

Where at the time of an accident insured was suffering from some disease which had no causal connection with the injury or death resulting from the accident, the accident was the sole cause within the policy. *Penn. v. Standard Life Ins. Co.*, 76 S. E. 262, 263, 160 N. C. 399, 42 L. R. A. (N. S.) 597.

### SOLE HEIR

A clause of a will constituting the wife of testator his "sole heir" gives to her his full estate, to the exclusion of all other persons. *Bollentin v. Bollentin*, 109 N. Y. Supp. 212, 213, 57 Misc. Rep. 250.

### SOLE JUDGE OF VALUE

Where a contract of sale of the total equipment of a telephone company provided for an inventory to be made by two reputable experienced telephone men, who should be selected in a certain manner, and should be the "sole judges of all values," the appraisers were not limited to fixing values but were also authorized under the terms used to determine quantity as well. *Rogers v. Rehard*, 97 S. W. 951, 952, 122 Mo. App. 44.

### SOLE LEGATEE

"A 'sole legatee' takes all that remains after satisfying all charges, losses, and ex-

penses." In re Goggin's Estate, 88 N. Y. Supp. 557, 560, 43 Misc. Rep. 233.

### SOLE MANAGEMENT

The phrase "sole management," in a statute providing that during the marriage the husband shall have the "sole management" of all his wife's separate property, implies the power of control and possession, as personalty cannot be managed without the power to control and possession thereof to that end. Bledsoe v. Fitts, 105 S. W. 1142, 1144, 47 Tex. Civ. App. 578.

### SOLE MANUFACTURER

Where complainants were the sole proprietors of a certain kind of cigarette paper, manufactured exclusively for them in Paris, and all of the paper was stamped with complainant's watermark, and was unobtainable by others, complainant's representation that they were "sole manufacturers" of the paper in Paris, when in fact they had no factory there, was not such material misrepresentation as precluded them from equitable relief against a fraudulent infringement thereof, though the statement "manufactured solely and exclusively for complainant" would have been more exact. Gluckman v. Strauch, 91 N. Y. Supp. 223, 225, 99 App. Div. 361.

### SOLE OWNERSHIP

See Unconditional and Sole Ownership. See, also, Entire, Unconditional, and Sole Ownership; Sole and Unconditional Ownership.

Insured's ownership is "sole" when no one other than insured has any interest in the property as owner, and is "unconditional" when the quality of the estate is not limited or affected by any condition. Rochester German Ins. Co. of Rochester, N. Y., v. Schmidt, 162 Fed. 447, 451, 89 C. C. A. 333.

The title of an equitable owner of property in actual possession and entitled to a deed conveying the legal title is that of "sole ownership, both legal and equitable," within a fire policy providing that it shall be void if assured's interest be other than ownership of such character. Arkansas Ins. Co. v. McManus, 110 S. W. 797, 798, 86 Ark. 115.

### SOLE POSSESSION

As possession, see Possession.

### SOLE USE

In a bequest to a son and a daughter the words "for their sole use" actually mean "for their respective use." Gardiner v. Savage, 65 N. E. 851, 852, 182 Mass. 521.

#### As granting estate in fee

Where testator devised to his executrix all the rest and residue of his property, both real and personal, for her sole use and benefit, the legal effect of the words "for her sole use and benefit" was to give the property

absolutely to the devisee. Gallison v. Quinn, 66 N. E. 961, 962, 183 Mass. 241.

### SOLELY

See, also, Necessarily and Solely.

Where a corporation operating a business college owned real estate, part of which was vacant and held for an advance in value, and the balance was occupied by a building, one entire story of which was occupied as a residence of the family conducting the school, the property was not "solely" used for educational purposes so as to sustain a claim of exemption from taxation under Pub. Laws 1909, No. 309, § 7, par. 4. Parsons Business College v. City of Kalamazoo, 131 N. W. 553, 554, 166 Mich. 305, 33 L. R. A. (N. S.) 921.

The word "only," in the judiciary act (Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433), providing that, when jurisdiction is founded "only" on diversity of citizenship, suit may be brought in the district of the residence of either the plaintiff or the defendant, is equivalent to "solely." Whitaker v. Illinois Cent. R. Co., 176 Fed. 130, 131.

### SOLEMN

#### SOLEMN ADMISSION

Admissions made in a pleading, denominated "solemn admissions," are not required to be supported by evidence on the part of the adverse party. Such admissions are taken as true against the party making them without further proof or controversy. Knowles v. New Sweden Irr. Dist., 101 Pac. 81, 85, 16 Idaho, 217.

### SOLICIT

To "solicit" is to ask earnestly; to make petition to; to appeal to (for something); to endeavor to obtain by asking or pleading; to plead for. Thus where a grocer maintains a delivery wagon, and an employé delivers goods previously ordered from him when making a former delivery, or which have been ordered by letter or telephone from the customer direct to the store, the fact that a patron receiving goods orders others from the person delivering, not being asked, solicited, or requested so to do by him, does not establish the fact of "canvassing or soliciting orders for any article, goods or merchandise," under the provisions of an ordinance imposing a license tax on such occupation, so as to render either the agent or his principal liable for the tax. Village of Scribner v. Mohr, 132 N. W. 734, 735, 90 Neb. 21, Ann. Cas. 1912D, 1287.

#### Advertise

To solicit is defined as "to importune, entreat, implore, ask, attempt, try to obtain." The word "solicit," in Kirby's Dig. § 5133, making it unlawful for any person engaged in

the sale of liquor, where the same may be lawful to solicit orders for liquors in places where the sale is prohibited by law, does not include advertising, and an advertisement of liquors in a newspaper is not within the statute. *Carter v. State*, 98 S. W. 704, 81 Ark. 37.

#### **Attempt distinguished**

In determining whether certain conduct was punishable criminally at common law, it has been frequently said that "soliciting" is an act done which in itself is sufficient, when coupled with wrongful intent, to constitute a crime. The word has been used in the same connection with words like "incite," "endeavor," and "attempt," but the purpose has been to show that solicitation in itself embodied the elements of an independent crime, and not to discriminate it as an ineffectual attempt to commit another crime. The solicitation of a bribe does not constitute an "attempt" to accept or receive a bribe. *State v. Bowles*, 79 Pac. 726, 729, 70 Kan. 821, 69 L. R. A. 176.

#### **Take distinguished**

An act prohibiting any person or corporation from soliciting orders for the sale of intoxication liquors in any place in the state where the sale of such liquors is forbidden by law is not violated by a showing that orders have been taken in such a place. "Taking" and "soliciting" do not mean the same thing, and are not convertible terms. *Sanderfur-Jullan Co. v. State*, 77 S. W. 596, 72 Ark. 11.

#### **Letter**

Solicitation by letter, intended to be received and read by a post office employé in the post office building, and which was so received and read in such building, is embraced by the provision of Civil Service Act Jan. 16, 1883 (22 Stat. 403, 407, c. 27) § 12, that no person shall, in any room or building occupied in the discharge of official duties by any officer or employé of the United States mentioned in such act, "solicit, in any manner whatever," or receive, any contribution of money or any other thing of value for any political purpose whatever. *United States v. Thayer*, 28 Sup. Ct. 426, 427; 209 U. S. 39, 52 L. Ed. 673.

The solicitation by mail of orders for intoxicating liquor is personal solicitation within Pen. Code 1895, § 428, prohibiting the solicitation, personally or by agent, of orders for intoxicating liquor in a prohibition county, where the solicitor in person writes or mails the letter received by the prospective buyer. *Rose v. State*, 62 S. E. 117, 120, 4 Ga. App. 588.

Act May 14, 1886 (83 Ohio Laws, p. 157), as amended by Act March 28, 1906 (98 Ohio Laws, p. 99) and by Act March 12, 1909 (100 Ohio Laws, p. 92) § 4, provides that any person, firm, or officer of a corporation, who, after April 15, 1909, solicits orders for intox-

icants in territory where their sale as a beverage is prohibited, shall be subject to a fine. Held that, in view of the definition of the word "solicit," as implying an application to another for obtaining something, the solicitation to constitute a violation of the act may be made by letter, as well as in person. *Hayner v. State*, 93 N. E. 900, 902, 83 Ohio St. 178.

#### **Offense**

To "solicit the commission of an offense" is the doing of an act and is a step in the direction of an offense. To solicit the commission of an offense which is a felony is a misdemeanor at common law, and it is immaterial that the offense which is solicited is made a felony by act of Parliament or by the common law. *State v. Sullivan*, 84 S. W. 105, 109, 110 Mo. App. 75 (citing *State v. Hayes*, 78 Mo. 316; *State v. Avery*, 7 Conn. 267, 18 Am. Dec. 105; *Walsh v. People*, 65 Ill. 58, 16 Am. Rep. 569; 1 Bish. Cr. Law, § 767; 1 Russ. Cr. Law, §§ 193, 194; distinguishing *Hutchinson v. State*, 36 Tex. 293).

#### **SOLICITATION**

See Personal Solicitation.

#### **SOLICITING AGENT**

"A 'soliciting agent' who takes orders subject to the approval of his principal is not ordinarily regarded as a vendor." *State v. Bristow*, 109 N. W. 199, 200, 131 Iowa, 664.

#### **SOLICITOR**

See Assistant Solicitor.

As managing agent, see Managing Agent. As officer of bank, see Officer (Of Corporation).

In England legal practitioners are divided into two classes, denominated "solicitors" or "attorneys," and "barristers," and their respective duties and functions are well defined. "Barristers" could not recover for professional services, but "attorneys or solicitors" have always been permitted to recover at law for their services. *Spencer v. Busch*, 98 N. Y. Supp. 690, 692, 50 Misc. Rep. 284.

While it provided in section 11 of the act of 1891 (Acts 1890-91, p. 937) that accusations in the criminal court of Atlanta shall be signed by the "solicitor general," yet, when that section is construed in connection with sections 9 and 10 (page 937), it appears that the term "solicitor general" was loosely applied to the solicitor of that court, and it was intended that accusations should be signed by him, and not by "the solicitor general of the superior court." *Mitchell v. State*, 54 S. E. 931, 126 Ga. 84.

#### **SOLID**

#### **SOLID BLOCK**

The provision in the Tariff Act for statutory produced from a "solid block or mass of

marble or from metal," is not limited to statuary made from single blocks, and the words "solid block" do not refer to "metal." *United States v. Perry*, 133 Fed. 841; *United States v. Tiffany & Co.*, 160 Fed. 408, 411, 87 C. C. A. 360.

### SOLID ROCK

A provision of specifications in a contract for a railroad construction that "solid rock" shall include "all other material which in the judgment of the engineer cannot be moved without being blasted" is to be given a reasonable construction with reference to practical railroad construction, and solid rock may thereunder include material which can be moved without blasting, where such mode of moving it would not be practical. *Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co.*, 140 Fed. 465, 475.

### SOLITARY CONFINEMENT

"Close confinement" and "solitary confinement" do not import the same kind of punishment. Although "solitary confinement" may involve "close confinement," a criminal could be kept in "close confinement" without being subject to "solitary confinement." "Confinement" and "close confinement" equally mean such custody, and only such custody, as will safely secure the production of the body of the prisoner on the day appointed for his execution. *Rooney v. North Dakota*, 25 Sup. Ct. 264, 266, 196 U. S. 319, 49 L. Ed. 494, 3 Ann. Cas. 76.

The peculiarities of the system of punishment by "solitary confinement" were the complete isolation of the prisoner from all human society and his confinement in a cell of considerable size so arranged that he had no direct intercourse or sight of any human being and no employment or instruction. *Leach v. Whitbeck*, 115 N. W. 253, 254, 151 Mich. 327 (quoting and adopting definition in *Re Medley*, 10 Sup. Ct. 384, 134 U. S. 160, 33 L. Ed. 835).

### SOLUBLE GREASE

As alizarin assistant, see *Alizarin Assistant*.

### SOLVENCY—SOLVENT

See *Financially Solvent*.

See, also, *Insolvency—Insolvent*.

One is "solvent" when able to pay his debts and liabilities. *Young v. Young*, 111 N. Y. Supp. 341, 343, 127 App. Div. 130; *Lansing Boller & Engine Works v. Joseph T. Ryerson & Son*, 128 Fed. 701, 705, 63 C. C. A. 253.

A representation of "solvency" is a declaration that the party has property sufficient to pay all his debts and one about to be in-

curred. *Christian v. State*, 69 S. E. 29, 30, 8 Ga. App. 371.

Where defendant C. falsely represented that a corporation was wholly solvent and would pay 100 cents on the dollar, "solvency" as so used meant ability to discharge its obligations as they fell due in the ordinary course of business. *Simons v. Cissna*, 100 Pac. 200, 202, 52 Wash. 115.

A man may be fully able to pay his debts if he will, and yet in the eye of the law he is insolvent, if his property is so situated that it cannot be reached by process of law and subjected without his consent, to the payment of his debts. To say that a debtor is solvent, when his entire estate is exempt to him from the payment of his debts and cannot be subjected by his creditors against his will, would be a solecism. "Solvency" involves, not only the ability of the debtor to pay, but the ability of the creditor to enforce payment by legal process. *Pelham v. Chattahoochie Grocery Co.*, 47 South. 172, 175, 156 Ala. 500.

"Solvency" is generally understood to mean that a person is able to pay his debts as they mature. The term is used too, in a sense importing that one's property is adequate to satisfy his obligations when sold under execution. Only clear solvency in the latter sense will uphold a voluntary conveyance against pre-existing debts. An examination of the decided cases will demonstrate that rarely, or never, has a voluntary transfer of property by a debtor been upheld against his creditors, except when the circumstances of the debtor, at the date of the conveyance, clearly established that the transaction would not endanger, hinder, or delay the collection of his obligations, but that his remaining assets were unquestionably ample to meet them. *Vandeventer v. Goss*, 91 S. W. 958, 961, 116 Mo. App. 316.

Where a person, although indebted to others, has business or income and pays his debts, or has property out of which collection can be made, then he may fairly be regarded as a "solvent debtor," within Rev. St. 1898, § 1036, making debts due from solvent debtors subject to taxation. *Kingsley v. City of Merrill*, 99 N. W. 1044, 1046, 122 Wis. 185, 67 L. R. A. 200, 2 Ann. Cas. 748.

#### Ability to purchase distinguished

There is a marked distinction between the solvency of an individual and his ability to make a purchase. "Solvency" means his ability to discharge his legal obligations, while his "ability to purchase property" means, as the authorities say, that he is "ready" to do so, which, according to Webster, is "equipped or supplied with what is needed for some act or event." *Collurn v. Seymour*, 76 Pac. 1058, 1060, 32 Colo. 430, 2 Ann. Cas. 182.



## SOME

"Some" means two or more. *Hurn v. Olmstead*, 105 N. Y. Supp. 1091, 1092, 55 Misc. Rep. 504.

"Some," as defined in the Century Dictionary, is "a certain indefinite or indeterminate quantity or part of; more or less; often so used as to denote a small quantity or a deficiency." The definition given in Webster's International Dictionary is: "Consisting of a greater or less portion or sum; composed of a quantity or number which is not stated; used to express an indefinite quantity or number; not much; a little." "Some time" is equally as indefinite as a "considerable time," and certainly is not a longer time. So a special finding that a defect in an appliance, claimed to be the cause of an injury to an employé, had existed for "some time previous to accident" is too indefinite to warrant a recovery. *Missouri Pac. R. Co. v. Dorr*, 85 Pac. 533, 535, 73 Kan. 486 (citing *Marquette, H. & O. R. Co. v. Spear*, 6 N. W. 202, 44 Mich. 169, 38 Am. Rep. 242; *St. Louis Paper Box Co. v. J. C. Hubinger Bros. Co.*, 100 Fed. 595, 40 C. C. A. 577; *Railroad Co. v. Swarts*, 48 Pac. 953, 58 Kan. 235)

### SOME EVIDENCE

The phrase "some evidence," as used in the rule that a violation of the statute prohibiting the employment in factories of boys under 14 years of age is "some evidence" of negligence in an action for an injury to a servant, may mean indefinite or indeterminate, as opposed to definite or determinate. In other words, the violation is not determinate proof of negligence. *Lee v. Sterling Silk Mfg. Co.*, 101 N. Y. Supp. 78, 80, 115 App. Div. 589.

Every single piece of evidence is "some evidence." Thus the violation of a statute prohibiting the employment of a child of the age of plaintiff, in an action for injuries, is "some evidence" that it was wrong and negligent to employ such child. *Lee v. Sterling Silk Mfg. Co.*, 93 N. Y. Supp. 560, 562, 47 Misc. Rep. 182.

"Some evidence," as used in the rule that, in the absence of some evidence as to the fact, a judicial trial does not substitute an unfounded guess or conjecture for the legal proof which the law requires, means evidence having a logical and reasonable tendency to prove the fact. *Theobald v. Shepard*, 71 Atl. 26, 28, 75 N. H. 52.

### SOME NEWSPAPER

The words "some newspaper," as used in a law requiring the county treasurer to give notice of the sale for taxes by publication thereof in "some newspaper" in the county, must be given a wider latitude than the words "official newspaper," as used in a prior law, and hence, in selecting such newspaper, the treasurer is not bound to select

the particular newspaper with which the county commissioners may have a contract to do the county printing. *Allen v. Board of Com'rs of Cleveland County*, 73 Pac. 286, 288, 12 Okl. 603.

### SOME ONE

Where, on a trial of several persons for rape, the evidence showed three series of acts at different places, an instruction that, to hold two or more guilty, the evidence must establish that "some one" of them performed an act under circumstances constituting rape, and that such others as were held guilty assisted in committing such particular act, was not erroneous as authorizing a conviction, though the jury might not agree as to the defendant who was the principal, and who aided and abetted, since the words "some one" were not equivalent to "either" or "any one," but meant a particular person. *Vogel v. State*, 119 N. W. 190, 198, 138 Wis. 315.

### SOME OTHER

The term "some other occupation," in a fraternal benefit association certificate, providing for payment to a member becoming disabled from following his usual or "some other occupation" by reason of accident or disease, does not mean any other occupation, and so, where a fraternal association provided that a member, who was unable to perform the business which he had always followed because of disability arising after admission to endowment membership, should be deemed entitled to disability benefits, a member who was a farmer and operated a saw-mill, who had become permanently disabled by an accident so as to be unable to follow his usual occupation, was entitled to the benefit specified. *Beach v. Supreme Tent K. of M.*, 69 N. E. 281, 282, 177 N. Y. 100.

## SON

The word "sons" is not a technical, legal term, to which a fixed and determined meaning must be given, regardless of the sense in which it was employed, but is flexible and subject to construction, to give effect to the intention of the testator. *Connor v. Gardner*, 82 N. E. 640, 644, 230 Ill. 258, 15 L. R. A. (N. S.) 73.

An adopted son is a "son," within Transfer Tax Law N. Y. (Laws 1896, p. 869, c. 908) § 221, as amended by Laws 1905, p. 829, c. 368, which provides that, when property of the value of less than \$10,000 be transferred by any such transfer to or for the use of any wife or widow of a "son," such transfer of property shall not be taxable. In *re Duryea's Estate*, 112 N. Y. Supp. 611, 612, 128 App. Div. 205.

Testator in the first clause of his will bequeathed to his wife the interest on a mortgage during her life, and provided that at her death the principal sum of the mort-

gage should be equally divided between his "sons and their heirs share and share alike." In the second clause of the will he gave to his sons by name "or their heirs" the residue of the estate in equal shares. Held that, since under the Statute of Wills (2 Rev. St. [1st Ed.] pt. 2, c. 6, tit. 1) § 52, providing that, where property shall be bequeathed to a child of the testator, the legatee shall die during testator's lifetime, leaving a child, the property bequeathed shall vest in the surviving child, the children of testator's sons, who died in his lifetime, would share in the residue, the same rule should apply to the bequest in the first clause; the word "sons," as used therein, not meaning the sons who would survive the testator, but the sons who were named in the second clause of the will, and the children of sons who died in the lifetime of the testator were entitled to a share in the bequest. *In re Smith's Estate*, 97 N. Y. Supp. 321, 322, 110 App. Div. 421.

### SON-IN-LAW

Child as including, *see* Child—Children (In Statutes).

### SON ASSAULT

By a plea of "son assault demesne," the defendant justifies an assault and battery by asserting that plaintiff committed an assault on him and that he merely defended himself. *Smith v. Wickard*, 85 N. E. 1030, 1031, 42 Ind. App. 508.

A plea of "son assault demesne," which is in the nature of a confession of the assault charged, and an avoidance thereof, by showing that the plaintiff first assaulted the defendant, and that the injuries grew out of his assault, must, even under the Code, give "color," which, as a term of pleading, signifies an apparent or prima facie right in the plaintiff; the Code, while having abolished forms, not having changed the substance of various pleas. *Shirley v. Benick*, 151 S. W. 357, 359, 151 Ky. 25.

### SOON

*See* As Soon As Able; As Soon As Possible.

### SOONER

A "sooner" in the parlance of Oklahoma is one who to the injury of other intending settlers enters on and claims land as his homestead before such entry and claim are effective to initiate a valid homestead under the acts of Congress. *Howe v. Parker*, 190 Fed. 738, 740, 111 C. C. A. 466.

### SORREL

Both of the terms "sorrel" and "bay," as applied to the description of the color of horses, appear, according to the lexicogra-

phers, to have reference to "reddish brown." *Stickney v. Dunaway & Lambert*, 53 South. 770, 771, 169 Ala. 464.

### SORT

Plaintiff undertook to drive and deliver certain logs and clean and separate them from logs of other parties, and, by a second contract, agreed to float, drive, and sort in separate booms other logs bearing given marks. Held, that to "sort" meant to separate the logs, and the causes of action arising on the contracts were practically identical as to what was to be done under each. *McGuire v. J. Neils Lumber Co.*, 107 N. W. 130, 131, 97 Minn. 293.

### SOUND

*See* Finish Sound.

*See, also*, Unsound.

In an action for the breach of a contract for the delivery of "good merchantable corn," an instruction using the phrase "sound merchantable corn" is not erroneous, for the words "sound" and "good" mean substantially the same. *Stahr v. Hickman Grain Co.*, 116 S. W. 784, 786, 132 Ky. 496.

#### Physical condition

A "sound" condition physically signifies an absence of bodily infirmity, and means the same as sound health, which does not mean perfect health, and a mere temporary indisposition or ailment will not ordinarily be regarded as rendering the health unsound. *French v. Fidelity & Casualty Co. of New York*, 115 N. W. 869, 875, 135 Wis. 259, 17 L. R. A. (N. S.) 1011.

"Sound," active, and healthy are comparative terms. *Green v. Houston Electric Co.*, 89 S. W. 442, 445, 40 Tex. Civ. App. 260.

### SOUND AND DISPOSING MIND AND MEMORY

*See* Sound Mind and Memory.

### SOUND DISCRETION

The discretion of the court, as applied to its right to determine the imposition of a burden, such as costs on a party, which is said to rest in the sound discretion of the court, was introduced from civil law courts. While "sound discretion" is an excellent phrase in the abstract, the exercise of it over men's property, liberty, or life is sometimes called a tyrannical and not a judicial power; discretion is admitted to be dangerous, but sound discretion is claimed to be a different thing. Sound discretion is discretion as settled by rules; otherwise it is sound only when the court decides as the party seeking the decision wants; and hence in practice it will come to mean a notion, whim, or caprice of the judge who exercises it. *The Margaret v. The Connestoga*, 2 Wall. Jr. 116, 16 Fed. Cas. 710, 718.

Under Code Civ. Proc. § 2327, relating to the appointment of a committee of the person and property of a lunatic, etc., and making it the duty of the court to which a petition for such appointment has been presented to either issue a commission or direct the questions of fact to be tried before a jury, if it presumptively appears to the satisfaction of the court, from the petition and the proofs accompanying it, that the case is one of a person incompetent to manage his affairs, and that a committee ought in the exercise of a sound discretion to be appointed, not every case of mental weakness or impaired intellectual power will justify the court in exercising the power; for, even where incompetency exists, the situation and surroundings of the incompetent may be such that there is no necessity for the appointment of a committee, and the phrase "to the sound discretion of the court" indicates the necessity for especial care in a proceeding calculated to deprive a citizen, not only of the possession of his property, but also of his personal liberty. In *re Burke*, 110 N. Y. Supp. 1004, 1006, 125 App. Div. 889.

### SOUND HEALTH

"Sound health" means a state of health free from any disease or ailment that affects the general soundness and healthfulness of the system seriously, not a mere temporary indisposition, which does not tend to weaken or undermine the constitution of the assured. Sound health means freedom from serious disease, or grave, important, weighty trouble. *Jeffrey v. United Order of Golden Cross*, 53 Atl. 1102, 1105, 97 Me. 176 (citing *Brown v. Metropolitan Life Ins. Co.*, 32 N. W. 610, 65 Mich. 306, 8 Am. St. Rep. 894); *Atlantic & B. R. Co. v. Douglas*, 46 S. E. 867, 868, 119 Ga. 658.

The term "sound health," as used in a life insurance policy, providing that no obligation is assumed unless assured is in sound health, means an absence of any disease that has a direct tendency to shorten life. *Murphy v. Metropolitan Life Ins. Co.*, 118 N. W. 355, 356, 106 Minn. 112.

A sound condition physically signifies an absence of bodily infirmity, and means the same as "sound health," which does not mean perfect health, and a mere temporary indisposition or ailment will not ordinarily be regarded as rendering the health unsound. *French v. Fidelity & Casualty Co. of New York*, 115 N. W. 869, 875, 135 Wis. 259, 17 L. R. A. (N. S.) 1011.

A stipulation in a contract of fraternal insurance with a married woman that the policy should not take effect unless delivered to her "while in sound health" is not violated by reason of the applicant being pregnant at the time of delivery of the policy. *Rasicot v. Royal Neighbors of America*, 108 Pac. 1048, 1053, 18 Idaho, 85, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180.

### SOUND MIND AND MEMORY

See, also, Unsound Mind.

"Sound mind and memory" is equivalent to sanity, and one who is rational and acting rationally is, in the common understanding, sane and sound of mind. In *re Arrow-smith's Estate*, 69 N. E. 77, 79, 206 Ill. 352 (citing *Yoe v. McCord*, 74 Ill. 33; *Campbell v. Campbell*, 22 N. E. 620, 130 Ill. 466, 6 L. R. A. 167).

Every mind in the legal sense is sound that can reason and will intelligently in the particular transaction being considered, and every mind is unsound or insane that cannot so reason and will. In *re American Board of Com'rs for Foreign Missions*, 66 Atl. 215, 221, 102 Me. 72.

While the term "sound mind" is somewhat indefinite, yet, where the court had expressly instructed the jury as to what constituted unsoundness of mind, the finding that decedent was not of sound mind at the time he executed the will in dispute was sufficient to warrant the court in refusing to probate the will. In *re Selleck's Will*, 101 N. W. 453, 125 Iowa, 678.

### As capacity to understand nature of act

A person is of "sound mind" in making a will if, at the time of its execution, he has such mental capacity as to enable him to know the natural objects of his bounty, his obligations to them, the character and value of his estate, and to dispose of it according to a fixed purpose of his own. *Watson, Ex'r, v. Watson*, 121 S. W. 626, 629, 137 Ky. 25 (quoting and adopting definition in *Woodford v. Buckner*, 63 S. W. 617, 111 Ky. 241).

"Sound mind and memory" requisite to the valid execution of a will has been defined as "knowing and comprehending the transaction, or, in popular phrase, that the testator should, at the time of executing the will, know and understand what he was about." *Todd v. Todd*, 77 N. E. 680-682, 221 Ill. 410 (quoting and adopting definition in *Redf. Wills*, 123).

A "sound mind," used in reference to testamentary capacity, means such a mind as enables a person executing a will to be capable of knowing his property and understanding the reasonable claims of the persons who may have the reasonable and natural claims on his bounty. *Archambault v. Blanchard*, 95 S. W. 834, 846, 198 Mo. 384.

An instruction that if testator has sufficient mentality to recognize those who are the objects of his bounty, or should be, and to recollect the property that he is to bestow, and that he is making his will, the courts have no right to disturb it, and that testators have testamentary capacity if they can recognize to whom their bounty should go, or the fact of to whom they wish it to go, and that they have property of which they

wish to dispose, was not error when construed with other instructions properly defining "sound mind" as one capable of rationally thinking, reasoning, acting, and determining for himself, or a person of "sound and disposing mind" as one who is in possession of natural mental faculties of mind capable of rationally thinking and acting for himself. In *re Higgins' Estate*, 104 Pac. 6, 10, 156 Cal. 257.

The words "sound and disposing mind and memory" mean a mind sufficient to enable a testatrix to understand what business she was engaged in while she was making and executing a will, also to enable her to know who were the natural objects of her bounty, and her relation to them, and what property she had and the disposition she desired to make of it. *Seibert v. Hatcher*, 102 S. W. 962, 905, 205 Mo. 83.

#### **As affected by slight weakness of mind**

The requirements of a "sound and disposing mind" do not imply that the powers of the mind may not have been weakened or impaired by old age or bodily disease. In *re American Board of Com'rs for Foreign Missions*, 66 Atl. 215, 221, 102 Me. 72.

"Intellectual feebleness from age or other cause or delusions about matters not connected with property or its disposition may exist, and notwithstanding the person may have a 'sound and disposing mind and memory,' if the testator possesses so much mind and memory as enables him to transact common and simple kinds of business with that intelligence which belongs to the weakest class of sound minds, and can recall the general nature, condition, and extent of his property, and his relation to those to whom he gives, and also to those from whom he excludes his bounty, it is sufficient." In *re Randall*, 59 Atl. 552, 553, 99 Me. 396 (citing *Hall v. Perry*, 33 Atl. 160, 87 Me. 569, 47 Am. St. Rep. 352).

#### **SOUND REASON**

The use of the language "sound reason," "honest belief," in connection with instructions as to self-defense, can only be understood to mean that defendant must actually, in good faith, have thought that he was in danger of losing his life or suffering great bodily harm, and that he had reason and cause for such belief. *Robinson v. Territory*, 85 Pac. 451, 456, 16 Okl. 241.

#### **SOUND VALUE**

Appraisers of the loss on insured property were appointed, by the terms of the agreement for submission, to estimate "the sound value and loss" upon the property damaged and destroyed. In their award they stated that they had carefully examined the premises and remains of the property "in accordance with the foregoing appointment, and have determined the loss and damage"

to be an amount specified. Held, that the award was not in accordance with the submission, as the "sound value" is "the cash value, making an allowance for depreciation due to use, etc., at and immediately preceding the time of the fire." *Mason v. Fire Ass'n of Philadelphia*, 122 N. W. 423, 427, 23 S. D. 431.

#### **SOUNDING**

The term "soundings," as used in the plan for the laying of a sewer in a street upon which bids were called for, means tests that are made at intervals in the street by driving a bar into the earth in order to discover the character of the soil in the street. *Kelly v. New York*, 84 N. Y. Supp. 349, 350, 87 App. Div. 299.

Instruments used by timber men for the purpose of detecting hidden defects in the roof of a mine are known as "sounding rods." *Himrod Coal Co. v. Clark*, 64 N. E. 282, 284, 197 Ill. 514.

#### **SOUNDING IN DAMAGES**

Trespass is an action "sounding in damages," and the compensation for damage recoverable therein is, as the words imply, to be measured by the plaintiff's damage or loss arising from the defendant's trespass or wrongful act. *Trustees of Dartmouth College v. International Paper Co.*, 132 Fed. 92, 93.

In an action for rent, damages for failure to repair under a contract may be set off against the rent, and is not objectionable as sounding in damages merely, as under Code 1907, § 5859, a debt or demand not "sounding in damages merely" is one which, when the facts upon which it is based are established, the law is capable of measuring by a pecuniary standard. *Donnelly v. House*, 49 South. 324, 325, 160 Ala. 325.

A claim by a chattel mortgagor against the mortgagee for damage to property, by use or waste, taken in detinue against the mortgagor and improperly delivered to the mortgagee by the sheriff, could be set off in the detinue action, being a demand not sounding in damages merely, within Code 1907, § 5858, providing that a "demand not sounding in damages" merely, subsisting between parties at the commencement of the suit, whether arising ex contractu or ex delicto, may be set off by defendant. *Torbert v. McFarland*, 55 South. 311, 313, 172 Ala. 117.

#### **SOUNDING IN TORT**

A claim against the United States for compensation for unlawful and unnecessary destruction of property during the war under the order of the general commanding is one "sounding in tort" within the meaning of Act March 3, 1887, c. 359, 24 Stat. 505, excluding cases of that character from the jurisdiction of the Court of Claims. *Juragua*

*Iron Co. v. United States*, 29 Sup. Ct. 385, 389, 212 U. S. 297, 53 L. Ed. 520.

A claim for the value of the use by the military authorities of a Spanish merchant vessel captured in the harbor of Santiago is not one "sounding in tort." *Herrera v. United States*, 32 Sup. Ct. 179, 181, 222 U. S. 558, 56 L. Ed. 316.

### SOUNDNESS

Of mind and memory, see *Sound Mind and Memory*.

A warranty of "soundness" in a horse is one which avers that at the time of the sale the horse has no disease which actually diminishes his natural value, so as to make him less capable of work. *Andrews v. Peck*, 78 Atl. 445, 446, 83 Conn. 666, 32 L. R. A. (N. S.) 181, 21 Ann. Cas. 1000.

### SOURCE

See *New and Additional Sources*.

Any other source, see *Any Other*.

Other sources, see *Other*.

The term "source of stream" is defined by the *New Revised Encyclopedic Dictionary* as "the spring or fountain head from which its supply of water proceeds; any collection of water within or upon the surface of the earth from which a stream originates." *Sierra County v. Nevada County*, 99 Pac. 371, 376, 155 Cal. 1.

Laws 1905, p. 2023, c. 723, § 2, requires the submission of maps and profiles and approval of the State Water Commission before taking or condemning lands for new or additional sources of water supply. Held, that the word "source" may refer to a lake, etc., as a source of supply, or to any well-defined watershed from which percolating water might be taken, and the statute did not exclude a whole territory in which a city has incidentally procured some part of its supply, the limitation on "new and additional sources" meaning sources which had not been appropriated at the time of the statute. *Queens County Water Co. v. O'Brien*, 115 N. Y. Supp. 495, 498, 131 App. Div. 91.

### SOUTH

The term "southward" must be considered with reference to its subject-matter, and, as used in a conveyance describing land, may include land lying in a southwesterly direction, where that seems to be the intention. *Higgins v. Round Bottom Coal & Coke Co.*, 59 S. E. 1064, 1068, 63 W. Va. 218.

### SOUTHEAST

See *S. E.*

### SOUTHEAST QUARTER

See *S. E. 4*; *S. E. Qr. 24*.

### SOUTHWEST

Where a deed called for a "southwest course," without stating the degrees, it meant

a course equally diverging from south and west or south, 45 degrees west. *Holden v. Alexander*, 62 S. E. 1108, 1112, 82 S. C. 441.

"Southwest part of my farm," as used in a lease granting a quarry right from a parcel of land "beginning eighty rods easterly of the southwest part of my farm and extending northerly to the north line of land owned by me, eighty rods east of the lake shore," did not describe or fix any point as being intended to lie within the description, and was therefore void for uncertainty. *Goodsell v. Rutland-Canadian R. Co.*, 56 Atl. 7, 75 Vt. 375.

### SOUTHWEST QUARTER

The phrase "the southwest quarter" of a named section, used in a tax deed describing the lands conveyed, means the tract indicated on the official plat most nearly responding to that call, notwithstanding it does not contain 160 acres, nor one-fourth of the area of the entire section. *Gunn v. Brower*, 105 Pac. 702, 703, 81 Kan. 242.

A description "southwesterly  $\frac{1}{4}$  lot" means one-fourth of the lot toward or from the southwest, and it cannot be construed to mean the southerly one-fourth in area or quantity of the lot which was in the form of a rectangular parallelogram extending lengthwise northeast and southwest. While it cannot be said with certainty what part of the lot is included in the description, the most reasonable construction is that it describes a tract of land bounded by lines parallel with the side and end lines of the lot intersecting at the center thereof, the southwesterly corner of which is the southwesterly corner of the lot; that is, the most westerly corner. The term "southwesterly  $\frac{1}{4}$ " of the lot implies a correlative, a southeasterly one-fourth of the lot. *Ames v. Dever*, 110 N. W. 370, 100 Minn. 125.

### SOVEREIGN

The commonwealth, in leasing its lands, is not acting in its political character as "sovereign," but merely as the owner of property, occupying the position of a private citizen leasing his property, and the lease must be construed as if made between individuals. *Boston Molasses Co. v. Commonwealth*, 79 N. E. 827, 828, 193 Mass. 387.

### SOVEREIGNTY

The very meaning of "sovereignty" is that the decree of the sovereign makes law. *American Banana Co. v. United Fruit Co.*, 29 Sup. Ct. 511, 513, 213 U. S. 347, 53 L. Ed. 826, 16 Ann. Cas. 1047.

"Sovereignty of a state" embraces the power to execute its laws and the right to exercise supreme dominion and authority except as limited by the fundamental law. *People ex rel. Attorney General v. Tool*, 86 Pac. 224, 226, 35 Colo. 225, 6 L. R. A. (N. S.) 822, 117 Am. St. Rep. 198.

**SOW**

A "sow" is defined as the female of the hog or swine. *Langford v. State*, 89 S. W. 830, 48 Tex. Cr. R. 561 (citing *Webst. Dict.*).

**SPANGLE**

Articles composed of gelatin spangles, see Articles within Tariff Act.  
As other article, see Other.

**SPANGLED HAT CROWNS**

Dutiable as articles composed of gelatin spangles, see Articles within Tariff Act.

**SPARK**

"Sparking" is but the short jump of electricity from one object to another, or a slight break in a simple current. *Sexton v. Metropolitan St. R. Co.*, 149 S. W. 21, 26, 245 Mo. 254.

**SPARKING PLUG**

A "sparking plug" is a device for electricity igniting the gas in explosive engines. *Folger & Moriarty v. Dow Portable Electric Co.*, 128 Fed. 45.

**SPEAK**

An allegation in an indictment that defendant did falsely and maliciously impute a want of chastity to one B. by then and there, in the presence of A. P., "falsely and maliciously saying of and concerning her," etc., is sufficient under Rev. St. 1892, § 2419, providing that whoever "speaks of and concerning any woman," etc., since the word "saying," used in connection with "in the presence of and in the hearing of" in the indictment, is equivalent to the word "speaking" in the statute. *Stutts v. State*, 42 South. 51, 52, 52 Fla. 110.

**SPEAKING DEMURRER**

"Generally a demurrer founded on matter collateral to the pleading against which it is directed is called a 'speaking demurrer,' and is held bad." *Columbia Savings & Loan Ass'n v. Clause*, 78 Pac. 708, 709, 13 Wyo. 166 (citing *Ruddick v. Marshall*, 23 Iowa, 243).

"A demurrer which sets up a ground dehors the record or a ground which, to be sustained, requires reference to facts not appearing upon the face of the pleading thus attacked is said to be a 'speaking demurrer,' and is never held good." *Jeffries v. Fraternal Bankers' Reserve Society*, 112 N. W. 786, 787, 788, 135 Iowa, 284, 14 Ann. Cas. 346.

A demurrer which sets up a fact or omission not appearing in the bill and thereupon demurs is a "speaking demurrer" and cannot be sustained. *Teeter v. Veitch*, 57 Atl. 160, 164, 66 N. J. Eq. 162.

A demurrer averring any fact not stated in the pleading which is attacked is commonly called a "speaking demurrer." *Wood v. Kincaid*, 57 S. E. 4, 144 N. C. 393.

Where averments of fact are introduced in a demurrer, and the facts thus averred are necessary to support it, it constitutes a "speaking demurrer" and is bad. Where a bill in equity was filed in the common pleas, and defendant filed a demurrer setting up prior adjudication in the court of quarter sessions, it is bad as a speaking demurrer, where there is no reference in the bill to the proceedings of the quarter sessions. *Pew v. Minor*, 65 Atl. 787, 216 Pa. 343.

A "speaking demurrer," viz., one that alleges affirmative matter which, taken with the allegations in the petition, shows that no cause of action is pleaded, does not exist in Missouri. *Hubbard v. Slavens*, 117 S. W. 1104, 1111, 218 Mo. 598; *Waters v. Hubbard* (Mo.) 117 S. W. 1112.

A demurrer to an amended answer and cross-bill in equity, which, instead of raising a question against the sufficiency of the pleadings, alleges new matter in pais, is a "speaking demurrer" and, as such, improper. *Coffman v. Gates*, 121 S. W. 1078, 1080, 142 Mo. App. 648.

**SPEARMINT**

The word "Spearmint," as applied to chewing gum, is a term descriptive of the flavor, open to every manufacturer who uses such flavor, and cannot be appropriated as a trade-mark. *William Wrigley, Jr., & Co. v. Grove Co.*, 183 Fed. 99, 100, 105 C. O. A. 391; *Id.*, 161 Fed. 885.

**SPECIAL**

See, also, General.

**Peculiar synonymous**

An instruction, in an action for damages for change of grade of a street, that the jury should assess plaintiff's damage at the excess of the market value immediately before the grading was commenced, over the market value thereof immediately after the grading was finished, less the value "of any special benefits \* \* \* which are peculiar" to the property, is not erroneous for the use of the word "peculiar," which is simply synonymous with the word "special." *Powell v. City of Columbia*, 134 S. W. 76, 77, 154 Mo. App. 239.

**SPECIAL ACCEPTANCE**

See, also, General Acceptance.

**SPECIAL ACT**

See Special Law.

**SPECIAL ADMINISTRATOR**

As personal representative, see Personal Representative.

A "special administrator" is a representative of a decedent, appointed to care for and preserve his estate until an executor or general administrator is appointed. *Jones v. Minnesota Transfer Ry. Co.*, 121 N. W. 606, 607, 108 Minn. 129.

#### **SPECIAL AGENCY OR AGENT**

A "special agent" is one who is authorized to do one or more specific acts in pursuance of particular instructions or within restrictions necessarily implied from the act to be done. *Manhattan Life Ins. Co. v. First Nat. Bank of Denver*, 80 Pac. 467, 471, 20 Colo. App. 529 (quoting and adopting *Storey, Ag.*, § 17); *Bowles v. Rice*, 57 S. E. 575, 576, 107 Va. 51; *Columbus Show Case Co. v. Brinson*, 57 S. E. 871, 872, 128 Ga. 487 (citing *Jesse French Piano & Organ Co. v. Cardwell*, 40 S. E. 292, 114 Ga. 340, and citing and quoting from the opinion of Justice Strong in *Butler v. Maples*, 76 U. S. [9 Wall.] 773, 19 L. Ed. 822).

An agency is "special" when the agent is authorized to act in a single transaction only. *Belcher v. Manchester Building & Loan Ass'n*, 67 Atl. 399, 400, 74 N. J. Law, 833; *Karns v. State Bank & Trust Co.*, 101 Pac. 564, 566, 31 Nev. 170 (quoting *Great West. Min. Co. v. Woodmas of Alston Min. Co.*, 20 Pac. 771, 12 Colo. 46, 13 Am. St. Rep. 204).

An agency is "special" when both the end and the means are specific. *Robinson v. Bank of Winslow*, 85 N. E. 793, 794, 42 Ind. App. 350.

It is necessary to a valid service of process on an agent of a foreign corporation under *Burns' Ann. St. 1908*, § 311, providing for suits against foreign corporations in the county where it has an office or agency, etc., that the person served be an agent at the time of the service, and it was not sufficient to show that he has been a "special agent," for that term necessarily implies that the agency is for a special purpose, and the agency is terminated when that purpose is accomplished. *C. Callahan Co. v. Wall Rice Mill. Co.*, 89 N. E. 418, 419, 44 Ind. App. 372.

"An agent for a particular act or transaction is called a 'special agent.'" Section 5415, Rev. Codes. A person dealing with a special agent is bound to ascertain the scope of the agent's authority, and, if he does not, he deals at his peril. *Schaeffer v. Mutual Benefit Life Ins. Co.*, 100 Pac. 225, 227, 33 Mont. 459 (citing *Moore v. Skyles*, 82 Pac. 799, 33 Mont. 135, 3 L. R. A. [N. S.] 136, 114 Am. St. Rep. 801).

One to whom a money order was given by another, with instructions to see if it was all right, and, if so, to get it cashed, was a "special agent" of the latter, within the meaning of Civ. Code, § 3072, defining a special agent as an agent for a particular act or transaction. *Moore v. Skyles*, 82

Pac. 799, 33 Mont. 135, 3 L. R. A. (N. S.) 136, 114 Am. St. Rep. 801.

#### **As detective**

See Detective.

#### **General distinguished**

See General Agency or Agent.

#### **As officer**

See Officer; United States Officer.

#### **Steward**

One who contracted to serve a club as "steward," agreeing to personally conduct a restaurant at his own cost and without any liability on the part of the club, is a "special agent" of the club, so that the club could show the exact limit of his authority. *Reis v. Drug & Chemical Club*, 105 N. Y. Supp. 285, 286, 55 Misc. Rep. 276.

#### **SPECIAL APPEARANCE**

See, also, General Appearance.

"Special appearance" is one made for the purpose of urging jurisdictional objections. Merely because a defendant says he entered a "special appearance" does not make it such. That must be determined in part at least by the object he has in view. *Everett v. Wilson*, 83 Pac. 211, 212, 34 Colo. 476.

A "special appearance" is made when a party or his attorney seeks to obtain an order vacating some proceeding which, it is insisted, has been undertaken in an unauthorized manner; such appearance being thus limited to prevent conferring jurisdiction of the person. *Multnomah Lumber & Box Co. v. Weston Basket & Barrel Co.*, 99 Pac. 1046, 1048, 54 Or. 22.

A party's appearance with a statement that he appeared "specially" is a "special appearance," though no objection to the jurisdiction was specified. *Marr v. Cook*, 111 N. W. 116, 117, 147 Mich. 425.

The appearance of an attorney for the sole purpose of moving to dismiss the action for irregularities in the proceedings is a "special appearance," and the right to dismiss may be insisted on. *Woodard v. Tri-State Milling Co.*, 55 S. E. 70, 71, 142 N. C. 100.

An appearance which is general in fact cannot be made special by its designation as a "special appearance." *Rogers v. Penobscot Min. Co.*, 132 N. W. 792, 795, 28 S. D. 72, Ann. Cas. 1914A, 1184.

Where an appearance is properly restricted, it will stand as made until some inconsistent action is taken, and it is not necessary to state the precise purpose of the appearance on the docket, but its mere designation as "special" confines it to dilatory matters, and precludes a presumption of anything further; and hence a failure to file a motion to dismiss in time, after a special appearance, does not make the appearance

general. *Wade v. Wade's Adm'r*, 69 Atl. 826, 827, 81 Vt. 275.

In determining whether an appearance is special or general, the question of whether it is to deny the court's jurisdiction of the person controls, irrespective of any stipulation or statement that it was special, and irrespective of defendant's intention to make it so. *Sit You Gune v. Hurd*, 120 Pac. 1135, 61 Or. 182.

An appearance for any other purpose than questioning jurisdiction for want of process, defect of process, defective service thereof, or because the action was commenced in the wrong county, etc., is general, and not special, though accompanied by the claim that the appearance is special; and hence an appearance to move to vacate a cause, or to dismiss or discontinue it, because plaintiffs' pleading does not state a cause of action, which is equivalent or analogous to a demurrer, amounts to a general appearance. *Norfolk & O. V. Ry. Co. v. Consolidated Turnpike Co.*, 68 S. E. 346, 348, 111 Va. 131, Ann. Cas. 1912A, 239.

Whether an appearance is general or special is governed by the object and purpose of the appearance; and any action upon the part of the defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a "general appearance." *Dailey v. Foster*, 128 Pac. 71, 72, 17 N. M. 377.

A "special appearance" for the purpose of objecting to the jurisdiction is not an "appearance" within Municipal Court Act (Laws 1902, p. 1578, c. 580, § 311), providing that where personal service of summons has not been made nor personal service of notice of entry of the judgment had, and the defendant has not appeared, he may appeal at any time within 20 days after personal service of the entry of the judgment. *Dixon v. Carrucci*, 97 N. Y. Supp. 380, 382, 49 Misc. Rep. 222.

The "special appearance" of a foreign corporation defendant in a state court for the single purpose of insisting that no valid service has been made upon it is not a submission to the claimed jurisdiction. *Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co.*, 150 Fed. 666, 670.

The filing of a petition for removal of a cause to the proper Circuit Court of the United States in a state court, where the action is pending, amounts to a "special appearance" by defendant in the state court only, and does not therefore prevent it, after removal, from moving in the federal court to dismiss the action for want of jurisdiction of defendant's person, either in the state or federal court. *International Text-Book Co. v. Heartt*, 136 Fed. 129, 131, 69 C. C. A. 127 (citing *Goldney v. Morning News*, 15 Sup. Ct. 559, 156 U. S. 518, 89 L. Ed. 517; *Wabash Western R. Co. v.*

*Brow*, 17 Sup. Ct. 126, 164 U. S. 271, 41 L. Ed. 431).

An administrator with will annexed, who appeared merely to dismiss the petition to revoke the probate of the will for failure to issue the required citation, did not "appear generally," and his appearance was a "special appearance," though he did not designate such appearance as special. In *re Hite's Estate*, 101 Pac. 8, 9, 155 Cal. 390.

## SPECIAL ASSESSMENT

See, also, Special Tax.

"Special assessments" are a peculiar species of taxation standing apart from the general burdens imposed for state purposes and governed by principles that do not apply universally. They are made upon the assumption that a portion of the community is to be specially and peculiarly benefited in the enhancement of the property peculiarly situated as regards a contemplated expenditure of public funds, and in addition to the general levy they demand that special contributions in consideration of the special benefit shall be made by the persons receiving it. *Billings Sugar Co. v. Fish*, 106 Pac. 565, 572, 40 Mont. 256, 26 L. R. A. (N. S.) 973, 20 Ann. Cas. 264; *Farnham v. City of Lincoln*, 106 N. W. 666, 668, 75 Neb. 502 (quoting and adopting definition in *Cooley, Tax'n* [1st Ed.] p. 416, and [3d Ed.] vol. 2, p. 1153; *Winona & St. P. R. Co. v. City of Watertown*, 44 N. W. 1072, 1 S. D. 46.

A "special assessment" within Const. art. 9, § 9, authorizing the Legislature to vest municipalities with power to make local improvements by special assessment, etc., is an assessment to pay for improvements for public purposes on real property which is, by reason of the locality of the improvement, specially benefited beyond the benefits by the improvement to real property generally throughout the municipality, proportioned by such benefits. *Loeffler v. City of Chicago*, 92 N. E. 586, 589, 246 Ill. 43, 20 Ann. Cas. 335.

"A 'special or local assessment' is a burden imposed by law upon real property for a public improvement; the extent of the burden being determined by the special benefits which inure to the assessed property by reason of the improvement." A tax in a city on all property taxable by the state to construct public sewers which will benefit the whole city, and is called a special public sewer tax, is a general tax and not a "special assessment." *Union Trust Co. v. Pagenstecher*, 119 S. W. 1103, 1104, 221 Mo. 121.

A "special assessment" is a "tax" in the sense that it is an enforced contribution from the property owner for the public benefit, but not in the sense that it is a burden, as he receives an equivalent in the shape of the enhanced value of his property, and only property benefited by the improvement may be assessed, the district being determined legisla-



tively, but the amount of the tax is determined judicially, and according to the benefits. Although possessing many points of similarity, special assessments and taxes are inherently different, and the same rule of construction where the words are used in statutes will not be indiscriminately applied. *State ex rel. Moore v. Furstenau*, 129 N. W. 81, 82, 83, 20 N. D. 540.

Ordinary "special assessments" means the taxation of abutting property for such improvements as sidewalks, paving, etc. A special levy of two mills on the dollar on all the property within the city for the purpose of providing a system of waterworks when some of the property assessed may be one or more miles from a water main or hydrant is not a special assessment, and calling it such does not make it so. *City of Ottumwa, Iowa, v. City Water Supply Co.*, 19 Fed. 315, 329, 56 C. C. A. 219, 59 L. R. A. 604.

Where a town voted to exempt certain business organizations from taxation for 10 years, such vote precluded a village within the town from levying general taxes on such exempt property, but did not preclude the levy of special assessments thereon for municipal improvements; "general taxes" being based on the fact that the government must have revenue, and on the principle that all citizens and property within its jurisdiction should contribute, without special benefit, while "special assessments" are based on the theory of a special benefit to the property assessed, by means of a local improvement. *Caverly-Gould Co. v. Village of Springfield*, 76 Atl. 39, 42, 83 Vt. 396.

#### **As incumbrance**

See Incumber—Incumbrance.

#### **As tax**

See Tax—Taxation.

### **SPECIAL ASSUMPSIT**

At common law the action of assumpsit was divided into "special assumpsit," or an action brought on an express promise, and "general assumpsit" or an action brought on an implied contract. *Board of Highway Com'rs v. City of Bloomington*, 97 N. E. 280, 284, 253 Ill. 164, Ann. Cas. 1913A, 471.

### **SPECIAL AUTHORITY**

In Acts Ind. 1899, p. 150, c. 105, § 6, relating to township taxation, and providing that no debt of township not embraced in the annual estimates shall be created without "special authority," the term "special authority" refers to authority given by the board at a special meeting of the board and upon call of the trustee to determine whether an emergency exists for the expenditure of any sums not included in existing estimates and levied as fixed at the annual meeting. *Lincoln School Tp. v. American School Furniture Co.*, 68 N. E. 301, 302, 31 Ind. App. 405.

### **SPECIAL BAIL**

An undertaking by defendant and his sureties by which, in consideration of the release of property attached, they become responsible to the plaintiff for the amount which may be recoverable, in form as well as in nature, is "special bail," in that it is given by responsible, and not merely nominal, parties, as in case of common bail, with which it is contrasted. *Preston v. McNell Lumber Co.*, 143 Fed. 555, 557.

### **SPECIAL BENEFITS**

#### **Construction of railroad**

The term "special benefits," as used in condemnation of railroad right of way, has the same meaning and is governed by the same principles as when employed in highway, drainage, or ordinary municipal improvement proceedings, only in so far as private property is taken for public use by such proceedings, and in other cases the identity of meaning and principles is to be determined with reference to distinctions with respect to the exaction of payment as a condition precedent to use of the land by a railroad, to the difference in accessibility to the improvement, and to the judicial nature of proceedings to condemn as distinguished from the administrative character of local improvement assessments. Such benefits must be pro tanto a fair equivalent for land parted with and damages inflicted. To that end they must be special, not common; direct, not consequential; substantial, not speculative; proximate, not remote; actual, and not constructive. In *re Mantorville Ry. & Transfer Co.*, 112 N. W. 1033, 1035, 101 Minn. 488, 11 L. R. A. (N. S.) 277, 118 Am. St. Rep. 647.

#### **Municipal improvements**

A "special benefit" within the statute providing for assessments for the construction of a sewer in proportion to special benefits is a benefit derived from the construction of a sewer so situated and constructed that connection can be had with the property as opportunity presents for individual use. *Power v. City of Helena*, 116 Pac. 415, 416, 43 Mont. 336, 36 L. R. A. (N. S.) 39.

A lot derives "special benefit" from the construction of a sewer, within the meaning of a statute and ordinance providing that assessments shall be made in proportion to special benefits, when the sewer is so situated and constructed that connection can be had therewith, as the opportunity presented for individual use determines the question of special benefit. *Bennett v. City of Emmetsburg*, 115 N. W. 582, 589, 138 Iowa, 67.

An owner whose property is damaged is entitled to just damages, irrespective of damages awarded to, or "special benefits" assessed against, another owner; such special benefits being the peculiar benefits that accrue to any owner by a public improvement, apart from those common to the general public, and

having no relation to the damages awarded. Appeal of Newton, 79 Atl. 742, 746, 84 Conn. 234.

"Special benefits" are peculiar benefits received from local improvements above the ordinary benefits which the community receives. *Durkee v. City of Barre*, 71 Atl. 819, 824, 81 Vt. 530.

Special assessments upon abutting landowners for public improvements are based upon "special benefits," which are those that the landowner receives from the improvements in excess of the general public. *Corliss v. Village of Richford*, 81 Atl. 234, 85 Vt. 85.

"The term 'special benefits' implies benefits such as are conferred specially upon private property by public improvement, as distinguished from such benefits as the public generally is entitled to receive therefrom. \* \* \* If the improvement should result in an increase in the value to adjacent property, which increase is enjoyed by other adjacent property owners, as to the property of each exclusively, the benefit is special, and it is none the less so because several adjacent lot owners derive, in like manner, special benefits, each to his own individual property." *Spokane Traction Co. v. Granath*, 85 Pac. 261, 264, 42 Wash. 506 (quoting and adopting definition in *Kirkendall v. City of Omaha*, 57 N. W. 752, 39 Neb. 1).

"Special benefits," as used in the law of eminent domain, are such as affect the actual use and enjoyment of property and thereby render it more valuable in the market. All conveniences and benefits are not proper subjects for the jury to consider in awarding damages to a landowner seeking damages for injury to his land, but the benefits which may be taken into consideration to reduce the damages are such as are direct and special as to the claimant and as to his land, and are not such as are received in common by the whole community. With reference to cause and effect, "special benefits" are such as are direct, certain, and proximate, and not such as are indirect, contingent, or remote. While it is true that increased value of land is often taken into consideration, this is done only where such increased value arises from such direct, special, and proximate cause. The increased value must be founded on something which affects the land itself, directly and proximately, and something which increases the actual or usable value of the land, as well as its market or salable value, and not such as increases merely the market or salable value alone. Increased value, founded upon merely increased facilities for travel and transportation by the public in general, is not the kind of increased value which may be taken into consideration, since that kind of increased value is too indirect and too remote from the original cause, and besides it is common to the whole community, to a greater or less extent. *Williamson v.*

*Read*, 56 S. E. 174, 175, 106 Va. 453 (citing *Heninger v. Peery*, 47 S. E. 1013, 102 Va. 896).

"Whatever gives an additional value to the particular parcel of land is a 'special,' and not a 'general,' benefit; and it may be a 'special benefit' although not an immediate one." "These benefits are estimated like damages," and in doing so the general rule in estimating value is that "everything which gives the land intrinsic value is to be taken into consideration." Under the statute providing for the assessment of lands benefited by the construction of public drains under such act, only such lands are to be included in the assessment district as are "specially benefited" in some manner different and in addition to the benefit conferred in common with all lands in the community or locality affected; and where, owing to its location, the construction of a drain will not drain land in question any more or differently than is done by an existing swale or swamp, and will not render the land more accessible or affect its immediate surroundings, such land is not "benefited," though the drain may carry off the water; the lower land being subject to the natural servitude to receive the waters flowing from the land in question. *Zinser v. Board of Sup'rs of Buena Vista County*, 114 N. W. 51, 55, 137 Iowa, 660 (quoting and adopting definition in *Lipes v. Hand*, 1 N. E. 871, 4 N. E. 160, 104 Ind. 503; *Suth. Dam.* §§ 441, 452).

#### SPECIAL CASE

As used in Const. § 218, making it unlawful for any carrier to charge greater compensation in the aggregate for transportation under similar circumstances and conditions for a shorter than for a longer distance, but providing that such a common carrier may, in special cases, be authorized by the railroad commission to charge less for longer than for shorter distances, a "special case" might embrace a case involving the rate for transportation of all freight of a particular class to a certain point from some other point, but the section was not intended to restrict it simply to permission to a carrier to make a single shipment and charge less for the long than for the short haul. *Louisville & N. R. Co. v. Commonwealth*, 71 S. W. 910, 915, 114 Ky. 787 (concurring opinion).

#### SPECIAL CIRCUMSTANCES

Plaintiff, in an action for injury received from the sudden starting of defendants' elevator while he was alighting therefrom, should be allowed an order for examination before trial of defendants' employé, the operator of the elevator, unless defendants waive the giving by plaintiff of a bill of particulars of the respects in which the elevator was defectively equipped, constructed, and operated, an order for which was obtained by them; the "special circumstances" on which plaintiff seeks his order, under Code Civ. Proc. § 872, subd. 5, being that he cannot comply

with the order for a bill of particulars unless permitted to examine said employé. *Hill v. Bloomingdale*, 121 N. Y. Supp. 370, 371, 136 App. Div. 651.

The tug *Hoyt*, passing up East river on the Brooklyn side in the daytime, exchanged crossing signals with the ferryboat *Fulton*, crossing from New York; the *Hoyt*, as the privileged vessel, being required to keep her course and speed, and the *Fulton* to cross under her stern. The *Fulton*, however, held her course, and came so close to the *Hoyt* that the latter, to avoid collision, when under the *Fulton*'s bows starboarded her helm, throwing her head nearly across the river. During such time the tug No. 9 was coming down the river, and had given three signals to the *Hoyt* for passing port and port, none of which were answered. After the *Hoyt* had passed the *Fulton*, both she and the No. 9 gave alarm signals, ported, and reversed, but were then so near together that a collision occurred. Held, that the danger of the *Hoyt* from the *Fulton*, which was within full view of the pilot of the No. 9 was a "special circumstance" within the meaning of the rules (23 Stat. 438 et seq., rule 23) which required the latter to slacken speed or to stop and reverse, and that she was in fault for keeping her course and speed; that the *Hoyt* was also in fault for failing to answer the signals of the No. 9, although not for her maneuver in passing the *Fulton*. *The C. R. Hoyt*, 136 Fed. 671, 675.

#### SPECIAL COMMISSION

Neither the aggregate body of the qualified voters of a municipality, nor the electors signing the petition for the submission of a proposed ordinance to the vote of the electors, constitute a "special commission," within Const. art. 11, § 13, providing that the Legislature shall not delegate certain powers to any special commission. Hence the initiative provision of the charter of Los Angeles is not violative of this constitutional provision. *In re Pfahler*, 88 Pac. 270, 277, 150 Cal. 71, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911.

#### SPECIAL COMMISSIONER

The "special commissioner" is an officer of the court designated by the bankruptcy court as a court of equity to take testimony of witnesses, so called to distinguish him from a special master in the ordinary equity case. *United States v. Liberman*, 176 Fed. 161, 162.

#### SPECIAL CONTRACT

A "special contract," which is always express, is one with peculiar provisions or stipulations not found in the ordinary contract relating to the same subject-matter, and which, if omitted from the ordinary contract, the law will never supply, while an express contract is one whose terms are uttered or stated in words or writing, and may or may not be special. *Indianapolis Coal Traction*

*Co. v. Dalton*, 87 N. E. 552, 554, 43 Ind. App. 330; *Jackson v. Creek*, 94 N. E. 416, 418, 47 Ind. App. 541.

#### SPECIAL DAMAGES

"Special damages" are the natural but not necessary result of the act complained of and must be specifically alleged. *Irby v. Wilde*, 43 South. 574, 150 Ala. 402; *Lay v. Postal Telegraph Cable Co.*, 54 South. 529, 530, 171 Ala. 172; *Morris v. Allen*, 121 Pac. 690, 692, 17 Cal. App. 684; *Henderson v. Coleman*, 115 Pac. 439, 448, 19 Wyo. 183; *Cordner v. Hall*, 79 Atl. 55, 58, 84 Conn. 117; *Moore v. Linneman*, 136 S. W. 232, 143 Ky. 231, 234; *Friedman v. Pulitzer Pub. Co.*, 77 S. W. 340, 343, 102 Mo. App. 683 (citing *Hughes v. Western Union Tel. Co.*, 79 Mo. App. 133; *Roberts v. Graham*, 73 U. S. [6 Wall.] 578, 18 L. Ed. 791); *Thompson v. St. Louis & Suburban R. Co.*, 86 S. W. 465, 468, 111 Mo. App. 465; *Baltimore Mach. Works v. McKelvey*, 75 N. Y. Supp. 1090, 1092, 71 App. Div. 340; *Stowe v. La Conner Trading & Transp. Co.*, 80 Pac. 856, 857, 39 Wash. 28.

"Special damages" are those which are the natural and proximate result of the wrong, but not the necessary consequence thereof, and must be specially alleged. *Louisville & N. R. Co. v. Roney* (Ky.) 108 S. W. 343 (quoting and adopting definitions in *Newman, Pl.*, p. 438); *Epstin v. Berman*, 58 S. E. 1013-1015, 78 S. C. 327.

"Special damages" are such as actually result from the commission of a wrong, but are not such a necessary result as will be implied by law. *Lee v. Boise Development Co.*, 122 Pac. 851, 852, 21 Idaho, 461; *O'Brien v. Quinn*, 90 Pac. 166, 167, 35 Mont. 441 (citing *Root v. Butte, A. & P. Ry. Co.*, 51 Pac. 155, 20 Mont. 354; 13 Cyc. 13).

"Special damages" are those that do not necessarily, but do directly, naturally, and proximately, result from the breach. *Moses v. Autuono*, 47 South. 925, 926, 56 Fla. 499, 20 L. R. A. (N. S.) 350.

"Special damages" are such as are not the necessary, but the direct, natural, and proximate, result of the negligence complained of, and defendant is not presumed to know them, but they must be specifically alleged, unless they are fairly included in other damages alleged, or unless the law infers them from the facts stated. *Jacksonville Electric Co. v. Batchis*, 44 South. 933, 934, 54 Fla. 192.

"Special damages" are those of an unusual and extraordinary nature and not the common consequence of the wrong complained of, and they must be specially pleaded. *Norfolk & W. R. Co. v. Spears*, 65 S. E. 482, 483, 110 Va. 110.

"Special damages" are such as really took place, and are not implied by law. They are either superadded to general damages arising from an act injurious in itself, or are such as arise from an act not action-

able in itself, but injurious only in its consequences. *Thompson v. St. Louis & Suburban R. Co.*, 86 S. W. 465, 469, 111 Mo. App. 465 (quoting and adopting the definition in *Brown v. Hannibal & St. J. R. Co.*, 12 S. W. 656, 99 Mo. 318); *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774, 782 (quoting and adopting definition in *Bates, Fed. Proc.* § 1001, and citing *Tidd, Prac.* 1807, 389, 400; 1 *Chitty, Pl.* [12th Am. Ed.] 395-399); *Hoskins v. Scott*, 96 Pac. 1112, 1114, 52 Or. 271.

"Special damages" are such as result proximately but not ordinarily from the wrong complained of. They are either superadded to the general damages arising from an act injurious in itself, or are such as will arise from an act not actionable in itself, but injurious only in its consequences, such as really occur. Of a claim of such damages, the wrongdoer ought to be specifically informed. *Sloss-Sheffield Steel & Iron Co. v. Dickinson*, 52 South. 594, 595, 167 Ala. 211.

"Special damages" for breach of contract are such damages as have proximately resulted, but do not always immediately result, from the breach, and will not therefore be implied by law. *Howard Supply Co. v. Wells*, 176 Fed. 512, 515, 100 C. C. A. 70.

"Special damages" in actions for conversion, or for the taking and detention of personal property, not provable without special allegation thereof, are those which, although the natural, are not the necessary, consequences of the act; being outside of the costs and disbursements allowed by law, and consequential in their nature. In an action of claim and delivery, in which the plaintiff has seized lumber shipped by defendant to third parties, damages to the defendant because the seizure of the lumber prevented him from getting money to pay his men, made it necessary for him to mortgage his house to get money for that purpose, and so crippled him financially that he was obliged to suspend his business of sawing lumber and turn over his property to the plaintiff, who had a mortgage on it, are "special damages," not recoverable unless specially alleged. *Robert R. Sizer & Co. v. Dopson*, 72 S. E. 464, 466, 89 S. C. 535.

"General damages" are such as the law implies or presumes to have occurred from a wrong complained of, while "special damages" are such as really took place, and are not implied by law, but are either superadded to general damages from an act injurious in itself, or are such as arise from an act not actionable in itself, but injurious only in its consequences. Thus damages to the market value of a horse are general damages, while damages from loss of earnings or use are special damages. *Van Buskirk v. Quincy, O. & K. C. R. Co.*, 111 S. W. 832, 834, 131 Mo. App. 357.

The only difference between general and "special" damages is that general damages are the necessary and usual result of the acts

complained of, while special damages need not be, but must only be the proximate result thereof. In any case predicated upon a wrong, a person may be entitled to recover general damages which are the necessary and usual results of the acts complained of, and special damages which are not the usual and ordinary result but as directly traceable to the wrongful acts complained of and result therefrom, but all other damages are too remote. *McKinney v. Carson*, 99 Pac. 660, 664, 35 Utah, 180.

#### General damages distinguished

See General Damages.

#### Libel or slander

In libel, "special damages" are damages with respect to the property, business, profession, or occupation, which are computable in money. *Post Pub. Co. v. Butler*, 137 Fed. 723, 727, 71 C. C. A. 309.

"Special damages," in reference to publication of libelous matter, was such damages as were computable in money, and may be said to be fairly embraced in the list of actual damages as given in *Gen. St.* 1901, c. 57b, § 2, providing that the words "actual damages" shall be construed to include all damages which the plaintiff shall show he has suffered in respect to his property, business, trade, profession, or occupation. *Hanson v. Krehbiel*, 75 Pac. 1041, 1042, 68 Kan. 670, 64 L. R. A. 790, 104 Am. St. Rep. 422.

#### SPECIAL DEMURRER

See, also, General Demurrer; Special Exceptions.

A demurrer to the whole petition on the ground that it does not set out a cause of action "in a logical and legal form" should be regarded as a general demurrer, as a "special demurrer" is one pointing out defects in a pleading in such a manner that they may be amended. *Western Union Tel. Co. v. Cates* (Tex.) 132 S. W. 92, 93.

A "special demurrer" goes to the structure merely and not to the substance and obliges the party demurring to lay his finger on the very point. A demurrer is not necessarily a "special demurrer" merely because addressed to a particular paragraph of the pleading. *Douglas, A. & G. R. Co. v. Swindle*, 59 S. E. 600, 603, 2 Ga. App. 550 (quoting and adopting definition in *Martin v. Bartow Iron Works*, 35 Ga. 320, 16 Fed. 888).

A "special demurrer" is an objection to a pleading which shows: First, that the court has no jurisdiction of the defendant or of the subject of the action; second, that the plaintiff has not legal capacity to sue. *Civ. Code Prac.* § 92. *Louisville & N. R. Co. v. Herndon's Adm'r*, 104 S. W. 732, 735, 126 Ky. 589. See, also, *Gillen v. Illinois Cent. R. Co.*, 125 S. W. 1047, 1048, 137 Ky. 375; *Terrell v. Drake*, 140 S. W. 53, 145 Ky. 13.

**SPECIAL DEPOSIT**

See, also, Deposit; General Deposit.

A "special deposit" is a bailment, and implies the setting apart of the specific money or chattel deposited by its return on demand. *Schofield Mfg. Co. v. Cochran*, 47 S. E. 208, 209, 119 Ga. 901 (citing 1 Morse, Banks and Banking [4th Ed.] §§ 191, 193).

Bank deposits are either general or special, being "special" where the bank merely assumes custody of the funds, without authority to use them, and where the depositor is entitled to a return of the identical money, in which case the relation is that of bailor and bailee, and not creditor and debtor. *Fogg v. Tyler*, 82 Atl. 1008, 1010, 109 Me. 109, 39 L. R. A. (N. S.) 847, Ann. Cas. 1913E, 41.

A "special deposit" is one where the bank merely assumes charge or custody of the property without authority to use it, the depositor being entitled to receive back the identical thing deposited, in which case the title remains with the depositor, and, if the subject be money, the bank has no right to mingle it with other funds. *Butcher v. Butler*, 114 S. W. 564, 566, 134 Mo. App. 61 (citing 7 Words and Phrases, p. 6574).

"Special deposits" are deposits like stocks, bonds, and other securities, and sometimes money, to be specially kept and returned to the owner, or money deposited for a fixed period of time, or on unusual conditions, which is mingled in the general funds like a general deposit, and is repaid therefrom, or money which is to be applied by the bank at the depositor's request for specific purposes. *First Nat. Bank of Decatur v. Henry*, 49 South. 97, 100, 159 Ala. 307 (citing 5 Cyc. 313).

Plaintiff agreed to loan M. \$2,000 to pay the balance of the price of certain land, M. agreeing to deposit the amount in defendant bank as a special deposit, and to use the same only to pay for the land, and to give plaintiff a lien thereon as soon as the title was transferred. The money was deposited by M. in defendant bank to the credit of an account styled "Henry I. Moore, special," but the bank had no knowledge of the agreement between plaintiff and M., M. having overdrawn his general account, the amount of the special deposit, under agreement between M. and the bank, was transferred to his general account, and checked out, and not applied to the purchase price of the land. Held, that the style of the deposit was insufficient to put the bank on inquiry, and that its acts as to such deposit were not a conversion thereof as against plaintiff. *Prosser v. First Nat. Bank (Tex.)* 134 S. W. 781, 783.

Laws 1907, p. 248, by sections 1, 3, 5, 9, and 16 provides for the State Treasurer designating banks as state depositories for receiving funds of the state, excepting the educational fund, on deposit, and paying them out on order or checks of the State Treasurer,

such deposits to draw interest, and the depositories to deposit securities or give bonds for payment of such deposits and interest. Sections 6, 7, and 8 provide for the State Treasurer designating banks as "active depositories" for the collection of drafts, checks, etc., that he may receive on account of any claim due the state, for such active depositories promptly making such collections, without charge, and notifying the State Treasurer of the collection, and depositing securities for such prompt collection, and for the safe-keeping and prompt payment, on the State Treasurer's order, of such collections. Section 10 exempts the State Treasurer from liability for any moneys lost by failure or insolvency of a depository. Const. art. 8, § 5, entrusts the investment of the educational fund to a board of commissioners. Held, that a deposit for collection and safe-keeping of which nature a deposit of checks for the educational fund must be, is a "special deposit," title to which does not pass to the bank, as in the case of a general deposit, but remains in the state, so that the appropriation of such fund by a person having custody thereof is a larceny of state funds. *State v. Ross*, 104 Pac. 596, 601, 55 Or. 450, 42 L. R. A. (N. S.) 601, 613.

**General deposit distinguished**

Deposits in banks are either general or special. Where a special deposit is made, the bank is merely a trustee, the property right remaining in the depositor. Where a general deposit is made, the property is vested in the bank, and the relation of debtor and creditor is established. *Shopt v. Indiana Nat. Bank*, 83 N. E. 515, 517, 41 Ind. App. 474.

If the agreement between the parties is that the identical coin or currency shall be laid aside and returned, it is a "special deposit." But if the agreement is that the money shall be returned, not in the specific coin or currency deposited, but in an equal sum, it is a "general deposit." In either case the money is deposited for safe-keeping, and the only distinction between the two kinds of deposit is in the character of the return that is to be made, whether it shall be returned in the identical thing deposited or in kind. *Warren v. Nix*, 135 S. W. 896, 899, 97 Ark. 374.

Deposits in a bank are of two classes, special when the identical or other thing deposited is to be restored or is given for some specified purpose or is received by the bank as a collecting agent, such collection to be remitted, the property in the deposit in such case remaining in the depositor, the bank being the bailee or agent; and general special deposits which comprise all moneys simply deposited in the bank on account of the depositor to be withdrawn from time to time by him, such a deposit transferring the ownership of the money to the bank, and creating the relation of debtor and creditor be-

tween the bank and depositor. *City of Miami v. Shutts*, 51 South. 929, 931, 59 Fla. 462.

Where money or its equivalent is deposited in a bank without any special agreement, the law implies that it is to be mingled with other funds of the bank, and the relation of debtor and creditor is created, and the deposit is general; the bank becoming the owner of the fund. But, where there is an accompanying agreement that the identical thing deposited shall be returned or paid out for a specific purpose, the transaction constitutes a "special deposit," and the bank is liable only as bailee. Thus holders of bonds issued to secure funds for the construction of a railroad deposited money with a trust company from time to time as construction funds were needed, and the trust company paid out of the deposit exchange drawn on it by a bank in payment of drafts given by the construction company in payment for labor and material; the bank agreeing that the fund should be used for no other purpose, and there being no other business transactions between the bank and the trust company, it was held that the deposit was a special one, the bank holding as trustee, and, on its becoming insolvent, its power as trustee was destroyed, and it was entitled only to be reimbursed out of the fund for the amount of construction claims actually paid. *McBride v. American Ry. & Lighting Co. (Tex.)* 127 S. W. 229, 233.

Where money was deposited in a bank to secure payment of compensation under a well drilling contract, and, while the depositor had no right to check against the deposit, there was no agreement that the money should be kept separate from the other funds of the bank, it was a "general" and not a "special deposit," though the transaction was called a "trust fund account" on the bank's books, and hence, on the insolvency of the bank, the depositor was not entitled to a priority over general creditors. *Butcher v. Butler*, 114 S. W. 564, 566, 134 Mo. App. 61.

#### SPECIAL DEPOSITORY

"A 'special depositor' is merely a bailee, and his possession is the possession of his principal." *Critchfield v. Nance County*, 110 N. W. 538, 77 Neb. 807.

#### SPECIAL DUTY

The provision of Act May 13, 1907, requiring prosecuting attorneys in the several counties of the state to sue for and recover the penalty imposed on foreign corporations doing business in the state without filing with the secretary of state a copy of their charters or articles of incorporation, must be treated as declaratory of the general laws of the state, making it the duty of prosecuting attorneys to prosecute all actions in which the state is interested, and not as a "special duty," within the meaning of *Fitts v. McGhee*, 172 U. S. 516, 528, 19 Sup. Ct. 269,

274, 43 L. Ed. 535, holding that, where a statute makes it the "special duty" of a prosecuting attorney to maintain actions on behalf of the state for the enforcement of the provisions of the statute, a person aggrieved by such enforcement may maintain a bill to enjoin the enforcement of the statute on the ground that it is unconstitutional and void. The "special duty" referred to in the case cited is clearly an administrative duty, such as is exercised by boards or ministerial officers, but not by attorneys. *Western Union Tel. Co. v. Andrews*, 154 Fed. 95, 105, 106.

#### SPECIAL ELECTION

See, also, General Election.

It is not necessarily the time or manner of holding an election to fill a vacancy that makes it a "special election," but the fact that it is held at a time other than that fixed by law to elect an officer for the regular or defined term. *State ex rel. Fish v. Howell*, 110 Pac. 386, 388, 59 Wash. 492.

Laws 1911, c. 116, authorizing certain cities to adopt a commission form of government, provides (section 2) that on a proper petition the mayor, by proclamation, shall submit the question of organizing as a city under the act to a "special" election, to be held at a time specified therein and within 60 days after the petition is filed. The act did not further fix the time for holding the election. Const. art. 11, § 10, provides that cities and towns previously organized and incorporated may become organized under such general laws whenever a majority of the voters voting at a "general" election shall so determine. Held that, since a "special election" is any election which is not regularly held for the election of officers, or for some other purpose which comes before the electors at regular fixed intervals, any election at which the organization of a city was submitted would be, as to such question, a special election, and that the word "special," as so used, is surplusage; and hence, where a petition for the organization of a city under such act was filed within 60 days prior to a general election, it was the duty of the mayor to call the election at such time as would comply with the constitutional requirements; the act being, therefore, not invalid as violating the constitutional provision as to the kind of election at which the question was to be submitted. *State ex rel. Hunt v. Tausick*, 116 Pac. 651, 656, 64 Wash. 69, 35 L. R. A. (N. S.) 802.

#### SPECIAL ENTRY

In order that an entry on state lands should be a "special entry," it must carry on its face notice, to the common understanding of men acquainted in the neighborhood thereof, of some call therein, so that other entrymen may know when they are without its sphere. *Breckenridge Cannel Coal Co. v. Scott*, 114 S. W. 930, 936, 121 Tenn. 88.

Where it appears from undisputed testimony of a witness, and from the entry itself, that the objects and localities called for in said entry were notorious, well known, and easily ascertained, and that any one acquainted with that general region would know from the description in the entry where the land was and could have easily located it, such entry is a "special entry," and the date of title to the land called for therein is fixed by the date of the entry, and a grant founded on said prior special entry gives a title superior to that of an older grant but founded on a younger entry. *Savage v. Bon Air Coal, Land & Lumber Co.*, 2 Tenn. Ch. App. 594, 611.

### SPECIAL EXCEPTIONS

"Special exceptions" are nothing more than different reasons assigned why the general demurrer should be sustained. Mere reasons assigned why a general demurrer should be sustained to certain interpleading answers are not special exceptions to such answers. *Nixon v. Malone (Tex.)* 95 S. W. 577, 581.

### SPECIAL EXECUTION

See, also, General Execution.

"A 'special execution' is one that directs a levy on some special property, while a 'general execution' is one that makes no such requirement, but demands a levy on the debtor's property generally." A further distinction between a special and a general execution is to be found in the fact that ordinarily a special execution issues only in proceedings where defendant has not been brought into court by personal service of process, but his property has been seized, and hence the execution to satisfy the judgment is limited to the specific property seized, though by statute there are cases where, even when defendant is personally brought into court, the judgment is a special one against certain property belonging to defendant, and in such cases no general judgment is entered, whereas a general execution, which may be levied on any property defendant owns, follows a general judgment based on personal service. *Smith v. Rogers*, 90 S. W. 1150, 1152, 191 Mo. 334.

### SPECIAL FINDING

See, also, General Finding.

"Special findings" are particular findings of individual facts. *Atchison, T. & S. F. R. Co. v. Osburn*, 100 Pac. 473, 474, 79 Kan. 348.

The office of a "special finding" is to state the ultimate facts and not the probative or evidentiary facts. *Behler v. Ackley*, 89 N. E. 877, 880, 173 Ind. 173 (citing *Taylor v. Canaday*, 57 N. E. 526, 155 Ind. 671).

Under a statute authorizing a new trial on the ground that the decision of the court

is not sustained by sufficient evidence, specifications for a new trial that the "special findings" specified were not sustained by sufficient evidence, were without the issues, and were contrary to law, and that the court erred in not finding certain facts specified, were insufficient, since by the "decision" of the court referred to in the statute is meant "the special finding," when one has been required. *Major v. Miller*, 75 N. E. 159, 161, 165 Ind. 275.

An opinion of the trial judge analyzing the facts and applying the law is not a "special finding" of fact within Rev. St. § 700, providing that when an issue of fact in a civil action is tried by the court without a jury as authorized by section 629, and the finding is special, a review may extend to the sufficiency of the facts found to support the judgment. *Keeley v. Ophir Hill Consol. Min. Co.*, 169 Fed. 598, 600, 95 C. C. A. 96.

An opinion of the trial judge setting forth the reasons for its decision in an action at law tried without a jury is not a "special finding" within Rev. St. §§ 649, 700 (U. S. Comp. St. 1901, pp. 525, 570). *U. S. v. Sioux City Stock Yards Co.*, 167 Fed. 126, 127, 92 C. C. A. 578.

### SPECIAL FRANCHISE

See Each Special Franchise.

A "special franchise" granted to a railroad corporation is a right granted to it to maintain its road where, without such authority, it would be unlawful to do so. *People ex rel. New York Cent. & H. R. R. Co. v. Priest*, 99 N. E. 547, 555, 206 N. Y. 274.

Under Laws N. Y. 1896, p. 796, c. 908, § 2, subd. 3, as amended by Laws 1899, p. 1589, c. 712, providing that a "special franchise" shall be deemed to include the value of the tangible property of a person or corporation situated in, upon, or above any street, highway, public place, or public waters in connection with the special franchise, and the tangible property so included shall be taxed as a part of the "special franchise," and Laws 1899, p. 1594, c. 712, § 47, providing that tangible property subject to a special franchise tax situated in, upon, under, or above any street, highway, public place, or public waters, as described in subdivision 3 of section 2, shall not be taxable, except upon the assessment made by the state board of tax commissioners, taxable property of an electric light company situated in or under public waters in connection with a special franchise cannot be assessed by the commissioners of taxes in the city of New York, but is to be taxed only as a part of a "special franchise" made by the state board of tax commissioners. *People ex rel. Edison Electric Illuminating Co. v. Commissioners of Taxes and Assessments*, 110 N. Y. Supp. 833, 834, 58 Misc. Rep. 249.

General Tax Law (Laws 1896, p. 796, c. 908) art. 1, § 2, subd. 3, as amended by Laws 1899, p. 1589, c. 712, § 1, provides that "a franchise right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association, or corporation situated in, upon, over or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of a special franchise." Held, that the rights and privileges granted to a telegraph company to construct and operate lines in and between the cities of the state constitute, for the purpose of taxation, a "special franchise." *People ex rel. New England Tel. Co. v. Woodbury*, 116 N. Y. Supp. 209, 213, 63 Misc. Rep. 1.

The right granted by a city to maintain a tunnel under a street between buildings on each side thereof, the portion of the street affected by the grant being owned in fee by the city, is not a "special franchise" nor taxable as such within Laws 1899, c. 712, amending the tax law in relation to the taxation of public franchises as real property; the grant being for private purposes only, and made by the city as proprietor. *People ex rel. Abraham v. Perley*, 123 N. Y. Supp. 436, 438, 67 Misc. Rep. 471.

The charter of a corporation is its "general franchise," which can be repealed at the will of the Legislature pursuant to its reserved power to repeal; while a "special franchise" is the right granted by the public to use property for a public use but with private profit, and such a franchise, when acted on, is vested property and cannot be repealed, unless power to do so is reserved in the grant, though it may be condemned on making compensation. *Lord v. Equitable Life Assur. Soc. of United States*, 87 N. E. 443, 447, 194 N. Y. 212, 22 L. R. A. (N. S.) 420.

"Special franchises," which are privileges of a public nature, the exercise of which is permitted under grants from the state to corporations, partake at common law of the nature of realty, and by General Tax Law (Laws 1896, p. 796, c. 908) § 2, subd. 3, as amended by Laws 1899, p. 1589, c. 712, are classed as real estate within 1 Rev. St. (1st Ed.) p. 750, § 10, and Real Property Law (Laws 1896, p. 559, c. 547) § 1, and they are real estate within Const. art. 8, § 10, limiting municipal indebtedness to a specified per cent. of the assessed valuation of the real estate of the municipality. *Levy v. McClellan*, 89 N. E. 569, 571, 196 N. Y. 178.

Tax Law (Laws 1896, c. 908), as amended by Laws 1899, c. 712, § 1, included special franchises in the definition of land, adding "all surface, underground, or elevated railroads," "including the value of all franchises,

rights or permission to construct, maintain, or operate the same in, under, above, on, or through streets, highways, or public places." This act having been construed by the Supreme Court to include the privilege of crossing public highways at grade, the Legislature, by Laws 1901, c. 490, § 1, provided that the term "special franchise" should not include the crossing of a street, highway, or public place where such crossing was not at the intersection of another street or highway, unless the crossing was other than at right angles for a distance of not less than 250 feet, in which case the whole of the crossing should be deemed a special franchise; and, by Laws 1907, c. 720, § 1, the act was so amended as to provide that the term "special franchise" should not include the crossing of a street, highway, or public place "outside" the limits of a city or incorporated village, where such crossing is less than 250 feet long. Held, that the word "surface" as used in the act of 1899, did not limit that act to street railroads operated by horses or electricity, under the rule of *ejusdem generis*, but was intended to include steam railroads as well, so that steam railroads were subject to franchise taxation for the right to cross streets in cities at grade. *People ex rel. New York Cent. & H. R. R. Co. v. Woodbury*, 96 N. E. 431, 432, 203 N. Y. 167.

The property of a subway railroad company was subject to taxation, under the special franchise tax act (Consol. Laws 1909, c. 60, §§ 43-49), before final completion of its works. Under Tax Law (Consol. Laws 1909, c. 60) § 2, subd. 3, defining a "special franchise," etc., such term, so far as railroads are concerned, embraces rights or permission to construct, maintain, and operate railroads in, under, above, on, or through streets, highways, or public places only, and does not include the right to construct a subway under a navigable river, title to the bed of which was in the state. *People ex rel. Hudson & M. R. Co. v. State Board of Tax Com'rs*, 96 N. E. 435, 438, 203 N. Y. 119.

Special Franchise Tax Law (Laws 1896, c. 908, as amended by Laws 1899, c. 712, § 2, subd. 3), authorizes the assessment for the purpose of taxation of all franchises, etc., to construct a railroad above, on, or through streets, highways, or public places. Laws 1896, c. 908, § 2, subd. 4, as amended by Laws 1901, c. 490, provides that the term "special franchise" shall not be deemed to include the crossing of a street, highway, etc., where such crossing is not at the intersection of another street or highway, unless such crossing shall be at other than right angles for a distance of 250 feet, in which case the whole of such crossing shall be deemed a special franchise. Statutory Construction Law (Laws 1892, c. 677) § 1, provides that it is applicable to every statute, unless its general object, or the context of the language construed or other provisions of law, indicate that a different



meaning was intended, etc. Section 8 (incorporated in General Construction Law [Laws 1909, c. 27, § 35; Consol. Laws, c. 22]) provides that words in the singular number include the plural and in the plural number include the singular. Held, that under such rule the term "special franchise" includes the crossing of any number of streets, highways, or public places adjoining each other, where the crossing is at other than right angles for a distance of not less than 250 feet. *People ex rel. New York Cent. & H. R. R. Co. v. Woodbury*, 125 N. Y. Supp. 728, 729, 140 App. Div. 848.

Under Tax Law (Consol. Laws, c. 60) § 2, subd. 3, defining the terms "land," "real estate," and "real property" to include land, underground railroads, including the valuation of franchises to construct and operate the same, and defining a "special franchise" to include the value of the tangible property of a corporation situated in or under or above any street, a corporation owning special franchises to operate an underground railroad under city streets owns special franchises subject to taxation, though only so small a part of the railroad is constructed and in operation as is insufficient to meet operating expenses, taxes, and interest, and the franchises, if possessing a value, are taxable, though they are not used. *People ex rel. Hudson & M. R. Co. v. State Board of Tax Com'rs*, 127 N. Y. Supp. 918, 925, 143 App. Div. 26.

The New York & Long Island Railroad Company was incorporated in 1887 and obtained the consent of the then city of New York for the construction of a tunnel railroad under one of the streets of the borough of Manhattan, and the time for construction was extended to 1907, at which time the company's corporate existence expired under the provisions of section 5 of the railroad law (Laws 1890, c. 505, amended by Laws 1901, c. 508), and its property became vested in the relators, who were its directors at that date, as trustees for stockholders and creditors in accordance with section 35 of the general corporation law (Consol. Laws, c. 23). The state in 1891, by patent, granted to the company and its successors a right of way to construct a tunnel under the waters of the East River with all "the rights, hereditaments and appurtenances" belonging and appertaining thereto, to have and to hold forever. Tax Law, 1896, c. 908, § 2, subd. 3, as amended by Laws 1899, c. 712 (Consol. Laws, c. 60, art. 1, § 2, subd. 3), provides that the terms "land, real estate and real property" shall include underground railroads, including the value of all franchises to construct and operate the same, to be known as special franchises and to include the value of the tangible property of a corporation, situated under any public waters. In 1908 and 1909 the State Board of Tax Commissioners assessed the company's special franchise to the relators. Held, that while the patent was not an abso-

lute conveyance of land, or a fee, that part of the tunnel beneath the bed of the river extending from a point 300 feet east of the bulkhead line of the Manhattan shore was property subject to taxation as a "special franchise" under the tax law. *People ex rel. Bryan v. State Board of Tax Com'rs*, 127 N. Y. Supp. 858, 862, 142 App. Div. 796; *Id.*, 124 N. Y. Supp. 711, 67 Misc. Rep. 508.

Relator street railroad company has the exclusive right in the nature of an easement to occupy forever a strip within a street with its railroad tracks for running cars thereon. Tax Laws (Laws 1896, c. 908) § 2, subd. 3, as amended by Laws 1899, c. 712, provides that the terms "land, real estate," etc., include all structures erected upon or affixed to land, all surface or elevated railroads, including the value of all franchises or permissions to construct and operate the same on any streets; all railroad structures, tracks, etc., permitted or authorized to be laid upon any street, and that a franchise specified herein shall be known as a "special franchise," for the purpose of taxation. Held, that relator's right to maintain and operate its road within the street was not a "special franchise," within the statute. *People ex rel. Long Island R. Co. v. State Board of Tax Com'rs*, 133 N. Y. Supp. 348, 349, 148 App. Div. 751.

The mere fact that a corporation is organized for the specific purpose of acquiring, and is given power to acquire, public uses or franchises does not carry with it the idea that such franchises, when acquired, be they many or few, are merged in, and must be assessed as, part and parcel of the general corporate franchise. *San Joaquin & K. R. Canal & Irrigation Co. v. Merced County*, 84 Pac. 285-288, 2 Cal. App. 593.

### SPECIAL FUND

The term "special fund," in Comp. St. 1901, c. 12a, § 7, providing that property of every description belonging to any city governed by the act shall be exempt from taxation, execution, and sale, and that judgments against a city shall be paid out of the judgment fund or, when a special fund is created for such purpose, out of such special fund, does not include an assessment levied in pursuance of section 158, authorizing an assessment to pay damages awarded for grading, change of grade, or for the appropriation of private property, upon the lots and lands benefited, which shall abut or be adjacent to the street, avenue, or alley graded or opened, but refers to a levy made for the payment of a specific judgment in pursuance of chapter 77, art. 6, § 2. *City of Omaha v. State*, 94 N. W. 979, 980, 69 Neb. 29.

### SPECIAL GUARANTY

"A 'special guaranty' is limited to the person to whom it is addressed, and usually contemplates a trust or reposes a confidence in such person. Such a guaranty may not be

assigned until a right of action has arisen thereon." A guaranty executed and attached to a promissory note at the time it is indorsed and delivered imposes no trust or confidence in the indorsee, and, though it specifically names him, will be considered a general guaranty of the note, and not a 'special guaranty' personal to the indorsee, and it may be transferred by assignment upon the further indorsement of the note. *Everson v. Gere*, 25 N. E. 492, 122 N. Y. 290 (citing and adopting *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. Rep. 204).

### SPECIAL INJUNCTION

A "special injunction" is one granted for the prevention of irreparable injury, when the preventive aid of the court is the ultimate and only relief sought and the primary equity involved in the suit. *Beasley v. Jenkins*, 42 South. 145, 146, 117 La. 577 (citing *Current Law*, vol. 4, p. 96, § 1).

### SPECIAL INTEREST

See *Direct and Special Interest*.

### SPECIAL INTERROGATORIES

The purpose of "special interrogatories" is to elicit facts to test the correctness of the general verdict. *Freedman v. New York, N. H. & H. R. Co.*, 71 Atl. 901, 905, 81 Conn. 601, 15 Ann. Cas. 464.

### SPECIAL JUDGMENT

A "special judgment" is one operating in rem. *Smith v. Collyer*, 55 Atl. 805, 806, 69 N. J. Law, 365.

### SPECIAL JURY

Under V. S. 1127 (P. S. 1477), providing that a person drawn as juror from a town containing more than 200 inhabitants shall be disqualified from serving again for two years, a plea in abatement filed at the October term, alleging that on a date before the March term a certain juror was summoned as juror, and attended, qualified, and acted as such through the term, "without this, that said [juror] was during said last-mentioned session of said court summoned as a petit juror to serve at said session of court," was demurrable, because not showing that the juror was not drawn as a special or struck juror; the allegation that he was "drawn" not being sufficient for this purpose, in view of sections 1134, 1137 (1484, 1487), speaking of a struck jury as "drawn" and calling it a "special jury." *State v. Waterman*, 62 Atl. 1016, 1017, 78 Vt. 379.

### SPECIAL LAW

Local or special law, see *Local Law*.

See, also, *Class Legislation*; *General Law*.

A "special law" is one that relates to particular persons or things of a class, as distinguished from a "general law," which applies to all persons or things of a class. *Prince George's County Com'rs v. Baltimore & O. R.*

*Co.*, 77 Atl. 433, 434, 113 Md. 179 (citing 7 Words and Phrases, pp. 6578-6584; vol. 8, p. 7802); *State v. Miksicek*, 125 S. W. 507, 511, 225 Mo. 561, 135 Am. St. Rep. 597; *Ex parte Berger*, 90 S. W. 759, 762, 193 Mo. 16, 3 L. R. A. (N. S.) 530, 112 Am. St. Rep. 472, 5 Ann. Cas. 383 (citing *State ex rel. Lionberger v. Tolle*, 71 Mo. 645); *Koster v. Coyne*, 97 N. Y. Supp. 433, 435, 110 App. Div. 742 (quoting *In re N. Y. El. R. Co.*, 70 N. Y. 327, 350); *Sanchez v. Fordyce*, 75 Pac. 56, 57, 141 Cal. 427; *City of Little Rock v. North Little Rock*, 79 S. W. 785, 787, 72 Ark. 195 (citing *Little Rock & F. S. Ry. Co. v. Hanniford*, 5 S. W. 294, 49 Ark. 291; *Wheeler v. City of Philadelphia*, 77 Pa. 338); *Title & Document Restoration Co. v. Kerrigan*, 88 Pac. 356, 365, 150 Cal. 289, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199; *Jay v. Thomas*, 46 Pac. 578, 586, 5 Okl. 1; *Smith v. State*, 113 S. W. 289, 291, 54 Tex. Cr. R. 298 (quoting and adopting definition in *Clark v. Finley*, 54 S. W. 343, 93 Tex. 171); *O'Connor v. St. Louis Transit Co.*, 97 S. W. 150, 153, 198 Mo. 622, 115 Am. St. Rep. 495, 8 Ann. Cas. 703; *Boise Irrigation & Land Co. v. Stewart*, 77 Pac. 25, 28, 10 Idaho, 38 (quoting *Suth. St. Const.* § 121).

A "special law" is one that applies only to a special locality or to an individual or to a number of individuals selected out of a class to which they belong. *Mix v. Board of Com'rs of Nez Perce County*, 112 Pac. 215, 218, 18 Idaho, 695, 32 L. R. A. (N. S.) 534.

A law is "special," in a constitutional sense, when by force of an inherent limitation it arbitrarily separates some persons, places, or things from those upon which, but for such separation, it would operate. *Van Cleve v. Passaic Valley Sewerage Com'rs*, 58 Atl. 571, 572, 71 N. J. Law, 183.

An act is not "special" or lacking in uniformity merely because it does not apply to every person or subject within the state. *In re Martin*, 106 Pac. 235, 237, 157 Cal. 51, 26 L. R. A. (N. S.) 242.

An act general in form, relating to persons, places, and things as a class, and not local or temporary, is not necessarily "special legislation," though the occasion of its being passed is to aid in the formation of a corporation to administer a certain charitable trust. *St. John v. Andrews Institute for Girls*, 83 N. E. 981, 984, 191 N. Y. 254, 14 Ann. Cas. 708.

A statute which relates to particular persons or things of a class is "special," and comes within Const. art. 3, § 56, prohibiting special laws as to certain matters and in other cases where a general law can be made applicable. *Smith v. State*, 113 S. W. 289, 290, 54 Tex. Cr. R. 298.

If a statute operates only on a portion of the persons who come within its scope or range, it is a "special law," subject to the constitutional inhibition of such laws. *State*

ex rel. *Applegate v. Taylor*, 123 S. W. 892, 916, 224 Mo. 393.

A "general law," within the meaning of Const. Or. art. 11, § 2, as amended June 4, 1906, and providing that corporations may be formed under general laws, but shall not be created by special laws, is one by which all persons or localities complying with its provisions may be entitled to exercise powers, rights, and privileges conferred, while a "special law" is one conferring on certain individuals or citizens of a certain locality rights and powers or liabilities not granted to or imposed on others similarly situated. *Straw v. Harris*, 103 Pac. 777-780, 54 Or. 424; *Farrell v. Port of Columbia*, 91 Pac. 546, 547, 50 Or. 169.

The fact that an act to legalize bonds to be issued and sold by municipalities is limited in its application to bonds sold after its passage, and for not less than par, does not render it a "special law" in a constitutional sense. *City of Redlands v. Brook*, 91 Pac. 150, 152, 151 Cal. 474.

Const. § 110, defines a "special" or private law as one which applies to an individual association or corporation. *State ex rel. Attorney General v. Sayre*, 39 South. 240, 142 Ala. 641, 4 Ann. Cas. 656.

An act relating to persons or things as a class is a "general" and not a "special" law, and hence Act Oct. 14, 1879 (Laws 1878-79, p. 125), relating to the suspension and removal of railroad commissioners, is not a special law. *Gray v. McLendon*, 67 S. E. 859, 868, 134 Ga. 224.

The fact that municipal officers are now appointive has no reasonable relation to the method of appointment, and legislation changing the method of appointment, which applies only to municipalities where the excise commissioners are appointive at the time of the passage of the act, is "special" and unconstitutional. *Bumsted v. Henry*, 67 Atl. 375, 376, 74 N. J. Law, 790.

Gen. St. 1906, §§ 3772, 3775, regulating the catching of fish in rivers, creeks, bays, bayous or other waters on the coast are not "local" or "special laws," where the first provision therein covers the full territory of the state defined as on the coast of the state while the latter applies to all the rivers of the state, and are not in violation of Const. art. 3, §§ 20, 21. *Carlton v. Johnson*, 55 South. 975, 976.

#### **As depending on reasonableness of classification**

A statute making it an offense for the proprietors of places where liquors are kept for sale at retail to permit females under the age of 21 years to remain in or about the places is not "special or class legislation" because excepting therefrom open and public restaurants or dining rooms; the classification being a reasonable one under the police

powers of the state, and operating uniformly. *State v. Baker*, 92 Pac. 1076, 1078, 50 Or. 381, 13 L. R. A. (N. S.) 1040.

If the individuals to whom legislation is applicable constitute a class characterized by some substantial qualities or attributes of such character as to indicate the necessity or propriety of certain legislation restricted to that class, such legislation, if applicable to all members of that class, is not "special legislation" within the Constitution. *Ex parte King*, 106 Pac. 578, 579, 157 Cal. 161.

A law which operates only upon a class of individuals is none the less a general law if the individuals to whom it is applicable constitute a class which requires legislation peculiar to itself in the matter covered by the law. The class, however, must not only be germane to the purpose of the law, but must also be characterized by some substantial qualities or attributes which render such legislation necessary or appropriate for the individual members of the class. It may be founded on some natural or intrinsic or constitutional distinction, but the distinction must be of such a nature as to reasonably indicate the necessity or propriety of legislation restricted to that class. *Title & Document Restoration Co. v. Kerrigan*, 88 Pac. 356, 365, 150 Cal. 289, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199 (quoting and adopting definitions in *McDonald v. Conniff*, 34 Pac. 71, 99 Cal. 386, 391; *De Voe v. Superior Court of Mendocino County*, 74 Pac. 28, 140 Cal. 476, 98 Am. St. Rep. 73; *People v. Cent. Pac. R. Co.*, 38 Pac. 905, 105 Cal. 576, 584; *City of Pasadena v. Stimson*, 27 Pac. 604, 91 Cal. 238; citing *Rode v. Siebe*, 51 Pac. 869, 119 Cal. 518, 39 L. R. A. 342; *Darcy v. City of San Jose*, 38 Pac. 500, 104 Cal. 642).

#### **As law**

See Law.

#### **Local law distinguished**

The word "local," as applied to legislation, signifies legislation relating to part of the territory of a state only, while the word "special" is more appropriately applied to laws granting some special right, privilege, or immunity, or imposing some particular burden upon some portion of the people of the state less than all. *People v. Wilcox*, 86 N. E. 672, 673, 237 Ill. 421.

#### **Local law synonymous**

The terms "local law" and "special law" are used interchangeably. Const. 1901, § 10, defines a "local law" as one applicable to any political subdivision of the state, and a "special law" as one which applies to an individual association or corporation. *Montgomery City Charter (Acts 1892-93, p. 377) § 20*, exempts persons procuring a liquor license from the city from paying any tax or license to the county. Act March 4, 1903 (Gen. Acts 1903, p. 184), provides for a county liquor tax, and repeals all laws, general and "spe-

cial," inconsistent with itself, and Act Sept. 30, 1903 (Gen. Acts 1903, p. 298) § 4, again confers power on counties to levy a liquor tax, and provides that the statute shall not affect the exemption provided by any city charter. Held that, notwithstanding the constitutional definitions, the exemption was repealed by Acts March 4, 1903 (Gen. Acts 1903, p. 184), and not revived by Act Sept. 30, 1903 (Gen. Acts 1903, p. 298) § 4. *Gaston v. O'Neal*, 41 South. 742, 743, 145 Ala. 484 (citing *Maxwell v. State*, 89 Ala. 150, 7 South. 824; *Holt v. Mayor and Aldermen of Birmingham*, 111 Ala. 369, 19 South. 735).

The words "local" and "special," as used in Const. art. 3, § 30, providing that no local or special laws shall be passed for the incorporation of cities and towns, are synonymous words of description. *Eckerson v. City of Des Moines*, 115 N. W. 177, 183, 137 Iowa, 452.

Const. art. 11, § 2, grants to the legal voters of every city and town power to enact and amend their municipal charter, and article 4, § 1a, provides that the initiative and referendum powers reserved to the people are further reserved to legal voters of every district as to all local, special, and municipal legislation. Held that, as the words "local" and "special" mean enactments intended only to affect certain persons who operate in specified localities, an incorporated port cannot under a special election had under such powers extend its boundaries by annexing other territory without the consent of the inhabitants of the territory annexed, this being particularly true in view of L. O. L. § 3209, and Laws of 1911, p. 158, § 3, both of which provide for the annexation of new territory to municipalities and ports only with the consent of the inhabitants of the territory to be annexed. *State ex rel. v. Port of Tillamook*, 124 Pac. 637, 640, 62 Or. 332.

The words "local" and "special" in Const. art. 4, § 1a, reserving the initiative and referendum powers to the voters of every municipality as to all local, special, and municipal legislation, are synonymous, and mean enactments intended to affect only certain persons, or to operate in specified localities; and an act is "local" when the subject relates to a portion only of the people or their property, or when it operates only within a single city, county, or other particular division. *Schubel v. Olcott*, 120 Pac. 375, 379, 60 Or. 503. See, also, *Acme Dairy Co. v. City of Astoria*, 90 Pac. 153, 154, 49 Or. 520.

#### Classification of municipal corporations

A law is not "local" or "special" within the constitutional inhibition against such laws regulating county and township affairs, for classifying counties and townships on the basis of population, if population makes a substantial difference in the conditions affected by the statute, and the statute, if considered as regulating county and township

affairs, did not violate the constitutional inhibition for fixing a lower tax rate in counties and cities having a larger population. *People ex rel. Booth v. Opel*, 91 N. E. 458, 461, 244 Ill. 317.

Acts Tex. 30th Leg. (Laws 1907, p. 269, c. 139), providing for a particular jury system for all counties having a city containing a population of 20,000 or more, according to a census, is not a "special law," within Const. art. 3, § 56, prohibiting the passage of any local or special law regulating the summoning or impaneling of juries. *Northern Texas Traction Co. v. Danforth*, 116 S. W. 147, 148, 53 Tex. Civ. App. 419; *Houston Electric Co. v. Faroux (Tex.)* 125 S. W. 922, 923.

P. L. 1907, pp. 79, 89, 114, creating boards of fire and police commissioners, boards of finance, and boards of public works in cities having a population of not less than 100,000 nor more than 200,000, are each a "general law," and not a "special law," regulating municipal affairs. *McCarter v. McKelvey (N. J.)* 73 Atl. 884, 885.

Since the Constitution provides that cities of the commonwealth shall be divided into classes, the fact that the city of Louisville is the only city in the first class does not render such act void as "special legislation," in contravention of Const. § 59. *Kirch v. City of Louisville*, 101 S. W. 373, 375, 125 Ky. 391.

Acts 1906, p. 1, c. 1, empowering cities of the first class to construct a system of sewerage, and providing that the mayor shall appoint four persons who, with the mayor, shall constitute a sewerage commission, is not "special legislation," within Const. § 59, prohibiting the passage of special acts concerning specified subjects, though the city of Louisville is the only city of the first class, as the statute would be applicable to all cities of the first class. *Miller v. City of Louisville (Ky.)* 99 S. W. 284, 285.

Act March 1, 1910 (Laws 1910, c. 50), permitting all second-class cities to adopt the commission form of government as provided therein, is not "special legislation" contrary to Const. § 59, prohibiting the General Assembly from passing special acts amending the charter of any corporation. *Bryan v. Voss*, 136 S. W. 884, 886, 143 Ky. 422.

Laws 1905, p. 1160, c. 501, amending Laws 1898, p. 371, c. 182, entitled an act for the government of cities of the second class, provides that the amendatory act shall not apply to any city that becomes a city of the second class under the enumeration to be had in 1905, until 1908. Held, that this does not render it a "special city law," within Const. art. 12, § 2, providing that such a law shall not be passed until a certified copy of the bill has been transmitted to the mayor of the city affected thereby, and returned with a certificate whether the city has or has not accepted the same. *Koster v. Coyne*, 77 N. E. 983, 984, 184 N. Y. 494; *Id.*, 97 N. Y.

Supp. 433, 435, 110 App. Div. 742 (quoting Matter of N. Y. El. R. Co., 70 N. Y. 327, 350).

#### **Creation and definition of offenses**

Va. Code 1904, §§ 1759, 1766, denouncing certain acts as misdemeanors affecting the interests of the Virginia Pharmaceutical Association, and undertaking to give to the appointees of such association the exclusive right to be prosecutors of such crimes and the exclusive beneficiary in the penalty to the extent of a half of the fines imposed, apply to the whole state, and make a violation of its provisions by any person a misdemeanor punishable by fine, and are not "special or private laws" within Const. 1902, § 63, cl. 1 (Code 1904, p. ccxxiii), prohibiting the General Assembly from enacting any local, special, or private law for the punishment of crime. Bertram v. Commonwealth, 62 S. E. 969, 971, 108 Va. 902.

#### **Establishment and regulation of courts**

The law limiting the jurisdiction to justices of the peace in cities of the first class violates Const. art. 6, § 26, prohibiting the Legislature from enacting any "special law" regulating the jurisdiction of justices of the peace, the practice of courts of justice, or in all cases where a general law can be applicable. Special laws are generally objectionable for not extending to the whole subject to which their provisions would be equally applicable, and thus permitting a diversity of laws relating to the same subject. The object of the prohibition of special or local laws is to prevent this diversity. Each subject as to which such laws are prohibited is by such inhibition designated as a subject of only general legislation, which shall have a uniform operation. Generality in scope and uniformity of operation are both essential. A law which embraces a whole subject would still be special if not framed to have a uniform operation. Love v. Liddle, 72 Pac. 185, 187, 26 Utah, 62, 62 L. R. A. 482 (quoting and adopting definition in Suth. St. Const. § 127).

#### **Establishment of seat of government**

An act entitled "An act providing for the permanent location of the seat of government and capital of the state, creating a board of capital commissioners and defining its powers and duties, authorizing the Governor to accept, for capital purposes, the proceeds of the sale of land, or donations from other sources, and declaring an emergency," is not a "special law," within Const. art. 5, § 32, providing that no special or local law shall be considered by the Legislature until notice of the intended introduction thereof shall first have been published in newspapers, etc. Coyle v. Smith, 113 Pac. 944, 945, 28 Okl. 121.

#### **Regulation of civil remedies and proceedings**

A law in which procedure provided for the establishment and quieting of title to real estate is distinctive, and which applies only

where the records have been destroyed by earthquake, fire, or flood, is not violative of Const. art. 4, § 25, subds. 3, 33, prohibiting the Legislature from passing any local or "special laws" regulating the practice of courts, and in cases where a general law can be made applicable. The mere fact that a law operates only on one class of cases does not make it repugnant to the Constitution. Title & Document Restoration Co. v. Kerrigan, 88 Pac. 356, 365, 150 Cal. 289, 8 L. R. A. (N. S.) 682, 119 Am. St. Rep. 199 (citing Deyoe v. Superior Court, Mendocino County, 74 Pac. 28, 140 Cal. 476, 98 Am. St. Rep. 73).

Act No. 70 of 1886, § 1, which provides that in suits against railroads for the killing, etc., of stock, it shall suffice in order to recover to prove the killing or injury unless defendant shows that it did not result from carelessness on its part, etc., is a general law applying throughout the state and to all railroads, and, since it merely makes a change in the rules of procedure and evidence in a particular class of cases, does not discriminate invidiously between persons, and hence does not contravene Const. art. 48, §§ 15, 18, forbidding the passage of local or special laws regulating the practice of courts or changing the rules of evidence. Learned & Koontz v. Texas & P. Ry. Co., 54 South. 931, 932, 128 La. 430.

Const. art. 4, § 34, authorizes the Legislature to pass any local or general law for the establishment of municipal government in the city of Chicago, and, pursuant thereto, the Legislature enacted the Municipal Court Act, § 23 (Hurd's Rev. St. 1903, c. 37, § 286), providing that if upon application to the Supreme Court or Appellate Court, or to any judge thereof, for a supersedeas, the same shall be denied, the order or judgment shall stand affirmed unless the court or judge denying the supersedeas shall otherwise order. Const. art. 6, § 11, authorizes the creation of the Appellate Court, and section 29, provides that all laws relating to courts shall be general and of uniform operation, and the practice of all courts of the same class or grade, so far as regulated by law, and the effect of all judgments, shall be uniform. Held that, since a case brought to the Appellate Court from the municipal court upon writ of error was a new suit in the Appellate Court, the practice in the Appellate Court must be the same as in cases brought up from the other courts of record, and section 23 of the municipal court act was unconstitutional as being a special law regulating the practice in the Appellate Court. Clowry v. Holmes, 87 N. E. 303, 238 Ill. 577.

Act March 2, 1903 (St. 1903, p. 67, c. 61), amending Pol. Code, § 3443, to provide a special proceeding in the courts for determination of questions as to validity of proceedings for purchase of public lands, in which the ordinary rules as to practice, pleadings, and

evidence, including motion for new trial and appeal, are recognized, is not a "special law" regulating the practice of courts of justice, prohibited by the Constitution. *Boggs v. Ganeard*, 84 Pac. 195, 199, 148 Cal. 711.

#### **Regulation of corporations**

Const. art. 11, § 8, declares that no corporation shall be created or its powers increased or diminished by "special laws." Held, that Acts 1887, p. 112, c. 39, authorizing the board of directors of any railroad company to change a terminus at any time before final location of the line, is not a "special law," within the Constitution; the provision being applicable merely to laws for the benefit of particular corporations, designated by name. *Memphis & St. L. R. Co. v. Union R. Co.*, 95 S. W. 1019, 1024, 116 Tenn. 500.

#### **Regulation of drainage**

Acts 1909, c. 13, amended the drainage law of 1907, and section 1 provided that where drainage districts had been established, or where a hearing had been theretofore had on the petition, and action taken by the county commissioners' court, or where a public hearing was then pending, and the notices have been posted, the notices of the public hearing, as well as of the hearing on the engineer's report, provided for by section 10, should be deemed and declared legal notices of the public hearing. Acts 1911, c. 118, amending the Drainage Act 1907, provides that "in all drainage districts heretofore created, and which have issued and registered bonds with the comptroller," all proceedings done in connection with and leading up to the creation "of such districts" and the issuance of such bonds are hereby declared valid and legal. Held, that the statutes were not special laws within Const. art. 3, § 57, prescribing certain formalities in the passage of such laws. *Parker v. Harris County Drainage Dist. No. 2 (Tex.)* 148 S. W. 351, 362.

#### **Regulation of elections**

Acts 1904, p. 197, c. 93, amending St. 1903, § 1596a, subsec. 2, making the sheriff ex officio a member of the county board of election commissioners, so as to provide that, in counties containing cities of the second class, the circuit court clerk, instead of the sheriff, shall be a member of the board, is repugnant to Const. § 59, prohibiting the enactment of a "special law," where a general law can be made applicable, and forbidding the passage of special acts to provide for conducting elections. *Droege v. McInerney*, 87 S. W. 1085, 120 Ky. 796.

Act March 2, 1911 (Acts 1911, c. 83), providing for the time of election of all judges of the probate, juvenile, and superior courts of the state, is not rendered a "special act," and hence unconstitutional within Const. art. 4, § 22, prohibiting special acts regulating the election of county and township officers, because it specifically designates the courts to which it refers, and thus excludes courts

hereafter created. *Spencer v. Knight*, 98 N. E. 342, 344, 177 Ind. 564.

#### **Regulation of irrigation**

A law which defines the procedure for determining conflicting rights of appropriators and owners of water rights and applying to all alike of this peculiar class is a "general" and not a "special law," in the constitutional sense. *Boise Irrigation & Land Co. v. Stewart*, 77 Pac. 25, 28, 10 Idaho, 38.

#### **Regulation of liquor traffic**

Laws 1905, c. 115, prohibiting saloons within five miles of any United States government sanatorium, and within specified distances of any military reservation, and of enumerated educational institutions, is a general statute, and not a special one, within Act Cong. July 30, 1886, c. 818, 24 Stat. 170, prohibiting the "special laws," though there was but one United States sanatorium in the territory at the time of the passage of the act. *Rapp v. Venable*, 110 Pac. 834, 837, 15 N. M. 509.

Act Feb. 25, 1904, 24 St. at Large, p. 485, amending General Dispensary Law March 6, 1896, 22 St. at Large, p. 128, § 7, and levying a tax of one-half a mill on counties voting out the dispensary with the exception of two counties which never had dispensaries, is not a violation of Const. art. 3, § 34, as a "special law," where a general law could be applicable, but the law is general with special provisions. *Murph v. Landrum*, 56 S. E. 850, 855, 76 S. C. 21.

#### **Regulation of occupations**

A statute providing for an attorney's lien on his client's cause of action, providing that attorneys may contract for a percentage of the proceeds of any settlement, and that on notice to a defendant of an agreement between the attorney and client, stating the interest the attorney has in the cause of action, if defendant after such notice settles the cause of action without consent of the attorney, defendant shall be liable for the attorney's lien, is a general law and not class legislation on the ground that it simply applies to attorneys at law. *O'Connor v. St. Louis Transit Co.*, 97 S. W. 150, 153, 198 Mo. 622, 115 Am. St. Rep. 495, 8 Ann. Cas. 703.

#### **Regulation of public lands**

Where a contract for the preparation of abstracts of title required the insertion of all "special acts" of Congress affecting the property, the abstractor was not authorized to insert Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519, granting swamp lands to the state; that not being a special act of Congress, but an act general in its terms, applicable to all the lands of the state and in the state of the character described, and where such contract required the inclusion of "special acts" of Congress, or of the state Legislature, the abstractor was not authorized to include an act of Congress donating internal improve-

ment lands, nor state statutes curing defective conveyances and acknowledgments. *McVeigh v. Chicago Mill & Lumber Co.*, 132 S. W. 638, 642, 96 Ark. 480.

#### **Regulation of schools**

The school law of 1907 (P. L. 1907, p. 365) enacted in obedience to the constitutional mandate and in general terms extending throughout the entire state, purporting to deal with the single general subject of a system of free schools for education of all children in the state between the ages of five and eighteen years, and creating a board of trustees of the Teachers' Retirement Fund with enumerated powers is not a "special act," violative of Const. art. 4, § 7, par. 11, providing that the legislation shall pass no special act conferring corporate powers. *Allen v. Board of Education of City of Passaic*, 79 Atl. 101, 103, 81 N. J. Law, 135.

#### **Regulation of taxation**

Since property used for railroad or canal purposes constitutes a class for taxation by reason of its use a tax law operating on the whole mass of the property so used is a general law, while a tax law which does not embrace in its operation all the property so used is a "special law." *United New Jersey R. & Canal Co. v. Parker*, 69 Atl. 239, 245, 75 N. J. Law, 771, modifying 67 Atl. 686, and *Central R. Co. of New Jersey v. State Board of Assessors*, 67 Atl. 672.

#### **Special provisions in general laws**

The phrase "special provisions in general laws," as used in Const. art. 3, § 34, XII, providing that the General Assembly shall forthwith enact general laws concerning the subjects mentioned in such section which shall be uniform in their operation, "provided that nothing contained in this section shall prohibit the General Assembly from enacting special provisions in general laws," means provisions in general laws which, while having a limited application, must not be so inconsistent with the general scheme or purpose of the statute as to prevent substantial uniformity of operation throughout the state. *State ex rel. Schroder v. Burns*, 52 S. E. 960, 961, 73 S. C. 194 (citing *State v. Queen*, 40 S. E. 553, 554, 62 S. C. 247, 251; *Caroline Grocery Co. v. Burnet*, 39 S. E. 381, 384, 61 S. C. 205, 211, 58 L. R. A. 687; *State v. Higgins*, 28 S. E. 15, 51 S. C. 51, 38 L. R. A. 561; *Dean v. Spartanburg County*, 37 S. E. 226, 59 S. C. 110; *Nance v. Anderson County*, 39 S. E. 5, 60 S. C. 501),

#### **SPECIAL LEGISLATION**

See Special Law.

#### **SPECIAL MANDATE**

"Special mandate," as used in Code Civ. Proc. § 509, declaring that a judgment lies dates from the filing of special mandate from the Supreme to the lower court, refers entirely to the special mandate required by section

594 on reversal of a judgment in whole or in part and has no application where a judgment was affirmed. *Harvey v. Godding*, 109 N. W. 220, 221, 77 Neb. 289, 124 Am. St. Rep. 841.

#### **SPECIAL MEETING**

By the statute a "special meeting" of the board of county commissioners is a meeting called upon order of a majority of the board after the close of the regular session to be held at such time as the order may fix. The order must be entered of record, and five days' notice is required to be given to those not joining in the order. *Gilbert v. Canyon County*, 94 Pac. 1027, 1030, 14 Idaho, 429.

#### **SPECIAL MOTION**

Under Comp. Laws 1897, §§ 436, 437, providing that a judgment creditor whose execution has been returned unsatisfied may file a bill to compel the discovery of any property belonging to defendant, and the court shall have power to compel such discovery and prevent transfer of such property, and chancery rule 30, subd. "b," providing that, when the complainant in a creditor's bill shall have the statutory right of discovery, the defendant shall fully answer all interrogatories, and, if he fails to do so, the complainant may have his right to further answer and disclosure determined by the court on special motion, the trial court has a discretionary power to compel such discovery; the chancery rule having been promulgated by the Supreme Court, which is presumed to have used the term "special motion" in its technical sense which is not a motion of course, but one directed to the discretion of the court. *Crawford v. Mandell*, 138 N. W. 705, 707, 173 Mich. 109.

#### **SPECIAL OCCASION**

What will constitute a "special occasion" not being stated by Cr. Code, div. 11, § 3 (*Hurd's Rev. St.* 1911, c. 38, § 405), providing that, if the grand jurors are dismissed before the court adjourns, they may be summoned again on any special occasion at such time as the court directs, it is left to the discretion of the circuit court to determine when and for what purpose they shall be recalled. *People v. McCauley*, 100 N. E. 182, 184, 256 Ill. 504.

#### **SPECIAL ORDER**

Any special order, see Any.

An order amending a judgment already entered is a "special order after final judgment," and therefore appealable, under Code Civ. Proc. § 1722, as amended by Sess. Laws 1899, p. 146. *State ex rel. Boston & M. Consol. Copper & Silver Min. Co. v. District Court of Second Judicial Dist.*, 79 Pac. 410, 411, 32 Mont. 20.

An order of the district court overruling a motion to dismiss an appeal to that court from a judgment of a justice of the peace is not a "special order" made after final judg-

ment so as to be appealable. *Raymond v. Raymond*, 79 Pac. 1056, 1057, 32 Mont. 170.

An order overruling a motion to set aside an order of dismissal of an action, and for reargument of question involved in a demurrer to the complaint, is a "special order" after final judgment, and not a judgment. *Oliver v. Kootenai County*, 90 Pac. 107, 108, 13 Idaho, 281.

A judgment of dismissal and for costs is a final judgment, and an order overruling a motion to vacate the judgment is a "special order" after final judgment and appealable under Rev. St. 1899, § 806 (Ann. St. 1906, p. 769), authorizing an appeal from any special order after final judgment. *State ex rel. Potter v. Riley*, 118 S. W. 647, 656, 219 Mo. 667.

Where, in a suit to quiet title, a guardian ad litem was appointed at plaintiff's instance for a minor defendant, and, after hearing, the court entered judgment in favor of plaintiff, quieting his title to the premises, and added to the judgment a provision requiring plaintiff to pay the sum of \$200 to such guardian ad litem for his services, such part of the judgment was not appealable as a "special order made after final judgment," within Code Civ. Proc. § 939. *Aronson v. Levison*, 83 Pac. 154, 155, 148 Cal. 364.

A statute authorizing an appeal from a "special order made after final judgment" is broad enough to authorize an appeal from an order made by the court vacating or setting aside a judgment. *Shumake v. Shumake*, 107 Pac. 42, 45, 17 Idaho, 649.

Certain persons obtained a judgment in the superior court against petitioner in a partnership accounting, and on August 5th a final judgment was rendered in partition proceedings confirming the sale of the property involved therein, and directing that petitioner herein and others be paid a certain sum, but the referee, without any order of court, delivered the money to the clerk of court, who gave it to the county treasurer. On August 18th G. had execution issued under the judgment in the partition proceeding which was levied upon petitioner's interest in the money deposited with the county treasurer, and his interest therein was sold to G. for the value of the money, but the treasurer refused to deliver the money to him without an order of court, whereupon G. filed a petition in the superior court praying an order directing the treasurer to pay over the money, and, on the hearing, an order was issued directing the treasurer to pay over the money as required; the order being made without notice to petitioner. Held that, since the order concerned and affected the judgment against petitioner, it was appealable as a "special order" after final judgment, within Code Civ. Proc. § 939, subd. 3, and it was immaterial whether the execution should have issued on the judgment in the accounting action or in the suit for

partition, or that G. and the county treasurer were strangers to both actions, or that the two actions were entirely unrelated. *Magee v. Superior Court of Solano County*, 101 Pac. 532, 535, 10 Cal. App. 154.

### SPECIAL POWER

Real Property Law, § 118, declares a "special power" to be in trust where a person or class of persons other than the grantee is designated as entitled to any benefit from the disposition or charge authorized by the power. *Murray v. Miller*, 70 N. E. 870, 873, 178 N. Y. 316.

### SPECIAL PRESENTMENT

An indorsement of "true bill" is not necessary to the finding of an indictment, and, since a "special presentment" is treated as an indictment in this state, the indorsement "special presentment" on the finding of the grand jury is sufficient as a finding of an indictment. *Barlow v. State*, 56 S. E. 131, 133, 127 Ga. 58 (citing *Groves v. State*, 73 Ga. 205; *Foster v. State*, 41 Ga. 582; *Martin v. State*, 46 N. W. 621, 30 Neb. 507; *Sparks v. Commonwealth*, 9 Pa. 354; *State v. Williams*, 18 South. 647, 47 La. Ann. 1609; *White v. Commonwealth*, 70 Va. 824; *Tilly v. State*, 21 Fla. 242; *State v. Elliott*, 11 S. W. 566, 98 Mo. 150; *State v. Hogan*, 31 Mo. 340; *State v. Bowman*, 2 N. E. 289, 103 Ind. 69).

### SPECIAL PRIVILEGE

Especial privilege, see, also, Especial.

A "special privilege" in constitutional law is a right, power, franchise, immunity, or privilege granted to or vested in a person or class of persons, to the exclusion of others and in derogation of common right. *City of Plattsmouth v. Nebraska Telephone Co.*, 114 N. W. 588, 590, 80 Neb. 460, 14 L. R. A. (N. S.) 654, 127 Am. St. Rep. 779.

### SPECIAL PRIVILEGE OR IMMUNITY

See, also, Privileges and Immunities.

Rev. St. § 3836-3 (Bates' Ann. St. p. 2130), conferring power on building and loan associations to assess such dues, fines, interest, and premium on loans made, or other assessments as may be provided for in the constitution and by-laws, and that they shall not be deemed usury, though in excess of the legal rate of interest, is a valid enactment, and not in conflict with Const. art. 1, § 2, prohibiting "special privileges or immunities," in that it unlawfully discriminates in favor of building and loan associations on the question of usury. *Cramer v. Southern Ohio Loan & Trust Co.*, 74 N. E. 200, 204, 72 Ohio St. 395, 69 L. R. A. 415, 2 Ann. Cas. 990; *Brooklyn Building & Loan Ass'n v. Desnoyers*, 26 Ohio Cir. Ct. R. 352, 354.

A statute requiring corporations of other states and foreign countries, doing business in the state, to designate a resident agent on



whom process may be served, and providing that the designation shall be filed with the Secretary of State, and making a certified copy of such designation sufficient evidence of incorporation, is not invalid, as granting special and exclusive rights, privileges, and immunities to corporations. *Anglo-Californian Bank v. Field*, 80 Pac. 1080, 1082, 146 Cal. 644.

Act Oct. 1, 1903 (Loc. Acts 1903, p. 443), providing for the establishment, maintenance, and regulation of a dispensary in the town of Elba for the sale of liquors, and to establish and perpetuate a board of commissioners for the management of such dispensary—such board being created without funds to inaugurate the business, though authorized to borrow money—and providing that such commissioners shall receive all the issues and profits thereof, was unconstitutional, as a grant of a "special privilege" to the commissioners. *Town of Elba v. Rhodes*, 38 South. 807, 808, 142 Ala. 689.

Since Acts 1903, p. 140, c. 67, authorizing the county commissioners to pay to certain officers therein named salaries, notwithstanding the fact that such respective officers have not turned into the county treasury out of the fees that may have been collected a sum sufficient to equal the total amount of their respective quarterly allowance of salary, applies to all sheriffs who were in office during all or any part of the time from January 1, 1900, to March 3, 1903, the date of the taking effect of the act of 1903 (Acts 1903, p. 140, c. 67), and whose salaries have not been paid in full on account of the insufficiency of collected fees, it is not obnoxious to Const. art. 1, § 23, prohibiting the General Assembly from granting "special privileges or immunities" to any citizen or class of citizens. *Board of Com'rs of Perry County v. Lindemann*, 73 N. E. 912, 913, 165 Ind. 186.

A franchise or privilege granted by a city to an electric company to use its streets, not being exclusive, is not a "special privilege or immunity," prohibited by Neb. Const. art. 3, § 15. *Omaha Electric Light & Power Co. v. Omaha*, 172 Fed. 494, 498.

Neither the power of a municipality to contract with a third party for the construction and operation of waterworks, street railways, or other public utilities, nor the right of such a third party under such a contract, constitutes a special privilege or immunity, within the meaning of those terms in section 16, art. 1, of the Constitution of Nebraska, which prohibits the Legislature from "making any irrevocable grant of 'special privileges or immunities.'" *Omaha Water Co. v. Omaha*, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614 (citing *Walla Walla v. Walla Walla Water Co.*, 19 Sup. Ct. 77, 172 U. S. 1-17, 43 L. Ed. 341; *Detroit v. Detroit Citizens' Street R. Co.*, 22 Sup. Ct. 410, 184 U. S. 368-389, 46 L. Ed. 592).

## SPECIAL PROCEEDING

See Original Special Proceeding.

A "special proceeding" is a generic term for all proceedings in courts of justice which are not ordinary actions. *Anderson v. Englehart*, 105 Pac. 571, 573, 18 Wyo. 196, Ann. Cas. 1912C, 894. See, also, *State ex rel. Carleton v. District Court of Lewis & Clark County*, 82 Pac. 789, 790, 33 Mont. 138, 8 Ann. Cas. 752 (citing 1 Enc. L. & P. 906).

"The term 'special proceeding,' within its proper definition, is a generic term for all civil remedies in courts of justice which are not ordinary actions. Where the law confers a right and authorizes a special application to a court to enforce it, the proceeding is special, within the ordinary meaning of the term 'special proceeding.'" *Nelson v. Steele*, 88 Pac. 95, 96, 12 Idaho, 762 (quoting and adopting definition in *Re Central Irr. Dist.*, 49 Pac. 354, 117 Cal. 382, and citing *Schuster v. Schuster*, 87 N. W. 1014, 84 Minn. 403).

A "special proceeding" implies that there is a legal controversy existing between the parties. *Queens County Water Co. v. O'Brien*, 115 N. Y. Supp. 495, 499, 131 App. Div. 91.

The term "special proceedings," as used in Rev. St. 1898, § 3069, subd. 2, relating to appeals, has the same meaning as defined in sections 2593, 2596, providing that the title of which they are a part relate only to actions and proceedings in the circuit court and other courts of record, and declaring after defining an "action," that every other remedy is a "special proceeding." *Ellinger v. Equitable Life Assur. Society of U. S.*, 104 N. W. 811, 813, 125 Wis. 643.

## Accounting

Under Civ. Code Prac. 1869, §§ 2, 3, 4, dividing remedies in civil cases into actions and special proceedings, and defining a civil action as an ordinary proceeding in a court of justice by one party against another to enforce a private right, or redress or prevent a private wrong, and declaring that every other remedy in a civil case is a "special proceeding," and Kirby's Dig. § 6033, which provides that a civil action is commenced by filing a complaint and causing a summons to issue, the matter of confirming accounts of guardians, or administrators or executors, is not a civil action but a "special proceeding." *Nelson v. Cowling*, 116 S. W. 890, 893, 89 Ark. 334.

## Appeal from allowance of claim

An appeal from a city auditing board to the county board of supervisors by a constable for the adjustment of his claim for services is a "special proceeding." *Perry v. Myer*, 89 N. Y. Supp. 347, 348.

Under Mills' Ann. St. § 803, providing that an appeal to the district court from an order of the board of county commissioners

disallowing a claim shall be tried the same as appeals from justices' courts, an appeal from the disallowance of a claim is not a "special proceeding" in the district court, but is an "action," and its judgment is reviewable in the Supreme Court, within Const. art. 6, § 2, conferring on the Supreme Court jurisdiction to review final judgments in civil cases. *Washington County v. Murray*, 100 Pac. 588, 590, 45 Colo. 115.

#### **Appeal from order removing officer**

Under a city charter provision authorizing the mayor to remove for cause any one appointed to office by him, and providing that upon conviction of the cause charged the accused may appeal to the Supreme Court, an appeal from an order removing an officer is, under Code Civ. Proc. § 3334, defining special proceedings as prosecutions other than actions for the enforcement or protection of a right or redress of a wrong, a "special proceeding," and costs may, in the discretion of the court, be awarded at the rates allowed for similar services in an action, as provided by Code Civ. Proc. § 3240. *O'Neil v. Mansfield*, 95 N. Y. Supp. 1009, 1014, 47 Misc. Rep. 516.

#### **Appeal from revocation of license**

An appeal from a judgment of the State Board of Medical Examiners revoking a physician's license is a "special proceeding," within a statute defining an action as an ordinary proceeding by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, and declaring every other remedy to be a "special proceeding." *State ex rel. Gattan v. District Court of Second Judicial Dist.*, 101 Pac. 961, 39 Mont. 134.

#### **Attachment**

"Special proceeding," as used in the South Carolina Code, does not include an attachment, or process incident to an action. *Allen v. Partlow*, 3 S. C. 417, 418.

#### **Certiorari**

The "writ of review," by B. & C. Comp. § 594, made substantially the same as the common law writ of certiorari, is a "special proceeding." *Hall v. Dunn*, 97 Pac. 811, 813, 52 Or. 475, 25 L. R. A. (N. S.) 193.

#### **Commitment of insane**

Proceedings for commitment of a person as insane are not "special proceedings," within the meaning of that term, as defined by the Code. Costs cannot be charged against the petitioner. *In re Murtaugh*, 102 N. Y. Supp. 176, 177, 117 App. Div. 302.

#### **Proceeding to charge assignor with costs**

A proceeding against the assignor of a cause of action to charge him with costs, under Code Civ. Proc. § 3247, providing that, where an action is brought in the name of

another by a transferee, he is liable for costs as if plaintiff, and that, where costs are awarded against the plaintiff, the court may direct the person so liable to pay them, is a "special proceeding," properly commenced by notice or order to show cause. *Friedman v. Metropolitan S. S. Co.*, 96 N. Y. Supp. 331, 333, 109 App. Div. 600 (citing *Marvin v. Marvin*, 78 N. Y. 541).

#### **Condemnation proceedings**

Condemnation proceedings are "special proceedings" provided by statute. *State ex rel. Davis v. District Court of Fifth Judicial Dist.*, 74 Pac. 200, 29 Mont. 153.

Laws 1880, p. 349, c. 292, confers power to appoint commissioners in condemnation proceedings upon the circuit court or the judge thereof. Laws 1905, p. 446, c. 295, confers on the superior court for Lincoln county jurisdiction equal to and concurrent with the circuit court of that county in "all civil actions and proceedings at law and in equity," with an immaterial exception and confers express authority to issue all commissions provided by law, and provides that, whenever a statute shall mention the circuit judge, the words shall be deemed to apply to the judge of the superior court for Lincoln county. St. 1898, § 2594, divides remedies in courts of justice into "actions" and "special proceedings"; the latter embracing all remedies other than actions, under the direct provisions of section 2596. Held, that inasmuch as the words "at law and in equity" embrace all exercise of judicial or quasi judicial power of courts, whether conferred by statute, common law, or equitable rules, the expression "all civil actions and proceedings at law and in equity" is extensive and general, rather than restrictive and particular, and confers on the superior court or the judge thereof the same power to appoint commissioners in condemnation proceedings as is possessed by circuit courts or judges. *Wisconsin River Imp. Co. v. Pier*, 118 N. W. 857, 859, 137 Wis. 325, 21 L. R. A. (N. S.) 538.

#### **Enforcement of attorney's lien**

A proceeding by a client against his attorney pursuant to Code Civ. Proc. § 66, authorizing the court, on the petition of the client or attorney, to determine and enforce the lien of the attorney, is not an "action" but is a "special proceeding." *Cartier v. Spooner*, 103 N. Y. Supp. 505, 507, 118 App. Div. 342.

#### **Motion to exclude attorneys from participating in litigation**

An order denying a motion to exclude attorneys privately employed in an action by the state to recover a penalty from participating in the litigation is not an order terminating a "special proceeding." A special proceeding is one either entirely outside of an action, as a proceeding for contempt, or to condemn land, or one merely connected

with an action as a proceeding by a person not a party to the action, to be made such. *State v. Wisconsin Telephone Co.*, 113 N. W. 944, 945, 134 Wis. 335.

#### **Proceedings supplementary to execution**

Each of the remedies provided for by Code Civ. Proc. § 2432, in proceedings supplementary to an execution against property, is a "special proceeding" and should be prosecuted as such. *Harris v. Weiss*, 105 N. Y. Supp. 8, 9; *McAlpin v. Stoddard*, 105 N. Y. Supp. 9, 11, 54 Misc. Rep. 647; *Ward v. Stoddard*, 128 N. Y. Supp. 846, 849, 144 App. Div. 143; *Id.*, 127 N. Y. S. 713, 70 Misc. Rep. 506.

Supplementary proceedings against a foreign corporation are "special proceedings" within Code Civ. Proc. § 433, providing that the provisions of section 432 for service of process on a foreign corporation by delivering a copy thereof "to a person designated for the purpose, as provided in General Corporation Law (Consol. Laws, c. 23) § 16," shall not apply to special proceedings "where special provision for the service thereof is otherwise made." *Meyer v. Consolidated Ice Co.*, 116 N. Y. S. 906, 132 App. Div. 265; *Id.*, 90 N. E. 54, 55, 196 N. Y. 471.

Supplementary proceedings, though termed "special proceedings" in Code Civ. Proc. § 2433, are not such to the extent of preventing an order therein requiring the judgment debtor to attend for examination, being an order in an "action," within section 338, subd. 4, so as to allow it to be served in any part of the state, though made by a justice of the City Court. *Deane v. Sire*, 95 N. Y. Supp. 556, 557, 48 Misc. Rep. 606.

#### **Habeas corpus proceeding**

Habeas corpus belongs to what under the Code, are termed "special proceedings." *Winovich v. Emery*, 93 Pac. 988, 990, 33 Utah, 345.

#### **Highway proceeding**

A proceeding for the laying out of a highway being a "special proceeding" within the meaning of Code Civ. Proc. § 3334, costs may be awarded the successful party under section 3240, providing that costs in a special proceeding may be awarded to any party in the discretion of the court. *In re Terry*, 123 N. Y. S. 258, 262, 67 Misc. Rep. 514.

#### **Injunction proceeding**

The procedure by which an injunction against the foreclosure of a mortgage by advertisement may be obtained under Rev. Codes 1899, § 5845, is not a "special proceeding," within the meaning of that term, as used in the Code. *Tracy v. Scott*, 101 N. W. 905, 906, 13 N. D. 577.

As used in Rev. St. 1899, § 4247, providing for review of a judgment or final order, and section 4249 declaring that an order af-

fecting a substantial right, which in effect determines the action or prevents a judgment, and an order affecting a substantial right in a special proceeding, is a "final order" which may be reviewed in the Supreme Court, the term "special proceeding" is not limited to a proceeding apart from an action, but includes a necessary proceeding to aid the ultimate relief sought in an action, and hence an order denying a motion to dissolve a temporary injunction before judgment was a final order, terminating a "special proceeding," and reviewable on writ of error. *Anderson v. Englehart*, 105 Pac. 571, 573, 18 Wyo. 196, Ann. Cas. 1912C, 894 (citing 1 Enc. L. & P. 996).

In view of Code Civ. Proc. § 22, declaring that an "action" is an ordinary proceeding in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense, and section 23 declaring that every other remedy is a "special proceeding," a suit in equity to restrain defendants from polluting a water course is an "action" and not a "special proceeding" within Code Civ. Proc. § 394, providing that whenever an action is brought by a county or a city against residents of another county or city, or a corporation doing business in the latter, the action must be, on motion of the defendant, transferred for trial to a county other than the plaintiff, if the plaintiff is a county, and other than that in which the plaintiff is situated, if the plaintiff is a city, the term "special proceeding" being limited to a proceeding in a court which under the common law and equity practice was neither an action at law nor a suit in equity. *Yuba County v. North American Consol. Gold Min. Co.*, 107 Pac. 139, 140, 12 Cal. App. 223.

#### **Proceeding to investigate finances of town**

A proceeding instituted by the freeholders of a town for an investigation into its financial affairs, under General Municipal Law, § 3, Laws 1892, p. 1733, c. 683, is a "special proceeding." *In re Town of Hadley*, 89 N. Y. Supp. 910, 911, 44 Misc. Rep. 265.

#### **Application for leave to file petition in error**

The term "special proceeding" is sometimes defined as a proceeding in court which was not, under the common-law and equity practice, either an action at law or a suit in equity. The term is used in the Code in contradistinction to "action." So where one who has been tried and convicted before the mayor of a municipal corporation for violation of an ordinance applies, under section 1752, Rev. St. 1892, to the court of common pleas, or a judge thereof, for leave to file a petition in error to review the proceedings and judgment of the mayor, and the court or judge to whom the application is made

refuses to grant leave to file the petition in error, such refusal is not reviewable on error in the circuit court. Such application is not a "special proceeding" but a request for leave to file a proceeding to review a judgment. *Village of Canfield v. Brobst*, 72 N. E. 459, 461, 71 Ohio St. 42 (citing Enc. of Pl. p. 112).

#### **Mandamus proceeding**

The application for a writ of mandate is a "special proceeding" of a civil nature. *Jones v. Board of Police Com'rs of City and County of San Francisco*, 74 Pac. 696, 697, 141 Cal. 96; *Nelson v. Steele*, 88 Pac. 95, 96, 12 Idaho, 762.

A mandamus proceeding is a "special proceeding," and not an action, under Rev. Codes 1905, §§ 6741-6743, and is not triable de novo on appeal, section 7229 allowing a new trial only in actions. *State v. Fabrick*, 112 N. W. 74, 75, 16 N. D. 94.

When the writ of mandamus is the sole relief sought, it is ordinarily classed as a "special proceeding," but remains triable at law. *Ford v. City of Manchester*, 113 N. W. 846, 848, 136 Iowa, 213.

#### **Probate proceedings**

A proceeding in the probate court to establish a will does not come within the category of a civil action, but is a "special proceeding," though the latter is not defined in the statute. *Lanning v. Gay*, 78 Pac. 810, 811, 70 Kan. 353.

A proceeding in the Surrogate's Court to compel payment of a legacy is a "special proceeding," and is not controlled by Code Civ. Proc. § 1819, establishing limitations for an "action" to recover a legacy. In *re Cooper*, 101 N. Y. Supp. 283, 284, 51 Misc. Rep. 881.

#### **Application to be relieved from bid at judicial sale**

"An application to compel a purchaser to take title and that of a purchaser relieved from his bid are regarded as 'special proceedings.'" So under Code Civ. Proc. § 3240, providing that in case of "special proceedings," where costs are not specially regulated by the act, they may be allowed in the discretion of the court at the rates allowed for similar services in other actions, allowance for counsel fees in a proceeding to recover payments on land bought of a receiver, when there was a failure of good title, is discretionary with the court. *People v. New York Building-Loan Banking Co.*, 82 N. E. 184, 185, 189 N. Y. 233 (quoting and adopting the definition in *Parish v. Parish*, 67 N. E. 298, 175 N. Y. 181).

#### **Removal of administrator**

An application to the clerk of the superior court to remove an administrator, as authorized by Code, § 1521, is neither a "civil action" nor a "special proceeding," within

Code Civ. Proc., for the purpose of litigating rights and liabilities of adverse parties, but is a mere application for the exercise of a statutory power to protect the estate. In *re Battle's Estate*, 74 S. E. 23, 24, 158 N. C. 388.

#### **Removal of magistrate**

Proceedings provided for in Const. art. 6, § 17, and Greater New York Charter (Laws 1901, p. 599, c. 466) § 1401a, by virtue of which city magistrates may be removed from office by the Appellate Division of the Supreme Court, are not "special proceedings" within Code Civ. Proc. § 3334, defining that term as every other prosecution "by a party," and hence are not reviewable by the Court of Appeals. In *re Droege*, 90 N. E. 340, 342, 197 N. Y. 44.

#### **Statutory arbitration**

Statutory arbitration being made by Code Civ. Proc. c. 17, "special proceedings" within the purview of section 66, giving a lien from the commencement of any special proceeding unaffected by any settlement between the parties, an attorney's lien for fees on a specified portion of awards in favor of his client in statutory arbitration proceedings was not affected by the fact that the arbitration agreement provided for the setting off of awards recovered by each against the other, unless the attorney was a party to or consented to the agreement for the set-off of awards, since an attorney's lien is superior to the right of parties to set off judgments recovered by them respectively against each other. *Webb v. Parker*, 114 N. Y. Supp. 439, 494, 130 App. Div. 92.

#### **Action for trespass**

An action by the Forest, Fish, and Game Commission for trespass on the forest preserve is not a suit or special proceeding within Laws 1897, p. 98, c. 220, § 20, as amended by Laws 1898, p. 264, c. 135, § 20, authorizing the forest preserve board to bring an action or special proceeding for certain purposes and the provision of that section permitting the forest preserve board to settle and compromise any action or special proceeding authorized thereby furnishes no authority to the Forest, Fish, and Game Commissioner to settle such action. *People v. Santa Clara Lumber Co.*, 113 N. Y. Supp. 70, 75, 60 Misc. Rep. 150.

#### **Proceeding to vacate judgment**

An order of the superior court pending an appeal from a justice, there triable de novo, vacating the justice's judgment, is not an order preventing a judgment in the action from which appeal might be taken, or one after judgment; but though entitled, like the papers on which the motion was founded, in the action, is one in a "special proceeding," within Rev. St. 1898, § 3069, enumerating appealable orders. *Deuster v. Zillmer*, 97 N. W. 31, 33, 119 Wis. 402.

**SPECIAL PROMISE**

A "special promise" to answer for the debt, default, or miscarriage of another means an express promise, and not one implied by law. *Peele v. Powell*, 73 S. E. 234, 236, 156 N. C. 553.

**SPECIAL RECEIVER**

A "special receiver" is simply an officer of the court and as such has no right even in the cause in which he is appointed, without leave of the court, to intermeddle in questions affecting the rights of the parties. *Whyel v. Jane Lew Coal & Coke Co.*, 69 S. E. 192, 194, 67 W. Va. 651.

**SPECIAL REGISTRATION**

Under Const. § 6, requiring all elections to be free and equal, section 147 providing that, where registration is required, only persons registered may vote, Ky. St. 1903, § 1486, as amended by Acts 1904, p. 31, c. 6, requiring voters of all incorporated cities and towns to register before being entitled to vote, section 1490 providing that the general registration shall be on the first Tuesday in October in each year, and section 1495 providing that, when an election is ordered to be held in a county containing an incorporated city or town, at any other time than the regular November election, the officer ordering it shall fix a day for registration of the persons entitled to vote at such election, and declaring that the registrations thereunder shall be known as "special registrations," and that any person so registered shall be entitled to vote at all elections held prior to the next general election, a local option election held in an incorporated town in April, without any special registration being provided for, is void, and may not be sustained by showing that the result was not affected by omission of such registration. *Early v. Rains*, 89 S. W. 289, 291, 121 Ky. 439.

**SPECIAL SESSION**

Local Option Law Or. (Laws 1905, p. 47, c. 2) § 10, provides that the county court 11 days after election, or as soon thereafter as practicable, shall hold a "special session," and, if a majority of the votes are for prohibition, the court shall immediately make an order declaring the result of the vote and absolutely prohibiting the sale of intoxicating liquors, etc. Held, that the court, by announcing the result of the election at a special session called during general term, did not invalidate the proceedings; the words "special session," as used in the act, not being synonymous with "special term" (the word "term" signifying "the space of time during which the court holds a session"), and the word "session," as used, referring to a temporary sitting of the court, for the transaction of special business assigned to them, which may occur either during a general or special term, and, if all members are present

for such purpose, it is immaterial as to how it was called, or when, providing the time prescribed by the act for such special sitting has elapsed. *State v. Edmunds*, 104 Pac. 430, 432, 55 Or. 236 (quoting and adopting definition in *Bouv. Law Dict.*).

Gen. St. 1902, § 452, fixes the time and place of holding terms and sessions of the superior court. Section 454 provides that the judges of the superior court at their annual meeting shall provide for such "additional sessions" as may be necessary, and further provides that any judge may hold "a special session" for the trial of civil causes at any time, subject to the proviso that no contested issue shall be tried at a special session, except by a written agreement of parties or their counsel, unless 20 days' notice of the time and place of such session shall be given. The heading and body of a judgment file in a case described the session at which the trial was had as a "special session," and the notice which was given of the time and place of holding the session was stated. Held, that the session was a special session, at which it was error for the court to try the case, contested issues being involved therein, in the absence of a written agreement of the parties or their counsel, or of the prescribed 20 days' notice of the time and place of the session. *O'Keefe v. Scoville Mfg. Co.*, 61 Atl. 961, 962, 78 Conn. 286.

**SPECIAL STATUTE**

See Special Law.

**SPECIAL SUBJECT-MATTER OF LEGISLATION**

See Specially Named Legislation.

**SPECIAL TAIL**

Created by the words "heirs of the body," see Heirs of the Body.

**SPECIAL TAX**

See, also, General Tax; Special Assessment.

The term "special tax," as used in Act No. 24 of 1870, prohibiting the police jury from applying to roads any funds in the treasury not derived from a special road tax, merely means a tax levied specially for road purposes. *Klees v. Police Jury of Parish of St. Bernard*, 59 South. 247, 249, 131 La. 263.

"Special taxes" voted in aid of railroads under constitutional sanction are not local assessments, since the word "special" implies merely an additional tax over and above the general tax authorized by the Constitution. *Louisiana & A. Ry. Co. v. Shaw*, 46 South. 994, 995, 121 La. 997.

**Assessment for local improvements**

The term "special taxes," as applied to the charging of the cost of the improvement of city streets against abutting property, is not technically correct. Such charges are special benefits and not taxes in any sense of

the word. If they were taxes, they could not generally be enforced because the amount would make the total tax exceed the limitation prescribed by the Constitution. *State ex rel. Johnson v. Chicago, B. & Q. R. Co.*, 93 S. W. 784, 787, 195 Mo. 228.

Section 3 of the private act of December 20, 1860 (Laws 1860, p. 56), conferring corporate powers upon plaintiff, which provides that a certain amount of plaintiff's ground, together with the property thereon, "shall be exempt from all taxation, state, county, municipal, and special during the existence of this charter," does not exempt such property from assessments for local improvements; the word "tax" not including assessments, and the word "special" as used with "taxation" referring to special taxes levied and collected in the manner of general taxes, such as road and school taxes, and not to local assessments. *Board of Improvement of Paving Dist. No. 5 of Ft. Smith v. Sisters of Mercy*, 109 S. W. 1165, 1167, 86 Ark. 109.

#### Income tax

Supply Act Feb. 18, 1905 (24 St. at Large, p. 993) § 5, requires county auditors and treasurers to collect taxes levied under its provisions, and forbids their collecting any other tax except, among others, such special tax as is authorized under any act or joint resolution of the General Assembly. Held, that the income tax provided for by Act March 5, 1897 (22 St. at Large, p. 529; Civ. Code 1902, §§ 325-331), is a "special tax" within section 5 of the supply act. Hence the act providing for the income tax was not repealed. *Alderman v. Wells*, 67 S. E. 781, 785, 85 S. C. 507, 27 L. R. A. (N. S.) 864.

#### SPECIAL TAX BILL

As contract, see *Contract*.

#### SPECIAL TERM

Local Option Law (Laws 1905, p. 47, c. 2) § 10, provides that the county court 11 days after election, or as soon thereafter as practicable, shall hold a "special session," and, if a majority of the votes are for prohibition, the court shall immediately make an order declaring the result of the vote and absolutely prohibiting the sale of intoxicating liquors, etc. Held, that the court by announcing the result of the election at a special session called during general term did not invalidate the proceedings, the words "special session" as used in the act not being synonymous with "special term," and the word "session" as used referring to a temporary sitting of the court, for the transaction of special business assigned to them, which may occur either during a general or special term, and, if all members are present for such purpose, it is immaterial as to how it was called, or when, providing the time prescribed by the act for such special sitting has elapsed. *State v. Edmunds*, 104 Pac.

430, 432, 55 Or. 236 (quoting and adopting definition in *Bouv. Law Dict.*).

Circuit and county judges can convene their courts only by authority of express statutes, and no power is given them to convene during vacation without a previous order and without notice, so that they cannot by merely transacting business call into being a term of court. The words "special" and "adjourned" were applied by statute to terms of courts of record, held pursuant to orders made in term time, long before the enactment of the statute relating to the number and time of the terms of the probate court. Other statutes specifically authorize the probate court to transact designated business in vacation, and still others provide for the calling of special terms in vacation in certain cases. In other cases where courts may convene during vacation without previous order of adjournment during term time, provision is made for the calling of the special term by the judge or majority of the judges of the court in question; the terms of the Supreme Court held by order of the court in term time and those called by a majority of the judges in vacation being designated as "special terms." Held, that Rev. St. 1909, § 4060, which provides the number and time of the terms of the probate court, and that said court "may hold special and adjourned terms at any time when required," interpreted in the light of legislative intention expressed in the correlated acts, presupposes some action on the part of the court as such and does not invest the judge with the power to convene his court at will, so that where such judge in vacation, without adjournment to a given day, and without a previous order and without notice, took his seat and entered an order for the sale of land held by a curatrix, the court was not in session, and the order was void. *Carter v. Carter*, 141 S. W. 873, 237 Mo. 624.

A "special term" of a circuit court of the United States, as the expression is employed in Rev. St. § 670, is a session ordered for the disposal of business, supplementary to a regular term and to be held at the place fixed by Congress for holding such regular term. *American R. Co. v. Castro*, 27 S. Ct. 466, 468, 204 U. S. 453, 51 L. Ed. 564.

#### SPECIAL TRAVERSE

A "special traverse" must always consist of an inducement, which is the affirmative part of the pleading, and a negative, which is called the *absque hoc*, and a conclusion to the country. *Beatty v. Parsons* (Del.) 78 Atl. 302, 304, 2 Boyce, 134.

Where a plea is what is known as a "special traverse," the inducement should be in substance a sufficient answer to the declaration, though not a direct denial nor yet confession and avoidance, and such a plea should conclude with a traverse which goes to a material point of the declaration on which the

merits may be tried. *Rogers v. Barth*, 117 Ill. App. 323, 327.

### SPECIAL TRUST

The English statute of uses (St. 27, Henry VIII, c. 10) was not in force in the state of Virginia after the year 1792, and has never been adopted, in any form, as part of the law of this state, although St. 27, Henry VIII, did execute all trusts except what were known as "special trusts"—trusts imposing duties upon the trustees which had to be kept alive to avoid defeating the intention of the parties. *Blake v. O'Neal*, 61 S. E. 410, 414, 63 W. Va. 483, 16 L. R. A. (N. S.) 1147.

### SPECIAL VENIRE

Under Code Cr. Proc. art. 642, defining a "special venire" as a writ issued by the district court in a capital case, commanding the sheriff to summon jurors for the trial, a special venire issued in a capital case which names the case by style and number and the court in which it is pending, and which gives the date to which the same is returnable, is sufficient, and it need not state that the case is a capital one or state the nature of the offense. *Harrelson v. State*, 132 S. W. 783, 785, 60 Tex. Cr. R. 534.

### SPECIAL VERDICT

A "special verdict" is defined by statute as that by which the jury finds the facts only, leaving the judgment to the court. *Glade v. Eastern Illinois Min. Co.*, 107 S. W. 1002, 1004, 129 Mo. App. 443 (citing *Shipp v. Snyder*, 25 S. W. 900, 121 Mo. 155); *Nerger v. Commercial Mut. Fire Assoc.*, 114 N. W. 689, 690, 21 S. D. 537 (quoting Rev. Code of Civ. Proc. § 270); *Russell v. Rhinehart*, 122 N. Y. Supp. 539, 542, 137 App. Div. 843; *Morrison v. Lee*, 102 N. W. 223, 225, 13 N. D. 591.

A "special verdict" is one which sets out the facts, leaving the court to draw therefrom the conclusions of law. *Blackshare v. State*, 128 S. W. 549, 551, 94 Ark. 548, 140 Am. St. Rep. 144 (quoting and adopting definition in *Bish. New Cr. Proc.* § 1006).

A "special verdict" is that by which the jury find the facts only, leaving the judgment to the court. The true office of a special verdict is to single out the issuable facts of the case on which defendant's obligation rests. The question should be so framed as to present, in as clear and sharp a way as possible, the real issues concerning which proof is offered, so that, when determined by the jury, the court may apply the law and render judgment accordingly. *Olwell v. Skobis*, 105 N. W. 777, 781, 126 Wis. 308 (quoting and adopting the definition in *Bigelow v. Danielson*, 78 N. W. 599, 102 Wis. 470, 473).

The purpose of a "special verdict," is to furnish the basis of the judgment, while the purpose of "special interrogatories" is to elicit facts to test the correctness of the gen-

eral verdict. *Freedman v. New York, N. H. & H. R. Co.*, 71 Atl. 901, 905, 81 Conn. 601, 15 Ann. Cas. 464.

Under Code, § 3725, defining a "general verdict" as one in which the jury pronounce generally for plaintiff or for defendant on all or any of the issues, and section 3726, defining a "special verdict" as one in which the jury finds facts only, and providing that it must present the ultimate facts as established by the evidence, and not the evidence to prove them, so that nothing remains to the court but to draw from them its conclusions of law, where all the material facts are determined by answers to interrogatories, such findings may together constitute a special verdict rendering a general verdict unnecessary. *Farmers' Sav. Bank of Arispe v. Arispe Mercantile Co. (Iowa)* 127 N. W. 1084, 1086.

Under Code Civ. Proc. § 1186, declaring that a "special verdict" is one by which the jury finds the facts only, leaving the court to determine which party is entitled to judgment thereon, where the court in an equity suit submitted two of several questions of fact to the jury, the jury's answers did not constitute a special verdict. *Duclos v. Kelley*, 89 N. E. 875, 876, 197 N. Y. 78, reversing 106 N. Y. Supp. 1058, 122 App. Div. 329.

The term "special verdict," in the Code, requiring the court on request to direct the jury to find a "special verdict," does not mean a finding on every material issue, but the object of the statute is to determine whether a general verdict is or is not against the law. *Plyler v. Pacific Portland Cement Co.*, 92 Pac. 56, 60, 152 Cal. 125.

Under Code Civ. Proc. § 625, providing that in actions for the recovery of money only, or real property, the jury may render a general or special verdict, and that in all other cases the court may direct a special verdict upon any of the issues, and that a special finding of facts inconsistent with the general verdict controls the latter, the term "special verdict" does not mean, as at common law, a finding upon every material issue in the case, but allows findings upon any issue; and, while there may be a conflict in the special findings themselves, any inconsistency with the general verdict serves to nullify it. *Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds*, 118 Pac. 469, 471, 16 Cal. App. 461.

A "special verdict," though comprising many findings, is but one verdict, and no material part of it can be set aside for want of sufficient evidence to sustain it without setting it all aside. Under a statute making a special finding by the jury conclusive between the parties as to the facts found, a judgment cannot be rendered on the remainder of a special verdict consisting of many findings, some of which are set aside as not sustained by the evidence, but a new trial must be

granted. *Casey-Swasey Co. v. Manchester Fire Ins. Co.*, 73 S. W. 864, 865, 32 Tex. Civ. App. 158 (citing *Waller v. Liles*, 70 S. W. 17, 96 Tex. 21).

#### **Partial verdict distinguished**

Where a count of the indictment charged defendant with receiving stolen property knowing the same to have been stolen, a verdict finding defendant guilty of receiving stolen property, and fixing his punishment at one year in the penitentiary, is not a "special verdict," but a partial verdict in the form of a general verdict on the count. *Blackshare v. State*, 128 S. W. 549, 551, 94 Ark. 548, 140 Am. St. Rep. 144.

#### **SPECIALLY CHARGED**

The words, "specially charged," when used in connection with a state officer's duty to enforce a statute, are not limited to a case where the officer is expressly commanded by the statute to bring suits for penalties or prosecute offenses under the act, but include every case where the officer is charged by his general duties as a law officer of the state to enforce the statute. *Southern R. Co. v. McNeill*, 155 Fed. 756, 775.

#### **SPECIALLY EXCEPTED PERIL**

Where a policy insuring "against all direct loss or damage by fire, except as herein-after provided," contains a provision that the insurer shall "not be liable for loss caused directly or indirectly by invasion \* \* \* or for loss or damage occasioned by or through any earthquakes," a loss indirectly caused by the progress of fire from a distance, although originally started by an earthquake, is not within the exemption," and the insurer is not exempted from liability in such case by Civ. Code Cal. § 2628, which provides that, "when a peril is specially excepted in a contract of insurance, a loss which would not have occurred but for such peril is thereby excepted, although the immediate cause of the loss was a peril which was not excepted," since the peril "specially excepted" is fire directly caused by earthquake, and it was not the intention of the statute to create an exemption wider than that stipulated for by the parties. *Williamsburgh City Fire Ins. Co. of Brooklyn v. Willard*, 164 Fed. 404, 409, 90 C. C. A. 392, 21 L. R. A. (N. S.) 103.

#### **SPECIALLY NAMED LEGISLATION**

A proclamation calling a special session of the Legislature to enact all legislation as to corporations does not "specially name" legislation requiring railroad companies to fence their tracks, and *Laws Colo. 1902 (Ex. Sess.) c. 1*, known as the "fencing statute," is therefore void, under Const. art. 4, § 9, providing that at such session no business shall be transacted other than that specially named in the proclamation. *Nielsen v. Chicago, B. & Q. R. Co.*, 187 Fed. 393, 396, 109 C. C. A. 225.

A proclamation of the Governor calling the Legislature in special session to enact any and all legislation relating to or in any wise affecting foreign and domestic corporations, or corporations of a quasi public nature, does not name any special subject-matter of legislation within Const. art. 4, § 9, requiring the Governor, convening the Legislature in special session to state the purposes for which it is convened, and an act passed at the special session, defining the liability of railroads for killing live stock, is invalid. *Denver & R. G. R. Co. v. Moss*, 115 Pac. 696, 697, 50 Colo. 282.

#### **SPECIALLY PRESCRIBED BY LAW**

A provision in a standard fire policy that no suit or action should be maintainable thereon unless commenced within 12 months next after the fire, which provision was specially authorized by *Laws 1886, p. 721, c. 488, §§ 2, 3*, and *Laws 1892, p. 1980, c. 690, § 121*, prescribing a standard form of policy and forbidding the issuance of any other, constituted a limitation "specially prescribed by law," and not by a contract between the parties, within *Code Civ. Proc. § 414*, declaring that the provisions of the chapter shall constitute the only rules of limitation applicable to a civil action or special proceeding, except in the case where a different limitation is specially prescribed by law or a shorter limitation is prescribed by the written contract of the parties. *Bellinger v. German Ins. Co.*, 100 N. Y. Supp. 424, 426, 113 App. Div. 917; *Id.*, 100 N. Y. S. 424, 51 Misc. Rep. 463.

#### **SPECIALLY SET UP**

A right claimed under an authority exercised under the United States will be regarded as "specially set up or claimed," within the meaning of *Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575]*, defining the appellate jurisdiction of the Supreme Court of the United States over state courts, where it clearly and unmistakably appears from the opinion of the state court that the federal question was assumed to be in issue, that the decision was against the federal claim, and that the decision of the question was essential to the judgment rendered. *State of Montana v. Rice*, 27 Sup. Ct. 281-283, 204 U. S. 291, 51 L. Ed. 490.

The objection that no federal right was "specially set up and claimed" within the meaning of *Rev. St. U. S. § 709 [U. S. Comp. St. 1901, p. 575]*, governing the appellate jurisdiction of the federal Supreme Court over state courts, cannot successfully be maintained, where judicial proceedings in New Jersey were clearly relied upon in New York by executors in an "appeal to the surrogate" as a defense to the assessment of the New York transfer tax, although such right was not in terms stated to be one claimed under the federal Constitution—especially where the constitutional right was specifically claimed in writing while the surrogate still had the "ap-



peal" under consideration, and its denial was made the subject of exceptions. *Tilt v. Kelsey*, 28 Sup. Ct. 1, 3, 207 U. S. 43, 52 L. Ed. 95.

A right or immunity under a statute of the United States is "specially set up and claimed" in the state court within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, where a railroad company insists, throughout garnishment proceedings brought against it for charges in excess of a special rate entered into with the garnishment debtor alone, that no recovery could be had against it consistently with the interstate commerce act, as, in disregarding the agreement for the special rate, it only conformed to the provisions of such act governing rates to be applied to interstate shipments. *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 32 S. Ct. 316, 320, 223 U. S. 573, 56 L. Ed. 556.

## SPECIALTY

See Common-Law Specialty; Debt by Specialty.

There are two classes of specialty contracts in the English law: "Common-law specialties" and "mercantile specialties." The first class includes bonds and covenants (i. e., instruments under seal); the second class includes bills and notes, and policies of insurance, and possibly other mercantile instruments. *Teasley v. Brenau Ass'n*, 61 S. E. 141, 4 Ga. App. 243.

By "specialty" is meant a bond or the coupon originally attached to it, though the latter be unsealed and cut off from the bond for the purpose of demand of payment and action. *Prescott v. Williamsport & N. B. R. Co.*, 159 Fed. 244, 248 (citing *Penrose v. King* [Pa.] 1 Yeates, 344; *Helmbold v. Railroad Co.* [Pa.] 14 Wkly. Notes Cas. 128; *Philadelphia Trust, Safe-Deposit & Ins. Co. v. Philadelphia & E. R. R.*, 28 Atl. 960, 160 Pa. 590).

The word "sealed" inserted in the body of an instrument promising to pay money will not make it a "specialty" without a seal, and "(L. S.)" or some equivalent mark annexed. *Comley v. Ford*, 64 S. E. 447, 450, 65 W. Va. 429 (citing *Mitchell v. Parham* [S. C.] Harp. 3).

Bills and notes are not simple contracts, but "specialties," and one of the characteristics of a specialty is that none but the parties thereto can be parties to an action thereon. In *re L. B. Weisenberg & Co.*, 131 Fed. 517, 522.

A bank check more nearly resembles a "specialty" than a simple contract, and the law governing specialties is applicable thereto. "The term 'specialty' is applied to an instrument which becomes effective by the mere fact of its formal execution. There are two classes of specialty contracts in the Eng-

lish law: Common-law specialties and mercantile specialties. The first class includes bonds and covenants (i. e., instruments under seal); the second class includes bills and notes, and policies of insurance, and possibly other mercantile instruments. There is a prevalent notion, traceable to an opinion given in the House of Lords in 1778, in the case of *Rann v. Hughes*, 7 T. R. 350, note, that only contracts under seal can be specialties; all other contracts, whether written or oral, being merely simple contracts. The fallacy of this notion is easily demonstrated by an examination of the resemblances between bills and notes and instruments under seal, on the one hand, and the differences between bills and notes, and simple contracts, on the other hand, in those points in which specialties and simple contracts most strikingly differ from each other." *Purcell v. Armour Packing Co.*, 61 S. E. 138, 141, 4 Ga. App. 253 (citing 2 Ames' Cas. B. N. 872).

Pennsylvania Act 1713 (1 Smith's Law, p. 76) provides that all actions of debt grounded on any contract without specialty shall be commenced and sued within the time and limitation expressed, and not after, and then declares that such actions for debt must be brought within six years next after the cause of action accrued. Held, that a cause of action to enforce a stockholder's statutory liability for corporate debts after insolvency was based on an implied contract pursuant to the statute without a "specialty," and was therefore barred under such act within six years after it accrued. *Little v. Kohn*, 185 Fed. 295, 296.

## Judgment

Code Civ. Proc. 1859, § 20, barring actions not brought within three years "upon a 'specialty,' or any agreement, contract, or promise in writing," did not include a judgment. *Burnes v. Simpson*, 9 Kan. 447 (citing and adopting *Tyler's Ex'r's v. Winslow*, 15 Ohio St. 365; *Todd v. Crumb*, 5 McLean, 172, 23 Fed. Cas. 1350; *Dudley v. Lindsay*, 9 B. Mon. 486, 50 Am. Dec. 522; 2 Bl. Comm. 464, 465).

"A judgment for damages, estimated in money, is sometimes called by text-writers a 'specialty' or 'contract of record' because it establishes a legal obligation to pay the amount recovered; and by fiction of law a promise to pay is implied where such legal obligation exists. It is on this principal that an action *ex contractu* will lie upon a judgment. Chit. Cont. (Perkins' Ed.) 87. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for torts are usually the result of violent contests, and, as observed by the court below, are imposed upon the losing party by a higher authority against his will and protest." *Brun v. Mann*, 151 Fed. 145, 146, 156, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154 (quoting and adopting

definition in Louisiana *ex rel. Folsom v. New Orleans*, 3 Sup. Ct. 213, 109 U. S. 288, 27 L. Ed. 930).

## SPECIFIC

### SPECIFIC BEQUEST

See Specific Legacy.

### SPECIFIC CRIMINAL OFFENSE

As applied to habeas corpus proceedings, contempt of court is a "specific criminal offense." In *re Shull*, 121 S. W. 10, 11, 221 Mo. 623, 133 Am. St. Rep. 496.

### SPECIFIC DENIAL

There is a specific denial within St. 1898, § 4192, providing that a writing purporting to have been signed or executed by any person shall be proof that it was so signed or executed till such person shall "specifically deny the signature or execution," where, with the instrument before her, she stated, "I did not write that signature and did not authorize any one to write it for me," though the jury might have understood from the confusion of some of her other answers that she did not deny the act, but merely memory of it, where equally they might have understood that she did. *Illinois Steel Co. v. Paczocha*, 119 N. W. 550, 554, 139 Wis. 23.

### SPECIFIC DEVISE

A "specific devise" is a testamentary gift of a specific thing, identified and distinguished from all other things of the same kind, which may be satisfied only by its delivery. In *re Snyder's Estate*, 66 Atl. 157, 217 Pa. 71, 11 L. R. A. (N. S.) 49, 118 Am. St. Rep. 900, 10 Ann. Cas. 488.

At common law all devises of real estate are "specific." Every devise of land is specific. Every legacy of personal estate is not, because personal estate fluctuates and varies. Land does not, for no more passes by a will than the testator had at the time of making his will. *Forrester v. Lord Leigh*, 1 Amb. 173; *Clifton v. Burt*, 1 P. Wms. 679; *Howe v. Earl of Dartmouth*, 7 Ves. Jr. 147; *Milnes v. Slater*, 8 Ves. Jr. 305; *Redf. Wills*, pt. 2, 471; *Mirehouse v. Scaife*, 2 Mylne & C. 695; *Masters v. Masters*, 1 P. Wms. 424. In this country no devise of real estate will be regarded as specific unless it contains a description of the estate sufficient to enable the devisee to indemnify the same. In *re Woodworth's Estate*, 31 Cal. 595, 610, 614 (citing *Redf. Wills*, pt. 2, 870).

"A 'specific legacy' or 'devise' is a gift by will of a specific article or part of the testator's estate, which is identified and distinguished from all other things of the same kind and which may be satisfied only out of the particular thing." *White v. White*, 53 S. E. 371, 372, 73 S. C. 261 (quoting and adopting 18 Ency. Law, 714).

While at common law all devises of land were regarded as specific devises, a testamentary gift, to be specific, must be of a designated article or of a specific part of the testator's realty, and hence a devise of one-third of all his real property is not specific. When a will devised to testator's wife "one-third of all my property, both real, personal and mixed, of which I shall die seised and possessed or to which I shall be entitled at the time of my decease," the devise of land to the widow was not a "specific devise." *Wilts v. Wilts*, 130 N. W. 906, 907, 151 Iowa, 149.

"Testator gave land described by street and number and by boundaries to his brothers, and other land similarly described to his sons. By a codicil he revoked the devise to his brothers and gave the property to his children, to accumulate as well as moneys at interest, etc., not otherwise appropriated." Held, that the devise to the children of the lands described was a "specific devise" and not chargeable with the payment of general legacies, under Civ. Code, §§ 1357, 1359, 1360, 1362, defining specific devises, especially where, at the time of the making of the will, the testator had sufficient personal property to satisfy the general legacies. In *re Painter's Estate*, 89 Pac. 98, 99, 150 Cal. 498, 11 Ann. Cas. 760.

Under a will directing the executor to sell all real estate of which testator should die seised, except a building named, and giving all his residuary estate to his sister, if living at his death, the building constitutes a part of the residuary estate, subject to the general rule that where testator makes a general gift of legacies, and then, without creating any express trust for their payment, makes a general residuary disposition of the whole estate, the real estate will be charged with the legacies, and the building cannot be held to be a "specific devise" not so liable, on the ground that, as the direction to sell included all real estate but the building, nothing except it would pass under the residuary devise. *Tyler v. Tallman*, 68 Atl. 948, 949, 29 R. I. 57.

### SPECIFIC INSURANCE

Two blanket marine policies of insurance insured all merchandise belonging to insured from the moment it became his property, in Yucatan, until discharged from the steamer, in Boston, fixing the rate, but left the amount of the premium and insurance to be determined by the invoice, which might not arrive until after the cargo. Held, that the policies were contracts for "specific insurance." *Peabody v. Liverpool & L. & G. Ins. Co.*, 50 N. E. 526, 527, 171 Mass. 114.

### SPECIFIC LEGACY

See, also, General Legacy.

Legacies are divided into two classes—specific and general. A "specific legacy" is

a bequest of a particular thing that can be distinguished from others of the same kind. In re Parsons' Estate, 129 N. W. 955, 150 Iowa, 230.

"Specific legacy" is defined by Civ. Code, § 1357, to be a legacy of a particular thing specified and distinguished from all others of the same kind belonging to the testator. In re Painter's Estate, 89 Pac. 98, 100, 150 Cal. 498, 11 Ann. Cas. 760.

An enumeration of specific articles in a residuary clause does not make the bequest "specific" as to such articles, but a gift is specific, where the specified things are so enumerated as to distinguish them from the residue. Kemp v. Dandison, 135 N. W. 270, 271, 169 Mich. 578, Ann. Cas. 1913D, 1042.

A "specific legacy" is a bequest of a specified part of a testator's personal estate, distinguished from all others of the same kind. In re Fisher, 87 N. Y. Supp. 567, 568, 93 App. Div. 186 (citing Crawford v. McCarthy, 54 N. E. 277, 159 N. Y. 514).

A "specific legacy" is a gift by will of a specific article, or part of testator's estate, which is identified and distinguished from all other things of the same kind, and which may be satisfied only by the delivery of the particular thing bequeathed. In re Matthews, 107 N. Y. Supp. 301, 302, 122 App. Div. 605; White v. White, 53 S. E. 371, 372, 73 S. C. 261.

A "specific legacy" is a bequest of a specific thing or fund that can be separated out of all the rest of testator's estate of the same kind so as to individualize it, and enable it to be delivered to the legatee as a particular thing or fund bequeathed. Palmer v. Palmer's Estate, 75 Atl. 130, 132, 106 Me. 25, 19 Ann. Cas. 1184.

A "specific legacy" is a gift by will of a specific article of testator's estate distinguished from all other things of the same kind, and which can be satisfied only by the delivery of such particular thing. In re Snyder's Estate, 66 Atl. 157, 217 Pa. 71, 11 L. R. A. (N. S.) 49, 118 Am. St. Rep. 900, 10 Ann. Cas. 488.

A "specific legacy" is a gift of particular specified things, or of the proceeds of the sale of specified things, or of a specific fund or a defined portion thereof, and it is satisfied by the delivery of the specific property identified as the subject of the gift, and where the same is not owned by testator at his death the legatee takes nothing, for he has no claim on the general assets. Weed v. Hoge, 83 Atl. 636, 638, 85 Conn. 490, Ann. Cas. 1913C, 542.

"A 'specific bequest' is a testamentary gift of a part of the donor's personal property, which corporal object or chose in action is so accurately described that it can be identified from all other things of its kind." A "specific bequest," within B. & C. Comp. §

1171, exempting personalty specifically bequeathed from the payment of debts so long as any property of the estate not specially devised or bequeathed remains unsold, is a testamentary gift of a part of testator's personalty so accurately described that it can be identified from all other things of its kind. In re Noon's Estate, 88 Pac. 673, 675, 49 Or. 286 (citing 1 Rep. Leg. 191; Johnson v. Goss, 128 Mass. 433; In re Woodworth's Estate, 31 Cal. 595).

"A 'specific legacy' is a gift not only of the thing or fund itself, but of all its produce, from the time of the testator's death." A "specific legacy" is "a gift by will of a specific article or part of the testator's estate, which is identified and distinguished from all other things of the same kind, and which may be satisfied only by the delivery of the particular thing." Such legacies "carry any accessions that may accrue by way of increase or interest after the death of the testator." Gordon v. James, 39 South. 18, 23, 86 Miss. 719, 1 L. R. A. (N. S.) 461 (citing In re Hodgman's Estate, 35 N. E. 660, 140 N. Y. 428).

"A 'specific bequest' of personal property is the bequest of a particular thing or money specified and distinguished from all others of the same kind, as of a horse, or of money in purse." "A legacy of a particular thing specified and distinguished from all others of the same kind belonging to the testator is specific." Underhill says that a "specific legacy is a gift of a particular thing or of money specified and distinguished from all things, and which at the execution of the will is owned by the testator, as of a horse, or a piece of plate, or of money in purse, stocks of a corporation, and the like." "A 'specific legacy' is one that can be separated from the body of the estate and pointed out so as to individualize it and enable it to be delivered to the legatee as a thing *sui generis*." "A legacy is specific when it is a bequest of a specific article of the testator's personal estate, distinguished from all others of the same kind, as, for instance, of a particular horse, or piece of plate, money in a purse or chest, a particular stock in the public funds, or a bond or other security for money." It has been said: "A specific legacy is sometimes distinguished from the rest of the testator's estate, and it is sufficient if it can be specified and distinguished from the rest of the testator's estate at the time of his decease." Underhill states that the very essence of a "specific legacy" is absent in the above example, as the testator does not give the articles specifically which may be readily identified as owned by him at the execution of his will. In re Campbell's Estate, 75 Pac. 851, 853, 27 Utah, 361 (quoting definitions from 1 Underhill, Wills, § 407; In re Woodworth's Estate, 31 Cal. 595; Estate of Apple, 6 Pac. 7, 66 Cal. 432; Harper v. Bibb, 47 Ala.

547; *Loring v. Woodward*, 41 N. H. 391; 1 *Rop. Leg.* 170).

"A 'specific legacy' is a bequest of a particular article or specified part of the testator's estate which is so described and distinguished from all other articles or parts of the same as to be capable of being identified." Bequests of rents not in existence at the time of making the will, the proceeds of a sale of a storehouse left after paying the mortgage on it, and taxes and money in bank after paying expenses and doctor's bill are specific legacies. *Manlove v. Gaut*, 2 Tenn. Ch. App. 410, 445.

Where the thing bequeathed is by the terms of the will individuated so that it is distinguished from all others of the same kind, it is a "specific legacy," and hence a bequest of all "my household goods, cash on hand or in bank, life insurance and all other personal property of every description" was a "specific legacy" so far as the household goods, cash, and insurance were concerned, though a "general legacy" as to any other property passing by the bequest. *Kearns v. Kearns*, 76 Atl. 1042, 77 N. J. Eq. 453, 140 Am. St. Rep. 575.

A bequest of life insurance of a specified amount in a company named is a "specific legacy," which carried with it the gift of all its accretions. *In re Gans' Will*, 112 N. Y. Supp. 259, 262, 60 Misc. Rep. 282.

A bequest of all wheat of which testator was the owner stored on lands belonging to him and one-half of all grain that might be raised on such lands during a year named was a "specific bequest." *Rock v. Zimmermann*, 126 N. W. 265, 266, 25 S. D. 237.

A bequest of "all money that I may have in" a certain bank "except therefrom the sum of fifteen hundred (\$1,500) dollars," which was otherwise disposed of by the will, is a "specific legacy" as are other bequests in form. "I direct that five hundred (\$500) dollars of said money (herein before referred to in the Omaha National Bank) be paid to my grandson." *In re Bush's Estate*, 131 N. W. 602, 604, 89 Neb. 334.

The payee of a note dying in 1903 made the following bequest to the promisor, who then owed a balance of \$1,000 on the note: "I give and bequeath to my son \* \* \* the sum of \$1,000 to be paid as follows: Said sum to be credited on a promissory note I now hold against him for the sum of \$1,300." And by order of a probate court of another state made in 1905 that amount was credited on the note, and it was ordered sold, and the purchaser sued thereon to recover interest from 1903. Held, that the credit given to the promisor was a "specific legacy," to which the legatee's right of property became fixed at the time of the payee's death, and that neither the estate nor plaintiff, its assignee, were thereafter entitled to interest. *Martin v. Barger*, 114 Pac. 505-507, 62 Wash. 672.

### Demonstrative or general legacy distinguished

The distinction between a specific and a demonstrative legacy involves not merely a technical question depending for its solution solely upon the precise language of the bequest, but a substantial inquiry respecting the intention of the testator as shown by the terms of the particular legacy, examined in connection with all the other provisions of the will. A specific legacy is a bequest of a specific article or particular fund which can be distinguished from all the rest of the testator's estate of the same kind, while a general legacy is payable out of the general assets of the estate. *In re Stilphen*, 60 Atl. 888-890, 100 Me. 146, 4 Ann. Cas. 158.

A legacy is a general legacy and not "specific" where so given as not to amount to a bequest of a particular thing or money distinguished from all other things of the same kind. *In re Barton's Estate*, 118 N. Y. Supp. 1087, 1090, 64 Misc. Rep. 242.

A "demonstrative legacy" is one of a certain amount or quantity, the particular fund or personal property being pointed out from which it is to be paid or taken; it differing from a "general legacy" in that it does not abate upon insufficiency of assets, and from a "specific legacy" in that there is recourse for its payment from the general estate in the event of ademption. *Thompson v. Stephens*, 75 S. E. 136, 137, 138 Ga. 205.

A "general legacy" is one payable out of the general assets of testator's estate, while a "specific legacy" is a gift by will of a specific article or particular part of an estate, which is identified and distinguished from all others of the same nature, and is to be satisfied only by the delivery and receipt of the particular thing given. A bequest by testatrix of any and all sums that might thereafter be payable to her or her estate, as the proceeds of any insurance on her husband's life, to her husband's five sisters, or such of them as should be living at the time such insurance money should be actually collected and received by testatrix's executors, etc., was a "specific legacy." *Nusly v. Curtis*, 85 Pac. 846, 847, 36 Colo. 464, 7 L. R. A. (N. S.) 592, 118 Am. St. Rep. 113, 10 Ann. Cas. 1134.

A "general legacy" is a gift of personal property by a last will and testament not amounting to a bequest of a particular thing or money or of a particular fund designated from all others of the same kind. A "specific legacy" is a bequest of a specified part of a testator's personal estate distinguished from all others of the same kind. A "demonstrative legacy" is a bequest of a certain sum of money, stock, or the like payable out of a particular fund or security. Whether a legacy is specific or not must necessarily depend upon the nature of the thing referred to and described in the will. If the thing be capable of individuality as a ring or picture,

or if it be an assemblage of things as a library or a cabinet or something capable of being operated by sensible distinctions as the property of a particular estate, in all such cases the description in the will sets forth with distinctness the subject of bequest and makes it specific. Whether a bequest couched in general terms is specific or otherwise depends on this: If the things falling within the terms, when enumerated, are in their nature specific, then the legacy is specific, otherwise it is not. Where testator bequeathed to a legatee all the claims held by testator against his father and all his interest in the father's estate, such legacy was specific. *Rogers v. Rogers*, 45 S. E. 176, 177, 67 S. C. 168, 100 Am. St. Rep. 721 (quoting and adopting definitions in *Drawford v. McCarthy*, 54 N. E. 278, 159 N. Y. 514; *Pell v. Ball*, *Speers' Eq.* 48; citing 18 Enc. Law, 711, 714, 721).

A bequest of the use of the \$500 bequeathed to testatrix by her brother for life, the same to be paid to another on the death of the first legatee, was a "specific legacy" in fact, but it was a general legacy if the fund was not in such distinct form that it was identifiable when the will was made. In *re Getman*, 113 N. Y. Supp. 67, 68, 128 App. Div. 767.

#### **Stock, bonds, or securities**

A bequest of "my stock, right, title and interest" in a certain company was a "specific legacy." *Kearns v. Kearns*, 76 Atl. 1042, 77 N. J. Eq. 453, 140 Am. St. Rep. 575.

Where a legacy of bonds or securities is intended to be a gift of the bonds and securities specified, and such bonds and securities are the only source for the payment of the legacy, the legacy is a "specific legacy" of the bonds or securities, and not of the money in them or secured by them, and, if the specific security is disposed of or extinguished, the rule of redemption applies, and the legacy is gone. *Blair v. Scribner*, 57 Atl. 318, 326, 65 N. J. Eq. 498.

"A 'specific legacy or devise' is a gift by will of a specific article or part of the testator's estate, which is identified and distinguished from all other parts of the same kind, and which may be satisfied only by the delivery of the particular thing." Thus, where one clause of a will, standing by itself, bequeathed certain shares of stock, the legacy was a specific one. *Waters v. Hatch*, 79 S. W. 916, 922, 181 Mo. 262.

At the time of making his will, testator's estate consisted of certain securities of which he thereafter died possessed. By his will he gave to his wife \$17,000 "to be paid to her out of securities which I now hold, instead of cash." Held, that the legacy was a specific one and is to be paid out of the securities which were a part of the estate of testator. *Allen v. Allen*, 74 Atl. 274, 276, 76 N. J. Eq. 245, 139 Am. St. Rep. 758.

#### **SPECIFIC LEGATEE**

"A 'specific legatee' is one who has a bequest of a particular thing, distinguished from all others of the same kind." In *re Goggin's Estate*, 88 N. Y. Supp. 557, 560, 43 Misc. Rep. 233.

#### **SPECIFIC PERFORMANCE**

"Specific performance" is an equitable remedy, which compels such substantial performance of the contract as will do justice between the parties. *Sugar v. Froehlich*, 82 N. E. 414, 416, 229 Ill. 397.

"Specific performance" of contracts is a purely equitable remedy, being a substitute for the legal remedy of compensation when it is inadequate or impracticable, and lies within sound judicial discretion on consideration of the particular surrounding circumstances. *Brown & Sons v. Boston & M. R. R.*, 76 Atl. 692, 695, 106 Me. 248.

"Specific performance" contemplates that the party, against whom such relief is sought, has, by his contract and covenant, agreed to do some certain specific thing which the court can order. *Morey v. Terre Haute Traction & Light Co.*, 93 N. E. 710, 714, 47 Ind. App. 16.

"Specific performance" rests on the sound reasonable discretion of the court. *Hathcock v. Société Anonyme La Floridienne*, 45 South. 481, 482, 54 Fla. 631.

"Specific performance" is a matter of sound judicial discretion, controlled by established principles of equity, and it will be granted or withheld by the court upon a consideration of all the circumstances of each particular case. *Offutt v. Offutt*, 67 Atl. 138, 139, 106 Md. 236, 12 L. R. A. (N. S.) 232, 124 Am. St. Rep. 491.

The remedy by "specific performance" is within the legal discretion of the court, and is not a matter of strict right, and when the conduct of a purchaser in a contract for the purchase of land has created conditions rendering it inequitable for the court to interfere and specifically enforce the contract, there is no hardship in treating an abandonment as conclusive and in refusing to permit a retraction. *Cox v. Raider*, 101 N. W. 531, 533, 138 Mich. 249.

To warrant "specific performance" of a contract to sell land, the description of the subject-matter must be as definite and certain as that required in a deed. *Fordyce Lumber Co. v. Wallace*, 107 S. W. 160, 85 Ark. 1.

"It is not necessary, in order to sustain the right to a 'specific performance,' that at the time such performance is sought to be compelled the vendor should have a complete equitable or legal title to the land which he contracted to convey. It is sufficient that he then have some interest in the property. It is no answer for a vendor to say, when specific performance is sought under his contract, that the interest or title which the de-

cree seeks to affect, is not as complete as he agreed to convey. If the vendee is willing to enforce the contract against a lesser interest, or a less perfect title, it does not lie with the vendor to object on that account. It is only when the vendor has no title or interest in the lands at all that such a decree will not be awarded, for the very good reason that courts will not attempt to require done what it is impossible to do. If, however, the vendor has any interest in the property contracted to be conveyed, the vendee may enforce the contract as to whatever interest he may possess." *Farnum v. Clarke*, 84 Pac. 166-170, 148 Cal. 610.

### SPECIFIC REPAIRS

Work of excavating earth forming a causeway crossing a great pond, and substituting therefor a bridge at a different grade, constituted "specific repairs," within Pub. St., c. 49, §§ 10, 65, under which no notice to abutting owners is required. *Bigelow v. City Council of City of Worcester*, 48 N. E. 1, 2, 169 Mass. 390.

A street was laid out in 1872 by an order which established its grade; but, though opened to travel, the grade was not made as established until 1897, when the board of aldermen declared the grade as fixed in 1872, and, without any concurrent vote of the city council, instructed the superintendent of streets to bring the street to such grade. The mayor and board of aldermen, with the concurrent vote of the city council, alone had authority to establish a street grade. Petitioner, claiming damages by reason of the work done, filed a petition within a year from the expiration of 30 days after the filing of a previous petition for damages with the mayor and board of aldermen, as required by Pub. St. c. 52, in cases of objections to ordinary repairs. It was held that the work done under the 1897 order could not be regarded as "specific repairs," under Pub. St. c. 49, since specific repairs could only be ordered by officers authorized to establish a grade, and that the work must be treated as ordinary repairs. *Albro v. City of Fall River*, 56 N. E. 894, 895, 175 Mass. 590.

### SPECIFICALLY

Distinctly and specifically, see *Distinctly*.

### SPECIFICATION

See *Plans and Specifications*.  
Plans distinguished, see *Plan*.

A construction contract required the work to be done according to certain "specifications," under which the manner of doing the work and materials to be used were particularly set out. The contract then contained several paragraphs, grouped under the designation of "general stipulations." The contractor's contract with a subcontractor declared the "specifications" of the construction

contract to be a part thereof and to govern the same. Held, that the "general stipulations" of the construction contract constituted a portion of the "specifications," within the meaning of the subcontractor's contract, and consequently constituted a part thereof. *McGregor v. J. A. Ware Const. Co.*, 87 S. W. 981, 983, 188 Mo. 611.

Rev. St. 1899, § 5859, as amended by Laws 1901, p. 65, requires contracts for street improvements to be let to the lowest bidder on plans and specifications filed with the city clerk. Held, that the word "plans" as used means a profile, drawing, or picture showing, in a general way, the character of the work, while "specifications" means a detailed statement of the character of the improvements, the purpose of the provision being that by filing plans and specifications information would be furnished to enable bidders to intelligently figure the cost; and, where there was nothing complicated or difficult to understand about grading or paving the street to be improved, and all the details of the work were fully stated, both in the ordinance authorizing it and in the specifications filed, the omission to file plans did not invalidate the contract. *McCoy v. Randall*, 121 S. W. 31, 34, 222 Mo. 24.

Drainage Law (Laws 1895, pp. 271-296, c. 115), § 2, provides that the petition for the organization of a drainage district shall contain a description of the proposed system of drainage, designating the outlet, route, branches, and terminal. Section 9, as amended by Laws 1905, p. 362, c. 175, provides for the filing of a petition showing that the proposed system of drainage is necessary to drain the lands described, together with "specifications" for its construction, with plans and drafts of artificial appliances. Section 14 provides that, in case the damages for the right of way amount to more than the benefits, the proceeding shall be dismissed. Section 18 provides for the construction of the improvement. Section 19 provides for the manner of doing the work, and prohibits any change in the system, except on the consent of the owners benefited. It was held that there could be no misunderstanding as to what the word "specifications" means in this connection; that it was here applied to a public improvement, and its use, together with the use of the words "necessary plats and plans," and the further words providing for drafts of any artificial appliances or equipment necessary in aid of the improvement, together with the estimated cost thereof, indicate that such a system, with plans and specifications, is to be prepared and submitted in the petition as will enable the commissioners, in the event of its approval and adoption, to proceed in contracting for and constructing the improvement, without change. *State ex rel. Matson v. Superior Court, Skagit County*, 85 Pac. 264, 268, 42 Wash. 491.

**In architecture**

The word "specification," when used in a building contract, means a detailed statement of each particular part of the work to be done, usually prepared by the architect, to amplify the details of the plans. *Fowler v. Bushby*, 125 N. Y. Supp. 890, 891, 69 Misc. Rep. 341.

The term "specifications," as used in a building contract, ordinarily means a detailed and particular account of the structure to be built, including the manner of its construction and the materials to be used. *Woollacott v. Meekin*, 91 Pac. 612, 615, 151 Cal. 701, dissenting opinion (quoting the definition in *Baltimore & O. R. Co. v. Stewart*, 29 Atl. 964, 79 Md. 487).

The "plans" and "specifications" for the construction of a large building should be definite, specific, and certain, in justice both to the contractor and the owner. *Nave v. McGrane*, 113 Pac. 82, 85, 19 Idaho, 111.

**In patents**

In Rev. St. § 4916, authorizing the issuance of a reissue patent where the original is inoperative or invalid "by reason of a defective or insufficient specification," the word "specification," by settled construction, may include the claims as well as the technical specifications preceding them. *McDowell v. Ideal Concrete Mach. Co.*, 187 Fed. 814, 820, 109 C. C. A. 574.

**SPECIFICATION OF ERROR**

See *Distinct Specification of Error*.

**SPECIFY**

See *Substantially as Specified; Time Specified*.

"Specify" means to mention specifically or explicitly, to state in full and explicit terms or explicitly and in detail, name expressly, distinctly, and particularly. *A. M. Dillow & Co. v. City of Monticello*, 124 N. W. 186, 189, 145 Iowa, 424.

Where a town council passed a resolution declaring that it was desirable and necessary to lay out a new street between two points specified, and application was made for the appointment of commissioners to lay out the same after the publication of a notice reciting the resolution, the notice was not sufficient under a statute declaring that the notice shall "specify" the nature and extent of the intended improvement, inasmuch as the resolution failed to specify the exact location of the street. *In re Mt. Pleasant Ave.*, 10 R. I. 320, 326.

**SPECIFY FOR**

"In the plush trade, the words 'specified for' have a technical meaning, and signify the giving of instructions in respect to the printing." *Aikman v. Wahneta Silk Co.*, 96 N. Y. Supp. 1067, 1068, 110 App. Div. 191.

**SPECIFYING OUT**

The term "specifying out," as used in contracts made in the iron trade, means furnishing specifications or designations of the kind of iron desired for delivery. *Moran Bolt & Nut Mfg. Co. v. St. Louis Car Co.*, 109 S. W. 47, 49, 210 Mo. 715.

**SPECULATE—SPECULATION**

Engaged in speculating, see *Engaged*.

"Speculate" means to "take the risk of loss in view of possible gain." *Arentsen v. Moreland*, 99 N. W. 790, 796, 122 Wis. 167, 65 L. R. A. 973, 106 Am. St. Rep. 951, 2 Ann. Cas. 628 (quoting *Century Dictionary*).

One of the definitions of "speculate" is to take the risk of loss in view of possible gain. *Century Dict.* The authorities, both English and American, are to the effect that a vendor who agrees to convey what he at the time knows that he has no right to convey, because the title is in another, thereby assumes the risk of acquiring the title and making the conveyance, or responding in damages for the vendee's loss of the bargain. Such contracts are speculative in character, and the party giving them understands the risk he assumes when the covenant is entered into. Such contracts for the future delivery of personal property have frequently been characterized by this and other courts as "speculative" in character. *Lawson v. Cobban*, 99 Pac. 128, 130, 38 Mont. 138.

**SPECULATIVE DAMAGES**

Damages are speculative when the probability that a circumstance will exist as an element for compensation is conjectural. The term is usually applied in cases of breach of contract, when compensation is sought for loss of uncertain or remote profits, not within the understanding of the parties, or where there is an uncertainty as to whether the party has been in fact damaged, or whether the damages result from the act of the other party, or where they are wholly uncertain in measure or extent. The rule against the recovery of "speculative damages" is generally directed against uncertainty as to cause rather than as to uncertainty as to measure or extent; that is, if it is uncertain whether defendant's act caused any damages, or whether the damages proved flowed from the defendant's act, there may be no recovery of such uncertain damages, whereas uncertainty which affects merely the measure or extent of the injury suffered does not bar a recovery. *Crichfield v. Julia*, 147 Fed. 65, 70, 71, 77 C. C. A. 297 (citing *And. Law Dict.*; *Anvil Min. Co. v. Humble*, 14 Sup. Ct. 876, 153 U. S. 540, 38 L. Ed. 814; *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415; *Wakeman v. Wheeler & W. Mfg. Co.*, 4 N. E. 264, 101 N. Y. 205, 54 Am. Rep. 676; *Bluegrass Cordage Co. v. Luthy*, 33 S. W. 835, 98 Ky. 583; *In re Stern*,

116 Fed. 604, 54 C. C. A. 60; *Allen v. Field*, 130 Fed. 641, 65 C. C. A. 19).

In an action for injuries caused to plaintiff's property by the explosion of a boiler on property of defendant, the probable loss of profits which plaintiff might have earned during the rebuilding of his mill depend on so many contingencies that such damages are termed "speculative," and are not recoverable. *James McNeill & Bro. Co. v. Crucible Steel Co.*, 56 Atl. 1067, 1071, 207 Pa. 493.

Plaintiffs, cattle sellers in Baltimore, sent a telegram to their agent in Chicago on the evening of July 13, 1904, directing him, if he could purchase "reasonably," to ship Thursday for the succeeding Monday's market "four to six" car loads of market cattle. Defendant negligently failed to deliver the message until it was too late for the agent to comply therewith, though the agent testified that if he had received the message in the ordinary course he would have shipped the cattle. Plaintiffs testified that they had a regular line of customers on the Baltimore market, and that if they had been shipped one of the plaintiffs testified "he was satisfied" the cattle would have brought \$5 a head profit, "had they arrived on the market day." There was no evidence whether the agent would have purchased four or six loads, nor any certainty that the cattle would have arrived in time, nor that plaintiffs suffered loss by purchasing other cattle to fill their orders. Held, that the evidence was too speculative to sustain a recovery of \$5 a head for the number of cattle that could have been loaded in six cars as the profits plaintiffs lost by defendant's default. *Western Union Tel. Co. v. N. Lehman & Bro.*, 67 Atl. 241, 244, 106 Md. 318, 14 Ann. Cas. 736.

### SPECULATIVE RISK

The word "speculative" means disposed towards speculation, as distinguished from investment. An assignment of a life insurance policy to a third person, not a relative or creditor and having no insurable interest in the life of the insured, is invalid as a speculative risk. *Mutual Life Ins. Co. v. Lane*, 151 Fed. 276, 284.

### SPECULATOR

See *Ticket Speculator*.

### SPEECH

Liberty of speech, see *Liberty of Speech and the Press*.

### SPEED

See *Excessive Speed*; *Moderate Speed*; *Safe Speed*.

"Speed" is a relative term, and whether a certain speed, at which a car was propelled, resulting in injury to a railroad employé, is negligence, must to some extent depend upon

the location, conditions, and surroundings, and is usually a question for the jury. *Adams v. Cleveland C., C. & St. L. R. Co.*, 90 N. E. 382, 383, 243 Ill. 191.

### SPEEDY AND ADEQUATE REMEDY

A remedy does not fail to be "speedy and adequate" because by pursuing it through the ordinary course of law more time would be probably consumed than in prohibition proceedings sought to be used. *Hubbard v. Justice's Court of San Jose Tp.*, 89 Pac. 865, 866, 5 Cal. App. 90 (quoting *Agassiz v. Superior Court*, 27 Pac. 49, 90 Cal. 101).

### SPEEDY REMEDY

See *Plain, Speedy, and Adequate Remedy*.

The remedy by appeal or certiorari as to a void judgment is not adequate or "speedy," in the sense required to exclude relief by injunction. *Worrall v. H. S. Chase & Co.*, 123 N. W. 338, 340, 144 Iowa, 665.

### SPEEDY TRIAL

The term "speedy," as used in the guaranty of speedy criminal trials, being a word of indeterminate meaning, permits legislative definition to some extent. *State v. Webb*, 70 S. E. 1064, 1065, 155 N. C. 426.

A "speedy trial," guaranteed by the Constitution, means a trial as soon after indictment as the prosecution can, with reasonable diligence, prepare for it, regard being had to the terms of court, or a trial conducted according to fixed rules, regulations, and proceedings, free from vexatious, capricious, and oppressive delay. *State v. Keefe*, 98 Pac. 122, 126, 17 Wyo. 227, 22 L. R. A. (N. S.) 896, 17 Ann. Cas. 161.

A "speedy trial" means a trial regulated and conducted by fixed rules of law, and any delay created by the operation of those rules does not work prejudice to any constitutional right of the defendant. *Sample v. State*, 36 South. 367, 368, 138 Ala. 259.

The several continuances of trial on the first indictment, considered in connection with the trials on the other indictments, did not violate the constitutional provision requiring a "speedy trial" to defendant charged with crime. *State v. Dilts*, 69 Atl. 253, 256, 76 N. J. Law, 410.

The provision of the state Constitution that accused persons shall have a "speedy public trial" should be so construed as to allow officers representing the state in prosecuting criminal offenses reasonable time in which to secure the attendance of witnesses. This right is carefully guarded by laws requiring due diligence on the part of such officers in bringing parties to trial, and providing that after a reasonable delay the defendant shall be discharged from custody. *State v. Pratt*, 107 N. W. 538, 540, 20 S. D. 440, 11 Ann. Cas. 1049.



A "speedy trial," as provided for by Mansf. Dig. Ark. §§ 2192, 2193, means a trial conducted according to the fixed rules, regulations, and proceedings at law, free from vexatious, capricious, and causeless delays by the officers of the state or county upon whom devolves the prosecution or determination of criminal cases, and unless good cause to the contrary is shown, a person indicted under the law in force in the Indian Territory prior to statehood is entitled to be tried before the end of the third term of the court after the return thereof. *State ex rel. Sims v. Caruthers*, 98 Pac. 474, 482, 1 Okl. Cr. 428.

The right of a "speedy trial" is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice. The term "speedy trial," as it occurs in the Constitution, has been judicially interpreted as meaning generally a trial as soon after the indictment as the prosecution can with reasonable diligence prepare for, regard being had to the terms of court. Where relator was indicted at the October, 1909, term of the district court, which term ended February 4, 1910, and on February 8th a special term of said court was convened with a special judge at the instance and request of relator, for the purpose of hearing his motion to quash the indictment, and another special term was convened February 28, 1910, with a special judge, and the next regular term, which was to continue until May 31, 1910, convened on March 7, 1910, and the Legislature by Act March 25, 1910, provided that the regular term of said district court should commence on the first Mondays in January, May, and October of each year, relator's substantial right to a speedy trial was not violated. *State ex rel. Eubanks v. Cole*, 109 Pac. 736, 743, 4 Okl. Cr. 25 (quoting and adopting *Beavers v. Haubert*, 25 Sup. Ct. 573, 198 U. S. 77, 49 L. Ed. 950; 12 Cyc. 498, citing and adopting *Ex parte State*, 76 Ala. 482; *Sample v. State*, 36 South. 367, 138 Ala. 259).

Rev. Code 1852, as amended to 1893, p. 858, c. 116, § 17, provides that, if any person shall be committed for treason or felony, and shall not be indicted and tried at the next term of the court where such crime is cognizable, he shall be set at liberty on bail, unless it appear by affidavit that the witnesses for the state could not then be had, and, if the prisoner shall not be indicted and tried at the second term after commitment, he shall be discharged. Held, that where accused, charged with violating the election law, was indicted at the May, 1906, term of court, and the case was continued at the September term on the application of the state, defendant, not having insisted on a trial at that term, was not entitled to dismissal on being called for trial at the November term. *State v. Tyre* (Del.) 67 Atl. 199, 201, 6 Pennewill, 343.

## SPENDTHRIFT

### SPENDTHRIFT CLAUSE

A clause in a trust deed that the said trustee, party of the second part, shall hold principal, increase, and income of said fund, free from all claims, attachments, judgments, executions, and liens of every nature by creditors, against either of said parties of the first part, and the said parties of the first part shall not have, nor shall either of them have, any power to anticipate, charge, or encumber the said principal fund or any part thereof, or the increase, interest, or income thereof, or in any way defeat the intent of this instrument as herein expressed, which is to make provision for the support, maintenance, and personal comfort of the parties of the first part, free from liens and claims of creditors, is called a "spendthrift clause." *Wright v. Leupp*, 62 Atl. 464, 465, 70 N. J. Eq. 130.

### SPENDTHRIFT TRUST

Where a trust is created, so that neither the interest nor the principal could be reached by their creditors, it is called a "spendthrift trust." *Merrill v. Preston*, 72 N. E. 941, 942, 187 Mass. 197.

A "spendthrift trust" is created where property is left to a trustee, the proceeds to be used for the support of a designated beneficiary, in which case the beneficiary's interest may not be subjected to the payment of his debts. *Merchants' Nat. Bank v. Crist*, 118 N. W. 394, 395, 140 Iowa, 308, 23 L. R. A. (N. S.) 526, 132 Am. St. Rep. 267.

A trust created to provide for the maintenance of the beneficiary, and at the same time securing it against his improvidence and incapacity for self-protection, is what is known as a "spendthrift trust." *Bennett v. Bennett*, 75 N. E. 339, 341, 217 Ill. 434, 4 L. R. A. (N. S.) 470.

A "spendthrift trust" is defined as one created with a view of providing a fund for the maintenance of another, at the same time securing it against his own improvidence or incapacity for self-protection, provisions against alienation of the fund by the voluntary act of the beneficiary or in invitum by his creditors being the usual incidents of such trusts. *Croom v. Ocala Plumbing & Electric Co.*, 57 South. 243, 244, 62 Fla. 460.

The will of a testatrix, giving her son the annual income of her trust estate, and in terms preventing him from alienating it, or his creditors from reaching it, creates a "spendthrift trust." *Olsen v. Youngerman*, 113 N. W. 938, 939, 136 Iowa, 404.

"Spendthrift trusts" are defined as those trusts which are created with a view to providing a fund for the maintenance of another and at the same time securing it against his own improvidence or incapacity for self-protection. The fact that the beneficiaries of

such trust may be active, sober, frugal business men does not affect its character, nor is it essential to the creation of such a trust that the immunity of the fund from the claims of creditors be specifically provided for. If such a result is accomplished by the terms of the will, it is sufficient. *Wagner v. Wagner*, 149 Ill. App. 73, 84; *Id.*, 91 N. E. 66, 244 Ill. 101, 18 Ann. Cas. 490.

A "spendthrift trust" is the term commonly used to designate a trust created for the maintenance of the *cestui que trust* and to secure the fund against the improvidence of the *cestui que trust*. The English rule, which has been adopted in most of the states of this Union, is that it is against the policy of the law for the grant to be so limited that a donee shall have the possession and enjoyment of the property, but shall not have the power of alienation, or that the property shall not be liable for his debts. Under the English law it is competent to make the estate determinable, as upon the bankruptcy of the donee, in which event the estate is to revert to the donor, or to some person specified in the grant. In such case the creditor is deprived of the estate by the act which deprives the donee thereof. But where no such provision for the determination of the estate is contained in the grant, the property will pass to the assignee in bankruptcy. The American doctrine differs from the English rule, and is thus stated in 26 Am. & Eng. Enc. of Law (2d Ed.) p. 139: "This doctrine is that it is lawful for a testator or grantor to create a trust estate for the life of the *cestui que trust*, with the provision that the latter shall receive and enjoy the avails at times and in amounts either fixed in the instrument or left to the discretion of the trustee, and that such avails shall not be subject to alienation by the beneficiary nor liable for his debts." A deed conveyed the title to the grantee on condition that the land should not be liable for any debts of the grantee then existing, or that he might contract during a specified number of years, and that the grantee should have no right to incumber or dispose of the land for a certain period except to dispose of it by will. Held, that a "spendthrift trust" was not created, there having been no trust estate, the grantee not having been limited to the enjoyment of the income, his right not being limited to support, he having taken an absolute fee, and having had the right of possession. *Kessner v. Phillips*, 88 S. W. 66, 67, 189 Mo. 515, 107 Am. St. Rep. 368, 3 Ann. Cas. 1005.

Testator's will provided that a share of his estate should be held in trust for a daughter, a married woman, to "her sole and separate use" during her life, so that she might enjoy the net income free from the control of any husband, that she should have power to dispose of the principal fund by will, and that, in default of such will, it should go to her heirs. Held, that neither the principal

nor the income of the fund could be subjected to the claim of her attorneys for services in advising her in relation to the management of the fund, the fund being in possession of the court, and neither the principal nor income being a "separate estate," but the will created a mere "spendthrift trust." *Castree v. Shotwell*, 68 Atl. 774, 775, 73 N. J. Eq. 590.

## SPENT GINGER

The article known as "spent ginger," which is a by-product from the treatment of ginger root in the manufacture of ginger extract, etc., and consists of a dried cake of ginger particles, is held to be "ginger root, unground," as enumerated in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 667, 30 Stat. 201. *Lewis German & Co. v. United States*, 137 Fed. 817, 70 C. C. A. 315.

## SPICE

The residuum in the process of decortivating pepper berries, consisting of the inner cuticle in the form of a powder, which without further grinding, is mixed with ground pepper as an adulterant, is dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 287, 30 Stat. 173, as "spices not specially provided for." *Frame & Co. v. United States*, 143 Fed. 692, 693.

## SPIKER

A "spiker" is a railroad workman whose duty it is to drive spikes into the cross-ties, by which the track rails are held in place. *Nocita v. Omaha & C. B. St. Ry. Co.*, 131 N. W. 214, 89 Neb. 209.

## SPILLWAY

As structure, see Structure.

## SPINDLES

The word "spindles," used in relation to mills or factories, signifies more than a pin or rod on which yarn or thread is twisted, and is used as a unit of measure or capacity of the mill, including all the machinery and appliances necessary to operate it, so that the statement of the number of spindles in a mill fairly signifies to those acquainted with mills and mill property the size and capacity of the mill, though in the case of either a cloth or yarn mill the number of certain kinds of the machines might vary according to the quality or kind of yarn or cloth produced. So a description of a cotton or woolen mill in a list of property filed with the assessors under Pub. St. c. 11, by stating the number of spindles in the mill, is sufficient, where the assessors knew that cloth as well as yarn was manufactured; the spindles in the mill being taken as the unit of measure of its capacity, and the state-

ment including by implication all other necessary machinery. *Troy Cotton & Woolen Manufactory v. City of Fall River*, 46 N. E. 99, 100, 167 Mass. 517.

## SPINE

See *Railway Spine*.

## SPINNING MILL

A machine which doubles raw skein silk is called a "spinning mill." *Klots v. United States*, 189 Fed. 606, 607, 71 C. C. A. 590.

## SPIRIT—SPIRITS

See *Ardent Spirits*; *Neutral Spirits*; *Proof Spirit*; *Single-Stamp Spirits*.

Cordials are "spirits manufactured or distilled from grain or other materials," as that phrase is used in section 3, Tariff Act July 24, 1897, c. 11, 30 Stat. 203, and, when imported from France, are subject to the reduced rate of duty provided for such spirits in the reciprocal commercial agreement with that country (30 Stat. 1774) negotiated under the authority of said section. *United States v. Julius Wile Bro. & Co.*, 130 Fed. 331, 64 C. C. A. 577.

## SPIRITUALISM

Belief in as insane delusion, see *Insane Delusion*.

"Spiritualism" may be defined as a belief in the power of some departed spirits to communicate with the living by means of mediums. *City of Chicago v. Payne*, 160 Ill. App. 641, 642.

## SPIRITUOUS LIQUORS

"Spirituous liquor" is that which is in whole or in part composed of alcohol, extracted by distillation, such as whisky, brandy, or rum; these being regarded as spirituous and intoxicating liquors, without the necessity of proof. *Marks v. State*, 48 South. 864, 868, 159 Ala. 71, 133 Am. St. Rep. 20.

The term "spirituous liquors" includes malt liquors as well. *State v. Dowdy*, 53 S. E. 1002-1003, 145 N. C. 432 (citing *State v. Giersch*, 4 S. E. 193, 98 N. C. 720).

There is a marked distinction between "spirituous" and "malt" liquors. The former is obtained by distillation; the latter, by fermenting an infusion of malt. The qualifying words "spirituous" and "malt" are therefore not synonymous terms, and the employment of either cannot be understood as implying the use of the other, so as to permit the disjunctive "or," as used in the phrase "spirituous or malt liquors," set out in the complaint, to be construed as "to wit," such as spirituous liquor or whisky, malt liquor or beer, vinous liquor or wine, etc. The specific

charge that Wong Sing sold "spirituous and malt liquors," assuming that these kinds of beverages were blended so as to be embraced in a single transaction, is rendered uncertain by the subsequent statement in the complaint that he sold either "spirituous or malt liquors." Under ordinances forbidding the sale of "any spirituous or malt liquors," and making each sale a separate and distinct offense, an information charging a sale of "spirituous and malt liquors," or spirituous or malt liquors, was not sufficient under Code Cr. Proc. §§ 1306, 1308, requiring that the accusation be as direct and as certain as the crime charged, and that it charge but one crime, and in one form only. *Wong Sing v. City of Independence*, 83 Pac. 387, 389, 47 Or. 231.

St. 1898, c. 1565c, prohibiting the sale of any spirituous, malt, ardent, or intoxicating liquors or drinks in no-license territory, when considered in connection with section 1565, as amended by Laws 1905, p. 520, c. 341, providing that proof of the sale of any malt, spirituous, vinous, or distilled liquor shall be deemed proof of the sale of intoxicating liquors, etc., is violated by a sale of malt liquors or drinks which are the product where the alcohol, produced by fermentation, of which malting is a preliminary process, remains in the liquor drawn off from the malt, or by a sale of "spirituous liquors" or drinks which are the product where the alcohol is separated by distillation so that the liquor separated contains a percentage of alcohol, or by a sale of ardent liquors or drinks, or by a sale of intoxicating liquors or drinks, and hence a sale of malt liquor containing alcohol is an offense, though the beverage is a non-intoxicant. *Pennell v. State*, 123 N. W. 115, 116, 141 Wis. 35.

### Intoxicating liquor synonyms

As intoxicating liquor, see *Intoxicating Liquor*.

The qualifying phrase, "which produces intoxication," in Rem. & Bal. Code, § 6288, prohibiting the sale or giving away of "malt, spirituous or vinous liquor \* \* \* or any essence \* \* \* compound \* \* \* which produces intoxication," refers only to the enumerated essences and compounds preceding it, and does not qualify "spirituous liquor" which is deemed intoxicating. *State v. Bailey*, 121 Pac. 821, 822, 67 Wash. 336 (citing 7 Words and Phrases, pp. 6610-6615).

While all "spirituous liquors" are intoxicating, and by force of statute all intoxicating liquors are ardent spirits, it is certain that all ardent spirits are not "spirituous liquors." "Malt liquors," for instance, are intoxicating, but cannot be classed as spirituous. *Donithan v. Commonwealth*, 64 S. E. 1050, 109 Va. 845 (citing 17 A. & E. Enc. Law, 203; *State v. Oliver*, 26 W. Va. 422, 53 Am. Rep. 79; *Com. v. Livermore*, 70 Mass. [4 Gray] 20; *Feldham v. City of Morrison*, 1 Ill. App. 460).

Proof of an unlawful sale of a mixture, preparation, or liquid "which will produce intoxication" will sustain a conviction upon an indictment charging the unlawful sale of "spirituous liquors, wine, porter, ale, beer and drinks of like nature" without a state license therefor. For the purpose of chapter 32, § 1, of the Code of 1899, such mixture, preparation, or liquid is in law "spirituous liquor," whether it be such in fact or not. *State v. Good*, 49 S. E. 121, 122, 56 W. Va. 215.

#### Alcohol

Pure alcohol is within the term "spirituous and intoxicating liquors." *Marks v. State*, 48 South. 864, 868, 159 Ala. 71, 133 Am. St. Rep. 20.

Alcohol is judicially recognized as a "spirituous and intoxicating liquor." *Cureton v. State*, 70 S. E. 332, 333, 135 Ga. 660.

#### Cider

Cider is not to be considered a "spirituous liquor," and it is not a malt liquor, whisky, brandy, wine, ale, beer, or any mixture thereof. *Donithan v. Commonwealth*, 64 S. E. 1050, 109 Va. 845.

### SPIKE FENCE

"Spite fences" are fences, often high and unsightly, erected to annoy a neighbor or adjoining landowner by obstructing his air, light, or view. *Anthony Wilkinson Live Stock Co. v. McIlquam*, 83 Pac. 364, 368, 14 Wyo. 209, 3 L. R. A. (N. S.) 733 (citing *Allen v. Kinyon*, 1 N. W. 863, 41 Mich. 282; *Kuzniak v. Kozminski*, 65 N. W. 275, 107 Mich. 444, 61 Am. St. Rep. 344; *Wood*, Nuls. [2d Ed.] § 6).

A landowner has no right to maintain a "spite fence," which is one erected solely for the malicious purpose of vexing and injuring another landowner in the enjoyment of his land. *Norton v. Randolph* (Ala.) 58 South. 283, 285, 40 L. R. A. (N. S.) 129.

### SPLITTING OR COUGHING OF BLOOD

The term "splitting or coughing of blood," as used in a question by a medical examiner to an applicant for life insurance, means the disorder so called, whether the blood comes from the lungs or the stomach. *Eminent Household of Columbian Woodmen v. Prater*, 103 Pac. 558, 563, 24 Okl. 214, 23 L. R. A. (N. S.) 917, 20 Ann. Cas. 287.

### SPLENDID INVESTMENT

The statement that a purchase of property is a "splendid investment," made at the same time and in connection with representations as to conditions which, if true, would necessarily follow the conclusion expressed by such statement, since it forms a part of and gives color to the representations as an entirety, cannot be taken as "hot air" or re-

garded as "puffing," but must be considered as a part which goes to make up the whole of the representations, and, further than this, it cannot be taken as a statement or representation of prospective profits on the investment. *Collins v. Chipman*, 95 S. W. 666, 670, 41 Tex. Civ. App. 563.

### SPLIT

#### Telephone wires

"Splitting" a pair of telephone wires to make a connection is done when by electricity some of the wires in a cable are disabled, leaving others defective, and one good wire of a pair is connected with another good wire of another pair. *Cumberland Telegraph & Telephone Co. v. Kelly*, 160 Fed. 316, 87 C. A. 268, 15 Ann. Cas. 1210.

#### Switch

The expression "split the switch" means that in some unknown manner the switch has so far opened that the wheels of a car leave the main track and proceed on the switch track. *Simone v. Rhode Island Co.*, 68 Atl. 202, 203, 28 R. I. 186, 9 L. R. A. (N. S.) 740.

Where a switch tongue is jarred by the forward trucks or wheels of a car in passing on the main line rail, so as to catch the wheels of the after truck and force them onto the switch rail while the forward trucks continued on the main rail, the car is said to "split the switch," as it is expressed, and a derailment is necessarily produced. *Birmingham Traction Co. v. Reville*, 34 South. 981, 984, 136 Ala. 335.

### SPLITTER

A "splitter" in a packing plant is a person who splits recently slaughtered hogs with a cleaver. *Rendlich v. Hammond Packing Co.*, 80 S. W. 683, 106 Mo. App. 717.

A device with which it is customary to equip or guard saws in a sawmill, consisting of a piece of iron or steel about the thickness of the saw blade, placed in an upright position, a few inches back of the saw, the top extending only to the top of the saw, is known as a "splitter." *Peterson v. Union Iron Works*, 93 Pac. 1077, 48 Wash. 505.

### SPOLIATOR—SPOLIATION

The doctrine of "spoliation" is inapplicable, where testatrix requested another, who was made a beneficiary by her subsequent will, to retain a will until he learned that another had been filed in the probate court, and, on learning that fact, such other caused the former will to be destroyed. In *re Rogers' Will*, 80 Vt. 259, 67 Atl. 726, 730.

"Alterations of any sort, made in a will by a stranger to it, without the knowledge of the testator, have no effect whatever, and the instrument must be admitted to probate as it stood originally. Such changes are a

mere 'spoliation,' and parol evidence will always be received to show the original contents of the will." *Monroe v. Huddart*, 113 N. W. 149, 150, 79 Neb. 569, 14 L. R. A. (N. S.) 259.

"Whatever inferences may be drawn against a party by reason of his failure to produce evidence in his possession, or under his control, are allowed on the theory that he willfully withholds such evidence. His conduct, says Greenleaf, is attributed to his supposed knowledge, that the truth would have operated against him. \* \* \* He is treated in law as a 'spoliator of evidence.'" *Lowe v. Donnelly*, 85 Pac. 318, 319, 36 Colo. 292 (quoting and adopting definition in *Cartier v. Troy Lumber Co.*, 28 N. E. 932, 138 Ill. 533, 14 L. R. A. 470).

## Sponge

The term "sponges," as used in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 82, means natural "sponges," and does not include manufactured rubber sponges. *Alfred H. Smith Co. v. United States*, 143 Fed. 691, 692; *Id.*, 149 Fed. 1022, 79 C. C. A. 531.

## Spontaneous

### SPONTANEOUS COMBUSTION

As fire, see Fire.

The word "spontaneous," when used in connection with combustion, means the internal development of heat without the action of an external agent, which may become so rapid as to produce fire. *Western Woolen Mill Co. v. Northern Assur. Co., of London*, 139 Fed. 637, 639, 72 C. C. A. 1.

### SPONTANEOUS EXCLAMATION

A barn was destroyed by a fire which originated the day before on a neighboring ranch, whose manager, with others, discovered the danger while the fire was at some distance and vainly endeavored to save the building. In an action by the owner of the barn against the owner of the ranch, testimony that while the barn was burning the manager said that he had himself set out the fire was not competent evidence that he had in fact done so. The declaration of the manager was not rendered competent by reason of his being the defendant's agent, for it was a mere narration of a past transaction, not relating to, explaining, or characterizing any act in which he was then engaged, and the circumstances do not indicate that it was such a "spontaneous exclamation," made under the stress of nervous excitement, that its truth could be presumed without being sworn to. *Johnson v. McLain Inv. Co.*, 100 Pac. 52, 53, 79 Kan. 423, 131 Am. St. Rep. 302.

## Sport

See Private Sports; Public Sport.

Baseball does not come within the class of "sports" prohibited on Sunday by section

1368, C. L. 1897. *Territory v. Davenport*, 124 Pac. 795, 797, 17 N. M. 214, 41 L. R. A. (N. S.) 407.

## SPORTING

Playing at the game of baseball is "sporting," within the meaning of the statute concerning the observance of Sunday. *Seay v. Shrader*, 95 N. W. 690, 692, 69 Neb. 245.

## SPORTING HOUSE

The so-called "sporting houses" are houses of ill fame. *Johnson v. People*, 66 N. E. 877, 881, 202 Ill. 53.

## SPOT CASH

As used in a contract for the purchase of lemons, the term "spot cash" had reference to payment to be made after the lemons were washed, inspected, selected, accepted, and weighed, and the culls disposed of. *Central Mercantile Co. v. Graves*, 88 Pac. 78, 79, 74 Kan. 718.

A "spot cash sale" means a sale which requires the buyer to pay cash for the goods on the delivery of the same. In such a sale the title does not pass until the goods are paid for, and one delivering goods under and by virtue of such a contract for sale has the right to replevin the goods on failure of the buyer to pay the price. *McIver v. Williamson-Halsell-Fraser Co.*, 92 Pac. 170, 171, 19 Okl. 454, 13 L. R. A. (N. S.) 696.

## SPOUSE

See Former Spouse.

As legal representative, see Legal Representative.

## SPRAG—SPRAGGING

A "sprag" is a wedge-shaped piece of wood, which is placed on a track in front of the wheels of a car to bring the car to a standstill. *McGrath v. Delaware, L. & W. R. Co.*, 53 Atl. 207, 208, 68 N. J. Law, 425.

As applied to mining, "spragging" is the insertion of a strong stick, called a "sprag," from between the spokes of one car wheel to and between the spokes of the opposite wheel, so that, when the sprag comes in contact with the body of the car, it acts as a brake by preventing any further revolutions of the wheels, and compelling the sliding thereof along the track rails. *Collingwood v. Illinois & I. Fuel Co.*, 101 N. W. 283, 284, 125 Iowa, 537.

## SPRAWL

A boss in charge of workmen in a quarry is under no legal obligation to ascertain the safety of the place unless its superintendence is committed to him, and in any event an injury to one ordered by the boss to shovel "sprawl," or loose rock, near where a loose

rock in the wall is likely to fall, cannot be ascribed to the giving of the order by the boss unless he knew or had reason to believe that the place was unsafe; and a complaint alleging negligence of the boss in giving such order, when by the exercise of due diligence he should have known that the rock was likely to fall and injure the servant, is demurrable. *Alabama Consol. Coal & Iron Co. v. Hammond*, 47 South. 248, 249, 156 Ala. 253.

## SPRAY

"Spray" is defined as water dispersed in particles, as by the wind or by force of impact. Small showers of water, thrown in minute whirling streams by a syringe, constitute "spray" within this definition. *Marvel Co. v. Pearl*, 133 Fed. 100, 162, 66 C. C. A. 226 (citing Stand. Dict.).

## SPREAD

A statute, requiring certain papers to be "spread" upon a named book, is to be read as if it had said such papers should be recorded in such book. *Hager v. Melton*, 66 S. E. 13, 15, 66 W. Va. 62.

Const. § 106, requires proof by affidavit of publication of notice of intention to apply for the enactment of a local law to be "spread" on the journal of each house. "While ordinarily the language employed might be interpreted to mean to be transcribed upon or written upon, yet it is susceptible of a more extended definition or meaning, and in order to uphold the constitutionality of the act, there being no express prohibition, nor one resulting from necessary implication, against the doing of the thing as it was done, that construction will be adopted, if reasonable, that will save the statute. The pasting of the written or printed copy of the notice and affidavit of notice upon the page of the journal was, in a sense, spreading the same upon the journal, and the doing of the thing in the way in which it was done indicates a legislative construction of that provision in the Constitution, and under all the circumstances this legislative construction is entitled to some consideration." *Dudley v. Fitzpatrick*, 39 South. 384, 386, 143 Ala. 162.

## SPREADER

An iron spike placed immediately behind a power saw, of sufficient height to prevent the saw from catching the material and throwing the same back with force against the operator, is called a "spreader." *Nickey v. Dougan*, 73 N. E. 288, 289, 34 Ind. App. 601.

A "spreader," used in connection with a rip saw, is a piece of iron or steel slightly thicker than and set about two inches behind the saw it is to be used with, so as to spread the seam in the wood, and thereby hinder the clamping of the saw. *Dean v. St.*

*Louis Woodenware Works*, 80 S. W. 202, 204, 106 Mo. App. 167.

## SPRING

See Early Spring; Live Springs.

Water rising to the surface of the earth from below, and either flowing away in the form of a small stream or standing as a pool or a small lake, is the definition of a "spring." *De Wolfskill v. Smith*, 89 Pac. 1001, 1003, 5 Cal. App. 175 (quoting Cent. Dict.).

In an action involving an alleged appropriation of certain springs, it appeared that certain so-called "springs" occupied a space of about one-half an acre, and that during a portion of the year about 10 acres was marshy, and a witness testified that the springs rested right on the brow of a drop-off; that there was quite a bit of water standing around in the springs, and it looked like there might be five or six springs; but the evidence showed that there was no stream leading into them, and that the water therefrom formed no channel or stream in leaving, though during a portion of the wet season some of the water would flow down, for a short distance on the side hill, where it would disappear in the soil. Held, that the pools of water were not live springs, and that they constituted nothing more than a bog occasioned by seepage water. *Dickey v. Maddux*, 93 Pac. 1090, 1091, 48 Wash. 411.

## SPRING BACK BOOK

"A 'spring back book' is one that is heavily reinforced with board or some such material in such a way as will make the back close quickly." *Commonwealth v. Bacon* (Ky.) 111 S. W. 387, 391.

## SPRING OR AUTUMN ELECTION

The words "at the next spring or autumn election," in Const. 1850, art. 20, § 1, as amended in 1876 (Pub. Laws 1877, p. 311), providing that any amendment to the Constitution proposed by the Legislature shall be submitted to the electors at "the next spring or autumn election" thereafter, etc., when considered in connection with article 4, § 34, and article 5, § 3, article 7, § 1, mentioning the general biennial fall election, and article 11, § 1, referring to an annual election on the first Monday of April in each organized township, and article 13, § 6, providing for the election of regents of the university at the time of the election of a justice of the Supreme Court, and Comp. Laws, § 178, providing for the holding of a general election in the townships and wards of the state on the first Monday of April in odd-numbered years, for the election of judges of the Supreme Court, refer to two state-wide elections, one in the fall of the even-numbered years, and the other in the spring of the odd-numbered years, and the spring election referred to does not include the election held in

April in the even-numbered years. *Chase v. Board of Election Com'rs of Wayne County*, 115 N. W. 454, 455, 151 Mich. 407.

Const. 1850, art. 20, §§ 1, 2, as amended in 1861 (Laws 1861, p. 589, Joint Res. No. 17), 1876 (Pub. Laws, p. 311), providing that amendments to the Constitution proposed by the Legislature shall be submitted to the electors at the next "spring or autumn election," and that the question of the general revision of the Constitution shall be submitted to the electors at the general election in 1886, and in each sixteenth year thereafter, and at such other times as the Legislature may provide, and in case the majority of the electors decide in favor of a convention the Legislature shall provide for the election of delegates, and all amendments shall take effect at the commencement of the year after their adoption, fixes the date of the submission to the electors of the adoption or rejection of a Constitution framed by a convention which completed its labors in February, 1908, as the next November election. *Carton v. Secretary of State*, 115 N. W. 429, 435, 151 Mich. 337.

#### SPRING SHOT

A "spring shot" in blasting is a shot so arranged that it simply makes a chamber at the bottom of the drilled hole, while a blast proper is a stronger charge and both tears and throws the earth and rock. *Spokane v. Patterson*, 89 Pac. 402, 403, 46 Wash. 93, 8 L. R. A. (N. S.) 1104, 123 Am. St. Rep. 921, 13 Ann. Cas. 706.

#### SPRING WATER

"Spring water" is water taken directly from a natural spring. Ordinary croton water drawn from the pipes in New York City, filtered and bottled after the addition of small quantities of mineral salts and carbonic acid gas, is not "spring water," as the term is generally understood, and the labeling of the bottles as "spring water" constitutes a misbranding, within the meaning of the Food and Drugs Act (Act June 30, 1906, c. 3915, § 8, 34 Stat. 771). The proof showed that ordinary croton water, like the water of any fresh water lake or river, is partly spring and partly rain and surface water, and was not what is commonly understood by the public as "spring water." *United States v. Morgan*, 181 Fed. 587, 588.

Sess. Laws 1889, p. 215, § 1, providing that all ditches constructed to utilize the waste, seepage, or spring waters of the state, shall be governed by the same laws relating to priority of right to water in ditches constructed for the purpose of utilizing the water of running streams, if valid, is applicable only to appropriations of "waste, seepage, and spring waters" before they reach a natural stream, whether by natural surface flow or percolation, or by being artificially turned into the same; and the waters after reaching a natural stream become, in the absence of

an intention by the owner to reclaim them, a part of the stream, and inure to the benefit of the appropriators of its waters. *La Jara Creamery & Live Stock Ass'n v. Hansen*, 83 Pac. 644, 645, 35 Colo. 105.

#### SPRINKLING

As street improvement, see Street Improvement.

#### SPROCKET CHAIN DRIVE

A "sprocket chain drive" is the equivalent of a "belt drive" as a means for propelling railway motor velocipedes. *Sheffield Car Co. v. Buda Foundry & Mfg. Co.*, 177 Fed. 713, 715.

#### SPUN CANDY

"Floss" or "spun candy" is candy consisting of threadlike or silklike filaments formed from melted sugar or candy. *Electric Candy Mach. Co. v. Morris*, 156 Fed. 972, 973.

#### SPUR TRACK

As railroad track, see Railroad Track.

#### SQUARE

See Public Square.

The word "square," when placed on the plat of a city addition, indicates a dedication for public use, either for purposes of a free passage or to be ornamented and improved for grounds of pleasure, amusement, recreation, or health; such being its proper and natural meaning, as well as its ordinary and usual signification. The word "square" as a term of dedication imports absolute and complete abandonment to such public uses. *Fessler v. Town of Union*, 56 Atl. 272, 275, 67 N. J. Eq. 14 (quoting *Trustees of Methodist Episcopal Church of Hoboken v. Mayor, etc., of City of Hoboken*, 83 N. J. Law, 13, 97 Am. Dec. 696).

Ky. St. 1903, §§ 3564, 3566, 3567, 3571, 3572, providing that the original construction of any street, etc., may be at the exclusive cost of the owners of the "lots and parts of lots or land" abutting on the street improved, etc., when corrected by substituting the word "of" for the word "or" in the quoted clause, and when considered in connection with the history of the legislation as shown in section 3564, providing that the construction of any street may be made at the cost of the owners of lots in each fourth of a square apportioned according to the number of square feet, and defining a "square" as a "subdivision of territory bounded on all sides by principal streets," and as amended by Act March 24, 1894 (Acts 1894, p. 350, c. 114) § 5, constituting section 3572, does not authorize a municipality to assess for a street improve-

ment a street car franchise to operate a line of roads in the center of the street improved. *City of Maysville v. Maysville, St. R. & Transfer Co.*, 108 S. W. 960, 962, 128 Ky. 673 (citing and distinguishing *City of Louisville v. Figg*, 75 S. W. 269, 116 Ky. 135; *Louisville & N. R. Co. v. Barber Asphalt Pav. Co.*, 76 S. W. 1097, 116 Ky. 856; *City of Ludlow v. Trustees of Cincinnati S. R. Co.*, 78 Ky. 357).

Under St. 1903, § 2833, providing that, when an improvement is the original construction of any street, it shall be made at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned according to the number of feet owned by them, that each subdivision of the territory bounded on all sides by principal streets shall be deemed a square, and that if the contiguous territory is not defined into squares by principal streets the ordinance shall fix the depth on both sides, it is not meant that squares are rectangular figures, or having four equal sides, or figures of any uniform shape or size; and wherever territory is bounded on all sides by "principal streets," it is a "square" within the meaning of the statute, though of course there may be territory of that description of such size as to indicate that it had not yet been divided into squares, in which event it would fall within the latter part of such section, and the mere fact that a square is larger than the average does not militate against the validity of an assessment, where it is shown that the square is bounded on all sides by principal streets and its size is not such as to warrant a finding that the city has not determined that it shall remain a square in its present form. *German Protestant Orphan Asylum v. Barber Asphalt Pav. Co. (Ky.)* 82 S. W. 632, 633.

#### As synonymous with block

The words "square" and "block," when used to designate a piece of land in a city, are synonymous terms. We find the word "square" used chiefly in Southern cities, and the word "block" elsewhere; but they mean the same thing. They mean a piece of land defined by streets surrounding it. *Gilsonite Roofing & Paving Co. v. St. Louis Fair Ass'n*, 132 S. W. 657, 660, 231 Mo. 589.

Rev. St. 1909, § 7201, makes it unlawful for a county court to grant a license to keep a dramshop in a town or city containing 2,000 inhabitants or more until a majority of the taxpaying citizens and guardians of minors holding property in the "block or square" in which the dramshop is to be kept shall sign the petition asking for such license to keep a dramshop in such block or square. Held, that the words "block" or "square" as so used were synonyms and contemplated a portion of a city inclosed by streets, whether occupied by buildings or composed of vacant lots;

the term "block or square" meaning a portion of ground in a town or city surrounded by streets, and hence a petition signed by only a majority of the owners of property within a section of a city bounded on two sides by streets, neither dedicated nor open to the public, but shown on the plat of that portion of the city, was insufficient. *Kochtitzky v. Herbst*, 140 S. W. 925, 929, 160 Mo. App. 443.

The word "block," as used with reference to subdivisions of land, is synonymous with the word "square," and means the territory bounded by four streets. An application for a liquor license, under an ordinance requiring that it shall be signed by a majority of the property owners, according to the frontage, "on both sides of the street in the block upon which such dramshop is to be kept, and \* \* \* by a majority of the bona fide householders and persons and firms doing business on each side of the street in the block upon which the dramshop is to have its main entrance," though signed by the property owners and householders and persons or firms doing business on both sides of the street in the block in which the dramshop is to have its main entrance, is insufficient to compel the issuance of a license, where it does not have the signatures of a majority of the property owners on both sides of the streets bounding the block in which the dramshop is to be located, for the word "block," as used in the first clause recited, means the territory inclosed by the four streets, and is synonymous with the word "square." *Harrison v. People ex rel. Boetter*, 63 N. E. 191, 192, 195 Ill. 466 (citing *Cent. Dict.*; *Webst. Dict.*; *City of Ottawa v. Barney*, 10 Kan. 270; *Olsson v. City of Topeka*, 21 Pac. 219, 42 Kan. 709; *State v. Defes*, 10 South. 597, 44 La. Ann. 164; *Todd v. Kankakee & I. R. Co.*, 78 Ill. 530; *City of Chicago v. Stratton*, 44 N. E. 853, 855, 162 Ill. 494, 501, 35 L. R. A. 84, 53 Am. St. Rep. 325).

#### As park

The word "park," written upon a block upon a map of city property, indicates a public use; and conveyances made by the owners of the platted land by reference to such map operate conclusively as a dedication of the block. There is little, if any, distinction between the words "park" and "square," and when used in this way they mean substantially the same thing. *Frauenthal v. Slaten*, 121 S. W. 395-398, 91 Ark. 350.

#### SQUARE INCH OF WATER

A column of flowing water measured by the square inch, instead of cubic inches, is intended by deeds providing for a measurement of water by "square inches"; but no accurate measurement can be made unless the velocity of the flow is determined. *Crane v. McMurtrie (N. J.)* 68 Atl. 392, 899.



**SQUARE LEAGUE**

A "square league," or "sitio de ganado mayor," appears to have been the only unit in estimating the superficies of land granted by the Spanish or Mexican authorities. Eleven of these leagues was the usual extent for a rancho grant. If more or less was intended in the grant, it was carefully stated. *Corrigan v. State*, 94 S. W. 95, 100, 42 Tex. Civ. App. 171.

**SQUARED TIMBERS**

The words "saw logs" and "squared timbers," as used in a contract for the delivery of a certain number of "saw logs" and an agreement to pay therefor two cents per cubic foot for "squaring said logs," has reference to logs that will square out at least 18 cubic feet to the log. *Hinote v. Brigman & Crutchfield*, 33 South. 303, 305, 44 Fla. 589.

**SQUAT****SQUATTED UPON**

A vendee in possession after breach of contract and notice to quit can be ousted only by action, and not by summary proceedings to recover real property under Code Civ. Proc. § 2232, subd. 4, authorizing such proceedings against a person who has "intruded into" or "squatted upon" real property without the permission of the person entitled to possession, or after a permission given by the person entitled to such possession has been revoked and notice of revocation given. *Stockwell v. Washburn*, 111 N. Y. Supp. 413, 415, 59 Misc. Rep. 543.

**SQUATTER**

A "squatter" may be defined to be a person who settles or locates on land, inclosed or uninclosed, with no bona fide claim or color of title and without the consent of the owner. *Baker v. State*, 71 S. E. 594, 9 Ga. App. 423 (Pen. Code 1910, § 216, subd. 4; 7 Words and Phrases, p. 6619).

One who takes possession of a tract of public land with a view to becoming an entryman under the homestead law, except as to the limited statutory time allowed him preceding actual entry at the land office, is a mere "squatter" having no rights in the land as against the government or others. *United States v. Bagnell Timber Co.*, 178 Fed. 795, 799, 102 C. C. A. 243.

Where a lease was terminated by a warrant in summary proceedings for nonpayment of rent, an assignment of the lease without the landlord's consent, in violation of the covenants of the lease, did not confer any right upon the assignee, where his occupancy of the premises covered by the lease did not begin until after its termination; but such occupancy rendered him a mere "squatter" or "intruder," within Code Civ. Proc. § 2232, subd. 4, authorizing summary proceedings to

recover possession of land from a person who has intruded into or squatted upon any real property without the permission of the person entitled to the possession thereof. *Mahoney v. Hoffman*, 109 N. Y. Supp. 13, 14, 58 Misc. Rep. 217.

**SQUEEZE****SQUEEZER**

A "squeezer" is the name applied to a machine used in the manufacture of iron and steel, the function of which is to receive the product of the furnace after it has passed from the furnace between the rolls, and further to compact it by hydraulic pressure. *Pflueger v. Lewis Foundry & Machine Co.*, 134 Fed. 28, 29, 67 C. C. A. 102.

**SR.**

The suffix "Sr." is not part of a man's name, and, except in a few instances, may be disregarded. *Ross v. Berry*, 124 Pac. 342, 343, 17 N. M. 48.

**STABLE**

See Livery Stable.

A stable in which stall room is leased to persons who care for and control their own horses and vehicles is not "a stable for taking horses and carriages for hire," within Rev. Laws, c. 102, § 70, prohibiting the erection of such a stable within 200 feet of a church. The word "hire" in that act must be taken to have its secondary meaning of compensation or pay as distinguished from its more accurate meaning of compensation for use, and the words "take in upon hire" were inserted to make certain that a boarding stable was within the act. *Congregation Beth Israel v. O'Connell*, 72 N. E. 1011, 187 Mass. 236.

**As building**

See Building.

**Garage**

A restriction in a deed of property in a fine improved residence district, intended for the benefit of the grantor and his grantees, declared that "no stable of any kind, private or otherwise, shall be erected or maintained on any portion of said land," and that no building erected on the land should be used for any manufacturing or mechanical purpose. Held, that a building on such property, used by defendants as a garage for their own automobiles, was not a "stable," within the restriction. *Riverbank Imp. Co. v. Bancroft*, 95 N. E. 216, 218, 209 Mass. 217, 34 L. R. A. (N. S.) 730, Ann. Cas. 1912B, 450.

**STACK**

A "stack" of hay is a large pile gathered after the hay has been seasoned, as distinguished from a "cock" or "shock" which is a

small pile into which the hay is gathered after being mowed, and thus permitted to remain until seasoned. *People v. Doyle*, 110 Pac. 458, 459, 13 Cal. App. 611.

A "stack" is defined as being a "pile of grain in the sheaf, or of hay, straw, peas, etc., gathered into a circular or rectangular form, often, when of large size, coming to a point or ridge at the top, and thatched to protect from the weather." A lightning policy on grain "stacks" on a farm covers grain stacked under a shed. *Farmers' Mutual v. Reser*, 88 N. E. 349-352, 43 Ind. App. 634; *Id.*, 88 N. E. 353, 43 Ind. App. 738.

## STAGE

See At Any Stage; Entertainment of the Stage.

Stage of manufacture, see Degree.

## STAGE LINE

"Stage line," "railroad line," and "automobile line" are expressions which are ordinarily understood to be a regular line of vehicles for public use operated between distant points, or between different cities, and do not include hacks, stages, and automobiles, which merely operate from point to point in one city for the transportation of the public. That defendant's hack's or other similar vehicles regularly met railway trains at a station, and for hire transported passengers in that town, was not the operation of a hack line within the license law. *Commonwealth v. Walton*, 104 S. W. 323, 126 Ky. 523.

## STAGE OF CASE

Where, under Rev. St. § 880, a party is charged with attempting to prevent a witness from appearing or testifying in the case of *State v. A. B.*, "charged with larceny," such attempt is alleged to have been committed in a "stage of a criminal case," within the meaning of the law. *State v. Sullivan*, 51 South. 588, 589, 125 La. 560; *Same v. Hood*, 51 South. 589, 125 La. 563.

## STAGECOACH

As used in Ky. St. 1903, § 4724, regulating rate of toll on turnpikes, provides a certain charge for each pleasure or hackney coach, and a different charge for each stagecoach, vehicles used for carrying passengers, express matter, and mail were "stagecoaches." *Burton v. Monticello & B. Turnpike Co. (Ky.)* 109 S. W. 319.

## STAGING

As appliance, see Appliance.

As place of work, see Place.

## STAGGERING DRUNK

See Drunk.

## STAGNUM

The word "stagnum" comprehends both land and water. *Conover v. Atlantic City Sewerage Co.*, 57 Atl. 897, 898, 70 N. J. Law, 315.

## STAINED EARTHENWARE

Earthenware, to which a single color glaze has been added, is, under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 96, 30 Stat. 156, not only "decorated," but "stained," within the meaning of the paragraph. *United States v. L. Straus & Co.*, 168 Fed. 569, 570.

## STAIRWAY

### Ladder distinguished

A declaration by a servant for injuries alleged that defendant maintained "a one and two story building, \* \* \* a one story building having a second story or cupola, or a portion of the same near the middle part which was connected to the first story" by a "stairway which was in fact a ladder" not having any handrail, by reason of which plaintiff fell and was injured. Held, that the terms "stairway" and "ladder" are not synonymous, a stairway pertaining to architecture and having various technical parts, consisting of risers, treads, nosings, fliers, and winders, and being stationary, while a ladder is in the nature of a tool, consisting of a frame, usually portable, of wood, metal, or rope, used for ascent or descent, consisting only of two parts, the sides and cross-steps or rounds, which form the steps, and a cupola is not a story of a building, but is the top of a structure, usually a cup-shaped spherical roof, though the term is also applied to any similar structure rising above the roof of a building, whatever its shape may be; and, while the declaration was indefinite as to the description of the building, an allegation that plaintiff was required to use such "stairway" in the course of his employment sufficiently alleged a violation of Pub. Laws 1909, No. 285, § 14, providing that stairways with substantial handrails shall be provided in manufacturing establishments, and, where necessary, steps shall be substantially covered with rubber for the better safety of persons employed in such establishments, the risk of which plaintiff did not assume, and was therefore not demurrable. *Davis v. Buss Mach. Works*, 135 N. W. 303, 304, 169 Mich. 498.

## STAKE

See Grub Stake.

### In gaming

"Stakes," in the ordinary sense of the term, signifies something deposited by two persons with the third on condition that it is to be delivered to the one who shall become

entitled to it by the happening of a specified contingency. *Baxter v. Deneen*, 57 Atl. 601, 607, 98 Md. 181, 64 L. R. A. 949, 1 Ann. Cas. 147.

### STAKING IT

In operating a "cradle," which is a short detached track made to fit over a ground track with rails extending to a boat called "feather rails" which lap over the rails of the regular track of a railroad, so that a car can be shoved along the main track until it reaches the thin edge, when it will proceed along the cradle track to a boat, the adjusting of the cradle track at the right point is called "staking it," and is done in this manner: A wooden beam is put against the land end of the cradle, and the other end of the beam is attached to a locomotive, which pushes the track toward the river or pulls it away as may be necessary; the steamboat pushing or pulling on the cradle at the other end. *Burke v. St. Louis Southwestern R. Co.*, 97 S. W. 981, 120 Mo. App. 683.

### STALE

A suit to correct a mistake in a deed, brought more than 40 years after its date, with no excuse pleaded or proved for the delay, will be deemed a "stale" demand. *William Carlisle & Co. v. King* (Tex.) 122 S. W. 581, 583.

Entirely independent of any statutory period of limitations, equity will not enforce "stale demands," where the complainant has inexcusably slept upon his rights for so long a time and under such circumstances as to make it inequitable to enter upon an inquiry as to the validity thereof. *Kleinclaus v. Dutard*, 81 Pac. 516, 147 Cal. 245.

Where a demand was entered in favor of plaintiff, quieting title in certain land, but, by a mistake of the clerk, described the land as in fractional section No. 92, instead of fractional section No. 2, and plaintiff, without excuse, failed to discover the mistake for more than four years, when he filed a petition for correction, his claim was a "stale demand," and his right to relief was barred by laches. *Rogers v. Waggoner* (Tex.) 149 S. W. 561, 562.

### STALL

A "stall" for a horse is necessarily a quadrangular box. It must under any device have posts and sides. A certain patent on a portable horse stall held, under the evidence, not a mere improvement of a former patent obtained by the same person on a portable stall, but a distinct and independent contrivance, so that no interest therein passed under an assignment by the patentee of an interest in the former patent. *Stitzer v. Withers*, 91 S. W. 277, 279, 122 Ky. 181.

### STAMP

See Tax-Paid Spirit Stamps; Trading Stamp.

As property, see Property.

Where a witness testified that defendant stated he kicked and stamped deceased, an instruction that if defendant, by "stamping," kicking, and beating deceased, etc., was not objectionable in the use of the word "stamping," being but another form of saying that defendant kicked deceased. *Grant v. State*, 120 S. W. 481, 483, 56 Tex. Cr. R. 411.

### STAMP BUSINESS

See Trading Stamp Business.

### STAMP COMPANY

See Trading Stamp Company.

### STANCHION

The "stanchions" of a vessel are the parts of wood or iron placed so as to support the beams of the vessel. *W. S. Keyser & Co. v. Duit*, 150 Fed. 328, 80 C. C. A. 212 (citing *Patterson's Nau. Ency. verbo "Stanchions"*).

### STAND

See Trolley Stand.

### STAND BEHIND

Representations as to the condition of mules, made at the time of sale, and which induced the purchase, and accompanied by a statement of the seller that he would "stand behind" the mules, are warranties. *Mosby v. Larue*, 136 S. W. 887, 888, 143 Ky. 433.

### STAND BY

See Stood by, Aided, Abetted, or Assisted.

The phrase "stands by," within the equitable principle that one is estopped to claim title to land which, while standing by, he has permitted another to mortgage or sell, does not necessarily mean actual presence, but implies knowledge under such circumstances as render it the duty of the possessor to communicate it. *Gaddes v. Pawtucket Inst. for Savings*, 80 Atl. 415, 33 R. I. 177, Ann. Cas. 1913B, 407.

### STAND CONDEMNED

"A man's land should 'stand condemned' when, and only when, every step which the law prescribes to that end has been taken. Every reasonable doubt should be resolved in favor of the citizen. It is well known that charters are obtained by those most interested in securing the largest delegation of power possible. The owner, whose property is to be condemned, has no opportunity to be heard. The constitutional provision requiring notice of the introduction of private laws has, by custom and construction, been practically abrogated. Power is ever aggressive, and often indifferent to individual rights.

Recognizing these truths, taught by experience, the courts have wisely declared that all grants of power are to be construed strictly against the grant, and liberally in favor of the citizen." *Creedmoor Charter* (Priv. Acts 1905, p. 1006, c. 398) § 17, provides for the condemnation of land for street purposes, and declares that the report of appraisers shall lie in the mayor's office for purposes of inspection and appeal, and that, unless an appeal is taken from such report, the land so appraised shall stand condemned for the use of the town and the price fixed shall be paid. Held, that such provision applied only to the procedure for fixing the price to be paid, and should be construed to mean that if no appeal was taken from the appraised value the land should stand condemned at such value, but does not suspend the right of entry if an appeal is taken. *State v. Jones*, 52 S. E. 240, 248, 139 N. C. 613, 2 L. R. A. (N. S.) 313.

### STAND GOOD

#### As a guaranty or suretyship

An agreement to "stand good" for the board of another does not imply a guaranty or suretyship. One may "stand good" for a debt of his own, or for goods which he may purchase for another, and yet be the original and only obligor. *McNabb v. Clipp*, 81 N. E. 858, 859, 5 Ind. App. 204.

### STAND MUTE

See *Stood Mute*.

### STAND SUSPENDED

See *Suspend—Suspension*.

### STANDING

See *Good Standing*.

### STANDING CAR

Under a street railroad rule that, when passing standing cars, the gong must be rung and the car stopped with the front end opposite the rear of the standing car, the word "standing" was not limited to the passing of cars absolutely at rest, but included cars that had stopped and had just started from which passengers might have alighted. *Birmingham Ry., Light & Power Co. v. Morris*, 50 South. 198, 203, 163 Ala. 190.

### STANDING OR ERECTED UPON

The phrase "building standing or erected upon," as used in P. L. p. 378, providing for an assessment for damages to the owner of buildings standing or erected upon any street, the grade whereof has been changed, applies only to buildings fronting upon or possessing an entrance upon the street. *Delaware, L. & W. R. Co. v. City of Summit*, 72 Atl. 83, 84, 77 N. J. Law, 438.

### STANDING TIMBER

As interest in land, see *Interest* (In Property).

See, also, *Stumpage*.

"Standing timber" is a part of the freehold. *Marion County Lumber Co. v. Tilghman Lumber Co.*, 66 S. E. 124, 125, 84 S. C. 505.

## STANDARD

See *Fixed Standards*; *Mutual Standard*.

### STANDARD DEVELOPMENT OF STREAM

"Standard development of a stream" means the power which the stream affords by a natural, unobstructed flow to be used in a continuous 24-hour daily use. *Hazard Powder Co. v. Somersville Mfg. Co.*, 61 Atl. 519, 520, 78 Conn. 171, 112 Am. St. Rep. 144.

### STANDARD SCHEDULE RATE

Acts 1905, p. 873, c. 410, provides that it shall be unlawful for any person not the authorized agent of a carrier issuing the same to sell or deal in any passenger ticket issued and sold "below the standard schedule rate under contract that it shall be nontransferable." Held that, since standard schedule rates are fixed with reference to interstate commerce by Interstate Commerce Act, § 6, and with reference to intrastate commerce by Acts 1897, p. 121, c. 10, § 22, the act was not invalid for uncertainty of the expression "standard schedule rate." *Samuelson v. State*, 95 S. W. 1012, 1017, 116 Tenn. 470, 115 Am. St. Rep. 805.

### STANDARD TIME

"Allowing one hour for each 15 degrees of longitude west from Greenwich, the seventy-fifth meridian passing somewhere near Washington, the ninetieth near St. Louis, and so on, and by establishing one uniform standard of time for all the territory within each of the sections named, a satisfactory, practical basis is attained." Where a policy expired on a certain day at "noon," parol evidence was admissible to establish that, by a well-known custom of the place where the contract was made, the word "noon" was used to mean 12 o'clock midday, "standard time," and was so intended by the parties to the contract, instead of 12 o'clock sun time. *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.*, 87 S. W. 1115, 1118, 120 Ky. 752, 1 L. R. A. (N. S.) 464, 9 Ann. Cas. 324.

## STARBOARD

See *Tribord*.

## STARE DECISIS

See, also, *Law of the Case*.

"The doctrine of 'stare decisis,' commonly called the 'doctrine of precedents,' has been firmly established in the law. It means that we should adhere to decided cases and

settled principles, and not disturb matters which have been established by judicial determination." *Johnson v. Western Union Tel. Co.*, 57 S. E. 122, 124, 144 N. C. 410, 10 L. R. A. (N. S.) 256, 119 Am. St. Rep. 961 (quoting and adopting the definition of Justice Walker in *Hill v. Atlantic & N. C. R. Co.*, 55 S. E. 854, 143 N. C. 539, 9 L. R. A. (N. S.) 606.

It is well settled as a general proposition, admitting, however, of exceptions, that courts will adhere to and follow decisions of the highest court of the jurisdiction, where the same points come again in litigation; and the rule is of universal application, where the law has become settled as a rule of property by reason of such earlier decisions, and rights have become vested on the faith of them. This is the doctrine of "stare decisis." *Shoemaker v. Cincinnati*, 68 N. E. 1, 2, 68 Ohio St. 603.

Prior decisions of inferior courts cannot afford a basis for the application of the doctrine of "stare decisis." *City of Sedalia, to Use of Sedalia Nat. Bank, v. Donohue*, 89 S. W. 386, 388, 190 Mo. 407, 4 Ann. Cas. 89.

The maxim "stare decisis" does not contemplate whatever a court may happen to say in a discursive argument of a cause, or even several causes, but has regard only to points and adjudications actually involved as essential elements in the questions in actual controversy. *Ingham v. Wm. P. Harper & Son*, 128 Pac. 675, 676, 71 Wash. 286.

The maxim of "stare decisis" applies only to decisions on points arising and decided in causes, and the precedent includes the conclusions only upon questions which the case contains and which are decided. *Koerner v. St. Louis Car Co.*, 107 S. W. 481, 485, 200 Mo. 141, 17 L. R. A. (N. S.) 292.

Where a series of decisions of a court of last resort have been acted upon as the proper interpretation of the law for a long time, they will not be interfered with, though the courts will decide otherwise, were the question a new one. *Inman v. Sherrill*, 116 Pac. 426, 427, 29 Okl. 100.

The doctrine of "stare decisis" does not prevent a re-examination and correction of principles previously declared. It does not prevent a re-examination of the question of the method of impeaching accused, testifying in his own behalf, by proof of a prior conviction of crime, and a correction of the previously declared law, if found erroneous. *Commonwealth v. Walsh*, 82 N. E. 19, 198 Mass. 369, 124 Am. St. Rep. 559, 13 Ann. Cas. 642.

The rule of "stare decisis" applies with special force to an opinion prescribing rules for the location of survey lines, handed down several years ago, as it must be presumed that since it was delivered, many surveys have been made, grants issued, and titles confirmed under its authority, and it has thus

become a part of the practical construction of many thousands of grants and conveyances. *Morgan v. Renfro*, 99 S. W. 311, 314, 124 Ky. 314.

"Stare decisis" means to follow precedent, and is founded upon the broad principle that the law governing commercial transactions and affecting property rights should remain settled, and not be subject to flexible and restless precepts. Courts ought not, and will not, disturb contractual relations or valuable rights resting upon the strength of decisions by courts of last resort, but will adhere to the maxim "stare decisis," when necessary for their protection and enforcement, where the facts are substantially the same as those upon which the former decisions were grounded, "except from the most urgent consideration of public policy"; but the rule does not require a court to enforce a rule of law disapproved by the court of last resort, though announced by a court having at the time equal jurisdiction, unless a refusal would amount to a trap into which parties had been thereby induced to enter, to their irreparable injury. Subsequent to the execution of a contract for the drilling of a gas well, the Appellate Court decided that such contracts ran only from year to year, and that at the end of any year either party could terminate the agreement. Thereafter the Supreme Court placed a different construction on such contracts. There was nothing to show any arrangement between the parties to the contract, based on the faith of the decision of the Appellate Court. Held, that the rule of stare decisis did not require the trial court to enforce the rule of law as previously laid down by the Appellate Court. *Diamond Plate Glass Co. v. Knote*, 77 N. E. 954, 955, 38 Ind. App. 20.

## START

"Start" means to cause to move; to set going; to give an initial impulse, as to start a train; to cause to begin to move; the beginning, as of a journey or course of action; initial impulse or movement; first motion from a place. *Knuckey v. Butte Electric R. Co.*, 109 Pac. 979, 981, 41 Mont. 314.

## STARTED

An allegation that a street car "started" is, by necessary implication, an allegation that the car was stationary at the time. A thing cannot start without a stop. The one includes the other, *ex vi termini*. *Peterson v. Metropolitan St. R. Co.*, 111 S. W. 37, 42, 211 Mo. 498 (citing and adopting *Flaherty v. St. Louis Transit Co.*, 106 S. W. 21, 207 Mo. 318).

## STARTING PLACE

See Place of Starting.

Rev. St. 1895, art. 4494, requires railroad corporations to run cars at regular

times and to furnish sufficient accommodations at the place of starting, the junction with other railroads, and at sidings and stopping places established for receiving and discharging way passengers and freights. Article 4519 requires every railroad company to erect at every station or place for the reception and delivery of freight suitable buildings to protect freight. Article 4562, subd. 12, requires every railroad company to maintain depot buildings at its several stations for passengers and to maintain freight depots. Article 4579, subd. 1, requires the Railroad Commission to enforce all laws in reference to railroads. Held, that the Railroad Commission is bound, not only to enforce the regular running of the trains, but also the requirement as to starting places, junctions, etc., and may require a railroad company to locate a station and construct a depot where the railroad company is bound under the law to locate a station, and that a place located on the state line through which a railroad runs, which is located more than nine miles from the nearest station in the state, is a "starting place" within the meaning of the statute, and the company may be required to locate a station there, although it has a station within 900 feet of the place in another state. *Railroad Commission of Texas v. Chicago, R. I. & G. R. Co.*, 117 S. W. 794, 796, 102 Tex. 303.

## STATE

See Controversy between Citizens of Different States and Citizens of State and Foreign Subjects; Controversy between States; Courts of the State; In this State; Law of the State; Out of the State; Particular State; People of the State; Property of State; Property within the State; Suit against the State; Waters of the State; Within the State; Without the State; Works of the State.

Belonging to state, see Belong—Belonging.

Debt owing the state, see Debt Owed.

Employed within the state, see Employed.

Law of the state, see Law.

Other state, see Other.

Resident of state, see Resident.

Statute of a state, see Statute.

When the Constitution speaks of a "state," and inhibits the doing of certain things, it sometimes includes under the term every instrumentality or agency of the state which presumes to act by authority of the state, and in other cases the action of the state in its sovereign or legislative character is alone referred to. *Karem v. United States*, 121 Fed. 250, 256, 57 C. C. A. 486, 61 L. R. A. 437.

In the case of *State v. Wilmington City Council* (Del.) 3 Har. 204, it was said: "The question presented is whether the office of

treasurer of a public corporation such as the city of Wilmington comes within the true meaning and import of the term 'civil office in the state,' as used in the Constitution. The word 'state' has two meanings, and is used in both of them in different parts of that instrument. In one sense, it signifies the territory inhabited by the people; in the other, it means the body politic inhabiting the territory. So that the term 'civil office in the state' may mean either 'civil office in the territory' or 'civil office in the frame of government or political organization' which it was the business of the convention to establish." *Pol. Code Ga.* 1895, § 223, declaring that persons holding any office of profit or trust under the government of either of the several states, or of any foreign state, are held and deemed ineligible to hold any civil office in this state, did not render one who held the office of solicitor of the county court of a county ineligible to hold the office of mayor of a municipal corporation located in such county. *Long v. Rose*, 64 S. E. 84, 85, 132 Ga. 288.

*Code Civ. Proc.* §§ 1667, 1668, providing for treble damages for the cutting of trees, do not relate to damages to trees on lands of the state. The operation of the statute is limited to the lands of persons, and of cities, villages and towns, and does not extend to lands of the state. The "state" is a political corporate body. If treble damages had been intended as to the cutting of trees on its land, it would have been named. It is not a person within the meaning of the word as there employed. Not being within the list of corporate bodies therein mentioned the state may not be regarded as included within its provisions. *People v. Bennett*, 107 N. Y. Supp. 406, 407, 56 Misc. Rep. 160.

### As all state agencies

The word "state" in Const. U. S. Amend. 14, providing that no state shall deprive any person of life, liberty, or property without due process of law, includes its officers, its courts, and other governmental agencies. All of them are included in the prohibitions. *Ex parte Powers*, 129 Fed. 985, 988.

General and implied powers arising out of the charter of a municipal corporation do not constitute such legislative authority for an ordinance passed by the municipality repealing or repudiating a prior ordinance by which it entered into a contract as to render it an "act of the state" within the contract clause of the federal Constitution. *American Telephone & Telegraph Co. of Alabama v. New Decatur*, 176 Fed. 133, 136.

The word "state," in Const. U. S. art. 1, § 10, providing that no "state" shall pass a law impairing the obligation of contracts, includes a city or other subdivision or agency of a state. A resolution of a city council directing the removal from the streets of the tracks of a street railroad company is a law

of the state within the constitutional provision where under the state law, the resolution is as effective for the intended purpose as an ordinance would be. *Des Moines City R. Co. v. Des Moines*, 151 Fed. 854, 858, 859.

Where a state has conferred power on some one of its agencies to perform a certain function involving the exercise of discretion, the performance of such function within that grant, although in a manner to render it obnoxious to the laws of the state, is none the less the act of the "state" within the contemplation of the constitutional prohibition against deprivation of life, liberty, or property without due process of law. *San Francisco Gas & Electric Co. v. City and County of San Francisco*, 189 Fed. 943, 949.

**As citizen**

See Citizen.

**As company**

See Company.

**As corporation**

See Corporation.

**As jurisdiction**

Under Cr. Code, § 272, making it an offense for any person to hire, persuade, or induce a witness in a criminal case to leave the "state," so that he cannot be produced as a witness, an indictment alleging that witnesses were induced to absent themselves from the "jurisdiction" of the court was sufficient, as the word "jurisdiction" is synonymous with the word "state" as used in the statute. *Tedford v. People*, 76 N. E. 60, 62, 219 Ill. 23.

**As municipal corporation**

See Municipal Corporation.

**As owner**

See Owner.

**As the people**

A "state" has been defined as "a body politic or a society of men united together for the purpose of promoting their mutual comfort and advantage by the joint efforts of their combined strength, \* \* \* as a self-sufficient body of persons united together in one community for the defense of their rights and for other purposes. In this sense 'state' means the whole people united together in one body politic. It must be an organization of the people for political ends. It must permanently occupy a fixed territory. It must possess an organized government capable of making and enforcing the law within the community. \* \* \* A community cannot be considered a 'state' if the government is permanently incapable of enforcing its own laws." *Ex parte Corliss*, 114 N. W. 962, 980, 16 N. D. 470.

It is not merely the Legislature, or the executive, or the judiciary, but it is the entire body of the people, who together form the body politic known as the "state." This meaning is applicable in the rule that "the

extent to which the people of a municipality shall be allowed to directly participate in the governmental function of legislating therefor in local or municipal affairs is \* \* \* purely a question of state policy, in the determination of which the state is not restricted by any provision of the federal Constitution." *In re Pfahler*, 88 Pac. 270, 274, 150 Cal. 71, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911 (citing *Penhallow v. Doane's Adm'rs* [Pa.] 3 Dall. 54, 19 Fed. Cas. 151, 1 L. Ed. 507; *Brown v. State*, 5 Colo. 496).

**As person**

See Person.

**As real party in interest**

See Real Party in Interest.

**District of Columbia and territories**

A citizen of a territory is not a "citizen of a state," so as to confer federal jurisdiction on the ground of diverse citizenship. *Clark v. Southern Pac. Co.*, 175 Fed. 122, 125.

"A citizen of one of the territories of the United States is not a 'citizen of a state' within the meaning of the Constitution and judiciary acts." Hence an action by a citizen and resident of the Indian Territory against a citizen of a state is not removable to the federal court for diversity of citizenship. *Kansas City S. R. Co. v. McGinty*, 88 S. W. 1001, 1003, 76 Ark. 356 (quoting and adopting the language of *Dick v. Foraker*, 15 Sup. Ct. 124, 155 U. S. 404, 39 L. Ed. 201; citing *Hooe v. Jamieson*, 17 Sup. Ct. 596, 166 U. S. 395, 41 L. Ed. 1049; *Mansfield, C. & L. M. R. Co. v. Swan*, 4 Sup. Ct. 510, 111 U. S. 379, 28 L. Ed. 462; *Snead v. Sellers*, 66 Fed. 372, 13 O. C. A. 518).

A resident of the District of Columbia, although not a "citizen of a state" within the constitutional provision giving the federal courts cognizance of suits between citizens of different states, may maintain a cross-bill in a suit in such a court for relief which is ancillary to that sought in the original suit; the citizenship of the parties in such case being immaterial. *Ulman v. Jaeger's Adm'r*, 155 Fed. 1011, 1018.

A "state," as used in Rev. St. U. S. § 5339, and U. S. Comp. St. 1901, p. 3627, which provides that a person who commits murder upon the high seas, etc., and out of the jurisdiction of any particular "state" shall suffer death, refers only to the territorial jurisdiction of one of the United States, and not to any other government or political community. A murder committed on board ship lying in the harbor of Honolulu is cognizable in the District Court of the United States for the territory of Hawaii, under section 5339, as one committed in a haven or arm of the sea within the admiralty and maritime jurisdiction of the United States and "out of the jurisdiction of any particular state." *Wynne v. United States*, 30 Sup. Ct. 447, 448, 217 U. S. 234, 54 L. Ed. 748.

The language of the judiciary act, providing that the jurisdiction of the Circuit Courts of the United States shall extend to "controversies between citizens of different states" and also to "controversies between a citizen of a state and foreign citizens or subjects," cannot be construed to include a controversy between aliens, or a controversy between citizens of different territories or between a citizen of a state and a citizen of a territory. "Territory" is not a state within the meaning of the act defining the jurisdiction of the federal courts. *McClelland v. McKane*, 154 Fed. 164, 165 (citing *Barney v. Baltimore*, 73 U. S. [6 Wall.] 280, 287, 18 L. Ed. 825; *Watson v. Bonfils*, 116 Fed. 157, 53 C. C. A. 535; *Weller v. Hanaur*, 105 Fed. 193; *Johnson v. Bunker Hill & S. M. & C. Co.*, 46 Fed. 417; *Seddon v. Virginia, T. C. S. & I. Co.*, 36 Fed. 6, 1 L. R. A. 108).

#### Foreign state

Act Cong. June 29, 1906, c. 3591, § 7, 34 Stat. 595, amending Hepburn Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386, provides that any common carrier receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property, caused by it or by any connecting carrier, to which the property may be delivered, or over whose line or lines the property may pass, and that no contract, rule, receipt, or regulation shall exempt any such carrier from the liability so imposed. Held, that the word "state" was used in such provision in its limited sense to represent and include only the states of the federal Union, and that such section had no application to a shipment of cotton from a point in Texas to a foreign country. *Houston E. & W. T. R. Co. v. Inman, Akers & Inman*, 134 S. W. 275, 277.

#### STATE AID

Pub. Acts 1911, c. 187, provides that every resident Civil War veteran honorably discharged, or his widow, or widowed mother, resident in the state, or pensioned widows, fathers, and mothers, resident in the state, shall be paid by the state as "state aid" the sum of \$30 each, annually. Held, as "state aid" to those who do not need it, the statute to whom it is granted, and no public purpose may be subserved by taking property by taxation and giving it under the guise of "state aid" to those who do not need it, the statute is improper as furnishing aid to all classes regardless of their need. *Beach v. Bradstreet*, 82 Atl. 1030, 1034, 85 Conn. 344.

#### STATE ATTORNEY

As county officer, see County Officer.

#### STATE BAR ASSOCIATION

As political corporation, see Political Corporation.

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#### STATE BOARD OF CONTROL

As educational corporation, see Educational Corporation.

#### STATE BOARD OF HEALTH

As corporation, see Corporation.  
As individual, see Individual.

#### STATE BUSINESS

See Ordinary State Business.

#### STATE CIVIL SERVICE

Employees of the board of elections of the city of New York, existing under Election Law, art. 7, providing for a board of elections in every city of the first class, including within its boundaries one or more counties and in other counties, to execute the election laws within their respective cities or counties, empowering the board of aldermen of the city of New York to appoint the board for the city, and making the expenses, including salaries of the board, a charge against the city, are in the "state civil service" within Civil Service Law, § 2, subds. 4, 5, providing that the state civil service shall include all offices and positions in the service of the state or any of its civil divisions, except a city, and that the city service shall include such positions in the service of the city. *People ex rel. Werner v. Prendergast*, 136 N. Y. Supp. 688, 689, 152 App. Div. 104.

#### STATE CONSTITUTION

A "state Constitution" is really nothing but a law made directly by the people voting at the polls upon a draft submitted to them. The people of a state, when they so vote, act as a primary and constituent assembly, just as if they were all summoned to meet in one place like the folkmoets of our Teutonic forefathers. It is only their numbers that prevent them from so meeting in one place, and oblige the vote to be taken in a variety of polling places. Hence the enactment of a Constitution is an exercise of direct popular sovereignty, to which we find few parallels in modern Europe, though it was familiar enough to the republic of antiquity, and has lasted until now in some of the cantons of Switzerland. It is the highest legislative assembly recognized in law, invested with the right of enacting or framing the supreme law of the state. *Smith v. State ex rel. Hepburn*, 113 Pac. 932, 934, 28 Okl. 235; *Frantz v. Austry*, 91 Pac. 193, 204, 18 Okl. 561 (quoting and adopting the definition in 1 Bryce's Am. Com. 436; *Goodrich v. Moore*, 2 Minn. 61 [Gil. 49], 72 Am. Dec. 74).

#### Federal Constitution distinguished

"The principle that the expression of one thing is the exclusion of another \* \* \* is not fully applicable in construing a state as distinguished from a federal Constitution. The latter is an instrument of grants, the former one of limitations, of power. Merely because in the section [of the state Con-



stitution] relating to district courts the power of interchange is given, and the section applicable to county courts is silent, it is neither a logical nor a necessary deduction that the Legislature cannot confer upon county judges the right of interchange." *Prudential Ins. Co. of America v. Hummer*, 84 Pac. 61, 62, 36 Colo. 208.

### STATE COURT

See Courts of the State.

Proceeding in, see Proceeding.

A municipal court, established under Laws 1895, c. 229, as amended, is a "state court," within the meaning of Const. art. 6, § 1, requiring all inferior courts not therein specified to be established by the Legislature by a two-thirds vote. *State ex rel. Simpson v. Fleming*, 127 N. W. 473, 474, 112 Minn. 136.

The recorder's court of the city of Detroit authorized by the charter to administer the general laws of the state is, when trying an offense under state law, a "state court," and cannot take judicial notice of ordinances of the city of Detroit, though for certain purposes it is a municipal court. *People v. Quider*, 137 N. W. 546, 548, 172 Mich. 280.

### STATE DEBTS

Chapter 49, p. 54, Laws 1903, which authorizes the issuance of \$60,000 in bonds for the purpose of procuring funds to erect and equip buildings for the State Normal School at Valley City, and appropriates a sufficient portion of the interest and income dedicated to the support of that institution to repay the principal and pay the interest on the sum so borrowed, is unconstitutional and void for the following reasons: (1) It authorizes the creation of a "state debt" in excess of the state debt limit, in violation of section 182 of the state Constitution; (2) it authorizes the creation of a "state debt," and does not provide for a tax levy to pay the principal and interest, as required by said section; (3) it diverts the interest and income dedicated to the support of this institution to the payment of the "state debt," in violation both of the enabling act and of the state Constitution. *State ex rel. Board of University and School Lands v. McMillan*, 96 N. W. 310, 311, 322, 12 N. D. 280.

### STATE FARM

A farm leased by the state is a "state farm," within Const. art. 10, §§ 223, 226, forbidding the leasing of convicts, and providing that the Legislature may place them on state farms and have them work thereon under state supervision, and may buy farms for that purpose. *State v. Henry*, 40 South. 152, 155, 87 Miss. 125, 5 L. R. A. (N. S.) 340.

### STATE GOVERNMENT

See Branch of State Government; Full State Government.

Municipal government distinguished, see Municipal Government.

The phrase "state government," in the enabling act authorizing the people of Oklahoma and Indian Territory to form a Constitution and state government, includes counties and townships, and in the absence of any express prohibition on the constitutional convention it had complete power to establish and define the counties in the proposed state, as a necessary incident to the formation of a state government. Power to form a state government clearly implies the power to create and define every county within the limits of the new state. *Frantz v. Autry*, 91 Pac. 193, 211, 18 Okl. 561; *Board of Com'rs of Greer County v. Constitutional Delegate Convention of Oklahoma and Indian Territories*, 91 Pac. 239, 240, 18 Okl. 707.

### STATE HIGHWAY

All public highways are "state highways," and the state is the sole arbiter of the manner and conditions of their improvement, except as limited by the Constitution. *Cummins v. Pence*, 91 N. E. 529, 531, 174 Ind. 115.

### STATE HOSPITAL

As corporation, see Corporation.

### STATE INSTITUTION

The State College of Washington is a "state institution." *State ex rel. Johnson v. Clausen*, 90 Pac. 743, 744, 51 Wash. 548.

The fact that a charitable institution is by statute given the right to detain a person committed to it by a magistrate or court does not render the institution a "state institution" or a governmental agency. *Gallon v. House of Good Shepherd*, 122 N. W. 631, 633, 158 Mich. 361, 24 L. R. A. (N. S.) 286, 133 Am. St. Rep. 387.

Under the Military Code, a national guard armory is a "state institution," within Labor Law (Laws 1897, p. 462, c. 415) § 3, declaring that the provision that eight hours shall constitute a day's work does not apply to employes of state institutions. *Burns v. Fox*, 90 N. Y. Supp. 254, 255, 98 App. Div. 507.

### STATE LANDS

See Classes of State Lands; Public Lands.

### STATE OFFICE

See Office under the State.

Civil office under the state, see Civil Officer.

The office of prosecuting attorney must be held a "state office" within Const. art. 19, § 23, providing that no officer of the state, nor of any county, city, or town, shall receive for salary, fees, etc., more than \$5,000 net profits per annum, and requiring all sums in excess thereof to be paid into the state, county, or city treasury, notwithstanding that Act Feb. 1, 1875, p. 124, carrying out the

provisions of the article as to other state and county officers, construed it as not applying to the office of prosecuting attorney. *Griffin v. Rhoton*, 107 S. W. 380, 381, 85 Ark. 89.

### STATE OFFICER

The term "state officers" is sometimes construed as only the heads of the executive departments of the state elected by the people at large, such as Governor, Lieutenant Governor, State Treasurer, Attorney General, and the like, and it should be so construed when used without circumstances indicating any other intent. In its more comprehensive sense it includes every person whose duty appertains to the state at large. The exact sense in which the term is used in any particular law must often be determined by ordinary rules for judicial construction. *State ex rel. Milwaukee Medical College v. Chittenden*, 107 N. W. 500, 608, 127 Wis. 468.

The term "state officers," as used in Const. art. 4, § 4, conferring on the Supreme Court original jurisdiction in mandamus as to all state officers, is not limited to those heads of executive departments recognized *eo nomine* as executive officers in article 3, but embraces the heads of the executive departments, including the insurance commissioner. *State ex rel. North Coast Fire Ins. Co. v. Schively*, 122 Pac. 1020, 1021, 68 Wash. 148.

An officer appointed or elected for a particular locality, whose duties are of a public or general nature, in the discharge of which the whole state is interested, is a "state officer" in an enlarged sense, and, where it appears that such officer has not been dealt with by the Legislature or the constitutional convention as a local officer, but as a state officer, the court should give effect to the intention and understanding of the framers of the Constitution. *State ex rel. Ward v. Romero*, 125 Pac. 617, 621, 17 N. M. 88; *Butts v. Purdy*, 125 Pac. 313, 318, 63 Or. 150; *Dillman v. State (Wyo.)* 125 Pac. 367, 378.

Const. art. 15, § 7, requiring the Legislature to provide for the trial and removal from office of all "officers of the state," when considered in connection with article 5, § 24, providing for the removal of county officers, relates only to state officers and does not prohibit the removal from office of an officer of a city by recall. *Bonner v. Belsterling*, 138 S. W. 571-575, 104 Tex. 432.

The term "state officers" may be construed as meaning only heads of the executive departments of the state elected by the people at large, such as Governor, Lieutenant Governor, State Treasurer, Secretary of State, Attorney General, and the like, that being its particular meaning, or given its more comprehensive sense, including every person whose duties appertain to the state at large, according to the legislative intention: that the exact sense in which the term is

used in any particular law must often be determined by ordinary rules for judicial construction. Applying the rules that effects and consequences are to be regarded in construing a law, where the words thereof will admit of either of two reasonable meanings, the court held that in the law in question the words "any of the state officers" should be restrained to heads of departments having their official residence at the State Capitol, and expected to keep open office there during business hours, and generally speaking to be there themselves; that is, that the term was used by the lawmakers in its narrow and particular, instead of its broad and general, sense. *State ex rel. Williams v. Samuelson*, 111 N. W. 712-715, 131 Wis. 499 (citing and approving *State ex rel. Milwaukee Medical College v. Chittenden*, 107 N. W. 506, 127 Wis. 468).

Judicial Code (Act March 3, 1911, c. 231, § 266, 36 Stat. 1162), provides that no interlocutory injunction restraining the enforcement of any "statute" of a state, by restraining the action of any officer of such state in the enforcement of the statute, shall be issued by any Justice of the Supreme Court, or by any District Court of the United States, or any judge thereof, or by any Circuit Judge thereof acting as a District Judge, on the ground of unconstitutionality, unless the application shall be presented to a Justice of the Supreme Court of the United States, or to a Circuit or District Judge, and shall be heard and determined by three judges, of whom at least one shall be a Justice of the Supreme Court, or a Circuit Judge, and the other two either Circuit or District Judges, and unless a majority of the three judges shall concur in granting the application, etc. Held, that the words "statute of a state" were used in such act in their ordinary sense as meaning a law directly passed by a state Legislature, and that the words "officer of such state" meant an officer whose authority extended throughout the state; and hence such act was not applicable to a suit by a telephone company to restrain the enforcement of a city ordinance fixing telephone rates to be charged by such company. *Cumberland Telephone & Telegraph Co. v. Memphis*, 198 Fed. 955, 957.

### Administrator

An administrator belongs to that class of officers represented by curators, guardians, receivers, referees, and the like, whose duties are private, and whose acts concern private rather than public interests. An administrator is vested with no portion of the sovereign functions of the state to be exercised by him for the benefit of the public, and he is therefore not a "state officer," within the meaning of Const. art. 8, § 12, providing that "no person shall be elected or appointed to any office in this state, civil or military, who is not a citizen of the United States, and

who shall have resided in this state one year next preceding his election or appointment." A "public office" is a right and authority created by law, by which an individual is invested with some portion of the functions of government, to be exercised by him for the benefit of the public for a given period of time, either fixed by law or enduring at the pleasure of the creating power. The word "office," as here used, is to be distinguished from its application to such positions as are at most quasi public only, as the charge of an executor, administrator, or guardian, and from the offices of a private corporation. *Stevens v. Larwill*, 84 S. W. 113, 118, 110 Mo. App. 140 (citing *Mechem*, Pub. Off. § 1; *In re Hathaway*, 71 N. Y. 238).

#### **Assistant Attorney General**

In order to constitute an attorney employed to assist the Attorney General an officer of the state, the term of his appointment and continuance in office must be coterminous with the term of office of the Attorney General who appointed him, and of the Governor approving the appointment. *Terrell v. Sparks*, 135 S. W. 519, 521, 104 Tex. 191.

#### **County officer distinguished**

In general, a "state officer" is one whose duties and powers are coextensive with the state, while a "county officer" is one whose duties and powers are coextensive only with the county, and the fact that the official acts of an officer are so far extraterritorial that they are binding throughout the state does not make the officer who performs such acts necessarily a state officer. *People v. Evans*, 93 N. E. 388, 391, 247 Ill. 547.

#### **County, town, or school district officers**

A road overseer and members of the county court are not "state officers," within the Constitution, so as to confer jurisdiction on the Supreme Court on appeal in a case wherein they are parties. *Hill v. Hopson*, 120 S. W. 29, 31, 221 Mo. 103.

Under Laws 1893, p. 25, c. 29, § 3, as amended by Laws 1897, p. 59, c. 67, § 1, giving the highway agent of a town, under direction of the selectmen, charge of the construction and repair of highways within the town, and empowering him to employ men and teams, the highway agent and selectmen are "public officers" of the state, and not private agents of the town, so far as their duties in connection with the construction and repair of highways are concerned. *O'Brien v. Town of Derry*, 60 Atl. 843, 73 N. H. 198. So a town is not liable for injury to property through the negligence of its highway agent in blowing up ice in a river, under the direction of a selectman, for the purpose of draining water from a highway; his act being that of a public officer in the performance of his duty. *Wheeler v. Town of Gilsun*, 62 Atl. 597, 598, 73 N. H. 429, 3 L. R. A. (N. S.) 135 (citing

*O'Brien v. Town of Derry*, 60 Atl. 843, 73 N. H. 198; *Hall v. Concord*, 52 Atl. 864, 71 N. H. 367, 58 L. R. A. 455; *Dourles v. Town of Hopkinton*, 40 Atl. 433, 67 N. H. 456; *Wakefield v. Town of Newport*, 62 N. H. 624; *Grimes v. Town of Keene*, 52 N. H. 330).

#### **District attorney**

The district attorney is an "officer of the state." *Taylor v. State*, 38 South. 380, 384, 49 Fla. 69.

#### **District judge**

A district judge is a "state officer." *Grayson v. Perryman*, 106 Pac. 954, 956, 25 Okl. 339 (citing *Maben v. Rosser*, 103 Pac. 674, 24 Okl. 588).

#### **Medical examiners**

Rev. St. 1895, art. 946, providing that the Supreme Court may issue writs of mandamus against any "officer of the state government" except the Governor, being article 1012 of Act April 13, 1892 (Laws 1892, p. 21, c. 14), which provides for the organization of the Supreme Court under the amendment of Const. art. 5, and carefully limits the jurisdiction thereof, does not empower the Supreme Court to issue a writ of mandamus against the Board of Eclectic Medical Examiners; they not being state officers within the meaning of the act. *Betts v. Johnson*, 73 S. W. 4, 5, 96 Tex. 360.

#### **Members of dispensary commission**

The members of the South Carolina Dispensary Commission created by Sess. Laws 1907, p. 835, No. 402, with power to wind up the South Carolina State Dispensary, are not "officers of the state" within the ordinary acceptance of the term, and, if officers at all, are officers appointed solely for the performance of specific duties. *Fleischman Co. v. Murray*, 161 Fed. 152, 158.

#### **Municipal officer distinguished**

The distinction between "state officers" and "municipal officers" is that the duties of the former concern the state at large and the general public, although exercised within definite territorial limits, while the functions of the latter relate to a particular community. *Ex parte Corliss*, 114 N. W. 962, 988, 16 N. D. 470.

#### **Policemen**

A policeman is not strictly a "state officer." *State ex rel. Quintin v. Edwards*, 99 Pac. 940, 944, 38 Mont. 250.

The chief of police of a city of the first class is not a "state officer" within the meaning of Const. art. 19, § 6, providing that no person shall hold or perform the duties of more than one office in the same department of the government at the same time, which provision refers to state offices only. *Peterson v. Culpepper*, 79 S. W. 783, 785, 72 Ark. 230, 2 Ann. Cas. 378.

**Presidential electors**

Presidential electors are "state officers," and so one appointed as judge until the next general election of state officers cannot hold over, because at the next general election presidential electors only are to be selected. *Hodge v. Bryan*, 148 S. W. 21, 23, 149 Ky. 110.

**Superintendent of water district**

"As a general rule, the term 'state officer' is only applied to those superior executive officers who constitute the head of an executive department of a state." A state superintendent of a water district, appointed by the Governor, is a "state officer" removable under a statute providing that any officer who shall hold his office by appointment by the Governor may be removed by the Governor. *State ex rel. Hamilton v. Grant*, 81 Pac. 795, 798, 14 Wyo. 41, 1 L. R. A. (N. S.) 588, 116 Am. St. Rep. 982.

**Trustees of city schools**

The schools of a city, including high schools, are a part of the state's school system, and their trustees are "officers of the state." *City of Louisville v. Commonwealth*, 121 S. W. 411, 412, 134 Ky. 488.

**STATE PRISON**

A sentence to imprisonment in the state reformatory is not a sentence to a term of imprisonment in the "state prison," within Gen. St. 1894, § 4790, providing that a divorce may be decreed when either party, subsequent to the marriage, has been sentenced to imprisonment in the state prison. *Dion v. Dion*, 100 N. W. 4, 5, 92 Minn. 278.

The London, Ontario, Insane Asylum is not the "state prison" within Comp. Laws Mich. 1897, § 9733, postponing the running of limitations for false imprisonment when the right of action accrues while plaintiff is imprisoned in the state prison until the removal of the disability. *Alexander v. Thompson*, 195 Fed. 31, 33, 115 C. C. A. 33.

The words "state prison" are frequently used as synonymous with the word "penitentiary," never as meaning a jail, which, as is well known, is a prison appertaining to a county or municipality in which persons convicted of misdemeanors, committed in the county or municipality, are confined for punishment, and the use of the words "state prison" in a verdict reciting that "we, the jury, find the defendant guilty and fix his punishment at three years in the state prison" will be considered a sufficient designation of the state penitentiary. *Denham v. Commonwealth*, 84 S. W. 538, 539, 119 Ky. 508.

**STATE PRISON OFFENSE**

Under the federal statutes, the mailing of scurrilous matter printed on a postal card, or exposed on the exterior of a sealed letter, may be criminal; and a crime of that character is punishable by imprisonment, which may be in the penitentiary, and amounts by

the common understanding, to a "state prison offense." *Middleby v. Effer*, 118 Fed. 261, 262, 55 C. C. A. 355.

**STATE PUBLIC SCHOOL FOR DEPENDENT CHILDREN**

The State Public School for Dependent Children, to be located at the Home for the Friendless, provided for by Laws 1909, is identical with the Home for the Friendless, and appropriations made for that school, whether described as the Home for the Friendless or the State Public School, are specific appropriations as required by Const. art. 3, § 22, declaring that no money shall be drawn from the treasury except in pursuance of a specific appropriation, and that no money shall be diverted from any appropriation. *State ex rel. Johnston v. Barton*, 122 N. W. 64, 66, 84 Neb. 815.

**STATE PURPOSE**

The words "state purposes," as used in Const. art. 7, § 9, authorizing a tax levy for state purposes, "is for the running and current expenses in carrying on the different departments and institutions of the state government, which is intended to be upon a cash basis as provided by section 11 of the same article." The tax levy authorized by section 9 of article 7 of the Constitution "for state purposes" is intended to cover the current and running expenses of maintaining and conducting the state government, legislative, executive, and judicial, and operating and maintaining the state institution. Public or bonded indebtedness incurred under section 1 of article 8 for internal improvements and the erection of public buildings and institutions is not comprehended by section 9 of article 7, and a tax levy for the purpose of paying the interest on such indebtedness and bonds and providing a sinking fund therefor does not fall within the limits of the maximum rate of taxation as provided by section 9 of article 7. *Gooding v. Proffitt*, 83 Pac. 230-232, 11 Idaho, 380.

**STATE ROAD**

"The terms 'state road' and 'county road' seem to have no precise technical meaning, and it might be permissible to suppose that they were used merely to distinguish highways created directly by the Legislature and those created by the county authorities under general laws. But a better supported view is that any public road lying wholly within one county is a 'county road,' while a 'state road' extends through or into several counties. 'What is known in some sections as a "state road" is a highway laid out by the direct authority of the state, generally between distant places and through different counties, to supply a want felt by a large district of country, which, because of the diversity of interests, the local authorities are not willing to support.' A "state road" is a road running into two or more counties, and

is distinguished by this from a "county road," which lies wholly within one county. The first was formerly established by acts of special legislation; the latter by county commissioners, under general laws. Where an act of the Legislature declares all section lines in a certain county to be public highways, and provides that they shall be opened by the board of county commissioners, such section lines thereby become county roads, within the meaning of that term as used in an act providing that any part of a state or county road not opened for travel within a stated time shall be vacated." *Board of Com'rs of Cowley County v. Johnson*, 90 Pac. 805, 807, 76 Kan. 65 (quoting and adopting definition in *State ex rel. Stebbins v. Treasurer of Wood County*, 17 Ohio, 184).

"By 'special benefits' is not meant the general advance or benefits resulting to the community in general from the construction of the road, but such benefits as result in particular to the defendants from the location of the road there, such as the location of a depot there, or a convenient sidewalk, or an embankment which protects their lands from overflow, and the like." *Vaulx v. Tennessee Cent. R. Co.*, 108 S. W. 1142, 1145, 120 Tenn. 316.

Code, § 422, subd. 16, empowers the board of supervisors to discontinue any state or territorial highway, and subdivision 17 empowers them to establish or discontinue any county highway through or within the county. Section 751 empowers cities and towns to establish or vacate streets and alleys. Section 48, subd. 5, provides that the words "highway" and "road" include public bridges, and may be held equivalent to the words "county road," "county way," "common road," and "state road." Section 1507 provides that all public streets of villages are a part of the road. Held that, where a plat was made of land dividing it into lots, streets, and alleys prior to the incorporation of a town embracing the land platted, the streets and alleys became county roads subject to the jurisdiction of the board of supervisors, and though after the incorporation of the town the control may have passed to the city council, yet the incorporation of the town having been vacated, the control of the streets and alleys reverted to the board of supervisors. *Chrisman v. Brandes*, 112 N. W. 833, 835, 137 Iowa, 433.

#### STATE TAX

"All taxes, whether levied for state, county, or municipal purposes, are 'state taxes.' They can be imposed by no other authority than that of the state. The state appropriates the proceeds to what purposes it sees fit; but, however the proceeds may be appropriated, every tax is a state tax." *United New Jersey R. & Canal Co. v. State Board of Assessors*, 67 Atl. 438, 443, 75 N. J. Law, 35 (quoting and adopting definition in *State*

*Board of Assessors v. Central R. Co.*, 4 Atl. 578, 48 N. J. Law, 146, and citing *Camden & B. R. v. Cook*, 32 N. J. Law, 338).

"State taxes" are those assessed and levied by the counties by the direct mandate of the General Assembly, the rate of which is fixed by that body, and, though all taxes levied for school purposes are known as "state taxes," the ordinary taxes levied for school purposes under Acts 1903, c. 247, p. 323, §§ 2, 3, which are collected by the sheriff of each county and paid to the treasurers thereof, are county taxes. *Board of Education of Iredell County v. Board of Com'rs of Iredell County*, 49 S. E. 47, 48, 137 N. C. 63.

The tax on personal securities as "money at interest," provided by the act of 1879 (P. L. p. 130), and its supplementary acts, making such property taxable, annually, for state purposes at the rate of four mills on each dollar of the value thereof, is a "state tax," though a large part thereof is, under the statute, returned to the counties, and the personal securities upon which such tax is levied cannot be included in the assessed value of the "property therein," within Const. art. 9, § 8, limiting the borrowing power of a city to 2 per cent. upon the assessed value of the taxable property therein. *Elliot v. City of Philadelphia*, 78 Atl. 107, 110, 229 Pa. 215.

Act 1884 (P. L. p. 142), for the taxation of railroad and canal property, imposes a "state tax," within Act March 4, 1869 (P. L. p. 226), abolishing transit duties, and providing that all corporations theretofore paying transit duties should thereafter pay the tax therein prescribed until the Legislature should "by general law impose a uniform state tax equally applicable to all railroad and canal corporations of this state," and that the corporations should then pay such tax, since by the terms of Act 1884, §§ 9, 10 (P. L. p. 146), the tax is assessed by a state board, is payable into the state treasury, if unpaid, becomes a debt due the state, and is made a lien on the lands and tangible property and franchises in the state, and an action at law or in equity is given to the state for its collection, and this is true notwithstanding the tax is used only in part to carry on the state government and maintain state institutions; a considerable portion of it being required to be paid, by section 11, to the various taxing districts in which the real estate of the railroad and canal corporations, other than the main stem, is located to be used for local purposes. *United New Jersey R. & Canal Co. v. Baird*, 69 Atl. 472, 474, 75 N. J. Law, 788.

#### STATE'S ATTORNEY

"The state's attorney is a county officer, and his status as such is fixed by the Constitution which creates his office. He is elected for and within a county to perform his duties therein, and is not distinguished in any manner from the clerks of the courts, sheriff,

coroner, and other officers connected with the administration of justice within the county." *Cook County v. Healy*, 78 N. E. 623, 625, 222 Ill. 310.

## STATE

See Crude State; Natural State.

### STATE OF INTOXICATION

The words, "drunkenness" and "in a state of intoxication," as used in the statute punishing drunkenness, are words of ordinary signification, and mean the condition following the taking of liquor in excessive quantities, and the court in its instructions need not define the same. *Clark v. State*, 111 S. W. 659, 660, 53 Tex. Cr. R. 529.

### STATE OF USEFULNESS

See Reasonable State of Usefulness.

### STATED

An "account stated" is an acknowledgment of an existing condition of liability of the parties, from which the law implies a promise to pay the balance thus acknowledged to be due; the words "stated" and "settled," as applied to accounts, being sometimes used as synonymous. *State v. Illinois Cent. R. Co.*, 92 N. E. 814, 816, 837, 246 Ill. 188 (citing 1 Cyc. 364, and cases cited; 1 Words and Phrases, p. 93; 1 Ency. of L. & P. 728, and cases cited; *Chicago, M. & St. P. R. Co. v. Clark*, 92 Fed. 968, 35 C. O. A. 120; *McDow v. Brown*, 2 S. C. 95).

### STATED MEETING

Rev. St. 1898, § 1990, provides that members of any church which shall have been organized in the state, and which at the time maintains regular worship, may, after due public notice at some "stated meeting," organize a corporation for religious, charitable, or educational purposes. Where there was a factional disturbance, and a part of the members of the church held a meeting at a residence and a part at the church edifice, the meeting held at the regular home or edifice of the society was a "stated meeting" in the statutory sense, whether attended and supported by a majority or minority of the members, and it was not essential to the organization of a corporation that the notice given at such "stated meeting" be also given at the residence where the other meeting was held. *Spiritual & Philosophical Temple v. Vincent*, 105 N. W. 1026, 1029, 127 Wis. 93.

### STATED TIME

See For Stated Time.

## STATEMENT

See Brief Statement; Careless Statement; Consonant Statement; Grossly Improbable Statements; Materially False Statement; Reckless Statement;

Verified Statement; Voluntary Statement.

Opening statement as pleading, see Pleading.

Such statement, see Such.

The stenographer's receipt attached to the transcript is a sufficient "statement," within rule 21 (104 Pac. ix), providing that the amount paid for the stenographer's transcript shall be taxed as costs only when a statement thereof is filed with the clerk not later than 10 days after the cause is decided. *McAfee v. Walker*, 108 Pac. 79, 80, 82 Kan. 355.

The word "representation," in an answer in an action on a life insurance policy, averring as to the application for insurance that the false representation of the deceased in relation to his use of liquors afforded legal ground to claim annulment of the contract, was evidently used in that connection merely as synonymous with the word "statement" or "declaration." *Brignac v. Pacific Mut. Life Ins. Co. of California*, 36 South. 595, 601, 112 La. 574, 66 L. R. A. 322.

Under Rev. St. 1899, § 806, authorizing appeals from any final judgment, an order of the circuit court remanding a cause transferred to it by a justice of the peace, entered under the authority of section 3951, authorizing the circuit court to remand to the justice a cause which has been transferred as involving title to land, where the court is of the opinion that the "statement" filed does not show that title is in issue, is not a "final judgment," and is not appealable. The term "statement," as used in section 3951, means the verified pleading attempting to put in issue the title. *Walker v. Walker*, 96 S. W. 418, 419, 119 Mo. App. 503.

The word "schedule" has a meaning as the equivalent to "inventory." An inventory is a list or catalogue of property merely, without attempt to describe the same in detail. A schedule of property for taxation is a list of assessable articles without attempt to describe the same in detail. A "statement" is defined to be "a formal, exact, detailed presentation." A "statement" would contain all that would appear in a schedule or list, but would contain minutiae and matter of description not necessary to a schedule or inventory. Section 49 of the revenue act (3 Starr & C. Ann. St. 1896, p. 3423, c. 120), prescribing a penalty for the failure of a railroad to file a statement with the county clerk, refers to the statement or schedule showing the property held for right of way and the length of tracks and turnouts and tracts of land through which the road runs (which property is afterwards described as "railroad track"), which is required to be filed by section 41 of the act, and cannot be extended by implication to include the failure to report the value of the railroad track annually, or to return the lists of rolling stock required to

be returned by section 44, or to the failure to make the list or schedule of personal property or real estate, which is required to be listed by section 46. *Chicago, R. I. & P. R. Co. v. People*, 75 N. E. 368, 370, 217 Ill. 164.

#### **Mechanic's Lien**

A statement filed by a materialman substantially complied with Ky. St. 1903, § 2468, requiring a claimant to file a "statement showing the amount due, with credits and set-offs," though it did not show the full amount of the original bill nor the credits thereon, but simply set out a claim for the amount which was the balance due on the material. *Dobson v. Thurman* (Ky.) 101 S. W. 310, 311.

The "statement" mentioned in Rev. St. 1898, § 3315, requiring a person furnishing material to a contractor to give notice in writing to the owner setting forth, among other things, "a statement of the labor performed or the materials furnished, the amount due therefor from such principal contractor," means a general statement of material furnished, and a bill of items is not required. *Chandler Lumber Co. v. Fehlau*, 117 N. W. 1057, 1058, 187 Wis. 204.

#### **STATEMENT OF ACCOUNT**

As evidence, see Evidence.

Where, in an action by a bank on an account, the petition contained a specific statement of the account, consisting of checks for money drawn and deposits, a balance being stated as the sum due plaintiff, the petition was in itself a sufficiently itemized "statement of account" as provided by Rev. St. 1899, § 630 (Ann. St. 1906, p. 653), and was not objectionable for failure to have attached thereto an itemized statement thereof. *Citizens' Bank of Laredo v. Lowder*, 125 S. W. 1180, 141 Mo. App. 603.

#### **STATEMENT OF THE CASE**

The "statement of the case" contains a literal transcript of the testimony taken and reported by a referee to the district court, without any attempt to condense or eliminate immaterial matter. Held, following the rule announced in prior decisions of this court, that such practice is a plain violation of section 7058, Rev. Codes 1905, as well as rule 7 of this court, and does not constitute a "statement of the case." *Smith v. Kunert*, 115 N. W. 76, 77, 17 N. D. 120.

#### **Bill of exceptions distinguished**

There is no substantial difference between a bill of exceptions and a "statement"; consequently a "statement" would be considered although a motion in the trial court was for leave to file a "statement" and the motion to move for a new trial recited that it would be made on a bill of exceptions. *Sauer v. Eagle Brewing Co.*, 84 Pac. 425, 427, 3 Cal. App. 127.

The only difference between a "bill of exceptions" and a "statement of the case," within a statute requiring a party intending to move for a new trial to serve a notice of his intention, designating the ground on which the motion will be made, and whether the same will be made on affidavits or by a "bill of exceptions," or a "statement of the case," is that in a statement of the case the moving party, in addition to setting forth in the body of the document the exceptions which were taken at the trial, must also specify the particular ones upon which he relies in support of his motion, and if the insufficiency of the evidence is the ground of an exception, or is stated in a notice of a motion for a new trial, the particulars in which the evidence is claimed to be insufficient must be specified in either document. *Pease v. Fink*, 85 Pac. 657, 659, 3 Cal. App. 371.

An order denying a new trial recited that the motion was presented on all the grounds stated in the notice of intention to move for new trial, and upon the statement of the case previously settled. The record contained a bill of exceptions in which the insufficiency of the evidence to sustain the findings was specified, but the order denying the new trial did not clearly state that the grounds on which the motion was based were those specified in the settled statement; the document referred to as a statement of the case being denominated on its face as a "bill of exceptions." Held that, since the expressions "bill of exceptions" and "statement of the case" would be considered synonymous when necessary to accomplish the ends of justice, the recital in the order that the motion was presented on the statement of the case previously settled would be deemed sufficient evidence that the objections set forth in the statement were the grounds of the motion, so as to authorize a consideration of the evidence on appeal, though the copy of the notice of intention printed in the transcript was not authenticated by a bill of exceptions, and therefore could not be considered, under Code Civ. Proc. §§ 661, 951, 952. *Dennis v. Gordon*, 125 Pac. 1063, 1064, 163 Cal. 427.

#### **STATEMENT OF DEMAND**

A bill of particulars or specification of items referred to in and annexed to a "state of demand" is a part of such "state of demand." *Leonard v. Ware*, 4 N. J. Law, 150.

#### **STATEMENT OF FACT**

An agreed "statement of facts," made for purpose of the trial, and not certified by the court as provided by article 1293, cannot be treated as a statement of facts within Rev. St. 1895, art. 1382, authorizing the Court of Civil Appeals for good cause shown to permit the filing of statements of fact after the expiration of the statutory time. *Chickasha Mill. Co. v. Crutcher* (Tex.) 141 S. W. 353, 356.

**Opinion distinguished**

"To distinguish 'opinions' from 'statement of facts,' the general rule is if the vendor, knowing them to be untrue, makes statements with the intention of misleading the vendee, and if the latter, relying upon them, is misled to his injury, or if he induces the vendee not to make inquiries with respect to value, or any extrinsic facts affecting values, or makes statements in such a manner that the vendee, instead of being put on inquiry, is put off his guard, it has been held that a substantial right to recover damages is created, or the vendee may, at his option, avoid the contract. To effect this, however, the representations must, as a rule, be coupled with other circumstances, as where they are fraudulently made of particulars in relation to the estate which the vendee has not equal means of knowing, and where he is induced by the vendor's artifice to forbear inquiries which he would otherwise have made; but whether a representation as to value is merely an expression of opinion or belief, or an affirmation of fact to be relied on, is a question for the jury, and should properly be left to their decision. Again, while the purchaser must rely upon his own judgment in questions of value, yet, in regard to any extrinsic facts affecting the quality or value of the subject of the contract, he may rely upon the assurances of the vendor; and if he does so rely, and those assurances are fraudulently made to induce him to enter into the contract, he may maintain an action for the injury sustained." *Oneal v. Welsman*, 88 S. W. 290, 292, 39 Tex. Civ. App. 592 (quoting and adopting definition in 2 Warvelle, Vendors, § 946).

**STATEMENTS AND REPRESENTATIONS**

A complaint in an action to enforce an alleged resulting trust of a half interest in mining claims, alleging that in an interview plaintiff said that, if the claims were taken up, plaintiff would be entitled to a half interest therein, to which defendant agreed, and that plaintiff relied on such "statements and representations," and in consequence of such reliance conducted defendant to the mines, showed him their situation, and in pursuance thereof defendant wrongfully located the mines in the name of himself and another, and refused to allow plaintiff any interest therein, sufficiently alleged that the disclosure of the mines was procured by means of a previous agreement to which defendant was a party, to the effect that, if the mines were located, they should be so located that plaintiff should be entitled to a half interest therein. *Stewart v. Douglass*, 83 Pac. 699, 701, 148 Cal. 511.

**STATION**

See Electric Light Station; Flag Station; Regular Station; Your Station.  
See, also, Depot.

The words "M.'s Station," used in a railroad charter as a designation of the railroad's terminus, "should be held to mean a locality, and not a fixed and definite point." *Collier v. Union R. Co.*, 83 S. W. 155, 158, 113 Tenn. 96.

**As railroad depot**

In the United States the words "depot" and "station," as used in connection with railroads, are synonymous. In re *Atlantic & St. L. R. Co.*, 62 Atl. 141, 143, 100 Me. 430.

The word "station," as used in relation to a railroad, in its narrow sense means merely the building or place prepared for the reception and discharge of passengers, but in a larger sense includes the place at which the company habitually stations its trains. *Jacquelin v. Erie R. Co.*, 61 Atl. 18, 20, 69 N. J. Eq. 432.

The word "station," as used in Const. art. 9, § 26, means a place where railroad trains regularly stop for the convenience of passengers and taking in freight, and the word "depot" means a building for the accommodation and protection of passengers or freight. *Midland Val. R. Co. v. State*, 119 Pac. 413, 414, 29 Okl. 777.

As used in Rev. St. 1895, art. 4562, which makes provision for the accommodation of both passengers and freight at "stations," the word "stations" means places at which passengers and property are received for transportation, or delivery after transportation. *Railroad Commission of Texas v. Chicago, R. I. & G. R. Co.*, 117 S. W. 794, 796, 102 Tex. 393.

By the word "station," as used in a deed to a railroad company providing that, if it failed to maintain a "station" on the land conveyed, title should revert to the grantor, the land having been deeded to the company for a right of way and depot purposes in consideration of the establishment by it of a "station" at the point in question, a regular "station" is intended. *Hamel v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 107 N. W. 139, 140, 97 Minn. 334.

While a depot building or the presence of a station agent is not indispensable to constitute a place a "station," the point where a switch is maintained for the exclusive accommodation of a mill, rock quarry, or mine is not a "station," though trains do sometimes stop at such point to receive or discharge passengers or freight as a matter of especial accommodation. *Foster v. Kansas City S. R. Co.*, 87 S. W. 57, 58, 112 Mo. App. 67.

Chapter 69, p. 179, of the Acts of 1891, section 71a of chapter 54 of Code of 1899, requiring railway companies and persons operating railroads to provide and keep, among other things, for the accommodation of travelers, suitable water-closets at all "stations," does not contemplate the maintenance and keeping of such retiring places at what are



commonly known as "flag stations," were open platforms in connection with which no station buildings, offices, or agents are kept. *State v. Baltimore & O. R. Co.*, 56 S. E. 518, 61 W. Va. 367.

A place on a railroad where passengers and freight are regularly received and discharged, irrespective of whether a depot and station agent are maintained there, and though unincorporated, is a "station," within the rule permitting railroads to leave a sufficient space open about stations for the safe and commodious transaction of business, notwithstanding the statute requiring railroads to fence their tracks. *McGuire v. St. Louis, M. & S. E. R. Co.*, 87 S. W. 564, 565, 113 Mo. App. 79.

Railroad ground, on which a switch was laid, was not open for use by the public. Passengers were permitted to get on and off trains at that point, but could not procure tickets there for any station on the road or buy one for this point. Packages of freight were sometimes thrown off there for the accommodation of the consignees, but there was no agent to take charge of such freight when thrown off. It was not a regular stopping place for trains for any purpose, especially for taking on and discharging either freight or passengers. Held, that it was neither a "station" or "depot." *Duncan v. St. Louis, I. M. & S. R. Co.*, 85 S. W. 661, 663, 111 Mo. App. 193 (citing *Webst. Dict.*; 2 *Bouv. Law Dict.* [Rawle's Ed.] 1031).

"Just what is a 'station,' within the meaning of the law (exempting railroads from fencing at stations), is a hard matter to determine. \* \* \* It will not depend upon an office and agent being maintained, but depends more upon the business done, not with one or two or three individuals, firms, or companies, but with the public, and whether or not trains stop regularly or on signal to receive and discharge passengers and freight, and whether inducements are held out and accommodations afforded to the public to enter into reciprocal business relations." Where the evidence shows that trains stopped on signal to receive and discharge passengers, that freight was shipped in and out for the general public who desired, even though in small quantities, that a siding was maintained on which others than a mill located at that point loaded and shipped, and that a gravel pile was provided as a platform, indicating a willingness on the part of the railroad to do business, and that inducements had been and were held out to the public to do business thereat, and that the public had accepted such inducements, it constitutes a "station," within the meaning of the law. *Acord v. St. Louis Southwestern R. Co.*, 87 S. W. 537, 543, 113 Mo. App. 84.

#### **Yards included**

The term "station," as used in the railroad business, means the whole track within

the limits of the station yard, and not the buildings merely or the immediate vicinity where they are located. *Morrisette v. Canadian Pac. R. Co.*, 56 Atl. 1102, 1105, 76 Vt. 267.

#### **STATION GROUNDS**

The depot or "station grounds" of a railroad company is the place where passengers get on or off the train, and where freight is loaded and unloaded, including all grounds reasonably necessary or convenient to that purpose, together with the necessary tracks, switches, and turnouts thereon, or adjacent thereto, necessary for handling and making up trains, storage of cars, etc., and so much of the main track outside the switches as is necessary for the proper handling of trains at the station. *Wilmot v. Oregon R. Co.*, 87 Pac. 528, 530, 48 Or. 494, 7 L. R. A. (N. S.) 202, 120 Am. St. Rep. 840, 11 Ann. Cas. 18 (citing 3 *Words and Phrases*, p. 2005 et seq.; *Grosse v. Chicago & N. W. Ry. Co.*, 65 N. W. 185, 91 Wis. 482; *Groudin v. Duluth & S. S. & A. Ry. Co.*, 59 N. W. 229, 100 Mich. 598).

"Station grounds" or depot grounds, at convenient points along the line of railroads, embrace not only the land of the right of way but additional land of such extent as existing and prospective conditions seem to require, but the land originally appropriated should not be arbitrarily held to limit railroads or the public, and in every case, in determining what are station and depot grounds, three conditions must concur. The grounds must be necessary, convenient, and be actually used by the railroad in transacting business. They therefore include sufficient land for safe and convenient approaches and exits for passenger and freight transportation, for the location of depot buildings, warehouses, etc.; and an important criterion as to what land is necessary and convenient is the amount and character of business done at the station. *In re Atlantic & St. L. R. Co.*, 62 Atl. 141-143, 100 Me. 430 (citing *Davis v. Burlington & M. R. R. Co.*, 26 Iowa, 549; *Smith v. C. M. & St. P. Ry. Co.*, 15 N. W. 303, 60 Iowa, 512).

#### **STATION OR STATION HOUSES**

The words "station or station houses," in V. S. 3989, as amended by Acts 1902, No. 68, § 6, providing that when, in the judgment of the railroad commissioners, it appears that any addition to or change in the stations or station houses, or any change of the location of the station or station houses, or additional or new stations or station houses, should be afforded, they may order the same made, means the buildings at the point where a station had already been established, and not the place itself, and adds to the law, instead of declaring the law which was previously enacted. V. S. 3890 (P. S. 4469), provides that railroad companies shall establish and maintain depots or station houses at such

points as the Supreme Court shall adjudge the public good requires. Held that, under that section and under section 3989, as amended by Acts 1902, No. 68, § 6, the power to establish a station at a certain point was in the Supreme Court, and that the power of the commissioners was only in regard to buildings at a point where a station had already been established. In re Order of Railroad Com'rs, 65 Atl. 82, 84, 79 Vt. 266.

## STATIONER

### STATIONERY

See Fancy Stationery.

As materials, see Materials.

A sale of a building "including vault, safe, stationery, and all bank fixtures contained therein" does not include revenue stamps the use of which was no longer required by law, as the word "stationery" does not include stamps of any kind. *Gregory v. Keller*, 137 Ill. App. 441, 444.

The terms "stationery" and "all other necessary articles," in Rev. Code 1892, § 296, providing that the board of supervisors shall furnish the county officers with necessary stationery, furniture, and "all other necessary articles," embrace necessary postage used in the public business. The word "stationery" itself is indeterminate, and is to be interpreted in the light of custom and reason. It is hardly conceivable that the law-making power designed all officers, great and small, to pay, out of their salaries, the postage on state or county official business. *Downing v. Hinds County*, 36 South. 73, 84 Miss. 29.

Under Code 1896, § 3384, providing that the judge of probate must be allowed reasonable expenses for suitable "stationery," etc., the word "stationery" itself is indeterminate. Webster defines "stationery" to be "such articles as are usually sold by stationers, as paper, ink, quills, pens, blank books, etc." The Standard defines it to be "writing materials in general, including paper, envelopes, blank books, pens, ink, etc.; a term of somewhat indefinite extent, sometimes restricted to note paper and envelopes; as, 'His stationery bears a crest.'" Under the name of "stationery" are embraced all writing materials and implements, together with the numerous appliances with the desk and of mercantile and commercial offices. *Crook v. Commissioners' Court of Calhoun County*, 39 South. 383, 144 Ala. 505.

## STATU QUO

See In Statu Quo.

## STATUARY

"What productions are to be deemed professional productions of a 'statuary' or a sculptor it is difficult to state in general

terms, so as to embrace every article of the kind." *Merritt v. Tiffany*, 10 Sup. Ct. 52, 132 U. S. 167, 169, 33 L. Ed. 299.

"Painting a marble statue does not alter its original substance, or give the subject a new definition or meaning. Some marble statues, the work of a great sculptor, have been slightly painted under his own direction for the purpose, as supposed, of imparting a more lifelike appearance to the statue, and of possibly thereby enhancing its value. But the statue remained a statue nevertheless." The word "statuary" is defined by Rev. St. p. 478, § 2504, as limited to "professional productions of a statuary or of a sculptor only. Plaster casts of clay models, though painted and gilded and produced in unlimited quantities, are 'casts of sculpture' which, under the Tariff Act of 1897, are entitled to free entry where specially imported in good faith for the use and by the order of any society incorporated or established solely for religious, physiological, scientific, educational, or literary purposes, and are not dutiable as 'statuary.'" *Benziger v. United States*, 24 Sup. Ct. 189, 194, 192 U. S. 38, 50, 48 L. Ed. 331.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194, the definition there given the term "statuary," as used in this act," governs the provision for "statuary" in section 3, 30 Stat. 203, and the reciprocal commercial agreements negotiated as provided in said section. *Altman & Co. v. United States*, 172 Fed. 161, 162.

A "cistern" in several pieces, with figures sculptured thereon in almost full relief, is "statuary," within the meaning of that term as used in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194. *United States v. American Exp. Co.*, 139 Fed. 89.

In Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, the provision for "statuary \* \* \* wrought \* \* \* from metal" does not require metal to be the only component, or even the component of chief value. It is enough if it so greatly predominate as to characterize the entire work. *Tiffany & Co. v. United States*, 154 Fed. 168; *United States v. Tiffany & Co.*, 160 Fed. 408, 411, 87 C. C. A. 360.

A bronze and ivory statue of a high degree of artistic excellence is "statuary," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 454, 30 Stat. 194, defining that term as including "only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone, or alabaster, or from metal." *Tiffany & Co. v. United States*, 154 Fed. 168.

The provision for "statuary" in Tariff Act July 24, 1897, c. 11, § 3, 30 Stat. 203, and in the reciprocal commercial agreement with Italy, negotiated under said section, has the

same meaning as in section 1, Schedule N, par. 454, of said tariff act (30 Stat. 151), where it is prescribed that the "term 'statuary' as used in this act shall be understood to include only such statuary as is cut, carved, or otherwise wrought by hand from a solid block or mass of marble, stone or alabaster, or from metal." Bronze statuary, not being covered by this definition, is therefore not covered by said reciprocal agreement. *C. B. Richard & Co. v. United States*, 158 Fed. 1019, 86 C. C. A. 671; *Id.*, 151 Fed. 954.

A bronze bust cast by artisans from the artist's model is dutiable, upon importation from France, at 45 per cent. ad valorem, under the Tariff Act of 1897, par. 193, which covers articles or wares not specially provided for in the act, composed wholly or in part of metal, and whether partly or wholly manufactured, and is not classifiable as "statuary," under the commercial reciprocal agreement with France, negotiated in accordance with, and under the authority contained in, section 3 of that act, to make reciprocal agreements with reference, among other articles, to "paintings in oil or water colors, pastels, pen and ink drawings, and statuary," since the tariff act defines statuary as including only such as is cut, carved, or otherwise wrought by hand from a solid block of marble, stone, or alabaster, or from metal, and such as is the professional production of a statuary or sculptor. *B. Altman & Co. v. United States*, 32 Sup. Ct. 593, 597, 224 U. S. 583, 56 L. Ed. 894.

## STATUS

"Status" means standing, state, or condition, and as applied to a claim can mean nothing more. *Reynolds v. Pennsylvania Oil Co.*, 89 Pac. 610, 612, 150 Cal. 629 (citing *And. Law Dict.* 968).

### Right not synonymous

The word "status," as applied to the relationship of parent and child, husband and wife, or other like relation, is not synonymous with the word "right," but is to be construed as meaning "relationship," and hence the word "status" does not necessarily imply the existence of the right of inheritance. *Calhoun v. Bryant*, 133 N. W. 266, 271, 28 S. D. 266.

## STATUTE

See Contrary to the Form of the Statute; Declaratory Statute; Directory Statute; Matters in Statute; Personal Statute; Private Statute; Reference Statute; Remedial Statute; Subject (Of Statute).

Authorized by statute, see Authorized by Law.

Ex post facto statute, see Ex Post Facto. Object of statute, see Object.

Penal statutes, see Penal Laws.

Removal statute, see Remove—Removal. Unconstitutional statute, see Unconstitutional.

See, also, Act (In Legislation); Preamble; Title.

A resolution of the General Assembly authorizing a poor tort debtor to take the poor debtor's oath, with the same effect as if he had been committed to jail for a contract debt, is not a "statute," within the meaning of Gen. St. R. I. cap. 22, § 19, which prescribes the time when statutes shall take effect. *Barry v. Viall*, 12 R. I. 18.

Where an indictment concludes by charging an offense as having been committed "against the form of the statute," the indictment will be sustained, though the offense is the creation of several "statutes." *State v. Wilbor*, 1 R. I. 199, 204, 36 Am. Dec. 245.

Judicial Code (Act March 3, 1911, c. 231, § 266, 36 Stat. 1162) provides that no interlocutory injunction restraining the enforcement of any "statute" of a state, by restraining the action of any officer of such state in the enforcement of the statute, shall be issued by any Justice of the Supreme Court, or by any District Court of the United States, or any judge thereof, or by any Circuit Judge thereof acting as a District Judge, on the ground of unconstitutionality, unless the application shall be presented to a Justice of the Supreme Court of the United States, or to a Circuit or District Judge, and shall be heard and determined by three judges, of whom at least one shall be a Justice of the Supreme Court, or a Circuit Judge, and the other two either Circuit or District Judges, and unless a majority of the three judges shall concur in granting the application, etc. Held, that the words "statute of a state" were used in such act in their ordinary sense as meaning a law directly passed by a state Legislature, and that the words "officer of such state" meant an officer whose authority extended throughout the state; and hence such act was not applicable to a suit by a telephone company to restrain the enforcement of a city ordinance fixing telephone rates to be charged by such company. *Cumberland Telephone & Telegraph Co. v. Memphis*, 198 Fed. 955, 957.

### As contract

See Contract.

### As law

See Law.

### Municipal ordinance

A city ordinance is not a state statute, within the meaning of Act June 18, 1910, c. 309, § 17, 36 Stat. 557, requiring the presence of three judges for the hearing of an application for an interlocutory injunction restraining the enforcement of such a statute. *Sperry & Hutchinson Co. v. Tacoma, Wash.*, 190 Fed. 682, 683.

"The validity of city ordinances may be attacked for a number of reasons, such as that they were not properly published by a duly authorized municipal corporation, or that they are not within the inherent or delegated powers of the municipality, or that they do not relate to a subject within the scope of the municipal government, or that they are in violation of the Constitution or laws of the United States or the state, or contrary to the charter or general principles of the common law, or because they are unreasonable or are not properly passed by the legislative branch of the municipal government, or because of uncertainty or want of proper form, or because not enacted in good faith and for a legitimate purpose of the local government." A city ordinance is not a "statute," within the meaning of section 88 of the practice act, and a suit involving the validity of an ordinance is appealable to the Appellate Court, and not to the Supreme Court, unless a construction of the Constitution or a statute is also involved. *People ex rel. v. Harrison*, 79 N. E. 164, 165, 223 Ill. 540 (citing *Wood v. Chicago*, 68 N. E. 712, 205 Ill. 70; *McQuillan, Mun. Ord. § 14*, and cases there cited).

#### STATUTE AFFECTING SAFETY OF PERSONS

In this action to recover from the insurer in a liability insurance contract the amount paid by the insured in the settlement of an action brought against him, made after the insurer had denied liability under the contract and refused to defend the action, it is held the accident was not caused by "the failure of the insured to observe a 'statute affecting the safety of persons,'" was covered by the contract, and the insurer, in denying liability and refusing to defend the action after notice, breached the contract. *Butler Bros. v. American Fidelity Co.*, 139 N. W. 355, 357, 120 Minn. 157, 44 L. R. A. (N. S.) 609.

The phrase "statute in pari materia" is applicable to private statutes or general laws made at different times and in reference to the same subjects. *State v. Frederickson*, 63 Atl. 535, 537, 101 Me. 37, 6 L. R. A. (N. S.) 186, 115 Am. St. Rep. 295, 8 Ann. Cas. 48 (citing *Black, Interp. Laws*, p. 6).

#### STATUTE OF LIMITATION

See Limitation of Action.

#### STATUTE OF MERTON

What is called the "statute of Merton" arose out of certain facts peculiar to the history of England in connection with certain dependencies which it had at that time over sea, particularly Normandy, Aquitaine, and Anjou. The rule in those provinces and elsewhere on the Continent was that the subsequent marriage of the parents of an illegitimate child would make the child legitimate, and hence capable of inheriting. The

question was constantly arising in the ecclesiastical court, and seems to have produced considerable uncertainty as to the true rule that should obtain. The matter was submitted by the bishops to the Parliament, with the request that the rule making the antenatus legitimate by the subsequent marriage of its parents should be declared as the law of England. The Parliament refused, and, on the contrary, declared that it was, and always had been, the law of England that none were legitimate heirs except those born in lawful wedlock. This declaratory statute had thus arisen for the purpose of solving, so to speak, the very matter in doubt, and was regarded, in the celebrated English case of *Birtwhistle v. Vardill*, 7 Clarke & Finnelly, 895, as settling it and placing it beyond any question of comity. It was, as said by Lord Chief Justice Tindal, in the case just referred to, a matter of positive law, and a rule of property inhering in the lands, as it were. In other words, the statute was passed to cover precisely the question mooted. *Finley v. Brown*, 123 S. W. 364, 122 Tenn. 316, 25 L. R. A. (N. S.) 1285.

#### STATUTE OR ENGLISH MILE

A "statute or English mile" was adopted as the standard of land measurements in the thirty-fifth year of the reign of Elizabeth, 1593. The "statute mile" measures 5,280 feet on the land. *Lazell v. Boardman*, 69 Atl. 97, 99, 103 Me. 292, 13 Ann. Cas. 673.

#### STATUTORY APPEAL

See Statutory Writ of Error or Appeal.

#### STATUTORY ARBITRATION

See Arbitration.

As special proceeding, see Special Proceeding.

#### STATUTORY BOND

"Common-law bonds" and, "statutory bonds" are to be distinguished, in that the latter conform to a statute, while the former do not, though so intended. *City of Mt. Vernon v. Brett*, 86 N. E. 6, 10, 193 N. Y. 276.

The chief distinction between a "statutory bond" and a statutory undertaking is that in a statutory bond the principal must be a party, but in a statutory undertaking the person on whose behalf it is executed need not be a party. *Russell v. Chicago, B. & Q. R. Co.*, 94 Pac. 501, 502, 37 Mont. 1.

A bond by one arrested on a bastardy warrant, conditioned to secure the attendance of accused, not only on the day originally set for hearing, but on subsequent days to which the hearing might be continued, and conditioned on his abiding the order of court, is not a "statutory bond," within Rev. Laws, c. 82, §§ 4, 6, authorizing the release of accused on giving bond for his appearance before the court at a time specified in the bond, and authorizing the taking of a bond to secure

appearance at subsequent hearings, but is valid as a common-law bond, not contrary to public policy, and founded on a sufficient consideration, and the default of accused in court is a breach of the undertaking, and entitles plaintiff to at least nominal damages. *Howe v. Grimes*, 97 N. E. 371, 372, 211 Mass. 33.

### STATUTORY CRIME

Embezzlement as, see Embezzle—Embezzlement.

### STATUTORY DEDICATION

A "statutory dedication" is to be distinguished from a common-law dedication in this: That a statutory dedication operates by way of grant. The law surrounds the act of dedication with all the formalities and solemnities necessary to the creation of a grant. The plat must be signed, acknowledged, and recorded. Without a substantial compliance with the statute by the proprietor of a city or addition thereto, the estate in the streets intended to be conveyed would not pass to the city in trust. A common-law dedication, on the other hand, operates by way of estoppel, in pais, rather than by way of grant. *City of Leadville v. Coronado Min. Co.*, 86 Pac. 1034, 1036, 37 Colo. 234 (citing *City of Denver v. Clements*, 3 Colo. 472, 480).

The distinction between a "statutory dedication" and a common-law dedication is that the former proceeds from a grant whilst the latter operates by way of an estoppel in pais. There is no particular form or ceremony necessary in the dedication of land to a public use. An implied common-law dedication arises from some act or course of conduct from which the law will imply an intention, on the part of the owner of the property, to dedicate it to the public use. "An implied dedication is one arising, by operation of law, from the acts of the owner. It may exist without any express grant, and need not be evidenced by any writing, nor, indeed, by any form of words, oral or written. It is not founded on a grant, nor does it necessarily presuppose one, but it is founded on the doctrine of equitable estoppel. The law considers it in the nature of an estoppel in pais, and holds it irrevocable." *Roundtree v. Hutchinson*, 107 Pac. 345, 346, 57 Wash. 414, 27 L. R. A. (N. S.) 875 (citing *Elliott, Roads & S.* [2d Ed.] §§ 121, 123; *Cincinnati v. White*, 31 U. S. [6 Pet.] 431, 8 L. Ed. 452).

### STATUTORY DUTY

"A 'statutory duty' is no more imperative in law than a common-law duty. A penalty may be imposed upon the offender for a breach of statute, but it does not change the relation between the parties except to the extent that one entering the employ of another may assume, in the absence of knowledge, that the terms of the statute have been complied with." *Laws Colo. 1897*, p. 258, c. 69, requiring all railroad companies to securely

block all frogs and switch rails, does not deprive a railroad company, when sued for injury to an employé resulting from its failure to observe such law, of the right to defend on the ground of assumption of risk. *Denver & R. G. R. Co. v. Norgate*, 141 Fed. 247, 254, 6 L. R. A. (N. S.) 981, 5 Ann. Cas. 448.

### STATUTORY LIABILITY

A "statutory liability" is one that depends for its existence on the enactment of the statute and not on the contract of the parties. *Bigby v. Douglas*, 51 S. E. 606, 607, 123 Ga. 635.

The right of an abutting owner to recover for damages caused by a change of street grade is given by Const. art. 1, § 22, providing that private property shall not be damaged for public use without compensation, and not by Comp. Laws 1907, § 282, authorizing the recovery of damages to abutting property by change of an established grade of a street, so that a cause of action for such damages is not based on a "statutory liability" within section 2877, subd. 1, limiting the time for bringing actions for statutory liability. *Webber v. Salt Lake City*, 120 Pac. 503, 504, 40 Utah, 221, 37 L. R. A. (N. S.) 1115.

### STATUTORY LIEN

A "statutory lien" is a "remedy given by law which secures the preference provided for, but which does not exist, however equitable the claim may be, unless the party brings himself within the provisions of the statute, and shows a substantial compliance with all of its essential requirements." A mechanic's lien claim, stating that it is for "outside work on house and painting of inside blinds, \$100," does not substantially comply with Comp. Laws, § 3885, requiring the claimant of a mechanic's lien to file a statement setting forth the terms, time given, and conditions of the contract, and is insufficient to support a lien. *Porteous Decorative Co. v. Fee*, 91 Pac. 135, 136, 29 Nev. 375 (quoting and adopting the definition in *Phil. Mech. Liens*, § 9).

### STATUTORY OBLIGATION

"A 'statutory obligation,' which does not rest upon the consent of the parties, is clearly quasi contractual in its nature." In *re United Button Co.*, 140 Fed. 495, 502 (quoting *Keener*, *Quasi Cont.* p. 16).

### STATUTORY PROCEEDING

A claim is a "statutory proceeding," which is authorized to be interposed where a levy has been made on property, but the statute contemplates that this shall be done by some person who claims the property and shall make oath thereto. *Rowland v. Gregg & Son*, 50 S. E. 949, 950, 122 Ga. 819.

### STATUTORY RAPE

See Rape.

### STATUTORY RECEIVER

The man who is appointed receiver upon the return day of the order to show cause, or upon the appearance of the corporation upon the filing of the bill, is the "statutory receiver." He is appointed after the summary final hearing prescribed by the statute has been held. *Gallagher v. Asphalt Co. of America*, 58 Atl. 403, 408, 67 N. J. Eq. 441.

### STATUTORY REMEDY

A petition for a review of a civil action is a "statutory remedy" to be granted only "in the special cases" named in the statutes. *Rev. St. 1903, c. 91, § 1. Donnell v. Hodsdon*, 67 Atl. 143, 102 Me. 420.

### STATUTORY RIGHT TO REDEEM

There are now two kinds of equities of redemption, one statutory, and the other the original right of redemption, which relieved the debtor of the harsh forfeiture of his estate for nonpayment of the mortgage debt within the time stipulated. "The statutory right to redeem" differs essentially from the equity of redemption proper. It is not an estate in the mortgaged property, but is a mere personal privilege of redeeming the property within a certain time after the mortgage has been foreclosed. But it exists only in such cases and in favor of such persons as are designated in the statute by which it is created." *Ky. St. 1903, § 1709*, provides that when a execution defendant owns the legal title to land incumbered by a purchase-money lien, or the legal title in any real or personal estate, and shall have created a bona fide incumbrance thereon by mortgage, deed of trust, or otherwise, before an execution has created a lien on the same, the interest of the defendant may be levied on and sold subject to such incumbrance. Held, that the interest of an owner who had conveyed realty by a deed absolute on its face, taking a written defeasance, was subject to execution. *Ebelharr v. Tennyly*, 80 S. W. 459, 460, 118 Ky. 43.

### STATUTORY TRUST

A trust created under a statute authorizing a trust to be created in perpetuity for the purpose of caring for and keeping in repair a cemetery, burial lot, or monument, is a "statutory trust," in contradistinction to a charitable trust. *Mason v. Bloomington Library Ass'n*, 86 N. E. 1044, 1046, 237 Ill. 442, 15 Ann. Cas. 603.

### STATUTORY UNDERTAKING

The chief distinction between a statutory bond and a statutory undertaking is that in a statutory bond the principal must be a party, but in a "statutory undertaking" the person on whose behalf it is executed need not be a party. *Russell v. Chicago, B. & Q. R. Co.*, 94 Pac. 501, 502, 37 Mont. 1.

"A 'statutory undertaking' is not a common-law recognizance or bond. It is simply

statutory contract to pay money under certain conditions. To be enforceable, it must have been taken in substantial compliance with the terms of the statute authorizing it, and, if not so taken, it cannot be enforced as a common-law undertaking, and the sureties are entitled to stand on their contract according to its terms." *Malheur County v. Carter*, 98 Pac. 489, 493, 52 Or. 616.

### STATUTORY WRIT OF ERROR OR APPEAL

"A 'writ of error at common law,' being a command from a superior to an inferior court of record commanding the inferior court, in some cases itself to examine the record, in others to send it to the superior court to be examined, that some alleged error might be corrected, was the commencement of a new action, and hence the application for the writ and the writ itself had to point out clearly, not only the cause in which the error lay which was sought to be corrected, but the parties thereto, that they might be summoned to appear in the reviewing court. But the 'statutory writ of error or appeal,' which is sued out as a matter of right in the court rendering the judgment on which the error is predicated, is in no sense the commencement of a new proceeding or action, but is a mere continuation of the pending proceeding or action, being its transfer from a lower to a higher court for further proceedings." *Philadelphia Mortgage & Trust Co. v. Palmer*, 73 Pac. 501, 502, 32 Wash. 455.

### STAY

An oral direction by the judge, when directing entry of judgment, granting ten days' "stay," is generally to be regarded as meaning merely a stay of execution. *Gersman v. Levy*, 108 N. Y. Supp. 1107, 1110, 58 Misc. Rep. 174.

The upright posts of a staging are kept in their perpendicular position by means of boards called "stays." *Solari v. Clark*, 72 N. E. 958, 187 Mass. 220, 68 L. R. A. 243.

### STAY OF PROCEEDINGS

The mere filing of a motion for new trial with the clerk of court, and serving a copy on the attorney for the adverse party, did not operate as a "stay of proceedings" pending the motion, under circuit court rule No. 33 (108 N. W. xx), providing that a motion to set aside a verdict, made in open court and entered in the clerk's minutes, shall operate as a stay of proceedings until the motion is disposed of. *Colle v. Kewaunee, G. B. & W. R. Co.*, 135 N. W. 536, 540, 149 Wis. 96.

"Originally a supersedeas was a writ directed to an officer commanding him to desist from enforcing the execution of another writ, which he was about to execute or which might come into his hands. In modern times the term is often used synonymous with a 'stay of proceedings,' which of itself suspends

the enforcement of a judgment." In Oregon a writ of supersedeas is unknown, though a certificate of probable cause issued by the trial judge or by a justice of the Supreme Court is tantamount thereto, the effect of which is to suspend the enforcement of the judgment until it can be reviewed on appeal. *State v. Small*, 90 Pac. 1110, 1111, 49 Or. 595 (quoting *Dulin v. Pacific Wood & Coal Co.*, 33 Pac. 123, 98 Cal. 304, 306, and citing *State v. Armstrong*, 74 Pac. 1025, 45 Or. 25).

### STAY ORDER

The provision of the chancery act of New Jersey (Revision, p. 119, § 80), prohibiting an injunction to restrain legal proceedings, after verdict or judgment, at the instance of the defendant therein, unless the money be paid into court, or a bond given according to the statutory requirement, is peremptory and includes a temporary injunction called a "stay order." *Phillips v. Pullen*, 16 Atl. 915, 45 N. J. Eq. 157.

### STAY PROCEEDINGS ON A JUDGMENT

The words "stay proceedings on a judgment," in Civ. Code, § 295, providing that, on dissolution of an injunction to stay proceedings on a judgment, the damages shall be assessed by the court, and judgment shall be rendered against the party who obtained the injunction for the damages assessed, mean the same thing as the like words in section 285, providing that an injunction to stay proceedings on a judgment shall not be granted in an action brought in any other court than that in which the judgment was rendered, and they include an injunction to stay proceedings on an execution issued on a judgment no less than to stay the judgment itself in other respects, and the remedy given by section 295 is exclusive. *Mason, Gooch & Hoge Co. v. Mechanics' Lien & Trust Co.*, 82 S. W. 290, 292, 118 Ky. 707.

### STAY WITH AND CARE FOR

The words "to stay with and care for," used to express consideration of a contract to make a will, have no fixed legal signification, and where testator built a house on certain land, and plaintiff went there to live, and testator agreed that, if plaintiff would stay with and care for him, he would leave him the land, it indicated personal association, care, and attention, not including the furnishing of groceries, other necessities, and medical attention, and, the parties themselves having so interpreted the contract, it would be accepted as the true meaning. *Bless v. Blizzard*, 120 Pac. 351, 352, 86 Kan. 230.

### STEADYING BOARD

The office of a "steadyding board" in a packing plant is to hold the hog in position while the splitter cleaves it in two. *Rend-*

*Hch v. Hammond Packing Co.*, 80 S. W. 683, 106 Mo. App. 717.

### STEAL

See Horse Stealing; Private Stealing.  
Hog stealing, see Hog.  
See, also, Filch.

The word "steal" is a term of art, and includes criminal taking or conversion by way either of larceny, embezzlement, or by obtaining by false pretenses. *Commonwealth v. King*, 88 N. E. 454, 457, 202 Mass. 379.

A statement by one person to another in the presence of others that "when you get ready to steal any more of my oats, let me know," charges a theft. *Ladwig v. Heyer*, 113 N. W. 767, 768, 136 Iowa, 196.

In an action for slander by a daughter against her father, where the slanderous words charged in the petition were, "Bet, did you get my money? I knowed when you were standing there at the head of my bed taking my money," and an amended petition alleged that the words were "Bet, you got my money. I know damn well you did. You were at the head of my bed last night, and took it," and a second amended petition alleged the words to be "Bet, you stole my money. I know damn well you did. You were at the head of my bed last night and took it," and plaintiff's evidence was unsatisfactory as to why she did not rely on the words set out in the second amended petition, in the two others, and the evidence of her only witness, who was present when the words were spoken, was not conclusive as to what words were used, even if the word "steal" was used in view of the relationship and situation of the parties—it was a question for the jury whether the father meant to charge his daughter with the crime of larceny, since colloquially the word "steal" is often used where no intimation of a crime is intended. *Beams v. Beams*, 129 S. W. 298, 299, 138 Ky. 818.

### As actionable per se

Where a complaint alleged that defendant charged plaintiff with breaking into a house and stealing coal, defendant's language was slanderous per se. "The natural and obvious import of the word 'steal' is that of larceny. If it were qualified by the context so as to show the article said to have been taken not to be the subject of larceny, as apples from a tree, grass from the field, or coal from a mine, it might, in the absence of a statute declaring such act to be criminal (*Burns' Ann. St.* 1901, § 2017), be held to impute a trespass only, but to charge one with stealing coal from a house raises no such implication." *Short v. Acton*, 71 N. E. 505, 33 Ind. App. 361 (citing *Dunnell v. Fiske* [Mass.] 11 Metc. 551).

### As felonious taking

Webster defines "steal" as "to take and carry away feloniously; to take without right

or leave, and with intent to keep wrongfully; as to steal the personal goods of another." *Baldwin v. State*, 35 South. 220, 221, 46 Fla. 115.

The primary meaning of the word "steal" is "to take and carry away feloniously; to take without right or leave and with intent to keep wrongfully." *State v. Minnick*, 102 Pac. 605, 607, 54 Or. 86 (quoting and adopting the definition in *Webst. Dict.*).

"The word 'steal' or 'stealing,' in a criminal statute, when unqualified by the context, signifies a taking which at common law would have been denominated 'felonious.'" *Gardner v. State*, 26 Atl. 30, 33, 55 N. J. Law, 17.

The elements of "stealing" at common law are the wrongful or fraudulent taking and removal of the personal property by trespass with the felonious intent to deprive the owner thereof and to convert the same to the taker's own use. An indictment which alleges the unlawful and felonious taking and the unlawful and felonious intent to deprive the owner of the property and to convert the same to the taker's use is sufficient. *Barbe v. Territory*, 86 Pac. 61, 62, 16 Okl. 562.

An indictment for larceny, which merely alleges that accused "feloniously did steal, take and carry away" property described, without alleging the intent to convert it, is sufficient, since the word "steal" means in common and legal parlance the felonious taking and carrying away of the personal goods of another. *State v. Perry*, 126 S. W. 717, 94 Ark. 215.

Under Comp. Laws 1909, § 2554, making it burglary to break and enter any building, etc., with intent to steal therein, the word "steal" involves a felonious intent on the part of the taker to deprive the owner of property and to convert it to the taker's use; while any trespass involving the taking of personal property with intent to deprive another thereof is "larceny," within section 2557, making it burglary to enter any building, etc., with intent to commit any felony, larceny, or malicious mischief. *Sullivan v. State*, 123 Pac. 569, 570, 7 Okl. Cr. 307.

#### As larceny

The definition of Webster and other lexicographers of the verb "to steal" is "to take and carry away feloniously," and the words "steal" and "larceny" are synonymous. *Satterfield v. Commonwealth*, 52 S. E. 979, 980, 105 Va. 867.

The word "steal" has a uniform significance, and in common as well as legal parlance means the felonious taking and carrying away of the personal goods of another, and in a criminal statute, when unqualified by the context, signifies a taking which at common law would have been deemed felonious, and imports the common-law offense of larceny. *State v. Richmond*, 128 S. W. 744, 745, 228 Mo. 362.

Larceny is only another name for "stealing" or theft. *State v. Fair*, 76 Pac. 731, 733, 35 Wash. 127, 102 Am. St. Rep. 897.

To "steal" a domestic animal, in violation of *Wilson's Rev. & Ann. St.* 1903, § 2480, punishing stealing of live stock, is larceny in the sense in which the word "larceny" is used in section 5224, providing that, when property taken in one county by larceny has been brought into another, the jurisdiction of the offense is in either county; the words "steal," "larceny," and "theft" having the same meaning. *Cox v. Territory*, 104 Pac. 378-380, 2 Okl. Cr. 668 (citing *Hughes v. Territory*, 56 Pac. 708, 8 Okl. 28; *And. Law Dict.*; *Webst. Int. Dict.*).

As used in Criminal Code, § 114, making it criminal to steal money or other property, the word "steal" includes all the elements of larceny at common law. If the original taking of the property is with the consent of the owner, the crime of larceny is not committed. *Cohoe v. State*, 113 N. W. 532, 533, 79 Neb. 811.

Where defendant charged that plaintiff had "stolen from the town," and there was no prefatory averments or innuendo explaining the words "had stolen," they would be construed in accordance with their common acceptance to import larceny, and were therefore slanderous per se. *Flint v. Holman*, 73 Atl. 585, 82 Vt. 297.

The word "steal," as used in an indictment for abstracting mail matter from the mails, in violation of *Rev. St.* § 5469, alleging that defendant did "steal" and take from out of the mail the package described, is not used to designate technical larceny, but means simply to take without right or leave, and the use of that word sufficiently charges wrongful intent. *United States v. Trosper*, 127 Fed. 476, 477.

An information for receiving stolen goods, knowing the same to have been stolen, which alleges that accused received goods, knowing that the same had been taken and carried away from the owner with the intent on the part of the thief "to permanently deprive the owner" of the use thereof, etc., is fatally bad for failing to allege that accused knew that the property had been stolen; the word "stolen" meaning that a larceny has been committed, while the words "to permanently deprive the owner" of his property may not necessarily mean that a crime has been committed. *State v. Mayer*, 107 S. W. 1085, 1086, 209 Mo. 391.

#### Theft synonymous

"Steal" and "theft" have the same meaning. *Cox v. Territory*, 104 Pac. 378, 380, 2 Okl. Cr. 668.

## STEALTH

"Stealth," in the statute defining larceny (*St.* 1893, § 2371; *Wilson's Rev. & Ann. St.*



1903, § 2465) as the taking of personal property accomplished by fraud or stealth, and with intent to deprive another thereof, is the taking of property secretly, and without the knowledge or consent of the owner. *Flohr v. Territory*, 78 Pac. 565, 573, 14 Okl. 477.

## STEAM

In giving the board of railroad commissioners supervision over railroads operated by "steam," the statute by implication denies them power over railroads operated only by electricity. *Kansas City, Outer Belt & Electric R. Co. v. Board of Railroad Com'rs*, 84 Pac. 755, 756, 73 Kan. 168.

### STEAM BOILER

See Sectional Steam Boiler.

Ordinary steam heating plants used for heating buildings occupied in part for business and in part, for residence purposes are not within Gen. Laws 1899, p. 92, c. 91, providing for the licensing of persons operating "steam boilers" and steam machinery of any kind. *State ex rel. Urbach v. Justus*, 102 N. W. 452, 453, 94 Minn. 207.

### STEAM EGG COAL

"Egg coal," as known to the trade, is coal run over screens with a 3-inch mesh, and another screen with a 1½-inch mesh. There are two grades of egg coal; the higher grade, known as "domestic egg coal," being made by running the coal over the screens twice, and the lower grade, known as "steam egg," by running the coal over the screens but once. There is more slack in the lower grade than in the higher grade, and the higher grade is more expensive. *Indiana Fuel Supply Co. v. Indianapolis Basket Co.*, 84 N. E. 776, 777, 41 Ind. App. 658.

### STEAM ENGINE

A city ordinance making it unlawful to operate or move any "steam engine" over the streets except on tracks and on special permit from the mayor, designating the streets over which the same may be transported, applied alike to all persons engaged in the operation of steam rollers, engines, etc., and was neither discriminatory nor unreasonable. *Municipal Pav. Co. v. Donovan Co. (Tex.)* 142 S. W. 644, 647.

### STEAM FARM ENGINE

A "steam farm engine" consists of a horizontal boiler with a drop-fire box, and a horizontal engine attached to the top of the boiler, mounted on four wheels for convenience of transportation, and having the smokestack hinged so that it can be lowered when the machine is being moved. *Wilson v. Union Mut. Fire Ins. Co.*, 58 Atl. 799, 800, 77 Vt. 28.

### STEAM KICKER

A "steam kicker" is an appliance for rolling logs, which consists of iron bars about four feet in length, situated a few feet apart along the log deck; one end being attached to machinery beneath the deck, and the other end extending through the floor of the deck to the edge of the log way, and thus being capable, when set in motion, of pushing the logs along the deck. *Olson v. Humbird Lumber Co.*, 92 Pac. 897, 48 Wash. 136.

### STEAM MACHINERY

A meat hasher held not "steam machinery" within section 11 of child labor act, forbidding the employment of children to operate "steam machinery." *Swift & Co. v. Renard*, 128 Ill. App. 181, 187.

Ordinary steam heating plants, used to heat buildings used for both residence and business purposes, are not within a statute providing for licensing persons operating steam boilers and "steam machinery" of any kind. *State ex rel. Urbach v. Justus*, 102 N. W. 452, 453, 94 Minn. 207.

### STEAM RAILROAD

A belt line railroad, maintained in a city by two connecting railroad lines, for the purpose of affording better facilities for receiving and transferring freight from one line to the other, and from various manufacturing establishments located on such belt line, from which switches were constructed, was a "steam railroad" operated within the state, within *Burns' Ann. St. 1901, § 5173a et seq.*, requiring switches on such railroads to be indicated by a signal light, so attached as to indicate safety when the switch is closed and danger when open, and requiring such light to be kept burning at night and on dark and foggy days. *Toledo, St. L. & W. R. Co. v. Bond*, 72 N. E. 647, 649, 35 Ind. App. 142.

### STEAM ROLLER

*Burns' Ann. St. 1901, § 2044*, providing that any person using a "traction or road engine" on a public street in an incorporated town or city shall send a person in advance not less than 50 yards to warn approaching teams, does not apply to a "steam roller" used in making or repairing city streets. *City of New Albany v. Stier*, 72 N. E. 275, 277, 34 Ind. App. 615.

### STEAM SHOVEL

As materials, see Materials.

### STEAM VESSEL

See Coastwise Steam Vessel.

Every vessel propelled by machinery is considered a "steam vessel," within the meaning of the navigation rules. *The Nimrod*, 173 Fed. 520, 525.

### STEAMER

A steam ferryboat carrying passengers is a "steamer," and subject to the provisions of

Rev. St. § 4472, which prohibits any steamer carrying passengers from carrying certain dangerous articles as freight or stores. *The Nassau*, 188 Fed. 46, 47, 110 C. C. A. 184.

## STEARIC ACID

"Stearic acid," sometimes called stearin, is the solid constituent of fatty substances, as of tallow and olive oil, converted into a crystalline mass by saponification with alkaline matter, and abstraction of the alkali by an acid. *Standard Paint Co. v. Bird*, 175 Fed. 346, 352.

## STEEL

See Scrap Steel; Sheet Steel in Strips. Articles composed in part of steel, see Articles Within Tariff Act.

"Steel" is a product, or, perhaps, more accurately, a species, of iron, refined of some of its grosser elements, intermediate in the amount of its carbon between wrought and cast iron, and tempered to a hardness which enables it to take a cutting edge, a toughness sufficient to bear a heavy strain, and elasticity which adapts it for springs and other articles requiring resiliency, as well as a susceptibility to polish, which makes it useful for ornamental and artistic purposes." *Carnegie Steel Co. v. Cambria Iron Co.*, 185 U. S. 403, 410, 22 Sup. Ct. 698, 46 L. Ed. 968.

The provision for "steel in all forms and shapes," in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161, does not include completed articles, such as horseshoe calks and ball bearings, to which nothing needs to be done to fit them for immediate use. *Maldonado & Co. v. United States*, 172 Fed. 170, 100 C. C. A. 282; *Id.*, 176 Fed. 737, 100 C. C. A. 282.

A so-called "steel table," engraved, weighing nearly six tons, measuring 12 feet by 4 feet by 6 inches, and mounted like a table top on a frame, held to be within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161, for plates and steel in all forms and shapes. *Morris v. United States*, 140 Fed. 774.

Sheets consisting of a plate of iron or steel with a sheet of nickel welded thereto, the material being rolled to the desired thickness after welding, are not "sheets of iron or steel, common or black," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 131. *Boker v. United States*, 180 Fed. 959, 960.

### STEEL PLATES

The provision for "steel plates" in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135, 30 Stat. 161, while not covering all steel articles that are known as plates, includes so-called monogram dies and plates used in engraving, which, besides being called plates,

are within the dictionary definitions of "plates." *United States v. Sellers*, 160 Fed. 518, 519.

### STEEL TUBES

See Finished Steel Tubes.

### STEEL WIRE

See Round Steel Wire.

### STEEL WOOL

In Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161, the provision for "articles manufactured from \* \* \* wire," cannot be restricted to manufactured articles which contain the round wire in its integrity; and "steel wool," consisting of filaments shaved from steel wire, and constituting a finished commercial article, is embraced in said provision. *Buehne Steel Wool Co. v. United States*, 159 Fed. 107, 109, 86 C. C. A. 297.

"Steel wool," consisting of the filaments or shavings produced by passing toothed knives over steel wires, is dutiable under paragraph 135, Schedule C, § 1, Tariff Act July 24, 1897, c. 11, 30 Stat. 161, relating to "steel in all forms and shapes," rather than under paragraph 193, 30 Stat. 167, as articles composed of steel "not specifically provided for." *Buehne v. United States*, 140 Fed. 772, 773.

## STEER

The distinction between a "cow" and a "steer" must be recognized in construing the statute relating to larceny; the one being a full-grown female of the Bovine genus, and the other being a castrated male of the same genus. *Mobley v. State*, 49 South. 941, 942, 57 Fla. 22, 17 Ann. Cas. 735.

## STEERER

See, also, Bunco Steering.

A "steerer" is one of plausible manner and address, who gains the confidence of one intended to be fleeced. *People v. Simmons*, 109 N. Y. Supp. 190, 194, 125 App. Div. 234.

## STELLIONATE

In Scots and civil law the word "stellionate" denotes all such crimes in which fraud is an ingredient, as have no special names to distinguish them, and are not defined by any written law, and hence Pen. Code 1895, § 670, providing that one using any deceitful means or artful practice other than those mentioned in the Code by which an individual or the public is defrauded and cheated shall be punished as for a misdemeanor may be said to be the statute against stellionates. *Foster v. State*, 68 S. E. 739, 740, 8 Ga. App. 119.

**STEM**

See Main Stem.

**STENOGRAPHER**

See Official Stenographer.

As clerk, see Clerk.

As laborer, see Laborer.

As officer, see Officer.

**STENOGRAPHIC TRANSCRIPT**

The words "stenographic transcript," as used in Acts 29th Leg. pp. 219, 221, c. 112, §§ 3, 4, 5, providing that a transcript of the official stenographer's notes to be furnished on request may be sent up on appeal as the report of the testimony, and section 5 declaring that the act shall not apply in any case where such stenographic transcript is not made, mean the stenographer's notes transcribed and not the notes themselves. *Mundine v. State*, 97 S. W. 490, 491, 50 Tex. Cr. R. 93.

**STEPCHILDREN**

As heirs

See Heirs.

As children

See Child—Children (In Wills).

**STEPDAUGHTER**

"Dictionaries and text-books with unanimity define a 'stepdaughter' to be the child of a wife or husband by a former marriage, and, if this definition be regarded as controlling, the illegitimate child of the husband or wife before their marriage would not become the stepchild of the other party to the marriage contract. But Civ. Code 1895, § 2413, declaring the marriage of a man with his stepdaughter incestuous, is founded on the Roman law. It is for the protection of the most important unit of society, the family, that incest is pronounced a crime. If a man marry the mother of an illegitimate daughter and take the daughter into his care and custody, he becomes charged with a duty towards her, and his disregard of morality and decency in having sexual intercourse with her is a crime transcending a mere misdemeanor and has the elements which constitute incest." *Lipham v. State*, 53 S. E. 817, 818, 125 Ga. 52, 114 Am. St. Rep. 181, 5 Ann. Cas. 66.

**STEPFATHER**

The man who marries the mother of an illegitimate daughter becomes the "stepfather" of such child, within the meaning of Pen. Code 1895, § 380, and Civ. Code 1895, § 2413, defining incest. *Lipham v. State*, 53 S. E. 817, 125 Ga. 52, 114 Am. St. Rep. 181, 5 Ann. Cas. 66.

**STEPPING ASIDE**

To render the wrong of the agent that of the principal—respondeat superior—the fact that it was done in the course or period of employment is not sufficient; it must be in the prosecution of the principal's business, not by stepping aside therefrom to serve a personal end. The element of "stepping aside," mentioned in the last foregoing, which is essential to break the nexus between the principal, the agent and the employer of such principal, needs only change of mental attitude from that of serving the principal to that of serving a personal end; no particular interval of time is necessary. *Firemen's Fund Ins. Co. v. Schreiber*, 135 N. W. 507, 513, 150 Wis. 42, 45 L. R. A. (N. S.) 314, Ann. Cas. 1913E, 823.

**STEPS**

As part of building, see Building.

**STERLING SILVER**

Articles of the fineness of sterling silver are universally described as silver, and an indictment charging the receipt of certain ounces of silver, knowing it to be stolen, would be sustained by evidence showing that the articles were made of an alloy of silver and copper, in such proportions as to form what is called "sterling silver," but is not sustained by proof of receipt of silver spoon, fork, etc., blanks; the original shape of the metal having been so altered as to impart to the pieces of metal characteristics which would be more prominent as means of identifying them than the substance of which they were composed. *State v. Nelson*, 60 Atl. 589, 590, 27 R. I. 31.

**STEWARD**

See De Facto Steward.

As special agent, see Special Agency or Agent.

**STICK—STICKING**

See Dyer's Sticks; Joss Stick.

As deadly weapon, see Deadly Weapon.

As weapon, see Weapon.

The word "stick" is a synonym for the word "club." *State v. Richard*, 53 South. 669, 671, 127 La. 413.

"Sticking" lumber is the process of placing thin strips of wood between layers of boards or timber, in order to secure a proper circulation of air and the consequent seasoning of the lumber without warping or decay. *Hutchins v. Blaisdell*, 75 Atl. 291, 292, 106 Me. 92.

With reference to an instruction to an employé to unclog an oat roller by the use of a stick, a "stick" was defined, following Webster, as "a small shoot, branch, separated, as

by cutting, from a tree or shrub; \* \* \* any long and comparatively slender piece of wood, whether in natural form or shaped with tools; a rod; a wand; a staff"—and it was declared that wood was ordinarily meant, and that one would not infer, save under peculiar circumstances, that by the word "stick" a piece of iron was intended. *Wilder v. Great Western Cereal Co.*, 104 N. W. 434, 436, 130 Iowa, 263.

## STICKER MACHINE

The "sticker machine" is designed for the purpose of receiving strips of rough lumber at one end and turning it out at the other as a complete molding finished on all sides by a single operation. Such a machine consists usually of an iron table or platform, over which the material passes, about 8 feet in length,  $3\frac{1}{2}$  feet in height, and the same in width, open on the sides. At the south end is the countershaft, power pulley, and pulleys to operate the feed and knives. The operator stands at the south end and feeds the unfinished strips into the machine through guides. It passes first through the feed rolls, immediately after which it is operated on by the first set of knives, fastened to what is called the "top head." There are four of these heads, called, respectively, the "top head," the two "side heads," and the "lower head." These heads are blocks of iron or steel, about 8 inches long and 4 inches square, on two corners of which are set knives. They are attached to a short shaft, on the other end of which is a pulley, on which is the belt running to the power pulley. The top head is necessarily above the table with its shaft and pulley. After passing the top head, the material passes along the guide, and is operated upon first by one side head and then by the other. These side heads are of the same construction as the top head, but they necessarily are in a vertical position, projecting above the table; the pulley being beneath. The material then passes to the under head, which with its pulleys is under the table; the knives being allowed to project slightly above the table through an opening therein, which may be made to vary in width from  $2\frac{1}{2}$  to 6 inches. The finished material then passes out at the rear of the machine. The power is applied to and removed from the feed rolls and heads by means of levers at the right of the operator at the south end of the machine; one lever operating the feed rolls and another the heads. *Gardner v. Paine Lumber Co.*, 101 N. W. 700, 702, 123 Wis. 338.

## STILL

See Stop Still.

### STILL DUE

Rev. St. 1908, § 518, preserves the lien of a chattel mortgage for 30 days after maturity

without possession taken, and section 520, subsequently enacted, provides that the lien of any recorded chattel mortgage to secure any indebtedness may "at any time within 30 days after the maturity of the last installment of the indebtedness secured thereby" be extended as to the unpaid portion thereof by filing a sworn statement of the total payments on the debt and the amount remaining unpaid, that it is "still due" the mortgagee or his assignee, and that the mortgagee consents to an extension. Held, in view of section 518, that the word "due" was used in the sense that the debt was subsisting or outstanding, that the words "still due" referred to a time subsequent to a time when the debt was known or taken to be due, and that the expression "at any time within 30 days after the maturity of the last installment of the indebtedness secured thereby" required that such sworn statement be filed within 30 days after the maturity of the indebtedness, and that a statement on the date of maturity was premature and did not extend the lien as against a purchaser after the expiration of the 30 days. *Ferris v. Chambers*, 117 Pac. 994, 995, 51 Colo. 368.

### STILL WINE

"Still" wines are produced from the natural saccharine juice of fruits, and do not contain starch or maltose, which is a product of starch. They are always fermented in closed casks in the absence of air, and contain from  $7\frac{1}{2}$  to 16 per cent. of alcohol. *United States v. Nishimiya*, 137 Fed. 396, 398, 69 C. C. A. 588.

Sake is dutiable as "still wine" by similitude, being "similar" to that article in material and use within the meaning of the similitude clause in Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205, which prescribes the classification of unenumerated articles "similar \* \* \* in material, \* \* \* use," etc., to enumerated articles. The resemblance in material arises from the fact that the predominant substance in both articles is alcohol, and that there is a substantial similarity in their alcoholic strength; the percentage of alcohol being about 18 in sake and from 11 to 16 in still wine. The resemblance in use arises from the fact that both articles are drunk for purposes of exhilaration, and are capable of producing intoxication. *United States v. Komada & Co.*, 162 Fed. 465, 469, 89 C. C. A. 385.

## STING

Sting of insect as poison, see Poison.

## STIPULATE—STIPULATION.

See As Stipulated For.

A "stipulation" is an agreement as to terms. *Beck v. Budd*, 88 N. E. 785, 786, 44 Ind. App. 145.

"A 'stipulation' is an agreement of an attorney entered into for the purpose of binding his clients so far as he may do so." In re More's Estate, 77 Pac. 407, 408, 143 Cal. 493 (citing Code Civ. Proc. § 283; And. Dict. title "Stipulation").

A "stipulation" concerning a pending cause is unlike an ordinary contract, since it requires no consideration nor mutuality, and may bind those incapable of binding themselves out of court, and is subject to the supervision of the court. In an action in equity, a decree was entered dismissing the bill, "as per the following stipulation now filed herein," followed by an instrument purporting to specify the terms of a settlement between the parties, and signed by the attorneys for the respective parties. Held, that the instrument, aside from the order of dismissal, was neither a decree, nor a consent decree, having the force of a prior adjudication, nor was it a mere contract between the parties, but it was a "stipulation" entered into for the purpose of terminating the pending litigation upon terms agreed upon by the parties. *People ex rel. v. Spring Lake Drainage and Levee Dist.*, 97 N. E. 1042, 1047, 253 Ill. 479.

A building contract, providing that the owner on a certificate by the architect of the contractor's failure to perform any of the agreements may on three days' notice terminate the contract and complete the work, and that the expense incurred by the owner shall be certified by the architect, whose certificate shall be conclusive, does not provide against the contingency of abandonment of the work by the contractor, and where the contractor abandons the work the owner may complete it without obtaining the architect's certificate; the word "agreements" being synonymous with the word "stipulations." *Heidbrink v. Schaffner*, 127 S. W. 418, 421, 147 Mo. App. 632.

#### STIPULATED DAMAGES

A contract for "stipulated damages" constitutes a penal obligation, and one who sues to recover on the stipulation is not entitled to claim interest even from the date of his writ. *Moseley v. Johnson*, 56 S. E. 922, 923, 144 N. C. 274 (citing *Devereux v. Burgwin*, 33 N. C. 490).

Damages for the breach of a contract may be restricted or altogether excluded by the contract, but, being in derogation of law, such contracts are to be strictly construed. "Stipulated damages" can only be where there is a clear and unequivocal agreement which stipulates for the payment of a certain sum as liquidated satisfaction fixed and agreed upon by the parties for the doing or not doing of certain acts particularly expressed in the agreement. *Harrison v. Murray Iron Works Co.*, 70 S. W. 261, 263, 96 Mo. App. 348 (citing *Bish. Cont.*, § 404; *Fisher v. Barrett*, 58 Mass. [4 Cush.] 381).

#### STIPULATED FACT

A "stipulated fact" brings such fact upon the record, and calls upon the court to apply the law to the fact. Such fact stands on a par with any fact alleged in a complaint and admitted by the answer thereto. Courts, in furtherance of justice, will vacate a stipulation entered into under a mistake, or when the same has been obtained by deceit or fraud. *Prescott v. Brooks* (N. D.) 94 N. W. 88, 95.

#### STIPULATION POUR AUTRUI

A person can become a party to a contract by accepting a stipulation made in his favor by the contractants; he remaining a third person and stranger to it until, by accepting the stipulation, he becomes a party. Such a stipulation is called in the civil law a "stipulation pour autrui"; autrui meaning some one else, or a third person (that is to say, a person not party to the contract). *Allen & Currey Mfg. Co. v. Shreveport Waterworks Co.*, 37 South. 980, 982, 113 La. 1091, 68 L. R. A. 650, 104 Am. St. Rep. 525, 2 Ann. Cas. 471.

#### STIRPES

See Per Stirpes.

#### STITCHED

See Blind Stitches.

A pamphlet is "stitched," as the term is used in bookbinding, by stabbing holes in the back, inserting thread or wires, and tying them. *State v. Young*, 110 N. W. 292, 294, 134 Iowa, 505, 13 Ann. Cas. 345.

#### STOCK

See Clear Stock; On Stock; Rolling Stock; Turn Stock.

Mark on stock, see Mark.

Other stock, see Other.

The word "stock" is defined by the Century Dictionary as "the stock, stem, or trunk of a tree or other plant; the main body or fixed and firm part; a stem in which a graft is inserted, and which is its support; also a stem, tree, or plant that furnishes slips or cuttings." *United States v. American Exp. Co.*, 158 Fed. 808, 809, 86 C. C. A. 68.

In England the word "stock," as used in the statement in *Eversley's Law of the Domestic Relations* (2d Ed. 1896) 293, 294, that a valid gift is accomplished by a transfer by the husband into the wife's name of "stock," though previously purchased, is not limited to corporate shares, but included also certain public and private obligations, usually known with us as bonds. *Tucker v. Curtin*, 148 Fed. 929, 934, 78 C. C. A. 557.

#### As domestic animals

Code 1907, § 5476, provides that, when any stock is killed or injured or other prop-

erty damaged by any railroad, the burden of showing absence of negligence shall be on the railroad company. Held, that the term "stock" does not include a dog, but that it is included in the word "property," and, the statute being sufficiently broad to include a street railroad, the burden of proof, in an action against a street railroad company for killing plaintiff's dog, was on defendant to show absence of negligence. *Selma Street & Suburban Ry. Co. v. Martin*, 56 South. 601, 602, 2 Ala. App. 537.

Where a contract provided that each party was to pay one-half of all the labor required in conducting a farm owned by one, which the other was to take charge of, and that each was to furnish one-half the "stock," tools and feed, teams, etc., the word "stock" did not mean merely work stock, but included feeding animals. *Green v. Hart* (Ky.) 87 S. W. 315, 316.

#### As goods or merchandise in trade

Live cattle as goods, wares, and merchandise, see Goods.

See, also, Stock of Goods.

The common use of the word "stock," when applied to the goods in a mercantile house, refers to those which are kept for sale. A cash register, which is not a part of the goods kept for sale, does not come within the designation of "stock of goods, wares, or merchandise," within the meaning of an act making it the duty of the sellers of a stock of goods, wares, or merchandise in bulk to furnish an affidavit to the buyers giving a list of their creditors at the time of sale and declaring the sale fraudulent and void in the absence of such affidavit. *Albrecht v. Cudihoe*, 79 Pac. 628, 629, 37 Wash. 206.

A fire policy on a stock of merchandise for a specified sum, and on store and furniture and fixtures for a specified sum which stipulates that the entire policy shall be void if the subject of insurance be incumbered by chattel mortgage, is not invalidated, as to the insurance on the furniture and fixtures, by the execution of a chattel mortgage on the "stock of merchandise" and improvements, the mortgage not covering the furniture and fixtures; "stock," in mercantile law, being defined as "the goods which a tradesman holds for sale or traffic," and "merchandise" being defined to be "the objects of commerce." *Spring Garden Ins. Co. of Philadelphia v. Brown* (Tex.) 143 S. W. 292.

#### STOCK (In Corporation Law)

See Capital Stock; Certificate of Stock; Common Stock; Full-Paid Stock; Outstanding Stock; Person Holding Stock as Trustee; Preferred Stock; Promotion Stock; Subscribe—Subscription (To Stock); Treasury Stock; Value of Capital Stock; Watered Stock.

Diminishing capital stock, see Diminish.  
Issue of corporate stock, see Issuance—Issue.

Ownership of, see Ownership.

Paid-up stock, see Paid Up.

Stock dividend as principal, see Principal.

Subscription rights in additional stock as principal, see Principal.

A share of the capital "stock" of a corporation is the interest or right which the owner has in the management of the corporation, in its surplus profits, and, upon dissolution, in all of its assets remaining after the payment of its debts. *Lipscomb's Adm'r v. Condon*, 49 S. E. 392, 393, 395, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938 (citing *Clark*, Cor. 1141).

"Stock" in corporation law, instead of being the evidence of indebtedness, is a right to partake, according to the party's subscription or ownership, of the surplus profits made from the use and disposal of the property of the corporation. A share of stock is the interest which the shareholder has in the corporation, which is the right to participate in the profits and, on dissolution, in the division of the assets. *Sweetsir v. Chandler*, 56 Atl. 584, 587, 98 Me. 145.

"Stock" in a corporation is only evidence of the right of the holder or owner to share in the proceeds of the corporation's property, and a share of stock only represents an aliquot part of the corporation's property, or the right to share in its proceeds to that extent, when distributed according to law and equity. *Hall & Farley v. Alabama Terminal & Improvement Co.*, 56 South. 235, 241, 173 Ala. 398.

"Moneys and credits" cannot be classified as "corporation stock," so as to make the assessment thereof valid, under a Code provision that loan and trust companies shall be assessed upon the value of corporation stock, and, in arriving at the value of such stock, the amount of their capital actually invested in real estate owned by them shall be deducted from the value of such shares, and such real estate shall be assessed as other real estate, and the property of such corporation shall not be otherwise assessed. *Wahkonsa Investment Co. v. City of Ft. Dodge*, 100 N. W. 517, 519, 125 Iowa, 148.

#### As capital

"Stock" of a corporation is capital, and the stock certificate only evidences that the holder has invested his means as a part of the capital. *Weaver Power Co. v. Elk Mountain Mill Co.*, 69 S. E. 747, 748, 154 N. C. 76.

"Stock" is the share capital of a corporation or commercial company; the fund employed in carrying on of some business or enterprise divided into shares of equal amount, and owned by individuals who jointly form a corporation. *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945, 963.

Capital, in whatever form invested, appropriate to the purpose of the company, and

not merely the shares held by stockholders, must be regarded as meant by the word "stock," as used in a provision of a railway charter that the stock of the company and its branches shall be exempt from taxation for seven years, and after that shall be subject to a tax not exceeding a given per cent. upon the net proceeds of their investments, in view of the recognition in other provisions of the charter of the distinction between capital stock and "shares," and of at least 60 years' legislative and executive acquiescence in reading this partial exemption as applicable to the capital stock of the company, and of a series of decisions of the highest state court, holding either that the whole of the capital was exempt, in whatever form invested, or so much of the investment as corresponded in value to the authorized capital stock. *Georgia R. & Banking Co. v. Wright*, 132 Fed. 912, 914; *Wright v. Georgia R. & Banking Co.*, 30 Sup. Ct. 242, 244, 216 U. S. 420, 54 L. Ed. 544 (quoting *Bouv. Law Dict.*).

**As chattel**

See Chattel.

**As chose in action**

See Chose in Action.

**As debt**

See Debt.

**As money**

See Money.

**As goods or goods, wares, and merchandise**

See Goods.

**As property**

See Personal Property; Property.

**As security**

See Security.

**STOCK BEER**

"Lager beer" or "stock beer" is an un-equivocal term, designating a light German beer, so called because it is stored for ripening before being used. *People ex rel. Lance v. O'Reilly*, 114 N. Y. Supp. 258, 261, 129 App. Div. 522 (quoting and adopting definition in *Cent. Dict.*).

**STOCK BOOK**

As book, see Book.

**STOCK CATTLE**

A contract restraining defendant from dealing in stock cattle or horses for speculative purposes in the vicinity of M. was not so uncertain as to preclude specific performance because the term "stock cattle" was not one of universal meaning; parol evidence being admissible to explain the term, which in the absence of an allegation of mistake, would be presumed to have been used according to the common understanding of cattlemen in gener-

al. *Wilson v. Delaney*, 113 N. W. 842, 843, 137 Iowa, 636.

**STOCK CERTIFICATE**

See Certificate of Stock.

**STOCK CORPORATION**

See Stock Insurance Company.

A "stock corporation" is in essence an aggregation of individuals, a statutory partnership with assignable membership and limited liability of the members, so that the doctrine of equitable estoppel applies fully to all the internal concerns of such companies. *Breslin v. Fries Breslin Co.*, 58 Atl. 313, 316, 70 N. J. Law, 274.

Laws 1892, p. 1801, c. 687, § 3, declares a "stock corporation" to be one "having a capital stock divided into shares and which is authorized by law to distribute to the holders thereof dividends or shares of the surplus of the corporation." *People ex rel. Venner v. New York Life Ins. Co.*, 97 N. Y. Supp. 465, 466, 111 App. Div. 183.

Under General Corporation Law, Laws 1890, p. 1061, c. 563, § 2, defining a "stock corporation" as one having capital stock divided into shares, a building association formed under Laws 1851, p. 234, c. 122, and having capital stock divided into shares, is a stock corporation within Stock Corporation Law, Laws 1890, p. 1066, c. 564, defining the liabilities of stockholders of stock corporations. *Leighton v. Leighton Lea Ass'n*, 114 N. Y. Supp. 918, 921, 62 Misc. Rep. 73.

A corporation organized under laws 1851, c. 122, which by section 1 authorizes any number of persons, not less than nine, to incorporate to accumulate a fund to purchase realty, or make improvements on lands, or aid its members in acquiring realty, and to accumulate a fund to be returned to its members not receiving advances for acquiring realty, when the funds amount to a certain sum per share, is a nonstock corporation within General Corporation Law (Laws 1890, c. 563, as amended by Laws 1895, c. 672) § 3, subd. 2, providing that a "stock corporation" is one having a capital stock divided into shares, and which is authorized to distribute to the holders dividends or shares of the surplus profits, and that a corporation is not a stock corporation because of having issued certificates, called "certificates of stock," which are merely certificates of membership, and which is not authorized by law to distribute dividends or share profits from its operations. *Leighton v. Leighton Lea Ass'n*, 130 N. Y. Supp. 935, 940, 146 App. Div. 255.

A building association, organized under Laws 1851, p. 234, c. 122, as amended, for the purpose of aiding its members in acquiring real estate, making improvements thereon, and the accumulation of a fund to be returned to its members who do not obtain advances on their shares when the funds to the credit

of the share shall amount to \$100, the par value thereof, is not a stock corporation as defined by General Corporation Law, Laws 1892, p. 1801, c. 687, § 3, subd. 2, defining a "stock corporation" as one having stock divided into shares, but is a membership corporation, in which the corporation entity discharges its duties by acting as trustee for funds contributed by the members to mature the shares and seeing that the moneys contributed by the members under their mutual agreements are properly used in maturing the shares, and the demands of equity can only be satisfied by holding each member to his contract, not so much with the corporation as with the individual members. *Preston v. Reinhart*, 96 N. Y. Supp. 851, 852, 109 App. Div. 781.

### STOCK DIVIDEND

A "stock dividend" is an issue by a corporation of new shares of its own stock to its shareholders. *Union & New Haven Trust Co. v. Taintor*, 83 Atl. 697, 699, 85 Conn. 452.

It is the characteristic feature of a "stock dividend" that the property of the corporation itself remains unchanged, but that each one of the new shares of the increased capital stock represents a smaller fractional interest than before in the total amount of the corporate property; and hence a dividend declared out of a corporation's surplus or accumulated profits, though payable in the stock of another corporation, which diminished the property of the dividing corporation by what was given to the stockholders, was not properly a "stock dividend." *Gray v. Hemenway*, 98 N. E. 789, 790, 212 Mass. 239.

A "stock dividend" is not in the ordinary sense a dividend; a "dividend" being a distribution of the profits to stockholders as the income from their investment, while a "stock dividend" is merely an increase in the number of shares, such increase representing the same property that was represented by the smaller number of shares. A corporation on December 16th declared a 4 per cent. semiannual dividend and a 6 per cent. extra dividend and a 50 per cent. stock dividend, payable to the stockholders of record on January 2d following. After the dividends were declared, but before they were due, plaintiff, a stockholder, sold four shares to defendant, the parties agreeing that the seller should receive the "January dividend," and the amount of the regular semiannual dividend due in January was added to a sight draft attached to the certificates of stock sent to a bank to be delivered upon payment therefor. Neither party had heard of extra cash dividend nor of stock dividend declared. Held, that the "January dividend" reserved included only the cash dividends, and the buyer was entitled to the increased stock represented by the so-called "stock dividend." *Lancaster Trust Co. v. Mason*, 68 S. E. 235,

236, 152 N. C. 660, 136 Am. St. Rep. 851 (citing 7 Words and Phrases, p. 6664).

### STOCK DROVER

A "stock drover" is any person driving live stock through any county in the state and by Rev. St. Wyo. 1899, § 2005, it is made the duty of such drover to prevent his live stock from trespassing upon the property of another. *Haskins v. Andrews*, 76 Pac. 588, 590, 12 Wyo. 458.

### STOCK, FIXTURES, AND ACCOUNTS

A bill of sale by a partner to his copartner of all his interest in the "stock, fixtures and accounts," in a going retail business, did not include an unknown and unsuspected liability of an embezzler of property of the firm; and, in the absence of facts warranting an extension of the construction of the words, it did not convey an interest in an amount subsequently recovered by the copartner from the embezzler, either as reimbursement, as damages, or as a price of immunity from prosecution. *Hubbard v. Ferry*, 123 N. W. 142, 143, 141 Wis. 17, 135 Am. St. Rep. 27.

### STOCK INSURANCE

"Mutual insurance" "is essentially different from 'stock insurance,' and much of the litigation that has grown out of this species of insurance has been owing to inattention to this difference. Its original design was to provide cheap insurance by means of local associations, the members of which should insure each other. Such associations are in their nature adapted only to local business. They need many by-laws and conditions that are not required in stock companies; and it is necessary and equitable that each person who gets insured in them should become subject to the same obligations towards his associates that he requires toward himself." *J. P. Lamb & Co. v. Merchants' Nat. Mut. Fire Ins. Co.*, 119 N. W. 1048, 1049, 18 N. D. 253 (quoting with approval from *May, Ins.* § 146).

### STOCK INSURANCE COMPANY

A "stock insurance company" is one wherein the stockholders contribute all the capital, pay the losses, and take the profits. *State v. Willett*, 86 N. E. 68, 70, 171 Ind. 296, 23 L. R. A. (N. S.) 197.

### STOCK IN TRADE

Under Pub. St. 1901, c. 55, § 7, cl. 6, providing for the taxation of "stock in trade" defined to include raw materials and manufactures of any manufactory, logs, and lumber reckoned at the average value thereof for the year, and chapter 56, § 16, providing for the taxation of logs and lumber at the full value in the town where located on April 1st, logs of a foreign wood pulp and paper manufacturer stored on its land in New Hampshire for use in its manufacturing business are properly taxed as stock in trade, and logs or



lumber not properly stock in trade are taxable under chapter 56. *International Paper Co. v. Town of Walpole*, 74 Atl. 180, 181, 75 N. H. 320.

The bulk sales law (Act May 13, 1905 [Laws 1905, p. 284]) provides that a sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade or in the regular prosecution of the seller's business, or a sale of an entire stock of merchandise in gross, will be presumed to be fraudulent as against creditors of the seller, unless the seller and purchaser shall at least five days before the sale make a full inventory, and unless the purchaser shall within the same time in good faith make full inquiries of the seller as to the names and residences of his creditors and shall notify them of the proposed sale, etc. Held, that the words "stock of merchandise" in the statute are used in the common and ordinary acceptance of those terms, meaning the goods which a merchant holds for sale, and are equivalent to "stock in trade" as ordinarily understood among merchants. *Charles J. Off & Co. v. Morehead*, 85 N. E. 264, 266, 235 Ill. 40, 20 L. R. A. (N. S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434.

### STOCK LAW

Loc. Laws 1900-01, p. 2646, § 1, provides that a majority of the electors of any precinct in F. county may file a petition with the probate judge stating that they desire a "stock law" for the precinct, and he shall enter it as a stock-law precinct. Section 3 provides that any person injured by any live stock running at large in violation of this act shall have a lien, etc. Section 4 provides that any person injured by stock running at large contrary to the act may take up such stock, etc. Held, that the words "stock law" could only refer to some stock law existent in the state at the time of the passage of the act, and where there was no stock law in existence at that time the words were meaningless, and as there was nothing in the statute indicating what means must have been used to confine stock, or under what condition stock could run at large, which could only be learned by reference to some undesignated and wholly indeterminate stock law, the statute is uncertain, vague, indefinite, and ineffectual, in so far as it undertakes to declare any right for persons injured by reason of stock running at large and damaging crops. *Savage v. Wallace*, 51 South. 605, 607, 165 Ala. 572.

### STOCK LEDGER

A "stock ledger" is a stock book kept by a corporation in which the names and addresses of the stockholders and the number of shares held by them, respectively, are contained. In re Election of Directors of United States Cast Iron Pipe & Foundry Co., 65 Atl. 849, 850, 74 N. J. Law, 315.

### STOCK LOAN

"Stock loans" are loans to members exercising the right to borrow 90 per cent. of the withdrawal value of their stock by pledging their stock as security. *Fitzgerald v. State Mutual Building & Loan Ass'n*, 79 Atl. 454, 455, 76 N. J. Eq. 137, 139 Am. St. Rep. 743.

### STOCK OF GOODS

Any stock, see Any.

Defendant contracted with plaintiff and another to sell them a stock of goods consisting of merchandise and trade fixtures contained in a store, plaintiff to pay a certain sum down and a further sum to be determined by the amount of the invoice of "said stock of goods." Held, that the term "stock of goods" embraced the fixtures as well as merchandise, and they were to be invoiced at wholesale prices. *Hendrickson v. Anderson*, 120 N. W. 765, 766, 23 S. D. 78.

### STOCK OF GOODS, WARES, AND MERCHANDISE

Bar fixtures, safes, desks, cash registers, cigar cases, pool tables, refrigerators, and the like, used in connection with a business to which they are appropriate, in facilitating the operation of such business and the sale of the goods connected therewith, and included in a sale with the goods, are a part of a "stock of goods, wares, and merchandise," within the meaning of the act of 1903 (Acts 1903, p. 93), regulating the sale of stocks of goods, wares, and merchandise in bulk. *Parham & Co. v. Potts-Thompson Liquor Co.*, 56 S. E. 460, 461, 127 Ga. 303.

A cash register, which is not a part of the goods kept for sale, is not within *Laws* 1901, p. 222, c. 109, making it the duty of the sellers, on a sale of their "stock of goods, wares or merchandise" in bulk, to furnish an affidavit to the buyers, giving a list of their creditors at the time of the sale, and declaring the sale fraudulent and void in the absence of such affidavit; and the cash register is not subject to attachment in the hands of the buyers at the suit of a judgment creditor of the sellers, though no affidavit was made when the sale was consummated. *Albrecht v. Cudihee*, 79 Pac. 628, 629, 37 Wash. 206.

Pierce's Code, § 5346, declares that it shall be unlawful to purchase any "stock of goods, wares, or merchandise" in bulk for cash or on credit, without requiring the vendor or his agent, before payment is made, to give to the buyer a sworn statement of the names and addresses of his creditors, etc. Held, that a sale of the business and appliances of a boarding house and restaurant was not exempt from the provisions of such section, and that a failure to comply therewith rendered the sale invalid as to the seller's creditors. *Plass v. Morgan*, 78 Pac. 784, 785, 36 Wash. 160.

**STOCK OF MERCHANDISE**

A sale of all the property belonging to a livery stable business is not a sale of a "stock of merchandise," within the Bulk Sales Law. *Everett Produce Co. v. Smith Bros.*, 82 Pac. 905, 906, 40 Wash. 566, 2 L. R. A. (N. S.) 331, 111 Am. St. Rep. 979, 5 Ann. Cas. 798 (citing and adopting *Albrecht v. Cudihee*, 79 Pac. 628, 37 Wash. 206, and citing and distinguishing *Plass v. Morgan*, 78 Pac. 784, 36 Wash. 160).

The phrase "stock of merchandise," as used in St. 1903, p. 276, c. 415, relating to the sale in bulk of any part of the whole of a stock of merchandise, properly and naturally describes articles which the seller keeps for sale in the usual course of his business. It does not naturally describe fixtures. It would hardly be within the usual course of business for a storekeeper at any time to sell his fixtures, and it is not to be presumed that the Legislature intended to prohibit the sale of a fixture, unless such intent is clearly expressed. The natural reading of the statute makes it applicable, as has been said, only to the articles which, in the ordinary course of his business, the seller keeps for sale, and that must be taken to be its legal meaning. *Gallus v. Elmer*, 78 N. E. 772, 773, 193 Mass. 106, 8 Ann. Cas. 1067.

The bulk sales law (Act May 13, 1905 [Laws 1905, p. 284]) provides that a sale of any portion of a stock of merchandise otherwise than in the ordinary course of trade or in the regular prosecution of the seller's business, or a sale of an entire stock of merchandise in gross, will be presumed to be fraudulent as against creditors of the seller, unless the seller and purchaser shall at least five days before the sale make a full inventory, and unless the purchaser shall within the same time in good faith make full inquiries of the seller as to the names and residences of his creditors and shall notify them of the proposed sale, etc. Held, that the words "stock of merchandise" in the statute are used in the common and ordinary acceptance of those terms, meaning the goods which a merchant holds for sale, and are equivalent to "stock in trade" as ordinarily understood among merchants. *Charles J. Off & Co. v. Morehead*, 85 N. E. 264, 266, 235 Ill. 40, 20 L. R. A. (N. S.) 167, 126 Am. St. Rep. 184, 14 Ann. Cas. 434.

**STOCK OF SUGAR AND MOLASSES**

The phrase "stock of sugar and molasses," in a policy of insurance on a stock of sugar and molasses deposited in the sugar manufactory on a sugar plantation, on which there is a growing crop, embraces such stock in whatever form existing and which might be in the factory at the time the risk attached under the policy stipulating that the risk was to attach in two months and four days after the date of the policy. *Royal Ins. Co. v. Mil-*

*ler*, 26 Sup. Ct. 46, 49, 199 U. S. 353, 50 L. Ed. 226.

**STOCK ON HAND**

Where an insurance policy required the assured to take a complete itemized inventory of "stock on hand" at least once in each calendar year, the "stock on hand" means the stock of goods on hand, and not the fixtures in the store, or the building itself. *Continental Ins. Co. v. Cummings*, 81 S. W. 705, 707, 98 Tex. 115.

**STOCK SIGNAL**

"Stock signals" are several short blasts or sounds of a locomotive whistle. *Anson v. Gulf, C. & S. F. R. Co.*, 94 S. W. 94, 95, 42 Tex. Civ. App. 437.

**STOCK TICKER**

See Gambling Device.

**STOCK TRANSFER STAMPS**

As property, see Property.

**STOCKBROKER**

As mercantile pursuit, see Mercantile.

In many states in transactions involving the sale of stock on margins, the broker is held to be the agent of the customer, but in California the relation between a broker and customer is that of vendor and vendee. Under a constitutional provision that contracts for the sale of shares of corporation stock on margins to be delivered in future shall be void, and any money paid thereon may be recovered where the stock is purchased on margin, and the customer afterwards pays the broker the amount of the broker's advances and receives the certificates, the transaction becomes valid, and no action will lie against the broker to recover back the money paid on the stock so delivered. *Conrad v. Lepper*, 81 Pac. 307, 311, 13 Wyo. 473.

**STOCKHOLDER**

See Bona Fide Stockholder; Majority of Stockholders; Withdrawing Stockholders.

See, also, Shareholder.

"Stockholders" are those who appear on the books of a bank as owners of shares and who are entitled to manage its affairs. *Knickerbocker Trust Co. v. Myers*, 133 Fed. 764, 770 (citing *Magruder v. Colston*, 44 Md. 349, 22 Am. Rep. 47).

Civ. Code, § 322, declaring one to be a "stockholder" whose name appears on the books of the corporation as such, applies only to one who knowingly or voluntarily permits his name to so appear. *Welch v. Gillelen*, 82 Pac. 248, 249, 147 Cal. 571.

The word "stockholders," under the terms of the charter of a mutual insurance company, includes every person who had contributed to the fund on hand, whether holding any unexpired insurance or not. *Huber*

v. Martin, 105 N. W. 1031, 1038, 127 Wis. 412, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400.

An executor of a deceased stockholder is a "stockholder," within Stock Corporation Law (Laws 1892, p. 1824, c. 688), and entitled to inspect the stock book and to information as to the affairs of the corporation. In re Hastings, 106 N. Y. Supp. 938, 939, 56 Misc. Rep. 45.

The term "stockholder" is not synonymous with that of subscriber. Each has a distinct, definite, technical meaning. The latter is employed to denote one who becomes bound by a subscription to the capital stock of a corporation. Reid v. De Jarnette, 51 S. E. 770, 771, 123 Ga. 787.

Usually the holders of preference shares are "stockholders" of a company, subject to the rights and liabilities attaching to that relation, and the principal privilege they enjoy is priority of claim to dividends as against the holders of common shares, which priority is the prominent characteristic of preferred stock. Kidd v. Puritana Cereal Food Co., 122 S. W. 784, 787, 145 Mo. App. 502 (citing Kent v. Quicksilver Min. Co., 78 N. Y. 159).

A "stockholder" in a corporation is a creditor of the corporation to the extent of his contribution to the capital stock, and in that sense the capital stock is a liability of the corporation. Weaver Power Co. v. Elk Mountain Mill Co., 69 S. E. 747, 748, 154 N. C. 76.

The holder of a contract purporting to be for the purchase and sale of a diamond issued by what is commonly called a "tontine company" is not a "stockholder" in such company, and cannot secure the appointment of a receiver for such company because of the mismanagement of its affairs by its officers. Mann v. German-American Inv. Co., 97 N. W. 600, 603, 70 Neb. 454.

As used in Laws 1903, p. 141, c. 93, imposing a penalty on an officer of a corporation who makes exaggerated reports "to the stockholders or to other persons dealing with such corporation," the word "stockholders" does not designate that entire class, but only those dealing with corporations. State v. Merchant, 92 Pac. 890, 892, 48 Wash. 69.

The holder of a "voting trust" certificate is the beneficial owner of the stock represented by it in the hands of the "voting trustees." Being the beneficial owner, he is a "stockholder," within the meaning of section 65 of the corporation act (Laws 1896, p. 298, c. 185), and is entitled to institute the proceedings provided by that section for the winding up of an insolvent corporation. United States Independent Tel. Co. v. O'Grady, 71 Atl. 1040, 1041, 75 N. J. Eq. 301.

Under Rev. St. Ohio 1908, § 3259, which provides that the term "stockholder" shall

apply not only to persons who appear by the books of the corporation to be such, but also to an equitable owner of stock, although on the books it appears in the name of another, an action to enforce an assessment made under section 3260d may be maintained against both the equitable owner of stock of an insolvent corporation and the legal owner, in whose name the stock stands on the books. Irvine v. Blackburn, 198 Fed. 360, 361.

One who permitted his name to appear as a stockholder in a bank, and who qualified as a director on the faith of his interest in the bank to the extent of 10 shares, and who subsequently severed his connection with the bank by doing everything in his power to render his surrender of the shares of stock effectual as between himself and the president thereof, is not a "stockholder," as between himself and the president, nor as between himself and the bank. Willoughby v. Kelly, 91 Pac. 874, 876, 190 Okl. 123.

Persons were "stockholders," and not "creditors" of a corporation, where they received stock under a resolution in the handwriting of one of them, directing its issuance to them for advances, and retained it over four months, when they attached the certificates to their respective claims filed with the corporation's receiver; the papers in a suit by one of such persons in which the receiver was appointed reciting that they were "stockholders," and not disclosing the amount of such advances as debts of the corporation, though a schedule of the corporation's debts was set out. Iserman v. International Stoker Co., 86 Atl. 605, 606, 72 N. J. Eq. 708.

Where complainant transferred all his stock in defendant company to another corporation in exchange for the stock of the latter, and received back from it a single share, which he indorsed in blank and returned, such stock being transferred to him for the sole purpose of enabling him to qualify as a director in defendant company, he was not a "stockholder" thereof, within P. L. 1896, p. 296, c. 185, § 65, authorizing a "stockholder" of an insolvent company to sue to have the corporation placed under disabilities by injunction in respect to the exercise of its franchise and for the appointment of a receiver. Hoopes v. Basic Co., 61 Atl. 979, 980, 69 N. J. Eq. 679.

Under the statute providing that directors of a corporation shall be stockholders unless otherwise specified in the certificate of incorporation or by-laws, and under a certificate of incorporation providing that no person shall be a trustee of the corporation who is not a holder or owner of at least one share of the corporation's capital stock, the word "stockholder" was not used in the sense of stockowner, and hence one who was a stockholder of record, though not a beneficial owner, was qualified to hold the office of trustee.

In re George Ringler & Co., 130 N. Y. Supp. 62, 64, 145 App. Div. 361.

Civ. Code 1895, § 408 (Rev. Codes, § 3822), defined "stockholders" as the owners of shares in a corporation which has a capital stock. Rev. Codes, § 3887, provides that any corporation whose capital stock is not assessable may, with the written consent of three-fourths of its "stockholders" spread upon its records, make its stock assessable. A corporation whose capital stock was nonassessable, upon a vote of 96 out of 301 individual stockholders who owned more than three-fourths of all the capital stock, recorded that its stock had been changed from nonassessable to assessable stock. Held, that "stockholders," as used in the provision making stock assessable, referred to the owner of the stock and not to the shares themselves, and that the vote of the 96 stockholders, being less than three-fourths, was without effect. *Smith v. Iron Mountain Tunnel Co.*, 125 Pac. 649, 651, 46 Mont. 13.

Civ. Code, § 322, in relation to the liabilities of stockholders, provides that each stockholder is individually liable for such proportion of the corporate liabilities as his stock bears to the whole of the stock, and that the term "stockholder" applies to every equitable owner of stock, although the same appear on the books of the company in the name of another. Held that, where shares of stock appeared on the corporate books in the name of one as trustee for another, the former, as between himself and the corporation, was a "stockholder," and liable to the corporation for the amount of an assessment on an unpaid subscription; section 322 being applicable only to actions against stockholders by creditors of the corporation. *Union Sav. Bank of San Jose v. Willard*, 88 Pac. 1098, 1099, 4 Cal. App. 690.

A person who holds shares of stock in pledge, although the shares are assigned in blank by the registered owner, does not become a "stockholder" until the shares are transferred to him on the books of the corporation; and a mere pledgee, who has not become a registered stockholder, is not entitled to participate in, or to be notified of, the proceedings to effect a consolidation of two or more companies. *Cleveland City Ry. Co. v. First Nat. Bank*, 67 N. E. 1075, 1079, 68 Ohio St. 582.

Under Gen. Corp. Law, § 20, requiring the record holder of stock pledged to him to issue a proxy to the pledgor to vote, and under Stock Corporation Law, § 54, making the pledgor of stock liable as stockholder, such a pledgor is a "stockholder," within Stock Corporation Law, § 29, providing a penalty for a corporation's refusal to permit a stockholder to inspect its stockbook. *Booth v. Consolidated Fruit Jar Co.*, 114 N. Y. Supp. 1000, 1001, 62 Misc. Rep. 252.

Under Civ. Code, § 322, defining the term "stockholder" as applying not only to such persons as appear by the books of the corporation to be such, but also to every equitable owner of stock, etc., a pledgee of corporate stock, who allows himself to appear on the books of the corporation as the owner of the stock, is a "stockholder," within the section, and within Const. art. 12, § 3, making stockholders individually liable for corporate debts; but a pledgee of stock, who directs the secretary of the corporation to issue to him a new certificate in his name as pledgee, is not a stockholder because the secretary, without the knowledge of the pledgee, entered his name on the corporate books as a stockholder and issued stock in his name as such. *Shattuck & Desmond Warehouse Co. v. Gillelan*, 99 Pac. 348, 350, 154 Cal. 778.

An agreement showing an intention to become a stockholder in a corporation is sufficient, though there is no formal agreement; and where a number of persons already stockholders agree among themselves in writing to take up the unissued stock, pursuant to a proposal of the board of directors, to issue the stock to them on certain terms, the delivery of the agreement to the secretary constituted an acceptance of the proposal, so as to make such persons "stockholders" as to the unissued stock. Const. art. 12, § 3, and Civ. Code, § 322, make each stockholder of a corporation individually liable for such proportion of its debts incurred while he was a stockholder as the shares owned by him bear to the whole of the subscribed shares of the corporation, and the Code section also provides that the term "stockholder" as used therein applies, not only to such as appear by the corporate books to be such, but to every equitable owner of stock though it is on the books in another's name. Const. art. 12, § 14, requires books to be kept by the corporation wherein shall be recorded the amount of the capital stock subscribed, the names of the owners, and the amount of stock owned by each. Held, that the stockholders were not bound to see that not only their own names, but also the names of all other stockholders, were entered on the books as such, and that it would not be presumed that the corporation had entered the names of all stockholders on its books, so as to prevent a stockholder from showing other subscriptions than those shown by the corporate books, when sued on his statutory liability under section 322, so as to reduce the amount of such liability; the terms "owner" and "stockholder" in the statute including the real owner, though his name does not appear on the corporate books as owner. The statutory liability of one not the real owner of stock, but who appears on the corporate books as an owner, is based upon his estoppel to deny ownership. The issuance of certificates of stock is not necessary to make one a "stock-

holder" in a corporation. *Hughes Manufacturing & Lumber Co. v. Wilcox*, 108 Pac. 871, 872, 13 Cal. App. 22.

**As creditor**

See Creditor.

**As depositor**

See Depositor.

**As employer**

See Employer.

**As owner**

See Owner.

**STOCKHOLDERS OR OTHER PERSONS**

See Other Person.

**STOCKHOLDER'S SUIT**

A "class suit" is one in which one or more members of a numerous class, having a common interest, sue in behalf of themselves and all other members of that class. Such suits are sometimes called "creditors' suits" and sometimes "stockholders' suits." *Seminole Securities Co. v. Southern Life Ins. Co.*, 182 Fed. 85, 96.

**STOCKJOBBER**

An individual who makes it his continuous occupation or life business to buy and sell securities is called a "stockjobber" or "sharejobber." *Vanderbilt University v. Cheney*, 94 S. W. 90, 93, 116 Tenn. 259.

**STOCKYARD COMPANY**

As common carrier, see Common Carrier.

**STOLE**

As took, see Took.

**STOLEN**

See Steal.

**STONE**

See Building or Monumental Stone; Crushed Stone; Dimension Stone; Flat Stones; Footing Stone; Ornamented Stones.

As mineral, see Mineral.

A city ordinance, prohibiting the erection of any building within fire limits, except buildings constructed of "brick" or "stone," does not prohibit the construction of a concrete building, since "concrete" is either a species of brick, or is an artificial stone; and the ordinance is not in conflict with Rev. St. 1895, art. 523, authorizing cities to establish fire limits, and to prohibit the construction of buildings therein, except buildings of fireproof materials. *Ex parte Morris*, 120 S. W. 1007, 1008, 56 Tex. Cr. R. 533.

**STOOD BY, AIDED, ABETTED, OR ASSISTED**

An instruction in the language of Kirby's Dig. §§ 1560, 1561, 1563, that a defendant who "stood by, aided, abetted, or assisted" another in the commission of a felony may be convicted, is not erroneous as authorizing a conviction if he merely stood by, but did not aid or abet or assist. *Burnett v. State*, 96 S. W. 1007, 80 Ark. 225.

**STOOD MUTE**

Where the record disclosed that, accused having been arraigned at the bar in open court, and the information having been read to him, he stood mute, whereupon a plea of not guilty was entered by order of the court, the recital that "he stood mute" imported that he was requested to plead and declined to do so. *People v. Fisher*, 108 N. W. 280, 281, 144 Mich. 570.

**STOP**

See Emergency Stop; Payment Stopped; Service Stop.

**STOP ORDER**

A "stop order" is a direction by a purchaser to his broker to sell the stock purchased at the best available price if it should touch the price named in the order, while it is being held by the broker; but it does not impose an obligation on the broker to hold it until it reaches that price, as it is a measure of protection which the purchaser provides for himself against loss beyond a certain point in a fluctuating market. *Richter v. Poe*, 71 Atl. 420, 424, 109 Md. 20, 22 L. R. A. (N. S.) 174.

**STOP STILL**

Where a street car company was entitled to an instruction that it was not guilty of negligence unless a car had "stopped" when a passenger attempted to alight, the use of the term "stopped still" was no abuse of the right, as there is really no difference in the meaning of the expressions except that perhaps the latter is the more emphatic. *Peck v. St. Louis Transit Co.*, 77 S. W. 736, 737, 178 Mo. 617.

**STOP TO FILL**

A written contract for the transportation of horses, not a car load, which stipulates for their transportation from a designated point to another point for delivery to a connecting carrier for delivery to the point of destination, with the privilege of "stop" at a city "to fill," is unambiguous, and means that the horses will be held at the city to enable the shipper to fill the car with other horses, and it does not permit the shipper to unload and feed for two weeks, to make the horses more suitable for market, and parol evidence to explain it is inadmissible. *Banks v. Chicago*

go, B. & Q. R. Co., 134 S. W. 1071, 1072, 153 Mo. App. 469.

### STOPPING PLACE

See Usual Stopping Place.

### STOPE

See Filled Stope.

### STOPPAGE IN TRANSITU

The "right of stoppage in transitu" exists where the goods have not been paid for and the buyer is insolvent and may be exercised before the expiration of the term of credit or the maturity of the buyer's note, at any time before the goods come to the possession of the buyer. *F. H. Smith Co. v. Louisville & N. R. Co.*, 122 S. W. 342, 344, 145 Mo. App. 394.

The right of "stoppage in transitu" is an extension of the right to a lien for the price anterior to actual delivery, which lien the seller can enforce by seizing the goods in the possession of a carrier at any time prior to actual delivery into the possession of the buyer. *Willis v. Glenwood Cotton Mills*, 200 Fed. 301, 305.

All authorities agree that the right of "stoppage in transitu" is nothing but an extension of the vendor's lien on the goods for the payment of the purchase money. The transit is held to continue from the time the vendor parts with the possession until the purchaser acquires it; that is to say, from the time the vendor has so far made delivery that his right of retaining the goods and his right of lien are gone to the time when the goods have reached the actual possession of the buyer. The stoppage in transitu is called into existence for the vendor's benefit after the buyer has acquired title and right of possession and even constructive possession, but not yet actual possession, and the insolvency of the purchaser is a sufficient justification for exercising the seller's right, though the sale be unconditional and time be given to the purchaser. This right of stoppage is not precluded until the goods have actually reached the buyer or under circumstances equivalent thereto. The right is based on the equitable rule that one man's property shall not be taken to pay another man's debt. It arises from the discovery by the vendor during the transitus of the insolvency of the vendee, and the ordinary effect of its exercise is to vest in each party to the contract of sale the rights he had before the possession of the goods sold was delivered to the carrier. *Letts-Spencer Grocery Co. v. Missouri Pac. R. Co.*, 122 S. W. 10, 11, 138 Mo. App. 352 (citing *Schwabacher v. Kane*, 13 Mo. App. 126; *Estey v. Truxel*, 25 Mo. App. 238; *Kearney Milling & Elevator Co. v. Union Pac. Ry. Co.*, 66 N. W. 1059, 97 Iowa, 719, 59 Am. St. Rep. 434).

### STORAGE

See Place of Storage.

### STORAGE BATTERY

A "primary battery" is one in which chemical action takes place directly to produce electromotive force, while in a "secondary battery" the electromotive force is produced by a chemical action set up after a current of electricity has been passed through the cell for some time. Secondary batteries are commonly called "storage batteries." In *re Charles Town Light & Power Co.*, 183 Fed. 160, 165.

### STORAGE TRACK

The term "storage tracks" is applied to side tracks of a railroad used for the storing of cars by incoming trains to be incorporated in subsequent outgoing trains. *St. Louis S. W. R. Co. of Texas v. Pope*, 86 S. W. 5, 98 Tex. 535.

### STORAGE WAREHOUSING

See Field Storage Warehousing.

### STORE

See Goods in Store; In Store; Open Store; Sea Stores.

While a storehouse may under some circumstances come within the meaning of the word "store" as used in Rev. St. 1883, c. 6, § 14, providing that all personal property employed in trade, etc., shall be taxed in the town where so employed on the 1st day of April of each year, provided that the owner so employing it occupies any store, shop, mill, etc., for the purpose of such employment, the word "storehouse" does not come within the meaning of the word "store," where a finished manufactured product is placed in a storehouse for the purpose of storage, and not for the purpose of trade. *Inhabitants of New Limerick v. Watson*, 57 Atl. 79, 81, 98 Me. 379.

### As public place

See Public Place.

### STORE AND KEEP IN POSSESSION

The words "store and keep in possession," as used in 26 St. at Large, p. 60, prohibiting the unlawful accepting, receiving, storing, and keeping in possession alcoholic liquors contrary to law, involve the idea of continuity or habit, and have no different construction or meaning in counties where the sale of liquor is prohibited from that which they have in counties where liquors are lawfully sold through dispensaries. *State v. Green*, 71 S. E. 847, 848, 89 S. C. 132.

### STORED—STORING

An automobile which is merely kept at a garage to be taken out and used at the pleasure of the owner is not "stored," so as to give a lien for storage as to a warehouse-

man. *Smith v. O'Brien*, 94 N. Y. Supp. 673, 675, 46 Misc. Rep. 325.

Where a steamship company had a right to use a wharf belonging to a certain warehouse, and also to use the warehouse, and placed the cargo of a vessel in the warehouse from which it was stolen, the cargo was not "stored," in a technical sense, so as to render the warehousemen liable as such; it not having been delivered to them and a warehouse receipt taken. *Evans v. New York & P. S. S. Co.*, 163 Fed. 405, 406.

### STORED IN BULK

"Stored in bulk" means "having the cargo loose in the hold or not inclosed in boxes, bales, or casks." Such words, as used in *Ky. St. § 4224*, imposing a tax on oil depots wherein oils are stored in bulk, are to be construed as referring to oil stored in large oil tanks holding hundreds or thousands of barrels of oil, which are in common use, and not to oil stored in barrels in warehouses or sheds. *Standard Oil Co. v. Commonwealth*, 82 S. W. 1020, 1022, 119 Ky. 75 (citing *Webst. Dict. Unab.*).

### STOREHOUSE

As appurtenance, see *Appurtenance—Appurtenant*.

As store, see *Store*.

In a prosecution for burglary from a building adjacent to a grocery store in which the surplus stock was deposited, the building was properly designated in the indictment as a "storehouse." *State v. Turnbaugh*, 85 N. E. 1060, 1061, 79 Ohio St. 63.

The word "storehouse" is defined to be a house in which things are stored; a building for the storing of grains, foodstuffs, or goods of any kind; a magazine; a repository; a warehouse. A vat 6 or 8 feet deep and 6 feet in diameter, constructed of heavy oak timbers which are sunk in the ground, having a hinged cover secured in place by a lock, and which is used for storing hides awaiting sale, is a "storehouse," within Criminal Code, § 48, relating to burglary. *Steele v. State*, 113 N. W. 798, 80 Neb. 9, 127 Am. St. Rep. 741.

#### Elevator

A "storehouse" "is a building for keeping goods of any kind, especially provisions; a magazine; \* \* \* a warehouse." The word "storehouse," as used in *Comp. St. 1899, c. 77, art. 1, § 39*, relating to railway taxation, and providing that all machine and repair shops, general office buildings, storehouses, and also all real and personal property outside of the right of way and depot grounds, shall be listed for purposes of taxation by the officers of the companies with the precinct assessors where the property may be situated, includes an elevator. *Adams County v. Kansas City & O. Ry. Co.*,

99 N. W. 245, 247, 71 Neb. 549 (quoting *Webst. Dict.*).

#### Storeroom

See *Storeroom*.

### STOREROOM

As dwelling house, see *Dwelling House*.

As private residence, see *Private Residence*.

The "storeroom" contemplated by a policy of burglary insurance, provided that, if the assured is the occupant of an apartment, the insurance covers goods in a locked storeroom provided for the exclusive use of the assured, by the landlord in the same house, etc., is a room in an apartment or flat house, set apart and having conveniences, such as shelves, hooks, etc., for storage purposes, and is not, for instance, a bedroom used by the tenant in part for storing his goods; nor is it a separate laundry under lock and key in the basement of a flat house, set aside for the use of the assured, and used by him for laundry purposes, cooking, storing of vegetables, and wherein he stored trunks packed with winter clothing. If the policy included a bedroom or laundry room in which goods are stored, then the use of any room in an apartment or flat by the tenant to store his and his family's unused apparel, although the room is used for other purposes, if it had a lock door with a key, comes within the definition of storeroom, as used in the policy. *Michaels v. Fidelity & Casualty Co. of New York*, 105 S. W. 783, 784, 128 Mo. App. 18.

In a burglary trial, where the information alleged the breaking into a storehouse belonging to a mining corporation, that some of the witnesses stated that the ore stolen was stored in a storeroom, instead of a storehouse, or in the storeroom of the shafthouse, instead of the storeroom of the storehouse, was immaterial, and there was no variance, the evidence as a whole showing that the buildings were similar to those on other mining properties, and that the building or that portion broken into was used to store machinery, supplies, and ore, thus making it a storehouse; the word "storehouse" being defined by Webster as a building for keeping goods of any kind, a repository, a warehouse, and a "storeroom" as a room in a storehouse or repository; a room in which articles are stored. *Tollifson v. People*, 112 Pac. 794, 797, 49 Colo. 219.

### STORM

See *Extraordinary Storm*; *Unusual Freshet or Storm*; *Windstorm*.

### STORM SEWER

The purpose of a "storm sewer" is to carry off flood water, and *Denver City Charter*, art. 7, § 21, providing that the cost of a storm district sewer shall be assessed on all the

real estate in the district in proportion as the area of each piece of real estate in the district is to the area of all the real estate in the district, exclusive of highways, provides a valid method of assessment as each lot in the district is benefited by being relieved from the dangers and damages which may be occasioned from storm waters. *City of Denver v. Dumars*, 80 Pac. 114, 115, 33 Colo. 44.

## STORY

See Upper Stories.

The statute prohibiting one engaged in the erection of any building three or more stories high to begin the erection of the third story, or any story above the third, until a floor or protection has been put down on the second floor, or on the last story before the fourth story is commenced, and so on, consecutively, etc., does not contemplate that a floor shall be placed between the ground and the skylight of the room covering an open court; there being but one story in the building, and a "story" being defined as a vertical physical division of a house. *Lagler v. Bye*, 85 N. E. 36, 37, 42 Ind. App. 592.

## STORY TOLD

An instruction directed that, in determining the weight of the testimony, the jury should consider any interest of the witnesses in the result of the case; their conduct and demeanor while testifying; their apparent fairness or bias; their opportunities for seeing or knowing the things about which they testify; the reasonableness of the "story told" by them, and all the evidence and circumstances proved tending to corroborate or contradict them, "if any such appears." Held, that such instruction was not erroneous in the use of the words "story told" and "appears"; the words "story told" being used in the sense of the testimony given on the trial; and the word "appears" to mean the fairness or bias of the witness as disclosed by his conduct on the stand; his manner of testifying, etc. *Nicholson v. State*, 106 Pac. 929, 931, 18 Wyo. 298.

## STOVE

See Coal Stoves.

## STOVEPIPE

The word "stovepipe," as used in a city ordinance regulating the passage of stovepipe through any wall, partition, flooring, or ceiling, should be construed to refer to a pipe made of either sheet iron or heavy tin usually used to connect the stove with the chimney, or flue, of brick, fire clay, or terra cotta, and not to include the flue itself. *S. R. Fowle & Son v. Atlantic Coast Line R. Co.*, 61 S. E. 262, 264, 147 N. C. 491.

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## STOWAWAY

A "stowaway," within rule 23 of the Commissioner General of Immigration relating to the disposition of alien stowaways, is one who steals his passage. *United States ex rel. v. Williams*, 193 Fed. 228, 230.

## STOWMAN

A "stowman" is one engaged in loading and unloading freight cars, whose duty is to stay in the car and unload freight from trucks brought to him by a truckman, and to store it safely and compactly for transportation. *Brisco v. Chicago, B. & Q. R. Co.*, 109 S. W. 93, 95, 130 Mo. App. 513.

## STRAIGHT

Election Law, § 368, rule 9, providing that any "straight" line, crossing another straight line at any angle within a party circle or within the voting spaces, shall be deemed a valid voting mark, should be liberally construed, so that a tremulous line drawn by an infirm elector, or an irregular or curved line drawn by an elector with poor eyesight or with muscles untrained to the use of a pencil, or any single line but once crossing another single line in such a way as to substantially comply with the statute, though the line was retraced, and the pencil has not been kept exactly on the line at parts removed at the point where the lines cross, should not be held void. *Fallon v. Dwyer*, 90 N. E. 942, 943, 197 N. Y. 336.

## STRAIGHT TIME

Where the rate of paying for services is to be for "straight time," all the time that elapses, without deduction for time lost by wet weather or other causes not the willful act of the person performing the services, is meant. *Maurice v. Hunt*, 97 S. W. 664, 665, 80 Ark. 476.

## STRAND

See Three Strands or Cords.

A single thread is a "strand." A string is a "strand," and one of a number of flexible things, as grasses, strips of bark, or hair when used to be twisted or woven together, is called a "strand." *Haskell Golf Ball Co. v. Perfect Golf Ball Co.*, 143 Fed. 128, 130.

## STRANGER

The word "strangers," when used following other designations of persons, is generally intended to exhaust the whole category of persons within the range of the subject under discussion, not included in the terms which preceded it, and has the same meaning as if it read "all persons." The word "stranger," as used in Act No. 109 of 1906, entitled "An act to levy taxes on all inheritances, and



imposing a tax on inheritances falling to ascendants, descendants, collateral relations, and strangers," is intended to exhaust the whole category of persons who might be called to the inheritance, and applies to all who have not in fact or by law the status of legitimate ascendants, descendants, or collateral relations. *Succession of Baker*, 55 South. 714, 717, 129 La. 74, Ann. Cas. 1912D, 1181.

#### **As one not liable for the debt**

"The terms 'stranger' and 'volunteer,' as used with reference to the subject of subrogation, mean one who in no event resulting from the existing state of affairs can become liable for the debt, and whose property is not charged for the payment thereof, and cannot be sold therefor." *Hoffman v. Habighorst*, 91 Pac. 20, 21, 49 Or. 379.

#### **As one not a party**

In a complaint against the collector of internal revenue, to recover the amount of taxes exacted by him from plaintiffs, who are shipping agents, as due under the revenue act on copies of charter parties in their possession, and alleged by them to have been obtained for the information of themselves and their customers, an allegation that plaintiffs, such firm, were "strangers to said charter parties and the matter to which the same related," is not sufficient to show that plaintiffs were not the agents or representatives of one or the other of the parties to such instruments, and properly chargeable with the tax; the word "strangers" meaning that plaintiffs were not parties to the charter parties. *Simpson v. Treat*, 126 Fed. 1003, 1006.

#### **STRANGER IN BLOOD**

Act Cong. June 13, 1898, c. 448, 30 Stat. 448, as amended imposing a succession tax, classified legatees and distributees with reference to their degree of blood relationship to the deceased, and regulated the taxes accordingly. In the first class were placed the lineal issue or lineal ancestor, brother or sister of the decedent; in the second the descendants of a brother or sister; in the third the brother or sister of the father or mother or a descendant; in the fourth class, the brother or sister of the grandfather or grandmother or a descendant; and in the fifth all beneficiaries found to be in any other degree of collateral consanguinity, or who may be a stranger in blood to the person dying seised of the property. Held, that an adopted child, though under the laws of the state entitled to all the rights of heirship of a child born in lawful wedlock, was not a "lineal issue" within the first class, but was a "stranger in blood" within the fifth class. *Kerr v. Goldsborough*, 150 Fed. 289, 291, 80 C. C. A. 177.

#### **STRAP**

See Jack Straps.

#### **STRATUM**

As a geological term "bed" is synonymous with "vein" or "stratum," but the term "coal bed" may be used to mean "quarry." *Hoysradt v. Delaware, L. & W. R. Co.*, 151 Fed. 321-331.

#### **STRAW**

Manufactures of, see Manufactures—Manufactured Articles.

Wholly of straw, see Wholly.

#### **STRAW BOSS**

A "straw boss" is a boss without any authority. *Momence Stone Co. v. Groves*, 64 N. E. 335, 336, 197 Ill. 88.

"A 'straw boss' is a term to indicate that, in the absence of the real boss, the former was clothed with his authority \* \* \*." *St. Louis & N. A. R. Co. v. Midkiff*, 87 S. W. 446, 447, 75 Ark. 263.

In an action against a railroad for negligently causing the death of plaintiff's decedent, evidence that the second foreman or "straw boss" of defendant's construction crew was charged with the duties of indicating to the train crew by signaling when the construction crew was ready for the train to move and where the dirt thereon was to be unloaded, it not appearing that he had any other authority over the train crew, did not show that such foreman was engaged in the operation and management of the train, with absolute control and management of the movements thereof, so as to render defendant liable for his negligent failure to either discover deceased or warn him of his danger. *Forge v. Houston & T. C. R. Co.*, 90 S. W. 1118, 41 Tex. Civ. App. 81.

#### **STRAW BRAID**

A small amount of cotton thread in "straw braids" will not remove such articles from the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 409, 30 Stat. 189, for braids composed "wholly" of straw, where the thread is only used for temporarily tying the ends of the braids to prevent them from unraveling. *Samuel Schiff & Co. v. United States*, 140 Fed. 63.

#### **STRAW BRAIDS OR PLAITS**

Certain merchandise, consisting of wide braids or plaits of straw, fastened together so as to form rectangular strips measuring about 18 by 36 inches, held not dutiable as hats partly manufactured, under Tariff Act July 24, 1897, c. 11 § 1, Schedule N, par. 409, 30 Stat. 189, but as "straw braids or plaits," "suitable for making or ornamenting hats," etc., under the same paragraph. *Samuel Schiff & Co. v. United States*, 140 Fed. 63, 64.

#### **STRAW MAN**

A "straw man," in the parlance of real estate dealers, is a mere conduit or medium

for convenience in holding and passing title. *Van Raalte v. Epstein*, 99 S. W. 1077, 1079, 202 Mo. 173.

By the term "man of straw" is meant one of no substance, one in name only, an irresponsible person having no property to respond in damages, who loans himself out to others to sign contracts as a purchaser, knowing he is acting a lie. *Houtz v. Hellman*, 128 S. W. 1001, 1003, 228 Mo. 655.

## STREAM

See Floatable Stream; Running Stream; Standard Development of Stream; Surface Stream; Thread of a Stream; Underground Stream.

Improvement of stream, see Improvement.

Navigable stream, see Navigable.

The primary meaning of "stream" is "a course of running water, a river, rivulet, or brook" (quoting and adopting *Cent. Dict.*). The word "stream," within a statute relating to the formation of land upon the banks of a river or stream, is used in the same sense as "river," and as a more comprehensive term. *Western Pac. R. Co. v. Southern Pac. Co.*, 151 Fed. 376, 398, 80 C. C. A. 606.

Percolating water, oozing through the soil beneath the surface in an undefined and unknown channel, is not within the provisions of *Rev. St. Ariz. 1887*, par. 3190, § 1, par. 3201, § 3, for the appropriation of water from rivers, creeks, or "streams" of running water. *Howard v. Perrin*, 26 Sup. Ct. 195, 197, 200 U. S. 71, 50 L. Ed. 374.

Water oozing from a spring through a soft and spongy ground, and flowing into a pond, does not constitute a "stream," within the meaning of a lease demising the pond of water and the water of the stream leading thereto. *Dickey v. Maddux*, 93 Pac. 1090, 1091, 48 Wash. 411 (citing *Farnham, Waters and Water Courses*, p. 1561, § 458).

The legal distinction between a "stream of water" and a "water course," if any, is shadowy and unsubstantial; if the drain in controversy was not a water course, it was surely not a stream of water. Under *Burns' Ann. St. 1901*, § 5153, authorizing railroads to construct roads across any stream of water, water course, etc., a drainage ditch fed by no spring or water course, and used and constructed solely for expediting surface drainage, is not a water course, which the railroad is obliged to preserve and restore to its former state. *New Jersey, I. & I. R. Co. v. Tutt*, 80 N. E. 420, 422, 168 Ind. 205.

### As a boundary

A stream along the middle of which runs the boundary between counties is within *Revisal 1908*, § 1318, subsec. 29, providing that the cost of constructing a bridge over "a stream which divides one county from another" shall be defrayed by the counties in pro-

portion to the number of taxable polls of each. *Penn. Bridge Co. v. Com'rs of Chatham County*, 65 S. E. 895, 151 N. C. 215.

The word "stream," as used in *Comp. St. 1901*, c. 78, § 87, declaring that bridges over streams which divide counties, and bridges over streams on roads on county lines, shall be built at the equal expense of such counties, is used in a general sense, and includes rivers and smaller courses of water. In this statute the Legislature used the word in the sense of a course of running water, a river, rivulet, or brook. *Dodge County v. Saunders County*, 100 N. W. 934, 935, 70 Neb. 451. Under the statute providing for the maintenance and repair of bridges across "streams" that divide counties, it was held that the fact that a bridge across a river, where it divided two counties, was not one continual structure, but consisted of two separate portions separated by an island, one of which portions was entirely in one county, would not, under the circumstances, relieve the other county from the burden of contributing to the repair of the entire structure under the statute; the contention being that, the island being entirely within the limits of one county, the portion of the bridge in that county was not over a "stream" that divided counties, within the meaning of the statute. *Dodge County v. Saunders County*, 110 N. W. 756, 758, 77 Neb. 787.

### Defined channel

"A 'stream' does not cease to be a water course and become mere surface water because at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel." *Blohowak v. Grochoski*, 96 N. W. 551, 553, 119 Wis. 189 (quoting and adopting definition in *Gould Wat. [3d Ed.] § 264*).

A "stream of water" has a defined channel. It has banks and is very distinct from the percolation of subsurface water which oozes in veins or filters through the earth's strata. An "underground stream of water" differs from a surface stream only with respect to its location above or below the surface. When a lower proprietor complains of the use of water by an upper proprietor, which he claims to come to his premises by an underground stream, he must show that it is a stream of water flowing in a marked or well-defined channel, in contradistinction to subsurface percolating water. *Stoner v. Patten*, 63 S. E. 897, 898, 132 Ga. 178.

## STREET

See Common Street; Customary Use of Street; Paper Street; Parallel Street; Residence Street.

Any street or public ground, see Any.

Control of street, see Control.

Discontinuance of street, see Discontinuance.

Expenses of street, see Expenses.

Graded street, see Grade.

Improvement of as taking property, see Taking (In Eminent Domain).

Other portions of street, see Other.

Owner of street, see Owner.

Permit to close a street, see Permission—Permit.

Use of street, see Use—Used.

Vacation of street, see Vacation.

See, also, Avenue.

"A 'street' is a highway in a city or town used by the public for the purpose of travel, either by means of vehicles or on foot." *Atlanta & W. P. R. Co. v. Atlanta, B. & A. R. Co.*, 54 S. E. 736, 746, 125 Ga. 529 (citing 7 Words and Phrases, p. 6684).

All highways in a municipality are "streets," as distinguished from a public county road. *Wiggins v. Skeggs*, 54 South. 756, 757, 171 Ala. 492.

A "street," when properly vacated, ceases to be a street, and the rights of the public therein are divested, and it becomes private property on which, the city having granted the right, a street railway company may operate its road without the consent of abutting owners and without liability to pay them damages therefor. *Tomlin v. Cedar Rapids & I. C. R. & Light Co.*, 120 N. W. 93, 94, 141 Iowa, 599, 22 L. R. A. (N. S.) 530.

In the widest, and likewise the most correct, sense, a "street" is a means of intercommunication between the people of a city for traffic, and for the conduct of personal and social intercourse, and also for the convenient use of dwellings and business houses abutting thereon; its primary purpose is for passage, it is true, but that such passage need not be alone that of people, animals, or wheeled conveyances, or of things that run on the ground; that a message sent through the air on electric wires, over the street, takes the place of one sent by a man or boy walking, or on horseback, or conveyed by a vehicle, along the street; not only is the same service performed by the telephone, but in a manner far better and more quickly. Telephone poles and wires erected in the street do not constitute an additional burden on the fee of abutting owners, for which they are entitled to compensation. *Frazier v. East Tennessee Tel. Co.*, 90 S. W. 620, 622, 115 Tenn. 416, 3 L. R. A. (N. S.) 323, 112 Am. St. Rep. 856, 5 Ann. Cas. 838.

"An examination of the authorities will show that the terms 'street,' 'avenue,' 'road,' 'public road,' 'county road,' etc., are used loosely and indiscriminately in legislation and judicial decisions relating to public highways, and little reliance can be placed on the particular term used to describe any given way. Undoubtedly the term 'street' or 'avenue' commonly apply to a public highway in a village, town, or city, and the term 'road' to suburban highways, but there may be

roads in a city or town and streets or avenues in the country." *Ballinger's Ann. Codes & St.* § 3803 (*Pierce's Code*, § 7854), provides that any "county road" or part thereof, which remains unopened for public use for a space of five years after the order is made or authority granted for opening the same, shall be vacated and the authority for building it barred by the lapse of time. Held that, as boards of county commissioners have executive jurisdiction over all public highways within their respective counties and without the limits of incorporated cities and towns, such section was applicable to streets dedicated through platted land outside the limits of any incorporated city or town. *Murphy v. King County*, 88 Pac. 1115, 1116, 45 Wash. 587.

The term "street," in its broadest sense, means not only a road or public way in a city, town, or village, but means the whole surface and so much of the depth as is or can be used for the ordinary purposes of a street. It comprises a depth which authorizes the urban authority to do what is done in every street, namely, to raise the street and lay down sewers. It includes, therefore, the surface and so much of the depth as may not unfairly be used as streets are used. *City of Leadville v. Bohn Mining Co.*, 86 Pac. 1038, 1039, 37 Colo. 248, 8 L. R. A. (N. S.) 422, 11 Ann. Cas. 443 (citing *Elliott, Roads & Streets* [2d Ed.] § 16).

"Street" includes the surface and so much of the depth as may not unfairly be used as streets are used. An owner of land, who opened a street and acquiesced in the act of the Legislature establishing a town, owns the soil of the "street" subject to the public easement to use the street for municipal purposes, and he may enjoin the town from putting down a well in the street to strike the vein of mineral water supplying a well on his land, not for the purpose of obtaining water merely, but to supply the mineral water free to all; the attempt of the town being an attempt to take the owner's property for public use without compensation, and a judgment for damages affording inadequate relief. *Hamby v. City of Dawson Springs*, 104 S. W. 259, 260, 126 Ky. 451, 12 L. R. A. (N. S.) 1164.

Where land within a city including a street had been used together for a race track for many years without reference to the street or the original subdivisions, or the platted lots, the entire property being also used year after year for circus purposes without reference to street or lots, and the street never having been used by the public for street purposes at any time, so that there was nothing to preclude defendant from asserting title to the strip originally platted as a street, it did not constitute a public "street," and was therefore subject to special assessments for improvements. *Granite Bituminous*

*Pav. Co. v. McManus*, 129 S. W. 448, 450, 144 Mo. App. 593.

S. street was 50 feet wide. Abutting lots had been sold for the erection of buildings fronting on it. It was improved as a highway for the accommodation of those going to and from that part of the city. Held, that it was a "public street," within the statutes, and an improvement of it was not an internal improvement, the cost of which should be borne by the entire property in the square. *Steinacker v. Gast* (Ky.) 89 S. W. 481 (citing *Elliott, Roads & S.* § 23; 2 Cyc. p. 133).

*Sayles' Ann. Civ. St.* 1897, art. 549c, makes it the duty of every railroad company to place and keep that portion of its roadbed and right of way over or across which any public street may run in proper condition for use of the traveling public, etc. Held, that a "public street" within such act is one laid out and established by the municipality or one in which the public, by some of the methods known to law, has acquired a public easement. *City of Atlanta v. Texas & P. R. Co.*, 120 S. W. 923, 924, 56 Tex. Civ. App. 226.

Land condemned by a city for street purposes is by such act converted into a "public street," though not then opened to the public for use as a street. *Brown v. Scruggs*, 125 S. W. 537, 539, 141 Mo. App. 632 (citing *Ruppenthal v. St. Louis*, 88 S. W. 616, 190 Mo. 213).

#### **Dedication and acceptance required**

Merely platting a body of land into lots and "streets," without more, is insufficient to lay off and open such streets, since the survey serves only to define the location of the streets, and, the portions of land on such plat intended for public use become streets when they are put into condition for travel and the public is invited to use them. Until the street is so open for public travel, the land does not partake of the character of a highway. *Robins v. McGehee*, 56 S. E. 461, 463, 127 Ga. 431.

"While the mere dedication by the owner of a platted addition does not make public thoroughfares of the 'streets' shown on the plat, the acceptance by the city, either by the passage of an ordinance of acceptance or by the exercise of control over the streets, will make them public thoroughfares." *Brown v. Scruggs*, 125 S. W. 538, 539, 141 Mo. App. 632.

The word "street," as used in Code, §§ 917, 919, relating to the platting of land, and declaring that when a plat has been acknowledged and recorded the acknowledgment and recording shall be equivalent to a deed in fee simple of such portion of the premises platted as is set apart for streets and other public purposes, is used to designate the spaces left between the lots for public travel. The title thereto does not vest in the city or town

prior to its acceptance, and until then it is not deemed a road or public thoroughfare. *Chrisman v. Omaha & C. B. R. & Bridge Co.*, 100 N. W. 63, 65, 125 Iowa, 133.

#### **Alley**

An alley is not necessarily a "street," and the public have not necessarily a right to its use. *Milliken v. Denny*, 47 S. E. 132, 133, 135 N. C. 19.

An "alley" is a narrow "street," and a city which has accepted an alley is bound to keep it in reasonably safe condition for travel. *Asbury v. Kansas City*, 144 S. W. 127, 128, 161 Mo. App. 496.

The words "streets and alleys" are constantly used in collocation and in legislation; there being no difference between them, except an indefinite difference in width. *J. Burton Co. v. City of Chicago*, 86 N. E. 93, 95, 236 Ill. 383, 15 Ann. Cas. 965.

The word "street" has been defined as "a public way or road, whether paved or unpaved, in a village, town, or city, ordinarily including a sidewalk or sidewalks, and a roadway having a house or town lots on one or both sides; a main way in distinction from a lane or alley." Cent. Dict. A paved alley 16 feet wide, passing through the middle of a block, is not a "street," within *Burns' Ann. St.* 1901, § 7283d, prohibiting the sale of intoxicating liquors by virtue of a license in any room unless it is arranged either with window or glass door, or so that the whole of it may be in view of the street. *State v. Harrison*, 70 N. E. 877, 878, 162 Ind. 542.

#### **Boulevard**

A "boulevard" is a "street" in a city, within P. L. 1903, p. 659, § 27, making the consent of the common council or other governing body a condition precedent to the right of a railroad to cross city streets or highways at grade. *Board of Chosen Freeholders of County of Hudson v. Central R. Co. of New Jersey*, 59 Atl. 303, 307, 68 N. J. Eq. 500.

#### **Bridge**

A bridge along and over a street is a part of the "street." *Village of Sandpoint v. Doyle*, 95 Pac. 945, 947, 14 Idaho, 749, 17 L. R. A. (N. S.) 497.

A railroad company entering a city and crossing a street at grade, an ordinance was passed providing that the grade of the street be raised so as to enable the railroad company to construct its railroad tracks under the street, and the change of grade, made in pursuance of the ordinance, was accomplished by the construction of a bridge. By a previous ordinance of the city a street railway company was granted the right to lay double tracks upon this street on the condition that the owners thereof should keep the portion of the street covered by its tracks and two feet on either side thereof in repair. With respect to a second street of the city, another street

railway company was by ordinance authorized to construct double tracks upon the same, on the same condition as to repair as that imposed in the first grant of authority. A bridge connecting portions of that street and forming the only means of passage from one portion to another had at that time been constructed by the city. Neither the charters of these two street railway companies nor the ordinances of the city made any reference to bridges as distinguished from streets, and under the respective grants of authority to use such streets the two street railway companies laid their tracks upon these two bridges. Held, that the two bridges were parts, respectively, of the two streets, within the meaning, of the word "streets" as used in the ordinances imposing on the owners of the street railways, as a condition of their right to use the streets, the duty to repair the same. *Northern Cent. R. Co. v. United Rys. Co.*, 66 Atl. 444, 447, 105 Md. 345.

#### **Country highway or road**

In respect to the rights of the public in highways, held under valid dedications and acceptances, and the power of the Legislature over the same, there is no distinction in this state between the "streets" of incorporated cities and towns and country roads. *Hardman v. Cabot*, 55 S. E. 756, 758, 60 W. Va. 664, 7 L. R. A. (N. S.) 506, 9 Ann. Cas. 1030.

#### **County boulevard**

Railroad Law, § 26, provides that when any railroad shall cross any street or highway in any city it shall be either above or below grade, unless the common council or other governing body of the city shall grant permission to cross at grade, and section 9 declares that a railroad may construct a branch line of a certain character by following the provisions of the act, provided it shall obtain the consent of the municipal authorities thereto. Held, that the Hudson County Boulevard constructed by boulevard commissioners, as authorized by Gen. St. p. 2882, was "a street in a city" within the terms of the railroad law, and hence a railroad was entitled to cross the same on obtaining the consent of the city council, without the consent either of the boulevard commission or of the board of chosen freeholders, who are vested with control of the boulevard. *Board of Chosen Freeholders of County of Hudson v. Central R. Co. of New Jersey*, 59 Atl. 303, 308, 68 N. J. Eq. 500.

#### **As equivalent to highway or road**

See Highway; Road.

#### **As incumbrance**

See Incumber—Incumbrance.

#### **As land**

See Land.

#### **Parking included**

A space within a city street, set apart between the sidewalk and a roadway for a grass plot, is a part of the "street," for defects in which the city is liable. *Townley v. City of Huntington*, 70 S. E. 368, 68 W. Va. 574, 34 L. R. A. (N. S.) 118.

#### **Private way**

The word "street," as used in a city charter providing that the assessment districts for street improvements should be established by drawing a line midway between the street to be improved and the next parallel or converting street on each side thereof, means a public street, and does not include a private way, which had remained open and unobstructed for more than 10 years, during which time it had been used as a street by the public, when the title to it was vested in trustees for the exclusive use of certain property owners, and expressly reserved by an indorsement in a plat for the exclusive use of the property owners. *Collier's Estate v. Western Paving & Supply Co.*, 79 S. W. 947, 954, 180 Mo. 362.

As used in Railroad Law, § 62, providing that the authorities of any village, town, or city within which a street, avenue, or highway crosses, or is crossed by a railroad at grade, may petition the public service commission for discontinuance of the grade crossing and the separation of travel, etc., the words "street, avenue, or highway" import ways of a public character only, and proceedings are authorized for the discontinuance of grade crossings only where a public street, avenue, or highway crosses a steam surface railroad at grade, and the railroad commissioners have no authority to charge a village with a part of the expense of eliminating crossings over streets or ways which were exclusively private. *In re New York Cent. & H. R. R. Co.*, 93 N. E. 515, 200 N. Y. 121.

#### **As public franchise**

See Public Franchise.

#### **Public levee**

The word "streets," as used in the charter of the city of Red Wing (Spec. Laws 1864, c. 6, subd. 4, § 2, subd. 26), authorizing the council to abolish streets, does not apply to a public levee, though a levee has many of the characteristics of a public street. *Betcher v. Chicago, M. & St. P. Ry. Co.*, 124 N. W. 1096, 1098, 110 Minn. 228.

#### **As public place**

See Public Place.

#### **As public road**

See Public Road.

#### **As public use**

See Public Use (In Eminent Domain).

#### **As public way**

"A 'street' is a public way from side to side and from end to end." *Lacy v. City of*

aloosa, 121 N. W. 542, 544, 143 Iowa, 704, L. R. A. (N. S.) 853.

"Streets" and highways are public property. The streets, including the sidewalks, run from side to side and end to end to public. *C. J. Sullivan Advertising Co. v. City of New York*, 113 N. Y. Supp. 893, 61 Misc. Rep. 425.

A "street" is a road or public way in a town, or village. *St. Louis v. S. W. R. v. Underwood*, 86 S. W. 804, 805, 74 Ark. (quoting and adopting the definition in *St. Roads & S.*).

A "street" is a road or public way in a city, or village, and the purpose for which it is laid out and made use of determines its character. *Nelson County v. City of Bardstown*, 99 S. W. 940, 941, 124 Ky. 636 (quoting and adopting the definition in 2 *h. Mun. Corp.* § 1277).

A "street" is a highway, but a "highway" is not necessarily a street; a street being a highway in an incorporated town or city. *Strange v. Board of Com'rs of Grant*, 91 N. E. 242, 247, 173 Ind. 640.

A "street" is a public thoroughfare or way, established for the accommodation of the public generally, in passing from place to place and for such other incidental uses as are ordinarily made of public streets, such as laying drains, sewers, gas and water pipes, and the like. *Slaughter v. Meridian Light & Co.*, 48 South. 6, 9, 95 Miss. 251, 25 L. R. A. (S.) 1265 (citing *Theobald v. L. N. O. R. Co.*, 6 South. 230, 66 Miss. 279, 4 L. 735, 14 Am. St. Rep. 564).

Where a tract of land outside of a city is divided into lots and ways of ingress and egress are called "streets," in a suit for damages resulting from digging a cut across such way, it was held that to refuse a request defining a street as a public way in a city, town, or village, is to refuse the usual definition of a street, and in structuring that, if there was no street as defined, there could be no recovery. *Wille & N. R. Co. v. West End Heights Co.*, 69 S. E. 564, 135 Ga. 419.

Rural highways may \* \* \* be aptly and conveniently denominated "streets" and the public ways of a town or city properly and conveniently be called "streets." Pub. Laws 1903, p. 621, c. 375, directing the commissioners of Haywood county, under specified conditions, to sell the land of Waynesville township for improvement of roads of that township, does not by its repeal of Priv. Laws 1885, c. 127, § 1 (Waynesville Town Charter), or confer on the commissioners power to change or alter the streets of the town of Waynesville. *Waynesville v. Satterthwait*, 661, 664, 136 N. C. 226 (quoting *Ellis v. Streets*, § 7).

Const. art. 7, § 28, grants to the county the exclusive original jurisdiction in

all matters relating to roads and the disbursement of moneys for county purposes, and in other cases necessary to the internal improvement and local concerns of the county; and Const. Amend. 5, adopted January 13, 1899, gives the county court power to levy a road tax of not exceeding three mills, if the majority of the qualified electors of the county shall have voted therefor at a general election preceding such levy, but makes no provision who shall receive or expend the amount collected, except that it shall be used in the respective counties only to make and repair public roads. Const. art. 12, § 3, empowers the Legislature to pass laws for the organization of towns and cities, and Kirby's Dig. § 5456, grants to municipal councils the power to lay out, improve, and repair streets within their corporate limits. Act approved May 30, 1911 (Sp. & Priv. Acts 1911, p. 1003), requires two-fifths of the road tax collected on property within the city of Texarkana to be used on roads and bridges outside of the city limits according to discretion of the county judge, and the remaining three-fifths to be used exclusively for streets and highways within the city limits, and that the collector of Miller county pay three-fifths of such fund to the city treasury, and section 2 of the act extends its provisions to the tax collected in such city for 1910. Held, in an action to compel the collector to pay into the city treasury three-fifths of the road tax collected for 1910 on the property within the city, that the streets of the city were "public roads of the county" of which the city was a component part, although "streets" did not include roads, and that, in view of the powers of towns and cities, the act apportioning the road tax between the city and the county was not in conflict with the grant of exclusive original jurisdiction to county courts in all matters relating to roads. *Sanderson v. Texarkana*, 146 S. W. 105, 107, 103 Ark. 529.

#### As real property

See Real Property.

#### As right of way

See Right of Way.

#### Sidewalk included

"The term 'street,' in its broad sense, includes both the roadway for vehicles and the sidewalk for pedestrians." *Gallagher v. City of Jefferson*, 101 N. W. 124, 126, 125 Iowa, 324.

A sidewalk is not included in the term "street" within the meaning of the statute of Pennsylvania relating to the paving and grading of streets. In re *Shady Avenue*, 34 Pa. Super. Ct. 327, 331.

The word "street," in an ordinance ordering a street to be improved at the cost of abutting property, means the entire width of the public way, and includes the sidewalk. *Morton v. Sullivan* (Ky.) 96 S. W. 807, 808.

Except in special instances where the context indicates otherwise, "a street" is included in the term "highway" and a sidewalk is as much a part of the highway as is the roadway for driving or the street itself, and the obligation to keep the street in repair includes the sidewalk. *City of Chicago v. Pittsburgh, C. C. & St. L. R. Co.*, 146 Ill. App. 403, 432.

An electric light company, having the right to use "streets," can lay its conduits under sidewalks; they being parts of the "streets." *Allegheny County Light Co. v. Booth*, 66 Atl. 72, 74, 216 Pa. 564, 9 L. R. A. (N. S.) 404.

"A sidewalk is simply a part of the 'street' which the town authorities have set apart for the use of pedestrians. \* \* \* The abutting proprietor has no more right in the sidewalk than in the roadway." *Hester v. Durham Traction Co.*, 50 S. E. 711, 713, 138 N. C. 288, 1 L. R. A. (N. S.) 981 (citing and adopting *City of Ottawa v. Spencer*, 40 Ill. 211; *City of Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640).

"While the term 'street' in ordinary legal signification includes all parts of the way—the roadway, the gutters, and the sidewalk—yet the term 'sidewalk' has come to be generally used in this country for the purpose of designating a footway for passengers at the side of a street or road." *Marion Trust Co. v. City of Indianapolis*, 75 N. E. 834, 836, 37 Ind. App. 672.

"The term 'street' in ordinary legal signification, includes all parts of the way—the roadway, the gutters, and the sidewalks"—and therefore a sidewalk is a part of a street, and the statute delegating to villages the power to construct the sidewalks indicates that such sidewalks are to be constructed in a street and not upon abutting lots. *Smith v. Hofeldt*, 112 N. W. 605, 79 Neb. 276.

The word "street," as used in San Francisco City Charter, art. 6, c. 2, § 16, declaring that, where any portion of the roadway of any street or alley or any portion of any sidewalk shall be out of repair, the board of public works shall require the owners or occupants of adjoining property to repair said portion of said street, avenue, alley, court, or place, etc., is used in its full and broad significance to include the sidewalks which are always a part of it, so as to confer on the board jurisdiction to repair defective sidewalks or to award a contract for repairing thereof. *Heath v. Manson*, 82 Pac. 331, 332, 147 Cal. 694.

An instruction, in an action to compel removal of a telephone pole from the sidewalk in front of premises, that neither the Legislature nor the city council could authorize the substantial impairment of the beneficial enjoyment of the property outside that taken for the streets and highways, and that the super-

vision and control was limited to that portion used by the public generally, and known as the street or highway, was not objectionable as excluding the city from the sidewalks under the rule that a city's "street" is the highway from property line to property line. *Merchants' Mut. Tel. Co. v. Hirschman*, 87 N. E. 238, 244, 43 Ind. App. 283.

"As stated, a 'street,' in the legal acceptance, includes the portion provided for the passage of vehicles, and also the sidewalks provided for the use of pedestrians." The decision of municipal authorities as to location in the street of machinery operating safety gates at a railroad crossing will be interfered with by the courts only where the machinery is so located as to necessarily interfere with the use of a street as a public highway; and, where the machinery was so located as to leave 39 feet of unobstructed space in the highway, it did not interfere with the use thereof. *Siebert v. Missouri Pac. R. Co.*, 87 S. W. 995, 999, 188 Mo. 657, 70 L. R. A. 72 (citing *Miller v. New York*, 3 Sup. Ct. 228, 109 U. S. 385, 27 L. Ed. 971; *Gates v. Kansas City Bridge & Terminal Ry. Co.*, 19 S. W. 957, 111 Mo. 28; *Julia Bldg. Ass'n v. Bell Telephone Co.*, 88 Mo. 258, 57 Am. Rep. 398; *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 486; *Dubach v. Hannibal & St. J. R. Co.*, 1 S. W. 86, 89 Mo. 483; *Lockwood v. Wabash R. Co.*, 26 S. W. 698, 122 Mo. 86, 24 L. R. A. 516, 43 Am. St. Rep. 547; and distinguishing *Schopp v. City of St. Louis*, 22 S. W. 898, 117 Mo. 131, 20 L. R. A. 783).

That part of the charter of the city of Lewiston which provides that said city shall be liable to any one for any loss or injury to person or property growing out of any casualty or accident happening to any such person or property on account of "any 'street' or public ground therein" is broad enough to and does include the sidewalks on the streets. *McLean v. Lewiston*, 69 Pac. 478, 479, 8 Idaho, 472 (citing *Giffen v. Lewiston*, 55 Pac. 545, 6 Idaho, 231).

Where, in an action against a telephone company for injuries to a driver on a street by coming in contact with an unprotected guy wire, the evidence showed that the wire was on what would have been the sidewalk, had a sidewalk been constructed, and that the entire street from lot line to lot line was open for travel, an instruction based on the theory that there was evidence justifying a finding that the wire was on a public street was not erroneous, since the word "street," as commonly understood, means a highway used by the public for travel, either by means of vehicles or on foot, and embraces all the area between the lots on either side. *Davidson v. Utah Independent Telephone Co.*, 97 Pac. 124, 125, 34 Utah, 249 (citing 7 Words and Phrases, pp. 6689, 6690).

*Burns' Ann. St. 1908*, § 8962, is entitled "An act concerning actions against cities and

towns on account of injuries from defective highways and bridges." Section 1 of such act provides that no action for damages for injuries from any defect in any street, alley, highway, or bridge shall be maintained unless written notice of the time, place, cause, and nature of the injury shall be given. Held, that while a "street" is a distinctive public highway, and a public highway is not necessarily a "street," the act is not violative of Const. art. 4, § 19, providing that the subject of every act shall be expressed in its title, in that the title refers merely to highways and bridges, while the body of the act includes streets and alleys, as the term "highways" is generic and includes streets, alleys, and other public ways, and the term "street" includes sidewalks, unless associated with language restricting its meaning. *Gribben v. City of Franklin*, 94 N. E. 757, 758, 175 Ind. 500.

Sanborn's St. Supp. 1906, § 1210e, provides the manner of dealing with special assessments for any of the purposes mentioned in section 1210d, or for setting aside any special assessment, certificate, bond, tax sale, or certificate based thereon, where found invalid because of a defective assessment of benefits and damages. Section 1210d provides for constructing any "sewer, or grading, graveling, planking, macadamizing, paving or repaving any street or alley, or part thereof, or the curbing of or sodding along any sidewalk, or the paving of any gutter in any city." Milwaukee City Charter, c. 7 (Laws 1874, c. 184) § 2, provides for the grading, planking, paving, etc., to the center of any street or alley, and the grading, planking, paving, sodding, and curbing of any sidewalk, and paving of any gutter. Held that, while the word "street," in its general sense, included sidewalks, section 1210d, in referring to "any street or alley, or part thereof," did not include sidewalks, so that section 1210e would not apply to sidewalk improvements in the city of Milwaukee. *Abbot v. City of Milwaukee*, 134 N. W. 137, 138, 148 Wis. 26.

Hendersonville Town Charter, § 9 (Laws 1901, p. 220, c. 97), provides that when the commissioners shall decide to pave the streets, or any of them, the question shall be submitted to and decided by a majority of those voting upon the proposition at an election held as for other municipal purposes. Section 6 provides that lot owners may be required to pave the sidewalks under certain circumstances and pay for it, and, if they fail to do so, after proper notice, the commissioners may have them paved and charge the amount to the respective owners. Held, that while the commissioners might pave the sidewalks of certain individual owners who have been duly notified, from the current revenue, such action amounting only to an item to be charged in the current expenses of the town, an undertaking embracing a general scheme for paving the sidewalks of the town; or an indefinite number of them, and for incurring a town

indebtedness of \$18,000 therefor, was beyond the scope of section 6, and was a paving of streets, within section 9, which must be submitted to the voters, especially as the term "streets" may include both sidewalks and driveways. *Commissioners of Hendersonville v. C. A. Webb & Co.*, 61 S. E. 670, 671, 148 N. C. 120.

#### Determined by use

Where a place has been used for many years as a public highway with a well-defined footway or sidewalk divided from the driveway by a curb and a depression in the surface of the ground, the place was a "public street." *Casey v. United States Exp. Co.*, 63 Atl. 365, 366, 214 Pa. 1.

A "street" in a city used by all the inhabitants thereof is called a "public street." *Pittsburg, C., C. & St. L. Ry. Co. v. Robson*, 68 N. E. 468, 471, 204 Ill. 254.

A street in a town crossing a railroad dedicated to public use and used for 25 years by the general public, on which the railroad company has for years itself maintained a crossing for vehicles and foot passengers and directed a whistling post calling for warning signals and a warning board at the crossing having on it the words: "Look out for locomotive. Railroad crossing"—and sometimes worked for repair by town labor, is a public "street," within the meaning of Code 1899, c. 54, § 61, though no order of the town council can be produced showing acceptance by the town of such dedication or the establishment or recognition of the street by the council. *Ray v. Chesapeake & O. Ry. Co.*, 50 S. E. 413, 414, 57 W. Va. 333.

#### STREET AND HOUSE NUMBER

Rem. & Bal. Code, § 6292, provides that persons signing a local option petition shall state their post office address, the name of the precinct in which they reside, and, in case the subscriber is a resident of a city, the street "and" house number, if any, of his residence, and that no signature shall be valid unless such requirements are complied with. Held, that the words "street and house number, if any," of his residence, did not exempt the signer from giving either in case he had no house number, even if he did reside on a street, but that the word "and" required that the section be construed as though it read "street number if any, and house number, if any." *State ex rel. Czerny v. Superior Court of King County*, 127 Pac. 207, 209, 70 Wash. 592.

#### STREET CAR

See Summer Street Car.

As car, see Car.

As public conveyance, see Public Conveyance.

"Street cars," accurately speaking, are cars which traverse the streets of a town or city and carry passengers who get off and on



at various points along the line. They have been considered as vehicles of street travel. *Piedmont Cotton Mills v. Georgia Ry. & Electric Co.*, 62 S. E. 52, 62, 131 Ga. 129.

Ordinances making it unlawful to operate or run any "street car" unprovided with a car fender of the most improved design and construction, and providing that no "electric car" shall be propelled or operated without having one conductor and one motorman thereon, require a fender, conductor, and motorman only on motor cars, and not on trailers. *Von Diest v. San Antonio Traction Co.*, 77 S. W. 632, 633, 33 Tex. Civ. App. 577.

Rev. St. 1899, § 2864, provides that whenever any person shall die from the negligence of any officer, agent, or employé whilst running or managing any locomotive, "car," or train of cars, etc., or of any driver of any "public conveyance" whilst in charge of the same as driver, the master, or he who owns such railroad, locomotive, car, or other public conveyance at the time, shall forfeit for every person or passenger so dying the sum of \$5,000. This was amended by the act of 1905, which specifically mentioned "street cars." Held that, irrespective of the act of 1905, said section applied to street railroads. The "public conveyance" mentioned in the statute may be composed of steam engines and cars. The cars may be propelled by horse power, by electricity, or by steam. The conveyance may be a coach, propelled by horse power, or it may be an automobile. The words of the statute, "whilst running, conducting, or managing any locomotive, 'car,' or train of cars," are to be construed as though the statute read, "whilst running, conducting, or managing any car," or "whilst running, conducting, or managing any train of cars." This construction of the statute makes it obvious that a "street car" is included in the term "public conveyance." *Higgins v. St. Louis & S. R. Co.*, 95 S. W. 863, 865, 197 Mo. 300.

#### STREET CORNER

As public place, see Public Place.

#### STREET EASEMENTS

As property, see Property.

#### STREET IMPROVEMENT

See Permanent Street Improvement.

As public utility, see Public Utility.

The word "improvement" is a relative term, and its meaning must be ascertained from the context and the subject-matter of the instrument or writing in which it is used. As used in the phrase "for continuing the improvement of the boulevard," expressing the purpose of an appropriation, the word does not mean or apply to the opening of the street but to bettering its condition after it had been opened. In other words, the "improvement of the boulevard" consisted in grading, curbing, macadamizing, etc. *Wolf*

*Chemical Co. v. City of Philadelphia*, 66 Atl. 344, 347, 217 Pa. 215.

Under a statute providing that damages are recoverable only where improvements of a "street" have been made according to the initial grade, it has been held that property is so "improved" wherever it is so improved that it can be comfortably and conveniently used for the purpose to which it is devoted, while a street on which it abuts is maintained at that grade. *Richardson v. Sioux City*, 113 N. W. 928, 930, 136 Iowa, 436 (citing *Conklin v. City of Keokuk*, 35 N. W. 444, 73 Iowa, 343).

Code, § 792, provides that the cost of paving a street may be assessed to the abutting property, and Code Supp. 1907, § 792a, provides that the cost, so assessed, shall not exceed the special benefits conferred by the improvement. Section 817 declares that the cost of street improvements at intersections may be assessed against the property abutting or fronting on that portion of the street so improved in proportion to the linear feet fronting or abutting on such improvement. Held, that the word "improvement," as so used, includes the entire work under construction on a particular street, and is not limited to the work done directly in front of the particular parcel of ground, so that the cost of paving street intersections was properly treated as a part of the whole improvement and taxed to the entire property abutting on the part of the street improved. *Perry v. City of Albia*, 136 N. W. 681, 155 Iowa, 550.

#### Bridge

Under an amendment to the Constitution ratified by Act Feb. 20, 1905 (24 St. at Large, p. 935), providing that a city might increase its bonded indebtedness for the improvement of "streets," the construction of a bridge in place of a previous bridge, which spanned a river, dividing a city street, is an "improvement" of the street, and bonded indebtedness may be incurred to pay for such improvement. *Bruce v. City Council of Greenville*, 71 S. E. 817, 89 S. C. 241.

#### Sprinkling

Street sprinkling is not an "improvement" conferring special benefits on abutting property in the sense of contributing to its value, and a special tax therefor cannot be sustained. *City of Owensboro v. Sweeney*, 111 S. W. 364, 367, 129 Ky. 607, 18 L. R. A. (N. S.) 181, 130 Am. St. Rep. 477.

#### STREET IMPROVEMENT DISTRICT

A "street improvement district" is a single portion of a city set off as specially benefited by the improvement. *Southwick v. City of Santa Barbara*, 109 Pac. 610, 612, 158 Cal. 14.

#### STREET NUMBER

See Street and House Number.

"The 'street numbers' of houses in our cities do not indicate the numerical order of the houses, but are mere arbitrary symbols which have indeed a convenient relation to numerical order, but nothing more." An incitement which designates a house by its "street number" need not set forth that number in words at length. *State v. Castle*, 66 Ill. 1059, 1060, 75 N. J. Law, 187.

## STREET RAILROAD

See Existing Street Railways.

Operating street railway, see Operate.

Properly speaking, "street railways," under the statute, are only such as are authorized to occupy and use the streets of a city or town under franchise from the municipality. *Lewis v. Omaha & C. B. S. Ry. Co. (Iowa)* 138 N. W. 1092, 1094.

That an electric railway carries mail, persons, and property would not render it a commercial, and not a "street, railway." *Galveston, H. & S. A. R. Co. v. Houston Electric Co.*, 122 S. W. 287, 290, 57 Tex. Civ. App. 170.

A "street railway" is defined as "a railroad constructed upon the surface of the public street in towns or cities; a tramway," and "a railroad on the surface of the streets for the convenience of passengers; a surface railroad, as in a city," and "is one constructed and operated on and along the streets of a city or town, or to and from its suburbs." *Simoneau v. Pacific Electric R. Co.*, 115 Pac. 320, 323, 159 Cal. 494.

A "street railroad" is constructed on a street for the purpose of conveying passengers and to accommodate street travel, making frequent stops to take on and let off passengers and without regular stations. It conforms to the grade of the street, and its fundamental purpose is to accommodate local street travel. *Gillette v. Aurora Rys. Co.*, 81 N. E. 1005, 1008, 228 Ill. 261 (citing *Harvey v. Aurora & G. Ry. Co.*, 51 N. E. 163, 174 Ill. 295; *Dewey v. Chicago & M. Electric Ry. Co.*, 56 N. E. 804, 184 Ill. 426).

The words "street railway," as used in statutes, have reference "to the then known and used railways, the rails of which were laid to conform to the surface of the street, and the construction of which did not of necessity exclude the public from the use of part of the street." *Snouffer v. Cedar Rapids & M. City Ry. Co.*, 92 N. W. 79, 87, 118 Iowa, 287 (quoting and adopting definition in *Freiday v. Sioux City Rapid Transit Co.*, 60 N. W. 656, 92 Iowa, 191, 26 L. R. A. 246).

A road is a "street railroad" where large double truck cars are operated over it through contiguous towns, nearly all the lines are within the corporate limits, no interstate cars are run over the line involved, the company is permitted by its franchise to carry mail, persons, and property, under Laws 1901, p. 461, c. 207, relating to street railways,

passengers are carried only, the company was organized under general street railway laws and uses electricity as motive power, the lines were built throughout on public streets and highways, the cars stop at all street crossings, and between such crossings where the distance is great, or convenience of passengers requires it, to take on or let off passengers, the tracks are maintained at a level with the streets, and where five-cent fares can be charged from any point on the lines to any other point within the state, etc. *Michigan Cent. R. Co. v. Hammond, W. & E. C. Electric R. Co.*, 83 N. E. 650, 652, 42 Ind. App. 66.

"Street railways" superseded stage coaches, omnibus lines, and, in large measure, hacks, in carrying passengers to and from points in cities and towns and to suburban places. They went originally only to points reached by public highways. The public convenience and safety alike demanded that the grade of such highways should not be altered to meet the needs of a new method of conveyance which used these highways jointly with travelers by other modes. They did not need to go upon private property. The law did not contemplate that they should. Besides, the value of private property adjacent to these highways practically forbade its acquisition, if the law had permitted it, for use as a right of way. Being thus limited in their sphere of operation and powers, the term "street railway," in legal and popular acceptance, at first included only surface roads built upon streets and public highways for the carriage of passengers in and about cities and towns and adjacent suburban places. Under the influence of changed conditions of population and social life, these surface roads on the streets and highways began to serve the wants of the people in places not in any city or town, but in the vicinity thereon, and sometimes reached out to places not upon any public highway. *Montgomery Amusement Co. v. Montgomery Traction Co.*, 139 Fed. 353, 357.

### As common carrier

See Common Carrier.

### Elevated railroad

*Mueller Law 1903 (Laws 1903, p. 285) § 1*, authorizing cities to own, operate, or lease street railways, applies to elevated as well as surface street railways. *Barsaloux v. City of Chicago*, 92 N. E. 525, 527, 245 Ill. 598, 19 Ann. Cas. 255.

### As highway

See Highway.

### Interurban railroad

An electric railway is none the less a "street railway" within city limits, under ordinances authorizing it to use certain streets, etc., because when it leaves the city it becomes an interurban railway. *Jeffers v. City of Annapolis (Md.)* 68 A. 361, 363.

An interurban electric railway is classed as a "street railroad" by the statutes, and after securing the right to do so, as required by law from the proper local authorities, can construct branches from its main line. *Cleveland, C., C. & St. L. Ry. Co. v. Urbana, B. & N. Ry. Co.*, 26 Ohio Cir. Ct.  $\kappa$ . 180, 194.

A railway company which performs the service of an ordinary street railroad in a city under a franchise granted by the city is, as to such service, a "street railroad," though it is also an interurban railroad engaging in carrying passengers beyond the limits of the city, and the fact that the State Railroad Commission has assumed jurisdiction over it does not prevent it from being subject to the franchise so far as it operates a system within the city. *State ex rel. Denison v. Seattle, R. & S. R. Co.*, 116 Pac. 638, 640, 64 Wash. 167.

The general characteristic of a "street railroad" is that it is built upon and passes along streets and avenues for the convenience of those moving from place to place thereon. Its fundamental purpose is to accommodate street travel, and not travel to or from points beyond the city's lines. An electric railway company chartered under the general railway act, and authorized to operate between two cities and transport its passengers, mail, express, and other matter, is a "commercial railroad," and not a "street railroad." *City of Aurora v. Elgin, A. & S. Traction Co.*, 81 N. E. 544, 547, 227 Ill. 485 (citing *Harvey v. Aurora & G. Ry. Co.*, 51 N. E. 163, 174 Ill. 295; *South Beach Ry. Co. v. Byrnes*, 23 N. E. 486, 119 N. Y. 141; *Diebold v. Kentucky Traction Co.*, 77 S. W. 674, 117 Ky. 146, 63 L. R. A. 637; *Zehren v. Milwaukee Electric Railway & Light Co.*, 74 N. W. 538, 99 Wis. 83, 41 L. R. A. 575, 67 Am. St. Rep. 844; *Rahn Township v. Tamaqua & L. St. Ry.*, 31 Atl. 472, 167 Pa. 84).

"Street railways" are artificial highways designed to accommodate the inhabitants of municipalities, large or small, to enable them to pass from one portion of their territory to another and to stop at convenient and frequent points according to the regulations of the company. Ordinarily they are constructed upon the surface of the streets and in conformity with the grades thereof. They have a local purpose to serve in transmitting passengers from one portion of a city or town to another and over its streets. The fact that tracks of a railroad or railway are laid in and wholly confined to the streets of a city does of itself determine that they are the tracks of a street passenger railway company." *Sparks v. Philadelphia & C. R. Co.*, 61 Atl. 881, 882, 212 Pa. 105.

#### Railroad distinguished

As railroad, see Railroad—Railway.

There is a well-defined distinction between the definition of the words "railroad"

and "street railway." The one is a word of general and extended meaning, applying to all roads incorporated under the general law, and has always been held to impose an additional servitude upon a public way for which abutting owners are entitled to compensation. The other is local in its signification, referring to transportation of a character entirely different from that of a general railroad, and has been held to add no burden as an additional servitude. *Ecorse Tp. v. Jackson, A. & D. Ry.*, 117 N. W. 89, 91, 153 Mich. 393.

The Century Dictionary defines a "street railway" as a railroad constructed upon the surface of a public street in towns and cities, and the American & English Encyclopedia of Law states that "the distinctive and essential features of a 'street railway,' as distinguished from other railroads, are the location of the road upon the surface of streets and highways, its mode of operation, and its use for the carriage of passengers." In *re Minneapolis & St. P. S. R. Co.*, 112 N. W. 13, 16, 101 Minn. 132.

Where a company organized under the general railroad law built a road in the streets of a city, as organized by an ordinance thereof, to carry freight from manufacturies not otherwise accessible by steam railroads, and the road was operated as a steam railroad in connection with the road of the lessee, it was subject to taxation as a "railroad" and not as a "street railway." *City of Detroit v. Detroit Mfrs. R. R.*, 113 N. W. 365, 366, 149 Mich. 530.

The law recognizes several kinds of railroads and railroad companies, and recognizes a distinction between a railroad and a "street railroad." Statutes using the general term "railroad" may or may not apply to a "street railroad." Where the word "railroad" is used in a suit to determine whether it is intended to embrace in its meaning a "street railroad," the connection in which it is used must be considered. *Sams v. St. Louis & M. R. R. Co.*, 73 S. W. 686, 690, 174 Mo. 53, 61 L. R. A. 475.

"Street railways" differ in some respects in point of fact, in their operation, from the operation of the ordinary railroad and rules and regulations governing one class should be sometimes modified as regards the other; but it by no means follows from that fact that both classes could not and should not be made to fall under the general term "railroad," leaving the one term or the other to be made to apply where, by reason of some special circumstance, it would appear proper or necessary which had been intended to be referred to. We think the term "railroad" is a broader term than "street railroad" or "street railway"; but that it does not exclude the latter kind of railroads, unless, from the context of the law, it should appear that the General Assembly intended to exclude or to refer specially to the latter class. The word

"railroad" is the generic term, while the words "street railroad" apply to a "species" under the general term. The power of a railway to cross highways and other railroads is necessarily implied from the law authorizing its construction. In this particular, railways for the local transportation of passengers, such as street and electric lines, cannot be justly differentiated from commercial railroads. A street railway and an electric railroad designed to run beyond the municipal limits may be incorporated under the same charter. *Shreveport Traction Co. v. Kansas City, S. & G. Ry. Co.*, 44 South. 457, 458, 462, 119 La. 759.

"Railroads now exist in great variety, as regards motors and motive power, the size and style of cars and coaches, and methods of operation and construction. It is probable that these variations will be multiplied in the coming years. It is doubtful whether any permanent and satisfactory classification can now be made. There has been a general concurrence, however, in embracing all railroads in two divisions or classes: (1) Commercial railroads, and (2) street railroads. Commercial railroads embrace all railroads for general freight and passenger traffic between one town and another or between one place and another. So far they have not been successfully operated, to any extent at least, except by steam. They are usually not constructed upon the public streets or highways, except for short distances. 'Street railroads' embrace all such as are constructed and operated in the public streets for the purpose of conveying passengers, with their ordinary hand luggage, from one point to another on the street." *Wilder v. Aurora, De Kalb & R. Electric Traction Co.*, 75 N. E. 191, 206, 216 Ill. 493 (quoting and adopting definition in 1 Lewis, Em. Dom. § 110a).

#### As public use

See Public Use (In Eminent Domain).

#### As public utility

See Public Utility.

#### Underground railway

Mueller Law 1903 (Laws 1903, p. 285) § 1, authorizing cities to own, operate, or lease street railways, applies to underground and elevated, as well as surface, "street railways." Under Mueller Law 1903 (Laws 1903, 285) § 1, authorizing cities to own, operate, lease street railways, the city of Chicago acquire or build street railway subways. *Saloux v. City of Chicago*, 92 N. E. 525, 245 Ill. 598, 19 Ann. Cas. 255.

An underground tunnel railroad with a portion of its route beneath East river, much of it built on private property, is a "street railway" within Laws 1886, p. c. 642, re-enacted in Laws 1890, pp. 1108, c. 565, §§ 91, 92, 93, relating to street ce railroads. *New York & L. I. R. Co. v.*

*O'Brien*, 106 N. Y. Supp. 909, 121 App. Div. 819; *Id.*, 85 N. E. 1113, 192 N. Y. 558.

#### STREET RAILROAD CORPORATION

The Public Service Commissions Act provides that the term "street railroad corporations" includes receivers. Section 59 provides that an action to recover a penalty or forfeiture under the act may be brought in any court of competent jurisdiction in the state in the name of the people. Act Cong. Aug. 13, 1888, c. 866, § 3, provides that every receiver of any property appointed by a federal court may be sued without previous leave of the court. Held, that the state Supreme Court has jurisdiction of an action against federal receivers of a street railway corporation to recover the prescribed penalty for failure to make and file the annual report required by law. *People v. Joline*, 121 N. Y. Supp. 857, 860, 65 Misc. Rep. 394.

#### STREET RAILROAD TRACK

The words "car track," used in referring to a person as standing on the car track of a street railroad, clearly refer to the space necessarily covered by the cars in passing. *Crosby v. Portland R. Co.*, 100 Pac. 300, 305, 53 Or. 496.

#### STREET RAILWAY COMPANY

As public service corporation, see Public Service Corporation.

As railroad company or corporation, see Railroad Company; Railroad Corporation.

The term "street railroad company" is distinguishable from "commercial railroad company." *Town of Arlington v. Central of Georgia Ry. Co.*, 56 S. E. 1015, 1016, 127 Ga. 721 (citing *City Council of Augusta v. Central R. R.*, 78 Ga. 119).

"A 'street railway company' is a kind of railroad company, but it does not follow that it is affected by every statute concerning railroad companies. That is a question to be determined in each case by a study of the whole body of legislation bearing upon the question." "Gen. St. 1902, § 3861, providing that every 'railroad company,' before applying to the commissioners for their approval of the location of its road, shall deposit with the state treasurer a specified sum for each mile of its proposed road, when considered in connection with the facts that it was enacted in 1882, when 'street railroads' were operated by horses, and that it was placed in the Revision of 1902, in the chapter relating to 'steam railroads,' and not referred to in the subsequent chapter relating to 'street railroads,' and when considered in connection with sections 3680, 3687, and 3844, authorizing 'railroad companies' to acquire land necessary for the construction of their roads, and authorizing every 'street railway company' to purchase land for its road, and regulating the conditions and methods of exercising the power of eminent domain given to 'steam rail-

roads,' does not apply to a 'street railway company' authorized by its charter to take land in the manner provided for taking land for 'steam railroads,' and it need not deposit with the treasurer of the state any sum for each mile of its proposed road before it can maintain proceedings to condemn land for its road." *Stafford Springs St. R. Co. v. Middle River Mfg. Co.*, 66 Atl. 775, 777, 80 Conn. 37.

Under Rev. Laws, c. 14, §§ 44, 46, imposing an excise tax on the earnings of "street railway companies," and chapter 111, § 1, defining a street railroad as one operated by motive power, other than steam, and the charter of a railway company operating in Boston giving it authority to use all kinds of power employed by street railways, providing cars might be drawn by steam power during the nighttime, subject to the regulation of the board of aldermen, a corporation so chartered is a street railway company subject to the tax, though it used nothing but steam as a motive power, but in nearly all other respects was like a street railway. *McDonald v. Union Freight R. Co.*, 76 N. E. 655, 656, 190 Mass. 123.

#### STREET RAILWAY PURPOSES

An electric railway, operating beyond the limits of a city, and into a town incorporated for the mere maintenance of a park adjacent to the city, was a street railway, within a power reserved in the lease of the land used for the park, reserving to the lessors the right to grant a right of way through the land "for street railway purposes." *Montgomery Amusement Co. v. Montgomery Traction Co.*, 139 Fed. 353, 357.

#### STREET SURFACE RAILROAD

An underground tunnel railroad, with a large portion of its route beneath East river, and much of it built on private property, is not a "street surface railroad," within Laws 1886, p. 919, c. 642, re-enacted in Laws 1890, pp. 1108, 1109, c. 565, §§ 91, 92, 93, relating thereto. *New York & L. I. R. Co. v. O'Brien*, 106 N. Y. Supp. 909, 917, 121 App. Div. 819.

Laws 1890, p. 1113, c. 565, art. 4, entitled "street surface railroads," § 101, provides that "no corporation constructing and operating a railroad under the provisions of this article or of chapter 252, page 309, of the Laws of 1884" (relating to street surface roads), shall charge any passenger more than 5 cents for one continuous ride from any point on its road, or on any road, line, or branch operated by it, or under its control, to any other point thereof, or any connecting branch thereof within the limits of any incorporated city, or more than one fare within the limits of any such city for passage over its main line and any branch or extension thereof, if the right to construct such branch or extension was acquired under the provisions of such chapter or this article. Section 104 requires the issuance of transfers to any

point on any railroad operated by it. Held, that a road incorporated as a "street surface railroad," which leases and operates connecting elevated and steam surface railroads, does so under article 3, § 78, which applies to all railroads, and it may charge more than one fare for a continuous passage over its road and the elevated and steam surface roads, as it operates such roads under their respective charters, and its right in this respect is not changed by changing its motive power from steam to electricity. *People v. Brooklyn Heights R. Co.*, 79 N. E. 838, 839, 187 N. Y. 48.

#### STREET USE

In considering the various uses to which highways are subjected, the courts have classified them as "street uses" and "municipal uses." A "street use" is one which is connected with the right of passage, and tends in some way to preserve or make more secure and easy its exercise. To this use or easement a rural highway is as much subject as a city street. If the street or highway has been subjected to a use which is primarily a street or highway use, the extension of such use to purposes, municipal in nature, but not connected directly with the right of passage, does not impose an additional burden on the land subject to the public easement of travel, whether the highways be rural or urban. If, however, the use be independent of the right of passage, then it cannot be considered a street use, and as to urban streets or rural highways, whenever the fee of the road is in the abutting owner, it imposes a new burden beyond the public easement. The laying of water mains in a public highway is a proper exercise of an urban easement which imposes no new burden upon the fee of the street. *Richards v. Citizens' Water Supply Co.*, 125 N. Y. Supp. 116, 119, 140 App. Div. 206 (citing and adopting *Palmer v. Larchmont Electric Co.*, 52 N. E. 1002, 158 N. Y. 231, 43 L. R. A. 672; *Osborne v. Auburn Tel. Co.*, 82 N. E. 428, 189 N. Y. 393; *Trustees of Presbyterian Soc. in Waterloo v. Auburn & R. R. Co.* [N. Y.] 3 Hill, 567; *Van Brunt v. Town of Flatbush*, 27 N. E. 973, 128 N. Y. 50; *Eels v. American Telephone & Telegraph Co.*, 38 N. E. 202, 143 N. Y. 133, 25 L. R. A. 640; *Bloomfield & R. Natural Gaslight Co. v. Calkins*, 62 N. Y. 386).

#### STREET-WALKING

"Street-walking" is the parading in the streets by lewd women, to the encouragement or advertisement of their means of livelihood. *Callaway v. Mims*, 62 S. E. 654, 657, 5 Ga. App. 9.

#### STREETS WITHIN SAID LIMITS

The city of Columbia having been laid out the title to the land and streets vested in commissioners, for the use of the state, as provided by Act March 22, 1786 (4 St. at Large, p. 751). By Act Dec. 19, 1816 (6 St.

at Large, p. 53), the commissioners were required to convey to the Columbia Academy all the unsold land lying in the outer town of Columbia east of B. street, south of S. street, west of H. street, and north of L. street; and also such lots or squares as include the marsh north of S. street, and eastward of the town; and that "the streets within said limits" be vested in trustees, who should have power to dispose of them, reserving a right of way to such persons as might become owners of lots, squares, or portions of lands within such limits. Held, that the description of some of the lots to be conveyed as lying south of S. street, and others as lying north of the street, did not imply an intention to exclude that street lying between the lots so conveyed, but that the words "the streets within said limits" included that part of S. street lying between the lots north and south of it designated in the act, and therefore passed a title to such part of the street, which was thereafter subject to conveyance. *Allvorden v. Nelson*, 71 S. E. 982, 983, 89 S. C. 368.

### STREET WORK

"Street work" is a phrase of common usage, and has a well-defined signification. The words mean exactly what they indicate upon their face, namely, work upon a street—work in repairing or making a street. *Town of Mill Valley v. House*, 76 Pac. 658, 659, 142 Cal. 698.

"Street work," used in Vrooman Act, relating to the building and construction of streets, highways, etc., of a city or town, has been defined to mean "work upon a street—work in repairing or making a street." *City of San Diego v. Potter*, 95 Pac. 146, 148, 153 Cal. 288 (citing *Mill Valley v. House*, 76 Pac. 658, 142 Cal. 698).

The phrase "street work" is of common usage and has a well-defined signification. The words mean exactly what they indicate upon their face, namely, work upon a street—work in repairing or making a street. A contract for lighting the streets and public places of a town is not a contract for street work, within the meaning of an act requiring such contracts to be let to the lowest responsible bidder. *Tanner v. Auburn*, 79 Pac. 494, 37 Wash. 38.

### STRESS

The word "stress" means pressure, strain. *Huntington, A. & B. S. Transp. Co. v. Western Assur. Co.*, 57 S. E. 140, 61 W. Va. 324.

### STRESS OF WEATHER

"Stress of weather" means constraint imposed by continued bad weather, as to be driven back to port by "stress of weather." It is a stranding where the ship is forced by the wind into a mud bank, or where, having her head, she is forced by the wind to so change her position that at the ebbing of

the tide she is stranded and springs a leak. Under a policy of marine insurance providing that no claim shall be made for loss or expense resulting from grounding unless caused by stress of weather, the wind, causing stranding of a steamboat insured, comes under the term "stress of weather," though such wind is not a tornado or unusual in the section where the stranding occurs. *Huntington, A. & B. S. Transp. Co. v. Western Assur. Co.*, 57 S. E. 140, 61 W. Va. 324.

### STRETCHER

In masonry three courses of brick laid parallel to the wall are technically called "stretchers." Where, in an action for injury to an employé by bricks, laid as a stretcher the day before in a wall, giving way when he placed his foot thereon while laying a wall on top of the bricks, there was some evidence that the manner of laying the bricks was unusual, the question whether the place was safe or not was for the jury. *Meehan v. Hogan*, 104 N. Y. Supp. 417, 418, 54 Misc. Rep. 241.

### STRICT

#### STRICT CONSTRUCTION

A "strict construction" of a statute is a close adherence to the literal or textual interpretation, and a case is excluded from its operation unless the language of the statute includes it; while a statute "liberally construed" may be extended to include cases clearly within the mischief intended to be remedied, unless such construction does violence to the language used. *Iagler v. Bye*, 85 N. E. 36, 37, 42 Ind. App. 592.

The rule that a criminal provision must be strictly construed means only that the court must not bring cases within the provision of such a statute that are not clearly embraced by it, nor by narrow, technical, or forced construction of words exclude cases from it that are obviously within its provisions. What must be sought for always is the intention of the Legislature, and the duty of the court is to give effect to that intention as disclosed by the words used. Guided by such a rule of construction, a combination by stockholders in two competing interstate railway companies, to form a stockholding corporation which should acquire a controlling interest in the capital stock of each of such railway companies, violates the anti-trust act of July 2, 1890. *Northern Securities Co. v. United States*, 24 Sup. Ct. 436, 465, 193 U. S. 197, 48 L. Ed. 679.

The expression "strict construction," as used in the rule applicable to the construction of penal statutes, means that the scope of the statute shall not be extended by implication beyond the literal meaning of its terms, and not that the language of the terms shall be unreasonably interpreted.

**Moore v. Western Union Tel. Co.**, 148 S. W. 157, 159, 164 Mo. App. 185.

"Strict construction" of a statute is a construction according to its letter, which recognizes nothing that is not expressed, takes the language used in its exact and technical meaning, and admits no equitable considerations or implications. *Priest v. Caplitan*, 139 S. W. 204, 209, 236 Mo. 446.

The rule that penal statutes will be strictly construed means that their penalties will not be extended to cases not plainly within their language, and, on the other hand, a strained construction will not be adopted which would exclude from their operation cases plainly within their scope; and hence with those qualifications such statutes should be clearly and reasonably construed. *Mitchell v. State*, 80 Atl. 1020, 1022, 115 Md. 360.

The term "strict construction," in regard to a return of service of process by an officer, means that the return cannot be aided by presumptions or intendments, but must show on its face that every requisite of the statute has been complied with. *Regent Realty Co. v. Armour Packing Co.*, 86 S. W. 880, 882, 112 Mo. App. 271.

"Strict construction," as applied to statutes, means that they are not to be so extended by implication beyond the legitimate import of the words used in them as to embrace cases or acts not clearly described by such words, and to bring them within the prohibition or penalty of such statutes. It does not mean that words shall be so restricted as not to have their full meaning, but that everything shall be excluded from the operation of statutes so construed which does not clearly come within the meaning of the language used." *State v. Aetna Banking & Trust Co.*, 87 Pac. 268, 269, 34 Mont. 379.

"In law, 'strict construction' excludes mere implications, but does not require a literal and blind adhesion to mere words. Thus the rule that attachments can only be sustained on strict compliance with the terms of the statute has been construed to mean by a substantial compliance therewith." *Bowman v. Little*, 61 Atl. 657, 101 Md. 273.

#### STRICT FORECLOSURE

A consent judgment declared that defendant has an equity to redeem land on the payment to plaintiff of a specified sum, and, in case of the failure to pay the same within the time limited, "defendant shall stand debarred" absolutely of all equity in the premises. Held, that the words "defendant shall stand absolutely debarred" of all equity in the land do not amount to a "strict foreclosure," and defendant has the right to redeem. *Bunn v. Braswell*, 51 S. E. 927, 930, 139 N. C. 135.

#### STRICT INTERPLEADER

A bill of "strict interpleader" is one in which complainant asserts his possession of some fund, or something in which he claims no personal interest, but in which other persons whom he makes defendants set up conflicting claims, and complainant cannot safely determine to which claim he should yield; and the fact that a complainant also seeks independent affirmative relief differentiates his case from cases of strict interpleader. *Metropolitan Life Ins. Co. v. Hamilton* (N. J.) 70 Atl. 677, 678.

#### STRICT PROOF

The rule that, where the establishment of a marriage would invalidate a subsequent marriage and illegitimize issue, the former marriage must be established by "strict proof" means that it must be established to a moral certainty. *Bowman v. Little*, 61 Atl. 657, 1084, 101 Md. 273.

#### STRICTLY CHOICE

Where defendants offered to sell plaintiff two cars "choice" potatoes at a specified price, an acceptance requiring the potatoes to be strictly choice did not constitute a variance from the terms of the offer, in view of evidence that there was no difference between the grade "choice" and "strictly choice" potatoes. *Ennis Brown Co. v. W. S. Hurst & Co.*, 82 Pac. 1056, 1059, 1 Cal. App. 752.

#### STRICTISSIMI JURIS

The rule that the liability of a surety is "strictissimi juris" means that, when the meaning of a contract of indemnity or guaranty has once been judicially determined under the rule of reasonable construction applicable to all written contracts, then the liability of the surety, under his contract, as so interpreted or construed, is not to be extended beyond its strict meaning. *Covey v. Schlesswohl*, 114 Pac. 292, 50 Colo. 68.

#### STRIKE

See General Strike; Particular Strike.

A "strike" is cessation of work by employees in an effort to obtain more desirable terms. *Iron Molders' Union No. 125 of Milwaukee, Wis., v. Allis-Chalmers Co.*, 166 Fed. 45, 52, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315.

A "strike" by laborers is merely a combination to quit work, and is not of itself illegal, nor is the announcement by the workmen of their intention to strike illegal. *Albro J. Newton Co. v. Erickson*, 126 N. Y. Supp. 949, 951, 70 Misc. Rep. 291.

In the absence of a contract obligation, an organized union of employees may strike, which is done by their ceasing their employment by concerted action, and the "strike" may be based on the refusal of the employer

to comply with the employes' demand for the betterment of wages, conditions, hours of labor, the discharge of one employé, the engagement of another, or other considerations which in good faith may be believed to tend toward the advancement of the employes. *Pierce v. Stablemen's Union, Local No. 8,760*, 103 Pac. 324, 327, 156 Cal. 70.

An extensive strike among the anthracite coal miners of the country during the period covered by a contract of sale of bituminous coal, occasioning, in part, a very serious shortage of cars, was not a "strike" within the clause of the contract exempting seller from the duty to furnish coal during any portion of the time when prevented by strikes; it being intended to apply to strikes affecting the handling of the output of the seller's own mine. *Consolidated Coal Co. of St. Louis v. Jones & Adams Co.*, 83 N. E. 851, 852, 232 Ill. 326.

A "strike," which is the combined effort of workmen to obtain higher wages, or other concessions from their employers, by stopping work at a preconcerted time until their demands are complied with, is lawful, where the purpose of the strike is to obtain some benefit to the strikers; and so, where the members of a union threatened to call a strike unless workmen who refused to remain in the union were discharged, that act is not an unlawful interference with the rights of the nonunion employes, the purpose of the threatened strike not being to injure the non-union employé, but to protect the union, and so being different from a boycott, the primary object of which is to inflict injury upon another. *Kemp v. Division No. 241, Amalgamated Ass'n of Street and Electric Ry. Employes of America*, 99 N. E. 389, 393, 255 Ill. 213, Ann. Cas. 1913D, 347.

That the refusal of the miners to work in the dangerous and unminable part of the mine, they being continually at work in the other parts, is not a "strike," within the meaning of the saving clause of a mining lease relieving the lessee from payment of the specified minimum royalty in case of strikes. *New York Coal Co. v. New Pittsburgh Coal Co.*, 99 N. E. 198, 208, 86 Ohio St. 140.

A general strike of longshoremen, preventing the timely discharge of a shipment is within the strike clause of a bill of lading providing that the ships shall not be responsible for "strikes and stoppage of labor." *The Toronto*, 168 Fed. 386, 391.

#### In mining law

The course of the vein longitudinally, as it passes through the country, is its "strike," and where the dip of the vein is vertical, or practically vertical, the line of its ore bodies may mark the line of its strike. *Grand Central Min. Co. v. Mammoth Min. Co.*, 83 Pac. 648, 649, 29 Utah, 490.

#### STRIKE FROM DOCKET

As dismissal, see Dismissal.

#### STRIKE OUT

See Motion to Strike Out.

St. Louis City Ordinance No. 24,582 was entitled an ordinance to amend section 505 of the Revised Code of St. Louis by "striking out" said section and inserting in lieu thereof a new section, to be known by the same number, in relation to the sale and custody of skimmed milk, and providing penalties for the violation thereof, and then provided that section 505 was "amended by striking out" said section and inserting in lieu thereof the following new section bearing the same number, proceeding to provide a new standard for skimmed milk to be sold within the city. Held, that the term "strike out" as so used meant to "force out"; to "blot out"; "to efface"; "to erase"; and as so construed connected itself with the definition of repeal; and hence there was a repeal of section 505 by express terms, within City Charter of St. Louis, art. 3, § 28, providing that an ordinance conflicting with general ordinances of prior dates shall not be valid until the prior ordinances, or the conflicting parts thereof, are repealed by express terms. *City of St. Louis v. Kellman*, 139 S. W. 443, 446, 235 Mo. 687.

#### STRIKING DISTANCE

As element of obstruction on railroad track, see Obstruct—Obstruction.

#### STRING FUSE

"String fuse," used by miners, is fuse wound with string. *Wilita v. Interstate Iron Co.*, 115 N. W. 169, 170, 103 Minn. 303, 16 L. R. A. (N. S.) 128.

#### STRINGER

The term "stringers," used in relation to a bridge, is used interchangeably with "joists," and does not include cross-pieces, or braces, or suspension rods running from the cross-pieces to the trusses, but only the longitudinal pieces running from end to end under the floor of the bridge. *Town of Queensbury v. Hudson Val. Ry. Co.*, 135 N. Y. Supp. 200, 204, 75 Misc. Rep. 197.

#### STRIP

See Beaver Strips.

A "strip" of glass is a narrow piece comparatively long, and as used in Tariff Act July 24, 1897, c. 11 § 1, Schedule B, par. 110, 30 Stat. 158, imposing a certain duty on strips of glass, includes prismatic gauge glasses about 5¼ inches long, 1½ inches wide, and five-eighths of an inch thick. *United States v. Ashcroft Mfg. Co.*, 176 Fed. 736, 100 C. C. A. 281 (citing Stand. Dict.).



**STRONG****STRONG BEER**

"'Strong beer' is a term now practically obsolete. It was once in familiar use as the name of a species of beer made of malt and hops, and so called in order to distinguish it from 'small beer,' which was compounded of molasses and yeast with the addition of either ginger or spruce, and which contained a very small percentage of alcohol. The 'strong beer' seems to have been rich in the intoxicating principle, chemical analysis (in one of the reported cases) showing the presence of alcohol in the proportion of 8 per cent., and the courts had no difficulty in determining that such beverage was intoxicating liquor, within the meaning of the statutes on that subject. But, as it differed from the lager beer of modern commerce both in the process of its manufacture and in the proportion of alcohol contained (the latter being a very much lighter fluid), the courts appear to be unwilling to be bound, in their judicial dealings with beer of to-day, by the precedents relating to the beer of a past generation. At least there are some decisions, particularly in New York, not explainable on any other hypothesis." *Potts v. State*, 97 S. W. 477, 478, 50 Tex. Cr. R. 368, 7 L. R. A. (N. S.) 194, 123 Am. St. Rep. 847 (quoting *Black, Intox. Liq. pp. 21, 22, § 17*).

**STRONG HAND**

See With Strong Hand.

**STRUCK JURY**

See, also, Special Jury.

Under V. S. 1127 (P. S. 1477), providing that a person drawn as juror from a town containing more than 200 inhabitants shall be disqualified from serving again for two years, a plea in abatement filed at the October term, alleging that on a date before the March term a certain juror was summoned as juror, and attended, qualified, and acted as such through the term, "without this, that said [juror] was during said last-mentioned session of said court summoned as a petit juror to serve at said session of court," was demurrable, because not showing that the juror was not drawn as a special or struck juror; the allegation that he was "drawn" not being sufficient for this purpose. In view of sections 1134, 1137 (1484, 1487), speaking of a "struck jury" as "drawn" and calling it a "special jury." *State v. Waterman*, 62 Atl. 1016, 1017, 78 Vt. 379.

**STRUCTURAL IRON**

Where steel parts have been assembled and united into complete window sashes, they have been too far advanced in manufacture to permit their inclusion within the provision of the Tariff Act, relating to "structural shapes" of iron or steel fitted for use, but

must be rated as manufactures of metal. *Ackerson v. United States*, 172 Fed. 303.

**STRUCTURE**

See New Structure; Permanent Structure; Substructure; Superstructure.

Any other structure, see Any Other.

Cut as part of railroad structure, see Railroad—Railway.

Other structure, see Other.

Under Rev. St. 1892, § 2793, requiring the assessor to examine all buildings and structures, and section 2730 providing that the terms "real property" and "land" shall include, not only land itself, but also all buildings, structures, and improvements thereon, the assessor must return a list of new structures and affix a value thereto, and where the owner of a building during the preceding year remodeled and reconstructed it internally, and also reconstructed with new material some or all of its walls so as to substantially enhance the value of the premises, the new parts and the remodeling and improvement of the old should be listed, valued, and returned by the assessor as new structures, for the word "structure" in the statute is not confined to a structure independent of any other existing building, but the word includes that which is built or constructed, an edifice or building of any kind, any piece of work artificially built up or composed of parts joined together in some definite manner. *Lewis v. State*, 69 N. E. 980, 983, 69 Ohio St. 473 (citing *Cent. Dict.; Stand. Dict.*).

**Boiler**

A "structure" is defined to be "a building of any kind, but chiefly a building of some size and magnificence; an edifice." While the word "structure" may cover a great variety of form and construction, yet when used in connection with the words "house" and "building," it is evidently intended to simply describe a variety of building. The word "structure," as used in Labor Law, Laws 1897, p. 467, c. 415, § 18, which provides that a person employing another to perform labor of any kind in the erection or alteration of a house, building, or structure shall not furnish for the performance of such labor any scaffolding which is unsafe or improper, does not include a boiler which is portable and may be readily moved from place to place, such a boiler rather being an appliance in the business for which it is used. *Conley v. Lackawanna Iron & Steel Co.*, 88 N. Y. Supp. 123, 125, 94 App. Div. 149.

**Building**

Barge Canal Act (Laws 1903, c. 147) § 4, as amended, providing for the appropriation by the state of lands, "structures," and waters for canal purposes, relates only to the acquisition of land, with structures and waters appurtenant thereto, and does not include a sawmill erected and maintained by an indi-

vidual on state land adjacent to the Erie Canal; and a contractor to perform the work of enlargement required by the barge canal in the vicinity of the mill, who demolishes the mill under the direction of the state engineer, is not liable to the owner thereof, but the owner must litigate the question of compensation before the Board of Claims under Code Civ. Proc. § 264. *Watson v. Empire Engineering Corp.*, 137 N. Y. Supp. 231, 233, 77 Misc. Rep. 543.

#### Car

Labor Law (Consol. Laws 1909, c. 31) § 18, provides that a person employing or directing another to perform labor in the repairing of a house, building, or "structure" shall not furnish, erect, or cause to be furnished or erected, for such labor, scaffolding, "hoists," stays, or other mechanical contrivances which are unsafe, and which are not such as to give proper protection to a person so employed or engaged. Held that, where a car repairer was injured by the breaking of the handle of a ratchet jack with which the body of a freight car had been hoisted to permit repairs on the trucks, as the body was being lowered, the jack, while not a "hoist" within the statute, is nevertheless a "mechanical contrivance" furnished by the railroad company for plaintiff's use, and the car was a "structure" as to which the jack was being used; and hence the defective jack was within the statute. *Corbett v. New York Cent. & H. R. R. Co.*, 135 N. Y. Supp. 137, 139, 151 App. Div. 159.

A passenger car undergoing repairs is a "structure," within Labor Law (Laws 1897, p. 467, c. 415, § 18), providing that a person employing another to perform labor in the erection, repairing, altering, or painting of a house, building or "structure" shall not furnish or erect any improper or defective scaffolding, etc. The word "structure" should not be construed as limited by the words "house" and "building," but was intended to embrace all "structures" which, like unto a house or building, require the use of scaffolds, hoists, stays, or ladders in their construction, alteration, or repair. *Caddy v. Interborough Rapid Transit Co.*, 110 N. Y. Supp. 162, 163, 125 App. Div. 681; *Id.*, 88 N. E. 747, 195 N. Y. 415, 30 L. R. A. (N. S.) 30.

#### Derrick

Defendant engaged in sewer construction maintained as a part of its equipment a stiff-leg derrick supported by guy cables running from the top of the mast to anchorages in the ground. The guy cables were usually tested every morning, as there was danger that they might be loosened, which would cause the derrick to fall, but such examination was not made on the morning when intestate, a hoisting engineer, was killed by the fall of the derrick due to the loosening of the bolts on the spliced cable. Held, that such derrick was a "structure" within Labor Law (Consol. Laws

1909, c. 31) § 18, prohibiting any employer from furnishing unsafe mechanical contrivances, the word "structure" including "that which is built or constructed," "any production or piece of work artificially built up or composed of parts joined together in some definite manner, whether above or below ground," and that the fall of the derrick due to a failure to inspect the splicing for more than 24 hours constituted actionable negligence. *Stevens v. Stanton Const. Co.*, 137 N. Y. Supp. 1024, 1025, 153 App. Div. 82.

Labor Law (Laws 1901, c. 257) § 1 (Sunborn's St. Supp. 1906, § 1636—81), provides that a person employing another in labor of any kind in erecting, repairing, altering, or painting of a house, building, or structure shall not furnish, for the performance of such labor, scaffolding, hoists, stays, ladders, or other mechanical contrivances which are unsafe, and which are not so constructed, placed, and operated as to give proper protection to the life and limb of a person so employed. Held that, as "structure," as used in such act, included work below as well as above ground, and the word "erecting" was used in its broad sense to mean the creating of a particular thing out of its parts, an action for injury to an employé by the collapse of a derrick used to lower sections of water main pipe into place in a trench dug to receive it was within the statute; the derrick being within the prohibited instrumentalities, the setting up of the water main an "erection," and the putting in of new pipes an "altering," and the waterworks system a "structure" within the meaning of the act. *Kosidowski v. City of Milwaukee*, 139 N. W. 187, 188, 152 Wis. 223.

Under Code 1899, c. 75, § 3, providing that every materialman furnishing any material for the construction of any house or other structure shall have a lien to secure the payment of the value of any material on such house or other structure and on the interest of the owner in the land on which the same may stand, an oilwell derrick erected by a lessee for the purpose of the lease is a "structure" on which materialmen are entitled to a lien for materials furnished. *Showalter v. Lowndes*, 49 S. E. 448, 56 W. Va. 462, 3 Ann. Cas. 1096 (citing *Loonle v. Hogan*, 9 N. Y. 435, 61 Am. Dec. 683, note; *Lyon v. McGuffey*, 4 Pa. 126, 45 Am. Dec. 675, note).

#### Fill

A deed for a lot eight feet below the street contained a condition that the purchaser would not build any "structure or building" within four feet of the sidewalk. Held, that filling up the lot with dirt up to the sidewalk would be putting a "structure" within four feet of the sidewalk. *Clement's Adm'rs v. Putnam*, 35 Atl. 181, 68 Vt. 285.

#### Machine

Raw material used to construct a machine or other structure, if resolved into its

original elements as lumber, etc., could be shipped as such; but the machine or structure would be classified as a "structure." *Hardaway v. Southern Ry. Co.*, 73 S. E. 1020, 1025, 90 S. C. 475, Ann. Cas. 1913D, 266.

#### Passageway

"Structures" used in mining operations as passageways for miners working in a drift come within the rule making a mineowner liable for injuries to his employes, caused by a defect in the material or construction of a structure which could have been avoided by using ordinary care. *Jackson v. Yak Mining, Milling & Tunnel Co.*, 119 Pac. 1058, 1060, 51 Colo. 551.

#### Railroad tracks

The lowering of tracks of elevated and trolley roads on the terminal of a bridge is within the labor law (Laws 1897, p. 461, c. 415), requiring the use of safe and suitable mechanical contrivances, so constructed, placed, and operated as to give proper protection to one employed in performing labor in the repairing or altering of a "structure." *Flanagan v. F. W. Carlin Const. Co.*, 118 N. Y. Supp. 953, 956, 134 App. Div. 236.

#### Sign

A sky sign erected on the roof of a building for the purpose of advertising is a "structure," within the meaning of New York charter and ordinances providing for the regulation of the erection of buildings and structures, and hence subject to control thereby. *City of New York v. M. Wineburgh Advertising Co.*, 107 N. Y. Supp. 478, 483, 122 App. Div. 748; *Kobbe Co. v. City of New York*, 107 N. Y. Supp. 489, 122 App. Div. 755.

#### Spillway

Plaintiff bid a certain price per cubic yard for the construction of an earthen dam according to specifications defining the dam as an earthen "structure," and which used the word "structure" in defining the elevation and slope of the work to refer only to the dam as such, and which also provided that the contractor should excavate the earth at one end of the dam to form a spillway, placing the earth taken from the spillway into the dam, and which further provided that the contractor should make his bid cover a price per cubic yard for all work put in the structure. Held, that the word "structure" did not include the spillway, but that, as the contractor by placing the material taken therefrom into the dam would not lose anything, he was not entitled to recover for excavating the spillway. *McMillen v. Mart* (Tex.) 149 S. W. 270, 272.

#### Vessel

A sea-going vessel in dry dock undergoing repairs, while being painted, is a "structure," within Labor Law, § 18, regulating the scaffolding to be erected for the use of persons employed in painting a house, building, or structure, etc. *Gruner v. Texas Co.*, 117 N.

Y. Supp. 741, 742, 133 App. Div. 413. And so is a vessel in attaching iron plates at which workmen are employed. *Herman v. P. H. Fitzgibbons Boiler Co.*, 120 N. Y. Supp. 1074, 1075, 136 App. Div. 286.

## STUD PIN

As pin, see Pin.

## STUDENT

A franchise granted an electric railroad company provides that "school children" going to and returning from school shall ride for half fare. Rem. & Bal. Code, §§ 4317, 4333, and 4366 speak of those attending the State University, the State College, and normal schools as "students," and in chapter 8, § 4406, where common schools are defined, the Legislature adopts the word "children." In section 4714, under the title "Compulsory Education," the law refers to "child" or "children." Held that, as the common acceptance of the words "school children" is children attending the common school, it must be considered that the parties had that in mind at the time of the granting of the franchise, so that students at the State University and of business colleges would not be entitled thereunder to ride for half fare. *State ex rel. City of Seattle v. Seattle Electric Co.*, 128 Pac. 220, 221, 71 Wash. 213, 43 L. R. A. (N. S.) 172.

#### Student in office of attorney

Under the rule of practice requiring that an applicant for admission to the bar, who has not received a classical education or studied at a law school, must have "studied law three years in the office of an attorney and counselor at law," an applicant who had filed notice in the clerk of court's office that he had registered as a law student in the office of an attorney of the court, and who for three years thereafter received instruction from such attorney, and studied under his direction, was not entitled to take an examination for admission to the bar, where, during such three years, he was not in attendance at the office during the daytime, but was employed during the working hours of the day as clerk in a department store. In *re Bosworth*, 68 Atl. 316, 28 R. I. 462.

## STUDENT BRAKEMAN

As employé, see Employé.

## STUMP

See At the Stump.

Drawing the stumps, see Drawing.

## STUMPAGE

The word "stumpage" is defined to mean timber standing in the tree, and the standing timber on land is commonly called "stumpage." It is also a term used to express the compensation paid by the purchaser for stand-

g timber to be cut and removed by him. *Apusci v. Clark*, 106 Pac. 436, 438, 12 Cal. 44.

"Stumpage" being a term used to express a price paid by the purchaser for standing trees to be severed from the soil and converted into timber or logs by the purchaser, notice a claim for "stumpage" is not notice of a lien. *Ray v. A. Schmidt & Co.*, 66 S. 1035, 1036, 7 Ga. App. 380 (quoting 7 Words & Phrases, p. 6703).

#### STUMPAGE SCALE

Where a company is authorized to collect tolls on logs driven over its dams at a fixed rate "stumpage scale," and the parties to a contract do not agree upon a surveyor or scaler to determine the quantity of logs driven, there is an implied contract that they would be bound by a scale made according to the method customarily adopted by surveyors or scalers and between landowners, operators and recognized as the "stumpage scale." *Madunkeunk Dam & Imp. Co. v. E. Allen Clothing Co.*, 66 Atl. 537, 538, 102 257.

#### STUMPAGE VALUE

The "stumpage value" of a tree is merely the value of a tree of standing timber. *Stanley v. Livingston*, 71 S. E. 878, 879, 9 Ga. App.

In an action for the value of logs wrongfully taken from the plaintiff's land, the "stumpage value" which is the value on the land at the time of cutting was the lowest and most favorable measure of damages applicable, and was properly applied. *Quigley Lumber Co. v. Rhea*, 76 S. E. 330, 334, 114 71.

#### STUPIDLY DRUNK

See Drunk.

#### STYLISH

#### STYLE AND NATURE

A statute requiring a justice to enter in a docket, the "style and nature of the action" is not met by a recital on "breach of contract" or "action of covenant." *Stokes v. Stokes*, 4 N. J. Law, 159.

#### SUBAGENT

When an agent employs another person to assist him in transacting the affairs of his principal, the person so employed is a "subagent"; and authority to appoint a subagent is implied where, from the nature of the agency, such employment is necessary, here the agent has authority to employ agents he will not be liable for the acts or omissions of the subagent, unless in the meantime he is guilty of fraud or co-operation with the subagent in such acts or omissions and this rule seems to be in accord-

ance with Civ. Code, §§ 1690-1701, providing that an agent, unless specially forbidden to do so, can delegate his powers when the act is purely mechanical, or is such that the agent himself cannot perform it, or when it is in accordance with the usage of the place or when such delegation is specially authorized; and if the agent employs a subagent without authority he makes such subagent his agent; but a subagent lawfully appointed represents the principal in the same manner with the original agent. *Fanset v. Garden City State Bank*, 123 N. W. 686, 688, 24 S. D. 248.

Where one, employed by defendant as general help on her farm, and authorized to cut and haul logs to plaintiff's sawmill, employed another to help cut and haul logs, such other was the agent of defendant, whose knowledge of plaintiff's rule that yard logs or logs containing iron would not be sawed would be imputed to defendant, rendering her liable for the breaking of a saw, due to its striking iron in a yard log delivered. *Merritt v. Huber*, 114 N. W. 627, 628, 137 Iowa, 135.

#### SUBCONTRACT

A "subcontract" is one made under a previous contract. *Ryndak v. Seawell*, 76 Pac. 170, 173, 13 Okl. 737.

#### SUBCONTRACTOR

A "subcontract" is defined to be "a contract by one who has contracted for the performance of labor or service with a third party for the whole or part performance of that labor or service." The term "subcontractor," therefore, is not inappropriate to designate one who has contracted with the principal contractor to perform the whole as well as a part of the service which the latter has undertaken to perform. *Smith v. Wilcox*, 74 Pac. 708, 709, 44 Or. 323 (citing *Bouv. Law Dict.*).

A "subcontractor" is one who has entered into a contract, express or implied, to perform an act, with a person who has already contracted for its performance. *Fosburgh Co. v. Hampden County*, 90 N. E. 851, 854, 204 Mass. 494.

A "subcontractor" is an undercontractor, one who takes under the original contract, and is to perform in accordance with such original contract. *People, for Use of Davis, v. Campfield*, 114 N. W. 659, 660, 150 Mich. 675.

One who did grading on a railway roadbed, which work was orally sublet to him through his father by the original contractor, the subcontract being made for his benefit, and he using his own grading outfit and paying the laborers with his own money, was a "subcontractor" within the laborers' lien law, giving a subcontractor a lien for materi-

al furnished and labor performed in construction of a railroad. *Owen v. Cox*, 126 N. W. 658, 659, 86 Neb. 851.

A party agreeing to do work for a contractor according to the plans and specifications of the original contract is a "subcontractor" within the meaning of Pub. Acts 1905, No. 187, providing that such subcontractor shall give notice of his claim to the board of city officers authorizing the construction work, before he can recover on the contractor's bond, required to be given by the act. *People, for Use of Buhl Sons Co., v. Finn*, 127 N. W. 704, 705, 162 Mich. 481.

A firm employed by subcontractors to work on any part of a railroad bed covered by the subcontract on which they might be directed to work was not a "subcontractor" within a provision of the contract of employment, providing that all subcontracts should be written on forms identical with the original contract and a duplicate delivered to the chief engineer of the company, so as to invalidate the firm's contract of employment and deprive it of a lien, under R. v. St. 1899, § 4239 (Ann. St. 1906, p. 2324), allowing liens against railroads in favor of persons doing work in constructing and improving roadbeds or furnishing materials for them, provided such work is performed in accordance with a contract with the railway or its subcontractors. *Rankin v. Atchison, T. & S. F. R. Co.*, 129 S. W. 755, 758, 150 Mo. App. 32.

Lien Law (Laws 1897, p. 516, c. 418) § 2, defines a "subcontractor" as one who enters into a contract for the improvement of real property with a contractor, and defines a "materialman" as any person other than a contractor who furnishes material for the improvement. Held, that one agreeing with contractor to install a system of temperature regulation in a building, involving both the performance of labor and furnishing of materials was a subcontractor within the statute. *Herrmann & Grace v. City of New York*, 114 N. Y. Supp. 1107, 1112, 130 App. Div. 531.

Under Laws 1897, p. 514, c. 418, § 3, giving a lien to a "contractor, subcontractor, laborer, or materialman, who performs labor or furnishes material for the improvement of real property," the terms "contractor," "subcontractor," "laborer," and "materialman," while they refer primarily to the man who has a formal contract with the owner, or a subcontractor, with the contractor, or who performed manual labor or furnished material, also embrace the man who buys the labor and material which enter into the improvement. *Kerwin v. Post*, 104 N. Y. Supp. 1005, 1007, 120 App. Div. 179.

#### **As contractor**

See Contractor.

#### **As journeyman**

See Journeyman.

#### **As laborer or operative**

As laborer, see Laborer.

A "subcontractor," under the mechanic's lien law (Gen. St. 1909, § 6246 [Code Civ. Proc. § 651]), is one who takes from the contractor a specified part of the work; but a day "laborer" works under an agreement with the contractor, and is, in one view, also a subcontractor. *Rankin v. Rankin*, 122 Pac. 1120, 1122, 86 Kan. 899.

A laborer working by the day is not a "subcontractor" within the rule that a subcontractor is bound to accept payment as provided in the principal contract, but is entitled to a mechanic's lien as a laborer, under the express provisions of Burns' Ann. St. 1908, § 8295. *Johnson v. Spencer*, 96 N. E. 1041, 1042, 49 Ind. App. 166 (citing 5 Words and Phrases, p. 3964).

A building contract requiring the contractor to file receipts with the superintendent and owner showing that each subcontractor had been paid in full to the amount of the estimates, as per the certificate of the previous month, etc., does not require the superintendent or the owner to exact receipts for all claims for labor and material, a "subcontractor" being one who takes from the principal contractor a specific part of the work, and does not include laborers or materialmen. *Y. M. C. A. of North Yakima v. Gibson*, 108 Pac. 766, 769, 58 Wash. 307.

#### **As materialman**

See Materialman.

A "subcontract" is one made under a previous contract, and a "subcontractor" is one who takes a portion of a contract from the principal contractor. Where M. enters into a contract with R., agreeing to furnish all material and construct a building for R., and S., a materialman, having knowledge of the contract of M., makes a contract in relation thereto with M. to furnish the material for such building with the understanding that the material is to be used by M. in the construction of the building for R., S. thereby becomes a subcontractor, within the meaning of the mechanic's lien law, and, if the material is actually used in the construction of the building, S. is entitled to a mechanic's lien as a subcontractor. *Ryndak v. Seawell*, 76 Pac. 170, 173, 13 Okl. 737.

One furnishing all the stone for a building is a materialman, and not a "subcontractor," taking from the principal contractor a specific part of the work, though the stone is finished and ready for use at the time of its delivery, and so is entitled to a lien for materials, independently of Act March 6, 1909 (Acts 1909, c. 116), giving a lien to subcontractors. *Foster Lumber Co. v. Sigma Chi Chapter House of De Pauw University*, 97 N. E. 801, 803, 49 Ind. App. 528.

There can be such relation as a subcontractor to a subcontractor; and the fact that subcontractors were materialmen did not prevent them from being "subcontractors" with all of the lien rights as such. *Knapp Bros. Mfg. Co. v. Kansas City Stock Yards Co. of Missouri*, 152 S. W. 119, 122, 108 Mo. App. 146.

A company which merely sold steam radiators to the contractors, but performed no work on the building, was a "materialman," and not a "subcontractor," within Lien Law (Laws 1897, p. 516, c. 418) § 2, defining those terms. *Herrmann & Grace v. City of New York*, 114 N. Y. Supp. 1107, 1112, 130 App. Div. 531.

A written order for oak flooring, placed with defendant by the general contractor, contained the words, "Charge contract L-981-C-5," and another order to defendant recited that it covered the furnishing and delivery at the owner's switch of oak flooring for a contract known in the contractor's office as "1,981," which was the contract between the general contractor and the owner. Lien Law (Laws 1897, p. 515, c. 418) § 2 defines a "subcontractor" as one who enters into a contract with a contractor for the improvement of real property, and defines a "materialman" as any person other than a contractor who furnishes material for such improvement. Held, that defendant was a materialman, and not a subcontractor; the mere knowledge that the material was used by the contractor in the performance of a certain contract being insufficient to make him a subcontractor. *Hedden Const. Co. v. Proctor & Gamble Co.*, 114 N. Y. Supp. 1103, 1105, 62 Misc. Rep. 129.

Where plaintiff furnished materials for defendant's building under a contract with defendant, and not with the contractor, plaintiff was not a "subcontractor" defined by Kirby's Dig. § 4993, to include all persons furnishing work or material, except under contracts directly with the owner, etc., but was an original contractor, and therefore entitled to a mechanic's lien without giving the notice required of subcontractors by section 4976. *Leifer Mfg. Co. v. Gross*, 124 S. W. 1039, 1041, 93 Ark. 277.

Where a contract for the carpenter work of a building required "Davis or other equal steel stiffeners" for window frames, and the contractor sublet the contract for the installation of the window frames, and relator agreed to furnish, but not to install, the stiffeners in accordance with measurements furnished him by the subcontractor, and not in accordance with the specifications of the original contract, relator was a "materialman," and not a "subcontractor," and was therefore entitled to recover on the contractor's bond given under Comp. Laws, §§ 10743-10745, requiring contractors of public buildings to give security for the payment of ma-

terial furnished therefor. *People, for Use of Davis, v. Campfield*, 114 N. W. 659, 660, 150 Mich. 675.

Labor Law (Laws 1897, p. 462, c. 415, § 3) as amended by Laws 1899, p. 1172, c. 567, Laws 1900, p. 638, c. 298, and Laws 1906, p. 1394, c. 506, providing that every contract with the state or a municipal corporation, involving the employment of laborers, workmen, or mechanics shall stipulate that no such laborer, etc., in the employ of the contractor, subcontractor, or other person doing or contracting to do the whole or a part of the work embraced in the contract, shall be permitted or required to work more than eight hours a day, or be paid less than the prevailing rate of wages of the locality in which the work is to be done, and shall be void unless such stipulation is observed, does not include labor employed in the production of raw material necessary for municipal buildings and works, and a manufacturer supplying manufactured doors, windows, and other manufactured woodwork to a contractor for the erection of a municipal building in the city of New York was not a "subcontractor" within the meaning of the act, and hence the fact that such manufacturer employed workmen more than eight hours a day, and paid them less than the prevailing rate of wages in New York City, did not affect the validity of the contract; the fact that the contractor agreed to forfeit payments if he violated the law being immaterial. *Bohnen v. Metz*, 111 N. Y. Supp. 196, 198, 126 App. Div. 807.

#### **As mechanic**

See Mechanic.

#### **Subcontractor of subcontractor**

A "subcontractor" of a subcontractor is not entitled to a lien under a statute relating to liens of mechanics and others, and confining the lien to artisans, laborers, contractors, and "subcontractors." *Vandenberg v. P. T. Walton Lumber Co.*, 92 Pac. 149, 150, 19 Okl. 109.

A "subcontractor" is one who contracts with a principal contractor to do work embraced in the latter's contract; that is, obviously, some one who contracts to execute some integral part of the work covered by the scheme of the principal contract. A "subcontractor" is one who takes a part or the whole of the work from the principal contractor. Thus one who contracts with a subcontractor to have the sole hauling, at a certain amount per hundredweight, of all the cement needed for the structure, not being bound to personal service, and the amount of work requiring assistants, is not an employé but a "subcontractor" of the subcontractor, and therefore not within Rev. St. 1898, §§ 3314, 3315, giving a lien to a principal contractor, subcontractor, or employé of either who performs any work or labor for, in, or about the erection or construction.

*Farmer v. St. Croix Power Co.*, 93 N. W. 830, 834, 117 Wis. 76, 98 Am. St. Rep. 914 (quoting and adopting definitions in *Stand. Dict. and Cent. Dict.*).

*Burns' Ann. St.* 1901, § 7265, declares that all persons who shall perform labor in building bridges or other structures in the construction or repair of any railroad, whether under a contract with the railroad corporation, or a contract with any person, corporation, or company engaged, as lessee, contractor, "subcontractor," or agent of such railroad company, in constructing or repairing any such railroad, shall have a lien. Held, that such section conferred a lien on laborers employed for railroad construction by a subcontractor in the second degree; such work being performed in pursuance of recognized authority originally emanating from such railroad corporation. *Pere Marquette R. Co. v. Baertz*, 74 N. E. 51-55, 36 Ind. App. 408; *Pere Marquette R. Co. v. Smith*, 74 N. E. 545, 36 Ind. App. 439.

## SUBDISTRICT

*Code Supp.* 1907, § 1989a23, provides that if any person owns lands within a drainage district which has been assessed for benefits, and which is separated from the ditch by the land of others, and shall desire to drain his land across the land of such others into the ditch, and shall be unable to agree on the terms on which he may enter on their lands and construct such ditch, he may file a petition, asking the board of supervisors to establish a subdistrict within the limits of the original district to secure more complete drainage, describing the lands to be affected, and that all other proceedings shall be the same as provided for the establishment of original districts. By Acts 33d Gen. Assem. c. 118, § 22, it was provided that additional lands within any district which were benefited by an improvement might be included therein. Held, that the terms "subdistrict" and "original district" in section 1989a23 were used in contradistinction to each other, the term "original district" not having been used in the earlier statute in contradistinction to the annexed territory provided for by section 1989a54, as added by Acts 33d Gen. Assem. c. 118, § 22; and hence the phrase "within the limits of the original district" in section 1989a23 must be deemed as applicable to annexed territory as to the lands originally included in the district, so that it is not necessary to the annexation of territory to a district that it shall have been within the original territory. *Bird v. Board of Sup'rs of Harrison County*, 135 N. W. 581, 584, 154 Iowa, 692.

## SUBDIVIDE

### SUBDIVISION

See Legal Subdivision; Political Subdivision.

*Stock Law Act* (Acts 1903, p. 432) § 2, authorizes the holding of elections for the establishment of stock laws, and provides a "precinct" as the minimum territory for which an election is authorized to be held for that purpose. Act Sept. 29, 1903 (Acts 1903, p. 437) § 16, relating to the termination of an existing stock law, authorizes a petition "to secure an order for an election to repeal existing stock laws signed by a majority of the landowners of the county or precinct or subdivision whose land lies outside of any incorporated city or town." Held, that the term "subdivision," as used in section 16, should be construed to mean a "subdivision" already existing and definitely fixed by some law, so that the commissioners' court of a county had no jurisdiction to order an election for the disestablishment of an existing stock law in a precinct, in so far as it affected a portion only of such precinct. *Caudle v. Commissioners' Court of Talladega County*, 39 South. 307, 308, 144 Ala. 502.

The word "subdivision," as used in the amendment adopted in 1891 to Const. 1876, art. 16, § 20, providing that the Legislature shall enact a law whereby the voters of "any county, justice precinct, town or city by a majority vote from time to time may determine whether the sale of intoxicating liquors shall be prohibited within the prescribed limits," by inserting after the word "city" the parenthetical clause "or such subdivision of a county as may be designated by the commissioners' court," does not refer to the county, justice precinct, city or town. The amendment simply contemplated authority to hold local option elections in subdivisions not previously mentioned, and it was not intended, by using the word "subdivision," to give a different meaning or standing to those already enumerated, or in any manner to qualify them. The commissioners' court has no authority to combine subdivisions of a county for the purpose of a local option election. *Ex parte Mills*, 79 S. W. 555, 556, 46 Tex. Cr. R. 224.

A school district is not a "subdivision," within Const. art. 16, § 20, providing that the Legislature should enact a law whereby the voters of any county, justice's precinct, etc., or such other subdivision of a county, may by a majority vote determine whether the sale of intoxicants shall be prohibited within the prescribed limits; and a local option election held in a school district is without authority of law and void. *Ex parte Haney*, 103 S. W. 1155, 1156, 51 Tex. Cr. R. 634; *Ex parte Banks* (Tex.) 103 S. W. 1156.

The word "subdivision," as used in the Constitution, means some known political subdivision of a county, and is restrictive of the power of the Legislature to create or carve out other subdivisions for local option purposes. Election precincts not being of a permanent character, but subject to annual

changes, and not constituting political subdivisions of a county for purposes of government or election of officers, are not such subdivisions of a county as may be designated by the commissioners' court for the holding of local option election. *Eldred v. State*, 80 S. W. 529, 530, 46 Tex. Cr. R. 582.

### SUBDIVISION OF STATE

County as, see County.

Municipal corporation as, see Municipal Corporation.

### SUBJECT

See Foreign Citizen or Subject; Single Subject.

According to Webster's Dictionary, the word "subject" means "liable, subordinate, obedient, submissive." As used in a lease for two years, which provided that at its expiration the lessee should have the option of renewing it "from one to five terms of two years each, subject only to a sale of such property," the words "subject to sale" related to the word "option" and not to the words "from one to five terms of two years each," so that a sale of the property before the expiration of the last renewal period did not terminate the lease, especially where, before the expiration of the first term, the lease was renewed for two years, and thereafter for two more terms of two years each; the lessees giving notes for the monthly rent and the lessors collecting them up to the time of the sale of the property. *People's Bank & Trust Co. v. Tessler Hardware Co.*, 45 South. 624, 626, 154 Ala. 103.

According to Webster's Dictionary, the word "subject" is synonymous with the word "liable," and the word "liable" denotes something external which may befall us. "Subject" refers to evils which arise chiefly from external necessity and are likely to so arise; hence the word "subject" applies more to what is accidental, and the word "liable" to things from which we often inevitably suffer. The word "subject," as used in Const. art. 1, § 5, declaring that all oaths shall be taken "subject" to the pains and penalties of perjury, means that persons who take an oath are "liable" to the pains and penalties of perjury, if that oath is violated. Since Pen. Code 1895, art. 34, declares that no person shall in any case be convicted of an offense committed before he was nine years old, a person under nine years of age cannot be a witness in a case involving life or liberty. *Frazier v. State* (Tex.) 84 S. W. 360, 362.

According to Webster, the word "liable" denotes something external which may befall us; "subject" refers to evils which arise chiefly from internal necessity, and are likely to do so. Hence the former applies more to what is accidental; the latter to things from which we often or inevitably suffer." Therefore the provision of the general drain

law that an application for the establishment of a drain shall be signed by not less than ten freeholders, five or more of whom shall be owners of land "liable" to assessment for benefits in the construction of such drain, means that at least five of the signers must be persons who may properly be assessed for benefits, and, as so construed, is not subject to the objection of being impossible of enforcement. *Albert v. Gibson*, 105 N. W. 19, 21, 141 Mich. 698 (citing 5 Words and Phrases, p. 4110).

The words "under" and "subject" in a deed import that the grantee takes subject to an incumbrance, the amount of which has been deducted from the price, and a covenant is inferred that the grantee will protect the grantor therefrom. *Faulkner v. McHenry*, 83 Atl. 827, 828, 235 Pa. 298, Ann. Cas. 1913D, 1151.

A trust company, agreeing to hold bonds for another "subject" to the lien which it has on them, and to any proceeding taken to realize on default, and to hold them as trustee, "subject to and after satisfying therefrom all" of its claims, has no duty to perform which prevents it from purchasing the bonds on default. *Shepard & Morse Lumber Co. v. Hurd*, 112 N. Y. Supp. 401, 403, 128 App. Div. 28.

### Subjects connected with testamentary disposition

Where instructions in a will contest charged that, if testator was laboring under an insane delusion on "subjects connected with the testamentary disposition of his property" and the natural objects of his bounty when he made his will, he was not of sound mind, the words quoted meant any person, matter, or thing connected with the testamentary disposition of his property, and included the persons to whom devises were made as well as the things devised. *Snell v. Weldon*, 90 N. E. 1061, 1073, 243 Ill. 496.

### SUBJECT (Of Action)

See, also, Subject-Matter.

"The 'subject' of an action is the thing; the wrongful act for which damages are sought; the contract which is broken; the act which is sought to be restrained; the property of which recovery is asked." *Lasater v. Norfolk & C. R. Co.*, 48 S. E. 642, 643, 136 N. C. 89, 1 Ann. Cas. 456.

The phrase "subject of action," as used in the statute in respect of possessory and proprietary actions, whether involving real or personal property, embraces plaintiff's primary right, together with the specific property itself. *McArthur v. Moffet*, 128 N. W. 445, 446, 143 Wis. 564, 33 L. R. A. (N. S.) 264.

### As cause of action

The phrase "subject of the action" is different from "cause of action," and signifies



the ultimate or primary title, right, or interest which a plaintiff seeks to enforce or protect; not merely the wrong to be redressed in the particular case. This is the meaning of the words "subject of action," as used in the statute relating to counterclaims, and declaring that counterclaims are claims connected with the subject of the action. In replevin for chattels mortgaged to secure payment for a binder which plaintiff sold defendant, but afterwards took from him with his consent, the subject of the action is neither the chattels mentioned in the complaint nor their unlawful detention by defendant, but plaintiff's claim against the defendant on the notes and chattel mortgage. Plaintiff's right to the property depends entirely on whether the notes have been paid and the lien of the mortgage thereby destroyed. The indebtedness was therefore the subject of the action, and its existence the fact in dispute. Therefore a counterclaim on a money demand may be set up for affirmative relief as well as to defeat the plaintiff's claim, and a counterclaim alleging that plaintiff's claim to the chattels arose from a chattel mortgage given to secure payment for the binder, and that he had already been overpaid, and demanding judgment for the amount overpaid, was proper, being connected with the subject of the action. *McCormick Harvesting Mach. Co. v. Hill*, 79 S. W. 745, 750, 104 Mo. App. 544.

The phrase, "cause of action," has reference to an action at law, and is not synonymous with the phrase, "subject of the action," which relates to proceedings where specific relief is sought rather than a judgment against the person. *Stewart v. Templeton*, 106 Pac. 640, 641, 55 Or. 364.

Rev. St. § 5063, provides that, if no objection be taken either by demurrer or by answer, the defendant shall be deemed to have waived the same, except only the objections that the court has no jurisdiction of the subject of the action, and that the petition does not state facts sufficient to constitute a cause of action. The phrase "subject of the action" is not strictly synonymous with "cause of the action," although they are often used interchangeably. The subject-matter of an action is the abstract subject of judicial inquiry; for example, the infliction of a penalty for violation of a statutory duty. The subject of an action, in its strict sense, is the subject-matter applied to a particular case, as the right of the plaintiff in the case to recover a penalty for violation of the statute. *Baltimore & O. R. R. v. Hallenberger*, 81 N. E. 184, 186, 76 Ohio St. 177 (citing *Black, Dict.*; *Chicago & A. Ry. Co. v. Sutton*, 30 N. E. 291, 130 Ind. 405; *Hunt v. Hunt*, 72 N. Y. 217, 230, 28 Am. Rep. 129; *Bliss, Code Pl.* [3d Ed.] § 126; *Pow. Code Rem.* [4th Ed.] § 369).

In section 5623 of the statute (Comp. Laws 1909), which provides that several causes of action may be united in the same petition, where they arise out of the same transaction, or transactions connected with the same subject of action, the term "cause of action" means a redressible wrong. Its elements being the wrong and the relief provided. The "subject of action" is a primary right and its infringement. The term "transaction" is used in the first clause with reference to, and expressive of, all the acts, or groups of related acts, which go to make up one entire project, system, or deal, referred to as a "transaction," and in the latter clause it is used to include and encompass only such acts, or groups of acts, as in themselves constitute separate, redressible wrongs; and such wrongs (transactions) are connected with the same "subject of action" whenever they affect, grow out of, or constitute separate infringements of, the same primary right. *Stone v. Case*, 124 Pac. 960, 963, 34 Okl. 5, 43 L. R. A. (N. S.) 1168.

#### As facts constituting cause of action

The words "subject of action," in Code Civ. Proc. § 691, relating to counterclaims connected with the subject, should be construed, not as relating to the thing itself about which the controversy has arisen, but as referring rather to the origin and grounds of the plaintiff's right to recover or obtain the relief asked. *Potter v. Lohse*, 77 Pac. 419, 420, 31 Mont. 91 (citing *Collier v. Ervin*, 3 Mont. 142).

The words "subject of the action," in the statute, should be construed, not as relating to the thing itself about which the controversy has arisen, but as referring rather to the origin and ground of the plaintiff's right to recover or obtain the relief asked. An action in claim and delivery for furniture of plaintiff lessee seized by defendant lessor under an alleged lien for rent being for the wrongful taking of the property, the cause of action alleged in defendant's counterclaim for water, rent, plumbing, etc., or damages to the building, did not arise out of the same transaction, and was not connected with the "subject of action." *Osmer v. Furey*, 81 Pac. 345, 349, 32 Mont. 581.

"The words 'subject of the action' mean the facts constituting plaintiff's cause of action." In *re Harper*, 175 Fed. 412, 421.

The "subject" of plaintiff's action is his right and the invasion of that right by defendant. It is nothing more or less than the facts constituting the plaintiff's cause of action. *Telulah Paper Co. v. Patten Paper Co.*, 112 N. W. 522, 524, 132 Wis. 425; *Brahm v. M. C. Gehl Co.*, 112 N. W. 1097, 1099, 132 Wis. 674.

The phrase "subject of the action," in Code Civ. Proc. § 501, allowing a counterclaim where it is connected with the subject

of the action, means the plaintiff's principal, primary right, to enforce which the action was brought. *Steinmetz v. Cosmopolitan Range Co.*, 94 N. Y. Supp. 456, 47 Misc. Rep. 611.

"Subject of the action," as used in Code Civ. Proc. § 501, providing that a counterclaim must be connected with the subject of the action, mean the facts constituting the cause of action. *Van v. Madden*, 116 N. Y. Supp. 1115, 1117, 132 App. Div. 535.

#### **SUBJECT (Of Insurance)**

An insurance policy on household goods, which provided that it should be void if the "subject of insurance," being personal property, should be or become incumbered by a chattel mortgage, is not rendered void by a mortgage on a part of the property at the time the policy was executed, where the value of the unincumbered portion exceeds the amount of the insurance on all the goods, as "subject of insurance" means all property covered by the policy. *Mecca Fire Ins. Co. of Waco v. Wilderspin* (Tex.) 118 S. W. 1131, 1132.

#### **SUBJECT (Of Statute)**

See, also, Substance.

As used in the constitutional provision that an act shall contain but one subject, the term "subject" is to be given a broad and extended meaning, so as to allow the Legislature full scope to include in one act all matters having a logical or natural connection. To constitute duplicity of subject, an act must embrace two or more dissimilar and discordant subjects that by no fair intentment can be considered as having any legitimate connection with or relation to each other. In *re Atwell's Estate*, 101 N. W. 946, 947, 93 Minn. 462.

The word "subject," as used in a constitutional requirement that only one subject should be embraced in an act, and that it should be described in the title, is very indefinite. A phrase may state the subject in a very general or indefinite manner, or with minute particularity. Act Dec. 10, 1900 (Laws 1900-01, p. 239), providing that all grants, rights, privileges, and franchises which the city council of M. has heretofore granted or attempted to grant to any railroad company, and which have been accepted and utilized for railroad purposes, be and the same are hereby legalized, ratified, and confirmed, does not contain more than one subject, in violation of the Constitution. *State ex rel. Attorney General v. Louisville & N. R. Co.*, 48 South. 391, 393, 158 Ala. 208 (citing *Ex parte Pollard*, 40 Ala. 77).

A provision in a legislative enactment that it should be suspended until the passage of certain other legislation is not a part of the "subject" of the act within the purview of Const. 1901, § 45, providing that each law

shall contain but one subject, which shall be clearly expressed in its title. *State v. Montgomery* (Ala.) 59 South. 294, 298.

An ordinance regulating the speed of trains, prohibiting the obstruction of streets and sidewalks by them, making it unlawful for those not employed thereon to get on or off while in motion, and making the acts criminal and providing punishment therefor, does not contain more than one "subject" within Code, § 681, providing that no ordinance shall contain more than one subject. *Trout v. Minneapolis & St. L. R. Co.*, 126 N. W. 799, 800, 148 Iowa, 135.

#### **As matter acted on**

As used in Const. art. 4, § 19, requiring that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, the word "subject" refers to the thing about which the legislation is had, and the word "matters" includes subordinate and incidental things relating to the same general subject. The title of an act was "An act to amend sections 1, 4, and 5, of an act entitled 'An act concerning street railroad companies, granting additional rights and powers therein specified and matters relating thereto, and declaring an emergency.' \* \* \*" The general subject of the act was street railroad companies, and a provision giving power to acquire ground for the construction of lines for the transmission of electricity for light, heat, and power, and was not violative of the constitutional provision. *Mull v. Indianapolis & C. Traction Co.*, 81 N. E. 657, 659, 169 Ind. 214 (citing *State v. Gerhardt*, 44 N. E. 469, 145 Ind. 439, 33 L. R. A. 313; *Maule Coal Co. v. Partenhelmer*, 55 N. E. 751, 57 N. E. 710, 155 Ind. 101; *Parks v. State*, 64 N. E. 862, 159 Ind. 211, 59 L. R. A. 190).

#### **As object**

The word "subject" is broader than the word "object," and one subject may contain many objects. *Ex parte Hernan*, 77 S. W. 225, 226, 45 Tex. Cr. R. 343.

#### **Provision distinguished**

Const. art. 4, § 13, providing that no act shall embrace more than one subject, which shall be expressed in the title, prevents the joining in one act of incongruous and unrelated matters, since the word "subject" is not synonymous with the word "provision," and is not directed against the title, but the act itself; and any act may contain many provisions for the accomplishment of the legislative purpose provided they legitimately tend to effectuate the object of the act, and, where all the provisions relate to one subject indicated in the title, and are parts of or incident to it, or reasonably connected with it, the act is valid. *People v. McBride*, 84 N. E. 865, 868, 234 Ill. 146, 123 Am. St. Rep. 82, 14 Ann. Cas. 994.

**Related matters included**

The word "subject," within Const. art. 4, § 13, which requires the subject of an act to be expressed in the title, means the matter or thing forming the groundwork of the act, and may contain many parts which grow out of it and are germane to it, and which, if traced back, will lead the mind to it as the generic head. *People v. Sargent*, 98 N. E. 959, 961, 254 Ill. 514; *Board of Com'rs of Marion County v. Scanlan*, 98 N. E. 801, 802, 178 Ind. 142.

The title of Acts 1906, p. 549, entitled "An act relating to revenue and taxation, providing for license taxes on compounded, rectified, adulterated, or blended distilled spirits, and providing penalties for violations of its provisions," expresses but "one subject," within Const. § 51, requiring that an act shall relate to only "one subject" which shall be expressed in the title; the constitutional provision receiving a reasonable and not a technical construction. *Brown-Foreman Co. v. Commonwealth*, 101 S. W. 321, 323, 125 Ky. 402.

The caption of Acts 1899, c. 94, entitled "A general act relating to negotiable instruments, being an act to establish a law uniform with the laws of other states on that subject," is broad enough to cover the entire field of the negotiable instrument law, and embraces a section declaring that cancellation made unintentionally or under a mistake, without authority of the holder, is inoperative, and that, where an instrument or signature thereon appears to have been canceled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally or under a mistake or without authority, and the act is valid within Const. art. 2, § 17, providing that no bill shall become a law which embraces more than "one subject," which shall be expressed in the title. *Gilley v. Harrell*, 101 S. W. 424, 426, 118 Tenn. 115.

**Substance synonymous**

The word "substance," as used in the Constitution providing that the notice of the intention to apply for the passage of a local law shall state the substance thereof, is not synonymous with "subject" or mere purpose, but it means the essential or material part, essence, abstract, compendium, meaning. *Ex parte Black*, 40 South. 133, 134, 144 Ala. 1.

**SUBJECT-MATTER**

See, also, Subject (Of Action).

The "subject-matter" is defined by Black as "the thing in controversy." "Subject-matter" as applied to jurisdiction, is the matter or thing which it is desired to reach by legal proceedings. *Holmes v. Mason*, 115 N. W. 770, 80 Neb. 454.

The phrase "subject-matter," as used in the inquiry as to jurisdiction, means the

thing in issue, or the authority of a court to exercise judicial power over the class of cases or proceedings to which the one under consideration applies. *Wayne v. Alspach*, 118 Pac. 1033, 1035, 20 Idaho, 144.

The "subject-matter of a suit," when reference is made to questions of jurisdiction, means the nature of the cause of action, and the relief sought. *State ex rel. McManus v. Muench*, 117 S. W. 25, 29, 217 Mo. 124, 129 Am. St. Rep. 536 (citing *Hope v. Blair*, 16 S. W. 597, 105 Mo. 85, 24 Am. St. Rep. 366).

The term "subject-matter of the action," which was in use before the Code, is defined as "the cause, the object, the thing in dispute," and, when applied to an action where conflicting claims to realty were in issue, meant the real property itself. *McArthur v. Moffet*, 128 N. W. 445, 446, 143 Wis. 564, 33 L. R. A. (N. S.) 264.

"Subject-matter of the action" rather describes the physical facts of the things, real or personal, the money, lands, chattels, and the like in relation to which the suit is prosecuted." In a suit in a federal court of equity to establish and protect rights in the waters of a stream against other separate appropriators of waters from the same stream, all of whom are citizens of different states from complainant, the court may entertain cross-bills by any or all of the several defendants setting up priority of right as against complainant or their codefendants, since they relate to the subject of the original suit, which is the water of the stream, and, being ancillary to the original suit, the court has jurisdiction to determine the issues raised thereby without regard to the citizenship of the parties thereto. *Ames Realty Co. v. Big Indian Min. Co.*, 146 Fed. 166, 170 (quoting and adopting the definition in *Pom. Code Rem.* § 369).

**Cause of action synonymous**

"Cause of action," in the sense used in the common-law rule that a plea of abatement must show that a prior action is pending before the same parties for the same cause, is not synonymous with "subject-matter." A plea in abatement has not been changed by the Code, but remains as at common law, and must show that a prior action is pending between the same parties for the same cause, as distinguished from actions for different causes, though depending in whole or in part on the same subject-matter. *Tyler v. Standard Wine Co.*, 102 N. Y. Supp. 65, 67, 52 Misc. Rep. 374.

Under Kirby's Dig. § 6005, providing that all persons having an interest in the subject of an action, and in obtaining the relief demanded, may be joined as plaintiffs, etc., the "subject-matter of the action" is not the "cause of the action," nor the object of the action, but rather describes physical facts, the things real or personal in relation to which the suit is prosecuted, and hence, as in

a mortgage foreclosure suit, all the mortgagees have an interest in the subject-matter of the action, and, in obtaining the relief demanded, a senior and junior mortgagee may join in a foreclosure complaint. *Porter v. Hamill*, 128 S. W. 570, 571, 95 Ark. 97.

The term "cause of action" is not synonymous with "subject-matter," within the rules governing pleas in abatement, for pendency between the same parties of another action for the same cause, and the pendency of an action on an insurance policy is not a bar to an action by the insurer to reform the policy for mistake. *National Fire Ins. Co. of Hartford v. Hughes*, 81 N. E. 562, 563, 189 N. Y. 84, 12 L. R. A. (N. S.) 907.

The "subject-matter of the action," in personal injury suits, is the circumstances and the facts out of which the cause of action arises. *McAndrews v. Chicago, L. S. & E. R. Co.*, 162 Fed. 856, 858, 89 C. C. A. 546.

#### Property distinguished

When conferring jurisdiction of nonresidents upon courts, a sharp distinction has always been drawn between the word "property" and the term "subject-matter" of the action. The latter term signifies the nature of the cause of action and of the relief sought. It relates to the right to prosecute the particular suit and to obtain the relief demanded, while the word "property" is used in quite a different sense as denoting something tangible, or at least something which may be subjected to the process of the court, as in the case of attachment or garnishment. It is the res, and not the mere right, in the particular action, to sue for damages. *Duckworth v. Mull*, 55 S. E. 850, 854, 143 N. C. 461.

#### SUBJECT-MATTER INVOLVED

Under the statute (Laws 1905, c. 724, § 32) authorizing the acquisition by the city of New York of land for a water supply, and providing for allowances for counsel fees "not in excess of Code Civ. Proc. § 3253," and section 3254, providing for an additional allowance of not more than 5 per cent. on the value of the subject-matter, the allowance must be computed on the award of the commissioners, without reference to interest under the statute from the date of the vesting of the title in the city; the "subject-matter involved" at the time of the appointment of the commissioners and the beginning of their work being the market value of the property at the time it was taken and the title vested in the city. In re Board of Water Supply of City of New York, 133 N. Y. Supp. 213, 214, 75 Misc. Rep. 150.

#### SUBJECT TO

See Under And Subject To.

According to the Century Dictionary, to be "subject to" is "to become subservient to," or "subordinate to," and to "control" is defined as "to exercise a directing, restraining,

or governing influence over; to direct; to counteract; to regulate." *Coffey v. Superior Court of Sacramento County*, 82 Pac. 75, 79, 147 Cal. 525.

An agreement between defendants, who were creditors of an insolvent brokerage firm, and plaintiff's testator, provided that the latter would make such advances to the firm as he might desire to enable it to continue business, and that defendants would at all times "subject" their claims against the firm to the repayment by the firm of the advances. Held, that the agreement bound defendants to subordinate their rights to the testator's right to preferential payment in case of distribution of the assets of the firm in liquidation, but did not bind them to hold as trustees for the testator moneys voluntarily paid them out of the firm's profits after he ceased making advances, and hence defendants could not be required to repay the same to plaintiffs, whose judgment against the firm for the advances remained unsatisfied. *Duryea v. Lohrke*, 121 N. Y. Supp. 138, 141, 136 App. Div. 555.

#### Subject to arrival

Plaintiff offered to sell defendants, subject to arrival, one car load of refined powdered white arsenic from a lot "we have engaged for November shipment from Europe to New York," for arrival there early in December, at a specified price per hundred, which offer defendants accepted in terms. Held, that the words "subject to arrival" referred to the goods which were the subject of the contract, implying a condition that, unless the goods did arrive, the seller was not responsible for nondelivery and the purchaser not liable for the price; and hence, the goods never having been shipped from Europe because of the European seller's breach of contract, defendant could not recover damages for plaintiff's failure to deliver. *Penn-American Plate Glass Co. v. Harshaw, Fuller & Goodwin Co.*, 90 N. E. 1047, 1051, 46 Ind. App. 645.

#### Subject to countermand

See Not Subject to Countermand.

#### Subject to dower

Where a levy on land described it as all that tract of land in a specified county, on which H. lived at the time of his death, containing 1,666 $\frac{2}{3}$  acres, subject to the widow's dower in 701 acres, the words "subject to the widow's dower" indicated that the fee in the whole tract was levied on, and was to be sold subject only to the life estate of the widow in that portion of the land which had been set aside to her as dower. *Hawkins v. Johnson*, 62 S. E. 285, 289, 131 Ga. 347.

#### Subject to easement

A contract to convey land "subject to an easement" meant that the deed should contain a clause describing a reservation of an

easeinent. *Johnson v. Sherwood*, 73 N. E. 180, 186, 34 Ind. App. 490.

#### **Subject to execution**

St. § 4130, provides that the sheriff shall give a revenue bond for the collection of taxes, and that in no case shall sureties be accepted who are not jointly worth, subject to execution, a sum equal to the aggregate amount of money which the sheriff will probably receive, and that the commonwealth, etc., shall have a lien on the sheriff's real estate, which shall not be discharged until the money for which he may be liable shall have been paid. Held, that the words "subject to execution" had no reference to the county's lien on the sheriff's real estate, and hence such lien was not subject to the sheriff's homestead exemption. *Baker v. Fidelity & Deposit Co. of Maryland (Ky.)* 73 S. W. 1025, 1026.

#### **Subject to fire**

It is not necessary to prove that there have been fires on land to show that the land is "subject to fires" within the statute as to the removal of inflammable material from a right of way passing through forest lands or lands subject to fire; but the kind of growth and material on it would determine the question. *Higgins v. Long Island R. Co.*, 114 N. Y. Supp. 262, 264, 129 App. Div. 415.

#### **Subject to garnishment**

As used in Civ. Code Ga. 1895, § 4719, providing that, if the court shall decide that the fund in the hands of a garnishee was subject to garnishment had the garnishment not been dissolved, the court shall then render judgment against the defendant and his securities, the phrase "subject to garnishment" referred to such fund as might be brought in subjection to garnishment, and hence applied only to demands resting in contract, which the defendant could enforce in an action at law. *A. Klipstein & Co. v. Allen-Miles Co.*, 136 Fed. 385, 391, 69 C. C. A. 229.

#### **Subject to investigation**

The phrase "subject to legal investigation," in a sale of real estate at auction subject to legal investigation, means that the purchaser would buy with the privilege reserved on his part to decline the bargain if he discovered on examination of the abstract that the title of the vendor of the property was defective. *Middleton v. Findla*, 25 Cal. 76, 81.

#### **Subject to mortgage**

Taking a deed containing a recital that the premises are "subject to a mortgage" does not import a promise on the part of the purchaser to pay the mortgage debt. *Capitol Nat. Bank v. Holmes*, 95 Pac. 314, 316, 43 Colo. 154, 16 L. R. A. (N. S.) 470, 127 Am. St. Rep. 108 (citing 1 Jones, Mortg. § 865; *Strong v. Converse*, 90 Mass. [8 Allen] 557, 85 Am. Dec. 732; *Campbell v. Knights*, 24 Me.

332; *Weed Sewing Machine Co. v. Emerson*, 115 Mass. 554; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213).

Where a conveyance of land is expressly qualified as being "subject to a mortgage," the covenants in the deed, though absolute, apply only to the equity of redemption, which is all that such a deed purports to convey. A deed described the land conveyed, as "subject \* \* \* to one certain trust deed incumbrance, \* \* \* which said incumbrance has been assumed by" a third person, and contained a general covenant of warranty against all incumbrances except for taxes for a designated year, which the grantee agreed to pay. It was held that the covenant of warranty was not a covenant that the third person would pay the trust deed at maturity, but applied only to the estate conveyed, which was an equity of redemption; the statement that the incumbrance had been assumed by the third person being at most an added identification of the incumbrance. *Miller v. De Graffenried*, 95 Pac. 941, 942, 43 Colo. 306, 15 Ann. Cas. 981.

#### **Subject to objection**

The phrase "subject to objection," used by the court in response to objections, may mean, in a literal sense, that the evidence objected to is subject to (i. e., controlled by) the objection, or that it was admitted temporarily, and the objection held in the breast of the court sub judice, to be afterwards disposed of during the trial, or it may mean that the court notes the objection and considers it unnecessary and declines to rule on it. Such rulings, if rulings they be, are vague in legal intendment, and are shorn of all precision. *Morrison v. Turnbaugh*, 91 S. W. 152, 155, 192 Mo. 427.

#### **Subject to overflow**

In section 2 of the Drainage Laws of 1905, p. 306, c. 215, providing that "any drainage district may include lands within the county subject to overflow from the same natural water course, whether the same be situated partly within and partly without or wholly within or without any incorporated city," the expression "subject to overflow" is not a restriction of the power to include lands which, although not subject to actual overflow, are nevertheless subject to injury and damages from the overflow of other lands. *Roby v. Shunganunga Drainage Dist.*, 95 Pac. 399, 400, 77 Kan. 754.

#### **Subject to penalty**

In a contract for the building of a structure to be completed by a certain date, a provision that the contractor should be "subject to a penalty" of \$100 per day for any delay beyond such time is not to be construed as fixing the measure of recovery for such a breach, where there is no reason why the actual damages cannot be ascertained. *Stephens v. Phoenix Bridge Co.*, 139 Fed. 248, 249, 71 C. C. A. 374.

**Subject to reservation**

Where a deed created a water power easement by reservation and subsequent conveyances under which complainant acquired title were "subject to" reservations in the original deed, the words "subject to" were words of qualification only, showing the grantor's purpose not to grant an absolute title, but one subject to the rights reserved in the original deed, and did not give to the reservation any force or meaning beyond that given by the deed containing it, so that, the easement having terminated by the destruction of certain buildings on which it depended, complainant was not estopped by his deed from interfering with defendant's alleged continued right to the use of the easement. *Percival v. Williams*, 74 Atl. 321, 327, 82 Vt. 531.

**Subject to restriction**

The deed to a lot contained the restrictions that the front of any residence built thereon should not be less than 40 feet west of the east line of the lot, and that no other building except a residence should be built on the front half of the lot; but the deed contained no restrictions as to the back half of the lot. Subsequently defendant came into possession of part of the back half of the lot by a deed providing that the conveyance should be "subject to" the restrictions in the former deed. Held, that such restrictions, not originally referring to the back half of the original lot, were not made applicable thereto by defendant's deed; the phrase "subject to" meaning under the control, power, or dominion of, or subordinate to, and, not being words of contract, imposing upon defendant no contractual obligations. *Van Duyn v. H. S. Chase & Co.*, 128 N. W. 300, 301, 149 Iowa, 222.

**Subject to same risks**

Where defendant reinsured wheat alleged to have been contained in a certain warehouse, when, in fact, it was an elevator, subject to a higher rate of premium, a subsequent clause in the policy that it was "subject to the same risks," valuations, conditions, and adjustments as might have been taken by the reinsured did not render defendant liable on such policy. *Fireman's Fund Ins. Co. v. Aachen & Munich Fire Ins. Co.*, 84 Pac. 253-256, 2 Cal. App. 690.

**Subject to taxes**

An agreement to convey land "subject to taxes" meant that the deed should contain a clause describing a reservation of taxes in the covenant against incumbrances. *Johnson v. Sherwood*, 73 N. E. 180, 186, 34 Ind. App. 490.

**Subject to tenancy**

Where the present landlords and their predecessors in title accepted deeds "subject to existing tenancies," and found tenants in actual possession, they must be presumed to

have ascertained and know the nature, extent, and terms of these tenancies, and of the leases under which they were held; for the fact of an existing tenancy necessarily presupposes a lease of some kind. *Anderson v. Conner*, 87 N. Y. Supp. 449, 451, 43 Misc. Rep. 384.

**SUBJECTIVE SYMPTOMS**

Objective symptoms are those which the surgeon discovers from a physical examination of his patient, while "subjective symptoms" are those he learns from what his patient tells him. *Dean v. Wabash R. Co.*, 129 S. W. 953, 957, 229 Mo. 425.

**SUBLEASE**

See, also, Subtenant.

A covenant in a coal lease against assigning or subleasing without the consent of the lessor, when relied on as a ground of forfeiture, will be given a strict construction in equity, and a contract between such a lessee and a mining company, by which the latter was given possession of the lessee's plant and equipment and agreed to mine the property and load the coal in cars for the lessee, which retained the ownership and paid for the work, was merely a working contract, and not a "sublease" within the meaning of such a covenant. *St. Louis Union Trust Co. v. Galloway Coal Co.*, 193 Fed. 106, 115.

**Assignment distinguished**

See Assignment.

**SUBLETTING**

Assignment distinguished, see Assignment.

The employment by a farm tenant of a third person to work thereon, to whom is given possession of a house on the premises, does not constitute a "subletting" of any part of the premises, within the provision of the lease prohibiting a subletting without the written consent of the landlord. *Vincent v. Crane*, 97 N. W. 34, 35, 134 Mich. 700.

A "subletting" is where the lessee demises the whole or a part of the premises for a portion of the unexpired term. Thus where a lessee relet two rooms of the demised premises to another, such rooms and the rest of the premises being occupied thereafter by different families, there was a subletting of the property within Rev. St. 1895, art. 3250, prohibiting a tenant from subletting without the consent of the landlord, which operated as a forfeiture of the lease, and entitled the landlord to recover possession. *Hudgins v. Bowes*, 110 S. W. 178, 179.

**SUBMERGED LAND**

As land, see Land.

As tide land, see Tide Lands.

## SUBMISSION

See Final Submission.

"'Submission to arbitration' may be defined as the agreement by which parties refer disputed or doubtful matters pending between them to the final decision and award of another party, whether one person or more; the party to whom the reference is made is called an 'arbitrator'; the arbitration is the investigation and determination of the matters of difference between the contending parties by the arbitrator so chosen; and the 'award' is the decree or judgment of the arbitrator, and is generally conclusive in its effect." *Millsaps v. Estes*, 50 S. E. 227, 228, 137 N. C. 535, 70 L. R. A. 170, 107 Am. St. Rep. 496.

Under an agreement for appraisal made pursuant to the terms of a standard fire insurance policy, one appraiser learned the opinion of the other as to the amount of loss, and thought he would be unable to agree upon that amount, and subsequently conferred with the umpire with a view to agreement with him. Later, upon the other appraiser expressing satisfaction with the umpire's figures, the first appraiser suspected collusion and withdrew from the appraisal. Held, that his conduct amounted to a "submission" of the matter to the umpire, his withdrawal came too late, and an award by the umpire and the other appraiser was binding. *Garrebrant v. Continental Ins. Co.*, 67 Atl. 90, 93, 75 N. J. Law, 577, 12 L. R. A. (N. S.) 443.

## SUBMIT

See Duly Submitted; Properly Submitted.

The more usual definition of the term "submit" is "to commit to the discretion of another." *Board of Education of Cherokee County v. Board of Com'rs of Cherokee County*, 63 S. E. 724, 729, 150 N. C. 116.

Where it is announced by the justice at the conclusion of trial "Decision reserved," the case is "submitted" within Municipal Court Act (Laws 1902, p. 1557, c. 580) § 230, allowing the justice for rendering judgment 14 days from the time the case is submitted. *Moschauer v. Jenkins*, 112 N. Y. Supp. 1038, 1039, 128 App. Div. 825.

A justice's docket showed that the evidence in an action was heard on August 5th, on which date the attorneys on both sides agreed to file a brief, and the court took the cause under advisement, that on August 7th plaintiff's attorney filed a brief and on August 12th defendant's attorney filed a brief, and that on the same day judgment was entered. Held that, construing the record as a whole, it did not show that the cause was "submitted to the justice for final action" on August 5th within the meaning of Code, §

4522, requiring judgment to be rendered within three days after such submission, but did show a postponement of such submission by agreement until after the filing of briefs. *Moir v. Bourke* (Iowa) 137 N. W. 921, 922.

In *Liquor Tax Law* (Consol. Laws 1909, c. 34), § 13, providing that, if the four propositions shall not have been properly submitted at the biennial town meeting, they shall be submitted at a special town meeting duly called, to "submit" means to present and leave to the judgment of the qualified voters. In *re Norton*, 134 N. Y. Supp. 1030, 1032, 75 Misc. Rep. 180.

## SUBMIT AND TRY

See Regularly Submit and Try.

## SUBMITTED TO ELECTORS

Const. § 168, provides that changes in the boundaries of organized counties shall be submitted to the electors of the county or counties to be affected, and be adopted by a majority of all the legal votes cast at such election. Held: That the phrase "shall be submitted to the electors" means that all persons qualified to vote in the county, or counties, affected shall in a legal manner be given an opportunity to vote; that whether or not they exercise their right in no way affects the fact of submission; that the word "electors" means all persons possessing the qualifications as to residence, age, and citizenship, as prescribed by section 121, as necessary to entitle them to vote; that the phrase "votes cast" means the total of the separate votes, or expressions of voters' preference for or against such a change, and should be limited to mean the votes cast on that proposition. Held, further, that to effect such change requires merely a majority of the votes cast upon the question of a change, and not a majority of the highest number of votes cast for any candidate, or upon any proposition voted upon at the election, since to hold otherwise would be to give as much effect to the act of an elector who did not vote on such change as that of one who voted in the negative. *State v. Blaisdell*, 119 N. W. 360, 362, 18 N. D. 31.

## SUBORDINATE

A "subordinate," as the term is used in a statute dividing the employes of railroad companies into superiors and subordinates, is an employe who has no power to direct or control in the branch or department in which he is employed. *Kane v. Erie R. Co.*, 142 Fed. 682, 685, 73 C. C. A. 672.

## SUBORDINATE OFFICER

Under the civil service law (Laws 1895, c. 313), the tax commissioner in the city of Milwaukee is the "head of a principal department," having power to appoint the ward assessors as his "subordinates" and the power

to remove them, anything in the city charter, existing at the date of the enactment, to the contrary notwithstanding. *State ex rel. Hayden v. Arnold*, 138 N. W. 78, 84, 151 Wis. 19.

An inspector of police, an officer provided for by Greater New York Charter (Laws 1901, p. 118, c. 466) § 276, is a "subordinate officer," within section 300 and police rule 280, authorizing such an officer to prefer charges in writing against a patrolman without verification on information furnished by another person. *People ex rel. Rosenberg v. Greene*, 91 N. Y. Supp. 803, 804, 101 App. Div. 33.

A "subordinate officer," within the civil service law (Consol. Laws 1909, c. 7), is one subject to the direction and control of a superior officer; and special agents appointed under Liquor Tax Law (Consol. Laws 1909, c. 34) § 7, providing that such agents shall, under the direction of the commissioner and as required by him, investigate, etc., are subordinate officers. *In re Weaver*, 131 N. Y. Supp. 144, 145, 72 Misc. Rep. 438.

## SUBORNATION OF PERJURY

See Attempt at Subornation.

"Subornation of perjury" is the procuring of the commission of perjury by inciting, instigating, or persuading a witness to swear falsely. *State v. Johnson* (Del.) 84 Atl. 1040, 1041.

Where the crime of perjury is committed at the instigation or procurement of another, it is "subornation of perjury" by the party instigating it. *State v. Shaffner* (Del.) 69 Atl. 1004, 1005, 6 Pennewill, 576.

The crime of "subornation of perjury" consists of the commission of perjury by the person suborned and willfully procuring him to commit perjury by the suborner. *Bell v. State*, 63 S. E. 860, 5 Ga. App. 701.

To render one guilty of "subornation of perjury," he must not only have caused a false oath to be taken, but must have known at the time that the false oath was taken willfully, corruptly, and knowingly, so as to constitute perjury on the part of the person taking it. *State v. Trook*, 88 N. E. 930, 931, 172 Ind. 558 (citing *United States v. Evans*, 19 Fed. 912; *Commonwealth v. Douglass*, 46 Mass. [5 Metc.] 241; *Stewart v. State*, 22 Ohio St. 477; 2 Whart. Cr. Law, § 1329; 2 Bishop, Cr. Law, § 1197 [2]).

"Subornation" is in its essence "perjury," and the perpetrator of the offense a sort of an accessory before the fact, but the statute creates them as distinct offenses, and a different quantum of evidence is essential to sustain the conviction of one than the other. Under an indictment for perjury, the accused cannot be convicted of subornation of perjury. Being distinct offenses, involving essentially different acts on the part of the ac-

cused, proof of one ought not to be received in justification of an alleged libel, charging a person with having committed the other. *State v. Lomack*, 106 N. W. 386, 387, 130 Iowa, 79 (citing *Commonwealth v. Douglass* [Mass.] 5 Metc. 241; *People v. Evans*, 40 N. Y. 1).

Under Mills' Ann. St. § 1270, providing that if one falsely swears in a matter material to the issue, or suborns another person to swear falsely, he shall be guilty of perjury or subornation thereof, as the case may be, the crime of "subornation of perjury" cannot be committed unless the matter falsely sworn to is material. *McClelland v. People*, 113 Pac. 640, 641, 49 Colo. 538, 32 L. R. A. (N. S.) 1069.

According to the Oregon statute (B. & C. Comp. § 1875), one who procures any other to commit the crime of perjury is guilty of "subornation of perjury." *State v. Jewett*, 85 Pac. 994, 996, 48 Or. 577.

Procuring entryman to make false affidavits constituted "subornation of perjury," as defined by Rev. St. 5393. *Nickell v. United States*, 161 Fed. 702, 707, 88 C. C. A. 562.

## SUBPOENA

Service of Subpoena, see Service (In Practice).

A "writ of subpoena" in equity is a command that something be done and is an order of court. *Leas & McVitty v. Merriman*, 132 Fed. 510, 513.

The "summons" referred to in Civ. Code 1902, § 3130, providing for certain fees of witnesses in the courts of common pleas and probate, for every day's attendance on "summons," is not a mere verbal or written notice from the party, but is the "subpoena" referred to in section 2861, authorizing the issuance of subpoenas for witnesses, and requiring a subpoena to state at whose request the witness is summoned. "Summons" and "subpoena" mean the same thing. Hence a party may not tax witness fees against the adverse party unless the witnesses were subpoenaed. *Atherton v. Atlantic Coast Line R. Co.*, 64 S. E. 411, 82 S. C. 474.

According to the Idaho statute (Rev. St. 1887, § 6035), a "subpoena" is "the process by which the attendance of a witness is required." Under section 6039 a witness who resides in an adjoining county and more than thirty miles from the place of trial is not obliged to attend in response to a subpoena, but the privilege of disobeying the subpoena is personal to the witness, and where he waives the privilege and attends and testifies, he is entitled to his mileage for actual and necessary travel within the state, the same as any other witness who has attended under compulsory process. *Anderson v. Ferguson-Bach Sheep Co.*, 86 Pac. 41, 42, 12 Idaho, 418, 10 Ann. Cas. 395.



According to Code Civ. Proc. § 1985, a "subpœna" is a process "by which the attendance of a witness is required." It is the means provided by which a party may compel a witness to appear in court at the trial whether he is willing or not. The only object of the subpœna, and its only office, when complied with, is to secure his testimony by personal attendance. Since the party making a request for the attendance of a witness is liable for the statutory fee, in case the witness attends, such party is entitled to tax costs for such attendance, though the witness was not subpœnaed. *Linforth v. San Francisco Gas & Electric Co.*, 99 Pac. 716, 717, 9 Cal. App. 434. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testify as a witness. Where a subpœna regular on its face is issued out of a court of general jurisdiction, and it procures the attendance of the witness at the time and place appointed, and he is sworn and submits to a partial examination without objection, he waives any defect or irregularity in the issuance of the subpœna, and he cannot sustain the action of a judge of the superior court in refusing to direct him to complete the deposition by raising the question of the sufficiency of the subpœna for the first time in an original proceeding in the appellate court for a writ of mandate to compel the judge to require the witness to complete the deposition. *In re Scott*, 96 Pac. 385, 387, 8 Cal. App. 12.

**As mandate**

See Mandate.

**As process**

See Process.

**SUBPŒNA AD TESTIFICANDUM**

"Subpœna ad testificandum" is an expression, whatever the official hand clothed with the right to issue it, of inherent power possessed by courts having power to hear and determine controversies, to call for proofs of the facts involved and to summon and compel the attendance of witnesses before them; and process, for such purposes, is essentially judicial. *Jackson v. Mobley*, 47 South. 590, 592, 157 Ala. 408.

**SUBPŒNA DOCKET**

A "subpœna docket," in which clerks of circuit courts are required by Code 1896, § 934, subd. 6, to enter subpœnas issued, etc., is not a part of the final record in a cause, but a memorial, more permanent than the writs themselves, of the steps taken to procure testimony. *Jackson v. Mobley*, 47 South. 590, 592, 157 Ala. 408.

**SUBPŒNA DUCES TECUM**

As mandate, see Mandate.

A party is not entitled, under a "subpœna duces tecum," to have brought into

court a mass of books and papers that he may search them through to gather evidence. The subpœna must specify, with as much precision as is fair and feasible, the particular documents desired. *American Car & Foundry Co. v. Alexandria Water Co.*, 70 Atl. 867, 869, 221 Pa. 529, 128 Am. St. Rep. 749, 15 Ann. Cas. 641 (quoting and adopting 3 Wigmore, Evidence [1904] § 2200, and citing and adopting cases and authorities *Cowles v. Cowles* [Pa.] 2 Pen. & W. 139; *Wills v. Kane* [Pa.] 2 Grant, Cas. 47).

A "subpœna duces tecum" is an ancient writ. An order issued under Laws 1906, No. 75 (P. S. 4252-4256), directing a corporation to produce before a grand jury certain books and papers, is in effect the same as a "subpœna duces tecum," except that it applies to a corporation. *In re Consolidated Rendering Co.*, 66 Atl. 790, 794, 80 Vt. 55, 11 Ann. Cas. 1069.

The familiar process by which the production of documents in the hands of third persons is secured is the "subpœna duces tecum." One upon whom such process is served is bound to produce the required document. The production thus compelled does not, however, signify a delivery of the papers into the hands of the party calling for their production or of his counsel, or a submission of them to his examination; neither does such a consequence necessarily follow. The production which the possessor of the papers is required to make consists of bringing them into court and putting them into its control. Having by this act complied with the order of production, the producer may ask the court to pass upon any claim of privilege, or to make a personal inspection of the document or documents, to determine their relevancy or their relevant parts before their submission to counsel, and to make any proper order for the protection in such submission of the interests of the producer, as, for example, by withholding from the view of counsel any irrelevant matter which he ought not to be permitted to examine. *Banks v. Connecticut R. & Lighting Co.*, 64 Atl. 14, 15, 79 Conn. 116.

**SUBPŒNAED**

The allegation, in an indictment for conspiracy to prevent witnesses from attending a trial, that the witnesses were legally "subpœnaed" which under Code, § 5493 is accomplished by delivering a copy of the subpœna and showing the original to the witness, is only by way of inducement to the substance of the charge; and the variance between the allegation and the proof that a copy of the subpœna duly issued had been placed in the hands of each witness, who understood that he was required to attend court as a witness at the time and place indicated therein, was immaterial. *State v. Hardin*, 120 N. W. 470, 473, 144 Iowa, 264, 138 Am. St. Rep. 292

## SUBROGATION

See Conventional Subrogation.

"Subrogation" is the substitution of one person in place of another, whether as a creditor or as the possessor of any rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies, or securities. The doctrine is one of equity and benevolence. Its basis is the doing of complete, essential, and perfect justice between the parties, without regard to form, and its object is the prevention of injustice. It does not necessarily rest on contract or privity, but upon principles of natural equity, and does not depend upon the act of the creditor, but may be independent of him, and also of the debtor. It applies whenever any person other than a mere volunteer pays a debt or demand which in equity or good conscience should have been satisfied by another, or where a liability of one person is discharged out of a fund belonging to another, or where a person is compelled, for his own protection or that of some interest which he represents, to pay a debt for which another is primarily liable. *Robertson v. Sullivan*, 59 South. 846, 847, 102 Miss. 581 (quoting 7 Words and Phrases, p. 6722).

The doctrine of "subrogation" rests fundamentally on the equitable principle that, where a party is compelled to pay a debt for which another is liable, and which that other in good conscience ought to pay, the payment should invest the party paying with the creditor's rights and remedies against the other debtor. *Lackawanna Trust & Safe Deposit Co. v. Gomerlinger*, 84 Atl. 757, 760, 236 Pa. 179.

"Subrogation" is the substitution of a new for an old creditor; more generally the act of putting, by transfer, a person in the place of another. The right is not founded on contract, but is a creation of equity, and is enforced for the purpose of accomplishing substantial justice. *Holland Banking Co. v. See*, 130 S. W. 354, 356, 146 Mo. App. 269.

"Subrogation" contemplates some original privilege on the part of him to whose place substitution is claimed; and, where no such privilege exists, there is nothing on which to base the right. *Teter v. Teter*, 63 S. E. 967, 65 W. Va. 167.

"Subrogation" exists to enable a party secondarily liable who has paid the debt to benefit by the securities or remedies which the creditors hold against the principal debtor. *Paton v. Robinson*, 71 Atl. 730, 733, 81 Conn. 547.

The right of "subrogation" is independent of any contractual relation between the parties, and may be exercised wherever one party pays a debt for which another is primarily answerable, or which in equity should have been discharged by another, ex-

cept in case of one who has officiously and as a mere volunteer paid the debt of another for which neither he nor his property was answerable, or where it would work an injustice to the rights of another. *Vasser v. City of Liberty*, 110 S. W. 119, 121, 50 Tex. Civ. App. 111 (citing 6 Pom. Eq. Jur. § 920).

"Subrogation" is the doctrine of equity jurisprudence wherein a party, who has indemnified another in pursuance of his obligation to do so, succeeds, and is entitled to the cession of all means of redress held by the party indemnified against the one who caused the loss. *Travelers' Ins. Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426, 431, 107 C. C. A. 20, 36 L. R. A. (N. S.) 60.

"Subrogation" takes place where one pays a debt which another was justly liable to pay, and the payment is made to discharge the property of the person paying from an incumbrance. The right of subrogation is not founded upon contract, express or implied, but upon principles of equity and justice, and is broad enough to include every instance in which one party, not a mere volunteer, pays a debt for another, primarily liable, and which in good conscience and equity should have been paid by the latter. *Alberti v. Moore*, 93 Pac. 543, 548, 20 Okl. 78, 14 L. R. A. (N. S.) 1036 (citing *Lowrey v. Byers*, 80 Ind. 443; *Davis v. Schlemmer*, 50 N. E. 373, 150 Ind. 472, 479; *Cole v. Malcolm*, 66 N. Y. 363; *Boisot, Mech. Liens*, § 263; *Phil. Mech. Liens*, § 260).

"Subrogation" is an equitable and not a legal right. Its foundation, it is said, is on equity and benevolence. It is a doctrine which will be applied, or not, according to the dictates of equity and good conscience, and considerations of public policy. When the case is one of the subrogation of the individual to public rights and remedies, the situation assumes an aspect not presented, where the substitution relates to private rights. *Sperry v. Butler*, 53 Atl. 899, 901, 75 Conn. 369.

"Subrogation" is a remedy which equity seizes upon in order to accomplish what is just and fair between the parties, when the party seeking the aid of the court and the benefit of the rule has been no mere volunteer, and when his action is based upon general equitable rules. "The doctrine of subrogation is that one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against the other and to indemnity from the fund out of which should have been made the payment which he has made to the creditor. It is a mode which equity adopts to compel the ultimate discharge of a debt by him who in equity and good conscience ought to pay it, and to relieve him whom only a creditor would ask to pay, although, as between debtor and creditor, the debt may be extinguish-

ed; yet, as between the person who has paid the debt and the other parties, the debt is kept alive so far as may be necessary to preserve the securities." *Brinckerhoff v. Holland Trust Co.*, 159 Fed. 191, 200 (quoting and adopting *Sheld. Subr.* § 11).

"The scope of the right of 'subrogation' consists in the immediate transfer, by operation of law, to the promisor in suretyship of all the rights of the creditor against the principal whenever the promisor pays the debts or satisfies the obligation. This right of subrogation is independent of any agreement and rests upon principles of natural justice and equity." *Union Stone Co. v. Board of Chosen Freeholders of Hudson County*, 65 Atl. 466, 471, 71 N. J. Eq. 657 (quoting *Stearns, Law of Suretyship*, p. 462, § 261).

"Subrogation" is an equity. It is derived from the civil law. "'Subrogation' is the equity by which a person who is secondarily liable for a debt, and has paid the same, is put in the place of the creditor, so as to entitle him to make use of all the securities and remedies possessed by the creditor in order to enforce the right of exoneration as against the principal debtor, or of contribution against others, who are liable in the same rank with himself." *State ex rel. Moore v. Perkins*, 38 South. 196, 198, 114 La. 301 (quoting *Bish. Eq.* § 335).

#### Assignment distinguished

If one person, not a mere interloper, but having an interest in the matter, pay the note and satisfy the mortgage of another, the question whether he becomes an assignee of the note and mortgage is one of fact and intention of the parties. If, however, overriding equities so require, one who satisfies an incumbrance upon his land may be subrogated to the rights of the lienholder, or may be entitled to an equitable assignment of such rights. "Subrogation" and equitable assignment are acts of the law as distinguished from assignment by acts of parties. We must be careful to distinguish between an assignment of the mortgage debt and a mere right of subrogation to the lien of the mortgage creditor. Assignment is the act of the parties, and depends generally upon intention. Where the nature of the transaction is such as imports a payment of the debt and a consequent discharge of the mortgage, there can, of course, be no assignment, for the lien of the mortgage is extinguished by the payment. A mortgage creditor cannot be compelled to assign the debt and mortgage upon receiving payment. All that he can be required to do is to give an acquittance and release. The exception to this rule, if it can be so termed, is found in those cases where the party making the payment occupies the position of surety to the debt, or is in some way personally bound for its payment. Such a person may, in equity, require an assignment or transfer, not only of the

mortgage itself, but of all the securities held by the creditor, for his protection and indemnity, and, although no such assignment or transfer is actually made, a court of equity will treat it as having been done. But, if the party making the payment does not occupy the position of surety for the debt, as a general rule he cannot claim to be entitled as assignee unless by agreement with the creditor. Subrogation is, however, a very different thing from an assignment. It is the act of the law, and the creature of a court of equity, depending, not upon contract, but upon the principles of equity and justice. It presupposes an actual payment and satisfaction of the debt secured by the mortgage. But, although the debt is paid and satisfied, a court of equity will keep alive the lien for the benefit of the party who made the payment, provided he, as security for the debt, has such an interest in the land as entitles him to the benefit of the security given for its payment. *Lynds v. Van Valkenburgh*, 93 Pac. 615, 620, 77 Kan. 24 (citing *Binford v. Adams*, 3 N. E. 753, 104 Ind. 41; *Gatewood v. Gatewood*, 75 Va. 407, 410).

#### As a creature of equity

"'Subrogation' is of equitable origin, not dependent upon contract, and is always invoked to prevent injustice. It will never be permitted to work to the prejudice of the rights of others or produce injustice." *Moring v. Privott*, 60 S. E. 509, 511, 146 N. C. 558.

The doctrine of "subrogation" has its origin in equity; its purpose is indemnity; and its object is attained when the insurer has been fully compensated. The doctrine cannot be invoked to consummate injustice; it does not permit one party to secure an unfair advantage over the other; it does not permit the insurer to speculate, or profit or drive an unconscionable bargain. When he is paid in full, equity requires the return of the balance to the insured in payment of his uncompensated loss. Where a ship sunk by collision and abandoned to the insurer, being an actual total loss, is insured by a valued policy, and the stipulated sum is paid to the owner, who subsequently recovers her actual value, which exceeds her insurance value as damages from the vessel responsible for the collision, the insurer is only entitled to be reimbursed from such recovery by receiving back the amount it has paid out, with interest, and the insured is entitled to the remainder in payment of his uncompensated loss. *The Livingstone*, 130 Fed. 746, 749, 65 C. C. A. 610.

"'Subrogation' is a doctrine of equity jurisdiction, which does not depend on privity or contract, express or implied, except in so far as the known equity may be supposed to be imported into the transaction and, thus raise a contract by implication. It is founded on the facts and circumstances of each

particular case and on the principles of natural justice. In general, it will be applied wherever any person, other than a mere volunteer, pays a debt or demand which in equity or good conscience should have been satisfied by another, or where a liability of one person is discharged out of a fund belonging to another, or where one person is compelled for his own protection, or that of some interest which he represents, to pay a debt for which another is primarily liable, or wherever the denial of the right would be contrary to equity and good conscience. Subrogation being the creature of equity, it will not be permitted where it would work injustice to the rights of those having equal or superior equities. Thus it will not be enforced against a bona fide purchaser for value without notice, or in favor of a person guilty of fraud, or for the benefit of one who would thereby be enabled to derive an advantage from, or to establish his claim through, his own wrong or negligence or inequitable or illegal conduct. Nor will it be enforced at the expense of a legal right, or where resort to a usurious agreement or security would be necessary for its establishment." *German Savings & Loan Soc. v. Tull*, 136 Fed. 1, 6, 69 C. C. A. 1 (citing *Ætna Life Ins. Co. v. Middleport*, 8 Sup. Ct. 625, 124 U. S. 534, 31 L. Ed. 537; *Prairie State Nat. Bank v. United States*, 17 Sup. Ct. 142, 164 U. S. 227, 41 L. Ed. 412; *First Nat. Bank v. City Trust, Safe Deposit & Surety Co. of Philadelphia*, 114 Fed. 520, 52 C. C. A. 313).

"The doctrine of 'subrogation' is not administered by courts of equity as a legal right, but the principle is applied to subserve the ends of justice, and to do equity in the particular case under consideration. It does not rest on contract, and no general rule can be laid down which will afford a test in all cases for its application. Whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case." Thus, where plaintiff lent S. money with which a valid mortgage lien was paid off, and in good faith took a mortgage on the property, executed by S. and the woman with whom he was living as husband and wife, it was held that plaintiff had a lien on the property for the money loaned and so used, either by virtue of his mortgage or that, by subrogation, he has such lien by virtue of the lien so paid. Held, further, that plaintiff was not a mere volunteer, and that claimants may not avoid his mortgage and retain the benefit of the release of the prior valid lien. *Gordon v. Stewart*, 96 N. W. 624, 630, 4 Neb. (Unof.) 852 (citing *South Omaha Nat. Bank v. Wright*, 63 N. W. 126, 45 Neb. 23).

"Subrogation" is a doctrine primarily of equity jurisprudence, although its principles are now often applied in courts of common law, especially in those states in which equitable remedies are administered through

the forms of law. It is a substitution, ordinarily the substitution of another person in the place of a creditor, so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. More broadly, it is the substitution of one person in the place of another, whether as a creditor or as the possessor of any other rightful claim." Where the probate court directed the administrator of an estate to borrow money and complete a building which had been commenced by the decedent, and for the construction of which no contract existed at the decedent's demise which could be carried out, the person loaning the money could be subrogated only to such rights as the contractors had; and, as no legal basis existed for the establishment of a mechanic's lien, he acquired no right by subrogation to any such lien. *Waldermeyer v. Loebig*, 81 S. W. 904, 906, 183 Mo. 363.

#### As either legal or conventional

"Subrogation" is a remedy made use of by courts of equity as an efficient aid to justice, and, in the main, does not depend on a contractual obligation, though a man may acquire the right to a conventional subrogation by contract. This happens when one liquidates a demand secured by lien or guaranty, and takes an assignment of it, or agrees with the creditor that any security held by the latter shall continue available for the collection of the demand." *Crane v. Noel*, 78 S. W. 826, 828, 103 Mo. App. 122.

#### Persons entitled to relief

The doctrine of "subrogation" is applicable to all cases wherein a party who has indemnified another in pursuance of his obligation so to do succeeds, and is entitled to the cession of all means of redress held by the party indemnified against the party who has occasioned the loss. *Travelers' Ins. Co. v. Great Lakes Engineering Works Co.*, 184 Fed. 426, 431, 107 C. C. A. 20, 36 L. R. A. (N. S.) 60 (citing *Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.*, 25 Conn. 265, 65 Am. Dec. 571).

The doctrine of "subrogation" will be applied, in general, wherever any person, other than a mere volunteer, pays a debt or demand which, in equity and good conscience, should have been satisfied by another. "Subrogation," as a principle of equity jurisprudence, is generally confined to the relation of principal and surety and guarantors, or to a case where a person is compelled to remove a superior title to that held by him in order to protect his own, and also to cases of insurers. Whilst these general heads include the doctrine and principles of subrogation, that doctrine has been steadily expanding and growing in importance and extent in its application to various subjects and classes of persons. This equitable principle is enforced solely for the accomplishment or substantial justice, where one has an equity to

invoke which cannot injure an innocent person. The right of subrogation which springs from the mere fact of the payment of a debt, and which is included under the heads first above stated, is what is termed legal subrogation, and exists only where included within those classes. But, in addition to this principle of legal subrogation, there exists another principle, which is termed conventional subrogation, which results from an equitable right springing from an express agreement with the debtor, by which one advances money to pay a claim for the security of which there exists a lien, by which agreement he is to have an equal lien to that paid off, whereupon he is entitled to the benefit of the security which he has satisfied with the expectation of receiving an equal lien. It is the agreement that the security shall be kept alive for the benefit of the person making the payment which gives the right of subrogation, because it takes away the character of a mere volunteer. Since the equitable doctrine of subrogation was ingrafted on the English equity jurisprudence from the civil law, it has been steadily growing in importance, and widening in its sphere of application. It is a creation of equity, and is administered in the furtherance of justice. It is applied to give the party who actually pays the debt the full benefit and advantage of such payment. It has been long settled, and it is not controverted, that the doctrine applies where a junior incumbrancer discharges the prior incumbrance, and where the surety pays the debt of his principal, and in cases of like character. A just limitation of the application of the doctrine is that it does not apply to payments made by a mere volunteer or stranger. In *re McGuire*, 137 Fed. 967, 968 (citing *Home Sav. Bank v. Bierstadt*, 48 N. E. 161, 168 Ill. 618, 61 Am. St. Rep. 146; *Rachal v. Smith*, 101 Fed. 159, 164, 42 C. C. A. 297, 302).

"Subrogation," as a principle of equity jurisprudence, is generally confined to the relation of principal and surety or guarantors, or to a case where a person is compelled to remove a title superior to that held by him in order to protect his own and also to cases of insurers. The doctrine has, however, been steadily expanding and growing in importance and extent in its application to various subjects and classes of persons. The principle is enforced solely for the accomplishment of substantial justice, where one has an equity to invoke which cannot injure an innocent person. The right of subrogation springing from the mere fact of payment of a debt and included under the heads first above stated is termed "legal subrogation" and exists only where included within those classes. There exists, however, another principle, termed "conventional subrogation," which results from an equitable right springing from an express agreement with the debtor by which one advances money to

pay a claim for the security of which there exists a lien, by which agreement he is to have an equal lien to that paid off, whereupon he is entitled to the benefit of the security which he has satisfied. Where a party loaned money on land subject to two mortgages under an agreement that the loan was to be used to pay off the first mortgage, and that the second mortgage would be discharged and a new mortgage made subject to his mortgage, and in pursuance of the agreement he paid the first mortgage and took a satisfaction thereof, he was entitled to be subrogated to the rights of the first mortgagee. *Bank of Ipswich v. Brock*, 83 N. W. 436, 438, 13 S. D. 409.

Payment by one who stands in the relation of surety, although it may discharge the security, as respects the creditor, has not that effect as between the debtor and the surety; the surety being subrogated or assigned to all the securities and rights of the principal debtor, the equitable doctrine of "subrogation" not being limited in its operation to the relation of formal suretyship. *Wallace v. Jones*, 72 Atl. 769, 770, 110 Md. 143.

One who in the discharge of a secondary liability pays an obligation is entitled by "subrogation" to the securities of him who is primarily liable, although the primary and secondary liabilities are not incurred at the same time. When one in discharge of a secondary liability pays an obligation secured by mortgage upon real estate, his right to "subrogation" is not defeated by the cancellation and surrender of the mortgage without a stipulation that his right shall be preserved. *Smith v. Folsom*, 88 N. E. 546, 547, 80 Ohio St. 218 (quoting and adopting definition in *Neilson & Churchill v. Fry*, 16 Ohio St. 553, 91 Am. Dec. 110).

"Subrogation" is merely an equitable assignment, or an assignment by operation of law. The right to recover damages for the negligent destruction of property by fire together with the right to have the jury assess interest in its discretion, as they are authorized by statute to do in actions for the breach of obligations not arising from contract, is assignable and passes by subrogation to an insurance company to the extent of the proportion of the loss paid by it to the property owner. *Caledonia Ins. Co. v. Northern Pac. Ry. Co.*, 79 Pac. 544, 545, 32 Mont. 46.

"The remedy of 'subrogation' is no longer limited to sureties and quasi sureties, but includes so wide a range of subjects that it has been called the 'mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay.'" Certain breweries formed a mutual association for insurance against loss from liability for personal injuries, and a claim for personal injuries having been made against one of the mem-

bers, the insurer was notified to defend, and in compliance with the notice undertook the defense of the action, which resulted in a judgment against the insured. To save itself from having to pay the judgment, the insurer procured a surety to execute an appeal bond, and, after the bond was executed, the insurer withdrew from the case on the ground that the insured was in default of assessments. The surety proceeded to perfect the appeal, and also sought and procured a new trial on the ground of newly discovered evidence, and finally compromised the case without the appeal having been heard. The surety was entitled to be subrogated to the rights of the insured against the insurer for the amount paid on the settlement of the claim; it appearing that the settlement was a reasonable one, was made in good faith and for the benefit of the insured. *City Trust, Safe Deposit & Surety Co. v. Haaslocher*, 91 N. Y. Supp. 1022, 1027, 101 App. Div. 415 (quoting and adopting the definition in *Arnold v. Green*, 23 N. E. 2, 116 N. Y. 566).

"Subrogation" is a creature of equity invented to prevent a failure of justice." Hence, where a husband, after the death of his wife, discharged a mortgage upon her lands, and thereafter sold the lands to one, believing he obtained full title, the purchaser is entitled to be subrogated to the rights of the mortgagee in ejectment by the wife's heirs. *Olson v. Peterson*, 128 Pac. 191, 194, 88 Kan. 350 (quoting *Safe Deposit & Trust Co. v. Thomas*, 53 Pac. 472, 59 Kan. 470).

The right of "subrogation" is peculiarly a doctrine of equity jurisprudence and is founded on natural justice and the facts and circumstances of each particular case. The doctrine is variously applied to sureties who pay debts of their principal and may be subrogated to the securities, liens, etc., held by the creditor; to creditors who may be subrogated to securities and liens held by sureties; to persons interested in incumbered estates who pay off the incumbrances; and to persons paying or advancing money to discharge incumbrances on other's property, under an agreement that he may hold the discharged incumbrance as security for repayment. One entitled to subrogation is substituted in the place of the original holder of the right, with no greater rights or equities than he had. The rights acquired by a party entitled to subrogation cannot be extended beyond the rights of a party under whom subrogation is claimed. Subrogation contemplates some original privilege on the part of him to whose place substitution is claimed, and where no such privilege exists, or where it has been waived by the creditor, there is nothing on which the right can be based. While a surety who pays the debt of his principal is subrogated to the rights of the holder of the claim, he takes such rights subject to all disqualifications and limitations which attached to them in the hands of his predecessor.

Where the right of mortgagees to enforce their lien is barred by limitation, the right of one entitled to be subrogated to their lien is also barred, and the fact that such person is an infant is immaterial. *Brown v. Nelms*, 112 S. W. 373, 381, 382, 86 Ark. 368 (citing 4 Pom. Eq. Jur. § 1419; *Rodman v. Sanders*, 44 Ark. 504).

While the original debt, whether in the form of a judgment or a bond, is discharged by the payment, the surety becomes a simple contract creditor of his debtor; and to this new relation equity attaches what is called the "right of subrogation," which is defined to be the substitution of one person in the place of another, whether as a creditor or the possessor of any other rightful claim, and the substitute is put in all respects in the place of the party to whose rights he is subrogated; the principle having been adopted from the civil law by courts of equity. It is treated as a creature of equity, and is so administered as to secure real and essential justice, without regard to form, and independent of any contractual relations between the parties to be affected by it. It is broad enough to include instances in which one party pays the debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter. It has been held that the sureties of an insolvent clerk of a court, upon a breach of trust by their principal, will in equity be entitled to all the remedies and securities that belong to a cestui que trust, or creditor, against one who co-operated in the breach of trust. *Fidelity & Deposit Co. v. Jordon*, 48 S. E. 496, 497, 134 N. C. 236 (citing *Sheld*, Subr., p. 2, and 2 Beach, Mod. Eq. Jur. §§ 797, 798).

"Subrogation" is an equitable assignment. When equity and good conscience requires the assignment to be made, subrogation, if necessary, will be allowed. It is not a matter of strict right, but is purely equitable in its nature, dependent upon the facts and circumstances in each particular case, and intended to serve the purpose of compelling the ultimate discharge of a debt or obligation by him who in good conscience ought to pay it. The doctrine is sufficiently broad to entitle a surety who has paid the debt of his principal to the remedies which the creditor had, not only against the principal, but against others. A year after the issuance of such orders, they were presented to the county treasurer and paid, with interest. Upon the discovery of their fraudulent character, the county brought suit against the auditor on his bond, and by the final judgment of the Supreme Court of the state recovered a judgment, which was paid by the surety. Held, that the bank was primarily liable to the county for the amount received from its treasurer as money had and received to the county's use, and that the surety of the auditor, having paid the debt to the county, was

entitled by equitable subrogation to enforce its right of recovery against the bank. *National Surety Co. v. State Sav. Bank*, 150 Fed. 21, 26, 84 C. C. A. 187, 14 L. R. A. (N. S.) 155, 13 Ann. Cas. 421.

The right of "subrogation" (that is, the substitution for the common creditor of a surety, who has been compelled to pay his principal's debt) originated in the civil law and, though unknown to the common law, was in time adopted and applied in a modified form by the court of chancery in England. The substitution was intended to be complete and afford the debtor, who paid, the right to use his creditor's hand for the enforcement of contribution from his codebtors. In the application of this principle by the English courts, an obstacle was encountered in the rule of the common law that makes the payment of a debt operate as an absolute extinguishment thereof, and denies the right to a surety, who pays, to prevent the destruction of the debt, either by a direct assignment from the creditor or by any other means. The English courts of equity recognized this practice and, treating the debt as extinguished by payment, evolved the idea of founding an equitable right, not upon the creditor's actions, but upon the fact of payment. They held that, notwithstanding the debt itself was nonexistent, the fact that a surety had paid the debt gives him in equity the right to be substituted for the creditor as to all liens and securities incidental to the debt. It has been found that the English rule is inadequate to meet the requirements of equity and justice in all cases. There are rights, remedies, and liens so indissolubly bound up with the debt itself that their destruction attends that of the debt. To obviate such injustice, resort was had to the civil law, and the rule relating to the extinguishment of the debt was restricted in its application to the relation between the creditor and debtors and held to be of no effect upon the rights of the debtors among themselves. Though a judgment creditor held no securities for his debt, a surety of the judgment debtor having satisfied the judgment, there was an equitable assignment to him, and he might maintain an action against his cosurety after the running of limitations against the statutory actions for contribution and within the period within which the judgment creditor might have asserted his rights against the principal. *Burrus v. Cook*, 93 S. W. 888, 889, 117 Mo. App. 385.

"Subrogation" is a doctrine of equity jurisprudence, and it does not depend on privity or contract, except in so far as the known equity may be supposed to be imported into the transaction and thus raise a contract by implication. Where a curator, with the sanction of the probate court, executed a mortgage on his land to obtain money to satisfy a pre-existing incumbrance under which the land was about to be sold, and the lender ex-

pressly refused to accept a transfer of the old incumbrance, and insisted upon the making of a new mortgage, she was not entitled to be subrogated to the rights of the mortgagee in the first mortgage. *Capen v. Garrison*, 92 S. W. 368, 369, 193 Mo. 335, 5 L. R. A. (N. S.) 838.

Under the doctrine of "subrogation," one who has been compelled to pay a debt which should have been paid by another is entitled to all the remedies which the creditor possessed against the other and to indemnity from the fund out of which should have been made the payment which he has made to the creditor. The remedy is not limited to sureties or quasi sureties, but extends to cases where a person not a volunteer pays a debt which in equity and good conscience he ought not to pay, for the purpose of protecting property in which he is interested. Where a judgment was recovered against a partner, after his retirement from a firm, for a firm debt for which he was not liable, and, when execution was issued and payment demanded from him, he informed the sheriff that the continuing partner was liable on the debt and that his property should be first levied on, and in order to prevent a levying on his own property, he gave a check for the amount due on the judgment, which check was subsequently made good by money advanced by his wife, to whom the judgment was assigned after levying on the continuing partner's assets, and the continuing partner became a bankrupt, while the levy was in force, the assignee of the judgment and execution was entitled to "subrogation" to the rights of the judgment creditor and was entitled to have the proceeds of the property, levied on in the hands of the bankrupt's trustee, applied in settlement of the amount such assignee advanced as against the trustee and general creditors of the bankrupt. In *re Bruce*, 158 Fed. 123, 129.

"Subrogation," which is defined as the substitution of another person in place of a creditor to whose rights he succeeds in relation to the debt is an equitable result purely and depends on facts to develop its necessity that justice may be done. While a surety upon payment of his principal's debt is ordinarily entitled to be subrogated to the rights of the creditor in all the securities held by him this right depends upon the superiority of his equities, for equality of equities, which is essential to contribution, is fatal to subrogation. Where a bond was given to secure the discharge of an attachment, and subsequently the same parties, with other sureties, gave a supersedeas bond, the sureties on the supersedeas bond, on affirmation of the judgment and payment thereof, were not subrogated to the judgment creditor's rights against the surety on the attachment bond. *Fidelity & Deposit Co. of Maryland, v. Bowen*, 98 N. W. 897, 898, 123 Iowa, 356, 6

L. R. A. (N. S.) 1021 (quoting and adopting definition given in *Richards v. Cowles*, 75 N. W. 649, 105 Iowa, 738).

"Subrogation" in equity is that principle which substitutes a person who has paid a debt for which another is bound to all the rights and remedies of the creditor against that third party, provided he is not a mere volunteer, but made payment because his duty with respect to the contract or his interest with respect to the property or securities concerned compelled him. Thus, if a surety pays the debt of his principal, he is subrogated to the benefit of all securities, funds, liens, and equities which the creditor has against the principal. Since cosureties have the right to call on each other for contribution, a surety compelled to pay the debt of the principal is subrogated to the right of the creditor, not only against the principal, but against the cosurety also. In *re Rock Hill Cotton Factory Co.*, 47 S. E. 728, 729, 68 S. C. 436.

"Equitable subrogation" implies that there is no adequate remedy at law." Where a purchaser under an ineffectual foreclosure of mortgages, having paid them off, is entitled to the rights and remedies of the mortgagees, it constitutes a clear case of equitable subrogation. "Subrogation is allowed by courts of equity to secure justice. Ordinarily it takes place when one has paid a debt which some one else ought to pay; in such cases, sometimes the person so paying succeeds to the securities which the original creditor held for his debt." But an attaching creditor of mortgaged chattels, who has paid off the mortgage, cannot have equitable subrogation to the mortgagee's rights and a foreclosure, where the statute provides a method of reimbursement in the attachment suit. *Carstenbrook v. Wedderien*, 94 Pac. 372, 374, 7 Cal. App. 465 (quoting and adopting *Randall v. Duff*, 40 Pac. 20, 107 Cal. 33).

Where in a former suit it was held that plaintiff was entitled to "subrogation" to the rights of a mortgagee, to the extent of the mortgage on the premises, which plaintiff had paid prior to failure of title, such right was not enforceable in an action for breach of warranty, subrogation being the substitution of one person in the place of another, so that where a purchaser's title to land fails he will be subrogated to the rights of holders of liens or incumbrances which he has paid, or which has been paid out of the purchase price. *Tilghman Lumber Co. v. Matheson*, 70 S. E. 1033, 1035, 88 S. C. 432.

Where the purchaser at foreclosure sale redeems from tax sales made before foreclosure, he is entitled to be "subrogated" to the rights of the state as against a judgment creditor of the mortgagor redeeming from foreclosure. *Northern Inv. Co. v. Frey Real Estate & Inv. Co.*, 81 Pac. 300, 33 Colo. 480, 108 Am. St. Rep. 104.

## SUBSCRIBE—SUBSCRIPTION

Date of subscription, see *Date*.

For book as written instrument, see *Written Instrument*.

### Attest distinguished

To "subscribe" within Code Pub. Gen. Laws 1904, art. 93, § 317, providing that wills shall be in writing signed by testator and attested and subscribed in his presence by two or more credible witnesses, means that the witnesses shall sign their names to the same paper for the purpose of identification, and implies that attestation has been performed. *Brengle v. Tucker*, 80 Atl. 224, 226, 114 Md. 597.

The word "subscribed," as used in statutes relating to the execution of wills in conjunction with the word "attested," does not add to the meaning of the latter word as a matter of law or fact, as the word "attested," being derived from the Latin words "ad" and "testari," meaning to witness or bear witness, implies the act of subscribing as well as observing. *International Trust Co. v. Anthony*, 101 Pac. 781, 785, 45 Colo. 474, 22 L. R. A. (N. S.) 1002, 16 Ann. Cas. 1087.

### As execute

To "subscribe" means to write one's name beneath or at the end of an instrument. The statute as to conveyance of lands (Real Property Law [Laws 1896, p. 593, c. 547, §§ 208, 241]) provides that "a grant in fee, or of a freehold estate, must be subscribed by the person from whom the estate or interest is intended to pass, or by his lawful agent," "and when duly acknowledged or proved," as therein found, the deed may be recorded. Since the word "executed," in Liquor Tax Law (Laws 1896, p. 60, c. 112, § 17, subd. 6), as amended by Laws 1897, p. 220, c. 312, providing that the consent of property owners on an application for a liquor tax certificate shall be in writing, "executed," and acknowledged as deeds entitled to be recorded, is synonymous with the word "subscribed," names attached to a consent, but which precede the consenting clause therein, are insufficient. In *re Griffin*, 106 N. Y. Supp. 24, 26, 56 Misc. Rep. 21 (citing 7 Words and Phrases, p. 6729).

### Mark

A note executed by an illiterate promisor by his mark is sufficient, and need not be attested. Civ. Code 1896, § 1, defining "signature" or "subscription" as including mark when one cannot write, his name being written near it and witnessed by one who writes his own name as a witness, is inapplicable to the execution of notes; and a note is validly executed by one who cannot write his name by his affixing thereunto an X-mark between an initial of his own name and his surname, written by the payee, the name of a witness, who also could not write his name,



being written by the payee. *McGowan v. Collins*, 46 South. 228, 229, 154 Ala. 299.

Under sections 2965 and 6492 of Comp. Laws 1909, in order for one, who cannot write, to execute a written instrument by mark, the person who writes the name of the maker must also write his own name on the instrument as a witness to the signature, except in the case of a paper executed before a judicial officer; and when the name of the maker is written by one person, and a wholly different person writes his name as a witness, this does not constitute a "signature." *Sims v. Hedges*, 123 Pac. 155, 156, 32 Okl. 683.

#### Place of signing

"Subscribe" means the signing or writing of one's name beneath or at the end of the instrument; the word being derived from the Latin word "subscribo." Attorney General ex rel. *Cannon v. Clarke*, 59 Atl. 395, 396, 26 R. I. 470 (quoting *James v. Patten*, 6 N. Y. [2 Seld.] 12, 55 Am. Dec. 376).

The word "subscribe" means "to set under or to write under, as opposed to a signature at some other place. It refers rather to the place of signature than to the manner thereof; that is to say, the signature must be at the end of the instrument rather than at some other place." *Loughren v. B. F. Bonniwell & Co.*, 101 N. W. 287, 125 Iowa, 518, 106 Am. St. Rep. 319.

The word "subscribe," as used in a statute requiring testamentary witnesses, as well as the testator, to "subscribe" the will with their names, means that they should write their names at the close of the will. In re *Seaman's Estate*, 80 Pac. 700, 703, 146 Cal. 455, 106 Am. St. Rep. 53, 2 Ann. Cas. 726 (citing *Soward v. Soward*, 62 Ky. [1 Duv.] 126).

The word "subscribed," as used in section 74, c. 73, Comp. St. 1903 (*Cobbey's Ann. St. 1903*, § 10258), relating to contracts between real estate brokers and landowners, is synonymous with the word "signed," and does not require the signature to be at the foot of the instrument. *Myers v. Moore*, 110 N. W. 989, 990, 78 Neb. 448 (citing In re *Walker's Estate*, 42 Pac. 815, 110 Cal. 387, 30 L. R. A. 460, 52 Am. St. Rep. 104; *California Canneries Co. v. Scatena*, 49 Pac. 462, 117 Cal. 447).

Real Property Law (Laws 1896, c. 547, § 208), requiring that a conveyance of land shall be "subscribed," means signed at the end, instead of the writing of the name in any part of the conveyance. *Leask v. Horton*, 79 N. Y. Supp. 148, 39 Misc. Rep. 144.

The buyer's name need not be "subscribed" to the auctioneer's memorandum of sale in order to satisfy the statute of frauds; it being sufficient if it appears in the body of the memorandum, and the memorandum shows an intention to bind the buyer. *Love*

*v. Harris*, 72 S. E. 150, 152, 156 N. C. 88, 36 L. R. A. (N. S.) 927, Ann. Cas. 1912D, 1065.

#### Printed or stamped signature

A summons containing the printed names of the attorneys satisfies a statute requiring the summons to be "subscribed" by the plaintiff or his attorneys. *Warner v. Miner*, 82 Pac. 1033, 1034, 41 Wash. 98 (citing and adopting *Mezchan v. More*, 11 N. W. 534, 54 Wis. 214; *Herrick v. Morrill*, 33 N. W. 849, 37 Minn. 250, 5 Am. St. Rep. 841; 7 Words and Phrases, p. 6729).

#### Signature synonymous

See Sign—Signature.

#### Signature by another

The word "subscribe" in Gen. Laws 1896, c. 11, § 13, providing that each voter may subscribe to one nomination for each office, requires a writing of the voter's name by the voter himself, and not by another by his authority. Attorney General ex rel. *Cannon v. Clarke*, 59 Atl. 395, 396, 26 R. I. 470.

#### Typewriting

A contract for the sale of real property may be "subscribed" as required by Real Property Law (Consol. Laws 1909, c. 50) § 259, in typewriting as well as with pen and ink. *Landecker v. Co-Operative Bldg. Bank*, 130 N. Y. Supp. 780, 781, 71 Misc. Rep. 517.

A signature in typewriting is sufficient to meet the requirements of St. 1898, § 2308, which provides that a note or memorandum evidencing an agreement for the sale of goods, chattels, etc., for the price of \$50 or more, must be in writing and "subscribed" by the parties to be charged. *Garton Toy Co. v. Buswell Lumber & Mfg. Co.*, 136 N. W. 147, 150, 150 Wis. 341.

#### Writing implied

As used in a note promising to pay the financial agent of a college \$200 and interest when \$50,000 was subscribed, the word "subscribe" should be taken in its ordinary sense to mean the signing of one's own name beneath or at the end of an instrument, to agree in writing to furnish a sum of money or its equivalent for a designated purpose, the act of a person in signing in writing an agreement to furnish a sum of money for a particular purpose, and does not include an oral agreement by an organization pledging the members to pay \$1,000, to the use of the college pursuant to a resolution unanimously passed at a meeting of the organization; it not appearing that either the pledge or the resolution was in writing. *Wasson v. Clarendon College & University Training School (Tex.)* 131 S. W. 852.

A subscription agreement, reciting that the subscribers agreed to give notes for the amount set opposite their names for a specified purpose, and that the agreement should be void unless a specified sum was subscribed, executed as a preliminary step to the organi-

zation of a corporation which was subsequently formed, did not require that subscriptions aggregating the specified amount should be in writing, though "subscribe" or "subscription" involves the idea of a written signature, since by common usage the words are often employed to include an agreement, written or oral, to pay some amount to a designated purpose. *Rutenbeck v. Hohn*, 121 N. W. 698, 700, 143 Iowa, 13, 136 Am. St. Rep. 731.

The word "subscribe" means "to sign one's name to a letter or other document; to give consent to something written by signing one's name; to assent; to agree; to set one's name to a paper in token of a promise to give a certain sum; to enter one's name for a newspaper, book," etc. Where a subscription paper is headed with merely the title, character, authorship, and price of a book, followed by the word "subscribers," a name written under "subscribers" clearly imports a promise to take a copy of the book and pay the price indicated, and constitutes a "writing obligatory" or "instrument in writing," within the meaning of *Burns' Ann. St.* 1901, § 2354, defining forgery. *State v. Hazzard*, 80 N. E. 149, 150, 168 Ind. 163 (quoting and adopting the definition in *Webst. Int. Dict.*).

The word "subscription," as used in Acts of 1869, authorizing aid to railroads by counties and townships and postponing the right of railroad companies, until after the appropriation has been levied and collected, and requiring that a "subscription" shall have been made, is used in the sense of a formal written promise. *State ex rel. Western Const. Co. v. Board of Com'rs of Clinton County*, 76 N. E. 986, 990, 166 Ind. 162.

#### **SUBSCRIBE—SUBSCRIPTION (To Stock)**

See, also, *Subscriber*.

Where corporate stock was given to bondholders of a corporation as a bonus to induce them to purchase the bonds, their acceptance of the stock as such bonus constituted a "subscription" sufficient to carry any liability that might attach thereto. *French v. Busch*, 189 Fed. 480, 485.

#### **As agreement to pay**

"A 'subscription' for stock implies a promise to pay for it, even though the subscription was before incorporation." *Nebraska Chicory Co. v. Lednicky*, 113 N. W. 245, 248, 79 Neb. 587 (citing 1 Cook, Corp. §§ 71, 75; 1 Mor. Corp. §§ 47, 54).

#### **As contract**

A "subscription" to a joint-stock company is not only an undertaking to the company, but with all other subscribers. Such contracts are tripartite, and, even if fraudulent as between two of the parties, they are enforceable for the benefit of the third.

*Marles Carved Moulding Co. v. Stulb*, 64 Atl. 431, 432, 215 Pa. 91 (quoting and adopting from *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. 489).

#### **Issue distinguished**

Const. art. 12, § 3, provides that each stockholder of a corporation shall be individually liable for such portion of the debts incurred while he was a stockholder as the amount of stock owned by him bears to the whole of the subscribed capital stock. Held, that a complaint to enforce stockholders' liability under such section, alleging that the whole capital of the corporation was divided into 60,000 shares, of which about 37,735 shares were "issued," was not equivalent to an allegation that only that number of shares were "subscribed," and that the complaint was therefore fatally defective for failure to allege the whole number of shares subscribed. *San Francisco Commercial Agency v. Miller*, 87 Pac. 630, 631, 4 Cal. App. 291 (citing *San Joaquin Land & Water Co. v. Beecher*, 35 Pac. 349, 101 Cal. 70; *California Southern Hotel Co. v. Callender*, 29 Pac. 859, 94 Cal. 120, 28 Am. St. Rep. 99; *Mitchell v. Beckman*, 28 Pac. 110, 64 Cal. 117; *Tulare Sav. Bank v. Talbot*, 63 Pac. 172, 131 Cal. 45).

#### **Ownership included**

St. 1906, p. 527, c. 463, part 2, § 57, providing that a railroad corporation, except as authorized by the general court or the act, shall not "directly or indirectly subscribe for, take, or hold the stock or bonds of or guarantee the bonds or dividends of any other corporation," prevents a railroad corporation from obtaining without legislative permission any kind of proprietary interest in the stock or bonds of other corporations; the words "subscribe for, take, or hold" intending to include legal ownership of every kind, and the word "indirectly" covering other modes of holding than by taking or holding the legal title, and the words together covering every kind of proprietary interest in the stock or bonds referred to. *Attorney General v. New York, N. H. & H. R. Co.*, 84 N. E. 737, 742, 198 Mass. 413.

#### **SUBSCRIBED AND SWORN TO**

The words "subscribed and sworn to \* \* \* before me," in a jurat annexed to an affidavit purporting to verify a petition to prove exceptions taken on a trial, import that the petitioner signed the petition and made oath that the statements therein contained were true, and show a verification of the petition. *Lord v. Rowse*, 80 N. E. 822, 823, 195 Mass. 216.

The words "subscribed and sworn to before me," in the certificate of an officer before whom an affidavit is made, may be deemed equivalent to the words "sworn to or affirmed" before the officer and "signed in his presence," as used in *Wilson's Rev. & Ann.*

St. 1903, § 4317. *Pallady v. Beatty*, 83 Pac. 428, 429, 15 Okl. 626.

## SUBSCRIBER

### To corporate stock

As partners, see Partnership.

The term "stockholder" is not synonymous with that of "subscriber." It has a distinct, definite, technical meaning. The latter is employed to denote one who becomes bound by a subscription to the capital stock in the corporation. *Reid v. De Jarnette*, 51 S. E. 770, 771, 123 Ga. 787, 3 Ann. Cas. 1117.

"Subscribers" to a corporation are those who on the formation of a corporation agree mutually to take and pay for the shares of capital stock, and, in the absence of any special provision, they agree with each other to pay therefor the par value of the stock. *McDowell v. Lindsay*, 63 Atl. 130, 131, 213 Pa. 591.

Though persons securing shares of stock in a corporation at a price less than par expressly contract that their liability shall be limited to the price paid, and do not formally subscribe to the stock, a subscription is presumed from any agreement or act by which the stock is acquired from the corporation, and such persons are "subscribers" within Const. art. 11, § 3, providing that stockholders of all corporations shall be liable for an indebtedness of said corporation to the amount of their stock subscribed and unpaid. *McAllister v. American Hospital Ass'n*, 125 Pac. 286, 288, 62 Or. 530.

### To a book

The term "subscriber" means "one who subscribes; one who contributes to an undertaking by subscribing; one who enters his name for a paper, book, map, or the like." Where a subscription paper is headed with merely the title, character, authorship, and price of a book, followed by the word "subscribers," a name written under "subscribers" clearly imports a promise to take a copy of the book and pay the price indicated, and constitutes a "writing obligatory" or "instrument in writing," within the meaning of *Burns' Ann. St. 1901*, § 2354, defining "forgery." *State v. Hazzard*, 80 N. E. 149, 150, 168 Ind. 163 (quoting and adopting the definition in *Webst. Int. Dict.*).

## SUBSCRIBING WITNESS

See, also, Attesting Witness.

An attesting witness under Act April 26, 1855 (P. L. 328) means a "subscribing witness." *Historical Soc. of Dauphin County v. Kelker*, 74 Atl. 619, 620, 226 Pa. 16, 134 Am. St. Rep. 1010.

*Cobbey's Ann. St. 1903*, § 4995, provides that all devises, legacies, and gifts made or given in any will shall be void unless there be two subscribing witnesses. While it is true that the words "subscribing witnesses,"

used in this section, technically construed, would only apply to a witness to a written will, and not to the attesting witness of an oral testament, yet, if this narrow construction be given the section above quoted, it destroys the effect of the use of the words "all beneficial devises, legacies, and gifts whatsoever made or given in any will," for there can only be technically a subscribing witness to a written will; but, if a construction be given this section in conformity with the manifest intention of the lawmakers, we will treat "subscribing witness" as having been used as synonymous with "attesting witness," or a witness by whose testimony a will must be established. *Godfrey v. Smith*, 103 N. W. 450, 454, 73 Neb. 756, 10 Ann. Cas. 1128.

## SUBSEQUENT

See Condition Subsequent.

As since, see Since.

Next synonymous, see Next Term.

## SUBSEQUENT ASSESSMENT

In Pol. Code, § 3815, providing that no redemption of property sold to the state for delinquent taxes shall be permitted without payment of all subsequent assessments, costs, fees, penalties, and interest, "subsequent assessments" mean all taxes levied against the property subsequent to the tax for which the sale was made. *Boyer v. Gelhaus*, 125 Pac. 916, 918, 19 Cal. App. 320.

## SUBSEQUENT CENSUS

The phrase "a subsequent state or United States census," as used in *Laws 1900*, c. 367, § 1, subd. 7 (re-enacted in *Liquor Tax Law [Consol. Laws, c. 34]* § 8, subd. 8), means a state or United States census subsequent to 1899, so that the automatic readjustment of rates began with the United States census of 1900, the intent being that the basis of the computation should rest for alternative five-year periods on a preceding state or United States census, state census being taken in 1895 and decennially thereafter, and the rate payable for liquor tax in Brooklyn in advance on September 15, 1910, was determinable on the basis of population shown by the United States census of 1910. In *re Ahlers*, 127 N. Y. Supp. 61, 65, 141 App. Div. 891; *People ex rel. Brady v. Clement*, 127 N. Y. Supp. 68, 142 App. Div. 908.

## SUBSEQUENT CONDITION

See Sale upon Subsequent Condition.

## SUBSEQUENT CREDITOR

As used in *Civ. Code S. C. 1902*, § 2456, providing that mortgages shall be valid, so as to affect subsequent lien or simple contract creditors, only when recorded within 40 days, but that the subsequent recording shall be notice to all creditors who become such after the date of the recording, the words "subsequent creditors" mean only those who became

such after the execution of the mortgage, not including the mortgagee, so that, where a mortgage on the bankrupt's stock was not recorded within 40 days, and before recording other claims arose, exceeding the amount of a fund realized from the sale of the property, the mortgagee was not only not entitled to a lien, but was not entitled to share with such "creditors." *Simmons v. Greer*, 174 Fed. 54, 656, 98 C. O. A. 408.

### SUBSEQUENT INDORSER

As used in Negotiable Instruments Law Laws 1897, c. 612, § 205, providing that a material alteration voids a negotiable instrument, except as against the party who has assented thereto and subsequent indorsers, the words "subsequent indorsers" mean those who indorse subsequent to such alteration. *First Nat. Bank of City of Brooklyn v. Gridley*, 98 N. Y. Supp. 445, 448, 112 App. Div. 1.

### SUBSEQUENT MEETING

Any subsequent meeting, see Any.

### SUBSEQUENT PLEADING

"Subsequent pleadings," as used in the rules are pleadings subsequent in logical sequence or order of pleading and not subsequent in time. *Rice v. Van Why*, 111 Pac. 601, 49 Colo. 7.

### SUBSEQUENT PROCEEDING

#### Entry of Judgment

The entry of judgment is one of the "subsequent proceedings," within Rev. Codes, § 1, providing that after appearance a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given. *State ex rel. v. District Court of Second Judicial District*, 99 Pac. 139, 140, 38 Mont. 119.

### SUBSEQUENT PURCHASER

A statute, providing that so long as a claim remains unrecorded it shall not affect subsequent purchasers for value and credit, applies to all creditors and not to "subsequent" creditors only. *Price v. Wall's*, 33 S. E. 599, 600, 97 Va. 334, 75 Am. p. 788 (citing and adopting *Eldson v. Eldson*, 29 Grat. 338; *March v. Chambers*, 71 Grat. 299; *Dobyn's Adm'x v. Warlick*, Va. 159).

#### Purchaser from grantor

The "subsequent purchasers" of whom § 3159, Rev. Codes, speaks, are those who acquire title under the same grantor, and it is only the record is constructive notice. *Larris v. Reed*, 121 Pac. 780, 782, 21 Colo. 164.

#### Purchaser subsequent to recording

The word "subsequent," as used in Mills Act, p. 593, § 446, providing that deeds and instruments in writing affecting any interest in a real estate shall take effect as to

"subsequent bona fide purchasers" after filing the record, has reference to the recording, and not to the date, of the instrument. Hence where a person, having a mining claim, contracted in writing to convey it to another claiming the same ground, and subsequently the person making the conveyance conveyed his claim to a purchaser, who had no notice of the contract between conflicting claimants, the contract was entitled to priority over the conveyance, where it was recorded without knowledge of the conveyance before the conveyance was recorded. *Houlahan v. Finance Consol. Min. Co.*, 82 Pac. 484, 485, 34 Colo. 365 (citing *Doyle v. Teas*, 5 Ill. [4 Scam.] 202, 252; *Reed v. Kemp*, 16 Ill. 445; *Brookfield v. Goodrich*, 32 Ill. 363; *Delano v. Bennett*, 90 Ill. 533).

### SUBSEQUENT REGISTRATION

Const. art. 2, § 4, subd. "c," provides for the registration of voters having certain qualifications up to January 1, 1898. It requires copies of the registration list to be kept by the clerk of court of the county and Secretary of State, and declares that the certificate of either of such officers shall be sufficient evidence of the citizen's right to subsequent registration, and the franchise under the limitations imposed. Held, that "subsequent registration," as so used, included any registration after the first prior to January 1, 1898, and hence a clerk's certificate of registration under such section was not a substitute for a registration certificate required by Civ. Code 1902, § 185, to entitle the voter to vote at a subsequent election, but was only evidence of his right to register and obtain the necessary certificate. *State ex rel. Birchmore v. State Board of Canvassers*, 59 S. E. 145, 146, 78 S. C. 461, 14 L. R. A. (N. S.) 850, 13 Ann. Cas. 1133.

### SUBSEQUENT TERM

The word "subsequent," in the act requiring commissioners appointed by the orphans' court to set off dower to make their report at the next or subsequent term after their appointment, has the same meaning as "next," and, if either word had been used alone, it would have expressed the same idea. *Osborn v. Rogers*, 19 N. J. Eq. 429, 431.

## SUBSTANCE

See Infectious Substance; Noxious Portion or Substance.

Disallowed in substance, see Disallow—Disallowance.

Other mineral substance, see Other.

"Substance," as employed in the constitutional requirement that notice of intention to introduce a local act shall state the "substance" of the proposed law, cannot be said to be synonymous with "subject" or a mere purpose, but means the essential or material part, essence, abstract, compendium, meaning. *Law v. State*, 38 South. 798, 799, 142 Ala. 62

(quoting and adopting definition in *Wallace v. Board of Revenue of Jefferson County*, 37 South. 321, 140 Ala. 491); *Ex parte Black*, 40 South. 133, 134, 144 Ala. 1; *State ex rel. Hanna v. Tunstall*, 40 South. 135, 137, 145 Ala. 477; *State ex rel. Van Deusen v. Williams*, 39 South. 276, 277, 143 Ala. 501; *Wallace v. Board of Revenue of Jefferson County*, 37 South. 321, 322, 140 Ala. 491.

#### **Form distinguished**

See Form.

### **SUBSTANTIAL**

"Substantial" means "belonging to substance; actually existing; real; \* \* \* not seeming or imaginary; not illusive; real; solid; true; veritable." *Elder v. State*, 50 South. 370, 374, 162 Ala. 41 (citing *Webst. Int. Dict.*).

### **SUBSTANTIAL CAUSE OF ACTION**

A complaint on a note, not due when suit is brought does not state a "substantial cause of action," within Code 1907, § 4143, prohibiting vacation of the judgment for matter not previously objected to, if the complaint states a substantial cause of action. *Ritter v. Hoy*, 55 South. 1034, 1 Ala. App. 643.

### **SUBSTANTIAL CHANGE**

#### **Amendment**

A "substantial change" in a pleading within B. & C. Comp. § 2247, permitting the circuit court, in furtherance of justice and upon terms, to allow the pleadings to be amended so as not to substantially change the issue tried in the justice's court, or introduce any new cause of action, is such a change as necessitates different proof to prove the amended averments than that necessary to prove the original; an amendment which merely rearranges or more fully sets out the facts originally alleged being proper. *Morrison v. Gardner*, 111 Pac. 243, 246, 57 Or. 438.

In an action for slander, it is not error to permit filing of amendment charging the utterance of other slanderous words from those alleged, where the new cause of action is of the same general character as that contained in the original petition, and where defendant has ample time to meet such amendment; it not "substantially changing" the cause of action within Comp. Laws 1909, § 5679. *Trower v. Roberts*, 120 Pac. 617, 619, 30 Okl. 215.

### **SUBSTANTIAL COMPLIANCE**

A "substantial compliance," which means a compliance with the essential requirements, is a sufficient compliance with a penal municipal ordinance, requiring street railways to maintain fenders upon the front ends of cars. *Fitzgibbons v. Galveston Electric Co.*, 136 S. W. 1186, 1187.

"Substantial compliance," with reference to contracts, means that, although the con-

ditions of the contract have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from a literal performance, he has received substantially the benefit he expected, and is therefore bound to pay. *St. Louis, Memphis & S. E. R. Co. v. Houck*, 97 S. W. 963, 966, 120 Mo. App. 634.

### **SUBSTANTIAL CONTRIBUTION**

An instruction that, where the negligence of an employé actually contributes to the results, his negligence would not be compared, provided it was a "substantial contribution" to the accident, was not objectionable on the theory that any negligence on decedent's part was sufficient to defeat the action, since negligence, unless "substantial," could not be said to contribute directly and proximately to the injury. *Toledo, St. L. & W. R. Co. v. Kountz*, 168 Fed. 832, 840, 94 C. C. A. 244.

### **SUBSTANTIAL CONTROVERSY**

Where a temporary injunction restraining the performance of a contract is granted on the giving of a bond and dissolved on final hearing, the fact that the contract has expired by its own terms prior to the taking of an appeal is not ground for dismissal, since the liability on the injunction bond presents a "substantial controversy" beyond the costs, which can only be reviewed by hearing the appeal. *Click v. Sample*, 83 S. W. 932, 73 Ark. 194.

### **SUBSTANTIAL DISPUTE**

See Real and Substantial Dispute.

Where in supplementary proceedings K. appeared, at the hearing of a motion to punish the judgment debtor for contempt in refusing to turn over certain property to a receiver, by the same attorney that appeared for the judgment debtor, without filing a written claim, or supporting it by documentary evidence or otherwise, there was no "substantial dispute" as to right of possession, within Code Civ. Proc. § 2447, providing that, where the judgment debtor has in his possession personal property belonging to him, and his right to possession thereof is not substantially disputed, the judge may require the debtor to turn over such property. *Charles D. Durkee & Co. v. Bonnell*, 125 N. Y. Supp. 790, 791.

### **SUBSTANTIAL ENCRoACHMENT**

Under the rule that a vendee is justified in refusing to accept title to the property, if there are "substantial encroachments" thereon, encroachments on the street of 16 and 17 inches by the show windows of two buildings erected on the property contracted to be sold are not "substantial encroachments." *Klim v. Sachs*, 92 N. Y. Supp. 107, 108, 102 App. Div. 44.

**SUBSTANTIAL ERROR**

The determination of the board of assessors that an entire sewer system should be taken as a whole, and that the lateral connecting sewers or enlarged or changed sewers along any line should be included in the entire cost, and paid for by the territory deemed benefited, being a matter committed to their exclusive judgment, even if the court should consider another method more equitable, would not amount to a "substantial error" in the proceedings giving a right to a reduction of the assessment under Greater New York City Charter, Laws 1901, c. 466, § 959, giving such right where the cost of a local improvement has been unlawfully increased by a "substantial error." In re Shafter, 122 N. Y. Supp. 769, 772, 138 App. Div. 35.

**SUBSTANTIAL EVIDENCE**

By "substantial evidence" is not meant that which goes beyond a mere "scintilla" of evidence, since evidence may go beyond a mere scintilla and yet not be substantial evidence. Substantial evidence must possess something of substance and relevant consequence and not consist of vague, uncertain, or irrelevant matter, not carrying the quality of proof or having fitness to induce conviction. Substantial evidence is such that reasonable men may fairly differ as to whether it establishes plaintiff's case, and, if all reasonable men must conclude that it does not establish such case, then it is not substantial evidence. *Jenkins & Reynolds Co. v. Alpena Portland Cement Co.*, 147 Fed. 641, 643, 77 C. C. A. 625 (citing *Minahan v. Grand Trunk Western Ry. Co.*, 138 Fed. 37, 70 C. C. A. 463; *Grand Trunk R. Co. v. Ives*, 12 Sup. Ct. 679, 144 U. S. 408, 36 L. Ed. 485).

**SUBSTANTIAL INCLOSURE**

Where plaintiff, claiming title to a lot, incloses it on three sides with a fence, so that it makes a complete inclosure in connection with an adjoining lot, the owner of which makes no claim to the first lot, but has given his individual covenant of quiet enjoyment in an executor's deed thereof, there is a "substantial inclosure" of the lot, within Code Civ. Proc. §§ 370, 372, providing that such an inclosure constitutes adverse possession. *Brown v. Doherty*, 87 N. Y. Supp. 563, 566, 93 App. Div. 190.

Defendant purchased an acre tract of salt meadow in January, 1887, but by his deed acquired only an undivided one-fifth of the land, which for at least 30 years had been surrounded by a ditch or ditches, and in part by a branch of a creek. On February 15, 1907, he conveyed the land to plaintiff. Held, that the ditch or ditches, and creek, constituted a "substantial inclosure," so as to give defendant title by adverse possession. *Koch v. Ellwood*, 123 N. Y. Supp. 502, 503, 138 App. Div. 584.

Where lands are wild and uncultivated, and they are used for pasturage or for obtaining timber or fuel therefrom, or some such similar use, a "substantial inclosure" might consist in a wire fence sufficient to indicate a purpose to claim the ownership and use of the land to the exclusion of all others and to protect the land from trespassing vehicles, riders, or stock. And, although there may be occasional breaks for roads and standing water in a fence inclosing land, yet the fence may be a "substantial inclosure" when it is manifest that there was for the full statutory period a conspicuous effort to maintain a fence around the land commensurate with the attending circumstances for the obvious purpose of exercising rights of ownership of the land and to use the land in a way to which it was suited. *Baughner v. Boley*, 58 South. 980, 984, 63 Fla. 75, 87.

**SUBSTANTIAL INJURY**

See Error Not Causing Substantial Injury.

**SUBSTANTIAL PARTY**

"Substantial parties" are parties who have an interest in the result and ought to be joined if they were within the jurisdiction but whose interests are separable from those of the other defendants. Their absence does not prevent equity from being done to the other defendants. *Perkins v. Hendryx*, 149 Fed. 526, 528.

**SUBSTANTIAL PERFORMANCE**

See, also, Substantial Compliance.

"Substantial performance" of a contract is performance, except as to unsubstantial omissions, with compensation therefor, and, when the omissions are slight and unintentional, compensation is substituted pro tanto for performance to prevent the hardship of a failure to recover for that which was well done, and, while the rule may be applicable to a contract to print and furnish illustrated advertising catalogues ordered from a sample, it cannot be invoked by a seller who, under such a contract and after notice of a defect in the work, furnished catalogues, in which a gloss or coloring process, to be given to the illustrations, did not exactly cover or register with the first impressions, so that the illustrations were blurred to such an extent as to make all the catalogues worthless. *Dickinson v. Sheldon*, 130 N. Y. Supp. 889, 892, 146 App. Div. 144.

"Substantial performance" of a construction contract permits only such omissions or deviations from the contract as are inadvertent or unintentional, and are not due to bad faith, and do not impair the structure as a whole, but are remediable without doing damage to other parts of the structure and may without injustice be compensated for by deductions from the contract price. *Littell v. Webster County*, 131 N. W. 691, 694, 152 Iowa, 206.

"Substantial performance" of a building contract is actual performance, and in such case deductions may be made from the contract price for small omissions or defects in the work occurring in good faith. *Smith v. Russell*, 125 N. Y. Supp. 952, 954, 140 App. Div. 102.

"Substantial" as well as "complete performance" means performance according to the terms of the agreement, not the doing of some act which is as advantageous financially to the promisee as the agreed act would have been. *Clough v. A. J. Stillwell Meat Co.*, 86 S. W. 580, 582, 112 Mo. App. 177.

The phrase "substantial performance" is used in two senses. Sometimes it means full performance according to the fair intent of the contract, and permits recovery on the contract without recoupment; sometimes it means something distinctly short of full performance. *Viles v. Barre & M. Traction & Power Co.*, 65 Atl. 104, 105, 79 Vt. 311.

"Substantial performance" of a building contract permits any omission or deviation which is inadvertent, not due to bad faith, not impairing the structure as a whole, remediable without material damage to other parts of the building, and subject to compensation without injustice by deductions from the price. *Mitchell v. Caplinger*, 133 S. W. 1032, 1033, 97 Ark. 278.

"Substantial performance" means full performance in all the essential elements necessary to the accomplishment of the entire purpose of the contract. *Manning v. School Dist. No. 6 of Ft. Atkinson*, 102 N. W. 356-364, 124 Wis. 84.

"Substantial performance" with reference to contracts is performance except as to unsubstantial omissions; that is, "unsubstantial defects may be cured, and at the expense of the contractor, not of the owner." One who fails in full performance, and who invokes the doctrine of "substantial performance," must furnish the evidence to measure the compensation for the defects which is the substitute for his failure to do as he agreed. *Nesbit v. Braker*, 93 N. Y. Supp. 856, 857, 104 App. Div. 393.

"Substantial performance" by one employed to supervise the erection of a building on plans prepared by him, essential to recover the contract price under an allegation of entire performance, means performance, and the deviations permitted must be unimportant and inadvertent, and a finding of substantial damages of nearly 25 per cent. of the contract price for his failure to perform, resulting from his permitting the installation of a plumbing system deviating in essential particulars from the plans, precludes a recovery. *Gompert v. Healy*, 133 N. Y. Supp. 689, 690, 149 App. Div. 193.

"Substantial performance" means strict performance in all essentials necessary to

the full accomplishment of the purposes for which the thing contracted for was designed. Failure as to any of such features, whether in good or bad faith, any departure from the contract, not caused by inadvertence or unavoidable omission, any defect so essential as that the object which the parties intended to accomplish to have a specified amount of work performed in a particular manner is not accomplished, is inconsistent with substantial performance, within the rule permitting a recovery by the builder notwithstanding incompleteness. To constitute "substantial performance" of a building contract, or one to supervise the construction of a building according to specific plans, the building as completed must be the result of good-faith efforts to strictly perform, and must satisfy all essentials to the accomplishment of the owner's purpose. *Foeller v. Heintz*, 118 N. W. 543, 545, 137 Wis. 169, 24 L. R. A. (N. S.) 327 (quoting *Manitowoc Steam Boiler Works v. Manitowoc Glue Co.*, 97 N. W. 515, 517, 120 Wis. 1).

A "substantial performance" of a building contract admits of only such deviations as are inadvertent and unintentional, and not due to bad faith, and such as do not impair the structure as a whole, and can be conveniently remedied, and without injustice be paid for by deductions from the contract price. *Pippy v. Winslow*, 125 Pac. 298, 299, 62 Or. 219.

#### SUBSTANTIAL REPAIR

The repair of a wooden viaduct, under which railroad tracks ran and over which the street was carried, by changing 40 per cent. of the materials, was a "substantial repair," within the meaning of the ordinance. *City of Shreveport v. Kansas City Southern Ry. Co.*, 63 South. 923, 127 La. 677.

#### SUBSTANTIAL RIGHT

An order of the superior court made in a special proceeding pending an appeal from a justice, vacating the justice's judgment, is final in a proceeding, and, because preventing docketing of the judgment pending the appeal, affects a "substantial right," within Rev. St. 1898, § 3069, making such order appealable. *Deuster v. Zillmer*, 97 N. W. 31, 34, 119 Wis. 402.

A judgment vacating a town plat is appealable as a final order affecting a "substantial right," within Gen. St. 1894, § 6140, subd. 6, providing for an appeal from a final order affecting a substantial right. *Koochiching Co. v. Franson*, 98 N. W. 98, 99, 91 Minn. 404.

The right of a prisoner to earn a diminution of his term by his own act is a "substantial one," of which, by law passed subsequent to the commission of the offense, he cannot be deprived. *People ex rel. Adams v. Johnson*, 90 N. Y. Supp. 134, 136, 44 Misc. Rep. 550.

The error in an instruction as to the burden of proof on a material issue affects the "substantial rights" of the defeated party within Laws 1909, c. 192, § 3072m, requiring the court to disregard errors not affecting the substantial rights of a party. *Carle v. Nelson*, 130 N. W. 467, 470, 145 Wis. 593.

The term "substantial right," as used in Rev. St. 1892, § 6707, providing that an order affecting a substantial right in an action is a final order which may be vacated, modified, or reversed, involves the idea of a legal right, and that such one is enforced and protected by law, and such a right is involved in an order of the court of common pleas removing a guardian. *North v. Smith*, 76 N. E. 619, 73 Ohio St. 247 (citing *Armstrong v. Herancourt Brewing Co.*, 42 N. E. 425, 53 Ohio St. 467).

An order denying a motion to remove the trial of an indictment from the County Court to the Supreme Court on the ground that the judge of the County Court has been counsel in the cause, within the prohibition of Code Civ. Proc. § 46, affects a "substantial right," and an appeal lies therefrom. *People v. Haas*, 93 N. Y. Supp. 790, 791, 105 App. Div. 119.

An order directing a judgment debtor to apply property to the satisfaction of the judgment made in proceedings in aid of execution is an "order affecting a 'substantial right' made in special proceeding after judgment," within Wilson's Rev. & Ann. St. 1903, § 4735, providing that such order is final and appealable. *Ryland v. Arkansas City Milling Co.*, 92 Pac. 160, 164, 19 Okl. 435.

An order of the surrogate, refusing to dismiss, upon issue joined, a special proceeding for the revocation of letters testamentary, is not an "order affecting a substantial right," within Code Civ. Proc. § 2570, authorizing appeals from orders of the surrogate or Surrogate's Court in a special proceeding affecting a substantial right. *Kelly v. Langevin*, 137 N. Y. Supp. 1099, 1100, 153 App. Div. 322.

## SUBSTANTIAL STATEMENT

### Of assessment

A tax deed based on an assessment to "Priscilla Durham," which recites that the land was assessed to "Petruella Durham," is not a "substantial" statement of the assessment within the requirements of B. & C. Comp. § 3127, defining the effect of tax deeds as evidence. *Bradford v. Durham*, 101 Pac. 897, 899, 54 Or. 1, 135 Am. St. Rep. 807.

## SUBSTANTIALLY

"Substantially" means in substance; in the main; essentially; by including the material or essential part. *Town of Checotah v. Town of Eufaula*, 119 Pac. 1014, 1019, 31 Okl. 85; *Vannest v. Murphy*, 112 N. W. 236, 238, 135 Iowa, 123. See, also, *Electric Can-*

*dy Mach. Co. v. Morris*, 156 Fed. 972, 974; *Eisfeld v. Kenworth*, 50 Iowa, 389, 390.

An oil and gas lease, describing the premises as all that certain tract of land situated in a certain district on the waters of a designated stream, bounded "substantially" as follows, etc., means bounded "about" or "in the main" as designated and not "wholly" or "completely" so. *South Penn. Oil Co. v. Knox*, 69 S. E. 1020, 1021, 68 W. Va. 362.

## SUBSTANTIALLY AS DESCRIBED

See *Operate Substantially as Described*.

The use of the phrase "substantially as described" in a clause of a patent cannot import into it an element not claimed nor referred to therein. *General Compressed Air & Vacuum Machinery Co. v. American Air Cleaning Co.*, 177 Fed. 272, 274.

The words "substantially as described," as applied to a description of a device by a patentee who describes his device in his specification, refer to the specification, and the specification must be read to ascertain the actual intention of the patentee to protect him in the use of the patent. *Dunlap v. Willbrandt Surgical Mfg. Co.*, 151 Fed. 223, 235, 80 C. C. A. 575 (citing *Seymour v. Osborne*, 78 U. S. [11 Wall.] 516, 20 L. Ed. 33).

An element of a combination, although not definitely described in the claims for a patent except by reference to the specification by the words "substantially as described" at the end of each claim, may be read into the claims, where it is fully described in the specifications, and is essential to the operation of the machine. *Sanders v. Hancock*, 128 Fed. 424, 436, 63 C. C. A. 166.

## SUBSTANTIALLY AS SET FORTH

The words "substantially as set forth" at the end of a claim in a process patent have the effect of importing into the claim the particulars of the specification relating to the process to illustrate its operation, but not the function or operation of the mechanism there described, nor can they extend the patent beyond the claim which bounds the patentee's rights. *United States Consol. Seeded Raisin Co. v. Selma Fruit Co.*, 195 Fed. 264, 269, 115 C. C. A. 234.

## SUBSTANTIALLY AS SPECIFIED

The rule that the specification of a patent, which forms a part of the same application as its claims, must be read and construed with the latter, not for the purpose of expanding, nor for the purpose of limiting or contracting, the claims, but for the purpose of ascertaining their true meaning and the intention of the parties when they were made and allowed, governs the construction when the words "substantially as specified" are found in the claim, for the claim is founded upon and is explained by the specification, whether these words appear in it or not.



The words "substantially as specified," in a claim, refer to the elements, construction, and operation set forth in the specification. *O. H. Jewell Filter Co. v. Jackson*, 140 Fed. 340, 344, 72 C. C. A. 304.

The words "substantially as specified," at the end of a claim for a combination, refer to the whole claim, and import nothing into it not already there, either to narrow it so as to escape anticipation, or to broaden it so as to establish infringement. *American Can Co. v. Ilckmott Asparagus Canning Co.*, 142 Fed. 141, 146, 73 C. C. A. 359.

#### **SUBSTANTIALLY SIMILAR**

In a statute making a common carrier, who charges any person a greater or less compensation for any service rendered in the transportation of passengers or property than he charges or receives from any other person for doing a like service in the transportation of a like kind of traffic, under "substantially similar circumstances and conditions," guilty of unjust discrimination, the expression quoted refers to those circumstances and conditions which affect transportation and not those which involve personal conditions or contractual relations between one particular shipper and the carrier, but are such things only as are circumstances of carriage generally. *Pennsylvania R. Co. v. International Coal Min. Co.*, 173 Fed. 1, 4, 97 C. C. A. 383.

#### **SUBSTANTIALLY THE SAME**

In slander, "although the words proved are equivalent to the words charged in the declaration, yet, not being the same in substance, an action cannot be maintained; and, although the same idea is conveyed in the words charged and those proved, yet if they are not 'substantially the same words,' though they contain the same charge but in different phraseology, the plaintiff is not entitled to recover." *Hauser v. Steigers*, 119 S. W. 52-54, 137 Mo. App. 560 (quoting and adopting definition in *Berry v. Dryden*, 7 Mo. 324).

Under Election Law (Laws 1896, c. 909, § 56), providing for party nominations, and the name of two or more different political parties shall not be "substantially the same," the name "Social Democratic Party" is not substantially the same as the name "Democratic Party." In re Social Democratic Party, 91 N. Y. Supp. 941, 944, 45 Misc. Rep. 194.

### **SUBSTANTIVE LAW**

"Substantive law" is that part of the law which creates, defines, and regulates rights as opposed to adjective or remedial law, which prescribes the method of enforcing rights or obtaining redress for their invasion. *Mix v. Board of Com'rs of Nez Perce County*, 112 Pac. 215, 220, 18 Idaho, 695, 32 L. R. A. (N. S.) 534.

### **SUBSTITUTE**

As interpleader, see Interpleader.

The word "substitute" means one who or that which stands in the place of another; that which stands in lieu of something else. *State v. Fargo Bottling Works Co.*, 124 N. W. 387, 391, 19 N. D. 396, 26 L. R. A. (N. S.) 872.

The use of the word "substituted" in an order of court, whereby the trustee in bankruptcy of a defendant, in an action in replevin for goods sold in consequence of defendant's fraud, is substituted as defendant, does not show an intention to wholly discharge defendant from further connection with the case, and plaintiff, having commenced the action against defendant, has the absolute right to such judgment as he may show himself entitled to. *Kuh, Nathan & Fisher Co. v. Glucklick*, 94 N. W. 1105, 1107, 120 Iowa, 504.

#### **SUBSTITUTE FOR COFFEE**

A liquid extract of the coffee bean held not to be dutiable under Tariff Act as "articles used as coffee, or as substitutes for coffee," but as an unenumerated manufactured article. *E. C. Hazard & Co. v. United States*, 164 Fed. 907, 908.

#### **SUBSTITUTE FOR MALT LIQUOR**

To sell, give away, barter, or otherwise furnish an "imitation" or "substitute" for malt liquor does not constitute an offense against the laws of Oklahoma, unless such imitation or substitute contains as much as one-half of 1 per centum of alcohol, measured by volume. *Ex parte Hunnicutt*, 123 Pac. 179, 185, 7 Okl. Cr. 213.

#### **SUBSTITUTED ADMINISTRATOR**

One who, under Laws 1901, p. 303, takes the place of the administrator de bonis non, except with additional powers, being entitled to demand and receive the whole of the personal estate of his decedent, except such portion as shall have been properly paid out and distributed; he being given express power to sue and recover all the assets from any persons, or from the heirs at law or personal representatives chargeable, or their equivalent in value. *Hoagland v. Cooper*, 58 Atl. 705, 707, 65 N. J. Eq. 407.

#### **SUBSTITUTED TRUSTEE**

On the death of a trustee, whereby the trust devolves on the court, it appoints, not a "substituted trustee," but some one as its representative to execute the trust under its direction. There is no authority in the statute for appointing a substituted trustee by that name. In re Gueental, 90 N. Y. Supp. 138, 139, 97 App. Div. 530.

#### **SUBSTITUTION**

A provision in a will by which a second legatee is to take at the death of the first

'is "substitution." Succession of May, 34 South. 52, 109 La. 994.

"The term 'substitution' is generally applied to a limitation intended to provide for the death of prior devisees or legatees before the period of distribution." *Dent v. Pickens*, 58 S. E. 1029, 1035, 61 W. Va. 488 (quoting and adopting the definition in *Schaeffer v. Schaeffer*, 46 S. E. 151, 54 W. Va. 681).

An essential requisite to a "substitution" is that the thing given be tied up in the hands of the first recipient during his natural life. A "fidel commissum" differs from the "substitution," in that the charge imposed on the first recipient is to be executed during his life. A better founded distinction, perhaps, lies in the fact that in case of a substitution the first recipient and ultimate beneficiary both take title to the thing given directly from the donor, while in the case of the fidel commissum the title vests in the ultimate beneficiary, for whom the first recipient holds and administers the gift as trustee. In *re Billis' Will*, 47 South. 884, 885, 122 La. 539, 129 Am. St. Rep. 355.

#### SUBSTITUTION OF TENANTS

A "substitution of tenants" does not necessarily take place merely because the landlord receives payment of rent from an under-tenant, to whom the original tenant has subleased the property; but it requires a contract, express or implied, to bring about such a substitution. *Schachter v. Tuggle Co.*, 70 S. E. 93, 8 Ga. App. 561.

#### SUBSTITUTIONAL — SUBSTITUTIONARY

A gift to two or more persons or their children is "substitutional," and the children take only their parents' share. *Van Houten v. Hall*, 64 Atl. 460, 461, 71 N. J. Eq. 626.

#### SUBSTRUCTURE

In railroad parlance, the "substructure" is the embankment, gates, fills, and other things necessary to make up the roadbed, while the "superstructure" consists of the cross-ties and rails, etc., necessary for the operation of trains over the road. *Louisville & N. R. Co. v. United States Iron Co.*, 101 S. W. 414, 418, 118 Tenn. 194.

#### SUBTENANT

A "subtenant" is one who leases all or a part of the rented premises from the original lessee for a term less than that held by the latter. *Hudgins v. Bowes* (Tex.) 110 S. W. 178, 179.

#### SUBTERRANEAN WATER

As mineral, see Mineral.

### SUBURBAN

#### SUBURBAN RAILROAD

"Suburb," as defined by the *Century Dictionary*, denotes: "A region or place adjacent to a city; an outlying district of a city; a town or village so near that it may be used for residence by those who do business in the city; in the plural, collectively, environs; surroundings; outskirts; hence any adjuncts of a place." The word "country" sometimes includes suburbs; the ordinary meaning of a "street and suburban railway" is a railway in the city and the suburbs thereof. A railroad would be denominated a street and suburban railroad and could be given the power to run in any part of the country, but, unless it appears that it was the intention to give this power, the ordinary meaning of a street and suburban railroad should be given it, which meaning would be that such railroad would be confined to the city or town and its suburbs. *Piedmont Cotton Mills v. Georgia Ry. & Electric Co.*, 62 S. E. 52, 61, 131 Ga. 129.

A district which lies adjacent to and outside of city limits is "suburban." Railroads which are to run from the limits of a city to outlying cities, towns, and villages are "suburban railroads." In *re Minneapolis & St. P. Suburban Ry. Co.*, 112 N. W. 13, 16, 101 Minn. 132.

A notice to the sheriff to call a jury for the appraisal of damages in proceedings to condemn a railroad right of way, which stated that the right of way was for a "suburban and interurban" line, did not prevent the operation of steam propelled cars or trains upon the right of way without a new condemnation; a "suburban road" not necessarily being one operated by power other than steam. *Lewis v. Omaha & C. B. S. Ry. Co.* (Iowa) 138 N. W. 1092, 1095.

#### SUBWAY

As city purpose, see City Purpose.

#### SUBWAY RAILROAD

As street railroad, see Street Railroad.

### SUCCEEDING

See Next Succeeding.

### SUCCESS

#### SUCCESSFUL

Where a contract provided that the defendant was to sell a pumping engine, and a pump jack, and to erect the "machine," and plaintiff was to pay when the machine was "in successful operation," defendant's contract was not complete until that result had been brought about, and that only is "successful" which terminates in the accomplishment of what is wished or intended; hence the engine was not being "successfully oper-

ated" where it caused the pump to make a certain number of strokes per minute, without regard to the effect thereof to damage connections with the well. *Moore v. Otto Gas Engine Works*, 121 N. Y. Supp. 631, 633, 136 App. Div. 713.

### SUCCESSFUL CLAIMANT

#### Owner

Kansas City Charter, art. 5, § 59, provides that, when a purchaser at a tax sale shall be defeated in a suit by or against him for the recovery of land, the "successful claimant" shall be adjudged to pay the person claiming under the tax deed the full amount of the purchase price, interest, and penalties. Held, that the successful claimant within such section was the owner of the property, and that he was a necessary party to the purchaser's suit to recover possession in order to entitle the purchaser to recover the purchase price from him. *Russell v. Woerner*, 110 S. W. 691, 692, 131 Mo. App. 253.

### SUCCESSFUL OR SATISFACTORY

See, also, Satisfactory.

A contract for plaintiff's services as foreman of a molding shop for three years, or as long as he performed his duties "in a successful or satisfactory manner," is performed on the part of the foreman when he does his work in a good, efficient, and workmanlike manner, and, if he does so, the employer has no right to discharge him. *Bridgeford & Co. v. Mengher*, 139 S. W. 750, 752, 144 Ky. 479.

### SUCCESSFUL PARTY

Shannon's Code, § 4938, provides that the "successful party" in all civil actions shall be entitled to full costs, and section 4962 provides that, in any case not embraced in the express provisions of law, the court may make disposition of the costs in its discretion, and section 4961 provides that the law of costs shall be construed remedially. Held that, where defendant in justice's court made no tender, and plaintiff recovered judgment, and on appeal by defendant to the circuit court plaintiff recovered judgment, but for a less amount, neither party was the "successful party," within section 4938, and costs were governed by section 4962. *Garrison v. Trotter*, 86 S. W. 1078, 1079, 114 Tenn. 526.

Shannon's Code, § 4938, awards to the "successful party" costs, unless otherwise provided by law, and section 4942 declares that on nonsuit, dismissal, abatement by death of plaintiff, or discontinuance the defendant is the successful party. Held that, to entitle defendant to recover costs, it must appear that he was the successful party. *Scatcherd v. Love*, 166 Fed. 53, 55, 91 C. C. A. 639.

Under a statute declaring that the "successful party" is entitled to costs, a de-

fendant who procures the removal of the case to another court, where it is dismissed on the ground that the court wherein it originated was not legally constituted, is entitled to costs. *Pritchard v. Fowler*, 40 South. 955, 956, 146 Ala. 187.

### SUCCESSFUL VACCINATION

Laws 1897, p. 392, § 92, as amended by Laws 1905, p. 263, c. 142, § 3, making it the duty of a board of school directors to require "successful vaccination" as a condition of school membership, is not too indefinite to be capable of enforcement; a common-sense construction being to treat as successfully vaccinated not only one in whom the customary reaction follows the operation, but one in whom no such reaction follows three several operations, thus evidencing that he cannot be vaccinated. *State ex rel. McFadden v. Thorrock*, 104 Pac. 214, 216, 55 Wash. 208.

### SUCCESSFULLY IMPEACHED

Strictly speaking, the words "successfully impeached," when used in relation to witnesses, means no more than the word "impeached." If a witness is impeached at all, he is "successfully impeached," while an attempt to impeach may, of course, be either successful or unsuccessful. *Chicago City R. Co. v. Ryan*, 80 N. E. 116, 117, 225 Ill. 287 (citing *Powell v. State*, 29 S. E. 309, 101 Ga. 9, 65 Am. St. Rep. 277; *Smith v. State*, 35 S. E. 59, 109 Ga. 479; *Commonwealth v. Welch*, 63 S. W. 984, 111 Ky. 530; *Beedle v. People*, 68 N. E. 434, 204 Ill. 197).

## SUCCESSION

See Continued Succession; Hereditary Succession; Net Succession; Perpetual Succession; Universal Succession.

"Succession" is the transmission of the rights and obligations of the deceased to his heirs, and it signifies also the estates, rights, and charges, which a person leaves after his death, whether the charges exceed the property, or there is nothing left but the charges, or the property exceeds the charges, and it includes, not only the rights and obligations of the deceased, as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also the new charges to which it becomes subject. Civ. Code, arts. 871, 872, 873. *Delaneuville v. Duhe*, 38 South. 20, 22, 114 La. 62.

Where the idea of planting a crop on a plantation under administration is conceived by the administrator long after the harvesting of the crop that was growing when decedent died, and the crop is planted and harvested still later without authority from the court, the creditors, or the minor heirs, neither the crop nor the obligations incurred in making it is part of the "succession" defined by Civ. Code, art. 872, to embrace the estates, rights, and charges which a person

leaves after his death, nor is the crop anything that accrues to the succession within Civ. Code, art. 873, providing that the succession embraces all that has "accrued" thereto since the opening thereof. *Maxwell-Yerger Co. v. Rogan*, 51 South. 48, 50, 125 La. 1.

The rule that the property of a succession pending administration is owned by the abstract being called "succession" means only that the property is so held for the purpose of administration, and not that the property is so held in hostility to or exclusion of the ownership and legal seisin of the legal heir or of the universal legatee. *Tulane University of Louisiana v. Board of Assessors*, 40 South. 445, 446, 115 La. 1025.

"A 'succession' is an ideal, a juridical person, independent from those having an interest therein." *Succession of Levy*, 39 South. 37, 39, 115 La. 377, 8 L. R. A. (N. S.) 1180, 5 Ann. Cas. 871.

"The term 'right of succession' does not mean a right to receive property pursuant to a contract made during life, which would be enforceable at law, and which would contain ample consideration for the promise to pay; but, on the other hand, it means a succession without consideration, either by will or intestacy, from a resident or from a non-resident, or such agreement or arrangement voluntary in its nature as may have been made during life in contemplation of death for the express purpose of evading the statute [Transfer Tax Law (Laws 1896, c. 908, § 221, as amended by Laws 1905, c. 368)], and deferring the enjoyment of the benefits transferred until the testator's death." In *re Stebbins' Estate*, 103 N. Y. Supp. 563, 566, 52 Misc. Rep. 438.

The word "succession," as used in the title to Laws 1907, c. 49, entitled "An act to provide for succession to the estates of decedents," etc., means the change in legal relations by which one person, called the "successor," comes into the enjoyment of or becomes responsible for one or more of the rights or liabilities of another person called the "predecessor." *Gaster v. Gaster's Estate*, 137 N. W. 900, 901, 92 Neb. 6.

Civil Code, § 1383, declares: "'Succession' is the coming in of another to take the property of one who dies without disposing of it by will. The state does not come in by way of succession on failure of heirs or next of kin to take an estate of a decedent, but in such event the property, whether real or personal, goes to the state by escheat. In *re Miners' Estate*, 76 Pac. 968, 970, 143 Cal. 194.

## SUCCESSION TAX

See, also, Inheritance Tax.

A "succession tax" is not a burden imposed on property, but is a privilege tax on the right of taking property from another,

whether by will or devolution as a matter of law. *Knox v. Emerson*, 131 S. W. 972, 973, 123 Tenn. 409.

A tax on an interest in land passing by will or law of descent is a "succession tax." In *re Macky's Estate*, 102 Pac. 1075, 1078, 46 Colo. 79, 23 L. R. A. (N. S.) 1207.

A "succession tax" or "inheritance tax," excise or duty, is a special, not a general, tax. *People v. Koenig*, 85 Pac. 1129, 1130, 37 Colo. 283, 11 Ann. Cas. 140.

The inheritance tax is variously termed "succession tax," "legacy tax," and "prolate duties"; but, whatever it may be termed, it is not a tax upon property, but upon the right of succession thereto. *State ex rel. Foot v. Bazille*, 106 N. W. 93, 96, 97 Minn. 11, 6 L. R. A. (N. S.) 732, 7 Ann. Cas. 1056.

The tax variously called an "inheritance tax," a "legacy tax," a "transfer tax," and a "succession tax" is a "burden imposed by government on all gifts, legacies, and successions, whether of real or personal property, or both, or any interest therein, passing to certain persons (other than those specially excepted) by will, by intestate law, or by deed or assignment made inter vivos, intended to take effect at or after the death of the grantor." Revenue Act 1903 (Laws 1903, p. 323, c. 247), imposing a "succession tax" on legacies, is not a tax on property but on the right of succession, and therefore is not void for nonuniformity. In *re Morris' Estate*, 50 S. E. 682, 683, 138 N. C. 259 (quoting and adopting definition in *Dos Passos* [2d Ed.] § 2).

"A collateral inheritance or 'succession tax' is a duty or bonus exacted in certain instances by the state upon the right and privilege of taking legacies, inheritances, gifts, and successions passing by will, by intestate laws, or by any deed or instrument, made inter vivos, intended to take effect at or after the death of the grantor. The burden or the tax is not imposed upon the property itself, but upon the the privilege of acquiring property by inheritance. In nearly all inheritance tax laws the statutes provide for appraising the property to be inherited, but the object of such valuation is not to tax the property itself. It is to arrive at a measure of price by which the privilege of inheritance can be valued." In *re Tuohy's Estate*, 90 Pac. 170, 171, 35 Mont. 431 (quoting *Gelsthorpe v. Furnell*, 51 Pac. 267, 20 Mont. 299, 39 L. R. A. 170).

## SUCESION LEGITIMA

"Issue," and not "lawful heirs," was meant by the words "sucesion legitima" in a devise of the residue of the testator's estate "in the character of fidel-commissum, and that the other [shares] may [profit by] accretion, in case of death without sucesion legitima," in equal parts to his nieces and a foster child, who was to adopt his surname,

coupled with a provision for the education of such foster child, and a request that when her education was finished she should return to live with the said nieces. *De Rodriguez v. Vivoni*, 26 Sup. Ct. 475, 476, 201 U. S. 371, 50 L. Ed. 792.

## SUCCESSIVE

Four successive weeks, see, also, *Four*.

The words "ten successive days," in a city ordinance providing for the publication for "ten successive days" of a notice for bids for a public improvement, mean publication on 10 successive days when a newspaper may be published without the publisher running the risk of violating Rev. St. 1899, § 2240 (Ann. St. 1906, p. 1420), prohibiting labor on Sunday, and a publication in a daily newspaper not published on Sunday of a notice in each successive issue from April 5th and ending April 17th is sufficient though there was no publication on the two Sundays intervening. *Porter v. R. J. Boyd Paving & Construction Co.*, 112 S. W. 235, 239, 214 Mo. 1.

The fact that the county court ordered the notice of a special election under the local option law to be published for four "successive" weeks, instead of for four "consecutive" weeks, as required by Rev. St. 1899, § 3029 [Ann. St. 1906, p. 1736], did not invalidate the election; the words "successive" and "consecutive" being synonymous. *State v. Hitchcock*, 101 S. W. 117, 118, 124 Mo. App. 101.

Code Civ. Proc. § 639, relating to foreclosure of mortgages by advertisement, provides that notice that a mortgage will be foreclosed by sale must be given by publication for six successive weeks. Civ. Code, § 2445, provides that the phrase "successive weeks" shall be construed to mean calendar weeks, and publication on any day in such weeks shall be sufficient for that week. A notice of foreclosure by advertisement which is published for six successive weeks, once in each week, is a sufficient publication, though but 37 days intervened between the first publication and the day of sale. *Thomas v. Issenhuth*, 100 N. W. 436, 437, 18 S. D. 303.

"The meaning of 'successive,' as used [in *Sayles' Rev. Civ. St. 1897, art. 3301*, requiring that the final order of the court putting local option into effect shall be published for four successive weeks, etc.], is well understood, and apprehends that the publication be continuous; that is, without a break. By judicial interpretation, one exception to this continuity has been ingrafted on the statute. That, we believe, is founded in reason, and is based on a breach of the continuity in the publication caused by the act of the law. While the injunction exists, no publication can be made; but, when this is dissolved, the

reason for delay or restraint ceases, and the publication should be immediately resumed." Where an order was published in a paper for three weeks consecutively in October, 1901, and was then enjoined, but the injunction was dissolved in May, 1902, by the Court of Civil Appeals, and mandate issued in November, 1902, a subsequent publication for two consecutive weeks in March, 1904, is not a compliance with the statute requiring publication for "four successive weeks." *Griffin v. State (Tex.)* 87 S. W. 155, 156.

Where an order putting local option into effect was published in a paper for two successive weeks consecutively, and further publication was prevented by injunction for a time, but no further publication was made until 16 months after dissolution of the injunction, when it was again published two weeks consecutively, the order was not published for "four successive weeks," as required by *Sayles' Rev. Civ. St. 1897, art. 3301*. *Stephens v. State (Tex.)* 87 S. W. 157.

## SUCCESSIVE SENTENCES

"Successive sentences" (that is, one to commence on the expiration of another for distinct offenses) are not cumulative sentences. *Harris v. Nixon*, 27 App. D. C. 94, 97.

## SUCCESSIVELY

"Successively," in Civ. Code, art. 145, providing that the notices of judgment are to be given from month to month for three times successively, means by succession; in a series; one after another; consecutively. *Derby v. Dancey*, 36 South. 795, 796, 112 La. 891.

## SUCCESSOR

The word "successor," in Const. art. 6, subd. "Elections," § 4, providing that every person holding civil office shall, unless removed, exercise the duties of the office until his successor is duly qualified, means a successor legally chosen. *Ballantyne v. Bower*, 99 Pac. 869, 872, 17 Wyo. 356, 17 Ann. Cas. 82.

Where, in an action by the receiver of a corporation, a bond to discharge an attachment was given to H., receiver of the C. & Z. Co., a corporation, to be paid to H., "his successors and assigns," and the record in the action was sufficient to advise the surety from the beginning that the corporation was the real party in interest, the term "successor" was not limited to another receiver, but also meant succession in corporate control, so that on the termination of the receivership control over the action, in which the bond was given, the corporation was entitled to prosecute an action on the bond. The term "successor," in modern acceptation, has a broader significance than succession in respect to the estate of a decedent. It may mean, in a proper situation, succeeding to a place or a right or an interest or a power,

official or otherwise. It may mean succession in corporate control. One corporation may succeed to the control of another, and that control may be succeeded by a receiver, and in turn the corporation first surrendering control may succeed the receiver in control. This is the kind of succession that is intended in an attachment bond given to a receiver made payable to him, "his successors and assigns," and made to safeguard the cause of action in the suit in which the bond was given against loss by reason of discharging the defendant's property from attachment. *American Surety Co. v. Campbell & Zell Co.*, 138 Fed. 531, 535, 71 C. C. A. 55.

The commissioner of water supply, gas, and electricity is the successor of the board of commissioners of electrical subways within the meaning of a contract between the board and a subway company, which provided that the company should reimburse the commissioners or their successors "for all reasonable expenses incurred by them in superintending and inspecting the construction" of all subways constructed thereunder, and which defined the term "successors" as including "any officer or officers of the city of New York, who shall succeed to the powers and duties of the parties of the first part [the commissioners], or any part of such powers and duties, under the provisions of any law now existing or hereafter enacted by the said Legislature, or any other persons or officers hereafter appointed or selected pursuant to any law to succeed to the powers and duties, or any part thereof." *People ex rel. Consolidated Telegraph & Electrical Subway Co. v. Monroe*, 83 N. Y. Supp. 382, 384, 85 App. Div. 542.

The use of the words "successors and assigns" in a statute in connection with specific grants of power to a railway company does not necessarily imply that the company can assign or lease all its property and its franchises to another company to be exercised by the latter. A municipal ordinance authorizing enumerated street railway companies and their successors and assigns to severally sell, convey, or lease their property rights, privileges, and franchises to any of the companies enumerated, or to a company designated, its successors and assigns, and authorizing the company acquiring the property rights and franchises of the enumerated companies to hold the same during the term of the ordinance, authorizes a purchaser of the property and franchises of the enumerated companies to lease the same to the designated company without the special consent of the municipality, notwithstanding Const. Mo. art. 12, § 20, forbidding a street railway transferring its franchise without first obtaining the consent of the municipality. *Moorshead v. United Rys. Co. of St. Louis*, 96 S. W. 261, 265, 203 Mo. 121 (citing *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 9 Sup. Ct. 409, 130 U. S. 1, 32 L. Ed. 837).

A mortgage of realty from a corporation to trustees for bondholders and to their "successors" may be reformed to read "heirs"; the use of the word successors showing that something more was intended than a life estate, and that the purpose was to convey all the estate which the corporation had. *McMillan v. Fish*, 29 N. J. Eq. 610, 613, 614.

A corporation organized by purchasers at a mortgage foreclosure sale of a railroad constructed pursuant to Act No. 68, p. 79, 20th Leg., exempting such railroads and their "successors" from taxation, is the successor of the company commencing the construction of the railroad, within the meaning of the act, so as to be entitled to the exemption provided for therein. *Grand Canyon R. Co. v. Treat*, 95 Pac. 187, 192, 12 Ariz. 60.

#### Executor

A clause in a lease providing for forfeiture if the lessee, "his successors or assigns," etc., includes the executors of the lessee, by the word "successors." *West Shore R. Co. v. Wenner*, 57 Atl. 408, 70 N. J. Law, 233.

#### Receiver

Where a railroad right of way bond bound the railway company, its surety and their successors or assigns to pay to the United States all damage to public land and timber or public property on a forest reservation by reason of the railroad company's occupation of a right of way over the reservation, the word "successors" was sufficient to bind the surety for damages resulting from the alleged negligent operation of the railroad by a receiver subsequently appointed. *United States v. Bailey*, 178 Fed. 302, 303.

#### SUCCESSOR IN INTEREST

The right to file a mechanic's lien is a personal right, limited to the person performing the labor or furnishing the material, and is not assignable; a "successor in interest," within Lien Law (Consol. Laws 1909, c. 33) § 2, being one who succeeds to a lienor's rights under a valid notice of lien already filed. *Tisdale Lumber Co. v. Read Realty Co.*, 138 N. Y. Supp. 829, 830, 154 App. Div. 270.

A purchaser of land sold on execution is entitled to redeem from a prior sale under mortgage foreclosure, as "the 'successor in interest' of the judgment debtor," under Code Civ. Proc. § 701, subd. 1, providing that the judgment debtor, or his successor in interest, shall be entitled to redeem. *Pollara v. Harlow*, 71 Pac. 454, 455, 138 Cal. 390.

#### SUCCESSOR IN OFFICE

A deed in consideration of an amount specified, paid by persons named, "a commit of the Society called Particular Baptist, or their successors in that office for the time being," granting to the persons named land described, "to have and to hold" to the persons named, and "to their successors in office,"

and covenanting with the persons named and their successors in office that grantor was lawfully seised in fee and had good right to convey, and would forever warrant and defend, conveys the land to grantees, not in their individual right, but as trustees; the word "committ" meaning "committee," and being equivalent to trustees, and the words "successors in office" providing for a continuance of the trust. *Hamlin v. Particular Baptist Meeting House*, 69 Atl. 315, 318, 103 Me. 343.

## SUCH

See *At Such Time*; *In Every Such Case*.  
Such other, see *Other*.

Testator gave "eight thousand dollars to wife all of which is to be held in trust by [trustees] without bond—they to pay heirs such rate of interest as shall be agreed upon, until children become of age—and she remains unmarried—in such case money shall fall to my legal heirs." Held, that the words "in such case" were equivalent to "in case she remarries." *Benton v. Benton*, 104 Pac. 856, 858, 78 Kan. 373.

The word "such," as used in Civil Code Ga. 1895, § 1948, providing that it shall be unlawful for any such bank to lend in the aggregate more than 25 per cent. of the amount of its capital stock to the officers and directors thereof, etc., refers to a bank of issue. *Thornton v. State*, 63 S. E. 301, 303, 5 Ga. App. 397.

The words "such accident," in an instruction in an action against a carrier for injuries to a passenger, to the effect that if the jury found that plaintiff was not guilty of contributory negligence, and was thrown from the car as claimed, and that such accident would not have happened under ordinary circumstances, had defendant exercised the utmost care, a presumption of negligence against defendant was raised, have reference to somewhat more than the mere fact that plaintiff was injured, and they at least referred back to his being thrown from the car through some neglect of defendant, and, when so construed, the instruction was not erroneous on the ground that it justified the jury in presuming negligence from the mere fact that plaintiff was injured while a passenger. *Fitch v. Mason City & C. L. Traction Co.*, 100 N. W. 618, 620, 124 Iowa, 665.

The words "such cases," as used in a statute, providing that a judgment on a verdict of acquittal of an offense, the punishment of which is imprisonment, shall not be reversed, but in "such cases" an appeal may be taken by the commonwealth when important to the correct administration of the criminal law, should be referred to the words "an offense the punishment of which is imprisonment," and an appeal by the commonwealth would lie in a misdemeanor case, even

before a final judgment. *Commonwealth v. Huber*, 104 S. W. 282, 284, 126 Ky. 456.

The words "such cities" as used in section 3 of the act of March 13, 1911 (Laws 1911, c. 82), mean cities of the class to which the one adopting the new form of government belongs, if existing under the general laws, or would legally belong if it were organized and operating under the general laws of the state. *Swain v. Fritchman*, 125 Pac. 319, 323, 21 Idaho, 783.

Under P. L. 1904, p. 259, § 3, requiring warrants to be signed by the mayor in cases where the common council or other body having charge of the finances of any such municipality shall not designate the officers to sign, the word "such" refers to sections 1, 2, which designate the act as applying to any cities in this state. *Fox v. Clark*, 59 Atl. 224, 72 N. J. Law, 100.

Tax Law, Laws 1896, p. 841, c. 908, § 131, provides that after one year from the time of sale of taxes the Comptroller shall execute a conveyance of unredeemed lands, which shall vest an absolute estate in fee and which shall be presumptive evidence that the sale and all proceedings prior thereto from and including the assessment, and all notices required previous to the expiration of the time for redemption were regular, and that after two years from the date of such conveyance, such presumption shall be conclusive. Section 132, headed "Effect of Former Deeds," provides that every such conveyance theretofore executed by the Comptroller which has been recorded for two years shall be similarly conclusive, but that such conveyances may be canceled because of the payment of such taxes, the levying of such taxes by a town or ward without legal right to assess the land, or of any defect in the proceedings affecting the jurisdiction upon constitutional grounds, on direct application to the Comptroller, or in an action brought therefor, provided that such application be made, or action brought, in the case of sales held prior to 1895, within one year from the passage of the act, and in the case of the sale of 1895 and all sales thereafter within five years from the expiration of the period allowed for redemption. Held, that the words "such conveyance," wherever used in section 132, relate to the conveyances executed by the Comptroller, and that the enumerated defects excepted from the provisions of the section and the appended proviso enacting a statute of limitations in respect thereto, do not apply only to "former deeds," but apply to all conveyances by the Comptroller before or after the passage of the act. *People ex rel. McGuinness v. Lewis*, 111 N. Y. Supp. 398, 401, 127 App. Div. 107.

The words "such court" in Act Feb. 28, 1891 (Acts 1891, p. 44, c. 37) § 25, as amended by Acts 1893, p. 31, c. 32, providing where appeal has been taken to the Appellate Court, and it should have been to the Supreme

Court, the Appellate Court must transfer the cause to the Supreme Court, but, where appeal has been taken to the Supreme Court when it should have been to the Appellate Court, the Supreme Court must transfer it to the Appellate Court, "and the action of such court in making such transfer shall be final," apply to the Supreme Court, and an order of that court retransferring an appeal to the Appellate Court is final. *Pittsburgh, C., C. & St. L. Ry. Co. v. Peck*, 88 N. E. 939, 942, 172 Ind. 562.

The term "such date," as used in Code 1899, c. 131, § 16, providing that judgment shall be entered for the aggregate of principal and interest due at the date of the verdict or judgment, with interest thereon from "such date" in all cases as to which it is not otherwise provided, means the date of the verdict, when there is one, and the date of the judgment or decree, when there is no verdict. *Campbell v. City of Elkins*, 52 S. E. 220, 223, 58 W. Va. 308, 2 L. R. A. (N. S.) 159.

By the words "such deceased child," in the first section of the statute of 1783 (chapter 36), is intended the deceased child of any deceased father and not the deceased child of an intestate father. *Mayo v. Boyd*, 3 Mass. 13, 16.

B. & C. Comp. § 2010, as amended by Laws 1907, p. 342, makes it unlawful to hunt, kill, or pursue deer within the state during the closed season, and declares that "any person having in possession any deer or carcass or part of a deer during the season when it is unlawful to take or kill such deer, shall be guilty of a misdemeanor." Held, that the words "such deer" referred to deer killed during the closed season, and that the section did not prohibit the keeping during the closed season, for food, the flesh of deer lawfully killed during the open season. *State v. Fisher*, 98 Pac. 713, 714, 53 Or. 38.

Comp. St. 1910, § 1054, authorizes the commissioners appointed to organize a new county to appoint a clerk and to hold a special election on the question of division from the old county, but provides that such election may be held coincident with the general election. Section 1056 provides that, in the event of a favorable vote, the voters of the county shall at the next general election, or at the same election if the special election is held coincident with the general election, vote for state, district, and county officers. Section 1057 authorizes the organization commissioners and clerk to perform all duties connected with "such election" imposed by law on county commissioners and county clerks in organized counties and to canvass the returns and declare the result. Held, that since commissioners are appointed to organize the county, and it is not fully organized until officers are elected, and since section 1056 when originally enacted as section 6, Laws 1895, c. 59, provided for an election of officers in the new county at the general elec-

tion following the appointment of the commissioners, and contained no provision concerning a special election, and has been changed only by the addition by Laws 1909, c. 75, § 3, of the provision that, when the special election is held coincident with the general election, the election of officers shall be held at the same time, the provision of section 1057 for the conduct of "such election" by the organization commissioners and clerk does not refer only to the special election, but to the election at which state, district, and other officers are to be elected. *Dillman v. State* (Wyo.) 125 Pac. 367, 371.

In *Hurd's Rev. St.* 1903, p. 282, § 3, declaring that, if a majority of the votes cast at "such election" shall be for city organization under general law, such city shall from thenceforth be deemed organized under such act, the words "such election" refer to the municipal election of the city referred to in section 1. *People ex rel. v. Weber*, 78 N. E. 56, 57, 222 Ill. 180.

The words "such election," as used in the section of the Constitution which provides how constitutional amendments shall be passed through the General Assembly for submission to the people, and for publication for at least six months "immediately preceding the next general election for senators and representatives, at which time the same shall be submitted to the electors of the state for approval or rejection, and if a majority of the electors voting in such election adopt such amendments the same shall become a part of the Constitution," evidently refer to the general election for senators and representatives, and the "majority" necessary to adopt an amendment must be the majority of electors voting at the general election for senators and representatives, and not a mere majority voting on the subject of the amendment. *Rice v. Palmer*, 96 S. W. 396, 400, 78 Ark. 432 (citing *Knight v. Shelton*, 134 Fed. 423; *State ex rel. Attorney General v. Powell*, 27 South. 927, 77 Miss. 543).

Although the term "such general law," as used in Const. art. 11, § 4, requiring the Legislature to establish a uniform system of county government and by general laws provide for township organization under which any township may organize, and providing that, whenever any county shall adopt township organization, the local affairs of the several townships shall be managed in the manner prescribed by "such general law," refers only to laws relating to township organization, it does not mean that general laws applicable to the whole state, without specifically excepting such townships, are not as controlling therein as the same are in counties and cities of other classes. *Gunter v. Huneke*, 108 Pac. 1078, 1080, 58 Wash. 491.

Where an accident policy provided for the payment of a monthly sum if insured were disabled solely by external, violent, and



accidental means, and also provided for a payment "if death should result from such injuries," the words "such injuries" have no regard to the extent of disablement that immediately followed the injury. *Driskell v. United States Health & Accident Ins. Co.*, 93 S. W. 880, 882, 117 Mo. App. 362.

Under an accident policy binding insurer to indemnify insured or his beneficiary as therein scheduled, if insured should receive personal bodily injury effected directly and independently of all other causes through external, violent, and purely accidental means, and which should cause at once total and continuous inability to engage in any labor or occupation, and providing that, if within 90 days from the accident any one of the losses scheduled should result necessarily and solely from such injury, insurer would pay as therein designated, an accidental injury causing the death of insured within 90 days thereafter entitles the beneficiary to recover on the policy, whether total disability followed the injury "at once" or not; the words "such injury" referring back to the injury mentioned in the first clause for the purpose of identification, and not having the effect of uniting both sentences, so as to make the provision when considered as a whole mean that, before a beneficiary could recover for the death of insured, there must have been an accidental injury resulting both in immediate and total inability and loss of life. *Continental Casualty Co. v. Colvin*, 95 Pac. 565, 568, 77 Kan. 561.

"Such judgment," as used in *Ky. St. 1903*, § 2552, relating to the liability of sureties and providing that, if such judgment be obstructed by appeal, supersedeas, or injunction, the time of such obstruction shall also be disallowed, referred to a judgment against the surety or sureties and not against the principal. *McGovern v. Rectanus (Ky.)* 105 S. W. 965, 967, 14 L. R. A. (N. S.) 380.

Pending an appeal from a judgment ousting a corporation from its franchise to maintain a toll road, the company issued receipts to travelers paying the toll which recited that, in the event "of such judgment being affirmed in the Supreme Court," the receipts would be redeemable on presentation after such affirmation. Held, that the words "such judgment being affirmed" referred to the judgment of ouster which should finally terminate the litigation. *Ver Duyn v. Detroit & S. Plank Road Co.*, 104 N. W. 612, 613, 141 Mich. 450.

The expression "such land," in *Texas Laws 1907*, p. 492, c. 20, providing that such of the land in the counties included within this section as is now sold, but which may hereafter become subject to sale, shall not be subject to sale until the former sale shall have been canceled, means lands under the provision of the act that are subject to sale without the condition of actual settlement.

*Hamilton v. Terrell*, 107 S. W. 47, 48, 101 Tex. 330.

Section 6 of chapter 67 of the Laws of 1905, entitled "An act to abolish the state board of taxation and to create in lieu thereof a board for equalization, revision, review, and enforcement of tax assessments" (P. L. 1905, p. 126), authorizes the state board of equalization, "after due investigation," to increase the assessment made upon "any property" that has been assessed at less than its true value, and for this purpose, if necessary, to direct a reassessment of "such property" to be made by an assessor or other taxing officer, or by some other person appointed by the board. The terms "any property" and "such property" import that its purpose is to secure an increase in valuation of some specific parcel of property, and, when the state board determines after due investigation that the property has been assessed at too low a rate, the board is to increase the assessment made upon such property. *Jersey City v. Board of Equalization of Taxes of New Jersey*, 67 Atl. 38, 40, 74 N. J. Law, 753.

In the provision in a life policy, required by *Laws 1907*, c. 220 (Rev. Laws Supp. 1909, §§ 1695—2 to 1695—12), that all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties, and no such statement shall avoid the policy unless contained in a written application, and unless a copy of such application be indorsed on or attached to the policy, the words "such statement" do not mean statements made in the absence of fraud, but do mean statements made relating to the applicant's history, habits or health, of the character usually made and signed by an applicant for insurance, whether they are made in the absence of fraud or not. *Whelock v. Home Life Ins. Co.*, 131 N. W. 1081, 1083, 115 Minn. 177.

In *Code Civ. Proc.* § 722, as amended by *Laws 1899*, p. 143, providing that, if plaintiff fails to reply or demur to the counterclaim, defendant shall be entitled to the same relief as a plaintiff on the failure of defendant to demur or answer the complaint, and if the answer contains new matter, and plaintiff fails to reply or demur thereto within the time allowed by law, defendant may move for such judgment as he may be entitled to upon "such statement," the words "such statement," mean the statement of the new matter relied on as constituting a defense, without any reference to the matter set up in the complaint. *State v. Quantie*, 94 Pac. 491, 500, 37 Mont. 32.

The words "such work," as used in *St. Louis city charter*, art. 6, § 28 (Ann. St. 1906, p. 4869), providing, "Every ordinance requiring such work to be done shall contain a specific appropriation from the public revenue and fund," based on an estimate of cost, etc., mean, when considered in connection

with the preceding section of the article and the entire article, work to be paid for out of the city treasury, and do not include work to be paid for by another. *City of St. Louis v. Terminal R. Ass'n*, 109 S. W. 641, 644, 211 Mo. 364.

Rev. Laws, c. 149, § 35, provides that no action shall be maintained on a guardian's bond after four years from his discharge, unless the person entitled to bring such action is at the discharge out of the commonwealth, when it may be commenced within four years after his return. Chapter 202, § 7, a part of the general statute of limitations, gives minors and insane persons the time limited in previous sections of the chapter after their disability is removed for bringing "such actions." Section 18 provides that the chapter shall not apply to actions where special provision is otherwise made. Held, that section 35, and not section 7, governs the limitation as to suits upon guardians' bonds. *Hill v. Arnold*, 85 N. E. 97, 199 Mass. 109.

Consolidation Act (Laws 1882, p. 366, c. 410) § 1458, provides that a person who shall use any threatening, etc., behavior with intent to provoke a breach of the peace, etc., shall be guilty of disorderly conduct. Section 1459 provides that, when it appears on oath of a credible witness before any police justice that any person has been guilty "of any such disorderly conduct as in the opinion of such magistrate tends to a breach of the peace," the magistrate may cause the person complained of to be brought before him to answer the charge. Held that, under section 1459, "disorderly conduct" is such conduct as in the opinion of the magistrate tends to a breach of the peace, and the section does not relate only to the acts specified in section 1458. The evident intent and meaning of section 1459 is "any disorderly conduct such as in the opinion" of the magistrate tends to a breach of the peace. The word "such" is correlative with "as," and, if it had been intended by its use to refer to the acts set forth in section 1458 only, the word "as" would not have been used. The use of the word "as," without any punctuation after the word "conduct," shows that the word "such" is used only to anticipate the limiting clause commencing with "as," and not to refer to the preceding section. *People v. Mansi*, 113 N. Y. Supp. 866, 868, 129 App. Div. 386.

#### As any

The word "such" must be construed as equivalent to "any" in Act June 9, 1897, § 6, providing that no child under 16 years of age shall be employed to work by any person or corporation at such hazardous employment whereby its life or limb is in danger. *Struthers v. People*, 116 Ill. App. 481, 488.

Code 1906, § 1106, requires persons dealing in firearms, etc., to keep a record of sales thereof; section 1107 makes it unlawful to sell, give, or lend to any minor or intoxicated

person, with knowledge, any weapon the carrying of which concealed is prohibited, etc.; section 1108 declares that any father, who shall knowingly permit his son under 16 to have or carry concealed any weapon the carrying of which is prohibited, shall be guilty of a misdemeanor; and section 1109 provides that any student who shall carry on the school grounds, or within two miles thereof, any weapon the carrying of which concealed is prohibited, or who shall permit such weapon to be carried or had by pupils, shall be guilty of a misdemeanor. Section 1110 then provides that if any "such" person, having or carrying any other weapon, the carrying of which concealed is prohibited, shall in the presence of three or more persons, in a threatening manner, etc., he shall, on conviction, be fined. Held, that section 1110 is not limited to the person described in the four preceding sections; but the word "such" should be regarded as having been inserted by a clerical mistake, and that section 1110 should be construed as applicable generally to any person. *State v. Ware*, 59 South. 854, 102 Miss. 634.

Laws 1890, p. 1106, c. 565, § 78, as amended by Laws 1892, p. 1398, c. 876, provides that any railroad corporation may contract with any other for the use of their respective roads, and, if such contract shall be a lease, certain formalities are to be observed in its execution. Section 104 (page 1114) provides that "every 'such' corporation entering into such contract shall carry or permit any other party thereto to carry between any two parts on railroads or portions thereof embraced in such contract any passenger desiring to make one continuous trip between such points for one single fare not higher than the fare lawfully chargeable by either of 'such' corporations for an adult person. Every 'such' corporation shall upon demand and without extra charge give to each passenger paying one single fare a transfer entitling such passenger to one continuous trip to any point of any railroad embraced in such contract, to the end that the public convenience may be promoted by the operation of the railroads embraced in such contract substantially as a single railroad with a single rate of fare." Held, that the word "such," in that connection, refers to "any railroad corporation or any corporation owing or operating any railroad or railroad route within this state," and that section 104 applies to surface lines leased by one or more corporations to another, and operated by the lessee, so as to render the lessee liable where transfers are tendered and refused for the penalties provided for their refusal. *Griffin v. Interurban St. Ry. Co.*, 72 N. E. 513, 516, 179 N. Y. 438.

Laws 1909, c. 20, § 1, declares it unlawful "to report, record or register" any bet on a horse race, whether held in or out of the state, unless held in an inclosed race track or fair grounds and the bet is made and all

acts in regard to it are done in the inclosure on the day of the race. Section 2 provides that when for 14 days, in any year, there have been bets reported, recorded, or registered on a horse race on any inclosed race track or fair grounds, it shall thereafter be unlawful during such year to report, record, or register any bet on a horse race held "in such inclosure." Laws 1909, c. 92, amends the prior act by expressly extending it to "making" such bets, and by substituting "thirty days" for 14 days, as regard counties of the first class, leaving the 14 days provision in effect in other counties. Held, that betting on horse races in counties of the first class was allowed for only 30 days in a year, and not 30 days on each track therein; "in such inclosure" meaning the same as "in any inclosure" or "in such an inclosure." *State v. Gemmell*, 122 Pac. 268, 269, 45 Mont. 210.

In the last sentence of Bankr. Act 1898, c. 541, § 67c, 30 Stat. 564, providing that, "if the dissolution of such lien" would militate against the interests of the estate of the bankrupt, it shall not be dissolved by the adjudication, the words "such lien" refer to any lien "created or obtained in or pursuant to any suit or proceeding at law or in equity" within four months mentioned at the beginning of the subdivision, and the provision applies to liens obtained for the benefit of all creditors as well as those obtained for the benefit of one creditor, to which clauses 1, 2, and 3 alone relate. As so construed, such subdivision is not in conflict with subdivision 1 of the same section. *First Nat. Bank v. Guarantee Title & Trust Co.*, 178 Fed. 187, 191, 101 C. C. A. 507.

The words "manufacturer," "such manufacturer," and "said manufacturer," as used in Acts 1908, p. 281, c. 189, § 15, providing that a licensed manufacturer may sell the products of his brewing at any place within the state, except where such manufactory is situated in no-license territory, but such manufacturer may sell the product of his brewing to be delivered to a common carrier to be transferred to any place where the same may be legally sold, and the said manufacturer may sell the products of his brewing in quantities not less than one gallon at the place of manufacture, except in no-license territory, mean any manufacturer, whether located in license or no-license territory; the only difference between the two classes of manufacturers intended by the statute being that the manufacturer located in license territory can sell and deliver not less than one gallon at the place of manufacture, while the manufacturer located in no-license territory can make no sale and delivery at such place. *Robert Portner Brewing Co. v. Southern Exp. Co.*, 63 S. E. 6, 8, 109 Va. 22.

That testimony was given against one charged with bribery does not conclusively bar the use of such testimony against a witness in subsequent judicial proceedings

against him, but, to have such effect, the testimony must have been given under some compulsion. The term "such testimony," in Const. art. 3, § 32, providing that one may be compelled to testify in any lawful investigation or judicial proceeding against one charged with having permitted bribery or corrupt solicitation and will not be permitted to withhold his testimony upon the ground that it may incriminate himself or subject him to public infamy, but that such testimony cannot afterwards be used against him in any judicial proceeding except for perjury in giving such testimony, does not mean any testimony, but merely such as a witness may have been "compelled to testify," and, where it does not appear from the record of the prior case that accused in a subsequent case testified in obedience to a subpoena or other compulsion, nor that he objected to answering any question put to him, his testimony in the prior case may be used against him in the subsequent case. *Commonwealth v. Richardson*, 79 Atl. 222, 229 Pa. 609.

#### As referring to last antecedent

In construing a deed which provided that not more than two dwellings should be erected upon the property within ten years after the date of the deed, and that "such dwellings so erected" should be set back at least 15 feet from the building line and should aggregate in cost not less than \$3,000, the court said the word "such" always refers to an antecedent in the context of the instrument, which explains its meaning, and as "dwellings" are not mentioned in deed, except in the restriction as to building line, "such dwellings" are those permitted to be erected by the building line restriction and these are limited to two in number during the prescribed period of 10 years; and it was held that the restriction as to building line and cost referred only to the buildings to be constructed within the 10-year period, so that both restrictions ceased to be effective at the end of 10 years. *Mitchell v. Packham*, 63 Atl. 219, 221, 103 Md. 693.

The inheritance tax law, imposing a tax on property passing by will or by the intestate laws, for which heirs, legatees, and devisees, etc., shall be liable, and declaring that when the beneficial interests to any property shall pass to any father, etc., the rate of taxes shall be a specified sum on every \$100 of the market value of the property received by each person, provided that \$10,000 of any "such estate" shall not be subject to taxes, lays a tax on the receipt of property by each person, and the exemption applies to the separate distributive shares and legacies, and not to the aggregate value of the property of decedent; the words "such estate" referring to the words "property received by each person." *People v. Koenig*, 85 Pac. 1129, 1130, 37 Colo. 283, 11 Ann. Cas. 140.

As used in St. 1905, p. 255, c. 330, section 1 of which imposes on certain hospitals the

duty to keep records of the cases under their care and the history of the same in books kept for that purpose, and section 2 of which provides that such records shall be admissible in evidence, the words "such records" embraces only those kept pursuant to section 1. *Delaney v. Framingham Gas Fuel & Power Co.*, 88 N. E. 773, 776, 202 Mass. 359.

Pub. St. 1901, c. 191, § 8, provides that tort actions for personal injuries shall survive to the extent stated in the five following sections. By section 9, if such an action is pending at the death of a party, it shall abate, unless decedent's administrator, if decedent was plaintiff, shall appear and prosecute the action before the end of the second term after decedent's death. By section 10, if an action is not then pending and has not become barred, one may be brought any time within two years after decedent's death. By section 11, the damages recoverable in any such action shall not exceed \$7,000. Section 12 provides that if the administrator of the deceased party is plaintiff, and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered, reasonable expenses caused by the injury, probable duration of his life, etc., may be considered as elements of damage. Section 13 provides how the damages recoverable shall be distributed, and section 14 provides that all other actions existing in behalf of or against a deceased person, except those for the recovery of penalties and forfeitures of money under penal statutes, shall survive and may be prosecuted or defended by his administrator. Held, construing section 11 in view of Pub. St. 1901, c. 2, § 14, making the words "said" and "such," when used to refer to any person or thing, apply to the person or thing last mentioned, that the words, "in such action," therein, referred to the action authorized by section 10, and not to the pending action authorized to be prosecuted by the administrator by section 9, so that damages recoverable in such action are not limited. *Piper v. Boston & M. R.*, 75 Atl. 1041, 1046, 75 N. H. 435.

Code 1899, c. 31, § 25 (Code 1906, § 884), relating to errors in tax proceedings, provides that no irregularity, error, or mistake in the delinquent list or the return thereof, or in the affidavit thereto, or in the list of sales filed with the clerk of the county court, or in the recordation of "such list" or affidavit, etc., shall, after deed made, invalidate the sale. Held, that the irregularity, error, or mistake in the recordation of such list or affidavit intended by the statute to be provided against did not refer to the delinquent list, but to the list of sales filed with the clerk; but the words "such list" being used to refer to the list next preceding the words, which was the "sales list." *Ritchie Lumber Co. v. Nutter*, 66 S. E. 646, 649, 66 W. Va. 444.

The words "such period," in Laws 1894, p. 910, c. 447, § 27, providing that Sunday

must be excluded from reckoning if it is the last day of any such period, refer to the preceding sentence in the statute, which relates to a number of days specified as a period from a certain day within which, or after or before which, an act was authorized or required to be done. *Benoit v. New York Cent. & H. R. R. Co.*, 87 N. Y. Supp. 951, 953, 94 App. Div. 24.

St. 1902, c. 435, § 1, as amended by St. 1909, c. 514, § 48, provides that no child or woman shall be employed in laboring in specified occupations, except as permitted, etc., and then declares that every employer shall post in a conspicuous place, in every room in which such persons are employed, a printed notice stating the number of hours of work required of them in each day of the week, the hours of commencing and stopping work, and the hours when the time allowed for meals begins and ends. Chapter 514, § 67, declares that the meal hours shall be the same where the women and children employed number five or more, except that an exception is made in section 69 of certain employments where continuous process is required, and declares that the employment of such persons in any time other than stated in the printed notice shall be a violation thereof. Held, that the words "such persons," as used in section 48, referred to those who regularly employed women and children more than 10 hours in any one day, and that only such manufacturing and mechanical establishments as employed women and children in practically permanent labor were required to post notices fixing definitely the hours of work. *Commonwealth v. Riley*, 97 N. E. 367, 369, 210 Mass. 387, Ann. Cas. 1912D, 388.

"Such place," as used in a statute, which provides that when one, after the time fixed for the completion of a tax assessment, sends into the taxing district a stock of goods to be disposed of in a place of business temporarily occupied, without intending to engage in permanent trade in such place, it shall be taxed at the general rate for the current year, refers to the place of business. *Lang v. Berrien*, 71 Atl. 117, 118, 77 N. J. Law, 214.

Civ. Code 1895, § 1900, provides that any domestic corporation may be sued on contracts in the county in which the contract was made or is to be performed, if it has an office and transacts business there. Suits for damages, because of torts, may be brought in the county where the cause of action originated. Service of "such suits" may be effected by leaving a copy of the writ with the agent of defendant, or, if there be no agent in the county, then at the agency or place of business. Held, that the words "such suits" refer to suits for damages because of torts, and, if defendant has an agent in the county where the tort, wrong, or injury was done, service may be effected by leaving a copy of the writ with him. But, under this statute, a corporation, with its

principal office in a given county, cannot be sued in another county for a trespass committed therein, when it has no agent, agency, or place of business in the latter county. *Tuggle v. Enterprise Lumber Co.*, 51 S. E. 433, 434, 123 Ga. 480.

As used in Rev. St. 1898, § 3315, providing that a subcontractor of a principal contractor, furnishing any material to such principal contractor, "in any of the cases mentioned in the preceding section shall be entitled to the lien and remedy given by this chapter; if within sixty days after furnishing such materials, he shall give notice in writing setting forth that he has been employed by such principal contractor to furnish and has furnished such material," etc.—the words "such material" manifestly refer to material furnished under the circumstances and conditions of the preceding section, giving a lien to the principal contractors for material furnished to be used "for or in or about" the erection or construction of buildings. But a notice by a subcontractor, stating that he was employed to furnish and did furnish material as specified for the construction of the building, with the amount due from the principal contractor, is sufficient, without setting out the conditions of the sale of the material to the principal contractor. *Laev Lumber Co. v. Auer*, 101 N. W. 425, 427, 123 Wis. 178.

#### As of like kind

The word "such" is defined by the lexicographers as: "Of that kind of the same or like kind, identical with or similar to something specified or implied; \* \* \* being the same as what has been mentioned or indicated; being the same in quality; having the quality specified, etc." In order to bring a public amusement, not specifically enumerated, within the statute, providing that it shall be unlawful to keep open on Sunday any theater, playhouse, show, concert, saloon, or any "such" place of public amusement, the likeness or similarity must exist in some other than the mere fact that it is a public amusement and must in a general way correspond to the amusements specified. In re *Hull*, 110 Pac. 256, 257, 18 Idaho, 475, 30 L. R. A. (N. S.) 465.

The word "such," as used in a constitutional provision directing the Legislature to enact a law whereby any county, justice precinct, town, city, or such subdivisions of the county as may be designated by the commissioners' court of the county, may determine from time to time whether the sale of intoxicants shall be prohibited within the prescribed limits, means subdivisions of like character—political subdivisions of the county—and empowers the Legislature to authorize the commissioners' court to designate some other existing subdivision of the county than one of those enumerated, but does not sanction a law which authorizes the commissioners' court to combine two or more

political subdivisions of a county into a local option district, thus, in effect, creating a new subdivision. *Ex parte Heyman*, 78 S. W. 349, 353, 45 Tex. Cr. R. 532.

The term "such other subdivision," as used in Const. Tex. art. 16, § 20, providing that the Legislature shall enact a law whereby the voters of any county, justice's precinct, etc., or such other subdivision of a county, may by a majority vote determine whether the sale of liquor shall be prohibited therein, means subdivisions of a like character. A county or school district is not such a "subdivision." *Ex parte Haney*, 103 S. W. 1155, 51 Tex. Cr. R. 634; *Ex parte Banks* (Tex.) 103 S. W. 1156.

The first or primary definition of the word "such," in the Century Dictionary and Cyclopedia, is "of that kind;" "of like kind or degree;" "like;" "similar." A secondary meaning of the word is given as "the same as previously mentioned or specified;" "not other or different." Under a fire policy covering enumerated articles and "such" other merchandise as is usually kept for sale in a retail hardware store, the primary meaning of the word is the correct one to be applied, especially as the word "such" is followed by "as," and this meaning is strengthened by the use of "other," and the words, read together, mean "articles in addition to those already mentioned," and it was not meant only to include goods of a kind already mentioned. *Traders' Ins. Co. v. Dobbins & Ewing*, 86 S. W. 383, 385, 114 Tenn. 227.

In an action for injuries to an employé while working at a machine, where the jury have found that the machine was not reasonably safe, and that the injury was the fatal and probable result of its unsafe condition, the finding in the affirmative, in answer to the question, evidently framed to cover the question of proximate cause, whether "such injury" ought to have been foreseen by a person of ordinary care and prudence, will be construed as meaning that "such an injury" or an injury of like nature ought to have been apprehended or considered probable. *Coolidge v. Hallauer*, 105 N. W. 568, 570, 126 Wis. 244.

In Act Aug. 13, 1910 (Acts 1910, p. 92) § 6, providing that upon approaching a pedestrian in a highway, or horses or other draft animals being ridden or driven thereon, the person operating an automobile shall give reasonable warning of its approach by bell, horn, gong, or other signal, and use every reasonable precaution to insure the safety of such person or animal, the words "such person" apply to the rider or driver of an animal on a highway, as well as to a pedestrian. *Holland v. State*, 76 S. E. 104, 105, 11 Ga. App. 769.

#### As referring to omitted antecedent

The word "such," in a resolution of the county board, where it appears to perform

no function in the sense in which employed, may sometimes be construed to refer to some omitted antecedent or consequent, and such antecedent or consequent supplied by construction. *Cochran v. Vermillion County*, 113 Ill. App. 140, 144.

#### As same as previously mentioned

Kirby's Dig. § 957, provides that any corporation may surrender its charter by a resolution, on filing a certified copy of the resolution with the Secretary of State and the clerk of the county in which "such corporation" is organized. When that section was adopted as a part of the act of April 12, 1893 (Laws 1893, p. 265), railroad corporations could be organized by filing the articles of association with the Secretary of State, while manufacturing and other business corporations were required by Kirby's Dig. § 845, to file their articles of association and certificate with the clerk of the county in which they were to have their principal place of business and also with the Secretary of State. Held, that section 957 does not apply to railroad corporations "such" meaning, previously mentioned or specified, and the phrase "in which such corporation is organized" limiting "any corporation" to those required to file their articles and certificate with the clerk of the county in which they are to have their principal place of business. *Freeo Val. R. Co. v. Hodges*, 151 S. W. 281, 282, 105 Ark. 314.

The word "such," as used in an instruction which, after describing the offense charged, stated that, if the jury find that "such" offense was committed at any time within five years prior to the filing of the information, they should find a verdict of guilty, signifies the same as previously mentioned or specified, not other or different, and refers to the offense described in the first part of the instruction. *State v. Connors*, 94 Pac. 199, 201, 37 Mont. 15.

#### As suggestive or mandatory word

The word "such," in Code 1896, § 3440, requiring locomotive engineers, on perceiving an obstruction on the track, to use all means known to skillful engineers, "such" as applying brakes and reversing engine, to stop their trains, is used only as suggestive, and is not mandatory, and the statute requires the doing of all things known to skillful engineers, and the direction to apply brakes and reverse the engine is only suggestive. *Harris v. Nashville, C. & St. L. Ry. Co.*, 44 South. 962, 963, 153 Ala. 139, 14 L. R. A. (N. S.) 261.

## SUCKER

A "sucker" is a person readily deceived. *People v. Simmons*, 109 N. Y. Supp. 190, 194, 125 App. Div. 234.

## SUDDEN

On evidence in an action against a street railroad for injuries from negligently and suddenly starting a car, as plaintiff was entering, construing the word "sudden" to mean happening without notice, coming unexpectedly, held, that the question whether the car was negligently started was for the jury. *Benjamin v. Metropolitan St. R. Co.*, 151 S. W. 91, 93, 245 Mo. 598.

## SUDDEN AFFRAY

In the statute defining the offense of shooting or cutting another in sudden affray or in sudden heat of passion, the words "in sudden affray" are not synonymous with the words "in sudden heat and passion." *Brown v. Commonwealth (Ky.)* 79 S. W. 1193, 1194; *Tall v. Commissioners (Ky.)* 110 S. W. 425, 427 (citing *Violet v. Commonwealth*, 72 S. W. 1, 24 Ky. Law Rep. 1720).

## SUDDEN HEAT AND PASSION

Sudden affray distinguished, see *Sudden Affray*.

An instruction that if defendant "in sudden heat and passion," created by such provocation as is ordinarily calculated to excite the passions beyond control, and which did then and there excite defendant's passions beyond control, and without previous malice, willfully shot, etc., he was guilty of voluntary manslaughter, was not erroneous; the term "without previous malice" was necessarily included in the term "in sudden heat and passion." *Metcalf v. Commonwealth*, 86 S. W. 534, 535, 27 Ky. Law Rep. 704.

## SUDDEN PASSION

See *Under the Immediate Influence of Sudden Passion*.

Though the "sudden passion" which will reduce the killing to manslaughter is usually anger, yet it is not limited thereto, but sudden terror, rendering the mind incapable of cool reflection, is sufficient. *Commonwealth v. Colandro*, 80 Atl. 571, 574, 231 Pa. 343 (quoting 6 Words & Phrases, p. 5227).

Under Rev. St. 1898, § 4168, providing that homicide is justifiable when committed in a "sudden heat of passion" caused by an attempt of the deceased to commit a rape upon or defile the wife, daughter, or other female relative or dependent of the accused, or when defilement has actually been committed, the "sudden heat of passion" must have, at the time of the homicide, controlled his actions, stifled his power of reasoning, and for the time being rendered him incapable of distinguishing between right and wrong. Such uncontrollable passion must therefore necessarily have been aroused at such close proximity in point of time to the fatal act as to have left no sufficient time intervening for cooling and for reason to again assert itself; and, if sufficient time had

elapsed between obtaining knowledge of the defilement or attempted defilement and the commission of the homicide for cool reflection and deliberation by him, the killing is not justified, though there had been defilement or an attempt to defile. An accused cannot rely for justification on mere rumors or appearances observed by him at any distance of time before he kills deceased. The statute was evidently designed to apply only where accused had come suddenly upon the defiler, or had unexpectedly received reasonably reliable information of the same, and the fatal blow was struck in uncontrollable passion, suddenly aroused because of the suddenness of the occasion, and in the absence of sufficient time for deliberation and for reason to gain sway over passion. The law was not intended to shield an accused who, because of mere rumors or appearances, which he deemed but to be evidence of undue familiarity, determines to kill, and with that purpose in view pursues the purpose and willfully shoots the parties down while not in a guilty act or compromising position. *State v. Botha*, 75 Pac. 731, 736, 27 Utah, 289.

#### SUDDEN PROVOCATION

The repetition by an employé at the breakfast table that he would not, though ordered, go out with his team before breakfast so long as his knife stayed with him, is not a sudden and sufficient provocation with-in Gen. St. 1906, § 3204, defining excusable homicide. *Pelt v. State*, 50 South. 832, 58 Fla. 90.

#### SUE

The National Home for Disabled Volunteers, being a charitable institution engaged as an agency of the federal government in discharge of a governmental function, is not subject to be sued in tort for damages for alleged unlawful and wrongful or negligent acts of its officers in diverting and polluting waters of a spring on lands of plaintiff, the power "to sue and be sued at law and in equity" conferred on the corporation by Rev. St. § 4825, being limited to matters within scope of other corporate powers with which it is vested. *Lyle v. National Home for Disabled Volunteer Soldiers*, 170 Fed. 842, 843.

#### SUE TO INSOLVENCY

"Sue to insolvency" means that the party shall exhaust the ordinary legal remedies provided for the collection of debts. *Pollard v. Murrell*, 6 Ala. 661, 662.

#### SUERTE

"Suerte" is a term used in the Mexican law to designate a small lot, two hundred varas square, suitable for a garden, vineyard, or orchard. *Redding v. White*, 27 Cal. 282, 285.

#### SUFFER

See Conscious Suffering.

A charge to allow plaintiff a just, pecuniary compensation for bodily injuries and disabilities and "suffering" and distress of mind caused by the acts complained of is not subject to the objection of allowing one recovery for bodily injuries and another for disabilities, and one for "suffering" of mind and another for "distress" of mind. The term "suffering," as used in the charge, is evidently intended to refer to physical pain, but, if construed to refer to mental distress, the charge only permits of one recovery for that element of damage. *St. Louis Southwestern R. Co. of Texas v. Highnote (Tex.)* 84 S. W. 365, 368.

It may be assumed that the word "suffer" implies not merely nonresistance to that which is done, but also an approval of or at least an acquiescence in it, with an ability to prevent it. But where a child was committed to the custody of the State Board of Charity, and supported by the commonwealth, and the mother made only a few cursory inquiries, the last of which was much more than two years before the petition for adoption, and she did not appear to have made opposition to the adjudication of commitment, though notified of the proceeding, a finding that she "suffered" her child to be supported as a pauper by the commonwealth for more than two years continuously prior to the petition was warranted. *Purinton v. Jamrock*, 80 N. E. 802, 803, 804, 195 Mass. 187, 18 L. R. A. (N. S.) 926.

A debtor who does not pay a lawful debt when due, upon which the creditor obtains a judgment against him and levies on his property, "suffers and permits" the creditor to obtain a preference, through legal proceedings, within the meaning of Bankr. Act July 1, 1898, c. 541, § 3, subd. 3, cl. a, 30 Stat. 546, 547. *Bogen & Trummel v. Protter*, 129 Fed. 533, 534, 64 C. C. A. 63.

A will devised certain real estate in trust to a religious society for the erection of a chapel, and provided that the society should "suffer and permit" the same "to be under the care, custody, and management" of the deacons of the society as designated. A subsequent clause bequeathed a legacy for the support of an industrial school, "to be held and managed by the same persons as are to hold and manage the trusts in respect to the chapel"; and a third clause bequeathed a legacy to defray the expenses of maintaining a minister and public worship, and, if necessary, to be applied toward rebuilding the house, if destroyed. Held, that the deacons of the society were entitled to control the disposition and management of the property so devised and bequeathed, independent of the society holding the title. *Worcester City*

*Missionary Soc. v. Memorial Church*, 72 N. E. 71, 74, 186 Mass. 531.

#### Knowledge and intention implied

The words "suffer" and "permit," as used in Ky. St. 1903, § 1978, and in an indictment based thereon, mean that defendant must have suffered or permitted the game with knowledge that money or property was being bet, won, or lost thereby, or that some fact or circumstance must appear from which such knowledge might be inferred. *Bunnell v. Commonwealth* (Ky.) 99 S. W. 237, 239.

The words "suffer" and "permit," in the statute punishing one who suffers or permits gaming on premises in his possession or under his control, mean that accused must have suffered or permitted gaming, with knowledge that money was bet and won or lost thereby; or the evidence must show facts by which the jury may infer such knowledge. *Lancaster Hotel Co. v. Commonwealth*, 149 S. W. 942, 943, 149 Ky. 443.

At defendant's trial for suffering a game of poker to be played in a house in his occupation and control, under Ky. St. § 1978 (Russell's St. § 3572), the court instructed that it must be proved beyond a reasonable doubt that defendant suffered games of cards to be played in a house in his occupation or under his control at or in which money or property was won or lost, and that the expression "suffering games of cards to be played" meant the allowing or permitting games of cards to be played with the knowledge that money or property was, or is to be, won or lost thereon, without any further instruction as to the evidence from which the jury might infer such knowledge. Held, that these instructions fully covered the case. *Ruh v. Commonwealth*, 133 S. W. 219, 220, 141 Ky. 585.

#### Power to prevent implied

"Suffered," as used in a covenant against incumbrances "done, suffered, or made," implies reasonable control, and it cannot be held to apply to an incumbrance not caused by the act of the party nor within his power to prevent. *Polak v. Mattson*, 128 Pac. 89, 92, 22 Idaho, 727.

#### Voluntary and involuntary act included

Dismissal for failure to furnish additional security for costs is a nonsuit, within Rev. St. 1899, § 4285, declaring that, where plaintiff "suffers" a nonsuit, he may commence a new action within one year. *Wetmore v. Crouch*, 87 S. W. 954, 955, 188 Mo. 647, 3 Ann. Cas. 94 (citing and adopting *Chouteau v. Rowse*, 2 S. W. 209, 90 Mo. 191; *Hewitt v. Steele*, 38 S. W. 82, 136 Mo. 334).

In a suit for death, after the evidence for plaintiff was all in, plaintiff was compelled to take a nonsuit, with leave to move to set it aside. Thereafter a motion to set aside was denied, and judgment was rendered

in favor of defendant. Plaintiff then, without appealing from the judgment, started another suit. Rev. St. 1899, § 2868, as amended by Laws 1905, p. 138 (Ann. St. 1906, p. 1652), and section 4285 (Ann. St. 1906, p. 2357), provides that if any action shall have been commenced within the times prescribed in this chapter, and the plaintiff therein "suffer" a nonsuit, such plaintiff may commence a new action within one year after such nonsuit is suffered. Held, that the fact that the court rendered final judgment for defendant after denying the motion for nonsuit, did not make it any the less a judgment of nonsuit, permitting the second action within the statute, since on overruling of the motion to set aside the nonsuit, the case was out of court and no judgment on the merits could thereafter be entered. *Mason v. Kansas City Belt R. Co.*, 125 S. W. 1123, 1130, 226 Mo. 212, 26 L. R. A. (N. S.) 914.

## SUFFERANCE

See Tenant at Sufferance.

## SUFFICIENT

See Legally Sufficient; Safe and Sufficient.

The word "sufficient," within Rev. St. c. 98, § 10, requiring "sufficient" sureties on replevin bonds, means adequate to suffice or equal to the end proposed. *Massachusetts Breweries Co. v. Herman*, 76 Atl. 943, 944, 106 Me. 524.

An instruction, in the language of Kirby's Dig. § 6644, defining a railroad company's duty to maintain stock guards is not objectionable because it uses the words "good" and "sufficient," while the statute uses the words "suitable" and "safe"; the words being substantially the same. *Kansas City Southern R. Co. v. Greer*, 119 S. W. 1121, 1123, 90 Ark. 531.

An instruction that it was the duty of the carrier to stop the train a sufficient time to permit passengers to leave the car with safety was properly modified by changing the word "sufficient" to "reasonable." A "sufficient" time where the passenger acts with "reasonable" diligence is but tantamount to giving the passenger a reasonable opportunity to alight. *Barringer v. St. Louis, I. M. & S. R. Co.*, 85 S. W. 94, 95, 73 Ark. 548.

The words "ample" and "sufficient" are so nearly synonymous that no material error was committed in the use of the word "ample," in an instruction as to the time a train should stop at a station to permit passengers to alight, though the word "sufficient" would have been more appropriate. *St. Louis Southwestern R. Co. of Texas v. Haynes* (Tex.) 86 S. W. 934, 935.

An instruction requiring the carrier to use "sufficient" accommodations, instead of



"reasonable" accommodations, as required by statute, was not erroneous, where, from another instruction given, it was manifest that the court did not intend to convey to the jury, by use of the word "sufficient," any meaning beyond that intended by "reasonable," as used in the statute, and in that connection read to the jury the section of the statute requiring railroad companies to furnish "reasonable" accommodations. *Anderson v. South Carolina & G. R. Co.*, 61 S. E. 1096, 1097, 1098, 81 S. C. 1.

Though a statute requires motor vehicles to be provided with "a good and efficient" brake, an instruction that "a good and sufficient" brake must be supplied was not improper, as "efficient" means that which causes an effect, and "sufficient," as used in the instruction, meant, that the brake should be reasonably sufficient for the purposes for which it was intended, and it was therefore practically synonymous with "efficient." *Fox v. Barekman*, 99 N. E. 989, 991, 178 Ind. 572 (citing 7 Words and Phrases, p. 6763).

A cattle guard is "sufficient," within the meaning of the statute, if it ordinarily, usually, or generally prevents cattle from getting on the track. *Sappington v. Chicago & A. R. Co.*, 69 S. W. 32, 34, 95 Mo. App. 387.

An instruction, in an action for trespass to land, that by United States statutes a right of way for highways is granted over public lands, and long-continued user by the public is "sufficient" to establish an acceptance of the grant, is not objectionable as declaring long-continued user essential to the establishment of the highway. *Montgomery v. Somers*, 90 Pac. 674, 677, 50 Or. 259.

#### SUFFICIENT ABILITY

No absolute rule can be laid down as to what constitutes "sufficient ability," within the statute authorizing the commonwealth to recover charges paid for the support of an insane person, where he is of "sufficient ability." The word "sufficient" implies a consideration of the circumstances of the person who is called upon to pay, and the question is one of present ability and of the existing condition of things and not of future contingencies. A person will still be regarded as of "sufficient ability," though his capital is being impaired by the support of himself and his family, and will be still further impaired if he is required to contribute to the support of a daughter by a former marriage. A woman about 70 years old, who has about \$1,200, is in good condition physically, and has a good prospect of living 10 years with good care, her mental condition being such that she could with perfect safety be removed to a private family, if she could be well cared for, and might recover, is of "sufficient ability," within the meaning of the statute. *Chapin v. McCurdy*, 81 N. E. 652, 653, 196 Mass. 63 (citing *Templeton v. Stratton*, 128

Mass. 137). And one whose guardian has \$890 on deposit in a savings bank is of "sufficient ability," within the meaning of the statute. *Chapin v. Kelly*, 81 N. E. 653, 196 Mass. 66.

#### SUFFICIENT BOND

As used in Code, § 2450, providing that, where a statement of consent to the sale of intoxicating liquors has been filed, any citizen, on filing a "sufficient bond" for costs, may file a general denial as to the statement, and on being given notice thereof the persons who filed the statement, shall file with the city clerk bond conditioned to pay the costs of the hearing in the district court, in a sum to be fixed by the clerk of court, the words "sufficient bond" mean an adequate one, and have no reference to the conditions to be embodied in the instrument. A fair construction of the statute is that a penalty in the first of the two bonds provided for therein should be fixed by the clerk of court, and the bond filed with and approved by him. *Lemen v. Drexel*, 132 N. W. 184, 187, 152 Iowa, 144.

#### SUFFICIENT CASE FOR JURY

The words "sufficient case for the jury," in the statute authorizing the granting of a nonsuit when the plaintiff fails to prove a "sufficient case for the jury," are not meant as words of limitation as to cases which are tried only before a jury, but they are meant to be a guide to the court as a statutory test of the sufficiency of the evidence; and hence the court's right to grant a nonsuit extends to equity cases, and is not limited to those only which are triable to a jury. *McCafferty v. Flinn*, 107 Pac. 225, 226, 32 Nev. 269 (quoting *Burch v. Southern Pac. Co.*, 104 Pac. 225, 32 Nev. 75, Ann. Cas. 1912B, 1166).

#### SUFFICIENT CAUSE

See, also, Probable Cause.

The words "sufficient cause," as used in a benefit certificate, providing that the secretary of the medical board of the order should have power to reconsider any medical examination within six months after passing the same, and, if there be sufficient cause which existed at the time of the examination to have rejected it, he might reject it, whereupon the assured should cease to be a beneficiary member of the order, means more than a sufficient reason. They mean such a state of things, as distinguished from such as might in reason, but would not in fact, lead to a rejection. *Gilroy v. Supreme Court, I. O. F.*, 67 Atl. 1037, 1038, 75 N. J. Law, 584, 14 L. R. A. (N. S.) 632.

Where creditors of a decedent's estate presented judgments as claims against the estate, and assumed that the burden of proof was on the next of kin to show that the judgments were not within the class excepted from the operation of the discharge in bankruptcy, the error in such assumption was not

"sufficient cause" within Code Civ. Proc. § 2481, subd. 6, for opening a decree settling the administrator's account. In *re Peterson's Estate*, 124 N. Y. Supp. 907, 909, 68 Misc. Rep. 10.

#### As legal cause

A statute authorizing the removing of an officer for "sufficient cause," including incapacity and official misbehavior, contemplates a cause relating to the administration of his office, affecting the rights and interests of the public. *Lancaster v. Hill*, 71 S. E. 731, 732, 136 Ga. 405, Ann. Cas. 1912C, 272.

#### Probable cause synonymous

Under Pen. Code, § 872, providing that if it appears from the examination that a public offense has been committed, and there is sufficient cause to believe defendant guilty, the magistrate must issue the commitment, evidence that accused on June 16, 1906, stated, in the affidavit to secure registration as a voter, that he was born in England, and on January 31, 1908, stated, in a similar affidavit, that he was born in San Francisco, was sufficient to justify an order of commitment; the term "sufficient cause," as used in the statute being equivalent to the term "probable cause," as used in the habeas corpus act. Pen. Code, § 1487. *People v. Coombs*, 98 Pac. 686, 687, 9 Cal. App. 262

#### SUFFICIENT CONSIDERATION

A duebill, issued to the holder of an order for the payment of money for his services by the drawee of the order in part payment thereof, is supported by "sufficient consideration," under Civ. Code, §§ 2160, 2161, relating to "good consideration," since, the transaction amounting to an assignment of the order, the payee of the order lost his right to a statutory lien for his services, and the drawee (the maker of the duebill) gained the benefit of its waiver. *Parnell v. Davenport*, 93 Pac. 939, 940, 36 Mont. 571.

An agreement to extend the time for payment of a debt is ample consideration within Negotiable Instruments Law, §§ 25, 27, for an agreement in a collateral note that notes pledged may be held to secure any other debt. *American Nat. Bank v. J. S. Minor & Son*, 135 S. W. 278, 280, 142 Ky. 792.

#### SUFFICIENT DEED

See Good and Sufficient Deed; Good and Sufficient Quitclaim Deed.

#### SUFFICIENT DESCRIPTION

See Describe—Description.

The provision of Pol. Code, § 3650, subd. 2, providing that land must be listed for taxation by township, range, section, and, when such land is not a congressional division or subdivision by metes and bounds or other description "sufficient to identify" it, implies that evidence may be received, not

for the purpose of helping out a defective description or to show the intention with which it was made or to resolve an ambiguity in its terms, none of which things can be done, but to show the sufficiency of the description and apply the description given to the surface of the earth. *Baird v. Monroe*, 89 Pac. 352, 357, 150 Cal. 560 (quoting *Best v. Wohlford*, 78 Pac. 293, 144 Cal. 733).

#### SUFFICIENT EVIDENCE

See Sustained by Sufficient Evidence.

"Sufficient evidence" is defined to be such evidence as in amount is adequate to justify the court or jury in adopting the conclusion in support of which it is adduced. *United States v. Detroit Timber & Lumber Co.*, 124 Fed. 393, 402 (citing *Walker v. Collins*, 59 Fed. 70, 8 C. C. A. 1, and quoting *Cent. Dict.*).

An instruction, in a civil action, that plaintiff was required to establish his case to the satisfaction of the jury was error, since the jury might find for plaintiff if they believed from the preponderance of the evidence that he was entitled to recover; "satisfactory evidence" or "sufficient evidence" meaning the amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt. *Brewer v. Doose* (Tex.) 146 S. W. 323, 324 (citing 7 Words and Phrases, p. 6335).

In proceedings to have the name of a certain person stricken from the enrollment book of an election district, affidavits supporting the application, which stated that such person was not a qualified elector of the district in which the enrollment was made, that he had removed from, and no longer resided at, the address at which he was enrolled as residing, that he did not reside there, nor in such election district, at the time of the making of the affidavits, and that his then address was unknown, were not "sufficient evidence" to authorize a court in striking out such elector's name under subdivision 11 of section 3 of the primary election law (chapter 179, p. 332, of the Laws of 1898, as amended by chapter 350, p. 900, of the Laws of 1904), authorizing and requiring such action on proof consisting of "sufficient evidence" of the elector's removal from the election district, where they did not show that either affiant was the lessee, janitor, or proprietor of the house from which the elector enrolled, or in a position to know the facts set forth. In *re Dalessandro*, 81 N. E. 1163, 188 N. Y. 585.

The word "sufficiency," in the rule that a finding on conflicting evidence will be adhered to if supported by sufficient evidence, means sufficient in the mind of the reviewing court. *Faulkner v. Simms*, 94 N. W. 113, 115, 68 Neb. 295.

#### SUFFICIENT FENCE

See Legal and Sufficient Fence.

**SUFFICIENT GROUNDS**

The words "sufficient grounds," as used in the statute regulating the practice in granting writs of ne exeat, mean grounds sufficient under the principles of the common law, and no grounds are sufficient, under those principles, unless it appears that the party is a debtor. *Davidor v. Rosenberg*, 109 N. W. 925, 926, 130 Wis. 22, 118 Am. St. Rep. 986.

**SUFFICIENT INSTRUCTION**

"Instructions" are "sufficient," if, when considered in their entirety and not by detachments or fragments, they adequately present the issues in the case. *Oölitic Stone Co. of Indiana v. Ridge*, 91 N. E. 944, 951, 174 Ind. 558.

**SUFFICIENT SUPPORT**

See Good and Sufficient Support.

**SUFFICIENT TITLE**

See Good and Sufficient Title.

**SUFFICIENT VALUE**

As used in St. 1906, c. 356, § 1, as amended by St. 1910, c. 460, providing that if the commissioners on fish and game determine that the fish or fisheries of any brook or stream are of sufficient value to warrant the prohibition or regulation of the discharge therein from sawmills, and that the discharge or sawdust from a particular mill injures the fish, they may regulate or prohibit such discharge, the words "of sufficient value" mean of a value sufficient to justify the preservation and multiplication of the fish in the stream, in view of all the circumstances, including the location of the stream, the opportunities afforded by it for enjoyment, etc., and do not mean that it must be of sufficient value to justify devoting the stream to fish culture, instead of industry. *Lyman v. Commissioners on Fisheries and Game*, 97 N. E. 66, 67, 211 Mass. 10.

**SUFFICIENT WATER SUPPLY**

In view of the amendment of 1905 (Laws 1905, c. 339), a "sufficient" supply of water to run the mills, etc., did not mean the natural flow of the river, but only "sufficient water" for that purpose when the rights of others having property which might be affected by the use of the water were considered; the word "head" being used in the original act in the sense of "reserve," nor was it required that sufficient water be vented at any time without regard to the dam company's duty to the public of driving logs through the dam. *Milo Electric Light & Power Co. v. Sebec Dam Co.*, 84 Atl. 941, 943, 109 Me. 427.

**SUFFRAGE**

The right of "suffrage" includes the right to form political parties, and the right of each party to have all the machinery, not

reasonably prohibited by law, for making its organization effective as to the policy of its members by electing officers in harmony therewith. *State ex rel. McGrael v. Phelps*, 128 N. W. 1041, 1054, 144 Wis. 1, 35 L. R. A. (N. S.) 353.

The right of "suffrage" is a political privilege, and not a vested or natural right, and may be limited by statute, except as prohibited by the Constitution. *Russell v. State ex rel. Crowder*, 87 N. E. 13, 17, 171 Ind. 623.

"Suffrage" or the right to vote is not a necessary incident of citizenship, nor inherent in each and every individual, but is the exercise of political power, which may be conferred, modified, or withdrawn by the people, in the exercise of their sovereign will. *Solon v. State*, 114 S. W. 349, 353, 54 Tex. Cr. R. 261 (citing 15 Cyc. p. 280; *Cooley, Const. Lim.* 752; *Anderson v. Baker*, 23 Md. 531; *State ex rel. Attorney General v. Dillon*, 14 South. 383, 32 Fla. 545, 22 L. R. A. 124).

**At primary**

A party primary election law is not rendered unconstitutional because the right of "suffrage" at the primary is made dependent upon the assertion of a partisan belief by the elector and because such election regulations forbid an elector from voting who belongs to no political party. *State v. Flaherty*, 136 N. W. 76, 78, 23 N. D. 313, 41 L. R. A. (N. S.) 132.

**SUGAR CANDY**

So-called dragees, small round bodies with a silver coating, which are composed of sugar and starch, and are used by bakers for decorating cakes, and to some extent by confectioners, are not "sugar candy" or "confectionery," within the meaning of the Tariff Act, but are dutiable as articles in part of silver. *La Manna, Azema & Farnan v. United States*, 154 Fed. 955, 956 (citing *Seeberger v. Schlesinger*, 14 Sup. Ct. 729, 152 U. S. 581, 587, 38 L. Ed. 560).

**SUGGEST**

See False Suggestion of Material Fact.

"Suggestion" of a compound or preparation is an entirely different thing from such an origination or discovery of a process for making the compound as would entitle the discoverer to letters patent for the process." Where defendant's assignor agreed with plaintiff to manufacture and sell proprietary medicines suggested by plaintiff, and he conveyed to defendant's assignor and a firm formed by him all his right and title to certain formulæ, in consideration of an agreed royalty on sales, and the contract was subsequently modified as between plaintiff and defendant, by which defendant agreed to pay a royalty on all sales of the preparations "suggested" by plaintiff and bearing his

name, plaintiff was entitled to royalties on all the preparations which were then or thereafter sold by defendant as plaintiff's preparations, though he might not have invented or discovered the process for making them. *Barclay v. Charles Roome Parmele Co.*, 61 Atl. 715, 718, 70 N. J. Eq. 218.

## SUI JURIS

See Non Sui Juris.

The word "sui juris," as used in an instruction in a personal injury suit, submitting it to the jury to determine whether or not the person injured, who was under six years of age, was sui juris, means that the child was of sufficient age and discretion to care for his own safety, and render it prudent to permit him to be about alone. *Kostenbaum v. New York City R. Co.*, 105 N. Y. Supp. 65, 67, 120 App. Div. 160.

## SUICIDE

See Commit Suicide; Contemplated Suicide.

See, also, Felo de Se; Self-Destruction; Voluntary Self-Destruction.

"Suicide" in law is the act of taking one's own life voluntarily and intentionally—self-murder. *Sampson v. Ladies of Macabees of the World*, 131 N. W. 1022, 1024, 89 Neb. 641; *Coverston v. Connecticut Mut. Life Ins. Co.*, 6 Fed. 654, 655.

The meaning of the term "suicide" at the common law is that one who, being of years of discretion and sound mind, destroys himself. The act consists in designedly destroying one's life. *Rudolph v. United States ex rel. Stuart*, 36 App. D. C. 379, 385; *Plunkett v. Supreme Conclave, Improved Order of Heptasophs*, 55 S. E. 9, 10, 105 Va. 643.

"In the eye of the law, the taking of life by an insane person, whether it be his own or that of some other person, is not an act for which he is responsible. In the Century Dictionary a 'suicide' is defined to be one who commits suicide; at common law one who, being of the years of discretion and sound mind, destroys himself; and the act itself is defined to be designedly destroying one's own life. To constitute 'suicide' at common law, the person must be of years of discretion and of sound mind." The Penal Code defines "suicide" as the intentional taking of one's life. The benefit laws of a mutual benefit association provided that, if any member committed "suicide," such act avoided all rights under his certificate except that the executive committee of the association should pay the beneficiary a certain reduced amount according to other subdivisions of the section, one of which declared that, if the member committed "suicide" within one year from the date of his certificate, the beneficiary should receive one-twentieth of the amount thereof. The association was liable

for the full amount of its certificate issued to a member who died from strangulation occasioned by hanging herself while being insane; she being incapable of an intent to take her life. *Mauch v. Supreme Tribe of Ben Hur*, 91 N. Y. Supp. 367, 369, 100 App. Div. 49 (quoting and adopting definition in *Weber v. Supreme Tent of Knights of Macabees of the World*, 65 N. E. 253, 172 N. Y. 490, 92 Am. St. Rep. 753).

"Suicide" includes the moral element of self-destruction, while an insane person may kill himself without the presence of such moral element. *Gavin v. Des Moines Life Ins. Co.*, 126 N. W. 906, 908, 149 Iowa, 152.

In an action on a life policy, the law never presumes "suicide" from the fact of self-destruction. *Mutual Life Ins. Co. v. Durden*, 72 S. E. 295, 297, 9 Ga. App. 797.

### As crime

See Crime.

### Die by one's own hand synonymous

"Die by his own hand," "die by suicide," and "commit suicide" are synonymous with "voluntary suicide." *Campbell v. Order of Washington*, 102 Pac. 410, 412, 53 Wash. 398 (quoting and adopting definition in *Grand Legion of Select Knights v. Korneman*, 63 Pac. 293, 10 Kan. App. 577).

The word "suicide" and the words "to die by his own hand," or "by his own act," or "to take his own life," mean the same thing, and convey the idea of voluntary, intentional self-destruction. A provision in a life insurance policy to the effect that, if the insured, "whether sane or insane, die by his own hand," the policy shall be null and void is valid; and its breach renders the policy void, unless the assured was in such a state of mind as to be unconscious of the physical nature of the act of self-destruction. In the absence of any proof as to his insanity, all the presumptions are in favor of his sanity and of his consciousness of the character of the act which he committed. *Dickerson v. Northwestern Mut. Life Ins. Co.*, 65 N. E. 694, 696, 200 Ill. 270 (citing *Grand Lodge, Independent Order of Mutual Aid, v. Wieting*, 48 N. E. 59, 168 Ill. 408, 61 Am. St. Rep. 123; *Supreme Lodge, Order of Mutual Protection, v. Gelbke*, 64 N. E. 1058, 198 Ill. 365; *Mutual Life Ins. Co. v. Terry*, 82 U. S. [15 Wall.] 580, 21 L. Ed. 236; *Bigelow v. Berkshire L. Ins. Co.*, 93 U. S. 284, 23 L. Ed. 918; *Home Benefit Ass'n v. Sargent*, 12 Sup. Ct. 332, 142 U. S. 691, 35 L. Ed. 1160).

The word "suicide," as used in a mutual benefit certificate declaring that no benefit shall be paid on the death of a member who shall commit suicide within five years from and including the date of his initiation, means voluntary, intentional self-destruction, and does not bar a recovery if, when the deceased took his life, he was so affected with insanity as to be unconscious of the act or

of the physical effect thereof, or was driven to the commission of the fatal act by an insane impulse which he had not the power to resist. *Supreme Council of Royal Arcanum v. Pels*, 70 N. E. 697, 698, 209 Ill. 33.

**As deliberate or voluntary self-killing**

When the reasoning faculties of insured are so impaired that he does not understand the consequences of the act he is about to commit when taking his own life, or if he is impelled thereto by an insane impulse which he has not the power to resist, such death is not "suicide," within the provisions of a benefit certificate making it void if death is so caused. *Knapp v. Order of Pendo*, 79 Pac. 209, 210, 36 Wash. 601.

If one in a fit of delirium or other condition of irresponsibility, without intention to take his own life, does some act from which his death ensues, such death is by "accident," not by "suicide." *Cady v. Fidelity & Casualty Co. of New York*, 113 N. W. 967, 970, 134 Wis. 322, 17 L. R. A. (N. S.) 260.

**As intentional injury**

See Intentional Injury.

**Self-killing by accident or mistake**

The phrase "self-destruction or suicide," as used in a certificate of membership in a benefit association, declaring that the contract for benefits does not include assurance against self-destruction or suicide, whether the member be sane or insane, does not prevent a recovery on the certificate where the member's death was due to his voluntary taking of carbolic acid, not with intent to cause death, but to frighten his wife into giving him money. *Courtemanche v. Supreme Court*, I. O. O. F., 98 N. W. 749, 750, 136 Mich. 30, 64 L. R. A. 668, 112 Am. St. Rep. 345.

**Self-killing while insane**

"Suicide," being the intentional killing of one's self, could not be predicated of the act of an insane person, which must be regarded as involuntary, and not really his act. *Jarnagin v. Travelers' Protective Ass'n of America*, 133 Fed. 892, 895, 66 C. C. A. 622, 68 L. R. A. 499.

While Civ. Code 1910, § 2500, provides that death of insured, by "suicide" releases an insurer from the obligation of the contract, yet every act of self-destruction is not suicide within the rule, since in law self-destruction as a result of insanity is not suicide. *Fraternal Relief Ass'n v. Edwards*, 70 S. E. 265, 267, 9 Ga. App. 43.

In Civ. Code 1910, § 2500, providing that death by suicide releases the insurer from the obligation of his contract, "suicide" is intentional self-destruction by one who is sane; an accidental act or one by an insane person not being legally suicide. *Mutual Life Ins. Co. of New York v. Durden*, 72 S. E. 295, 297, 9 Ga. App. 797.

A beneficiary, suing on a fraternal benefit certificate stipulating that the member committing suicide shall forfeit all benefits which his beneficiary would otherwise have, and providing that on it being established that the member was a lunatic, and recognized as such, and the secretary of the order notified thereof, his suicide shall not operate as a forfeiture of the benefits, and that the burden of proof shall be on the beneficiary, must, on showing that the member committed suicide, prove that he was at the time a lunatic, and prior thereto recognized as such; the word "suicide" including an act committed by any one, whether sane or insane, though ordinarily the word when used in a contract of insurance does not include a case of suicide by an insane person. *Schack v. Supreme Lodge of Fraternal Brotherhood*, 99 Pac. 989, 990, 9 Cal. App. 584.

**SUICIDE, SANE OR INSANE**

When a contract of life insurance provides that the policy shall be void if insured shall commit "suicide" within a certain time, whether at the time of committing suicide the insured shall be either sane or insane, the meaning is that, regardless of his sanity or insanity, the voluntary self-destruction of the insured within the time set out, shall invalidate the policy. *Jenkins v. National Union*, 45 S. E. 449, 450, 118 Ga. 587.

The term "death by suicide, sane or insane," does not include death by the act of the assured, without any mental purpose of self-destruction. *Cady v. Fidelity & Casualty Co. of New York*, 113 N. W. 967, 970, 134 Wis. 322, 17 L. R. A. (N. S.) 260.

**SUIT**

See Civil Action—Case—Suit—etc.; Class Suit; Costs of Suit; Creditors' Suit; In Suit; Multiplicity of Suits; Original Suit; Party to Suit or Proceeding; Prior Suit; Purposes of Suit; Stockholder's Suit; Time of Suit.

Action or suit—inter partes, see Action Inter Partes.

Any and all suits, see Any.

Any suit, see Any.

Recover by suit, see Recover—Recovery.

A "suit" is a prosecution of some demand in a court of justice. *Myers v. State*, 105 S. W. 48, 50, 47 Tex. Civ. App. 336.

"Suit" is a general term denoting any legal proceeding of a civil kind." In *re Oliver's Guardianship*, 83 N. E. 795, 796, 77 Ohio St. 474.

"A 'suit at law' is a contest between two parties in the court of justice; the one seeking and the other withholding the thing in contest." *Monmouth Inv. Co. v. Means*, 151 Fed. 159, 163, 80 C. C. A. 527 (quoting and adopting definition in *Pearson v. Nesbit*, 12 N. C. 315, 17 Am. Dec. 569).

A "suit" is the pursuit in a court of justice of the remedy to which the party by reason of the existence of the supposed facts believes himself to be entitled. *Baltimore & O. R. Co. v. Larwill*, 93 N. E. 619, 621, 83 Ohio St. 108, 34 L. R. A. (N. S.) 1195.

"A 'suit' is 'any proceeding for the purpose of obtaining such remedy as the law allows.'" *State ex rel. West v. McCafferty*, 105 Pac. 992, 997, 25 Okl. 2 (quoting *Bookwalter v. Conrad*, 39 Pac. 573, 851, 15 Mont. 464).

The word "suit" is of comprehensive signification and applies to any proceeding in a court of justice in which a person pursues a remedy which the law affords him for the redress of an injury, or the recovery of a right, and it includes both actions and proceedings. *In re Sherill*, 81 N. E. 124, 135, 188 N. Y. 185, 117 Am. St. Rep. 841.

Though the Code abolished the common-law distinctions between suits and actions and did away with the name suits, a "suit" now is either an action or a proceeding in the nature of an action in court. *In re Milwaukee Light, Heat & Traction Co.*, 125 N. W. 908, 905, 142 Wis. 424, 27 L. R. A. (N. S.) 567, 20 Ann. Cas. 707.

Ordinarily the term "suit" is applied to any proceeding in a court of justice by which one pursues that remedy which the law affords him, but it is not always essential that the proceedings should be originally instituted in a court. *Cass County v. Sarpy County*, 119 N. W. 685, 686, 83 Neb. 435 (citing 7 Words and Phrases, p. 6769).

Strictly speaking, under the code practice, "we have no such thing as 'suits,' although we commonly use that term. We have only actions and special proceedings. What were formerly denominated 'suits in equity' and 'actions at law' are now denominated 'civil actions.'" *State ex rel. Risch v. Board of Trustees of Policemen's Pension Fund*, 98 N. W. 954, 959, 121 Wis. 44.

A "suit" or "action" being "the lawful demand of one's right in a court of justice" (quoting Words and Phrases, vol. 1, p. 129), while a "complaint" is, under B. & C. Comp. § 67, a concise statement of the facts constituting the cause of action, the dismissal of the complaint on sustaining a demurrer thereto does not necessarily discharge the demand so as to terminate the action and permit an appeal from the order of dismissal. *Giant Powder Co. v. Oregon Western Ry. Co.*, 103 Pac. 501, 502, 54 Or. 325.

St. 1907, c. 290, effective April 13, 1907, relating to the dissolution of certain corporations, provided (section 2) that nothing in the act should affect any suit pending by or against any corporation mentioned in the first section thereof. Held, that the word "suit," as used in such section, included every proceeding in a court of justice by which a

person might pursue a remedy afforded by law, including an action at law, and that the word "pending" was descriptive of the action from the date of the writ, so that, the writ in a suit by a corporation having been dated April 9, 1907, the suit was pending, and was not abated by the dissolution of the corporation under such act, notwithstanding the reference in section 1, to St. 1903, c. 437, §§ 52, 53, continuing the corporate existence of dissolved corporations, for three years only, to prosecute and defend suits. *Worcester Color Co. v. Henry Wood's Sons Co.*, 95 N. E. 392, 395, 209 Mass. 105.

The word "suit," in Gen. Laws, c. 187, § 34, providing that on notice to the proper officer of a railroad 14 days previous to commencing a suit on account of any lawful claim against the railroad, if the railroad neglects or refuses to pay the claim, and plaintiff recovers more than the amount tendered by it, he shall also recover reasonable compensation, means a suit which is prosecuted to final determination, and the fact that a suit has been commenced against the railroad before the service of the required notice does not preclude plaintiff from recovering counsel fees, where he does not enter such suit in court, but, after giving the notice, institutes another suit, which he prosecutes to a successful termination. *Smallwood v. New York, N. H. & H. R. Co.*, 59 Atl. 314, 315, 26 R. I. 451.

#### Action synonymous

The words "action" and "suit," as used in statutes of limitation, are generally synonymous. *Whitfield v. Burrell*, 118 S. W. 153, 156, 54 Tex. Civ. App. 567; *Jellison v. Swan*, 74 Atl. 920, 922, 105 Me. 358.

Rev. St. 1874, c. 63, § 11, providing that notice of proceedings by an abandoned spouse to sell the property of the delinquent spouse for family support shall be given "as in ordinary actions," and that anything done under "the order or decree of the court" shall be valid, as if done by the party owning the property, authorizes service by publication as in chancery, notwithstanding the use of the word "action"; that word in a comprehensive sense being synonymous with "suit," and being used interchangeably therewith to mean any legal proceeding in a court for the enforcement of a right, so that the words "ordinary actions" did not contemplate personal service as in a strictly legal action. *Brand v. Brand*, 96 N. E. 918, 920, 252 Ill. 134.

In a legal sense, "action," "suit," and "cause" are convertible terms. *Tillamook County v. Wilson River Road Co.*, 89 Pac. 958, 959, 49 Or. 309 (citing Bouv. Law Dict.; And. Law Dict.); *Messenger v. Board of Com'rs of Converse County*, 117 Pac. 126, 130, 19 Wyo. 309.

**Proceeding by appeal, error, or review**

As used in the act of separation of Maine from Massachusetts, providing that all rights and liabilities of all persons shall, after said separation, continue the same as if said district was still a part of this commonwealth in all suits pending, etc., the term "suits" included a pending petition for review. *Hobart v. Tilton*, 1 Me. (1 Greenl.) 399.

**Assessment on corporate stock**

A proceeding by the trustee of a bankrupt corporation to have an assessment ordered on unpaid stock is not a "suit" within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 23b, 30 Stat. 552, but is an administrative proceeding within the jurisdiction of a court of bankruptcy, since it does not require notice to nor the presence of the stockholders, whose personal rights are not involved but remain to be determined in subsequent suits to collect the assessments if made. *In re Newfoundland Syndicate*, 196 Fed. 443, 445.

**Bankruptcy proceeding**

A creditor, who objects to the discharge of a bankrupt, may prosecute his objections in forma pauperis by virtue of Act July 20, 1892, c. 209, 27 Stat. 252, which gives any citizen, entitled to commence "any 'suit' or 'action' in any court of the United States," such right on making the required showing. Objections to a bankrupt's discharge are the beginning of a distinct and separate dispute and fall within the accepted definition of a "suit" or an "action." *In re Gullbert*, 154 Fed. 676, 677 (citing Words and Phrases, ad verba).

An application by a trustee in bankruptcy to open the proceeding on the ground that it had been closed before the estate had been fully administered is not a "suit," within Bankr. Act July 1, 1898, c. 541, § 11d, 30 Stat. 549, providing that suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate is closed. *In re Paine*, 127 Fed. 246, 248.

**Case synonymous**

The word "suits," in R. S. 1857, c. 82, § 78, making parties and other persons interested in "suits" competent as witnesses, is not synonymous with the word "cases," in section 83, excepting cases prosecuted or defended by executors or administrators. *Gunnison v. Lane*, 45 Me. 165, 166.

**Cause synonymous**

As used in the federal removal statute, the words "suit" and "cause" mean the same thing. In common usage, and very often in statutes and decrees, the words "suit," "action," "case," and "cause" are used interchangeably to indicate the same thing. As defined by Bouvier, a "cause" is "a contested question before a court of justice; it is a

suit or action." *Young v. Southern Bell Telephone & Telegraph Co.*, 55 S. E. 765, 767, 75 S. C. 326, 7 L. R. A. (N. S.) 501, 9 Ann. Cas. 940.

**Condemnation proceeding**

Until an appeal has been taken from the award filed by commissioners in condemnation proceedings under the drainage statute of Kansas, the proceeding is in the nature of an inquest to determine damages, and is not a "suit," within the meaning of the removal statute, and is not removable into a federal court. *Kaw Valley Drainage Dist. v. Metropolitan Water Co.*, 186 Fed. 315, 108 C. C. A. 393; *Kaw Valley Drainage Dist. v. United States Trust Co. of Kansas City, Mo.*, 186 Fed. 324, 108 C. C. A. 402.

"The term 'suit' is certainly a very comprehensive one and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. Modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which a decision of the court is sought is a suit." A proceeding by a railroad company to condemn right of way under the statutes of South Dakota is a civil suit, within the federal judiciary act, and is removable where the requisite diversity of citizenship exists and the jurisdictional amount is involved. *South Dakota Cent. R. Co. v. Chicago, M. & St. P. R. Co.*, 141 Fed. 578, 580, 73 C. C. A. 176 (quoting and adopting definition in *Weston v. Charleston*, 27 U. S. [2 Pet.] 449, 7 L. Ed. 481).

**Proceeding before state board**

The phrase, "suits at common law and in equity," as used in Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091), providing for the removal of causes, embraces not only ordinary actions and suits, but includes all the proceedings in the ordinary law and equity tribunals, as distinguished from proceedings in military, admiralty, and ecclesiastical courts, but does not include a proceeding before the board of control of the state of Oregon on a petition by the users of the water in a stream for an investigation to determine the rights of appropriators as authorized by Laws Or. 1909, p. 319, in any event, not during the preliminary proceedings before the board and prior to an appeal to the courts, such proceeding being one in the nature of a hearing before executive or administrative officers in the exercise of their functions to regulate and control the use of state waters. *In re Silvies River*, 199 Fed. 495, 501.

**Criminal prosecution**

The term "suit," as used in Acts 1905, p. 46, providing for the transfer of suits pending in a county or counties from which a new county has been laid off, cannot, without serious strain, be construed to include a criminal case. *Pope v. State*, 53 S. E. 384, 385,

124 Ga. 801, 110 Am. St. Rep. 197, 4 Ann. Cas. 551.

**Proceeding to discover assets of estate**

A proceeding for the discovery of assets belonging to a decedent's estate is a "suit pending," within the meaning of a statute providing for the taking of depositions in a suit pending, even though the person from whom discovery is sought is charged with embezzlement of the assets. *Ex parte Gfeller*, 77 S. W. 552, 556, 178 Mo. 248.

Rev. St. 1899, § 74 (Ann. St. 1906, p. 362), provides that, on the filing of an affidavit alleging cause to believe that an administrator has withheld assets, the court may cite and compel him to appear by attachment. Section 75 provides for the examination of the administrator and witnesses on oath, provided interrogatories shall be filed and answered in writing by the parties cited, and sections 77 and 78 (pp. 363, 364) provide for a trial of the issues raised on such interrogatories. Held, that such a proceeding was a "suit" between the affiant and the administrators, and, where the amount involved was from \$12,000 to \$15,000, jurisdiction of an appeal from the circuit court was in the Supreme Court, and not in the Court of Appeals. *In re Clinton's Estate*, 123 S. W. 1, 2, 223 Mo. 371.

**Drainage proceeding**

A proceeding under the Farm Drainage Act, to establish a special drainage district, is not a "suit or proceeding at law or in chancery," within the Appellate Court Act and the Practice Act; a "suit or proceeding at law" meaning one substantially conforming with the forms and modes prescribed by common law, and a "suit or proceeding in chancery" meaning one substantially conducted according to the forms and modes prescribed by the rules of chancery. Hence an appeal to or writ of error from the Supreme Court to review an order of the county court, establishing a drainage district, is unauthorized. *Myers v. Commissioners of Newcomb Special Drainage Dist.*, 91 N. E. 1070, 1073, 245 Ill. 140.

**Election contest**

Const. art. 6, § 38, and Rev. St. 1899, § 4681, require all writs and process to run in the name of the state and all writs to be attested by the clerk of the court from which they are issued. Const. art. 8, § 9, declares that the trial of contested elections shall be by the courts of law, and authorizes the General Assembly to designate the court or judge by whom the contest shall be tried and to regulate the manner of trial and incidental matters. Rev. St. 1899, § 7029, in relation to election contests, gives jurisdiction to the circuit courts, and provides for a notice to be given by the contestant to the contestee, which shall specify the grounds upon which the contestant relies. Held, that a proceeding to contest an election is not a case or

"suit" which requires the filing of a petition in court, and the suing out of a writ of summons running in the name of the state, and a notice in conformity with section 7029, is due process. *State ex rel. Wells v. Hough*, 91 S. W. 905, 911, 193 Mo. 615.

**Executory process**

A proceeding, termed "executory process" in Louisiana, to seize and sell a vessel under a mortgage, is a "suit" within Act Cong. Aug. 13, 1888, c. 866, 25 Stat. 433, which provides for the removal of certain suits. *W. G. Coyle & Co. v. Stern*, 193 Fed. 582, 585, 113 C. C. A. 450.

**Injunction**

Where the injunction applied for is merely ancillary to the main purpose of the "suit," the suit is not a suit for injunction within Rev. St. 1895, art. 2996, providing that writs for injunction shall be returnable to and tried in the county in which defendant has his domicile. *International & G. N. R. Co. v. Anderson County (Tex.)* 150 S. W. 239, 248.

**Proceeding to recover penalty**

"The word 'suit' is generally used to designate a civil case." An action by the state for penalties imposed by the anti-trust act of Texas, declaring that corporations violating the act shall be guilty, and when convicted, shall be subject to penalties recoverable by "suit" where the "offense" is committed, is not a criminal prosecution, within the statute prescribing the time for the institution of criminal prosecutions, but is a civil suit. *Waters-Pierce Oil Co. v. State*, 106 S. W. 918, 927, 48 Tex. Civ. App. 162.

**Law actions**

The term "suit," though frequently used to include both actions at law and suits in equity, is more appropriately applied to the latter. *Mathis v. Stevenson*, 71 Atl. 267, 268, 75 N. J. Eq. 68.

The word "suits" is a very comprehensive term, and includes all actions at law, ex contractu and ex delicto, and all actions in equity. *L. Buckl & Son Lumber Co. v. Atlantic Lumber Co.*, 128 Fed. 332, 340, 63 C. C. A. 62.

The word "suit" includes an action at law as well as a proceeding in equity (citing 7 Words and Phrases, 6769), and should be so construed as used in Judiciary Act March 3, 1875, c. 137, § 8, 18 Stat. 472, providing that no civil suit shall be brought by original process or proceeding in any other district than that whereof defendant is an inhabitant or in which he shall be found at the time of serving such process or commencing the suit. *Elk Garden Co. v. T. W. Thayer Co.*, 179 Fed. 556, 558.

**Mandamus proceeding**

Mandamus is a "personal action," within Rev. Code 1852, amended to 1893, p. 787, c. 105, § 2, declaring that all personal actions,



with specified exceptions, shall survive, and is a "suit at law," within Const. art. 4, § 26, providing that no suit at law shall abate at the death of any party, where the cause of action survives. *State v. Jessup & Moore Paper Co. (Del.)* 80 Atl. 350, 351.

#### Probate proceeding

Under Rev. St. 1895, art. 1889, subd. 4, requiring the clerk of court on an application for the probate of a will to cite all persons interested in the estate to appear and contest the application if they desire, a married woman who is interested as an heir in the estate of a decedent may contest the probate of the will, whether she is or is not joined by her husband, since a contest to probate a will by the heirs is not a "suit," within the statute, in which a wife must be joined by her husband. *Pierce v. Farrar (Tex.)* 126 S. W. 932, 933.

"The proceeding to establish or prove the claim against the executors is essentially an independent 'suit' inter partes and not a matter of 'pure probate jurisdiction.'" *Farmers' Bank of Cuba City, Wis., v. Wright*, 158 Fed. 841, 850 (citing and adopting *Broderick's Will*, 88 U. S. [21 Wall.] 503, 22 L. Ed. 599; *Farrell v. O'Brien*, 25 Sup. Ct. 727, 199 U. S. 89-110, 50 L. Ed. 101).

#### Writ of prohibition

A writ of prohibition is a "suit." *Weston v. Charleston*, 27 U. S. (2 Pet.) 449, 464, 7 L. Ed. 481; *Eckert v. Wood*, 69 S. W. 45, 46, 95 Mo. App. 378.

#### Proceeding in rem

"Suit" is the following of a person and is not only not technically, but not even in common parlance, applied to seizure or proceedings in rem." The foreclosure of a lien is strictly a proceeding in rem and does not become in any sense a suit until an affidavit is made. *Weston v. Beverly & McCollum*, 73 S. E. 404, 405, 10 Ga. App. 261 (quoting and adopting the definition in *The Little Ann*, 15 Fed. 622).

#### Receivership

A "suit actually commenced and pending" to justify the appointment of a receiver, under Code, § 267, must be one in which the main relief sought is independent of the receivership, and the latter is a purely ancillary remedy. *Vila v. Grand Island Electric Light, Ice & Cold Storage Co.*, 94 N. W. 136, 138, 68 Neb. 222, 63 L. R. A. 791, 110 Am. St. Rep. 400. 4 Ann. Cas. 59 (citing *Merchants' & Manufacturers' Nat. Bank v. Kent Circuit Judge*, 5 N. W. 627, 43 Mich. 296; *State ex rel. Merriam v. Ross*, 25 S. W. 947, 122 Mo. 456, 23 L. R. A. 534; *In re Brant*, 96 Fed. 257; *Barber v. International Co. of Mexico*, 48 Atl. 758, 73 Conn. 593; *State v. Union Nat. Bank*, 44 N. E. 585, 145 Ind. 537, 57 Am. St. Rep. 209).

#### Scire facias

See *Scire Facias*.

"Scire facias" is regarded in law as an action or "suit." *McFellian v. Lunt*, 14 Me. 254, 258.

#### Same—Suit on judgment distinguished

While scire facias to revive a judgment is like a "suit" on a judgment in respect to parties, and in that it requires a defense, the judgment in the suit on the judgment is for the debt and damages, while that on the scire facias is that plaintiff have execution, and until the judgment debt is satisfied scire facias may be prosecuted at the same time as the action on the debt, and the pendency of the scire facias does not abate the suit on the judgment. *Drennen v. Dunn*, 52 South. 313, 314, 166 Ala. 213.

#### SUIT AFFECTING TITLE

See *Affecting*.

#### SUIT AGAINST THE STATE

A suit against an individual, although he be a state official, to prevent him from effecting the destruction of property, or the impairment of property rights, under color of an unconstitutional law, is not a "suit against the state," within Const. U. S. Amend. 11. *Seaboard Air Line R. Co. v. Railroad Commission of Alabama*, 155 Fed. 792, 808.

The North Carolina Corporation Commission and the Attorney General being specially charged by Revisal N. C. 1905, §§ 1060, 1113, 5380, and Laws 1907, p. 251, c. 217, § 2, with the enforcement of such chapter, a suit against the Attorney General and the members of the commission to restrain the enforcement of the chapter, and other similar laws, because of alleged unconstitutionality, was not a "suit against the state," within Const. U. S. Amend. 11, providing that the judicial power of the United States shall not extend to any suit against one of the United States by citizens of another state, or by citizens or subjects of a foreign state. *Southern R. Co. v. McNeill*, 155 Fed. 756, 777.

A suit in a federal court against the North Carolina Corporation Commission, the Attorney General, and Assistant Attorney General to enjoin the enforcement of the act of March 2, 1907, the maximum passenger rate act (Acts 1907, p. 250, c. 216), prohibiting a railroad company to charge a passenger rate in excess of 2¼ cents a mile, and imposing a penalty on the railroad company for a violation thereof, and declaring any agent of the railroad company violating the same guilty of a misdemeanor, is a "suit against the state," within Const. U. S. Amend. 11, declaring that the judicial power of the United States shall not extend to any suit against a state by a citizen of another state. *State v. Southern Ry. Co.*, 59 S. E. 570, 582, 145 N. C. 495, 13 L. R. A. (N. S.) 966.

A suit against the Attorney General of a state to restrain him as an officer of the state from enforcing by civil actions an unconstitutional enactment of the Legislature, as therein directed, to the injury of a private citizen or corporation in a matter in which the state has no pecuniary interest, is not a "suit against the state," of which a federal court is denied jurisdiction by the eleventh constitutional amendment. *Consolidated Gas Co. v. New York*, 157 Fed. 849, 882.

A suit in a federal court to restrain the Missouri Secretary of State from enforcing Laws Mo. 1907, p. 174, requiring him to cancel the license of any foreign railroad corporation to do business in Missouri in case it removed an action brought against it to the federal court, and providing, in addition, a penalty of not less than \$2,000 nor more than \$10,000 for each offense, with disability to again do business within the state for five years, on the ground that such act was unconstitutional, was not a "suit against the state," within Const. U. S. Amend. 11, providing that the judicial power of the United States shall not extend to any suit against one of the United States by citizens of another state, etc.; such an action being construed to be against the state when it involves only penalties, fees, and costs, and property rights are not involved. *Chicago, R. I. & P. R. Co. v. Swanger*, 157 Fed. 783, 789.

Where a state statute provides that suits to recover penalties for its violation shall be brought in the name of the state by direction of the Governor, the Governor acts thereunder officially as executive officer of the state having a discretionary power, and a "suit" to enjoin him from exercising such power is one "against the state," of which a federal court is without jurisdiction under the eleventh constitutional amendment. *Central of Georgia R. Co. v. McLendon*, 157 Fed. 961, 963.

An action by a university, whose lands are exempt from taxation, against officers charged with the duty of levying and collecting taxes, to restrain such officers from enforcing taxes on improvements erected by lessees on such exempt lands, is not a "suit against the state," so as to exclude the jurisdiction of the federal courts. *University of the South v. Jetton*, 155 Fed. 182, 187.

A suit to enjoin the enforcement of a state statute fixing railroad rates on domestic shipments as confiscatory against state officers specially charged by such statute with the duty of its enforcement is not a "suit against the state," within the meaning of the eleventh constitutional amendment. *Louisville & N. R. Co. v. Railroad Commission of Alabama*, 157 Fed. 944, 956.

A federal court which has acquired jurisdiction of a suit to enjoin the enforce-

ment of state statutes fixing railroad rates, and has under authority given by such statutes themselves suspended their operation pending final hearing as to their constitutionality, has power on an amended bill to enjoin county solicitors and sheriffs of the state from instituting civil or criminal proceedings under such suspended statutes against employes of complainant, which would result in irreparable injury, and such amended bill does not convert the "suit" into one "against the state," within the meaning of the eleventh constitutional amendment. *Louisville & N. R. Co. v. Railroad Commission of Alabama*, 157 Fed. 944, 956.

A suit to enjoin state officers or a state commission from enforcing a state statute or regulation fixing maximum railroad rates is not a "suit against the state," of which a federal court is prohibited from entertaining jurisdiction by the eleventh constitutional amendment; no property or revenues of the state being affected by such suit. *Perkins v. Northern Pac. R. Co.*, 155 Fed. 445, 447.

A suit to enjoin the enforcement of an order of the Mississippi railroad commission, compelling a railroad company to stop its trains at a specified station, is not a "suit against the state." *Mississippi R. Commission v. Illinois Cent. R. Co.*, 27 Sup. Ct. 90, 93, 203 U. S. 335, 51 L. Ed. 209.

A federal court is not without jurisdiction of a suit to restrain the enforcement of a state statute fixing railroad rates, to which the officers of the state who are charged with such enforcement are made parties defendant, on the ground that such suit is in fact a "suit against the state." *Poor v. Iowa Cent. R. Co.*, 155 Fed. 226, 228.

A suit to compel the State Dispensary Commission appointed to wind up the affairs of the State Dispensary under Sess. Laws 1907, p. 835, No. 402, to pay a dispensary creditor from the trust funds held by the Commission for the liquidation of dispensary indebtedness, was not a "suit against the state" within Const. U. S. Amend. 11, providing that the judicial power of the United States shall not extend to any suit at law or equity commenced or prosecuted against one of the United States by citizens of another state. *Fleischman Co. v. Murray*, 161 Fed. 152.

A suit in equity against individuals to enjoin them as officers of a state from enforcing an unconstitutional enactment to the irreparable injury of the property rights of the complainant is not one against the state within the meaning of the eleventh constitutional amendment; and it is immaterial whether such officers are specially charged with the enforcement of the statute, or whether such duty devolves on them under the general laws. *Central of Georgia R. Co. v. Railroad Commission of Alabama*, 161 Fed. 925.

A suit against a state officer which involves the pecuniary interest of the state to restrain or direct the action of the officer in a matter intrusted to his official discretion, is a "suit against the state" itself, of which the national courts have no jurisdiction, but a suit to enjoin or direct a state officer in the performance of an official act which requires the exercise of no discretion and involves no pecuniary interest of the state, and no violation of a positive statute thereof indicative of its public policy, is not a suit against the state. Where corporations were required by statute to deposit securities with the state treasurer to insure performance of their contracts, and the corporations have become insolvent, a suit by creditors entitled to the benefit of the securities to require the state treasurer to turn the same over to receivers, to be disposed of for the benefit of complainants and all others entitled to share therein, is not a "suit against the state." *Morrill v. American Reserve Bond Co. of Kentucky*, 151 Fed. 305, 308.

A suit against state officers to enjoin them from enforcing a tax alleged to be in violation of the federal Constitution is not a "suit against a state," within the prohibition of the eleventh amendment to the federal Constitution. *Gunter v. Atlantic Coast Line R. Co.*, 26 Sup. Ct. 252, 256, 200 U. S. 273, 50 L. Ed. 477.

A suit against the members of a state railroad commission and the prosecuting attorney for a district of the state to enjoin the enforcement of an order made by the commission which is unconstitutional and without authority of law is not a "suit against the state" within the meaning of the eleventh constitutional amendment, and is within the jurisdiction of a federal court of equity. *St. Louis & S. F. R. Co. v. Allen*, 181 Fed. 710, 717.

A suit against state officers to restrain the collection of a privilege tax on the operation of oil wells, imposed by Acts 29th Leg. p. 358, c. 148, is in fact a "suit against the state," and cannot be maintained without its consent. *Producers' Oil Co. v. Stephens*, 99 S. W. 157, 158, 44 Tex. Civ. App. 327.

A suit to enjoin a state officer from taking action to forfeit the franchise rights of a corporation under a statute alleged to be in violation of the Constitution of the United States is not one against the state within the meaning of the eleventh constitutional amendment, and is within the jurisdiction of a federal court. *Chicago, R. I. & P. R. Co. v. Ludwig*, 156 Fed. 152, 157.

In equity the money in the state treasury is the money of the people of the state, and suits by a taxpayer to restrain the misappropriation by public officers of such money to an unauthorized purpose are not "suits against the state," within the prohibition of Const. 1870, art. 4, § 26, declaring that the

state shall not be made a party to any action at law or suit in chancery. A bill in equity seeking to restrain the commissioners of the Illinois & Michigan Canal and certain public officials from applying certain sums of money appropriated to the maintenance of the canal by Laws 1903, p. 45, on the ground that the act was illegal and that the appropriation was not warranted by the law, was not a suit against the state. *Burke v. Snively*, 70 N. E. 327, 328, 208 Ill. 328.

An action against the Attorney General and prosecuting officers of the state to enjoin them from instituting a criminal proceeding is an "action against the state," and cannot be maintained in a court of the United States under the eleventh amendment to the Constitution. *Logan & Bryan v. Postal Telegraph & Cable Co.*, 157 Fed. 570, 574.

A suit to enjoin individual defendants from proceeding as officers of a state to enforce an act of the Legislature of such state which is unconstitutional and void is not a "suit against the state" within the meaning of the eleventh amendment to the Constitution, and is within the jurisdiction of a federal court. *Kansas Natural Gas Co. v. Haskell*, 172 Fed. 545.

The question whether a suit is one against the state within Const. art. 5, § 19, providing that the state shall never be made defendant in any of her courts, is not necessarily determined by reference to the parties to the record; but where the state is the real party in interest, though only its officers and agents are parties, it is a "suit against the state" within the prohibition. *Pitcock v. State*, 121 S. W. 742, 745, 91 Ark. 527, 134 Am. St. Rep. 88.

A suit against state officers charged with the enforcement of a statute to enjoin its enforcement because in violation of the federal Constitution is not a "suit against the state" within the meaning of the eleventh constitutional amendment, and is within the jurisdiction of a federal court. *Western Union Tel. Co. v. Julian*, 169 Fed. 166, 170.

A suit against the dairy and food commissioner of a state to restrain certain action taken under cover of his office, but alleged to be in violation of the state laws, which injuriously affects the reputation and sale of certain products manufactured by complainants, is not a "suit against the state," forbidden by Const. U. S. Amend. 11. *Scully v. Bird*, 28 Sup. Ct. 597, 600, 209 U. S. 481, 52 L. Ed. 899.

State officers, who without legislative authority or sanction trespass upon state property given by express enactment into the exclusive possession of a private corporation, do not represent the state, and may be sued as any other trespassers upon the rights of possession would be sued; a suit against them not being a "suit against the state."

**Conley v. Daughters of the Republic of Texas (Tex.)** 151 S. W. 877, 881.

An action against the board of commissioners for the management of the state penitentiary to reform, for mistake, a contract, made with its predecessors, for the purchase of land, so as to provide for the conveyance of less land, and recover the agreed price, is an "action against the state" within Const. art. 5, § 19, providing that the state shall never be made a defendant in any of her courts, so that the court had no jurisdiction thereof. *Jobe v. Urquhart*, 138 S. W. 663, 664, 98 Ark. 525.

An action against a commission or other officials acting as administrative agents for the state, to prevent the enforcement of a tariff which is unreasonable and confiscatory, is not one against the state, if the act itself is unconstitutional and void as against the complainant. A proceeding against officers of the state to test the constitutionality of a statute, in the enforcement of which the officers act only by formal judicial proceedings in the courts of the state as attorneys for the state, is in effect a "suit against the state." *Western Union Telegraph Co. v. Andrews*, 154 Fed. 95, 107.

An action brought under Comp. Laws, § 2091, authorizing a warden of a state prison to be sued by his name of office, and maintained against one as "warden of the Michigan Reformatory" for breach of a contract made and breached by him in his official capacity, was an "action against the state." *McDowell v. Fuller*, 135 N. W. 265, 267, 169 Mich. 332.

Though a municipal corporation is an agent of the state government for local purposes, a suit against it and its officers is not against "one of the United States," within the meaning of the eleventh amendment to the federal Constitution. *Camden Interstate R. Co. v. Catlettsburg*, 129 Fed. 421, 423.

#### **SUIT ARISING UNDER CONSTITUTION OR LAWS OF UNITED STATES**

See Arise—Arising; Federal Question.

#### **SUIT FOR DISCOVERY**

See Discovery.

#### **SUIT FOR DIVORCE**

See Divorce Suit.

#### **SUIT FOR LAND**

A suit to reform a deed by correcting the description, and to quiet complainant's title to the land as correctly described as against a second grantee from the same grantor, is one "for lands" within the meaning of Shannon's Code Tenn. § 4458, prescribing limitation for such suits, and, under the Tennessee decisions, the statute cannot be pleaded by a defendant who has never been

in possession. *Williams v. American Ass'n*, 197 Fed. 500, 507, 118 C. C. A. 1.

#### **SUIT FOR PENALTY OR FORFEITURE**

A proceeding under Acts 31st Leg. c. 17, § 8, to revoke a liquor license for violation of law, is not a suit by the state to recover a forfeiture, within the Constitution, as affecting the jurisdiction of the Court of Civil Appeals. *Hernandez v. State*, 135 S. W. 170, 172.

A proceeding, authorized by Acts 31st Leg. c. 17, §§ 9a, 9b, 9c, 9f, 9g, for the revocation by the Comptroller of Public Accounts of liquor licenses for violations of the law by liquor dealers is not a "suit" by the state for "forfeiture" or "penalty," within Const. art. 5, § 8, conferring on the district court exclusive jurisdiction of such suits; for, though an official act may be judicial as involving the exercise of discretion and judgment, yet, when discretion is conferred on an executive officer in the discharge of administrative or executive duties, the acts of the officer are not judicial. *Baldacchi v. Goodlet (Tex.)* 145 S. W. 325, 328.

#### **SUIT FOR RECOVERY OF CONTENTS OF CHOSE IN ACTION**

See Contents.

#### **SUIT FOR THE RECOVERY OF REAL PROPERTY**

See, also, Real Property.

A proceeding brought under sections 6343 and 6344, Revised Statutes, to set aside a transfer of real estate as in fraud of creditors and to obtain the relief provided therein is for the recovery of real property, or of an estate or interest therein, within the meaning of section 5019, Revised Statutes. *Gem City Acetylene Generator Co. v. Coblenz*, 99 N. E. 302, 303, 86 Ohio St. 199, Ann. Cas. 1913D, 660.

An action for specific performance of a contract to convey land is not a "suit for the recovery of land or damages thereto," within the exception to a defendant's right to be sued in the county of his residence, expressed in Hartley's Dig. art. 667, providing that, in case where the recovery of land or damages thereto is the object of the suit, the suit must be instituted where the land or a part thereof is situated, since the "recovery of land," as used in the exception, has reference to the possession, and "damages thereto" has reference to an injury to the possession or to the freehold or estate, and not to damages for breach of contract to make title. *Lucas v. Patton*, 107 S. W. 1143, 1145, 49 Tex. Civ. App. 62.

#### **SUIT FOR TAXES**

A "suit for taxes" is one for a debt due the state with a prayer for foreclosure of the statutory lien. *Dunn v. Taylor*, 94 S. W. 347, 351, 42 Tex. Civ. App. 241.

# SUIT IN EQUITY

Though L. O. L. § 1, abolishes the difference between forms of action at law, the difference between "actions at law," which include those cases where the relief sought consists in the direct recovery of real or personal property, or some amount of money only, and "suits in equity," arising when the requisite relief cannot be adequately administered by an action at law, is maintained. *Van de Wiele v. Garbade*, 120 Pac. 752, 753, 60 Or. 585.

An action in the district court by the party actually in possession of the property in controversy, for the purpose of quieting title to his leasehold estate, under the provisions of Rev. St. 1887, § 4538, is a "suit in equity," and neither party is entitled to a jury as a matter of right. *Shields v. Johnson*, 79 Pac. 391, 393, 10 Idaho, 476, 3 Ann. Cas. 245.

An action by persons, who subscribed a bonus to induce defendant to construct and operate a factory, to recover their subscriptions because of breach of defendant's contract, is an "action at law," not a "suit in equity," though an accounting is prayed. *Akins v. Hicks*, 83 S. W. 75, 109 Mo. App. 95.

A proceeding to contest an election is not a "suit in equity," but is a purely statutory proceeding unknown to the common law, and therefore one in which a writ of error is not a writ of right, and the only method of bringing the record to the Supreme Court for review is an appeal, as provided in the election law. *Devous v. Gallatin County*, 91 N. E. 102, 103, 244 Ill. 40, 18 Ann. Cas. 422.

## Appeal distinguished

Appeal distinguished, see Appeal.

# SUIT IN PERSONAM

See In Personam.

# SUIT IN REM

See In Rem; Quasi in Rem.

# SUIT IN WHICH THE UNITED STATES ARE PLAINTIFFS

Under Act Aug. 13, 1894, c. 280, § 1, 28 Stat. 278, requiring contractors for government work to give bonds conditioned (1) for the performance of the contract; (2) for the prompt payment of all persons supplying labor or materials in the prosecution of the work—and authorizing such persons, in case of nonpayment, to bring suit in the name of the United States for his or their use and benefit against such contractor and sureties, such a suit is one in which the United States are plaintiffs, within the meaning of section 1 of the Judiciary Act of August 13, 1888, c. 866, 25 Stat. 433. *United States v. Churchyard*, 132 Fed. 82, 83.

A suit by the United States for the use of the Creek Nation of Indians to cancel patents or deeds to town lots belonging to said nation in its tribal capacity and sold by the

United States for its benefit under Act March 1, 1901, c. 676, § 10, 31 Stat. 864, on the ground that such deeds were obtained by fraud, is one in which "the United States are plaintiffs or petitioners," of which a Circuit Court is given jurisdiction by Act March 3, 1875, c. 137, § 1, 18 Stat. 470, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 434. The fact that the act expressly conferred jurisdiction of such suits on the United States courts in the Indian Territory did not make such jurisdiction exclusive so as to prevent the bringing of suits thereunder in the Circuit Court after statehood and after the territorial courts had ceased to exist. *United States v. Rea-Read Mill & Elevator Co.*, 171 Fed. 501, 511.

# SUIT INVOLVING TITLE

See Involve.

# SUIT MONEY

In divorce proceedings, "suit money" is money for the purpose of enabling the wife, who has commenced proceedings in divorce to meet the expenses incident to the prosecution of the action, independent of attorney's fees. *Hart v. Hart*, 73 Pac. 35, 31 Colo. 333.

# SUIT OF CIVIL NATURE

A proceeding for an original writ of mandamus pending in a state court is not a "suit of a civil nature" at law or in equity, within the removal acts; the circuit courts of the United States having no authority to issue such writs except as ancillary to, or in aid of, a pre-existing jurisdiction. *North Carolina Corp. Commission v. Southern Ry. Co.*, 66 S. E. 427, 429, 151 N. C. 447.

An action for a writ of mandamus not in aid of a jurisdiction previously acquired is not a suit "of a civil nature at law or in equity," within Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 434 [U. S. Comp. St. 1901, p. 509], authorizing the removal of any "suit of a civil nature at law or in equity" to the federal courts, on the ground of the diversity of citizenship of the parties. *Western Union Tel. Co. v. State ex rel. Hammond Elevator Co.*, 76 N. E. 100, 102, 165 Ind. 492, 3 L. R. A. (N. S.) 153, 6 Ann. Cas. 880 (citing *Rosenbaum v. Bauer*, 7 Sup. Ct. 633, 120 U. S. 456, 30 L. Ed. 743; *Mystic Milling Co. v. Chicago, M. & St. P. Ry. Co.*, 132 Fed. 289; *Kelly v. Grand Circle Women of Woodcraft*, 129 Fed. 830; *State of Indiana v. Lake Erie & W. Ry. Co.*, 85 Fed. 1).

A proceeding for mandamus, under 2 Ballinger's Ann. Codes & St. § 5765, authorizing such proceedings to be commenced by the filing of a motion supported by affidavits, and authorizing the assessment of damages and costs when a judgment is given in favor of the applicant, together with the issuance of a peremptory writ, is a special proceeding, and not a "suit of a civil nature at common

law or in equity." *Kelly v. Grand Circle Women of Woodcraft*, 129 Fed. 830, 831.

"The writ of mandamus is not a 'suit of a civil nature' at law or in equity, within the meaning of the acts of Congress creating the circuit courts of the United States and defining their jurisdiction." *Mystic Mill. Co. v. Chicago, M. & St. P. R. Co.*, 132 Fed. 289, 291.

Proceedings to condemn land for public use, instituted in a state court, constitute a "suit of a civil nature," within the meaning of U. S. Comp. St. 1901, p. 508 (4 Fed. St. Ann. p. 265), making such suits removable, if the requisite jurisdictional facts appear. *Fishblatt v. Atlantic City*, 174 Fed. 196, 197.

A proceeding before the Corporation Commission on petition of a merchants' association to compel defendant railroad company to furnish better freight facilities in a city by the removal of its depot from one side of its main line to the other, etc., was not a "suit at law or in equity" within the removal acts, nor did it become so on an appeal being taken to the superior court of the state from an order directing the removal; the term "suit of a civil nature," as used in such acts, being construed to apply only to a proceeding in a court of justice by which a litigant pursues a remedy which the law affords him. *North Carolina Corp. Commission v. Southern Ry. Co.*, 66 S. E. 427, 430, 151 N. C. 447.

The statutes of Idaho provide that one desiring to appropriate water from a stream must apply to the state engineer and obtain a permit; that, in case a stated part of the works has not been completed within a certain time, an after appropriator from the same stream may petition the state engineer for a revocation of the permit, and that officer, after investigation, shall either cancel the permit and notify the holder or refuse to do so and notify the petitioner; that, in either case, the party feeling himself aggrieved may appeal to the district court of the county in which the point of diversion is situated, making the other party defendant, and filing a petition and a copy of the petition to and decision of the state engineer. There is no further provision as to pleading or procedure. Held, that, after such an appeal has been taken, the proceeding in the district court is a "suit of a civil nature at common law or in equity," of which a Circuit Court of the United States is given concurrent jurisdiction with the state courts by section 1 of the judiciary act of March 3, 1875 (18 Stat. 470, c. 137, as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433, and therefore removable under section 2, where the other requisite jurisdictional facts exist. *Waha-Lewiston Land & Water Co. v. Lewiston-Sweetwater Irrigation Co.*, 158 Fed. 137, 140.

#### SUIT OF LOCAL NATURE

See Local Nature.

#### SUIT TO INVALIDATE PATENT

Where a patent for land granted to a railroad company excluded and excepted all mineral lands, should any such be found in the tracts described, exclusive of coal and iron lands, and plaintiff prior to patent had located a quartz mine within the grant, a suit to quiet title against one holding under the railroad grant involved only a construction of the patent to the railroad company, and was not a "suit to invalidate" the same, within Act Cong. March 2, 1896, c. 39, 29 Stat. 42 (U. S. Comp. St. 1901, p. 1603), prohibiting actions to annul patents erroneously issued under railroad grants after five years from the passage of the act. *Van Ness v. Rooney*, 116 Pac. 392, 394, 160 Cal. 131.

#### SUITABLE

The word "suitable" within Const. art. 8, which requires the Legislature to require towns to make suitable provision for common schools at their own expense, is an elastic term, depending upon the necessities of changing times, and subject to the Legislature's discretion to determine what is suitable. *Sawyer v. Gilmore*, 83 Atl. 673, 680, 109 Me. 169.

An instruction, in the language of Kirby's Dig. § 6644, defining a railroad company's duty to maintain stock guards is not objectionable because it uses the words "good" and "sufficient," while the statute uses the words "suitable" and "safe"; the words being substantially the same. *Kansas City Southern R. Co. v. Greer*, 119 S. W. 1121, 1123, 90 Ark. 531.

#### SUITABLE APPLIANCES

See Safe and Suitable Appliances; Suitable Means and Appliances.

#### SUITABLE ARTICLE

Other suitable articles, see Other.

#### SUITABLE FOR CULTIVATION

The words "suitable for cultivation" include "all lands ready for occupation and which by ordinary farming processes are fit for agricultural purposes." A section of land absolutely unfit for cultivation, unless, by the boring of artesian wells, water may in the future be developed in such quantities as to render it possible to artificially irrigate it, is land not "suitable for cultivation," within Const. art. 17, § 3, providing that lands belonging to the state, suitable for cultivation, shall be granted only to actual settlers in quantities not exceeding 320 acres to each, and Pol. Code, § 3495, providing that land suitable for cultivation may be sold in quantities not exceeding 640 acres to any one person. *Robinson v. Eberhart*, 83 Pac. 452, 454, 148 Cal. 495 (citing and adopting *Manley v. Cunningham*, 13 Pac. 622, 72 Cal. 236; *Fulton v. Brannan*, 26 Pac. 506, 88 Cal. 454, 456; *Jacobs v. Walker*, 27 Pac. 48, 90 Cal. 43).

Const. art. 17, § 3, providing that public lands "suitable for cultivation" shall be granted only to actual settlers, applies to land originally unfit for cultivation, but which, at the time of application for purchase has been made fit for cultivation, without regard to how it was reclaimed. *Boggs v. Ganeard*, 84 Pac. 195, 196, 148 Cal. 711.

The phrase "suitable for cultivation," as used in Const. art. 17, § 3, providing that lands belonging to the state, which are "suitable for cultivation," shall be granted only to actual settlers, applies to all tracts of land suitable for cultivation; that is to say, on which there is arable or tillable land sufficient, with the use of the other land of the tract for pasturage or otherwise, to furnish a support for the settler. *Sanford v. Maxwell*, 84 Pac. 1000, 1002, 3 Cal. App. 242.

#### SUITABLE FOR SAWMILL PURPOSES

Under a sale of all the pine timber "for sawmill purposes" on described lands, timber suitable at the time of sale for sawmill purposes passes, to that extent the phrase "for sawmill purposes" being identical with "suitable for sawmill purposes," but vendee does not, as when the broader phrase "suitable for sawmill purposes" is used, obtain the right to use such timber as may be within the description for any other than sawmill purposes. *Mills & Williams v. Ivey*, 60 S. E. 299, 301, 3 Ga. App. 557.

A lease of "timber suitable for sawmill purposes" includes cypress timber, when there is nothing to show that by the custom of the trade only pine timber is embraced in such description. Under a sale of "timber suitable for sawmill purposes," the purchaser can use timber of the kind described for any purpose which he sees proper. A lease conveyed "all and singular the timber suitable for turpentine and sawmill purposes growing on" the lands described. The lease further provided that the grantee was "to have and to use said described timber for turpentine purposes as aforesaid, with all the rights and privileges of cutting or boxing, dipping, and using all the trees on said land for turpentine purposes, and to cut and use said timber for sawmill purposes as aforesaid, with all the rights and privileges of cutting, felling, and hauling the trees on said land 'suitable for sawmill purposes.'" Held, that the lease gave to the grantee the use of such timber only as was suitable for both turpentine and sawmill purposes, and consequently did not include cypress timber. *Gray Lumber Co. v. Gaskin*, 50 S. E. 164, 167, 122 Ga. 342.

#### SUITABLE MEANS AND APPLIANCES

In an action by a servant for personal injuries, "safe and suitable" appliances mean reasonably safe and suitable, and, when used in the charge, do not require the master to furnish absolutely safe appliances, and in this sense the word "suitable" is used as meaning

"safe or not defective." *Davis v. Northwestern R. Co.*, 55 S. E. 526, 528, 75 S. C. 303.

The term "suitable" as used with reference to a master's duty to provide "suitable appliances" for the use of his servants, means compatible with safety. *Shohoney v. Quincy, O. & K. C. R. Co.*, 122 S. W. 1025, 1037, 223 Mo. 649.

#### SUITABLE MONUMENT

A testator, who sets apart a specified sum for funeral expenses and proper interment of his remains and a "suitable monument" to his memory, etc., gives to the executors discretion in the selection of the monument, its form and style, with reference to the amount set apart for the purpose, and the full amount of the fund, or such part as the executors deem fit, may be expended in the erection of the monument. *Fancher v. Fancher*, 103 Pac. 206, 207, 156 Cal. 13, 23 L. R. A. (N. S.) 944, 19 Ann. Cas. 1157.

#### SUITABLE PERSON

An administrator, whose private interests conflicted with those of the estate, and who has not used due diligence in collecting the assets and preserving them, is "unsuitable," within the purview of Rev. Laws 1905, § 3709, and should be removed. *First Nat. Bank of Boston v. Towle*, 137 N. W. 291, 295, 118 Minn. 514.

Under Rev. St. § 1702b, providing that, on the removal of an assignee for the benefit of creditors, the court shall appoint as his successor the person named in a petition presented by a majority of the creditors, representing a majority in value of the debts or some "suitable person," the court is required to appoint the nominee of the creditors unless he is unsuitable. A "suitable person," within the meaning of the statute, is not necessarily the most suitable person, and the court has no authority to reject the nominee of the creditors merely because in its judgment a better person could be obtained. A person is not necessarily unsuitable because he is a creditor of the assignor. The word "suitable" has regard to interest and business qualifications for the office of trustee and such relations to the estate and its creditors as will be consistent with the proper and safe administration of the trust. *State ex rel. Fourth Nat. Bank of Philadelphia v. Johnson*, 83 N. W. 320, 326, 105 Wis. 164. If, for any cause, the welfare of the infant demands that its care and custody be withheld from the parent and given to another, the parent is not a "suitable person" to have such care and custody, within the meaning of the statute. *Sheers v. Stein*, 43 N. W. 728-730, 75 Wis. 44, 5 L. R. A. 781.

Under Real Property Law (Consol. Laws, c. 50) § 112, empowering the Supreme Court to remove a trustee who, for any cause, shall be deemed to be an "unsuitable person to execute the trust," a trustee who asserts in-

terests in hostility to his trust becomes an unsuitable person, and where a testator's surviving partner is named as testamentary trustee and a substantial controversy as to an accounting, and the inventory of partnership interests furnished by the surviving partner arises between him and the other testamentary trustees, in which the surviving partner's interests conflict with his duties as trustee, the court is justified in removing him as trustee. *In re Keller*, 127 N. Y. Supp. 16, 18, 142 App. Div. 454.

#### **SUITABLE SCHOOL ACCOMMODATIONS**

The failure of a board of education of a township to provide transportation for children living remote from the schoolhouse is not such a failure to provide "suitable school facilities and accommodations," under section 126 of the school law (P. L. 1904, p. 48), as to authorize the county superintendent of schools to transmit to the custodian of the school moneys an order to direct him to withhold from the district all moneys in his hands to the credit of such school district received from the state appropriation or from the state school tax. *Board of Education of Frelinghuysen Tp. v. Atwood*, 62 Atl. 1130, 1131, 73 N. J. Law, 315; *Id.*, 65 Atl. 999, 1000, 74 N. J. Law, 638.

#### **SUITOR**

As witness, *see* Witness.

#### **SULPHIDE OF ZINC**

Where it was proved that lithofone, composed of 70 per cent. sulphate of barytes and 30 per cent. sulphide of zinc, was known as "lithofone," whether dry or ground in oil, and by commercial designation was known as "sulphide of zinc white," it was classifiable for duty as such under the Tariff Act, and not as a white paint or pigment containing zinc, but not containing lead. *Gabriel & Schall v. United States*, 123 Fed. 296, 297, 59 C. C. A. 352.

#### **SUM**

*See* Lump Sum; Original Sum; Penal Sum.

All sums, *see* All.

Other sums, *see* Other.

A street railway franchise which provides for the exchange of transfers with any other company operating street railways, which shall give and receive transfers on the basis of settlement that the transfer shall be redeemed at such a proportionate part of the fare paid as the run or local route of the car on which the transfer is received bears to the sum of the runs of the local route of the cars from which the transfer is issued, and on which it is received, gives a passenger the same right to travel as to distance over the railway system to which a transfer is tender-

ed as if he pays fare on that system, and two street railway companies operating systems under the franchise and giving and receiving transfers are each entitled to one-half of the fares earned from passengers receiving and using transfers, the words "local route" meaning the entire distance a passenger may travel on the system as if he paid fare, whether he changes cars on that system or not, and the word "sum" referring to the result of two units added so that the entire distance a passenger may travel on each system constitutes a unit or the sum which goes to make up the entire service required to be furnished on the payment of one fare. *State ex rel. Linhoff v. Seattle, R. & S. Ry. Co.*, 114 Pac. 431, 433, 62 Wash. 544.

#### **As money**

The word "sum" is restricted in its application to money, except where a different meaning plainly appears. *Kelley v. Sullivan*, 87 N. E. 72, 73, 201 Mass. 34.

#### **As value**

In Transfer Tax Law (Laws 1911, c. 732) § 221a, subd. 1, providing for a tax of 1 per centum on any amount in excess of \$5,000 up to the sum of \$50,000, "amount" and "sum," though popularly used to denote money, mean value; the tax being upon all kinds of property. *In re Elletson's Estate*, 136 N. Y. Supp. 455, 456, 75 Misc. Rep. 582.

#### **SUM COLLECTED**

The term "sums collected," in a statute allowing a commission in tax suits on sums collected, means sums collected for taxes. On sums collected for costs in the action no commission is chargeable. *State ex rel. Kemper v. Smith*, 13 Mo. App. 421, 423.

#### **SUM DUE**

All sums due, *see* All.

#### **SUM LIQUIDATED**

*See* Liquidate.

#### **SUM OF MONEY**

##### **Labor**

Labor actually done is not "sums of money actually expended," within the meaning of the statute providing that official stenographers shall be allowed and paid all sums of money actually expended in necessary hotel and traveling expenses, etc. *State ex rel. Woodside v. Woodside*, 87 S. W. 8, 9, 112 Mo. App. 451.

##### **Conveyance of land**

Testator's children signed an instrument acknowledging having received from their father "divers sums of money and other property," which he desired acknowledged in order that no misunderstanding or confusion might result in the settlement of his estate. Subsequently two of the children signed an instrument acknowledging that since executing the above instrument they had received certain real estate as an advancement, and consent-



ing that the value of the same, as fixed at a certain sum set opposite their names therein, "may be deducted from any share we may become entitled to" in his estate. The will directed "that the sums of money which I have advanced and which I may hereafter advance to my children shall be considered as advances and charged against each; \* \* \* such advances and payment of money shall be taken out of their respective shares." Held, that the conveyances of land to the two sons were to be deemed "sums of money," or "advances and payment of money," within the intention of the will. *Vreeland v. Vreeland*, 56 Atl. 1089, 65 N. J. Eq. 668.

## SUMMARY

### SUMMARY APPLICATION

An order of the trial court quashing an execution is an order made "on a summary application in an action after judgment" under Comp. Laws 1909, § 6068, and appealable. *Barnett v. Bohannon*, 112 Pac. 987, 988, 27 Okl. 368.

### SUMMARY PROCEEDING

A "summary proceeding" is not an action though analogous to its purpose and scope; it is a special proceeding. Properly speaking, therefore, there can be no judgment in summary proceedings, though the final order entered is frequently referred to as a judgment, and is in effect a judgment. *Seymour v. Hughes*, 105 N. Y. Supp. 249, 250, 55 Misc. Rep. 248.

A "summary proceeding" is a form of trial in which the ancient established course of legal proceedings is disregarded, especially in the matter of trial by jury and, in the case of the heavier crimes, presentment by a grand jury. Code 1904, § 3768, provides that the courts and judges may issue attachments for contempts and punish them summarily in certain cases. Held, that a summary proceeding, within the meaning of the act, was one in which the party offending was not to be given a trial by jury. *Yoder v. Commonwealth*, 57 S. E. 581, 583, 107 Va. 823 (citing *Brown v. Epps*, 21 S. E. 119, 91 Va. 726, 27 L. R. A. 676).

A proceeding before a justice of the peace for a violation of Fish and Game Act, § 33, section 3 of which act authorizes the issuance of a warrant to any constable, etc., to bring the defendant before the justice for a hearing in a summary way, whereupon, if convicted, a penalty is imposed, on failure of which the justice is empowered to commit the defendant to the county jail, is a "summary proceeding" before a justice of the peace sitting as a magistrate, and hence it is not necessary to indorse the summons and complaint, as required in suits by common informers. *Minard v. Dover, R. & P. O. Gas Co.*, 68 Atl. 910, 911, 76 N. J. Law, 132 (quoting *Hoeberg v. Newton*, 9 Atl. 751, 49

N. J. Law, 617; *Feigen v. McGuire*, 44 Atl. 972, 64 N. J. Law, 152; *Orange v. McGonnell*, 59 Atl. 97, 71 N. J. Law, 418).

### SUMMARY TRIAL

As criminal case, see Criminal Case or Cause.

## SUMMER

### SUMMER ROAD

On each side of a paved strip of a road was a smooth surface of sod or earth at the same level, but inclining gradually to the sides and apparently intended for the same use. Such smooth surface is what is known as a "summer road," used by many travelers in good weather in preference to the macadamized stone. Recovery may be had against a city for the death of one killed by coming in contact with a heavily charged and exposed electric wire used by the police department of the city, and lying so near the highway as to endanger a traveler deviating a few feet from the beaten path, and the city cannot avoid liability for the death of a person coming in contact with the wire by the fact that the accident occurred on the side of a road, of which 16 feet was macadamized in the middle, and that, if deceased had kept to the macadamized portion, he would not have lost his life. *Emery v. City of Philadelphia*, 57 Atl. 977, 978, 208 Pa. 492.

### SUMMER STREET CAR

The term "summer street car" is commonly used to designate a car which is open from top to bottom on the sides. *Cummings v. Wichita Railroad & Light Co.*, 74 Pac. 1104, 68 Kan. 218, 1 Ann. Cas. 708.

## SUMMON

See Duly Summoned.

What a sheriff, who has served a summons, adds in his return to the statutory return "served" or "summoned" may, if incorrect, be rejected as surplusage. *Berlin Iron Bridge Co. v. Norton*, 17 Atl. 1079, 51 N. J. Law, 442.

### SUMMONS

Issuance, as commencement of action, see Commencement of Action.

Issue of, see Issuance—Issue.

In several of the states, a summons in an action may be issued by the plaintiff's attorney, and in a majority of such states it is held that a "summons" is not a process. Properly speaking, the summons is a process only when issued from the office of a court of justice requiring the person to whom it is addressed to attend the court for the purpose therein stated. Under the Code of Oregon, the summons is not technically a process, but is more in the nature of a mere notice informing the defendant that an action has been commenced against him, and that he is

required to answer the complaint within a specified time. *Leas & McVitty v. Merriman*, 132 Fed. 510, 518 (quoting *Whitney v. Blackburn*, 21 Pac. 874, 17 Or. 564, 11 Am. St. Rep. 857).

"Summons" is a process, the main object of which is to notify defendant that plaintiff claims to have a cause of action against him, and that he is required to answer such claim. *Bradey v. Mueller*, 118 N. W. 1035, 1037, 22 S. D. 534.

The office of a summons is to bring defendant to whom it is directed into court to answer the petition. *Mansur v. Pacific Mut. Life Ins. Co.*, 118 S. W. 1193, 1194, 136 Mo. App. 726.

"A 'summons' is a jurisdictional writ and is the only method by which the court can obtain jurisdiction of a defendant; without it, the court cannot lawfully proceed." In *re Farrell*, 92 Pac. 785, 787, 36 Mont. 254 (citing and adopting the definition in *Sharmon v. Huot*, 52 Pac. 558, 20 Mont. 555, 63 Am. St. Rep. 645).

The words "process" and "summons," as used in the common law and in the statute, are often synonymous, and it has been settled at common law that process and summons were synonymous. Process is the means by which the court compels the appearance of the defendants, and summons is the first process in the institution of an action whereby the defendant is notified to appear and answer. *Ackermann v. Berriman*, 114 N. Y. Supp. 937, 940, 61 Misc. Rep. 165.

The "summons" referred to in Civ. Code 1902, § 3130, providing for fees of witnesses, in the courts of common pleas and probate, \$1 for every day's attendance on summons, is not a mere verbal or written notice from the party, but is the "subpœna" referred to in section 2861, authorizing the issuance of subpœnas for witnesses, and requiring a subpœna to state at whose request the witness is summoned. "Summons" and "subpœna" mean the same thing. *Atherton v. Atlantic Coast Line R. Co.*, 64 S. E. 411, 82 S. C. 474.

A notice of appeal is not a "summons," within Rev. Codes 1905, § 6738, defining process as a writ or summons issued in a judicial proceeding and need not be served in the manner in which process is required to be served. *Gooler v. Kidness*, 121 N. W. 83, 85, 18 N. D. 338.

#### As process

See Process.

#### Return

The return being a part of the summons, it is sufficiently described by the word "summons." *Casety v. Jamison*, 77 Pac. 800, 801, 35 Wash. 478.

#### SUMP

The "sump" of a mine is the pit beneath the cages of a shaft and is regarded by min-

ers as an extremely dangerous place because the cages may drop into it. *Dallas Coal Co. v. Rotenberry*, 107 S. W. 997, 85 Ark. 237.

#### SUN KINK

A "sun kink" is a creeping together of the rails of a railroad track. *Hudson v. Ft. Worth & D. C. R. Co.*, 139 S. W. 617, 618.

#### SUNDAY

Observe Sunday, see Observe.

Playing baseball on Sunday as crime, see Crime.

Sunday law involving privilege and immunity of citizen, see Privileges and Immunities.

The Missouri Sunday laws have regard to that day as a day of rest, and not as to its religious character. *State v. Chicago, B. & Q. R. Co.*, 143 S. W. 785, 786, 239 Mo. 196.

By common usage the terms "Sabbath" and "Sunday" are used indiscriminately to denote the Christian Sabbath; that is, Sunday. "Sabbath day" is synonymous with "Sunday." *Town of Winnfield v. Grigsby*, 53 South. 53, 54, 126 La. 929 (quoting 7 Words and Phrases, p. 6281).

#### As from midnight to midnight

"Sunday," as used in Pen. Code 1895, art. 199, prohibiting the conduct of business, etc., on Sunday, means the entire day, extending from midnight Saturday until midnight Sunday. *Muckenfuss v. State*, 116 S. W. 51, 52, 55 Tex. Cr. R. 229, 20 L. R. A. (N. S.) 783, 131 Am. St. Rep. 813, 16 Ann. Cas. 768.

An indictment alleging that accused sold liquor between midnight of Saturday and sunrise of the succeeding Monday morning does not charge a sale on Sunday, in violation of Act March 12, 1908 (Laws 1908, c. 189), punishing the sale of liquor on Sunday, because a sale made after 12 o'clock Sunday night and before sunrise Monday morning is not a criminal offense, though included in the indictment; "Sunday" being from 12 o'clock Saturday night until 12 o'clock Sunday night. *Jeffries v. Commonwealth*, 75 S. E. 90, 113 Va. 773.

#### SUNDAY EXCEPTED

Const. § 79, provides that if a bill shall not be returned by the Governor within three days (Sundays excepted) after it shall have been presented to him, it shall be a law, unless the legislative assembly, by its adjournment, prevent its return, in which case, it shall be a law, unless the Governor shall file it, with his objections, in the office of the Secretary of State within 15 days after such adjournment. Held, that the phrase "Sundays excepted" qualifies the phrase "three days" only, and in computing the 15-day period in which the Governor may exercise the veto power after adjournment of the Legislature, Sundays are not excepted, and, where the

Legislature adjourned on March 3d, a bill transmitted to the Governor on that day became a law on March 18th, and an attempted veto on March 21st, was of no effect. *State v. Norton*, 131 N. W. 257, 21 N. D. 473.

### SUNDAY SCHOOL

As public worship, see Public Worship.

### SUNK LAND

A government survey or plat of a township selected by the state under the swamp lands act (Act Cong. Sept. 28, 1850, c. 84, 9 Stat. 519) showed that a certain part of the survey was not laid out into sections and subdivisions, and that the surveyed part was separated from the unsurveyed part by a meandered line, the unsurveyed part being designated as "sunk lands" and in the surveyor's field notes described as low, wet lands. The township was patented to the state according to the official plats of the survey. Held, that a "meandered line," being an ordinary line bounding a body of land, there was nothing to show that the sunk lands was a body of water, though temporarily covered with water, and under the patent the entire township passed to the state as swamp lands. *Chapman & Dewey Lumber Co. v. Board of Directors St. Francis Levee Dist.*, 139 S. W. 625, 628, 100 Ark. 94.

### SUNSTROKE

As accident, see Accident—Accidental.  
See, also, Heatstroke.

The word "sunstroke," when used in an insurance policy in describing one of the risks covered, should not be interpreted as applying only to an effect produced by the heat of the sun unless the context requires it, but the term, unexplained, denotes a condition produced by any heat, solar or artificial. *Continental Casualty Co. v. Johnson*, 85 Pac. 545, 74 Kan. 129, 6 L. R. A. (N. S.) 609, 118 Am. St. Rep. 308, 10 Ann. Cas. 851 (citing the definitions in *Webst. Int. Dict.*; *Stand. Dict.*; *Cent. Dict.*; *Enc. Brit.*). See, also, *Carr v. Pacific Mut. Life Ins. Co.*, 75 S. W. 180, 183, 100 Mo. App. 602.

### SUPER-CALENDERED PAPER

See Sized and Super-Calendered Paper.

### SUPERINTEND

"'Superintend' means to have charge and direction of." *Sanders v. Belue*, 58 S. E. 762, 763, 78 S. C. 171.

The word "superintend," as used in *Burns' Rev. St.* 1901, § 5903, providing that the county school superintendent shall have the general superintendence of the county schools, visit them, attend teachers' institutes, and superintend generally the elevation of the standard of teaching, means to have

charge and direction; to regulate the conduct and progress of; and hence such section does not authorize a school superintendent to institute a suit in equity to restrain township school trustees from paying a teacher for services rendered out of the school revenue. *McGreggor v. State ex rel. Ballard*, 68 N. E. 315, 31 Ind. App. 483.

### SUPERINTENDENCE

See General Superintendent.

Intrusted with superintendence, see Intrust.

See, also, Fellow Servant; Superintendent.

One who has general superintendence of all the servants operating a blast furnace exercises "superintendence" within the Employers' Liability Act making a master liable for the negligence of one exercising superintendence. And the same is true of one who has charge of a gang of men engaged in breaking iron ore into lumps of proper size for use in a blast furnace. *Williamson Iron Co. v. McQueen*, 40 South. 306, 309, 144 Ala. 265.

Where the only evidence of a hostler's negligence was in the manual labor of lowering a push bar, which was merely manual labor, and had nothing to do with the superintendence of the master's work or of other employes, he was not engaged in any "act of superintendence" within the meaning of subdivision 2 of the employer's liability act (Code 1907, § 3910). *Louisville & N. R. Co. v. Andrews*, 54 South. 553, 554, 171 Ala. 200.

The duty of a fire boss of a mine to examine the conditions of the mine, when gas is known to exist therein, before men are permitted to enter for work, is a duty of "superintendence," within employer's liability act (Code 1907, § 3910, subsec. 2) making an employer liable for injury caused by the negligence of one intrusted with superintendence, while in the exercise of such superintendence, and this is true irrespective of Code 1907, § 1031, providing that when gas is known to exist in a mine the operator must employ a competent fire boss to examine every place in the mine before men are permitted to enter for work. *Pratt Consolidated Coal Co. v. Davidson*, 55 South. 886, 887, 173 Ala. 667.

The master of a vessel who has sole charge of its navigation is one "whose sole or principal duty is that of superintendence" within the meaning of the New York employer's liability act (Laws 1902, c. 600), and, under such act, the shipowner is liable for the negligence of the master causing an injury to a member of the crew under him. *Trautfler v. Detroit & Cleveland Nav. Co.*, 181 Fed. 256, 262.

One who is charged with superintendence within Code 1907, § 3910, making an employer liable for negligence of an employe who has superintendence intrusted to him while exer-

cising such superintendence, does not cease to be superintendent merely because he performs duties in the capacity of a fellow servant, but he may act in a dual capacity, and his acts while acting as a fellow servant are not acts of superintendence for which the employer is liable, but, where he negligently does or fails to do something involving superintendence, the act is one of "superintendence," though he may at the same time have been engaged in the performance of duties of a fellow servant. *Linderman v. Tennessee Coal, Iron & R. Co. (Ala.)* 58 South. 900, 902.

A complaint in an action for injuries to a brakeman while operating a logging train, which alleges that plaintiff was working under the engineer, who was intrusted with the "superintendence" of the operation of the train and of plaintiff, and that while plaintiff was engaged in operating the train he was injured, and that the injuries were caused by the negligence of the engineer while in the exercise of such superintendence, shows that the injuries were caused by the negligence of the engineer while acting in his capacity as superintendent, and not in his capacity as engineer, within Code 1896, § 1749, subd. 2, making an employer liable for an injury to a servant caused by the negligence of one having any superintendence intrusted to him. *Creola Lumber Co. v. Mills*, 42 South. 1019, 1021, 149 Ala. 474.

The fact that a foreman having charge of a gang of men works with his hands, the same as the rest of the men, for the greater part of the time, or even all of the time, does not necessarily exclude him from being one "whose . . . principal duty is that of superintendence," within the meaning of the Massachusetts employers' liability act (Rev. Laws, c. 106, §§ 71-79), for whose negligence, causing an injury to another employé, the master is liable. *New England Telephone & Telegraph Co. v. Butler*, 156 Fed. 321, 324, 84 C. C. A. 217. See, also, *Robertson v. Hersey*, 84 N. E. 843, 198 Mass. 528.

The question of what constitutes "exercising superintendence," as the term is used in Rev. Laws Mass. c. 106, § 71, providing that if personal injury is caused to an employé, who at the time of the injury is in the exercise of due care by reason of negligence of a person in the service of the employer, who was intrusted with and was "exercising superintendence," etc., is one not of the magnitude of the job but of the nature and power of the person in charge thereof. One who is on the ground dissevered from all other authority, and having full power at the time over the work to be done, even though only temporarily, may be "exercising superintendence." *Munroe v. Fred T. Ley & Co.*, 156 Fed. 468, 472, 84 C. C. A. 278.

The act of one in charge of the work of unloading a schooner in selecting an improper piece of rope, for the purpose of lashing a

ladder by which access was had to the hold, was an act of "superintendence," notwithstanding that he himself did the lashing. *Hourigan v. Boston Elevated Ry. Co.*, 79 N. E. 738, 739, 193 Mass. 495 (citing *Knight v. Overman Wheel Co.*, 54 N. E. 890, 174 Mass. 455; *Murphy v. New York, N. H. & H. R. R.*, 72 N. E. 330, 187 Mass. 18; and distinguishing *Shepard v. Boston & M. R. R.*, 33 N. E. 508, 158 Mass. 174; *Sullivan v. Fitchburg R.*, 36 N. E. 751, 161 Mass. 125; *Dowd v. Boston & A. R. Co.*, 38 N. E. 440, 162 Mass. 185; *O'Neil v. O'Leary*, 41 N. E. 662, 164 Mass. 387).

A teamster engaged in moving timbers was directed by an employé to unhitch his horse from a wagon and hitch it to a chain which had been attached to one of the timbers to be hauled. The chain slipped and caught another timber. The teamster, while in the act of prying the timbers apart, was injured in consequence of the employé starting the horse. Held to authorize a finding that the employé, while starting the horse, was in the exercise of the controlling authority, which he had as superintendent, within the meaning of the employers' liability act. *Coates v. Soley*, 80 N. E. 464, 465, 194 Mass. 386.

A car dispatcher on a street railroad is an "employé intrusted with and exercising superintendence," within the direct provisions of Rev. Laws, c. 106, § 71, cl. 2, giving employes an action for personal injuries caused by the negligence of such person. *Fitzgerald v. Worcester & S. St. Ry. Co.*, 85 N. E. 911, 912, 200 Mass. 105, 19 L. R. A. (N. S.) 239.

Where plaintiff was working under the direction of M. as superintendent, and M. decided to cut a wire holding planks in place without giving any warning to workmen near, and did so, whereupon one of the planks fell and injured plaintiff, the act of negligence was not the cutting of the wire, which was manual labor and properly done, but in deciding to cut it without any warning, which was an act of "superintendence." *Mooney v. Benjamin F. Smith Co.*, 91 N. E. 125, 126, 205 Mass. 270.

The person in charge of a particular piece of work as a subforeman or pusher is a person engaged in "superintendence," within the New York Employer's Liability Act (Laws 1902, c. 600), making the master liable for injuries to servants caused by the negligence of a superintendent or a person exercising "superintendence." And so is a foreman whose sole duty is to superintend the work of a shift of men under him, make out reports, and to have charge of the appliances in the rooms in which they worked. *Castner Electrolytic Alkali Co. v. Davies*, 154 Fed. 938, 942, 83 C. C. A. 510. The person in charge of a particular piece of work as a subforeman or pusher is a person engaged in superintendence within the New York employer's lia-

bility act (Laws 1902, c. 600), making the master liable for injuries to servants caused by the negligence of a superintendent or a person exercising superintendence. *Pennsylvania Steel Co. v. Lakkonen*, 181 Fed. 325, 327, 104 C. C. A. 513.

The action of the superintendent of a factory in starting up a loom which the operator had stopped for the purpose of cleaning it was an "act of superintendence" for which his principal was responsible to the operator, who was injured thereby under New York Employer's Liability Act (Consol. Laws N. Y. 1909, c. 31) § 200. *American Mfg. Co. v. Bigelow*, 188 Fed. 34, 36, 110 C. C. A. 77.

The conductor of the car on which plaintiff, a conductor off duty, was injured was not a person whose sole or principal duty was that of "superintendence," within the Employers' Liability Act, so as to entitle plaintiff to recover on the ground that such conductor was guilty of negligence in commanding plaintiff to occupy a dangerous position, on the front platform of the car. *McLaughlin v. Interurban St. Ry. Co.*, 91 N. Y. Supp. 883, 885, 101 App. Div. 134.

One who had charge of men engaged in unloading coal from cars, and who checked the cars and helped in the unloading, was not as to the others exercising "superintendence," within the Employers' Liability Act. *Miller v. Solvay Process Co.*, 95 N. Y. Supp. 1021, 1023, 109 App. Div. 135.

The superintendent of a roundhouse had general supervision of all work, and authority to hire and discharge men, but another was foreman or inspector of boiler repairs, with a gang of men under his direction. Held, that such person, while engaged in directing boiler repairs in the absence of the superintendent, was engaged in "superintendence," within the statute, as to the men under his direction. *Faith v. New York Cent. & H. R. R. Co.*, 95 N. Y. Supp. 774, 776, 109 App. Div. 222.

The direction of a foreman, who had power to stop machinery, that it be stopped, or the failure to so direct, while a condition of the machinery was being remedied which necessitated the loosening of a belt running from the main shaft to a counter shaft, which had become wound around a pulley, on the counter shaft, was an act of "superintendence," within Employers' Liability Act. *Guilmartin v. Solvay Process Co.*, 82 N. E. 725, 726, 189 N. Y. 490. See, also, *Gallagher v. Newman*, 83 N. E. 480, 481, 190 N. Y. 444, 16 L. R. A. (N. S.) 146.

Where an ordinary laborer, during the absence of the regular superintendent, is intrusted with his duties, he cannot be regarded as "exercising superintendence," within the Employers' Liability Act (Laws 1902, c. 600) § 1, subd. 2, while he is performing the

ordinary duties of a laborer and participating in the work of his fellow laborers. *Hope v. Scranton & Lehigh Coal Co.*, 105 N. Y. Supp. 372, 374, 120 App. Div. 595.

A foreman of a gang varying from 10 to 50 men, having immediate superintendence of the work and of the men engaged therein, who were obliged to do as he directed, was, in directing one of them to remove planks forming a part of the floor of the room where the employes worked and not to replace the same, engaged in an "act of superintendence," within Employers' Liability Act. *Heffron v. Lackawanna Steel Co.*, 105 N. Y. Supp. 429, 432, 121 App. Div. 35.

The foreman of a gang employed in trimming trees preliminary to stretching electric wires, while holding a rope attached to a limb to prevent from falling, when it was sawed off, is not exercising "superintendence," within the Employers' Liability Act, making an employer liable for injuries to an employe arising from negligence of one intrusted with and exercising superintendence. *Lowrey v. Huntington Light & Power Co.*, 105 N. Y. Supp. 852, 853, 121 App. Div. 245.

A boss of a machine shop, directing plaintiff and his coemployes to lower an iron flask, watching them, and directing their movements, but not assisting them in any way, is exercising "superintendence," within the meaning of Employers' Liability Act. *Ozogar v. Pierce, Butler & Pierce Mfg. Co.*, 105 N. Y. Supp. 1087, 1090, 55 Misc. Rep. 579.

Defendant's superintendent, directing the unloading of a vessel, ordered a box to be placed in the gangway, and leaned against the side thereof. The box fell, and, under the direction of one who, during the presence of the superintendent, was plaintiff's fellow servant, the box was again put in place, and afterwards again fell and injured plaintiff. Held that, in the absence of proof that the superintendent was absent from the works, and that the servant who directed the replacing of the box was an employe whose sole or principal duty was that of superintendence, the act of such servant was not an "act of superintendence." *Williams v. Citizens' Steamboat Co.*, 106 N. Y. Supp. 975, 978, 122 App. Div. 188.

Plaintiff, a machinist, employed to assist in cleaning the sheaves and cables of an elevator, worked in company with O., who was second assistant to the engineer. Plaintiff claimed that he was told by the chief engineer to assist O., and that he acted under O.'s orders, and was injured because of his negligence in telling plaintiff to go ahead with the work without giving warning to the men in charge of the elevator; plaintiff being subsequently injured by the starting of the elevator. Held, the mere fact that O. was directed to stand guard and give directions when to proceed with the work was insuffi-

cient to constitute his acts "acts of superintendence," within Employers' Liability Act. *Falk v. Havemeyer*, 108 N. Y. Supp. 140, 142, 123 App. Div. 657 (citing *McConnell v. Morse Iron Works & Dry Dock Co.*, 80 N. E. 190, 187 N. Y. 341, 10 L. R. A. [N. S.] 419, 10 Ann. Cas. 205; *McLaughlin v. Interurban St. R. Co.*, 91 N. Y. Supp. 883, 101 App. Div. 134; *Quinlan v. Lackawanna Steel Co.*, 94 N. Y. Supp. 942, 107 App. Div. 176).

It is not negligence, in a detail of "superintendence," for a telephone company's foreman, when directing an experienced lineman to climb a pole and cut wires, to omit to tell the lineman to investigate as to whether detaching the wires will weaken the support of the pole, and to suggest that the pole be tested to ascertain whether it is rotten where it enters the ground, where such poles are first attacked by rot, and to inform him of the manner of making the test; such matters being as much within the knowledge of the lineman as of the foreman. *La Duke v. Hudson River Tel. Co.*, 108 N. Y. Supp. 189, 191, 124 App. Div. 106.

Where a railroad company's employé was a track supervisor, and had general supervision of the work of loading rails on cars, and it did not appear that there was any limitation on his authority, he was exercising an "act of superintendence" while overseeing the work of loading rails, within the employer's liability act (Laws 1902, p. 1748, c. 600), though designated as a foreman. *Vincenzo v. Delaware & H. Co.*, 110 N. Y. Supp. 589, 591, 126 App. Div. 481.

Iron workers employed on a building were divided into gangs, under the charge of a foreman, called a "pusher." There was a general superintendent of the whole work, and in his absence the pusher had direction of the men, and of a derrick with which they worked; and, if the men needed help, he assisted with his hands, if he saw fit. Held, that the pusher was a "person intrusted with and exercising superintendence," whose sole or principal duty is that of superintendence, for whose negligence the master is made responsible, regardless of the absence of the general superintendent; the statute (Laws 1902, p. 1750, c. 600, § 3) not requiring that the person shall be a general superintendent, or that he shall have power to employ or discharge men. *Hurley v. Olcott*, 119 N. Y. Supp. 430, 435, 134 App. Div. 631.

To facilitate the work of removing old ties from an elevated structure, the foreman of a track gang directed employés to go down into the street, and as the ties were thrown down to remove them, and directed other employés to station themselves near the place to warn the public, and he himself stationed himself where he could see when the ties were to be thrown. The foreman gave a signal that all was clear as each tie was thrown down, and an employé, while in the act of

removing a tie, was struck by a tie which was thrown on the signal of the foreman that all was clear. Held, that the foreman was performing a mere detail in the work of removing the ties, and was not exercising an "act of superintendence," so as to render defendant liable under the employer's liability act (Consol. Laws, c. 31, §§ 200-204). *Larson v. Brooklyn Heights R. Co.*, 119 N. Y. Supp. 545, 547, 134 App. Div. 679.

A servant, required to see that the instructions of the superintendent as to the manner of doing the structural iron work on a building were carried out and to assist in the performance of the work, was not engaged in an act of "superintendence" while assisting in moving a derrick after the superintendent had instructed him as to the manner of doing the work; and a fellow servant, injured by such servant's negligence in doing the work, could not recover, under the employer's liability act (Laws 1902, p. 1748, c. 600). *Pratt v. McKee*, 119 N. Y. Supp. 967, 968, 135 App. Div. 752.

A hoisting elevator was raised or lowered in a twelve-story building in obedience to signals. A signal man was at the bottom of the shaft to notify the engineer and another at the top to direct its movement for the two upper floors only, but for other floors a signal by any one would be obeyed, regardless of the position of the elevator. An employé was working on the fifth floor when the elevator suddenly started upward, in response to a signal from an unknown source, and he was injured. Held that in the suit therefor, tried on the theory that liability was created under the employer's liability act (Consol. Laws, c. 31), the court having eliminated the question of a safe place to work, the only remaining theory on which the cause of action came within the act was that if any of defendant's employés, charged with the duty, gave the signal to start, it was an act of superintendence, and that under the circumstances it was not such an act, even if given by an employé, of which there was no evidence, plaintiff's assignment of negligence being in fact based on the absence of such a person, and a judgment in his favor on that theory could not stand. *McDonnell v. Andrew J. Robinson Co.*, 121 N. Y. Supp. 47, 49, 136 App. Div. 598.

Plaintiff was employed to run an elevator in defendant's factory, and the foreman got in and ran it up to the third floor, where plaintiff had a bundle to deliver. The foreman then told him to deliver the bundle, and he would wait for him until he came back. On plaintiff's return, he found the chain down and the door partly open, and in the darkness attempted to step in the elevator, which in the meantime had presumably been run up to the fourth floor by the foreman, and he thus fell to the bottom of the shaft. Held, that the foreman's direction and assur-

ance were acts done by virtue of his authority as foreman, and his disregard of such assurance was a violation of duty as superintendent; the foreman under the circumstances owing plaintiff the duty either not to move the elevator, or at least to close the opening so as to warn him on his return, and hence he was injured in consequence of a negligent act or omission of superintendence within the meaning of the employer's liability act (Consol. Laws, c. 31). *Martin v. Cornell*, 121 N. Y. Supp. 119, 120, 136 App. Div. 585.

The engineer of defendant in charge of a steam shovel gang, who hired and discharged the men and directed the manner of their work, directed plaintiff to perform work directly under the bucket, and, on plaintiff's request that he have the bucket turned to one side because there were two men working on the arm of the engine or crane, said "It's all right. Go ahead. Don't be afraid," although the arm could have been easily swung to one side. Held, that the engineer's determination was an "act of superintendence" within the employer's liability act. *Impelizzieri v. Cranford*, 133 N. Y. Supp. 336, 337, 148 App. Div. 758.

#### **SUPERINTENDENT**

See Town Superintendent.

As judicial officer, see Judicial Officer.

As laborer, see Laborer.

As officer, see Officer.

See, also, Superintendence; Vice Principal.

The word "superintendent" implies a person exercising large executive powers, and does not include a mere foreman having direction of mechanics and other workmen engaged with him in the construction of a building; he being a fellow servant for whose negligence the master is not liable. *Fournier v. Pike*, 128 Fed. 991, 994.

"A 'superintendent' is a man having the control, with the power of authority; that is to say, when he speaks the workmen are to obey, not because he advises them or requests them, or hopes they will, but because, by virtue of his position, they have agreed to obey him. That is the nature of his authority." *Munroe v. Fred T. Ley & Co.*, 156 Fed. 468, 472, 84 C. C. A. 278 (quoting and adopting the definition in *Malcolm v. Fuller*, 25 N. E. 83, 152 Mass. 160, 163). See, also, *Bowie v. Coffin Valve Co.*, 86 N. E. 914, 915, 200 Mass. 571.

A "superintendent" is one who has the oversight and charge of something, with the power of direction, which power is entire and absolute, and an employé intrusted with the management of a business during the absence of the manager thereof is not a superintendent, since he is subject to the control of the manager, who is his superior. *Ruemmel-*

*Braun Co. v. Cahill*, 79 Pac. 260, 262, 14 Okl. 422.

On an issue as to whether a certain person was defendant's superintendent in the work of unloading coal from a schooner, it appeared that he did manual work only when he felt like it; that it was his duty to report how many men he wanted, and to report them if they did not work properly; that it was his duty to tell the men where to shovel the coal, and to tell the engineer when to hoist and lower the coal scoop, and also to tell the men when to stop work; and that there was no other person in the immediate charge of the work. Held, that the facts warranted a finding that he was a "superintendent," within the employers' liability act. *Hourigan v. Boston Elevated Ry. Co.*, 79 N. E. 738, 739, 193 Mass. 495 (citing *Knight v. Overman Wheel Co.*, 54 N. E. 890, 174 Mass. 455; *Murphy v. New York, N. H. & H. R. Co.*, 72 N. E. 330, 187 Mass. 18; and distinguishing *Shepard v. Boston & M. R. R.*, 33 N. E. 508, 158 Mass. 174; *Sullivan v. Fitchburg R. Co.*, 36 N. E. 751, 161 Mass. 125; *Dowd v. Boston & A. R. Co.*, 38 N. E. 440, 162 Mass. 185; *O'Neill v. O'Leary*, 41 N. E. 662, 164 Mass. 387).

A teamster, who worked with a laborer, even though directing his work and exercising a sort of superintendence over him in obedience to the orders of the master's superintendent, is a fellow servant of the laborer, and not one acting as "superintendent" with the authority of the master, within Rev. Laws, c. 106, § 71. *Anderson v. Smith*, 95 N. E. 392, 209 Mass. 52.

A mine foreman, whose duties are confined to the underground portion of a colliery, is not the "superintendent" of the colliery, within Act June 2, 1891 (P. L. 176), and required by article 14 (page 195) to give notice to the mine inspector of the district in certain cases. *Corgan v. George F. Lee Coal Co.*, 87 Atl. 655, 657, 218 Pa. 386, 120 Am. St. Rep. 891, 11 Ann. Cas. 838.

A plumber, employed to fit and repair pipes in a blacksmith shop, without power to hire or discharge his helper, who is hired by the employer and directed by him to serve as helper and obey the directions of the plumber, is a fellow servant of the helper, and not a "superintendent" within Employers' Liability Act (Laws 1902, p. 1748, c. 600), making an employer liable for injury to an employé caused by the negligence of an employé intrusted with superintendence, etc., and the employer, having supplied suitable appliances, is not liable for injuries to the helper in consequence of the plumber selecting defective appliances. *McConnell v. Morse Iron Works & Dry Dock Co.*, 80 N. E. 190, 191, 187 N. Y. 341, 10 L. R. A. (N. S.) 419, 10 Ann. Cas. 205.

An employé whose duty it is to signal another employé in charge of a crane to oper-

ate the crane, and who gives directions for the carrying out of the orders of a superior, is not a "superintendent" within the meaning of Laws 1902, p. 1748, c. 600, making the master liable for injuries caused by reason of the negligence of any person intrusted with and exercising superintendence, whose sole and principal duty is that of superintendence. *Quinlan v. Lackawanna Steel Co.*, 94 N. Y. Supp. 942, 943, 107 App. Div. 176.

A "pusher" in charge of a gang of five or six structural iron workers, whose work is the same except that he sees that they all work to advantage, is not a "superintendent," within the Employers' Liability Act, for whose negligence, in directing the starting of the hoisting engine, the master is liable. *Abrahamson v. General Supply & Construction Co.*, 98 N. Y. Supp. 596, 597, 112 App. Div. 318.

One employed by a railroad, and having charge of the work of cleaning ashes from locomotives in the absence of the regular superintendent or foreman, and who had control of the men and directed them in the work of handling the engines, was acting as a "superintendent," within Employers' Liability Act. *Mikos v. New York Cent. & H. R. R. Co.*, 102 N. Y. Supp. 995, 996, 118 App. Div. 536.

An employé operating a machine with the assistance of other employés, with incidental power to supervise the work of his assistants, but without authority to exercise superintendence conferred on another, is not a superintendent within the Employers' Liability Act (Laws 1902, p. 1748, c. 600), making an employer liable for injury to an employé caused by the negligence of any person in the service of the employer intrusted with superintendence; a "superintendent" being one whose principal duty is that of superintendence, and mere incidental authority to exercise a minor supervision over others is not sufficient. *Bovi v. Hess*, 107 N. Y. Supp. 1001, 1006, 123 App. Div. 389.

An employé of the owners of a vessel engaged in superintending repair work thereon is not the "superintendent" of an employer supplying employés to do the work, within Employers' Liability Act (Laws 1902, p. 1748, c. 600), making an employer liable for injuries to employés caused by the negligence of "any person in the service of the employer" intrusted with and exercising superintendence. *Droge v. John N. Robins Co.*, 108 N. Y. Supp. 457, 461, 123 App. Div. 537.

The mere presence of a superior employé does not necessarily prevent a subordinate employé from acting as a "superintendent" within the Employers' Liability Act (Consol. Laws, c. 31). *Smith v. Milliken Bros.*, 93 N. E. 184, 186, 200 N. Y. 21.

The operator of an elevator used by employés is not a "superintendent," within the Employers' Liability Act (Laws 1902, p. 1748,

c. 600). *Lee v. Western Electric Co.*, 119 N. Y. Supp. 775, 776, 135 App. Div. 60.

One whose duty it is to employ men and direct them in their work, and whose principal duty consists of supervision and direction, though he may occasionally help with the actual work, bears the relation of "superintendent" to an ordinary workman acting under his directions. In determining whether the act of an employé, for which the master is charged with liability, was one of superintendence, the grade of the employé doing the act should qualify and determine the character of the act, if the act in itself is doubtful and indeterminate. *Buckley v. Beinhauer*, 121 N. Y. Supp. 180, 182, 136 App. Div. 540.

A foreman in charge of the operation of a derrick, there being no other present in charge, was a "superintendent," within Employers' Liability Act (Laws 1902, c. 600; Consol. Laws 1909, c. 31) §§ 200-204, relating to compensation for personal injuries to servants. *Cain v. Thompson-Starrett Co.*, 138 N. Y. Supp. 472, 474, 153 App. Div. 414.

Where the foreman of a contractor who was erecting a building directed a carpenter to move a certain derrick with the assistance of a gang of men, the situation warranted a finding that the carpenter, as concerning the moving of the derrick, was a "superintendent" or foreman, in the absence of the regular foreman, with the authority and consent of defendant. *Farrell v. B. F. Sturtevant Co.*, 80 N. E. 469, 470, 194 Mass. 431.

One who has charge of a gang of men working at a stone crusher, and whose principal work consists of giving orders, and whose only manual labor consists of opening and closing the hoppers, and who must decide under which hopper teamsters shall load, is a statutory "superintendent." *Bourdeau v. J. J. Prindiville Co.*, 99 N. E. 949, 950, 213 Mass. 145.

An act of an employé may be one of "superintendence," where it relates to the furnishing a safe place to work or safe appliances or to the keeping of them in a safe condition. On the other hand, an act is not one of "superintendence" where, at the time and in doing the act complained of, he is engaged in mere manual labor, which is the duty of a common workman. But it is held that he is engaged in an act of superintendence, although he is, at the time of the injury, performing an act of manual labor, where it is done pursuant to directing the work and in furtherance thereof. Thus where a foreman, while in control of work and directing servants under him, performs an act of manual labor pursuant to and in furtherance of the direction which he had previously given in regard to this particular work, he does not cease thereby to be a "superintendent," for whose negligence the master is liable. *Rippy v. Southern R. Co.*,



61 S. E. 1010, 1011, 80 S. C. 539, 21 L. R. A. (N. S.) 601 (quoting 26 Cyc. pp. 1364, 1365).

### **SUPERINTENDENT OF SCHOOL**

As officer, see Officer.

### **SUPERINTENDING CONTROL**

As vice principal, see Vice Principal.

## **SUPERIOR**

A "superior," as the term is used in a statute dividing the employes of railroad companies into superiors and subordinates, is an employe having charge or control of the employes in any separate branch or department. *Kane v. Erie R. Co.*, 142 Fed. 682, 685, 73 C. C. A. 672. Any employe who exercises authority over another is not the fellow servant but the "superior" of such other, and every employe who exercises authority over another in his own branch or department is the "superior," and not the fellow servant, of an employe in a separate branch or department, who exercises no authority there. *Id.*, 133 Fed. 681, 684, 685, 67 C. C. A. 653, 68 L. R. A. 788. Under the second clause of section 3 of Act Ohio April, 2, 1890 (87 Ohio Laws, p. 150), which provides that every person in the employ of a railroad company, "having charge or control of employes in any separate branch or department, shall be held to be the superior and not fellow servant of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed," as such provision has been construed by the Supreme Court of the state, an engineer, although having control of but a single employe, may be the constructive "superior" of a fireman in a different branch of the service. *Erie R. Co. v. Kane*, 118 Fed. 223, 227, 55 C. C. A. 120.

In an action against a street railroad for personal injuries, error in instructing that the street railroad had no prior right to that part of the street occupied by its track, as against pedestrians and vehicles, is not cured by an instruction that it had a superior and preferential right, since there is no distinction between a "prior" right and a "superior" or "preferential" right, and hence the two instructions were clearly inconsistent and left the jury to accept either and disregard the other. *Denver City Tramway Co. v. Gustafson*, 121 Pac. 1015, 1019, 21 Colo. App. 478.

## **SUPERIOR COURT**

The "superior court" is a constitutional court, and jurisdiction is vested therein by the Constitution for the hearing and determining of civil and criminal cases. It has original jurisdiction in regard to certain classes of civil cases and appellate jurisdiction in regard to other classes. It has exclusive jurisdiction of certain classes of civil cases, as well as of certain criminal cases,

and it has concurrent jurisdiction with other courts of civil and criminal cases of given classes. The superior court, as created by the Constitution, is a court for the determination of civil and criminal cases. The manner in which these cases shall be heard and determined, so far as it is not prescribed in the Constitution, is left to the determination of the General Assembly. The Constitution confers upon the superior court and upon the judge authority to exercise, in certain instances, powers which would ordinarily be exercised by the executive or legislative departments of the state, as where the judge is authorized to appoint a notary public who is *ex officio* a justice of the peace, or where the superior court is authorized to grant charters to corporations of a given character. There is nothing in the Constitution which confers upon the superior court, as such, the right to hear and determine contests of elections. *Ogburn v. Elmore*, 51 S. E. 641, 643, 123 Ga. 677.

The "superior court" is a court of general jurisdiction, having cognizance of all classes of cases, including claims interposed to levies on realty or personality. *Winn v. Butts*, 53 S. E. 406, 407, 127 Ga. 385.

"The term 'superior court' must be interpreted in the sense it had at the time of the adoption of the Constitution establishing it, which was that it was the highest court in the state next to the Supreme Court and superior to all others, from which alone appeals lay direct to the Supreme Court, and possessed of general jurisdiction, criminal as well as civil, and both in law and equity." *State v. Baskerville*, 53 S. E. 742, 743, 141 N. C. 811 (citing *Rhyne v. Lipscombe*, 29 S. E. 57, 122 N. C. 650).

"The 'superior court' is a superior court of judicature over this state, with a supreme jurisdiction, original and appellate, over the trial of all causes not committed to the jurisdiction of inferior courts." *In re Burnette*, 85 Pac. 575, 579, 73 Kan. 609 (quoting and adopting the definition in *Styles v. Tyler*, 30 Atl. 165, 64 Conn. 432).

### **Clerk**

Revisal 1905, § 352, provides that when power is conferred or duties imposed upon the superior court the words "superior court" or "court" mean the clerk of the superior court, unless otherwise stated, or reference is made to a regular term of the court. Section 2842 provides that a surety on paying money, upon producing to the superior court a receipt showing that he has satisfied an execution and expended money as surety, the court shall award execution against the estate of the principal. Held, that the clerk of the superior court has authority to enter a judgment for the recovery of money paid by the surety for the principal. *Bank of North Wilkesboro v. Wilkesboro Hotel Co.*, 61 S. E. 570, 573, 147 N. C. 591.

**SUPERIOR FORCE**

While common carriers are not considered, under the Civil Code of Louisiana, as insurers, against loss or damage by fire, they are liable "unless they can prove that such loss has been occasioned by accidental and uncontrollable events." "Force majeure," or "superior force," is an accident which human prudence can neither foresee nor prevent. *Lehman, Stern & Co. v. Morgan's Louisiana & T. R. & S. S. Co.*, 38 South. 873, 874, 115 La. 1, 70 L. R. A. 562, 112 Am. St. Rep. 259, 5 Ann. Cas. 818.

**SUPERIOR SERVANT RULE**

In some jurisdictions the "superior servant rule," so called, has been adopted. This rule may be briefly stated thus: Where the negligent act of one servant causing injury to another is the direct result of the exercise of the authority conferred upon him by the master over the servant injured, the master is liable. In other jurisdictions, however, it is held that, in the absence of any statute, the superior servant or foreman, whatever his rank, is not a vice principal, unless he represents the master in the order or act complained of in respect to those duties that

the master is bound to perform, and this is the rule adopted in Kansas. *Lunn v. Morris & Co.*, 105 Pac. 15, 16, 81 Kan. 94 (citing *Consolidated Coal Co. v. Wombacher*, 24 N. E. 627, 628, 134 Ill. 57, 63; 2 Labatt, Mast. & S. § 521; *Brick Co. v. Shanks*, 76 Pac. 856, 857, 69 Kan. 306, 310). See, also, *Moore v. Dublin Cotton Mills*, 56 S. E. 839, 845, 127 Ga. 609, 10 L. R. A. (N. S.) 772.

**SUPERPHOSPHATE**

A "superphosphate" is a fertilizer produced by chemical action upon matter which in turn produces the three essential ingredients that make all fertilizers valuable, viz., available phosphoric acid, potash, and nitrogen. The most valuable of these properties is the available phosphoric acid, which comes from bone, meat scraps, blood, and a certain rock. Webster defines it as "a fertilizer prepared by treating ground bones, bone black, or phosphoric with sulphuric acid, whereby a portion of the insoluble phosphoric acid is rendered soluble in water." *Goodman v. B. F. Beard & Co.* (Ky.) 93 S. W. 666.

## SUPERSEDEAS

"A 'supersedeas' suspends the efficacy of the judgment, but does not, like a reversal, annul the judgment itself. Its object and effect are to stay future proceedings, and not to undo what is already done. It has no retroactive operation, such as to deprive the judgment of its force and authority from the beginning, but only suspends them after and while it is itself effectual." *Hey v. Harding* (Ky.) 78 S. W. 136; *Gardner v. Continental Ins. Co.* (Ky.) 101 S. W. 911, 912 (quoting *Runyon v. Bennett*, 34 Ky. [4 Dana] 598, 29 Am. Dec. 431). Thus, where a party against whom a judgment has been obtained, directing his land to be sold, obtains a supersedeas, the lower court has no authority to place the land in the hands of a receiver and deprive him of its use pending the appeal. *Gardner v. Continental Ins. Co.*, 101 S. W. 911, 912 (quoting and adopting definition in *Runyon v. Bennett*, 34 Ky. [4 Dana] 598, 29 Am. Dec. 431).

"A 'supersedeas' is a statutory remedy. It is only obtained by a strict compliance with all the required conditions, none of which can be dispensed with. Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard." *Whitaker v. McBride*, 98 N. W. 877, 878, 5 Neb. (Unof.) 411 (quoting *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933).

"Originally a 'supersedeas' was a writ directed to an officer commanding him to desist from enforcing the execution of another writ, which he was about to execute, or which might come into his hands. In modern times the term is often used synonymous with a stay of proceedings, which of itself suspends the enforcement of a judgment." In Oregon a writ of supersedeas is unknown, though a certificate of probable cause issued by the trial judge or by a justice of the Supreme Court is tantamount thereto, the effect of which is to suspend the enforcement of the judgment until it can be reviewed on appeal. *State v. Small*, 90 Pac. 1110, 1111, 49 Or. 595 (quoting *Dulin v. Pacific Wood & Coal Co.*, 33 Pac. 123, 98 Cal. 304, 306, and citing *State v. Armstrong*, 74 Pac. 1025, 45 Or. 25).

The office of a "supersedeas" is to stay execution. *Green Bay & M. Canal Co. v. Norrie*, 118 Fed. 923, 924.

A "supersedeas," like an appeal, is a matter of right, and does not rest in the discretion of the court. *McCourt v. Singers-Bigger*, 150 Fed. 102, 104, 80 C. C. A. 56.

"The word 'supersedeas' does not strictly apply to a stay of proceedings, and that therefore a writ of error might operate as a stay without bond. But the term 'supersedeas' is often used in a broader sense than in its original sense. \* \* \* Where a demurrer to a proceeding to foreclose a mortgage was overruled, and a bill of excep-

tions signed and filed, bringing the ruling to this court for review, this alone did not ipso facto operate to prevent the presiding judge from proceeding with the trial. *Montgomery v. King*, 54 S. E. 135, 136, 125 Ga. 388 (citing and explaining *Franklin v. Kriegshaber*, 41 S. E. 47, 114 Ga. 947; *Jordan v. Jordan*, 16 Ga. 446, 448, 452; *Gustoso Cigar Mfg. Co. v. Ray*, 43 S. E. 984, 117 Ga. 565; *Marks v. Hertz*, 65 Ga. 119; *Southern Exp. Co. v. Lynch*, 65 Ga. 240; and citing and distinguishing *Jones v. Doherty*, 11 Ga. 305; and citing and adopting *Dulin v. Pacific Wood & Coal Co.*, 33 Pac. 123, 98 Cal. 304, 306; 20 Enc. Pl. & Pr. 1209).

The "writ of supersedeas" is frequently granted by this court for the purpose of staying proceedings in the superior court, when a review of the action of that court is sought in this court, either upon direct proceeding or on appeal, and is directed to the court whose action is under review, or to an officer of that court who may be about to enforce its judgment. *McAneny v. Superior Court of Santa Clara County*, 87 Pac. 1020, 1022, 150 Cal. 6.

## SUPERSTITIOUS USE

In England, masses for the dead are called "a superstitious use," and are forbidden by statute, but in California, and in other states generally, there is no statute designating such bequests superstitious uses, and generally like bequests are not prohibited as superstitious if they are for the observance of any ceremonial, the efficiency of which is recognized by the church of which the donor is a member. In *re Lennon's Estate*, 92 Pac. 870, 871, 152 Cal. 327, 125 Am. St. Rep. 58, 14 Ann. Cas. 1024.

## SUPERSTRUCTURE

In the technique of railroading and the parlance thereof, the word "superstructure" means the upper part of railroad bridges. *State ex rel. Pearson v. Louisiana & M. R. R. Co.*, 94 S. W. 279, 281, 196 Mo. 523.

The "superstructure" of a railroad is defined as "the sleepers, rails, and fastenings, in distinction from the roadbed, called also 'permanent way.'" *Bird v. Common Council of City of Detroit*, 111 N. W. 860-878, 148 Mich. 71 (citing *Webst. Dict.*). See, also, *Louisville & N. R. Co. v. United States Iron Co.*, 101 S. W. 414, 418, 118 Tenn. 194.

Under Revisal 1905, § 5290, authorizing the Corporation Commission to assess the "right of way and superstructures thereon," the word "superstructures" covers all buildings situated on the right of way. *Atlantic & N. C. R. Co. v. City of Newbern*, 60 S. E. 925, 927, 147 N. C. 165.

## SUPERVISE

The power conferred on the Board of Railroad Commissioners by Code, § 2112, giv-

ing it general supervision of all the railroads in the state, is not limited to any particular subject, and the section when construed in connection with section 2113, and Code Supp. 1907, §§ 2116, 2153, authorizing the board to make changes in the mode of operating railroads, requiring railroads to furnish cars and to transport freight without change of cars, empowers the board to require a carrier to accept the cars of a private owner or of a carrier, not a connecting carrier; to "super-vise" meaning to superintend, to direct, to take charge over, with the power of direction. *State v. Chicago, M. & St. P. Ry. Co.*, 130 N. W. 802, 804, 152 Iowa, 317.

### SUPERVISION

See General Supervision.

Schools in special or independent districts, which by the express terms of Rev. Codes 1899, § 639, are removed from the superintendence of county superintendents, are not under his "supervision," within section 652, which provides a graduated salary for county superintendents corresponding to the number of schools or departments of graded schools there were under their official supervision in the preceding year. *Dickey County v. Denning*, 103 N. W. 422, 423, 14 N. D. 77.

Under Pol. Code, § 4041, subd. 4, requiring county boards of supervisors when the cost of construction of any bridge, etc., exceeds \$500 to advertise for bids, but providing that, on being advised by the county surveyor that the work can be done for less than the lowest bid, the board may reject all bids and order the work done or structure built by days' work under the "supervision and control" of such surveyor, the latter to be held personally responsible under his official bond to construct such structure at a cost not exceeding the lowest bid, the board did not exceed its power in directing the surveyor or on his being instructed to construct a bridge to purchase material therefor, "supervision" implying oversight, and the word "control" being used to authorize additional power, such as is contained in one of its definitions, "to exercise a restraining or governing influence over, to regulate." *McCarthy v. Board of Supervisors of Merced County*, 115 Pac. 458, 459, 15 Cal. App. 576.

The words "general supervision" imply something more than a mere power to advise and suggest, and confer authority to oversee and review the acts and to correct the errors of those over whom the right of supervision is granted. Under Laws 1905, p. 2215, c. 115, § 2, subd. 2, requiring the state board of tax commissioners to exercise "general supervision" over assessors and county boards of equalization and the assessment of taxable property in order to secure equality in taxation, the commissioners do not act merely in an advisory capacity, but have power to classify intercounty railroads and fix the value thereof for purposes of taxation. *Great*

*Northern Ry. Co. v. Snohomish County*, 98 Pac. 924, 927, 48 Wash. 478.

### SUPERVISOR

See Board of Supervisors.

Determination of, see Determination.

According to the Century Dictionary, a "supervisor" is one who supervises; an overseer; an inspector; superintendent, as the supervisor of a coal mine; a supervisor of customs. And the word "supervise" means to oversee; have charge of, with authority to direct or regulate. The word "supervisor," when used to indicate an agent of an insurance company, denotes general agency. *New York Life Ins. Co. v. Rhodes*, 60 S. E. 828, 831, 4 Ga. App. 25.

### SUPERVISOR OF ASSESSMENT

As county officer, see County Officer.

### SUPERVISORY CONTROL

The "writ of supervisory control" is one to be seldom issued, and then only when other writs may not issue and other remedies are inadequate, and when the acts of the court complained of, as threatened, will be arbitrary, unlawful, and so far unjust as to be tyrannical. *State ex rel. Heinze v. District Court of Second Judicial Dist.*, 81 Pac. 345, 32 Mont. 579.

### SUPPLEMENT

A "supplement" to a newspaper is an addition to the usual issue of the newspaper. *Star Co. v. Colver Pub. House*, 141 Fed. 129.

### SUPPLEMENTAL ACT

The term "supplement" signifies something additional, something added to supply what is wanting. It is that which supplies a deficiency, adds to or completes, or extends, that which is already in existence, without changing or modifying the original. Thus the act, declaring that wherever the word "railroad" occurs in the act of May 12, 1869, relating to aid to railroads, or in any section of any subsequent act amendatory or supplemental thereto, the same shall include "street railroads, suburban street railroads, or interurban street railroads," is a "supplemental" and not "amendatory act," and is therefore not void for failure to set forth in full any part of the act of 1869, as required in case of amendments by Const. art. 4, § 21. *McCleary v. Babcock*, 82 N. E. 453, 455, 169 Ind. 228.

A "supplemental act" adds something that was left out of the original act, and does not necessarily revise it or amend it in the technical sense, while an amendment is something that may be incorporated into the act amended on its passage. A supplemental act is an independent law. *State ex rel. Gamble v. Hubbard*, 41 South. 903, 906, 148 Ala. 391.

**SUPPLEMENTAL ANSWER**

The office of a "supplemental answer" is, not to supply matter which should have formed a part of the original answer, but is restricted to replies to what may be embraced in the supplemental petition, and it cannot be made to serve the purpose of aiding a defective statement in the original answer, or to add any new matter only available against the cause of action stated in the original petition. *Blewitt v. Greene*, 122 S. W. 914, 915, 57 Tex. Civ. App. 588.

A pleading, which in its substance is a direct and full reply to the cause of action set up in the plaintiff's petition and contains, among other matter, a sworn denial of partnership of the defendants, should, under the rules of pleading, be designated either an "original" or "amended" answer, and is not a "supplemental answer." *Chicago, R. I. & T. R. Co. v. Halsell*, 83 S. W. 15, 98 Tex. 244.

**SUPPLEMENTAL ASSESSMENT**

Where the court on appeal adjudged that property was liable to assessment for benefits for widening a street, and reversed the judgment of the trial court sustaining objections to the assessment on the ground that the property was not subject to assessment, and remanded the case, and the city never filed in the trial court the remanding order, a new assessment of the property was not a "supplemental assessment" within Cities and Villages Act 1872. p. 257, art. 9, § 47, relating to supplemental assessments, where the first assessment proves insufficient. *City of Chicago v. Willoughby*, 94 N. E. 513, 515, 249 Ill. 249.

**SUPPLEMENTAL BILL**

A "supplemental bill" is where there has been some change in the rights or status of the parties which must be carried forward by a "supplemental bill," and usually, when a supplemental bill is thus allowed, matters can be brought in which could have been covered by an amendment to the original bill. *St. Louis & S. F. R. Co. v. Hadley*, 155 Fed. 220, 221.

A "supplemental bill" is but an addition to the original bill, and its usual purpose is to remedy some defect therein that cannot be remedied by amendment, and a bill, whose principal purpose is to obtain a correction of a decree and make it conform to the mandate of the Supreme Court, is not a supplemental bill. *Blondin v. McArthur*, 80 Atl. 663, 84 Vt. 516.

**SUPPLEMENTAL COMPLAINT**

A "supplemental complaint" is for the purpose of supplementing a good complaint, and cannot be availed of to change the original complaint to a new cause of action. *Lafayette Trust Co. v. Peck*, 117 N. Y. Supp. 336, 337, 133 App. Div. 370.

The rule of practice under statutes allowing the filing of supplemental complaints in actions at law is similar to that of the chancery courts in reference to supplemental bills, and the supplemental complaint differs from an amended complaint in that it does not take the place of the original pleading, but stands with it, and adds to it some fact which has occurred since the beginning of the action, which fact must be set forth therein. A "supplemental complaint" is one which assumes that the original complaint is to stand, and must consist of facts which had arisen since the filing of the original complaint, and must relate to matters which had occurred subsequent to the commencement of the action. *Bush v. Pioneer Min. Co.*, 179 Fed. 78, 80, 102 C. C. A. 372.

**SUPPLEMENTARY PROCEEDING**

As special proceeding, see Special Proceeding.

"Supplementary proceedings" are special proceedings of statutory origin in which the court has only such jurisdiction, as is conferred by the statute creating the remedy. *Mede v. Meyer*, 105 N. Y. Supp. 957, 958, 55 Misc. Rep. 621.

Proceedings by a judgment creditor after the return of execution unsatisfied for the examination of the judgment debtors respecting their property and choses in action, and upon the evidence adduced on such examination for the appointment of a receiver, which proceedings are authorized by the statutes of several of the states and are adapted to aid the enforcement of executions on judgments at law and as a substitute for a creditor's bill in equity, are known as "supplementary proceedings." *Regina Music Box Co. v. F. G. Otto & Son*, 124 Fed. 747.

"Proceedings supplementary to execution," while collateral to an original action, are still quite independent of it. Indeed, they embrace all the elements of an independent civil action. It has its own record, and only parties thereto need be served with notice of appeal. Supplementary proceedings, so far as the garnishee is concerned, are original proceedings, not against the debtor, but against his creditor, and are a substitute for a creditors' bill. *McKenzie v. Hill*, 98 Pac. 55, 56, 9 Cal. App. 78.

**SUPPLETORY OATH**

Where a party to a suit, on the trial thereof, presents himself as a witness in support of the charges against the adverse party on his account book, and voluntarily takes the "general oath" to tell the truth, the whole truth, and nothing but the truth, legally administered, instead of the "suppletory oath," a more restricted oath, to make just and true answers to such questions as shall be asked by the court or by the order thereof, and testifies untruly, wittingly, and willingly to

matters material and legitimately derivable from him, he will come within the purview of Rev. Stat. c. 158, § 1, and may be convicted of perjury. *State v. Keene*, 26 Me. 33, 35.

## SUPPLY

An agreement to supply materials to a contractor is not "supplying" them, and where one has agreed to supply materials, but they have never been delivered to or used by the contractor in his lifetime, or his sureties completing the work after his death, it cannot be said that the materials have been "supplied" to the contractor in the prosecution of the work, within the meaning of the federal statute, providing that any person entering into a formal contract with the United States for the construction of any public building "shall execute the usual penal bond with good and sufficient sureties, with the additional obligations that such contractor shall promptly make payments to all persons supplying him labor and materials, in the prosecution of the work provided for in such contract," and that one who has so supplied labor and materials may bring suit on the bond for his own benefit. *United States v. Murdock*, 59 Atl. 60, 62, 99 Me. 258.

Act March 30, 1892 (P. L. p. 369) § 1, gives a lien on money due a contractor for the construction of a city building to subcontractors, materialmen, etc., on their compliance with section 2, which requires the service of a verified statement showing the amount of the claim, that the materials were furnished to the contractor, and that they were actually used in the erection and completion of the contract with the city. Held, that where a notice of a lien recited that there was due claimant from D., subcontractor for the mason work on public school No. 9, \$6,630.49 for materials supplied in accordance with the contract between claimant and D., all of which had been fully completed, and the affidavit recited that there was due and owing claimant from D. \$6,630.49 for materials supplied on and about the construction of public school No. 9 in the city of Hoboken, the statement sufficiently averred that the materials were actually used in the erection and completion of the school under the contract with the city; the word "supplied" being used there in the sense of "furnish" and the word "about" being taken to mean "upon." *National Fire Proofing Co. v. Daly*, 74 Atl. 152, 155, 76 N. J. Eq. 35.

### SUPPLY (Noun)

See Necessary Supplies.

Other supplies, see Other.

### Supplies for city

The charter of Lowell (St. 1896, p. 364, c. 415) created a department of supplies, with a chief elected annually, and section 3 requires all materials and supplies for the city to be purchased by the head of such department,

subject to the mayor's approval, and provides that, so far as practicable, such purchases shall be made after public advertisement and under contract approved by the mayor. Section 6 provides that heads of departments shall have general charge of matters relating thereto, and shall execute all contracts, except for purchase of material and supplies; and section 7 forbids the city council, or any committee or member, from making contracts, purchasing material, etc., or expending public money, except to defray incidental expenses of the council. Held, that the provision relating to purchase of supplies and material in section 3 could not be construed so as to limit the word "purchase" to a purchase for money, the word "supplies" to articles of food, or the word "material" to that which the city has on hand for manufacture of other things, so that purchase of gravel, to be removed by the city and used on the streets and paid for by other filling deposited on the lot from which it was taken, was a purchase of material, which, under section 6, the superintendent of streets had no authority to make. *Bartlett v. City of Lowell*, 87 N. E. 195, 196, 201 Mass. 151.

### Supplies for mine

Electricity furnished to a mine for illumination or for power constitutes "supplies" within L. O. L. § 7444, giving any person furnishing materials or supplies for the working or development of any mine a lien upon such mine therefor; a "supply" in its restricted sense meaning any substance consumed with its use, but in its more general sense meaning anything furnished to meet a need, and the term "supplies," as used in the statute, including any substance the use of which might reasonably tend to the working or development of a mine. *Grants Pass Trust Co. v. Enterprise Mine Co.*, 113 Pac. 859, 174, 34 L. R. A. (N. S.) 395 (citing 8 Words and Phrases, p. 6802).

### Supplies for railroad construction work

Groceries furnished a subcontractor to supply his boarding house where he boarded his laborers while constructing a railroad are not "supplies" furnished for the construction of a railroad, for the price of which the seller is entitled to a lien under Ky. St. 1903, § 2492. *Carson & Co. v. Shelton*, 107 S. W. 793, 128 Ky. 248; *Id.*, 107 S. W. 793, 32 Ky. Law Rep. 1083, 15 L. R. A. (N. S.) 609.

## SUPPORT

See Good and Sufficient Support; Lateral Support; Self-Supporting Iron Wall.

The word "support" implies sustaining from beneath, as is indicated by its definition, "to bear by being under," and its derivation, "subportare." *General Electric Co. v. Garrett Coal Co.*, 141 Fed. 124, 125.

The word "support," as used in Gen. St. 1901, § 3018, subd. 6, providing for the exemp-

tion of the necessary fund for the support of exempt stock, means only sufficient food to feed the stock for a year. It does not entitle the debtor to claim, in the absence of food for stock, a crop of wheat for the purpose of selling the wheat and purchasing food for such stock. *Voss v. Goss*, 84 Pac. 564, 565, 73 Kan. 120, 117 Am. St. Rep. 457. Under this statute, a person who owns only part of the live stock specified is limited to the amount of food necessary for the "support" of only so much as he owns. *Byrnes v. John Deere Plow Co.*, 85 Pac. 819, 74 Kan. 97.

It has been held that "support," as used in reference to common schools, means continuing regular expenditures for the maintenance of the schools, so that a fund for the support of such schools cannot be used for building a new schoolhouse or purchasing the site. Hence the proceeds of lands granted for university purposes cannot be used for the erection or equipment of university buildings, but only for the support and maintenance of such university, in the payment of current expenses and charges. *Roach v. Gooding*, 81 Pac. 642, 644, 11 Idaho, 244.

#### **SUPPORT (Of Person)**

Support when estate is to be kept together, see *When*.

A law providing for the punishment of a man who "neglects to provide proper food, clothing, shelter, or care in case of sickness for his wife or minor child," does not by implication repeal a law providing for the punishment of a man who "willfully neglects, fails, or refuses to provide reasonable support and maintenance for his wife or minor children." "Support and maintenance" are of much broader import than "food, clothing, and shelter," and may include many things besides food and clothing and shelter. *Campbell v. People*, 94 Pac. 256, 42 Colo. 228.

Where a testator, having ample means, makes a liberal provision for the "support and maintenance" of his widow, those words will be given a broad and liberal meaning, when no language is used in connection therewith which tends to restrict or limit their meaning. *Blair v. Blair*, 108 Pac. 827, 828, 82 Kan. 464.

#### **Attorney's services**

Comp. Laws 1907, § 538, subd. 3, makes the necessary expenses incurred in the support of persons charged with or convicted of crime and committed to the county jail charges against the county. Section 4806 provides that the cost of trial shall be paid by the county wherein the offense was committed, and section 539 provides that costs accruing before removal shall be charged against the county in which the prosecution originated. Held, that the statutes did not raise an implied liability by a county to pay for services of an attorney appointed by the

district court to defend an indigent accused, the term "support" used in section 538 not including such charges. *Pardee v. Salt Lake County*, 118 Pac. 122, 124, 39 Utah, 482, 36 L. R. A. (N. S.) 377, Ann. Cas. 1913E, 200 (citing 2 Words and Phrases, pp. 1634-1638).

#### **Medical attendance**

The word "support," as used in the Oklahoma statute, making it the duty of a parent having custody of a minor child to support and educate such child, includes necessary medical attendance to preserve the health and life of such child. A reasonable construction of the statute requires the furnishing of medical treatment in such a manner and on such occasions as an ordinarily prudent person, solicitous for the welfare of his child and anxious to promote his recovery, would provide. *Owens v. State*, 116 Pac. 345, 6 Okl. Cr. 110, 36 L. R. A. (N. S.) 633, Ann. Cas. 1913B, 1218.

#### **As creating estate**

The following clause in a deed, executed by a husband and wife to their son: "The parties of the first part do hereby reserve a life time dower and 'support' of one the above land set joint in this deed"—secures to the grantors their maintenance and support for and during their lives, but under it they have no estate in the land or any portion thereof. *Beverlin v. Casto*, 57 S. E. 411, 414, 82 W. Va. 158.

#### **SUPPORT AS PAUPER**

The phrase "supported as a pauper" involves, not only the idea that aid shall have been given by a town, but that the aid shall have been applied to or received by the supposed pauper. *Sheboygan County v. Town of Sheboygan Falls*, 109 N. W. 1030, 1031, 130 Wis. 93.

## **SUPPOSE**

See *Induce to Suppose*.

"Suppose" and "guess" are frequently used to express one's opinion, though more apt to express conjecture. *Councill v. Mayhew*, 55 South. 314, 317, 172 Ala. 295.

In an action for an injury at a railroad crossing, the testimony did not disclose whether or not the engineer saw the team of plaintiff's intestate on the track, as intimated, and on appeal the court in its decision stated: "If the facts thus supposed were true, and the engineer, seeing the team standing on the track under the circumstances mentioned, immediately used all available appliances to stop the train, the question of such care would nevertheless be for the jury to determine." Held, that the word "supposed" was advisedly used, and was not objectionable as authorizing a judgment to rest on conjecture. *Kunz v. Oregon R. & Nav. Co.*, 94 Pac. 504, 508, 51 Or. 191.

A plea that "said several 'supposed' causes of action in said counts mentioned, if any such there be or still are," did not accrue within six years is defective for not confessing the causes of action which it seeks to avoid; but as the defect is formal merely, by force of chapter 184, § 4, of the Rhode Island Revised Statutes, the court must support the plea, though, for this cause, specially demurred to. *Marchant v. Valley Falls Baptist Church*, 6 R. I. 24, 26.

#### Allege synonymous

The word "supposed," as used in a plea in trespass for killing a dog, alleging that on the date of "the said supposed killing of said dog" it was found by defendant hunting wild deer, is equivalent to "alleged," and is a sufficient admission of a cause of action. *Mossman v. Bostridge*, 57 Atl. 995, 76 Vt. 409.

### SUPPOSITION

"Inference," in legal parlance, as respects evidence, is a very different thing from "supposition." The former is a deduction from proven facts, while the latter requires no such premise for its justification. Courts and juries, in dealing with the inquiry whether a party has discharged his burden of proof, cannot pronounce on mere supposition that the burden has been met, but can only establish the ultimate fact from others justifying such inference. *Miller-Brent Lumber Co. v. Douglas*, 52 South. 414, 415, 167 Ala. 286 (citing 4 Words and Phrases, p. 3579; 8 Words and Phrases, p. 6807).

### SUPPRESS

A statute, authorizing a municipal corporation to "suppress" skating rinks, gives no power to prohibit them. *Johnson v. Town of Philadelphia*, 47 South. 526, 527, 94 Miss. 34, 19 L. R. A. (N. S.) 637, 19 Ann. Cas. 103.

A village which has power to pass ordinances "to suppress saloons for the sale of spirituous and intoxicating liquors" has the option to wholly prohibit the business within municipal boundaries, but does not have the power to fix a saloon district within the village and prohibit the carrying on of the business at any place outside of the district. *Timm v. Common Council of Village of Caledonia Station*, 112 N. W. 942, 149 Mich. 323.

### SUPPRESSION

The terms "misrepresentation" and "suppression of fact by the employer," contained in a policy of guaranty insurance, which provided that any material misstatements or suppression of fact by employer in any statement or declaration to the company or in any claim made under this bond shall render the bond void from the beginning, mean the same thing. "Misrepresentations" is here

used in a somewhat more restricted sense than ordinarily. It has reference to misstatements, known to be untrue, or which are positively stated as true, without actual knowledge by the insured and made under circumstances which call for such knowledge as might be based on unreasonable care previously exercised. It is akin to the expression "suppression of fact by the employer," which is a species of misrepresentations, as it leads the inquirer to believe what is apparently true by concealing the fact which shows it to be not true. One is the active and the other is the passive phase of the same thing. One is the false statement and the other is the suppression of the truth, each intended to mislead as to the matter pertaining to the risk. *Fidelity & Guaranty Co., of New York v. Western Bank (Ky.)* 94 S. W. 3, 5.

### SUPREME COURT

The Supreme Court, created by Const. art. 7, § 1, which vests judicial power in a Supreme Court and other courts, is supreme over the other two departments of the state government, including the administrative, and it cannot be deprived by the Legislature of its powers; the words "Supreme Court" designating the highest court of the state or nation, possessing the highest and controlling jurisdiction, and the word "supreme," as used in connection with the word "court," signifying "over, above, beyond." *Ex parte France*, 95 N. E. 515, 519, 176 Ind. 72.

The "Supreme Court" is created by the Constitution, and the outlines of its jurisdiction established by that instrument. In re *Burnette*, 85 Pac. 575, 578, 73 Kan. 609.

The "Supreme Court" of Georgia is a constitutional court of limited jurisdiction. It has no original jurisdiction, but is a court alone for the trial and correction of errors from the superior court and certain city courts. *Georgia, F. & A. Ry. Co. v. Lasseter*, 51 S. E. 15, 16, 122 Ga. 679.

When the public statutes were adopted, the term "Supreme Court" included both the court which at the trial term determined questions of fact and the court which at law term settled questions of law. The court has the same power over questions of law involved in the adjudications of the superior court and properly transferred to it that the whole court had prior to 1901 at the law terms over questions of law raised and reserved at the trial terms. *Laws 1901*, p. 563, c. 78, §§ 2, 5. *Town of Bath v. Town of Haverhill*, 63 Atl. 307, 308, 73 N. H. 511.

The words "Supreme Court," in an appeal bond conditioned to prosecute the appeal with diligence to a decision in the said Supreme Court and perform the judgment thereof, etc., are not synonymous with the words "Court of Appeals," and after the Legislature extended the jurisdiction of the



Courts of Appeals, and the Supreme Court certified the case in which the bond was given to the Court of Appeals, no action would lie on the appeal bond, notwithstanding the judgment below was affirmed. *Brookshier v. McIlwrath*, 87 S. W. 607, 608, 112 Mo. App. 687.

## SUPREME LAW

The "supreme law" is the Constitution, and in no proper legal sense can any act of either department of the government, which violates its provisions or exceeds the powers delegated, be the law. *State v. Williams*, 61 S. E. 61, 62, 146 N. C. 618, 17 L. R. A. (N. S.) 299, 14 Ann. Cas. 562. See, also, *Butler Bros. Shoe Co. v. United States Rubber Co.*, 156 Fed. 1, 15, 84 C. C. A. 167.

The "supreme law of the territory" is the act of Congress creating the territory, prescribing its governmental functions, and defining and limiting its legislative authority, and sustains to the governmental powers the same relation that a Constitution sustains to those of a state, and an act of the territorial Legislature, which conflicts with the act of Congress, is void. *Burke v. Malaby*, 78 Pac. 105, 14 Okl. 650.

## SURCHARGE

To "surcharge" or falsify is to allege an omission in an account or deny the correctness of some or all of the items rendered. One who objects to a stated account must surcharge or falsify it; and an account rendered by an administrator is a stated account. *Tate v. Gairdner*, 46 S. E. 73, 74, 119 Ga. 133.

A bill against testamentary trustees, making charges of mismanagement, seeking to hold them liable on various claims, complaining of the compensation allowed them and of an item paid on the settlement of a claim of one of the trustees against the estate, is a bill to "surcharge and falsify." *Leach v. Cowan*, 140 S. W. 1070, 1077, 125 Tenn. 182, Ann. Cas. 1913C, 188.

## SURE FOAL GETTER

Where the seller of a stallion warranted that he was a "sure foal getter," such technical term, in the absence of evidence otherwise explaining it, meant a reasonably sure foal getter. *National Bank of Anadarko v. Oldham*, 109 Pac. 75, 76, 26 Okl. 139.

## SURETIES

A statute providing that an appeal from a justice shall be allowed by him on the party offering "sufficient security in such sum as the justice shall deem sufficient," whereupon the justice shall make an entry as follows: "On the — day of —, 18—, the said A. B. appeals, and C. D. becomes surety in the sum of," etc., which

entry shall be signed by the "sureties," and, when signed, shall bind the "sureties," is satisfied by a bond signed by one surety. The word "surety," as used in the entry on the justice's docket, means "security," and does not refer to the number of persons guaranteeing the prosecution of the appeal and the payment of the judgment. *Richardson v. National Bank of Wilmington & Brandywine* (Del.) 67 Atl. 157, 158, 6 Pennewill, 385.

## SURETY

See *Bound with Surety; Common Surety; Cosurety*.

A "surety" is one who, at the request of another and for the purpose of securing him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person or hypothecates property as security therefor. Civ. Code Cal. § 2831. Consequently a person who signs a note, and executes a mortgage to secure a loan contract by another for his exclusive use and benefit is a "surety." *Townsend v. Sullivan*, 84 Pac. 435, 436, 3 Cal. App. 115. See, also, *Kellogg v. Lopez*, 78 Pac. 1056, 1057, 145 Cal. 497.

A "surety" is "a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so." *McGraw v. Union Trust Co.*, 99 N. W. 758, 136 Mich. 521 (quoting *Smith v. Sheldon*, 35 Mich. 48, 24 Am. Rep. 529).

"A 'surety' is one who contracts for the payment of a debt in case of the failure of another person who is himself principally responsible for it; or, as it has otherwise been expressed, a surety is a person who, being liable to pay a debt, is entitled, if it is enforced against him, to be indemnified by some other person who ought himself to have paid it before the surety was himself compelled to do so." *Wm. Deering & Co. v. Veal* (Ky.) 78 S. W. 886, 887 (quoting *Brandt, Sureties*, § 1).

A "surety" is one who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to indemnity from another, who ought himself to have made payment or performed the obligation before the surety was required to do so. That several persons become both jointly and severally bound to pay a debt, which as between themselves is the debt of one of their number, does not make them principals, so as to deprive them of their rights as sureties, though the obligors, other than the principal debtor, are not identified in the writing as sureties, and where a joint and several bond, not designating any one as principal or as surety, bound the obligors to respond for the default of one of them, the other obligors were sureties. *Reissaus v. Whites*, 106 S.

W. 603-605, 128 Mo. App. 135 (citing Brandt Suretyship [3d Ed. § 1]).

"A 'surety' is an original maker, and becomes primarily and absolutely liable, as much so as the principal, to any party lawfully holding the paper." His undertaking is primary, as distinguished from that of a guarantor, which is collateral and secondary. A surety undertakes to pay if the debtor does not, while in a collateral undertaking, like a guaranty, the undertaking is to pay if the debtor cannot. In the one case there is a direct liability for the act to be performed, while in the other there is a liability for the ability only of another to perform the act. *Rouse v. Wooten*, 53 S. E. 430, 432, 140 N. C. 557, 111 Am. St. Rep. 875, 6 Ann. Cas. 280 (quoting and adopting *Ballard v. Burton*, 24 Atl. 769, 64 Vt. 337, 16 L. R. A. 664; *McIntosh Huntington Co. v. Reed*, 89 Fed. 464).

An indorser or guarantor liable by indorsement on an instrument of writing, against whom judgment is rendered in a court of record in this state in a suit on the instrument, is not surety or bail within the meaning of section 11713, General Code, so as to entitle such indorser or guarantor to be certified in the record of the judgment as surety or bail. *Crawford v. Turnbaugh* (Ohio) 98 N. E. 858, 859.

#### **As creditor**

See Creditor.

#### **Director**

Const. art. 12, § 3, providing that directors of corporations shall be liable for "all moneys embezzled or misappropriated" by the officers thereof, etc., makes the directors sureties of officers who are guilty of misappropriating corporate moneys, and the liability created is that of "suretyship" only. *Hercules Oil Refining Co. v. Hocknell*, 91 Pac. 341, 343, 5 Cal. App. 702.

#### **Guarantor distinguished**

See Guaranty.

#### **On note**

The word "surety," appended to the name of a maker of a note, cannot alter his liability as to the owner thereof, and only shows that, as between the promisors, one is a principal and the other a guarantor. *Cellers v. Meachem*, 89 Pac. 426, 427, 49 Or. 186, 10 L. R. A. (N. S.) 133, 13 Ann. Cas. 997.

Where a person unites with a drawer or drawers of a bill as surety, he is called a "surety drawer." *Union Nat. Bank of Kansas City, Mo., v. Neill*, 149 Fed. 711, 717, 79 C. C. A. 417, 10 L. R. A. (N. S.) 426.

The payee of a note who has indorsed and transferred the same, and against whom a judgment on the note has been obtained, has the right to have the judgment assigned to him on payment thereof, both under the doctrine of subrogation, and under Code Pub. Gen. Laws 1904, art. 8, § 5, providing that the

"surety" on any note who shall pay the money due thereon shall be entitled to an assignment thereof, and section 6, providing that when a person shall recover judgment against the principal debtor and surety, and the amount due on the judgment shall be satisfied by the surety, the creditor shall assign the same to the surety, although the maker of the note may have a defense to it as against the payee. *Wallace v. Jones*, 72 Atl. 769, 770, 110 Md. 143.

#### **Wife**

Where a husband is indebted in the form of an open account, and his wife executes a mortgage on her separate real estate to secure the payment of the debt, she is a "surety" only. *Indianapolis Brewing Co. v. Behnke*, 81 N. E. 119, 121, 41 Ind. App. 288.

An employé, who had become indebted to his employer, and who desired further credit, and the employer contrived to secure both by having the employé's wife execute a mortgage on her property to a third person, who should lend the wife the sum desired on the security of her note and mortgage, with the understanding that the employer would reimburse the third person and take an assignment of the note and mortgage without recourse. The wife executed a note and mortgage and received from the third person his check, which she indorsed to the employer, and shortly thereafter the note and mortgage were assigned to the employer, who gave the third person a check. The third person had no interest in the transaction. Held, that the note and mortgage were collateral security for the husband's debt, and were void within Code 1907, § 4497, prohibiting a wife from becoming, directly or indirectly, the "surety" for the husband. *Lamkin v. Lovell* (Ala.) 58 South. 258, 259.

#### **SURETY COMPANY**

The term "surety companies" in St. 1903, p. 476, which is an act to provide for the payment by the state, counties, cities, or cities and counties of the premium on official bonds, when signed by surety companies, includes any corporation contemplated by Code Civ. Proc. §§ 1056, 1057, and Pol. Code, § 955, subd. 4, which authorized corporations organized for that purpose to become the sole surety on any undertaking or bond required by any law of the state. *San Luis Obispo County v. Murphy*, 123 Pac. 808, 809, 162 Cal. 588, Ann. Cas. 1913D, 712.

#### **SURETYSHIP**

"Suretyship" is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation if the debtor does not, and falls within the purview of Hurd's St. Ill. 1911, c. 132, § 1, providing for the discharge of a surety if the creditor does not within a reasonable time commence suit after notice by the surety, who apprehends that

his principal is liable to become insolvent or leave the state. *Continental & Commercial Nat. Bank of Chicago v. Cobb*, 200 Fed. 511, 516, 118 C. C. A. 615 (quoting *Bouv. Law Dict.*).

An agreement between a wife and a mortgagee that in consideration of the mortgagee's becoming surety for her husband she would sign a second mortgage with her husband and would waive an indemnity bond given her by the mortgagee conditioned for the payment to her of money if the first mortgage, also held by him, were foreclosed, was not a contract of "suretyship," which a married woman is prohibited from executing under *Burns' Ann. St.* 1908, § 7855, such a contract being one whereby one person engages to be answerable for the debt, default, or miscarriage of another. *Druckmiller v. Coy*, 85 N. E. 1028, 1030, 42 Ind. App. 500.

An instrument in the ordinary form of a negotiable note, except that it contained at the end thereof and before the signatures the added words: "Collateral for S. Bryan note. Note 58"—constituted a contract of "suretyship" as defined by Civ. Code, § 2831. *National Bank of Commerce of San Diego v. Schirm*, 86 Pac. 981, 983, 3 Cal. App. 696.

"Suretyship" is a direct contract to pay the debt of another. It insures the particular claim. "A surety is liable as much as his principal is liable, and absolutely liable as soon as default is made, without any demand upon the principal whatsoever or any notice of default." *Rouse v. Wooten*, 53 S. E. 430, 432, 140 N. C. 557, 111 Am. St. Rep. 875, 6 Ann. Cas. 280 (quoting and adopting *Reigart v. White*, 52 Pa. 440; 2 Daniel, Neg. Inst. [5th Ed.] § 1753; *Tiedeman, Commercial Paper*, § 415).

"Suretyship" implies original undertaking, and the measure of liability is the extent of the principal's liability. A surety assumes to perform the contract of the principal debtor, if the latter should not, and the undertaking is immediate and direct that the act should be done which, if not done, makes the surety responsible at once. *Pittsburg Const. Co. v. West Side Belt R. Co.*, 75 Atl. 1029, 1030, 227 Pa. 90 (citing *Reigart v. White*, 52 Pa. 438; *Riddle v. Thompson*, 104 Pa. 330; *Philadelphia & R. R. Co. v. Knight*, 16 Atl. 492, 124 Pa. 58).

#### **Guaranty distinguished**

See Guaranty.

#### **As stand good**

See Stand Good.

## **SURFACE**

In common speech the nonmineral portion of land, the portion which covers and envelops the minerals, is called the "surface," or "the land," and the proprietor of land, who divests himself of title to the minerals

which it contains, is still spoken of as the owner of the "fee," or of the "surface," or of the "land." *Kansas Nat. Gas Co. v. Board of Com'rs of Neosho County*, 89 Pac. 750, 751, 75 Kan. 335.

According to *Snyder on Mines*, § 1030, the word "surface" means, not simply the geometrical superficies, without thickness, but includes whatever earth, soil, or land lies above and superincumbent on the mine. *Big Six Development Co. v. Mitchell*, 138 Fed. 279, 290, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332.

A contract between the owner of a junior mining location and the owner of a senior location, which conflicted, required the owner of the junior to convey, on issuance of his patent, to the owner of the senior, the "surface ground" within the conflict, excepting the junior vein, wherever it crossed the conflicting surface. Under the law at the time the owner of the junior claim was, as to the territory in dispute, entitled only to the junior vein where it crossed the senior location. Held, that the parties intended a conveyance of all minerals in the disputed territory, except the junior vein. *Bogart v. Amanda Consol. Gold Min. Co.*, 74 Pac. 882, 883, 32 Colo. 32.

Where testator devised to his son the surface of his farm, excepting coal underlying the same, the word "surface" is more limited than the word "land," and prima facie means only "vestimenta terra," but may be used in a secondary sense to denote the whole of the soil down to the center of the earth, except the coal, and, when land is purchased with the exception of mines and minerals, the purchase includes, not merely the surface, but the whole of the subsoil which does not consist of mines and minerals, and surface means not the mere plane surface, but all of the land except mines. *Dolan v. Dolan*, 73 S. E. 90, 91, 70 W. Va. 76, Ann. Cas. 1913D, 125.

St. 1908, c. 552, § 2, gives a town a right of action against a railroad charged with the duty to maintain or repair a bridge and which refuses to do so. The act abolishing grade crossings (St. 1906, c. 463), provides by part 1, § 38, that where a public way crosses a railroad by an overhead bridge, the framework of the bridge and its abutments shall be maintained by the railroad and the surface of the bridge by the town in which it is situated. The Railroad Commission directed that "the superstructure of said bridge shall be built of iron or steel with hard pine under-floor and spruce plank wearing surface." Across the main girders of the bridge were four beams, and supported by these, but three inches below the floor beams, were stringers, and on top of the stringers was laid an under floor of pine planks three inches thick, and over all was laid the wearing surface of two-inch spruce planks. Held, that the word

"surface" was not employed in its geometrical sense, as signifying a plane, but included some degree of thickness; that it was used in contradistinction to "framework," and was tantamount to flooring, when the bridge was considered as a whole; that the word "framework," as applied to things built or constructed, means that which furnishes form or strength, or both, and is the antithesis of "surface"; and that, in the division of the whole structure of the bridge into these two parts, the word "framework" had some tendency to point out which constituted the carrying strength of the bridge, while "surface" related more nearly to that which in the limits of the carrying strength supported the immediate burden of travel, and that the word "surface" included both layers of the flooring, for the repair of which the town was liable. *Sullivan v. Boston & A. R. R.*, 96 N. E. 347, 349, 210 Mass. 229.

### SURFACE-COATED PAPER

Box tops made of surface-coated paper and having designs printed by the lithographic process are dutiable as "surface-coated papers \* \* \* printed," rather than as lithographic prints. *Devoy v. United States*, 147 Fed. 765.

Decalcomania paper is dutiable as "surface-coated papers \* \* \* printed." *U. S. v. O. G. Hempstead & Son*, 159 Fed. 290, 292.

So-called "marbleized paper," which is made by hand, held dutiable as "surface-coated paper" and not as handmade paper. It is excluded from paragraph 401 of the Tariff Act of 1897, because not ejusdem generis with the classes of paper there enumerated. *Seyd v. U. S.*, 152 Fed. 657, 658.

### SURFACE RAILROAD

See Street Surface Railroad.

By the Railroad Law, § 4, subd. 4 (now Consol. Laws, c. 49, § 8, subd. 4), a steam railroad corporation has power to construct and maintain its road across and upon any highway which it intersects, and section 90 (now section 170) of that law gives street railroad corporations the right to construct their roads along the streets; hence a railroad has a right to use the streets the same as a street railroad, and, being a "surface road," is taxable under that provision of the tax law (Consol. Laws, c. 60) defining certain real estate for taxation purposes to be "all surface, underground or elevated railroads including all franchises and rights to maintain and operate the road upon the streets." *People ex rel. Erie R. Co. v. Woodbury*, 127 N. Y. Supp. 201, 202, 70 Misc. Rep. 261.

Tax Law (Laws 1896, c. 908), as amended by Laws 1899, c. 712, § 1, included special franchises in the definition of land, adding "all surface, underground, or elevated railroads," "including the value of all franchises, rights or permission to construct, maintain, or operate the same in, under, above, on, or

through streets, highways, or public places." This act having been construed by the Supreme Court to include the privilege of crossing public highways at grade, the Legislature, by Laws 1901, c. 490, § 1, provided that the term "special franchise" should not include the crossing of a street, highway, or public place where such crossing was not at the intersection of another street or highway, unless the crossing was other than at right angles for a distance of not less than 250 feet, in which case the whole of the crossing should be deemed a special franchise; and, by Laws 1907, c. 720, § 1, the act was so amended as to provide that the term "special franchise" should not include the crossing of a street, highway, or public place "outside" the limits of a city or incorporated village, where such crossing is less than 250 feet long. Held, that the word "surface" as used in the act of 1899, did not limit that act to street railroads operated by horses or electricity, under the rule of ejusdem generis, but was intended to include steam railroads as well, so that steam railroads were subject to franchise taxation for the right to cross streets in cities at grade. *People ex rel. New York Cent. & H. R. R. Co. v. Woodbury*, 96 N. E. 431, 432, 203 N. Y. 167.

### Underground railroad

Under Tax Law (Laws 1896, c. 908) § 185, imposing a franchise tax on companies "operating any elevated railroad or surface railroad," an underground street railroad is not to be classed as a "surface road" within the meaning of the statute merely because for a short distance it may run on the surface of the ground. *People ex rel. Interborough Rapid Transit Co. v. Williams*, 123 N. Y. Supp. 137, 138 App. Div. 612.

### SURFACE STREAM

A "stream of water" has a defined channel. It has banks and is very distinct from the percolations of subsurface water, which oozes in veins or filters through the earth's strata. An "underground stream" of water differs from a "surface stream" only with respect to its location above or below the surface. *Stoner v. Patten*, 63 S. E. 897, 898, 132 Ga. 178.

### SURFACE WATER

Waters escaping from the banks of a river at times of flood are "surface waters," and not waters of the stream. *Harvey v. Northern Pac. Ry. Co.*, 116 Pac. 464, 466, 63 Wash. 669.

Overflow waters that continue in a general course, though without defined banks, back into the water course from which they started or into another water course, do not become "surface waters," but remain a part of the water course. *Town of Jefferson v. Hicks*, 102 Pac. 79, 82, 23 Okl. 684, 24 L. R. A. (N. S.) 214.

Overflowing waters of a natural stream in times of ordinary floods or freshets, flowing over or standing upon the adjacent lowlands, are not "surface water" unless and until separated therefrom, so as to prevent their return to its channel, and failure of a railroad company to make culverts in an embankment constructed by it for its roadbed on lands subject to such overflow, of sufficient size to permit the water behind the embankment to rise and fall as fast as the stream does, is negligent and unskillful construction, making the company liable for resulting injury. *Uhl v. Ohio River R. Co.*, 49 S. E. 378, 383, 56 W. Va. 494, 68 L. R. A. 138, 107 Am. St. Rep. 968, 3 Ann. Cas. 201.

The overflow waters of a stream, especially where they run in a well-defined course and again unite with the stream at a lower point, must be regarded as a part of the water course from which the overflow comes, and cannot be regarded or dealt with as "surface water." *Brinegar v. Copass*, 109 N. W. 173, 174, 77 Neb. 241. See, also, *Cole v. Missouri, K. & O. R. Co.*, 94 Pac. 540, 541, 20 Okl. 227, 15 L. R. A. (N. S.) 268 (quoting with approval from *Crawford v. Rambo*, 7 N. E. 429, 44 Ohio St. 279).

"Surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and which continues to be such until it reaches some well-defined channel in which it is accustomed to flow and does flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream and ceases to be 'surface water.'" *Price v. Oregon R. Co.*, 83 Pac. 843, 846, 47 Or. 350; *Rait v. Furrow*, 85 Pac. 934, 936, 74 Kan. 101, 6 L. R. A. (N. S.) 157, 10 Ann. Cas. 1044 (quoting and adopting the definition in *Crawford v. Rambo*, 7 N. E. 431, 44 Ohio St. 279). Thus, where plaintiff's property was injured by water of a stream which was turned back by an insufficient culvert constructed as part of the fill erected over the stream, and the water causing the injury was the continuous overflow of the stream, it could not be regarded as surface water in determining the rights of the parties. *Price v. Oregon R. Co.*, 83 Pac. 843, 846, 47 Or. 350.

"Surface water," which an owner has the right to discharge from his own premises without regard to the rights of adjacent landowners, is that which arises from the sources of nature, such as streams, springs, and the like, and which comes from the ordinary tillage or use of the soil, and impurities which are naturally added to such water in the processes of husbandry or in its reasonable domestic use while being discharged from the owner's premises would not operate to make a trespass or nuisance against an adjoining owner. *Exley v. Southern Cotton Oil Co.*, 151 Fed. 101, 104.

A concourse of water fed by rain and snowfall, covering about 2,500 acres of depressed land, and which varies in depth from 3 to 6 feet, which is filled with swamp vegetation, and the land under which has been surveyed and conveyed to individual proprietors, and which is useless for any form of navigation or public purpose, is mere "surface water," which a proprietor of part of the submerged land may drain off at will, so long as he does so in a reasonable and careful manner, although he thereby drains the land of another proprietor, and destroys the value of fisheries maintained by him in the pond. *Appelgate v. Franklin*, 84 S. W. 347, 349, 109 Mo. App. 293 (citing *Hoyt v. City of Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Gould, Waters*, p. 127; *Wagner v. Long Island R. Co.* [N. Y.] 2 Hun, 633; *Luther v. Winnisimmet Co.*, 63 Mass. [9 Cush.] 171; *Hubbard v. Bell*, 54 Ill. 110, 5 Am. Rep. 98; *Olson v. Merrill*, 42 Wis. 203; *Stuart v. Clark's Lessee*, 32 Tenn. [2 Swan] 9, 58 Am. Dec. 49; *Morgan v. King*, 35 N. Y. 454, 91 Am. Dec. 58; *Brown v. Chadbourn*, 31 Me. 9, 50 Am. Dec. 641; *Potter v. Howe*, 6 N. E. 233, 141 Mass. 357; *Fernald v. Knox Woolen Co.*, 19 Atl. 93, 82 Me. 48, 7 L. R. A. 459; *Prieue v. Wisconsin State Land & Improvement Co.*, 67 N. W. 918, 93 Wis. 534, 33 L. R. A. 645).

Water standing in a wellhole which is fed by a subterranean spring, is not "surface water" before it leaves the well, and the owner could not divert it to another's injury, and, even if the well was fed by seepage of surface water it lost its character as surface water when it reached the well, and cannot thereafter be diverted by artificial means to another's injury. *Anderson v. Drake*, 123 N. W. 673, 674, 24 S. D. 216, 27 L. R. A. (N. S.) 250.

"Surface waters" are such as are not flowing or contained in a regular stream or water course. Whenever waters escape from the water course and are flowing over fields and lands where they are not accustomed to flow, such waters become "surface waters." *Standley v. Atchison, T. & S. F. R. Co.*, 97 S. W. 244, 247, 121 Mo. App. 537.

"Surface water" lies upon or spreads over the surface or percolates the soil, as in swamps, and does not flow in a particular channel." *Case v. Hoffman*, 54 N. W. 793, 795, 84 Wis. 438, 20 L. R. A. 40, 36 Am. St. Rep. 937.

#### As water course

See Water Course.

## SURGEON

See Assistant Surgeon.

See, also, Dentist.

The terms "dentist" and "surgeon" are not interchangeable. The professions are

largely separate and distinct from each other. The practice of each is regulated by different chapters of the Code, and the legal rights, duties, and responsibilities of each are dissimilar in very many respects. Hence, under Code, § 700, giving cities and towns power to license and tax itinerant doctors, itinerant physicians and surgeons, a city has no power to require a "dental surgeon" to obtain a license. *City of Cherokee v. Perkins*, 92 N. W. 68, 69, 118 Iowa, 405 (citing *People v. De France*, 104 Mich. 563, 62 N. W. 709, 28 L. R. A. 139; *State ex rel. Flickinger v. Fisher*, 119 Mo. 344, 24 S. W. 167, 22 L. R. A. 799).

"A physician is one who is versed in medical science, a branch of which is surgery; and a 'surgeon' is a physician who treats bodily injuries and ills by manual operations and use of surgical instruments and appliances. A physician, as defined by our statute and in common parlance, is a person skilled in both medicine and surgery." *Goss v. Goss*, 113 N. W. 690, 692, 102 Minn. 346 (citing *Rev. Laws*, 1905, §§ 2295-2300; 6 Words and Phrases pp. 5374-5376).

## SURGERY

See Practice of Medicine and Surgery; Practice of Medicine, Surgery, and Osteopathy.

"Surgery" was said in *Smith v. Lane*, 24 Hun, 632, to be limited to manual operations usually performed by surgical instruments or appliances. *People v. Allcutt*, 102 N. Y. Supp. 678, 681, 117 App. Div. 546.

### Administering chloroform

Where, in an action on an accident benefit certificate stipulating that insurer should not be liable for death resulting from surgical treatment the evidence showed that insured died while chloroform was being administered preparatory to an operation and an attending physician testified that the proximate cause of death was acute dilatation of the heart immediately caused by the chloroform, and that insured's diseased condition did not contribute to his death, the jury could find that surgical treatment did not include the administering of chloroform; "surgery" being defined as the branch of the healing art that relates to external injuries, deformities, and other morbid conditions to be remedied directly by manual operations, "surgical" being defined as being of or pertaining to surgery, "treatment" meaning the act or manner of treating, "remedy" being defined as something used for the cure or relief of bodily disease, and "surgical treatment" meaning treating a disease by means of surgery. *Belle v. Travelers' Protective Ass'n of America*, 135 S. W. 497, 502, 155 Mo. App. 629.

### Dentist

A dentist does not practice "surgery," within Code Civ. Proc. § 834, prohibiting such practitioners testifying concerning informa-

tion acquired in attending a patient, etc. *Howe v. Regensburg*, 132 N. Y. Supp. 887, 838, 75 Misc. Rep. 132.

## SURGICAL OPERATION

See Operation.

## SURNAME

By the common law since the Norman Conquest, a legal name has consisted of one "Christian name," or that which is given one after his birth or at baptism, or is afterwards assumed by him in addition to his family name, and of one "surname," or family name, which is that derived from the common name of his parents, or borne by him in common with other members of his family. *Schaffer v. Levenson Wrecking Co.*, 81 Atl. 434, 82 N. J. Law, 61.

## SURPLUS

The "surplus" is that which remains after expenses and dividends. *Marks v. American Brewing Co.*, 52 South. 983, 985, 126 La. 666.

Where a will gives all testator's property to certain persons, and provides that if, after paying these bequests, there should be a surplus left over, it shall be paid to the named beneficiaries pro rata, the word "surplus" includes the shares of any of the beneficiaries who have died during the lifetime of testator. *In re Jones' Estate*, 134 N. Y. Supp. 859, 862, 75 Misc. Rep. 47.

Plaintiff in a mortgage foreclosure proceeding borrowed money from certain claimants, agreeing to repay them "out of the surplus" belonging to her from the sale of the property, and agreeing that another claimant should be paid "out of the proceeds of the sale." Held, that the word "surplus" implied that the first of the claimants should be paid out of what was left of the proceeds of the property after all proper deductions had been made, and that neither contract was sufficient to give either of the lenders a claim against the proceeds prior to that of plaintiff's attorneys for their legitimate expenses and fees. *Pettibone v. Thomson*, 130 N. Y. Supp. 284, 289, 72 Misc. Rep. 486.

"Surplus," as used in Code, art. 93, § 32, as amended by Acts 1892, c. 571, providing that where a married woman dies intestate, leaving children or descendants, the surplus of her estate shall be distributed to her husband for his life, and after his death to the children and descendants per stirpes, means that part of the estate which is left after the debts, costs of administration, etc., are paid. *Hunter v. Hersperger*, 54 Atl. 65, 67, 96 Md. 292.

Under Rev. St. 1899, §§ 1923, 6794, 6795 (Ann. St. 1906, pp. 1311, 3338), providing that the surplus in any fund collected by a county for a specific use may be appropriated to any

other legitimate use, and declaring that when there is a balance in the county treasury to the credit of any special fund which is not needed for the special purpose the county court may transfer the balance to a courthouse fund for the erection of a courthouse and when all warrants and debts properly chargeable to a fund in any one year are paid, the residue is a "surplus" and may be transferred. *Decker v. Deimer*, 129 S. W. 936, 948, 229 Mo. 296.

The word "surplus," as used in Laws 1891, p. 346, c. 164, providing that town officers may expend any surplus moneys for which no provision for expenditure is made to redeem outstanding bonds or for improvements, includes any money owned by and in the possession of the town, not raised by taxation for a specific purpose, not impressed by a trust, or required by contract to be used for a particular purpose. *McConnell v. Allen*, 105 N. Y. Supp. 16, 18, 120 App. Div. 548.

The term "surplus," as used in the nomenclature of bankers, does not include undivided profits. Such profits may be surplus in the sense that they are a constituent of capital, but they are not surplus in the commonly accepted sense. It is quite usual, upon the organization of financial corporations, for the stockholders to contribute, besides the share capital, a fund which is known as "surplus." It is also quite usual for the directors or managers of these institutions to set apart and to add to this fund from time to time some part of the accumulated profits of the business in excess of dividend requirements. The fund produced in either of these ways is what is known as "surplus." The term is not used to designate the accumulated profits of ordinary banking firms or individual bankers; and, when the statute uses it, it does so with reference to the particular class of bankers to which alone it is applicable, and means the fund created by corporate or quasi public institutions as an addition to or re-enforcement of the share capital. *Leather Manufacturers' Nat. Bank v. Treat*, 128 Fed. 262, 263, 62 C. C. A. 644. See, also, *Central Trust Co. of New York v. Treat*, 171 Fed. 301, 302.

The life insurance premium actually charged and collected from the insured is applied, first, to pay the policy's proportion of the year's death claims; then to make good its own reserve; then to pay the expenses, including all official salaries; then to pay losses, if any; and, if there should be a balance after paying these items, it is called a "surplus." *United States Life Ins. Co. v. Spinks (Ky.)* 96 S. W. 889, 893, 13 L. R. A. (N. S.) 1053.

#### Net profits synonymous

The words "net profits," in P. L. 1904, p. 275, providing that the directors of a corporation shall not make dividends except "from its surplus, or from the net profits," are not

synonymous with "surplus." *Goodnow v. American Writing Paper Co.*, 69 Atl. 1014, 1015, 73 N. J. Eq. 692.

#### SURPLUS PROFITS

Under Laws 1890, p. 1071, c. 564, as amended by Laws 1892, p. 1829, c. 688, providing that the directors of a stock corporation shall not make dividends except from the "surplus profits" arising from the business of the corporation, where the stockholders paid into the treasury \$500,000 for which no additional stock was issued, and the company thereafter entered into a merger agreement with another corporation, and for the purpose of equalizing the capital and surplus of the merging companies \$200,000 was returned to the former stockholders, the sum so returned was not surplus profits of the company, for it did not in any sense arise from its profits or earnings in the course of its business, but was contributed solely for the purpose of strengthening the company and adding to its working capital. *People ex rel. North American Trust Co. v. Knight*, 89 N. Y. Supp. 72, 74, 96 App. Div. 120.

#### SURPLUSAGE

"Surplusage" means allegations of matter wholly foreign and impertinent to the case; all matter beyond the circumstances necessary to constitute the action. *Wood v. State*, 107 Pac. 937, 942, 3 Okl. Cr. 553. See, also, *Neis v. Whitaker*, 84 Pac. 699, 700, 47 Or. 517 (citing Bliss, Code Pl. [3d Ed.] § 215).

"The term 'surplusage' comprehends whatever may be stricken from the record without destroying the plaintiff's right of action, as if, for example, in suing the defendant for a breach of warranty upon the sale of goods, he should set forth, not only that the goods were not such as the defendant warranted them to be, but that the defendant well knew that they were not." *Prestwood v. McGowin*, 41 South. 779, 790, 148 Ala. 475 (quoting and adopting the definition in 1 Greenl. Ev. [15th Ed.] § 51).

"'Surplusage' is any allegation without which the pleading would be adequate at law. In general, unnecessary averments in an indictment may be treated as mere waste material, to pass unnoticed, having no legal effect whatever." *State v. Murphy*, 77 S. W. 157, 158, 102 Mo. App. 680.

#### SURPRISE

See Inadvertence, Surprise, and Excusable Neglect.

See, also, Accident (In Practice).

"Surprise" denotes some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any fault or negligence of his own, which ordinary prudence could not have guarded

against. *Brandt v. Krogh*, 111 Pac. 275, 284, 14 Cal. App. 39; *Porter v. Anderson*, 113 Pac. 345, 350, 14 Cal. App. 716. See, also, *Horn v. United Securities Co.*, 81 Pac. 1009, 1010, 47 Or. 35.

Surprise as a ground for the granting of a rehearing in equity must be something unexpectedly arising under circumstances which the party was not reasonably called upon to anticipate, and which ordinary prudence and foresight could not guard against. *Anderson Land & Stock Co. v. McConnell*, 171 Fed. 475, 479.

Where the only service had on a corporation was on its business agent, and he, on the advice of an attorney, paid no attention thereto, and the corporation had no notice of the service of the summons, until after the entry of its default, the corporation was entitled to a vacation of the judgment for "surprise." *Roberts v. Wilson*, 84 Pac. 216, 217, 3 Cal. App. 32.

Parties are ordinarily bound to anticipate the ruling of the court on motions for nonsuit, and any surprise which follows such a ruling is not such "surprise" as warrants or requires the granting of a continuance or the allowance of an amendment to the pleading. *Vulcan Iron Works v. Burrell Const. Co.*, 81 Pac. 836, 837, 39 Wash. 319.

#### As equivalent to accident

In legal intentment, "surprise" is practically synonymous with "accident," and the latter is defined to be an unforeseen event, occurring external to the party affected by it and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wishes he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain. *Ludwig v. Walker*, 111 N. Y. Supp. 1102, 1103, 59 Misc. Rep. 62.

The word "surprise" is used interchangeably with "accident" to designate the emergencies giving rise to accidents; both words signifying a detrimental situation wherein a party is placed unexpectedly, and against which ordinary prudence would not have guarded. *State ex rel. Hartley v. Innes*, 118 S. W. 1168, 1170, 137 Mo. App. 420. See, also, *Clemans v. Western*, 81 Pac. 824, 826, 39 Wash. 290.

#### Amendment of pleading

The filing of an amended petition was not matter of "surprise," warranting a continuance, where it merely amplified the original grounds of recovery. *Houston & T. C. R. Co. v. Cluck (Tex.)* 84 S. W. 852. See, also, *Pollock v. Jordon*, 132 N. W. 1000, 1001, 22 N. D. 132, Ann. Cas. 1914A, 1264.

#### Neglect of counsel

Where a party employs counsel of good reputation and large experience, the neglect of such counsel of matters necessary to the ordinary procedure of the case is a "surprise" to the party, within Rev. Codes 1905, § 6884, entitling him to relief from a default judgment, taken against him through surprise, at any time within one year after notice thereof, in the discretion of the court. *Citizens' Nat. Bank of Sisseton, S. D., v. Branden*, 126 N. W. 102, 104, 19 N. D. 489, 27 L. R. A. (N. S.) 858.

#### Unexpected evidence

Under Rev. St. 1899, § 800, providing that a new trial may be granted for mistake or surprise, the granting of a new trial on a showing by defendant in an action on account, after verdict for plaintiff, that when he heard a witness testify on the trial concerning two payments by defendant to the plaintiff's decedent, and that the account in suit had been paid to decedent, he was at first surprised, but gradually the facts came to him, especially when it was found the draft by which payment of the account in suit was made verified the statement of the witness, is not an abuse of discretion of the trial court. *Connally v. Pehle*, 79 S. W. 1006, 1009, 105 Mo. App. 407.

#### Violation of agreement

A judgment taken against a party contrary to an agreement with his adversary is one taken by surprise within B. & C. Comp. § 103, permitting the trial court to relieve against a "judgment taken through surprise," etc. *Voorhees v. Geiser-Hendryx Inv. Co.*, 98 Pac. 324, 326, 52 Or. 602.

## SURRENDER

See Voluntary Surrender.

The word "surrender" presupposes the possession or ownership of the thing to be surrendered. Thus, where a codicil directed that the executor should surrender certain evidence of indebtedness against specified legatees, the word implied possession on the part of testatrix, so as to exclude the debts which she did not own. *Brown v. Gibson's Ex'r*, 59 S. E. 384, 385, 107 Va. 383.

Under a statute providing that, where goods are attached and a bond has been executed by the officer to satisfy the judgment, the officer shall forthwith "surrender" the property attached to the person whose interest has been attached, the word "surrender" means to relinquish or give up, and therefore it is not necessary for the officer to return the property to the place from which it was removed. *Clark v. Wilson*, 14 R. I. 13.

Plaintiff on surrendering certain stock to decedent, received from him an instrument containing the words "Good for \$1,000.00 \* \* \* for ten shares Kinloch Jockey Club



stock surrendered to the undersigned, \* \* \* by the owner of said stock J. Kessler and for which I am liable. Joseph D. Lucas." Held, that the word "surrendered" did not mean mere delivery, but imported a transfer of title, a giving up or making over, a relinquishment of a right or privilege, and that the words "Good for \$1,000.00" and "for which I am liable" imported a promise on decedent's part to pay plaintiff \$1,000 for the stock, so that the instrument contained all the elements of a note as between the parties. *Kessler v. Claves*, 125 S. W. 799, 801, 147 Mo. App. 88.

#### Of accused

"Produce" means to bring forward; to lead forth; to offer to view or notice; to exhibit; to show; while "surrender" means to yield to the power of another; to deliver up; to give up, as a principal surrendered by his bail. Under Pen. Code 1895, § 935, providing that bail may surrender their principal in vacation to the sheriff, or in open court, in discharge of themselves from liability, producing or presenting a principal in court is not all that is required to discharge the sureties on a bail bond. In order for a surrender of the principal in open court to be effective, the attention of the court must be called to the presence of the accused principal, and the intention to surrender him must be definitely expressed and understood. *Perkins v. Terrell*, 58 S. E. 133, 135, 1 Ga. App. 250 (quoting *Webst. Int. Dict.*).

"Surrender" is made by the delivery of the accused to a person or court having authority to commit or rebail him." Cr. Code, div. 3, § 11 (*Hurd's Rev. St. 1899*, c. 38, § 304), providing that, in all cases of bail for the appearance of any person charged with a crime, his sureties may, at any time before default, surrender the principal in their exoneration, or the principal may surrender himself to the proper officer, authorizes a voluntary surrender by the principal in open court; section 14 (section 307), providing that the surrender shall be made to the sheriff, applying only where under that section and sections 13 and 15 (sections 306, 308) the sureties enforce surrender. *Young v. Deneen*, 77 N. E. 193, 195, 220 Ill. 350 (citing *State v. Le Cerf* [S. C.] 1 Bailey, 410).

#### Of estate

"Surrender" is a yielding up of possession of an estate for life or years to him who has the immediate reversion or remainder, wherein the particular estate may merge or drown by mutual agreement. *Parsons & Sweeney Oil Co. v. McCormick*, 70 S. E. 371, 372, 68 W. Va. 604; *Bailey v. Wells*, 8 Wis. 141, 158, 76 Am. Dec. 233.

In a warranty deed in the usual form, with a provision that "the possession of said above-described premises to be given" to the grantee, on or before a certain day, which was the next day after the expiration of a

lease, the word "given" must be construed as synonymous with the word "surrendered" or "granted." *Beakey v. Schwitzgebel*, 105 Pac. 42, 43, 81 Kan. 38.

A mere unexecuted agreement for a surrender of leased premises does not operate as a surrender; and, to constitute a "surrender" there must be, in addition to an offer of surrender, an abandonment by the lessee and a resumption of the possession by the lessor, or such a relinquishment by the lessee as will justify a resumption of the actual possession by the lessor. *Young v. Berman*, 131 S. W. 62, 64, 96 Ark. 78, 34 L. R. A. (N. S.) 977.

#### Of option

There is a "surrender" of an option to purchase a mine, where the purchaser signifies his intention to surrender it and forfeit his rights, and the vendor thereupon takes possession and continues therein. *K. P. Min. Co. v. Jacobson*, 83 Pac. 728, 729, 30 Utah, 115, 4 L. R. A. (N. S.) 755.

#### Of preference

The word "surrender," as used in the Bankruptcy Act, providing for the surrender of preferences, includes a voidable preference of which a creditor is deprived by the judgment at the suit of the trustee as well as a surrender by voluntary act. In re *Otto F. Lange Co.*, 170 Fed. 114, 116; *Keppel v. Tiffin Sav. Bank*, 25 Sup. Ct. 443, 445, 197 U. S. 356, 49 L. Ed. 790; In re *Clark*, 176 Fed. 955, 963 (quoting and adopting *Keppel v. Tiffin Sav. Bank*, 25 Sup. Ct. 443, 197 U. S. 356, 49 L. Ed. 790); In re *Armstrong*, 145 Fed. 202, 210 (citing *Keppel v. Tiffin Bank*, 25 Sup. Ct. 443, 197 U. S. 356, 49 L. Ed. 790).

### SURRENDER BY OPERATION OF LAW

A "surrender" of premises by a tenant may be express or implied. "A surrender of premises is created by operation of law when the parties to a lease do some act so inconsistent with the subsisting relation of landlord and tenant as to imply that they both agreed to consider the surrender as made." *Sammis v. Day*, 96 N. Y. Supp. 777, 778, 48 Misc. Rep. 327 (quoting *Gray v. Kaufman Dairy & Ice Cream Co.*, 56 N. E. 903, 162 N. Y. 388, 49 L. R. A. 580, 76 Am. St. Rep. 327).

To make a "surrender" by operation of law by a new lease within Laws 1896, p. 592, c. 547, § 207, providing that an interest in real estate other than a lease for a term not exceeding one year cannot be surrendered unless by operation of law, etc., there must be a new valid lease either to the lessee or a third party, and such a new lease by parol is only effective as a surrender when it is within the exception in the statute of frauds. *Rogge v. Levinson*, 113 N. Y. Supp. 525, 527.

A "surrender" by operation of law takes place where the owner of a particular estate has been a party to some act the validity of

which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. *Haycock v. Johnston*, 106 N. W. 304, 305, 97 Minn. 289, 114 Am. St. Rep. 715 (quoting and adopting *Smith v. Pendergast*, 3 N. W. 978, 26 Minn. 318).

### **SURRENDER VALUE**

See Cash Surrender Value.

### **SURREPTITIOUS**

"Surreptitious" means fraudulently obtained; falsely crept in; obtained by falsehood, fraud, or stealth, by suppression or concealment of facts. Where the inventor of an improvement in pumps for fire engines had the device placed on an engine of which he was in charge as engineer, where it was publicly tested, and thereafter used successfully for many years without material alteration, and was shown and explained by the inventor to the manufacturers of the engine without any injunction of secrecy, the action of the manufacturers in placing the device on an engine which they subsequently built for another city did not involve any breach of trust or confidence, such as to render the use of the invention on the new engine "surreptitious," fraudulent, or piratical, and defeat its effect as a public use, even though they knew that the inventor contemplated applying for a patent. *Eastman v. New York*, 134 Fed. 844, 852, 69 C. C. A. 628.

### **SURREPTITIOUSLY**

As used in Rev. St. § 4920, providing that in an action for infringement, the defendant may prove that plaintiff had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same, the word "surreptitiously" has no relation to a case where each party to an interference has really and truly proceeded independently and honestly. *Automatic Weighing Mach. Co. v. Pneumatic Scale Corporation*, 158 Fed. 415, 420.

### **SURROGATE**

In Code Civ. Proc. § 2747, providing that the surrogate or Supreme Court may by reference ascertain the rights of the parties interested in the legacy, and grant an order for the payment of the money due, the words "the surrogate" must be deemed to refer to the judicial officer who has or had general jurisdiction over the estate, its representatives, and its management and disposition. *Kinneally v. People*, 90 N. Y. Supp. 587, 589, 98 App. Div. 192.

### **SURROGATE'S WITNESSES**

Under Laws 1837, c. 460, § 11, providing for the examination of "attesting witnesses," increased in scope by Laws 1841, c. 129, so as to apply "to all witnesses whom any person

interested in the proof of a will shall request to be examined," afterwards incorporated with Code Civ. Proc. § 2618, by which a notice is filed and an order procured for the examination before the surrogate of the witnesses named in the notice, called "surrogate's witnesses," parties may waive, either actually or constructively, the necessity of calling any "surrogate's witnesses" not essential to prove the factum of the will. Contestants of a will, who place the names of witnesses in a notice and order and who call such witnesses are bound by the evidence of such witnesses, other than attesting witnesses, except in cases of surprise. In *re Hock's Will*, 129 N. Y. Supp. 196, 204, 74 Misc. Rep. 15.

### **SURROUNDING**

Immediately surrounding, see Immediately.

### **SURVEY**

#### **Of land**

See Block Survey; Call Survey; Legal Survey; Official Survey; Preliminary Survey.

Prior to the act of 1907 (Laws 30th Leg. p. 490, c. 20) school lands could be sold in tracts of 80 acres or multiples thereof, but section 5 (page 491) of such act, regulating purchases by lessees and their assignees, changed the rule, and required such sales to be made "in whole surveys only." Section 6, authorizing purchases by others, provided that no survey should be sold in any county except as a whole, though it might be leased in two or more tracts, and section 6b (page 492) provided for sales "in whole tracts only." Section 6e (page 494) declared that all surveys and unsold portions of surveys should be sold as a whole, that all unsurveyed tracts of 640 acres or less should be so sold, and that all tracts containing 100 acres or less, where-soever situated, should be sold for cash and without condition of settlement. Held that, tracts of the public domain not yet sectionized being referred to in the statutes as unsurveyed lands, the "surveys" should be construed to mean entire sections. *Ford v. Terrell*, 107 S. W. 40, 101 Tex. 327.

### **SURVEYOR**

As officer, see Officer.

### **SURVIVE—SURVIVING—SURVIVOR**

See If Surviving; Then Surviving.

Surviving issue as meaning children, see Issue (Descendants).

The phrase "surviving grandchild," when used in a testamentary gift to grandchildren, includes any grandchild who may at the time of the death of testator be en ventre sa mere. *Hewitt v. Green*, 77 Atl. 25, 29, 77 N. J. Eq. 345.

Where a deed in the nature of a testamentary disposition by the grantor of his property provides that, in certain contingencies, the property shall go to his "surviving children," and at the time he has a wife living, those words will not be considered to include children by a subsequent wife, especially where it appears that thereafter the grantor, by a similar deed, made provision for the latter children. *Frosch v. Monday*, 34 App. D. C. 338, 346.

Testatrix devised land to two nephews, R. and C., for life, with remainders to their children, and provided that if either should die without leaving a child surviving him the share of the one so dying should pass to his "surviving brother," with a limitation over on both dying without children. R. died, leaving a child, who survived C., who died childless. Held, that the child of R. was entitled to C.'s share; the word "surviving" not being intended to attach a condition, but referring to the other nephew. *Smith v. Smith*, 47 South. 220, 224, 157 Ala. 79, 25 L. R. A. (N. S.) 1045.

Testator, having bequeathed a share of the residue to each of his four sisters, two brothers, and a niece, gave one-half of a full share to five of the eight children of a deceased brother specifically named. Held, that the three children of such deceased brother not named in the will were his "surviving issue" within Act May 6, 1844 (P. L. 564), providing that no devise or legacy made in favor of a brother or sister or the children of a deceased brother or sister of any testator not leaving any lineal descendants shall be deemed to lapse by reason of the decease of the devisee or legatee in the lifetime of the testator, if he shall leave issue surviving the testator, but such devise or legacy shall be good in favor of such surviving issue. In re Bentz's Estate, 70 Atl. 788, 790, 221 Pa. 350.

Testator, by the third clause of his will, gave the residue to his widow for her use during widowhood, providing that she should care for testator's minor children during minority. The fourth clause provided for a division among testator's "surviving children" if his widow remarried, and the fifth clause directed that, if the widow remained unmarried and died, then all of testator's property which she then possessed should be disposed of equally among all his "surviving children," except minor children who should survive their mother, provision for whom should be made under the third clause. Held, that the remainder devised to testator's children under the fifth clause vested at testator's death, and not at the death or remarriage of his widow. *Ball v. Holland*, 75 N. E. 713, 714, 189 Mass. 369, 1 L. R. A. (N. S.) 1005.

When a will was executed, as at testatrix's death, she had five unmarried daughters, one married daughter, and an incompetent son. In the first clause of the will she

expressed the desire that her unmarried daughters, or such of them as desired to live together with the son, should live in one house, directing the executors to keep the house in good repair for their use "during the lives of the two youngest of my daughters who may survive me," and that, if such unmarried daughters should prefer to live elsewhere, a fund should be set apart for the maintenance of another house for them, upon the termination of which trust or abandonment of the house her furniture should be given to her "surviving children in equal shares." The second clause directed that the proportionate part which the son would receive of the estate should be set apart for his support, and gave the share of the son upon his death to her "unmarried daughters." The third clause directed the residuary estate to be held in trust "during the lives of the two youngest of my daughters who may survive me, but not beyond the period of ten years after the date of my death," to pay the income "to my children" except the son, but "should, however, any of my daughters have died leaving lawful issue surviving me," the share of such parent should go to the use of her issue. Upon termination of the trust, the fund itself was given to the children, except the son, the issue of any deceased child to receive the share of the parent. The second clause, as originally prepared, contained the words "surviving daughters," instead of "unmarried daughters," which change was made before execution. Held, that testatrix by the words "surviving daughters," which were changed to "unmarried daughters," intended the daughters who were surviving upon the son's death, and the three daughters who were married after testatrix's death, but before the death of the son, were not entitled to share in the fund. *Robinson v. Martin*, 123 N. Y. Supp. 146, 148, 138 App. Div. 310.

#### As referring to death of spouse

Under Code Civ. Proc. § 16, declaring that words and phrases must be construed according to the context and the approved usage of the language, but that technical words and phrases or those which have acquired a peculiar meaning are to be construed according to such peculiar meaning, and Code Civ. Proc. § 1474, providing that if a homestead, selected by the husband and wife or either during coverture and recorded while both were living, was selected from the community or from the separate property of the one selecting it or joining in its selection, it vests, on the death of the husband or wife, absolutely in the survivor. The words "husband" and "wife," as used in section 1474, mean, respectively, a man who has a wife and a woman who has a husband, and do not mean an unmarried man or woman; and the word "survivor," as therein used, refers to the husband and wife as such, and means that, upon the death of the husband as a husband or the wife as a wife, the homestead

shall vest absolutely in the survivor of such marriage relation, so that the survivor must be a surviving spouse, and the surviving individual after the dissolution of the marriage is not within the statute. *Zanone v. Sprague*, 116 Pac. 989, 993, 16 Cal. App. 333.

#### As referring to death of testator

A gift to various persons, or the "survivors of them," refers to those surviving at the death of the testator. In *re Alexander's Estate*, 85 Pac. 308, 309, 149 Cal. 146, 9 Ann. Cas. 1141 (citing 2 Jarm. Wills [6th Ed.] 661).

Where an estate is given by will to the survivors of a class to take effect on the death of the testator, the word "survivors" means those living at the death of the testator, but if a particular estate is created, with remainder to the survivors of a class, the word "survivors" means those surviving at the termination of the particular estate. *Sullivan v. Garesche*, 129 S. W. 949, 952, 229 Mo. 496.

A testator devised his real estate to his wife for life, and on her death in equal portions to his two sons named, and provided that, "in case either of said sons" should not "survive," the wife "then the survivor to take all." Held, that the provision for the contingency of the death of a son referred only to a death occurring after the death of testator, and the child of a son who died in the lifetime of the testator took the deceased son's share, under *Hurd's Rev. St. 1905, c. 39, § 11*, providing that, when a devisee being a child shall die before the testator and no provision shall be made for the contingency, the issue shall take the estate devised as the devisee would have done had he survived the testator. *Pirrung v. Pirrung*, 81 N. E. 1065, 1067, 228 Ill. 441.

The word "surviving," in a will whereby testator bequeathed to his wife all his property for her support during her life or widowhood and whereby he provided that in case of her death or marriage, the whole estate should be divided equally between his surviving children or the issue of any one or more of them who shall have died leaving issue means "surviving" the testator, and not the wife, and the interest of the remaindermen vested as of the date of testator's death. *Runyon v. Grubb*, 103 N. Y. Supp. 949, 951, 119 App. Div. 17.

The words "surviving children," as used in a clause in a will reading, "but if such daughter shall die without children or lineal descendants, I direct said trustee to dispose of said sixth part of the residue and remainder of my estate among my surviving children as follows," etc., means the children surviving at the time of testator's death, so that their interest in the contingent remainders, limited to take effect in default of issue, became vested immediately upon his

death. *Stone v. Bradlee*, 66 N. E. 708, 710, 183 Mass. 165.

Where a testator devised certain land in trust for his son, to be conveyed on his death in fee simple to his issue, and, in case of his death without issue, to his surviving children, share and share alike, and the beneficiary died intestate, unmarried, and without issue, after the death of the testator, the "surviving" children were those surviving at the death of the testator, under the general rule in Pennsylvania, which has become a rule of property, that the words "survivor" or "surviving," following a prior gift, are understood as referring to the death of testator, unless an intent of the testator to refer them to some other time is plainly and manifestly shown. *Black v. Woods*, 63 Atl. 129, 213 Pa. 583.

Testator gave all the balance of his estate to his son and two daughters to be divided equally, and in case of the death of either of them the survivor or survivors were to inherit the property bequeathed to them; if more than one survivor it was to be divided share and share alike. Held, that the words "survivor or survivors" meant survivor or survivors at the time testator's death, and the interest in the real estate devised was an estate in fee simple vesting immediately on the death of testator, so that on the death of the daughters' children after the death of the testator their interest passed to their representatives and not to their brother as survivor. *Renner v. Williams*, 73 N. E. 221, 71 Ohio St. 340.

#### As referring to happening of other event

Ordinarily the word "survive" means to live longer than some other individual; but it may mean to continue to live beyond a specified period, event, or condition. Where testator devised lands in trust for his daughter, providing that, in case she should "survive" her then husband, the trustees should convey the land to the daughter absolutely and in fee, but that, while she was the wife of her then husband, neither she nor any one for her should have the power to sell or dispose of the property, or do anything which should deprive her of the uses and benefits created, the daughter, on her divorce from such husband, was entitled to the property in fee. *Cary v. Slead*, 77 N. E. 234, 235, 220 Ill. 508.

"Surviving," as used in Code Civ. Proc. § 2713, subds. 1-4, exempting to a surviving widow certain articles of property or their value in money, meant that the widow must survive the husband, and not necessarily survive the accounting of his estate. In *re Hulse's Estate*, 84 N. Y. Supp. 220, 41 Misc. Rep. 307.

The word "survivors," as used in a clause of a will that, "in the event either of my said children die before attaining the

age of 21 years, or if my wife should die before the majority of my child L., then the share of my estate of such deceased shall be divided in equal parts between the survivors," refers to children, one or more, who might survive any deceased child or children before arriving at the age of 21 years. *Johnson v. Terry*, 36 South. 775, 139 Ala. 614.

In a deed to the grantor's daughter for life, with remainder to her children or their representatives living at her death, or if she should die without children then to her brother or brothers and their children surviving, the word "surviving" refers to surviving the life tenant, and not surviving their respective parents. *Duke v. Huffman*, 75 S. E. 1, 2, 138 Ga. 172.

A provision in a will that, in the event of any of testator's sons dying intestate and unmarried, the share or shares of such son shall go to all testator's "surviving children" in equal proportions, refers to the children of testator who may be in existence at the time such death occurs. *Ridgely v. Ridgely*, 59 Atl. 731, 734, 100 Md. 230.

The words "surviving children," in a will providing that in the event of the death of any of the children his share in the trust fund should go to his lawful issue upon their arriving at full age, or, if there should be no lawful issue who should arrive at full age, such child's share in the trust fund shall go to the surviving children and their heirs and assigns forever, refer to those surviving at the death of one of the children. *Lawrence v. Phillips*, 71 N. E. 541, 542, 186 Mass. 320.

Where there is a devise or bequest for life followed by a devise or bequest to the "surviving children" of the testator, at the termination of the life estate, the quoted words mean those of the children of the testator who survive at the death of the life tenant, and unless, on taking the whole will into consideration, the words are plainly used in another sense, they do not include surviving children of predeceased children of the testator. *Stout v. Cook*, 81 Atl. 821, 822, 79 N. J. Eq. 573.

The "surviving heirs" in a devise to a child, followed by the provision that on his death without bodily heirs the property shall go to the surviving heirs of testator, are the distributees under the statute of distribution in being at the death of the child, and until his death it cannot be ascertained who will take as surviving heirs. *Barber v. Crawford*, 67 S. E. 7, 9, 85 S. C. 54.

Testator gave a nominal sum to each of his five children, gave the balance to his wife for life, or during widowhood, with a gift over, on her death or remarriage, to his "surviving heirs" equally, and provided that charges against his "heirs, their husbands or wives as contracted \* \* \* by them with me," should be deducted from their share.

A daughter, whose husband was indebted to testator, died before testator, leaving children. Held, that the words "surviving heirs" meant surviving children, and referred to such of the testator's children as should be surviving at the date of their mother's death or remarriage, and that the children of the deceased daughter did not take. *Howell v. Steelman*, 74 Atl. 976, 977, 76 N. J. Eq. 423.

Where a will provided that if both of testatrix's daughters, to whom she left the bulk of her estate, should die before marriage, the property should be divided equally among "my surviving children," the quoted words meant those of her children living on the death of both daughters before marriage, and as it was uncertain at the death of testatrix which, if either, of her children would be living at that time, the remainder, if it was a remainder, was contingent. When considering the estate over as an executory devise instead of a remainder, the words meant those children of testatrix surviving the two daughters to whom the estate was first given. *Sullivan v. Garesche*, 129 S. W. 949, 952, 229 Mo. 496.

Where a testator provided that upon the death of his widow \$1,200 of the residuary estate was given to three persons named, to be equally divided between them and the survivors and survivor of them, \$300 to three other persons and the survivors and survivor of them, and the residue to 24 persons and the survivors and survivor of them, the term "survivors and survivor" referred to survivors at the time of distribution of the residuary estate after the death of the widow. *In re Jones' Will*, 21 Atl. 950, 46 N. J. Eq. 554.

Testatrix, subject to her husband's life estate, divided her estate into nine equal parts, and gave two parts in fee to two sons, one part in fee to four grandchildren, the children of two deceased daughters, and the remaining six parts in trust to pay over the income to one son and five daughters in equal parts, and provided that, on the death of the son or daughters leaving issue, the income of the part which the parent received should be equally divided among the issue, and, in the event of the death of the son or daughters without issue, the share of the trust estate for the use of the son or daughter so dying should be held for the use of the surviving sons and daughters, to be equally divided between them, and the shares devised should be held on like trusts as before declared, and finally to be divided among their issue as before provided. Four children of the testatrix were the only children who survived her and left issue who survived the death without issue of the last survivor of the six beneficiaries. Held, that the trust estate was properly divided into four equal parts, and each part was properly divided among the children and issue of deceased children of each of the four children; the gift over to

the "surviving sons and daughters" meaning sons and daughters surviving the several life beneficiaries dying without issue, and not including sons and daughters who predeceased the testatrix, and the gift over of a share of a life beneficiary dying without issue being to the sons and daughters surviving, to the exclusion of the issue of deceased sons and daughters. *Dary v. Grau*, 77 N. E. 507, 508, 190 Mass. 482.

#### As outlive

"In its ordinary as well as in its legal signification the word 'survivor' means one who outlives another, one of two or more persons who lives after the other or others have died." *Hill v. Safe Deposit & Trust Co.* 60 Atl. 446, 447, 101 Md. 60, 4 Ann. Cas. 577.

#### Others synonymous

"To survive" means simply to remain in life after the death of another, or after a particular date or the happening of a particular event. The primary meaning of the word is to live beyond the life or existence of; to outlive; but it has according to some lexicographers, a secondary meaning, "to live after." Testatrix devised the residue of her estate to two daughters, and the survivor of them, so long as they or the survivor, respectively, remained single and unmarried. She further provided that, if the daughters married, her executors, after the marriage of both, should sell the residue, and that the survivor of the daughters, "being single and unmarried" until the time of her death, shall have full power to dispose of the property given to her absolutely, and that, if she fail to so dispose of it, the property at her death should belong to her heirs at law. One of the daughters married during the life of testatrix, and the other died unmarried before the death of her married sister, leaving a will by which she attempted to dispose of the entire devise. Held, that the word "other" could not be substituted for the word "survivor" in the will, and that, as the unmarried daughter did not "survive" her sister, the devise did not pass by her will, but passed as intestate property of the testatrix. *Hill v. Safe Deposit & Trust Co.*, 60 Atl. 446, 447, 101 Md. 60, 4 Ann. Cas. 577.

Testator directed the residue of his estate to be divided into the number of shares that he had children, that the share of each son be given to him absolutely, but that the shares of the daughters be invested for their benefit during their lives, and that on the death of either daughter without leaving any child her share "shall be esteemed as part of the residue of the estate, the interest and profits of which to be paid equally to my surviving children." Held, that the word "surviving" should not be read literally, or changed into "other," but should be held to mean stirpital succession, so that the share of a daughter deceased without leaving a child would fall back into the residue to be

distributed according to the existing stirpes. *Stout v. Cook*, 75 Atl. 583, 586, 77 N. J. Eq. 153.

The word "survivor," or "surviving," will be understood as the equivalent of the word "other," where in any other sense it would lead to intestacy or inequality among those standing in the same degree of relationship to the testator, or to a distribution not in accordance with the general scheme of the will. In *re Fox's Estate*, 70 Atl. 954, 956, 222 Pa. 108.

Testator devised his ground rents to his wife for life, and at her death gave a life estate in an undivided sixth of the rents to each of his children by name, and declared that immediately after the death of the children, respectively, one equal undivided sixth of the rents should go to their child or children absolutely as tenants in common, to be equally divided between them and the issue of any deceased grandchild per stirpes; also that, if any of testator's children died without a child, children, descendant, or descendants living at his or her death, respectively, the part of the child so dying should become the property of testator's surviving child or children, or his or their heirs, absolutely. Held, that the word "survivor," as used in the last clause, did not mean "other," but was to be taken in its ordinary meaning, so that the clause "surviving child or children" limited the right to the surviving child or children of the testator, and did not include the descendants of any deceased child, so that, on the death of testator's son without issue, his interest passed to his sole surviving sister. *Wilson v. Bull*, 54 Atl. 629, 632, 97 Md. 128.

Testator gave the use of a farm and other property to a nephew for life and to his children in fee, and provided that his other estate should be divided equally between two nieces, who should have the use of it for life, and the remainder should pass to their children as in the case of the nephew, and "in the case of the death of" the nephew or nieces "the share or shares of such deceased shall belong to the survivor or survivors of the other." Held, that the words "survivor and survivors of the other" included the children of any life beneficiary who predeceased the one dying without issue, for the quoted phrase will be given the meaning of "other and others," and the children of a deceased niece were entitled to a share on the subsequent death of the other niece dying without children. In *re Cary's Estate*, 69 Atl. 736, 738, 81 Vt. 112.

Where there are limitations to two brothers for life with remainders to their children, and in default of children of either to the "survivor" or "surviving brother," with a limitation over on both dying without children, cross-remainders are intended and necessarily implied between the stirpes of the life

tenants, and "surviving" or "surviving brother" must be read "other" or "other brother." *Smith v. Smith*, 47 South. 220, 224, 157 Ala. 79, 25 L. R. A. (N. S.) 1045.

#### As relating to benefit insurance

The term "survivors," as used in the code of a mutual benefit insurance association, providing that the purpose of a fund is to pay a sum to survivors of a member at his death, that, if a member shall die whose survivors possess no benefit certificate, the money shall not be paid without the order of court and that, if a member die whose survivors produce a death certificate, the recipient of the money shall give a receipt, does not include a person who is neither a relative nor member of the household of, nor connected by marriage with, the member of the association. *Koerts v. Grand Lodge of Wisconsin, Order of Hermann's Sons*, 97 N. W. 163, 164, 119 Wis. 520.

Rev. St. 1898, § 1955c, as amended by Laws 1899, p. 138, c. 101, authorizing members of a fraternal beneficiary corporation to name as beneficiary any person or persons designated by the laws of such corporation, or, if the laws thereof permit, providing that the insurance may be made payable to the member's estate, is a limitation on the rights of members; and where the laws of a corporation permitted only "survivors" of the member to be named as beneficiaries, one who was not a relative of a member was not a "survivor," and was not entitled to recover on the certificate, though designated by the member as his beneficiary in the manner provided by the laws of the corporation for changing beneficiaries, and though she had nursed and cared for the member for several weeks prior to his death. *Grand Lodge of Wisconsin of Order of Hermann's Sons v. Lemke*, 102 N. W. 911, 912, 124 Wis. 483.

A certificate not being void in toto, and providing that subject to the conditions of the certificate the association would pay insured certain benefits, among which was a death benefit to be paid to the beneficiary therein named if surviving, otherwise to be paid to the legal representative of insured and the beneficiary designated to receive the death benefit being in a class prohibited by law, the beneficiary did not "survive" within the meaning of the certificate, and the administrator was entitled to recover the benefit. *Oliphant v. American Health & Accident Ass'n*, 126 N. W. 806, 808, 147 Iowa, 656.

Plaintiff's wife signed an application for a benefit certificate on a blank printed form, wherein she designated several cousins as beneficiaries in various sums. A certificate was issued on the application, describing the beneficiaries and the respective shares to be paid them. A provision of the society's constitution stated its object to be to give to a sister money benefit in case of her husband's death, and in case of her death to pay "the surviv-

ors" such moneys as may be designated in the constitution, etc. It was elsewhere provided that, if any sister did not leave a last will, husband, or children, the law of inheritance of the state should govern, except that a husband who did not live with and properly care for a member could not ask for any death benefit, and in such case her children should be entitled thereto, or such persons to whom the sister wills it. It also provided that a sister who did not live with her husband must make a last will and turn it over to the lodge for safe-keeping. There was no provision limiting the beneficiaries to the husband or children. The member left no children, and plaintiff lived with her and properly cared for and supported her up to the time of her death. Held, that the word "survivors" was too vague to necessarily refer to surviving husband or children, and in view of the inexact language of the constitution, the word "survivors" should be interpreted as the parties to the contract construed its meaning and evidence was admissible that such designations as were made and the methods of procedure pursued were usually recognized by the society, and that printed blanks for that purpose were in use, especially where it was stipulated that the word "will," as used in the last section recited, might be properly translated as "designation." *Slavik v. Supreme Lodge of All Bohemian Ladies' Aid Societies*, 110 N. Y. Supp. 347, 349, 59 Misc. Rep. 183.

#### As relating to private easement

A private easement in a highway will continue to exist after the public easement has become extinct only in favor of those who owned a private easement when the public one was extinguished, since, while a private easement may survive the public easement, it cannot "survive" unless both existed at the same time. *Tuttle v. Sowadzki* (Utah) 120 Pac. 959, 964.

#### SURVIVABILITY

Where a right of action is so entirely personal that the party in whom it exists cannot by contract place it beyond his control, it will not survive, and hence as a general rule "assignability" and "survivability" of causes of actions are convertible terms. *Selden v. Illinois Trust & Savings Bank*, 87 N. E. 860, 863, 239 Ill. 67, 130 Am. St. Rep. 180.

#### SURVIVING PARTNER

As legal representative, see Legal Representative.

#### SURVIVING PARTY

Under Code Civ. Proc. § 1299, providing that, where an appeal is from one court to another, an application for an order of substitution must be made to the appellate court, and that, where personal notice of the application has been given to the proper representative of the deceased party, an order of substitution

may be made on the application of the "surviving party," a surviving adverse party may enforce such a substitution when it has not been procured at the instance of the personal representative of the deceased party himself, or of a party associated in interest with the decedent, where there is one; the word "surviving" being not limited to the surviving plaintiff or codefendant, but including a surviving adverse party. *Reed v. Farrand*, 91 N. E. 541, 542, 198 N. Y. 207.

### **SURVIVING SPOUSE**

As owner, see Owner.

### **SUSCEPTIBLE OF CULTIVATION**

A representation that land was above overflow and "susceptible of cultivation" is not an expression of opinion as to the character of the soil, as it would be susceptible of cultivation, whatever its character, if above water. *Matlock v. Reppy*, 14 S. W. 546, 548, 47 Ark. 148, 166.

### **SUSPECT**

Reasonable cause to suspect, see Reasonable Cause.

### **SUSPEND—SUSPENSION**

"Suspended" is defined as temporarily inactive or inoperative; held in abeyance. *Wisener v. Burrell*, 118 Pac. 999, 1001, 28 Okl. 546, 34 L. R. A. (N. S.) 755, Ann. Cas. 1912D, 356.

"'Suspend' is to cause to cease for a time; to hinder every proceeding; to interrupt; to delay; to stay." *Taylor v. State*, 38 South. 380, 389, 49 Fla. 69 (by Taylor, J., dissenting, citing *City of Little Rock v. Parish*, 36 Ark. 166).

To "suspend" means to remove either temporarily or permanently from employment. *Markey v. Pickley*, 132 N. W. 883, 885, 152 Iowa, 508; *Same v. City of Dubuque* (Iowa) 132 N. W. 885.

Where the by-laws of a beneficial association provide that each member shall pay an amount according to age, and any member failing to pay by a certain time shall stand suspended from the order, and from all benefits therefrom, the words "shall stand suspended" are equivalent in their legal effect to "cease and determine," and "null and void." *Beeman v. Supreme Lodge, Shfield of Honor*, 29 Pa. Super. Ct. 387, 396.

The expression "shall be suspended" in the constitution of a mutual benefit society, providing that if a member shall fail to pay his assessment within 15 days after being notified thereof, the party so failing to pay shall be suspended, is declaratory merely of the right to suspend for nonpayment of assessments, and it cannot be said that membership or standing has been lost or forfeited

as long as the society does not see fit to exercise such right. Such provision is not self-executing, so that a member who has failed to pay within the 15 days is still in good standing; the society having taken no action to suspend him. *Jelly v. Muscatine City and County Mut. Aid Soc.*, 95 N. W. 197, 120 Iowa, 689, 98 Am. St. Rep. 378 (citing *Warwick v. Supreme Conclave, Knights of Damon*, 32 S. E. 952, 107 Ga. 115; *Petherick v. General Assembly of Order of Amaranth*, 114 Mich. 420, 72 N. W. 262; *Northwestern Traveling Men's Ass'n v. Schauss*, 35 N. E. 747, 148 Ill. 304; *Puhr v. Grand Lodge German Order of Harugari*, 77 Mo. App. 47; *Bacon, Mut. Ben. Ass'n*, § 385).

The sale of spirituous liquors by a member of a fraternal benefit association was prohibited when insured became a member, and the executive committee had power to suspend a member from all benefits who engaged in any occupation prohibited by the laws of the order, its decision after hearing being final, unless an appeal was taken; but it also had power to reinstate a member upon removal of the cause of suspension. Held, that merely engaging in a prohibited occupation, such as the sale of intoxicants, would not of itself forfeit the rights of a member under his certificate; the word "suspend" ordinarily implying a cessation which may not be permanent. *Brown v. Great Camp of Knights of Modern Maccabees*, 132 N. W. 562, 566, 167 Mich. 123.

An oil lease provided for stipulated payments to the lessor for the lessee's failure to commence drilling, and also provided that the lessee might "suspend" drilling operations if the price of oil went below 75 cents a barrel. When the lease was executed, the price of oil was below 75 cents a barrel, and thereafter remained below that price. Held, that the lease merely authorized a suspension of drilling operations, and did not authorize a failure on the part of the lessee to commence drilling. *McComber v. Kellerman*, 124 Pac. 431, 433, 162 Cal. 749.

According to the dictionaries, to "suspend" is to cause to cease for awhile. Where a mining lease provided that the minimum royalty specified therein was to be suspended during the disability of the lessee because of strikes, accidents, or any cause of stoppage of transportation over which the lessee had no control, it was held that the minimum royalty ceased when any of the things happened that are provided against in the lease, and would again become effective when those things in their turn were suspended or ceased. *Robinson v. Kistler*, 59 S. E. 505, 507, 62 W. Va. 489.

When a "law is suspended," the law continues in esse, for the time being is not operative, but as soon as the power of suspension is relaxed it goes into immediate



operation. *Arroyo v. State* (Tex.) 69 S. W. 503, 505.

"To suspend" merely means, according to Bouvier, a temporary stop for a time. The suspension of a statute is different from a provision which declares that its operation shall cease at a specified time or on the happening of a contingency. The purpose of Const. art. 1, § 28, declaring that "no power of suspending laws in this state shall be exercised except by the Legislature," was to prohibit the Legislature delegating to its officers the power of suspending the laws, and not to prohibit it from providing that a law may cease wholly to operate upon the happening of an event. *Missouri, K. & T. R. Co. of Texas v. Shannon* (Tex.) 97 S. W. 527.

The "suspension" of the writ of habeas corpus, which is prohibited by Bill of Rights, § 18, Const. 1875, means a denial to the citizen of the right to demand an investigation into the cause of his detention. *State v. Towery*, 39 South. 309, 143 Ala. 48.

A mere failure to apply for administration is not a "suspension" within Pub. St. 1901, c. 191, §§ 2, 4, prohibiting suits against an administrator unless the demand is exhibited to, and suit is brought against, him within a specified time after grant of administration, excluding the time administration may have been suspended; the suspension contemplated being one caused by the death, resignation, removal, etc., of an original administrator upon a deceased debtor's estate within the period prescribed for presentation of claims or suing and having no reference to a suspension of administration upon a deceased creditor's estate. *Cummings v. Farnham*, 71 Atl. 632, 634, 75 N. H. 135.

#### **As punishment**

The "suspension" of a naval officer, charged with drunkenness and neglect of duty, from morning until evening of the same day, when he was restored to duty, to give "time to investigate the case," is not such a punishment for the offense as precludes, under the Navy Regulations of 1865, further proceedings against him by court-martial, but must be deemed simply a temporary precaution, for the preservation of good order and discipline. *Bishop v. United States*, 25 Sup. Ct. 440, 441, 197 U. S. 334, 49 L. Ed. 780.

#### **As remove**

Under Const. art. 12, § 8, conferring on the Governor power to remove officers of charitable and penal institutions, and article 4, § 22, authorizing the Governor to suspend an officer indicted for embezzlement, and Cr. Code 1902, §§ 381, 388, 389, 410, providing for the removal by the Governor of local officers convicted of specific misconduct, and providing for the dismissal from office of any magistrate convicted of neglecting to pay over fines, and Civ. Code 1902, §§ 625, 982, authorizing

the Governor to remove for cause any officer appointed by him to fill a vacancy, and authorizing the Governor to suspend magistrates for incapacity, misconduct, or neglect of duty, etc., the Governor has no power to remove magistrates serving for a full term except after trial and conviction, as provided by the Constitution and the statutes, but he may suspend any magistrate when a showing has been made to him by affidavit that the magistrate is probably guilty of embezzlement and a true bill has been found, and he may suspend for incapacity, misconduct, or neglect of duty, but submit the suspension to the Senate for approval or disapproval, and an attempt of the Governor to remove a magistrate without indictment and conviction is without effect as a removal. A "suspension" is the mere temporary withdrawal of the power to exercise the duties of an office, while a "removal" is a complete deprivation of official tenure. *McDowell v. Burnett*, 75 S. E. 873, 878, 92 S. C. 469.

#### **SUSPENDED SENTENCE**

See, also, Sentence Suspended.

The term "suspended sentence," as used in criminal law, refers to the suspension of the execution of a sentence already imposed, and not correctly to the suspending of sentence. *Gehrmann v. Osborne*, 82 Atl. 424, 428, 79 N. J. Eq. 430.

#### **SUSPENSION OF POWER OF ALIENATION**

Under Real Property Law (Consol. Laws 1909, c. 50) § 42, which provides that the absolute power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed, and that every future estate shall be void in its creation which suspends the absolute power of alienation for longer than two lives in being at the creation of the estate, a devise in trust for an unincorporated religious society incapable of taking by devise, with a disposition over to a substituted devisee if the society was incapable of taking within one year and 11 months after the probate of the will, is void as a "suspension of alienation" for a definite period not dependent upon the term of human lives. *Washburn v. Acome*, 131 N. Y. Supp. 963, 967, 74 Misc. Rep. 301.

Where a testator bequeathed his house and land to his brother, to hold until the last of his four children should become of age and then to be sold and divided equally between the children, the remainder to the children was vested, and there was no "suspension of the power of alienation." *In re Bray*, 102 N. Y. Supp. 989, 990, 118 App. Div. 533.

Where a testamentary trust did not authorize the sale of certain premises until the death of survivor of two of testator's daugh-

ters, an attempted testamentary disposition by such survivor of certain property, including that embraced in the original trust, by which attempted disposition she ordered that such property should be held in trust for the use and during the life of a certain person, with remainder to persons who could not be ascertained until the death of the cestui que trust, was invalid, since, if it were held valid, it would result in suspending the power of alienation for three lives. *Farmers' Loan & Trust Co. v. Kip*, 102 N. Y. Supp. 137, 139, 52 Misc. Rep. 407.

### SUSPENSION OF SENTENCE

Acts 32d Leg. c. 44, is not unconstitutional in authorizing district courts to suspend sentences in certain cases as an invasion of the right to "reprieve" or grant "commutations of punishment" reserved to the Governor by Const. art. 4, § 11, as a "reprieve" postpones the execution of a sentence to a day certain, whereas a "suspension" is for an indefinite time, and a "commutation" is the changing of the punishment assessed to a less punishment. *Snodgrass v. State (Tex.)* 150 S. W. 162, 165, 41 L. R. A. (N. S.) 1144 (citing 7 Words and Phrases, pp. 6115, 6116).

Pub. Acts 1907, No. 144, making one abandoning his wife or children guilty of a felony, authorizing the court to suspend sentence on the person convicted giving a bond conditioned that he will furnish his wife and children with necessary care, etc., is not invalid as invading the pardoning power of the executive, and confers no new power on courts possessing at common law inherent power to suspend sentence, which is a judicial function and distinct and different from the power to grant reprieves and pardons, since the "suspension of the sentence" postpones the judgment of the court, while the conviction and liability following it, together with disabilities, remain to become operative on sentence being given, while a pardon reaches both the punishment and the guilt, for it relieves the punishment and blots out the existence of the guilt. *People v. Stickie*, 121 N. W. 497, 499, 156 Mich. 557.

### SUSPENSIVE CONDITION

"The 'suspensive condition' is that to the realization of which is subordinated the birth of a right." It "suspends the very existence of the obligation." *Barber Asphalt Pav. Co. v. St. Louis Cypress Co.*, 46 South. 193, 197, 121 La. 152.

### SUSPENSORY

A "suspensory" is designed to slightly hold up male private organs, to relieve muscular or nervous strain, and not to protect them against injury. *Sharp & Smith v. Physicians' & Surgeons' Appliance Co.*, 174 Fed. 424, 425.

## SUSPICION

See On Suspicion; Reasonable Ground of Suspicion.

Reasonable cause to suspect, see Reasonable Cause.

That state of mind which in a reasonable man would lead to inquiry is called mere "suspicion." *Stuart v. Farmers' Bank of Cuba City*, 117 N. W. 820, 822, 137 Wis. 66, 16 Ann. Cas. 821. See, also, *United States v. Green*, 136 Fed. 618, 628.

In an action by the seller of goods against bankers who had made advances to factors to whom plaintiff had consigned its goods by bills of lading made out to such factors to recover the proceeds of the goods, an instruction that, if defendants had a "suspicion" that the factors were not the owners of the goods, it was their duty to make inquiry of plaintiff and that defendants were bound by whatever knowledge such inquiry would have elicited, deprived defendants of the benefit of Factors Act (Laws 1830, p. 203, c. 179) § 3, providing that every factor intrusted with any bill of lading shall be deemed to be the true owner thereof since the essence of a "suspicion" implies the absence of known facts. *Kinston Cotton Mills v. Kuhne*, 113 N. Y. Supp. 779, 784, 129 App. Div. 250.

### SUSPICIOUS PERSON

"Suspicious person" in police parlance is a vague and shadowy term, varying with the circumstances of each case. Thus an arrest may not lawfully be made with nothing but suspicion or hearsay to support it, and a sworn statement of detectives that plaintiff was known to them as a common cheat and gambler, and as an associate of criminals and disreputable persons, without any fact showing the source of such knowledge, did not show that plaintiff was a "suspicious person," so as to authorize a taking of his photograph for the rogues' gallery. *Owen v. Partridge*, 82 N. Y. Supp. 248, 251, 40 Misc. Rep. 415.

### SUSPICIOUS PLACE

What constitutes a "suspicious place," within a police regulation requiring a report as to all suspicious places, is to be determined by the exercise of good judgment and discretion on the part of the captain of the precinct, as he is required to make the report; but such judgment and discretion are not a mere whim or caprice on his part, but must have for their foundation some evidence. *People ex rel. Stephenson v. Greene*, 87 N. Y. Supp. 172, 175, 92 App. Div. 243.

## SUSTAIN

The liability of the principal to the surety in the bond, under the indemnity agreement set forth above, does not constitute a claim provable in bankruptcy against the

estate of the principal until the surety has actually paid the obligee in the bond the damages sustained by reason of the principal's default. No such damage has been sustained or incurred by the surety, within the meaning of the agreement, until after actual payment. *R. P. Williams & Co. v. United States Fidelity & Guaranty Co.*, 75 S. E. 1067, 1071, 11 Ga. App. 635.

Civ. Code, art. 3537, provides that prescription runs from the day the damages are "sustained." Plaintiff's mule was struck by a train, and sustained a flesh wound. He was treated for a few days, and then turned out to pasture, where he was left to get well, but instead he died. Held, that the damages were not "sustained" until the mule died, and hence limitations did not begin to run against plaintiff's right to recover for the death of the mule until that date. *Jones v. Texas & P. Ry. Co.*, 51 South. 582, 125 La. 542, 136 Am. St. Rep. 339.

#### **SUSTAINED BY SUFFICIENT EVIDENCE**

A case where the verdict is under the evidence, inadequate, is a case "not sustained by sufficient evidence," within Code, § 3755, authorizing the trial court to grant a new trial where the verdict is not sustained by sufficient evidence, etc. *Tathwell v. City of Cedar Rapids*, 97 N. W. 96, 98, 122 Iowa, 50.

#### **SUSTENANCE**

"Sustenance during quarantine" covers no more than the supplies left on the homestead during the widow's quarantine, or her reasonable board during the same period, and does not embrace the widow's mourning outfit or any expenses to attend the funeral of her husband; and the reasonableness of a sum to be allowed depends on the circumstances of the particular case. In *re Mehn's Estate*, 124 N. Y. Supp. 173, 176.

#### **SWALE**

As water course, see Water Course.

#### **SWAMP**

##### **SWAMP AND OVERFLOWED LANDS**

"Swamp lands," as distinguished from "overflowed lands," are such as require drainage to dispose of needless water or moisture on or in the lands, in order to make them fit for successful and useful cultivation. *State ex rel. Ellis v. Gerbing*, 47 South. 353, 357, 56 Fla. 603, 22 L. R. A. (N. S.) 337.

"Swamp land" is simply land that is too wet for cultivation; the characteristic by which it is distinguished from arable land, but it is none the less land. It is a mere state or condition of land, the existence of which must of necessity be passed on by the state's agency as an incident of its office.

*McCarter v. Sooy Oyster Co.*, 75 Atl. 211, 215, 78 N. J. Law, 394.

#### **SWEAR—SWORN**

See Duly Sworn; Subscribed and Sworn to.

Witness as person sworn, see Witness.

The word "swore" does not technically and necessarily imply a judicial administration of an oath. Any utterance or an affirmation with an appeal to God is to swear an oath, no matter how or before whom the utterance is made. That is its common import. In law it has a more technical meaning, and implies that the swearing has been officially done, but not necessarily judicially done. It is not sufficient, in an indictment for subornation of perjury, to charge that defendant procured the witness falsely and upon oath to depose, etc., since such averment relates to the acts of defendant and not the witness; nor is the defect cured by further expressions which assume, without stating that the witness was sworn, such as that when he was so sworn, or when he swore, he did not believe the things which he testified to be true. *U. S. v. Howard*, 132 Fed. 325, 338, 340.

The word "swear," in Rem. & Bal. Code, § 2353, providing that any person who, in a proceeding or investigation authorized by law, shall knowingly swear falsely is guilty of perjury in the second degree, means to state facts under the sanctity of an oath or affirmation administered by an officer having authority to administer the oath in that particular proceeding or investigation. *State v. Dallagiovanna*, 124 Pac. 209, 210, 69 Wash. 84, 40 L. R. A. (N. S.) 249.

The use of the phrase, "who were elected according to law to well and truly try and true deliverance make between the state of West Virginia," etc., was inadequate as a statement that a juror was "sworn." *State v. Moore*, 49 S. E. 1015, 57 W. Va. 146.

At a county seat election, voters at several precincts, on entering the polling places, were asked by the clerk the questions necessary to enable the clerk to fill out the blanks in the voter's affidavit required by section 12, art. 4, c. 31, p. 382, Session Laws 1907-08. The voter having answered fully, the clerk filled out the blank in the affidavit; whereupon the voter, in the presence of the special election commissioner, signed the affidavit, after which the special election commissioner, who is authorized by law to administer oaths to voters at such elections, explained the affidavit to the voter, and asked if he understood same to be his affidavit of qualification as a voter, or asked if he understood he was signing an affidavit that he was a legally qualified voter, to which the voter answered, "Yes," and the election commissioner thereupon signed his jurat upon the affidavit,

and the voter was given a ballot and permitted to vote. Held that, by reason of section 2182, Compiled Laws 1909, said acts on the part of the voter and of the election officers constituted a "swearing" by the voter to said affidavit, as required of him by said section 12, *supra*. *City of Blackwell v. City of Newkirk*, 121 Pac. 260, 264, 31 Okl. 304, Ann. Cas. 1913E, 441.

The phrase "sworn bailiff," in the record in a homicide case, showing that the jury was placed in charge of a "sworn bailiff," is sufficient to show that the bailiff was duly sworn, and the court on appeal would presume, after verdict, that the bailiff was duly sworn. *Williams v. United States*, 88 S. W. 334, 338, 6 Ind. T. 1.

### SWEARING

See, also, Profane—Profanity.

A reply by accused to the district attorney, while testifying before a grand jury, "It is none of your damn business," etc., did not constitute swearing and cursing in a "public place." *Morrison v. State*, 118 S. W. 541, 56 Tex. Cr. R. 20, Ann. Cas. 1914A, 811.

### SWORN COMPLAINT

It is sufficient compliance with the requirement of an act relating to the disposing of an intruder on Indian lands that a "sworn complaint" shall be filed, if the complaint is verified by the authorized attorney of the tribe or nation which is plaintiff, who states that the facts alleged are within his knowledge. *Brought v. Cherokee Nation*, 129 Fed. 192, 195, 63 C. C. A. 350.

### SWORN COPY

"A copy made by the witness, who swears to its correctness, is a sworn or examined copy. So, also, is one which the witness has compared with the original and found correct. The witness, however, must state that the instrument produced is a copy, although no particular language need be used." "It is sometimes said that a copy must have been compared with the original by the witness, either directly or by following while another read the original. And it has been held that a copy made from memory is not admissible, though the witness swears it is a true copy." *Biddy v. State*, 52 Tex. Cr. R. 412, 107 S. W. 814, 815 (quoting and adopting 10 Enc. Ev. p. 865).

### SWORN TO A LIE

The words "swore a lie," as used in a petition for slander, alleging that defendant did maliciously say of petitioner the following false and defamatory words, to wit, "S. A. Powell swore a lie," standing alone, import the crime of false swearing, rather than perjury. *Gillis v. Powell*, 58 S. E. 1051, 1053, 129 Ga. 403 (citing *Smith v. Wright*, 55 Ga. 218).

## SWEAT BOX

Confession induced by means of keeping the prisoner in a dark cell, or "sweat box," under circumstances leading him to believe that he would be kept there until he did confess, could not be used against him. *People v. Siemsen*, 95 Pac. 863, 867, 153 Cal. 387.

## SWEEP

A "sweep" on a log raft is an appliance in the nature of an oar used at the ends for steering and managing the raft in its navigation. *The Mary*, 123 Fed. 609, 611.

## SWEETMEATS AND PRESERVED FRUITS

Marmalade is dutiable under the provision of the tariff act of 1897, relating to "sweetmeats and preserved fruits," rather than as "jelly." *Bogle v. U. S.*, 175 Fed. 889, 891.

## SWELLS

The word "swells," as used in a six months' guaranty against "swells" in the sale of canned tomatoes, refers to defective cans in which the tomatoes may be packed, and the defect may be in the can itself or in the manner in which the tomatoes are packed. *Eau Claire Canning Co. v. Western Brokerage Co.*, 73 N. E. 430, 440, 213 Ill. 561.

## SWIFT

The mechanism which winds raw silk as reeled from the cocoon, so as to form a thread for manufacture, is known as a "swift." *Klots v. U. S.*, 139 Fed. 606, 607, 71 C. C. A. 590.

The unexpected jarring of a passenger car, variously described as "swift," "quite violent," "terrible," "awful," "very severe," and "unexpected," as the train was passing over a cross-over switch used during the repair of one of the railroad company's bridges, which resulted in a passenger, who was standing near the open door of a car, being thrown from the car and injured, did not constitute negligence on the part of the carrier. *Foley v. Boston & M. R. R.*, 79 N. E. 765, 766, 193 Mass. 332, 7 L. R. A. (N. S.) 1076.

## SWINDLE—SWINDLING

### SWINDLING

See, also, Confidence Game; False Representation.

Under Pen. Code 1895, art. 943, which defines "swindling" as the acquisition of money or instruments of writing, conveying or securing a valuable right, by some deceitful pretense or fraudulent representation, where a person secured the indorsement of his note by another upon false representations that he

was solvent, that he owed but a limited amount (naming it), and owned property of a value greatly in excess of such amount, and that a named person would loan him a given amount if the note was indorsed by the person to whom the representations are made, etc., he acquired a valuable right, and his act is "swindling," within the purview of the statute. *Hubbert v. State* (Tex.) 147 S. W. 267. But a representation that one will invest in certain property, and a failure to do it, is but a breach of the promise, not a basis for swindling. *Johnson v. State*, 123 S. W. 143, 145, 57 Tex. Cr. R. 347.

The pretense must be made to some one, and must be so declared in the indictment; and it must be alleged that the pretenses so made were relied upon, and the party was induced to part with the ownership of the property on the faith of such representations, which must be shown to be false, and that the party knew they were false when he made them. *Hunter v. State*, 81 S. W. 730, 732, 46 Tex. Cr. R. 498. A debtor for merchandise, who agreed to give a check on a bank in payment, on the creditor making out an itemized account and attaching it to the check, and who represented that the check would be paid, and who gave a check, to which was attached the account, is not guilty of "swindling" merely because the check was not paid for want of funds, since the debtor acquired no property or right by means thereof, or impaired the right of the creditor. *Allen v. State*, 126 S. W. 571, 572, 58 Tex. Cr. R. 494. The offense consists of the willful false representation as to a substantial and material fact, resulting in inducing another to part with his property. *La Moynes v. State*, 111 S. W. 950, 953, 53 Tex. Cr. R. 221. A defendant who falsely represented that he was the owner of land free from incumbrance, and purchased personal property on credit, securing the price by a deed of trust on the land, is guilty of "swindling," within Pen. Code 1895, arts. 943, 944, though the person swindled had constructive notice by means of the records that the land was incumbered. *Brown v. State*, 138 S. W. 604, 606, 62 Tex. Cr. R. 592. And so, where an indictment charged that defendant, in order to obtain \$10 from prosecutor, represented that he was the owner of certain real estate in El Paso county, Tex., and by means of false pretenses and fraudulent representations induced prosecutor to exchange such sum for an instrument purporting to be a conveyance of the land described, and by such false pretenses prosecutor was induced to part and did part with the possession of the money to accused, when, in fact, accused did not own the land or have the right to sell the same, or make a valid deed thereto, etc., sufficiently charged the crime of "swindling." *Yoakum v. State* (Tex.) 150 S. W. 910, 911.

"Swindling" is an offense eo nomine. Where a bail bond recited that accused was

charged with "swindling" over the value of \$50, it was not objectionable for failure to state whether the offense was a felony or a misdemeanor. *White v. State* (Tex.) 74 S. W. 770.

### Theft distinguished

Where title to property is acquired by means of a false pretext, the offense is "swindling"; while if the mere possession of the property is parted with by the owner by means of the false pretext, it is "theft." Thus, where defendant and another obtained money from the prosecutor under the false pretense that defendant had his father's corpse on the train, and that they were about to put it off because the express charges had not been paid, and that he would have plenty of money when he got to his destination, and that he had a check he could cash at a point further down the road, the offense was "swindling," and not "theft." *Bink v. State*, 98 S. W. 249, 250, 50 Tex. Cr. R. 450; *Id.*, 98 S. W. 863, 865, 50 Tex. Cr. R. 445.

A foot race was arranged between H. and W.; one T. being H.'s backer, and defendant G. being W.'s backer. Prosecutor gave T. a sum of money to bet on the race, on the latter's promise that it, or an equivalent sum, should be returned, whatever the outcome of the contest; prosecutor not intending to part with his money. The money was placed in a satchel, and after the race G. and W. claimed the same, and it was turned over to them. Held, that such acts constituted "theft," and not "swindling." *Glasgow v. State*, 100 S. W. 933, 935, 50 Tex. Cr. R. 635.

## SWITCH

### In railroad

See Derail Switch; Flying Switch; Running Switch.

Split the switch, see Split.

A "switch" is a device used for the transfer of cars from one track to another. The fact that a street railway switch was so constructed that it was liable to "catch and hold vehicles" does not, of itself, show that the switch was such a structure as to render the railroad liable for injuries to a traveler in a buggy the wheels of which were caught by the switch, and who was thereby thrown to the ground and injured. *Morie v. St. Louis Transit Co.*, 91 S. W. 962, 116 Mo. App. 12.

The purpose of a "switch" is to direct a car from the course, while that of a "crossing" is to keep it on the course. *Thomson-Houston Electric Co. v. Ohio Brass Co.*, 130 Fed. 542, 546.

The words "turnouts" and "switches," in Acts Tenn. 1903, c. 216, providing that any railroad company may build turnouts and switches without altering its charter, relate to tracks in the nature of side tracks ad-

jacent to and used in connection with another line of track, and do not refer to a track which branches off entirely from the existing line to a distant objective point. *City of Memphis v. St. Louis & S. F. R. Co.*, 183 Fed. 529, 539, 106 C. C. A. 75.

An approach to the Ohio river bridge of the Illinois Central Railroad, consisting of the tracks leading to the bridge and the embankment and steel structure upon which they rest, used in connection with its charter lines to connect with the Mobile & Ohio Railroad, is not a branch or lateral line, but a "switch" or side track, which it is empowered to acquire by section 1 of its charter, as needful to carry into effect its purposes, and falls within sections 18, 22, imposing a tax on gross receipts and exempting its charter lines from other taxation. *State Board of Equalization v. People*, 82 N. E. 324, 334, 229 Ill. 430.

A "switch rod" is a member connecting and holding in alignment the movable opposite rails of a railroad switch. The Elfborg patent for an adjustable switch rod, in which an eccentric is used as a means for adjusting the length of the rod in a split switch, is not a pioneer patent. *Ajax Forge Co. v. Morden Frog & Crossing Works*, 156 Fed. 591, 592.

An ordinance granting a street railroad company the right to lay its tracks required the single tracks to be laid in the center of the streets, and authorized double tracks on a certain street, to be laid on either side of the center of the street. The company sought to construct in a certain block of such street two tracks which continued parallel for a short distance on each side of the center line, when they reunited with the single track. Held, that the word "switch" has a meaning in addition to its technical meaning, depending upon its character, the word ordinarily meaning a side track constructed to permit the passage of cars from and to the main track; and the track which the company sought to construct was a "switch," and not a "double track," within the meaning of the ordinance. *City of Denison v. Denison & S. R. Co.*, 127 S. W. 804, 805, 103 Tex. 344.

**As machine**

See Machine.

**As turnout**

See Turnout.

**SWITCH TARGET**

A "switch target" is a device so adjusted to the switch stand that the switch cannot be opened or closed without shifting the target. A switch target is not a "signal," within a statute making a railroad company liable for injuries caused by the negligence of an employé having charge of any signal. The statute is applicable only to such signals as are complete within themselves, and not to subsidiary parts of another device, and

so operated that by the negligence of the operator they may be made to speak falsely. *Chicago, I. & L. Ry. Co. v. Barker*, 83 N. E. 369, 374, 169 Ind. 670, 17 L. R. A. (N. S.) 542, 14 Ann. Cas. 375.

**SWITCH TRACK**

As public utility, see Public Utility.

**SWITCHING**

See Service in Switching.

*Burns' Ann. St.* 1908, § 5260, authorizing county commissioners to require railroad companies to maintain flagmen at highway crossings traversed by tracks used for "switching" purposes, applies to tracks used for side-tracking trains to permit other trains to pass, and is not restricted to tracks used in making or breaking up trains. *Pennsylvania Co. v. Mosher*, 94 N. E. 1033, 1036, 47 Ind. App. 556 (citing Words and Phrases).

**SWITCHMAN**

See Railway Freight Brakeman or Switchman.

As laborer, see Laborer.

**SWITCHMAN'S SHANTY**

As business office, see Business Office.

**SWITCHYARD**

A railroad "switchyard," where railroads may be required to use more care to look out for trespassers, does not include every switch or siding at a station or in the country along the main line of travel, nor does the rule apply to a yard guarded by walls and fences to keep trespassers out. *Fowler v. Georgia R. & Banking Co.*, 66 S. E. 900, 902, 133 Ga. 664.

**SWIVEL**

Where an employer furnished a safe boat with which to row its employés to their place of work, the fact that the boat was provided with tight oars, otherwise known as "swivel oars"—that is to say, the oarlock was so arranged that when the oar was in position it was tight, the oarlock being fastened to the oar by an iron pin about the size of an eightpenny nail transversing it and the lips of the oarlock—did not render the employer liable for the death of a servant who was drowned by the overturning of the boat. *Chrismer v. Bell Telephone Co.*, 92 S. W. 378, 380, 194 Mo. 189, 6 L. R. A. (N. S.) 492.

**SWORD**

The provision for "swords" in the tariff act of 1897 relating to "swords, sword-blades, and side-arms," does not include so-called "bone swords," used as curios, ornaments, etc. *Morimura Bros. v. United States*, 165 Fed. 64.

**SWORE**

See Swear—Sworn.

## SYMBOL

Conceding that the use of a figure of a book, with words indicating that it represents the Holy Bible, is a "symbol common to all the people" and therefore within the prohibition of the election law and that the prohibitory language is mandatory, the use of such symbol on the ballots is a mere irregularity, which will not invalidate a local option election, it not appearing that it in any way influenced the election. *Erwin v. Benton*, 87 S. W. 291, 296, 120 Ky. 536, 9 Ann. Cas. 264.

## SYMBOLICAL DELIVERY

The giving of a key to a box containing notes has been held to be a good "symbolical delivery" of the notes. *Hagemann v. Hagemann*, 68 N. E. 381, 383, 204 Ill. 378 (citing *Stephenson's Adm'r v. King*, 81 Ky. 425, 50 Am. Rep. 173; *Telford v. Patton*, 33 N. E. 1119, 144 Ill. 611).

## SYMPTOM

See Objective Symptom; Subjective Symptoms.

## SYNOD

According to the constitution of the Presbyterian Church, the "Synod" has jurisdiction over three or more presbyteries. *Mack v. Kime*, 58 S. E. 184, 195, 129 Ga. 1, 24 L. R. A. (N. S.) 675.

## SYPHILIS

Among a certain class of people, the word "pock" is a synonym of "syphilis," or, according to Webster's International Dictionary, what is called French or Spanish pox. *Mills v. Flynn* (Iowa) 137 N. W. 1082, 1084.

## SYRIAN

As White person, see White Person.

## SYRUP

See Grenadine Syrup; Maple Syrup.

"Syrup" as defined by the United States Department of Agriculture, is the product obtained by purifying and evaporating the juice of a sugar-producing plant without removing any of the sugar. Syrup thus obtained from cane is cane syrup, syrup so obtained from sorghum is sorghum syrup, and syrup so obtained from corn is corn syrup. *People v. Harris*, 97 N. W. 402, 403, 135 Mich. 136.

The term "syrup" has an accepted meaning as commonly and properly understood and applied to articles of food for table use, and in this sense is employed in Laws 1907, c. 557, and kindred legislation, regulating the sale thereof, to designate articles of food

which are in common use as table syrups, such as maple, sugar cane, and refiner's syrup. *McDermott v. State*, 126 N. W. 888, 892, 143 Wis. 18, 21 Ann. Cas. 1315.

## SYSTEM

See Catalogue System or Method; C. G. S. System; Commercial System; High Tension System; Multiphase System; Proportional System.

The word "system" imports a unity of purpose as well as an entirety of operation. *Board of Education of City of Ardmore v. State*, 109 Pac. 563; 565, 26 Okl. 366.

### Of bookkeeping

The "system of bookkeeping," which the Railroad Commission is empowered to prescribe for carriers doing an intrastate business, and by Rev. St. 1895, art. 4571, is not limited to a record of facts, but includes assumed facts based on theory, opinion, or supposed averages. *Railroad Commission of Texas v. Texas & P. R. Co. (Tex.)* 140 S. W. 829, 832.

Under Rev. St. 1895, art. 4571 (Rev. Civ. St. 1911, art. 6667), giving the Railroad Commission "power to prescribe a system of bookkeeping," since "system" means "method" and "bookkeeping" is the art of recording in a systematic manner the transactions of merchants, traders, and other persons engaged in pursuits connected with money, the commission cannot order the apportionment of items of expense to be made upon a purely arbitrary basis of "car miles" in a certain ratio between passenger traffic and freight, and orders prescribing that certain conclusions and deductions be entered upon the books of the railroads are not authorized. *Texas & P. R. Co. v. Railroad Commission of Texas*, 150 S. W. 878, 880, 105 Tex. 386 (citing 1 Words and Phrases, p. 842).

### Of common schools

A kindergarten is not a part of the "system of common schools," required by Const. art. 9, § 5, to be provided by the Legislature. *Los Angeles County v. Kirk*, 83 Pac. 250, 252, 148 Cal. 385.

### Of mining

The claimant of a mining claim need not prepare plans and specifications to show how he intends to develop it; the requirement that he adopt a "system" or "general system" simply meaning that the work as commenced should be such that, if continued, will lead to the discovery and development of supposed veins, or, if these veins are known, that the work will facilitate the extraction of the ores. *Nevada Exploration & Mining Co. v. Spriggs* (Utah) 124 Pac. 770, 772.

### Of railroad

As used in Rev. St. 1883, c. 6, § 42, amended by Pub. Laws 1901, p. 160, c. 145,

relating to taxation, the word "railroad" comprehends the equipment, roadbed, sites of depots and warehouses, and other real estate, and the words "line or system" cannot be disconnected from it, and mean in this connection a railroad operated as a part of a line or system extending beyond the state. *State v. Canadian Pac. R. Co.*, 60 Atl. 901, 902, 100 Me. 202.

**Of sewerage**

Act April 25, 1907 (P. L. 1907, p. 267), authorizing the construction of an intercepting sewer, or a system of sewerage, in any city through which a stream runs, and into which the sewage of the city is emptied, so that all sewers emptying into such stream shall be connected with such system, does not authorize the building of a "system of sewerage" as an improvement distinct from

an intercepting sewer so as to embrace more than one object; but the words "or a system of sewerage" refer to the word "intercepting," and should be read, in connection with it and the purpose of the act, as meaning a system of intercepting sewers. *Summerton v. City of Elizabeth*, 73 Atl. 89, 90, 79 N. J. Law, 170.

**Of waterworks**

See Waterworks.

**SYSTEMATIZED DELUSION**

A "systematized delusion" is one based on a false premise, pursued by a logical process of reasoning to an insane conclusion; there being one central delusion, around which other aberrations of the mind converge. *Taylor v. McClintock*, 112 S. W. 405, 412, 87 Ark. 243.



## T

**T-RAIL CUTTER**

A "T-rail cutter" is a steel wedge-shaped instrument, sharp at one end, with a head on the other, about 2 inches broad and 8 or 10 inches long, having in the center a handle some 20 inches in length. One person holds it in place by the handle, while another strikes it with a sledge. *Langhorn, Johnson & Co. v. Wiley* (Ky.) 91 S. W. 255, 256.

**TABLE**

See Continued on the Table; Gambling Table; Turntable.

**TABLE BOARD**

The word "board," in the ordinary acceptance of the term, covers both room rent and table board. A "boarder" is ordinarily one who has food and lodging in another's house or family for a stipulated price. If it has the narrower meaning, it is usually designated "table board." *Heron v. Webber*, 68 Atl. 744, 745, 103 Me. 178.

**TABULATED**

Where a plea in bar to the granting of a liquor license alleged the adoption of local option in the county under the local option law of 1908 (Acts Sp. Sess. 1908, c. 2), and that the returns of the vote were "tabulated" by the election commissioners, and the vote when tabulated showed a majority of 917 in favor of such prohibition, and that on a date subsequent to the election the auditor certified the vote to the board of county commissioners, and the same was duly recorded in the commissioners' record of the county, the word "tabulated," as so used, was synonymous with canvassed, the duties of the canvassers being purely ministerial, consisting of the mathematical tabulation of the votes of the different precincts, as returned to them. *Kunkle v. Coleman*, 92 N. E. 61, 63, 174 Ind. 315.

**TACKING****Annexing**

"Tacking" means annexing. *Monmouth County Electric Co. v. McKenna*, 60 Atl. 32, 35, 68 N. J. Eq. 160.

**Doctrine of "tacking."**

The doctrine of "tacking" is that any kind of a conveyance, so long as it purports to convey title absolutely, satisfies the rule for color of title; good or bad faith in taking or holding possession being immaterial. *Illinois Steel Co. v. Budzisz*, 121 N. W. 362, 364, 139 Wis. 281.

**TACKLE**

See Ship's Tackle, Apparel, and Furniture.

**TAGLIABUE**

The "Tagliabue" or open cup test is a test to determine the inflammability of kerosene oil. *State v. Boylan*, 65 Atl. 595, 596, 79 Conn. 463.

**TAIL**

See Estate Tail.

**TAKE****As administering oath**

The word "take," as used in Civ. Code 1895, § 4417, providing that "attorneys cannot 'take' affidavits required of their clients unless specially permitted by law," means that the attorney cannot administer an oath to his client. *Moultrie Lumber Co. v. Jenkins*, 49 S. E. 678, 121 Ga. 721 (citing *Wilkowski v. Halle*, 37 Ga. 678, 95 Am. Dec. 374).

**As prescribe**

Act Feb. 11, 1893 (Loc. Laws 1892-93, p. 491), empowering a certain corporation to construct a bridge, and authorizing it to "take" reasonable tolls, did not grant the power to prescribe tolls, though the act was silent respecting the fixing of tolls and there was no express reservation of the power to the Legislature. *Tallassee Falls Mfg. Co. v. Commissioners' Court of Tallapoosa County*, 48 South. 354, 356, 158 Ala. 263.

**Solicit distinguished**

See Solicit.

**TAKE A FEE**

Rev. St. 1898, § 2108, provides that when an absolute power of disposition, not accompanied by any trust, shall be given to the owner of any particular estate for life, such estate shall be changed into a fee absolutely in respect to the rights of creditors and purchasers, but subject to any future estates limited thereon in case the power shall not be executed. Section 2109 provides that, when a like power of disposition shall be given to any person to whom no particular estate is limited, such person shall also "take a fee" subject to any future estates that may be limited thereon, but absolute in respect to creditors and purchasers. "Difficulty is suggested in giving to the words 'shall be changed into a fee' in section 2108 the same meaning as would be applicable to the words 'shall take a fee' in section 2109, declaring the interest of the donee of a power to whom no special estate is limited. It does not seem to us serious. Section 2108 was framed to include

the situation of the donation of a power to one who already held an estate for life or years, who therefore could not be said to 'take' a fee by the mere donation of the power. The phrasing was well adapted to express the declaration that upon such donation he should have a fee so far as rights of creditors or purchasers might be involved." *Auer v. Brown*, 98 N. W. 966, 969, 121 Wis. 115.

### TAKE AWAY OR WITHDRAW

The quoted words in Rev. St. U. S. § 5408, subjecting an officer who fraudulently "takes away or withdraws" or destroys a record or document, mean a taking away or withdrawal whereby some injury is attempted or inflicted on the record or document, or on some one who has an interest in it and is entitled to use it. *Martin v. United States*, 168 Fed. 198, 204, 93 C. C. A. 484.

Under a will which put two daughters and two grandchildren in separate classes, the grandchildren to take and receive subject to a clause providing for a trustee to "take and hold" and manage such of the estate as was given to the grandchildren until the contingencies named in still another clause, in the meantime using the profits for their education and support, the intent was to vest title in the trustee; the words to "take and hold" being sufficient to imply, if not create, title, and not implying mere possession in the trustee. *McCoy v. Houck* (Ind.) 99 N. E. 97, 100.

### TAKE EFFECT

A policy of life insurance and the application on which the same was issued provided that it should not "take effect or be in force" until delivered to the applicant in person during his lifetime and while in good health. The expression "take effect or be in force" merely intended to distinguish between policies which have not been delivered and those which have been delivered. *Austin v. Mutual Reserve Fund Life Ass'n*, 132 Fed. 555, 559.

The phrase "to take effect from and after the death of the husband," in an antenuptial agreement providing for the annual payment of a certain sum to the wife in lieu of dower, the same to take effect from and after the death of the husband, does not describe the time of the payment, but the event which brings the annuity into existence—the time from which it begins to run. *Mower v. Sanford*, 57 Atl. 119, 120, 78 Conn. 504, 63 L. R. A. 625, 100 Am. St. Rep. 1008.

### TAKE EFFECT AT MY DEATH

Where the form of a deed is actually employed, such phrases as "vest at my death," "take effect at my death," and the like, may well be construed as merely designed to postpone possession or enjoyment by the grantee till after the death of the grantor.

An instrument attested as a deed and in all respects in the form of a deed should, though it contains the words "this deed to take effect at my death," be treated, not as a will, but as a conveyance passing title in present, with right of possession postponed till the death of the maker. *Nolan v. Otney*, 89 Pac. 690, 691, 75 Kan. 311, 9 L. R. A. (N. S.) 317 (quoting *West v. Wright*, 41 S. E. 602, 115 Ga. 277).

### TAKE ENTIRE CHARGE

Where real estate agents agreed with the owner of premises to take entire charge of the premises for a specified time, the term "take entire charge" imports a promise to act as the owner's agent for such time in the care and management of the property. *Seymour v. Warren*, 71 N. E. 260, 261, 179 N. Y. 1.

### TAKE HIS OWN LIFE

The word "suicide," and the words, "to die by his own hand," or "by his own act," or "to take his own life," mean the same thing, and convey the idea of voluntary, intentional self-destruction. A provision in a life insurance policy to the effect that if the insured, "whether sane or insane, die by his own hand," the policy shall be null and void, is valid; and its breach renders the policy void, unless the assured was in such a state of mind as to be unconscious of the physical nature of the act of self-destruction. In the absence of any proof as to his insanity, all the presumptions are in favor of his sanity, and of his consciousness of the character of the act which he committed. *Dickerson v. Northwestern Mut. Life Ins. Co.*, 65 N. E. 694, 696, 200 Ill. 270 (citing *Grand Lodge, Independent Order of Mutual Aid, v. Wieting*, 48 N. E. 59, 168 Ill. 408, 61 Am. St. Rep. 123; *Supreme Lodge, Order of Mutual Protection, v. Gelbke*, 64 N. E. 1058, 198 Ill. 365; *Mutual L. Ins. Co. v. Terry*, 82 U. S. [15 Wall.] 580, 21 L. Ed. 236; *Bigelow v. Berkshire L. Ins. Co.*, 93 U. S. 284, 23 L. Ed. 918; *Home Benefit Assoc. v. Sargent*, 12 Sup. Ct. 332, 142 U. S. 691, 35 L. Ed. 1160).

### TAKE THE PLACE OF

Where the vote of a town for the discontinuance of a highway made it conditional on a certain person at her own expense building a highway to "take the place of" the one discontinued, the new highway was to be a highway legally laid out upon petition to the selectmen and in the manner provided by law. *Town of New London v. Davis*, 59 Atl. 369, 373, 73 N. H. 72.

### TAKE THE SAME ESTATE

Under Rev. Laws, c. 135, § 21, providing that, if a legacy be made to a relative of testator and he die before testator, his issue surviving testator shall "take the same estate" which the person whose issue they are would have taken, if he had survived the tes-

tator," they take the legacy as, under Rev. Laws, c. 141, § 23, the legatee would have taken it, subject to set-off in the probate court of the debts of the legatee to testator's estate. *Tilton v. Tilton*, 82 N. E. 704, 196 Mass. 562.

### TAKE UP NOTE

The phrase "take up the note" does not any more strongly imply that the debt evidenced by the note in question is to be finally discharged than that the person "taking up" a note will assume the place of the original payee or holder, with the privilege in that event of being subrogated to all pre-existent rights of the former holder. *Bridges v. Phillips*, 73 S. E. 423, 10 Ga. App. 279.

### TAKEN

#### Appeal taken

*Burns' Ann. St.* 1908, § 677, relating to vacation appeals, provides that: "In case of death of any or all of the parties to a judgment before an appeal is taken, an appeal may be taken by, and notice of an appeal served upon, the persons in whose favor and against whom the action might have been revived, if death had occurred before judgment." Section 679 provides for term-time appeals, where it is said: "When an appeal is taken during the term at which judgment is rendered," etc. Held, that an appeal is not "taken" in a strict sense until it has been fully perfected, but that the "taking" of an appeal, within sections 677 and 679, refers particularly to the time of giving notice thereof to appellee, and that the word "taken" is manifestly used in a like sense in section 679. *Bruillets Creek Coal Co. v. Pomatto*, 88 N. E. 606, 608, 172 Ind. 288.

#### Bond taken

*Civ. Code Prac.* § 493, provides as to the proceedings under section 489, subd. 3, by a guardian to sell and to maintain and educate his ward, that he must give a bond which by subdivisions 2 and 3 must be approved by the court and recorded with an order of sale and certified by the clerk of the court, who shall deliver it to the county clerk to be recorded, and, if it be not given, any order of sale or conveyance made thereunder shall be void. Held, that a bond was not "taken" within the meaning of the statute unless taken by an order of the court, and, if there was no order, the sale was void. *Watkins v. Northern Coal & Coke Co.*, 116 S. W. 1192, 132 Ky. 700.

The word "taken," in the certificate attached to a bail bond, reciting that the bail bond was "taken," subscribed, and acknowledged by the deputy clerk of the court, does not imply that the clerk had "taken" the bond as of his own authority, where it appeared that the bond was taken and approved by the sheriff of the county before the principal therein was released from custody. *Territory ex rel. Thacker v. Conner*, 87 Pac. 591, 594, 17 Okl. 135 (citing *Territory ex rel. Thacker v. Sellers*, 82 Pac. 575, 15 Okl. 419).

### Judgment, order, or other proceeding taken

The word "taken," in *Code Civ. Proc.* § 473, authorizing the court to relieve a party from a "judgment, order, or other proceeding, taken" against him through his mistake or excusable neglect, provided that application therefor is made within six months after the "judgment, order, or proceeding was taken," is used in the same sense as the words "rendered" or "rendition," when used with reference to a judgment, and while the word "rendered" is appropriate in reference to a judgment or decree, but not to a proceeding or order, the word "taken" is adopted as a term applicable to judgments, orders, and proceedings or either of them, and has relatively the same meaning as rendition. Where a party had no actual notice of a proceeding, nor any knowledge of judgment therein until it was filed, there should be some fixed manifestation of the judgment or proceeding before it can be considered as taken against him, within *Code Civ. Proc.* § 473. Under *Code Civ. Proc.* § 1661, authorizing the court, after hearing a petition for partial distribution, to order the same by first requiring the distributees to give a bond for a payment of their share of the debts, etc., an order for partial distribution must be prepared, approved, and signed by the judge after the hearing and granting of the petition therefor, and the signing and filing of a formal order is a taking thereof within section 473, authorizing the court to relieve a party from a judgment or order taken against him, provided the application is made within a specified time. *Brownell v. Superior Court of Yolo County*, 109 Pac. 91, 93, 157 Cal. 703.

#### Poison taken

Where a benefit certificate provided that no benefit should be paid where death or disability resulted from poison or other injurious matter "taken or administered accidentally or otherwise," the word "taken" should be construed, in connection with the word "administered," to mean an internal taking; and hence such clause did not preclude a recovery for death resulting from insured coming in contact with poison ivy while cutting a branch in the woods adjoining a city. *Dent v. Railway Mail Ass'n*, 183 Fed. 840, 841.

The word "taken," in a statute punishing the administering of poison to a person with intent to kill, "and which shall have been actually taken by such" person, etc., means any method by which the system is made to absorb the poison designedly administered, including the administration of poison by enema, or taken by the mouth, or by rubbing it into the skin by means of massage. *State v. Stuart*, 40 South. 1010, 1011, 88 Miss. 406.

#### Votes taken

Laws 1905, p. 137, c. 88, § 5, provides that, when ballots of absent voters are not

challenged before the county canvassing board, it shall count such votes "taken," as herein provided, and add the same to the total result in the precinct where the voter resides. Held, that the votes of absent voters are "taken" when received by the judges on election day, and hence, where the envelopes are found genuine and entitled to be opened, the board has no discretion, in absence of challenge, to refuse to count the votes. *Pratley v. State ex rel. Campbell*, 99 Pac. 1116, 1124, 17 Wyo. 371.

#### TAKEN BACK

Where a contract between a principal and sales agent stipulates that the agent shall not be entitled to commissions on a sale of machinery "taken back" by the principal, the agent is not entitled to commissions on a sale of machinery which is not paid for by the purchaser, and which the principal is obliged to take back in a worn condition, on foreclosure of a mortgage given by the purchaser to secure the price; this being a taking back within the meaning of the contract. *Reeves & Co. v. Watkins (Ky.)* 89 S. W. 266, 267.

#### TAKEN BY PUBLIC OFFICERS

While in legal contemplation it may be permissible to attribute the act of taking a bond, required by a city, to the municipality, yet in fact it is of necessity the act of public officials; and hence a bond taken by a city from a sewer contractor for the protection of materialmen and laborers is "taken by public officers," within the purview of a statute directing public officers to take bonds from contractors, although executed to protect the interests of the city. *American Bonding Co. of Baltimore v. Dickey*, 88 Pac. 66, 69, 74 Kan. 791.

#### TAKEN IN THE ACT

Under Penal Code 1895, art. 672, providing that a person shall be justified in killing another taken in the act of adultery with the slayer's wife, an instruction charging that the term "taken in the act of adultery" meant that the husband must see the parties together in such a position as to indicate with reasonable certainty "to a rational mind" that they had just then committed or were about to commit the adulterous act, and did not require that the husband be an actual witness to the copulation placed too high a burden of proof on accused; he being justified in acting on appearances causing "him to reasonably believe" from his standpoint that the parties were guilty. *Gregory v. State*, 94 S. W. 1041-1043, 50 Tex. Cr. R. 73.

#### TAKEN ON EXECUTION

The words "taken on execution," as used in Gen. St. 1901, § 4905, providing that lands and tenements taken on execution shall not be sold until public notice by advertisement, referred "obviously to a general execution where there had been a seizure or levy." *Nor-*

*ton v. Reardon*, 72 Pac. 861, 863, 67 Kan. 302, 100 Am. St. Rep. 459.

#### TAKEN UP FROM THE CIRCUIT

Laws 1907, p. 174, § 6, creating the city court of Flovilla, requiring the solicitor of that court to represent the state in cases carried therefrom to the Supreme Court in which the state is a party, and providing that for services rendered in the Supreme Court the solicitor shall be paid the same fees allowed to Solicitors General even if a writ of error would lie to a decision of the city court, does not apply to cases carried by certiorari to the superior court and then by writ of error to the Supreme Court; such a case being one "taken up from the circuit," within the meaning of Const. art. 6, § 11, par. 2, and Civ. Code 1895, § 5862, making it the duty of the Solicitor General to represent the state in cases in the superior courts of the circuit and in all cases taken up from the circuit to the Supreme Court, and he is entitled to receive the fee provided for such services. *Letson v. State*. 68 S. E. 60, 61, 7 Ga. App. 745.

#### TAKER

See First Taker.

#### TAKING

See Actual Taking; Fraudulent Taking.

A statute providing that aliens may take and hold lands by devise and descent only, and may convey the same at any time within five years, makes a distinction between acquiring, taking, and holding, and a limitation on the taking or acquiring is made; and an alien not residing in the state, and who has not made a declaration of citizenship, cannot take by purchase, but can only take by devise and descent, and such an alien can hold and convey only for the limited period, and at the end of the period the land will escheat. *Lehman v. State ex rel. Miller*, 88 N. E. 365, 367, 45 Ind. App. 330.

The exercise of the legislative power of fixing or regulating rates and charges for services performed or engagements undertaken may be a "taking" by the state of private property, and the "taking" away from the contract parties of their right of private contract, which is private property. *German Alliance Ins. Co. v. Barnes*, 189 Fed. 769, 775.

A "levy," is under Rev. St. 1909, § 2195, defined as a "taking," which means to gain control or possession of, in any way. *Butler v. Imhoff*, 142 S. W. 287, 290, 238 Mo. 581.

Since a railroad company is a quasi public corporation, the property of the railroad is "private property" and cannot be taken for private use, and therefore Act 1905 (24 St. at Large, p. 596), providing that railroad companies shall build side tracks connecting industrial enterprises with their main lines for the delivery and receipt of freight, the

cost thereof to be paid by the enterprises and repaid by the companies in annual installments of 20 per cent. of the freight collected, is violative of Const. U. S. Amend. art. 14, and Const. art. 1, §§ 5, 17, as authorizing the taking of private property for private use. *Mays v. Seaboard Air Line R.*, 56 S. E. 30, 34, 75 S. C. 455 (citing *Moore v. Columbia & G. R. Co.*, 16 S. E. 781, 38 S. C. 1).

Under a strict construction of Laws 1903, p. 172, c. 122, declaring that whenever any property covered by a chattel mortgage shall be taken and sold by virtue of the mortgage pursuant to the power of sale therein, the owner of the mortgage shall file an affidavit setting forth certain information, the voluntary delivery of the mortgaged chattels by the mortgagor to the mortgage is not a "taking" by the latter within the meaning of the statute, so as to require the filing of the affidavit. *Hammel v. Cairnes*, 107 N. W. 1089, 1090, 129 Wis. 125.

Code Civ. Proc. § 283, provides that in an action for recovery of specific property the jury may assess the value of the property and assess damages, if any claimed, which the prevailing party has sustained by reason of the taking of the same. Section 299 provides that in an action to recover personalty judgment may be for possession, or recovery of possession or the value thereof if delivery cannot be had, and damages for "taking." Held not to authorize punitive damages in an action for claim and delivery. By a well-known rule of construction, for the sake of consistency, "taking," used in section 283, is to be interpreted and applied as in section 299. To be consistent with section 299 the provision of section 283 as to damages to the prevailing party sustained by reason of the "detention or taking and withholding" such property must be held to mean that, when the prevailing party is the plaintiff, the jury must assess the damages for the detention, but when the prevailing party is the defendant, and the property has been taken in the claim and delivery proceedings, the jury may assess for such taking and for the withholding. *Tittle v. Kennedy*, 50 S. E. 544, 546, 71 S. C. 1, 4 Ann. Cas. 68.

The taking away by legislative enactment of the free exercise of the right of private contract is an appropriation by the state of private property within the meaning of the fourteenth constitutional amendment. *German Alliance Ins. Co. v. Barnes*, 189 Fed. 769, 775.

It is not a "taking" of private property for private use without the consent of the owner, which is inhibited by Const. 1901, art. 1, § 23, for the Legislature to authorize a manufacturing company to close a portion of a street, where there yet remains to the property owner a convenient and reasonable outlet to neighboring thoroughfares. *Jackson v.*

*Birmingham Foundry & Machinery Co.*, 45 South. 660, 662, 154 Ala. 464.

Under Immigration Act Feb. 20, 1907, c. 1134, § 19, 34 Stat. 904, providing that if any shipowner shall make any charge for the return of any alien brought to the United States and not entitled to enter, or shall take any security from him for the payment of the charge of deportation, he shall be guilty of a misdemeanor, an indictment alleging that defendant at Bremen collected return passage from certain proposed immigrants who were within the excluded classes, and held the money as security for a charge to be made for deportation, did not charge the taking of the money as security within the United States, since to retain money taken in a foreign country was not a continuous repetition of the "taking" within the United States by reason of the fact that the aliens were brought to the United States and ordered deported because not entitled to enter. *United States v. Nord Deutscher Lloyd*, 186 Fed. 391, 395.

Under Civil Damage Act (Code 1906, c. 32) § 26, providing that if a landlord's property be "seized or taken" for any fine, etc., by reason of his tenant's unlawful acts, such landlord may recover damages and costs, a "lien" upon a landlord's property, being defined as a hold or claim which one has upon the property of another as a security for some debt or charge, does not constitute a "seizure or taking" of his property within the meaning of the statute. *Brown v. United States Fidelity & Guaranty Co.*, 74 S. E. 868, 869, 70 W. Va. 613.

#### TAKING (In Abduction)

"Taking away" is synonymous with "abduction." *King v. Hanson*, 99 N. W. 1085, 1089, 13 N. D. 85.

The word "taking," in Pen. Code, § 282, defining abduction, does not require physical force or compulsion, as any deception, persuasion, or inducement is sufficient. *People v. Smith*, 100 N. Y. Supp. 259, 261, 114 App. Div. 513.

When defendant, to whom a girl had been temporarily committed for a proper purpose, conceived the intent to use her for a purpose prohibited by statute, and interposed his will between her and her guardian's control, he "took" her from her father for that purpose. *People v. Lewis*, 75 Pac. 189, 190, 141 Cal. 543.

The word "takes," in the first section of Act May 28, 1885 (P. L. 27), relating to rape of a child under 16 years of age, does not mean merely a taking of a woman child by force, but it means a taking by artifice, cajolery, craft, persuasion, or promise, or by the purely voluntary surrender of the person taken. *Commonwealth v. Walker*, 34 Pa. Super. Ct. 14, 16.

To "take," in the active sense, means to lay hold of, to seize with hands or otherwise. The word "take," as used in the statute providing that if any person take any woman unlawfully and against her will, to marry him or any other person, he shall be fined, means to obtain possession by force or artifice; to get the custody or control of; to reduce to one's power of will. Under the statute, such taking is an essential to constitute the crime. *State v. Hromadko*, 99 N. W. 560, 561, 123 Iowa, 665.

Prosecutrix testified that, as she was returning home along a railroad, she noticed a negro, and from his actions became suspicious and alarmed; that she slackened her steps, but, when he noticed that she had done so, he did likewise, and frequently turned and looked at her; and that she then became thoroughly frightened. The negro finally sat down on the railroad track until she had advanced to within 20 feet from him. About this time she attempted to pass him. A freight train came along and he left the track, and climbed through a barb wire fence, and said to her: "Come over here. You are going to come over here. You had better come over here." With that, she started and ran screaming down the track, and the negro also ran in the same direction on the inside of the wire fence which separated the railroad right of way from the adjoining pasture, until they came in sight of some men at work on the railroad, when he desisted. The negro's acts did not constitute a "taking," but were sufficient to justify submission of the case to the jury on the question whether they constituted a "detaining" of the prosecutrix against her will with intent to have carnal knowledge of her. *McKey v. Commonwealth*, 140 S. W. 658, 659, 145 Ky. 450.

#### **TAKING (In Attachment)**

If a sheriff, in serving attachment papers on a person, walked into his store, asked him for his key, which such person surrendered, and then told him to take his cash and get out, and followed him out and locked the door, such act constituted a "taking" of everything in the store, and rendered the plaintiff in attachment responsible for anything unlawfully taken. *Schwartzberg v. Central Avenue State Bank*, 115 Pac. 110, 112, 84 Kan. 581.

#### **TAKING (In Eminent Domain)**

See, also, Property Taken.

Any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed, is a "taking," within Const. art. 1, § 22, providing that private property shall not be taken or damaged for public use without just compensation. *Stockdale v. Rio Grande Western Ry. Co.*, 77 Pac. 849, 852, 28 Utah, 201.

In Laws 1897, p. 887, c. 27, relative to an addition to a certain park, and providing that the provisions of law relating to the "taking of private property" for public streets and places shall be applicable so far as the same shall be necessary for the acquiring of the land, the terms "taking of private property" and "acquiring all land," require not only the vesting of title, but payment for the property. In re City of New York, 89 N. Y. Supp. 6, 8, 95 App. Div. 552.

The word "taken," as used in Const. Art. 1, § 17, providing that no person's property shall be taken, damaged, or destroyed, for public use, without adequate compensation being made, and, when taken such compensation shall be first made or secured by a deposit of money, means actually invaded and appropriated. *Settegast v. Houston*, O. L. & M. P. Ry. Co., 87 S. W. 197, 200, 38 Tex. Civ. App. 623 (citing and adopting *Gainsville, H. & W. Ry. Co. v. Hall*, 14 S. W. 259, 78 Tex. 169, 9 L. R. A. 298, 22 Am. St. Rep. 42, and *Gulf, C. & S. F. Ry. Co. v. Eddins*, 60 Tex. 656, and limiting *Rio Grande & E. P. Ry. Co. v. Ortiz*, 12 S. W. 1129, 75 Tex. 602, and *Gulf, C. & S. F. Ry. Co. v. Fuller*, 63 Tex. 467).

Where an owner continues in the use and enjoyment of his property and property rights after the completion of a public improvement to the same extent and for the same purpose as before, his property has not been "taken" within Const. art. 1, § 22, providing that private property shall not be taken or damaged for public use without compensation, and it cannot be "damaged" within that provision except by the invasion of a theoretical legal right. *Salt Lake City v. East Jordan Irr. Co.*, 121 Pac. 592, 595, 40 Utah, 126.

Any act involving an actual interference with or disturbance of property rights, and not causing merely consequential or incidental injury to property or property rights, as distinguished from a prohibition of its use or enjoyment, or a destruction of interests in the property, constitutes a "taking" of the property. *School Corporation of Andrews v. Helney*, 98 N. E. 628, 630, 178 Ind. 1, 43 L. R. A. (N. S.) 1023.

Any actual and material interference with private property rights is a "taking" of property within the meaning of the provision in the Constitution referring to the taking of private property for public purposes without just compensation. *Board of Com'rs of Portage County v. Gates*, 93 N. E. 255, 259, 83 Ohio St. 19.

Any destruction, interruption, or deprivation of the usual and ordinary use of property amounts to a "taking" of the same without compensation, in violation of Const. art. 1, § 14. *Knowles v. New Sweden Irr. Dist.*, 101 Pac. 81, 83, 16 Idaho, 217.

Under Const. art. 1, § 11, authorizing an owner to recover just compensation as of the

time when his property was taken by condemnation, and under the New Haven city charter (13 Sp. Laws, p. 388), providing that lands shall be deemed to have been taken on the city paying the compensation fixed, authorizing an appeal to the superior court for the reassessment of damages, and providing that no land taken shall be occupied by the city until all appeals shall have been disposed of, an owner appealing to the superior court for and obtaining a reassessment in excess of the amount originally awarded is not entitled to interest from the date of the original assessment, but is only from the date of the reassessment until payment thereof; the word "taken" meaning the exclusion of the owner from his private use and possession, and the assumption of the use and possession for the public purpose. *Bishop v. City of New Haven*, 72 Atl. 646, 648, 82 Conn. 51.

The word "taken," as used in the charter of the town of Newborn, providing that the mayor and council shall have power to lay out and abolish streets and alleys and to extend and change the same as the public interest may require "by paying the owner just compensation for the property taken for any such purposes," means property actually seized or appropriated. *Stowe v. Town of Newborn*, 56 S. E. 516, 127 Ga. 421.

The term "taken," in Const. La. 1898, art. 167, providing that private property shall not be taken or damaged for public purposes without just compensation being first paid and in the same provision in the Constitution of 1879, is used in its proper signification in legislation relative to the exercise of the power of eminent domain. *Amet v. Texas & P. Ry. Co.*, 41 South. 721, 722, 117 La. 454.

In the constitutional provision as to compensation for property taken for public use, the term "property" includes the fee-simple title to the thing owned, whether it be burdened with an easement or not; and the term "taken" includes the appropriation of that thing or of some interest or estate in it, by actual, physical possession, such as exists when a railroad is constructed and operated on it. *McCammon & Lang Lumber Co. v. Trinity & Brazos V. Ry. Co.*, 133 S. W. 247, 249, 104 Tex. 8, 36 L. R. A. (N. S.) 662, Ann. Cas. 1913E, 870.

To deprive one of the ordinary beneficial use and enjoyment of his property is in law equivalent to the "taking," if it is within the constitutional provision as to the taking of private property for public use, and is as much a taking as though the property itself were actually taken. In earlier times it was held that property could be deemed to be taken within the meaning of the constitutional provision only when the owner was wholly deprived of its possession, use, and occupation. But a more liberal doctrine has long been established, and an actual physical taking of property is not necessary to entitle its

owner to compensation. A man's property may be taken, although his title and possession remain undisturbed. Where the owners of property condemned for railroad purposes remained in possession and had the use of the property until the final order of condemnation, the service of summons was not a "taking" of the property, within the meaning of the constitutional provision that "private property shall not be taken or damaged for public use without just compensation"; and hence they were not entitled to interest on the assessment of condemnation from the date of the service of summons in the action to verdict, less rents and other benefits of possession received by them during that period. *Oregon Short Line R. Co. v. Jones*, 80 Pac. 732, 734, 29 Utah, 147.

A judgment of condemnation of property amounted to a "taking" of the property for public use, and the price for such "taking" then became justly due the owner. *State ex rel. Donofrio v. Humes*, 75 Pac. 348, 350, 34 Wash. 347.

A direct injury to property is a "taking" thereof, within the constitutional meaning of that word relating to the "taking" of property for public use. *Leffmann v. Long Island Ry. Co.*, 93 N. Y. Supp. 647, 648, 47 Misc. Rep. 169.

"Any injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a 'taking,' and entitles him to compensation. So a partial destruction or diminution of the value of property by an act of government, which directly and not merely incidentally affects it, is to that extent an appropriation." *City of Clinton v. Franklin (Ky.)* 83 S. W. 142, 143 (quoting *Cooley, Const. Lim. [3d Ed.]* p. 545, and citing *City of Henderson v. McClain*, 43 S. W. 700, 102 Ky. 402, 39 L. R. A. 349; *City of Mt. Sterling v. Jephson [Ky.]* 53 S. W. 1046; *City of Ludlow v. Detweller [Ky.]* 47 S. W. 881; *Layman v. Beeler*, 67 S. W. 995, 113 Ky. 221).

Any actual and material interference with private property rights is a "taking" of property within the meaning of the provision in the Constitution referring to the taking of private property for public purposes without just compensation. *Board of Com'rs of Portage County v. Gates*, 93 N. E. 255, 259, 83 Ohio St. 19.

A law which deprives the owner of the beneficial use and free enjoyment of property, or restrains its use and enjoyment so as to materially affect its value, "takes" his property without compensation, within the meaning of the Constitution. *People ex rel. M. Wineburgh Advertising Co. v. Murphy*, 113 N. Y. Supp. 855, 857, 129 App. Div. 260.

#### **Appropriation of land for railroad**

The appropriation of land for railway purposes is a "taking" within the meaning of the provision of the Constitution of this

state providing that private property shall not be taken without compensation. *McCord v. Eastern Ry. Co. of Minnesota*, 116 N. W. 845, 846, 136 Wis. 254.

It has been held that a constitutional guaranty that private property shall not be "taken" or "appropriated" without compensation did not embrace mere consequential damages resulting to property abutting on a street, or other improvements thereof, but only to a trespass upon or physical invasion of the property. The reverse of this, however, is held by courts determining like questions under different constitutional and statutory provisions. Damages to be allowed by commissioners appointed under statute to inspect real property and consider the injury which the owners may have sustained by reason of a railroad, and to assess damages for the appropriation of his land, are not limited to real estate taken and injured, but may be such damages as the owner actually sustained to either his real or personal property by such appropriation of his land. *Blincoe v. Choctaw, Q. & W. R. Co.*, 83 Pac. 903, 906, 16 Okl. 286, 4 L. R. A. (N. S.) 890, 8 Ann. Cas. 689 (citing and adopting *Northern Transportation Co. v. Chicago*, 99 U. S. 635, 644, 25 L. Ed. 336; *Rigney v. City of Chicago*, 102 Ill. 64; *City of Chicago v. Taylor*, 8 Sup. Ct. 820, 125 U. S. 161, 31 L. Ed. 638; *Brown v. City of Seattle*, 31 Pac. 313, 5 Wash. 35, 18 L. R. A. 161; *City of Pueblo v. Strait*, 36 Pac. 789, 20 Colo. 13, 24 L. R. A. 892, 46 Am. St. Rep. 273, and citing and distinguishing *Seldon v. City of Jacksonville*, 10 South. 457, 28 Fla. 558, 14 L. R. A. 370, 29 Am. St. Rep. 278).

#### Assessment against gas company

A gas company has no such property right in the location of its pipes and mains, laid under an exclusive franchise to supply gas to the city and its inhabitants, as to make the imposition upon it of the cost of changes in the location of such pipes and mains, necessitated by the construction of the municipal drainage system authorized by Act La. July 9, 1896, a "taking" of property without due compensation. *New Orleans Gaslight Co. v. Drainage Commission of New Orleans*, 35 South. 929, 111 La. 838; *Id.*, 25 Sup. Ct. 471, 474, 197 U. S. 453, 49 L. Ed. 831.

#### Compelling adjoining owner to clean sidewalk

An ordinance requiring owners, etc., of property to remove snow from adjoining sidewalks, does not infringe the constitutional prohibition against the "taking of private property for public uses" without just compensation. *State v. McCrillis*, 66 Atl. 301, 303, 28 R. I. 165, 9 L. R. A. (N. S.) 635, 13 Ann. Cas. 701.

#### Consequential injury

The Legislature has complete control over the public highways, so that what is done in and on them by lawful authority can-

not be considered a nuisance, and consequential injuries resulting are not within the Constitution prohibiting the "taking of property" without compensation. In *re City of Detroit*, 128 N. W. 250, 252, 163 Mich. 229.

When the Legislature authorizes something to be done in the neighborhood of land which diminishes its value, but would not be actionable at common law if done by a neighboring owner, if the statute provides no compensation, the owner cannot claim any under the Constitution, because what is done does not amount to a "taking." And even if the thing authorized would be actionable at common law, and a nuisance, but for the statute, still it is not necessarily a "taking"; and, unless it does amount to that, no compensation can be recovered if the statute does not give it. *Lincoln v. Commonwealth*, 41 N. E. 489, 492, 164 Mass. 368 (citing *Titus v. City of Boston*, 36 N. E. 793, 161 Mass. 209).

Under a Massachusetts statute relating to the metropolitan sewer, and providing that the commonwealth shall pay all damages sustained by reason of the "taking" of land for sewer purposes, one who used the waters of a natural pond on his land in his business could not recover for the temporary drying up of the same, caused by the work of constructing a part of the sewer under a highway. *Chelsea Dye House & Laundry Co. v. Commonwealth*, 41 N. E. 649, 164 Mass. 350.

"When soil is removed from its natural position by one owner, and the soil of an adjoining owner is thereby permitted to fall, such result is not a consequential damage, but a direct injury. \* \* \* It is true that the word 'damaged' has been held to mean such damages as were recoverable at common law between individuals; but in view of the rule that the carrying away of land by its own weight is not consequential damage, but is an actual infringement and 'taking of property,' we think the same rule should apply where the land is carried away by means of water which is released in a public street by any means which would amount to an actual 'taking' and a resulting damage." Hence, where land is carried away by means of water which is released in a public street through the operations of certain railroads in constructing a tunnel under the street, the damage so occasioned is an actual infringement and "taking of property," within the Constitution declaring that private property shall not be "damaged" for public use without just compensation. *Farnandis v. Great Northern R. Co.*, 84 Pac. 18, 20, 21, 41 Wash. 486.

#### Same—Additional use of streets

Injury of an easement in the street fronting property by a railroad company is the taking of private property for public purposes for which compensation must be made under Const. § 242, providing that injury to



property by a corporation in exercise of the right of eminent domain is taking thereof for which compensation must be made. *Stein v. Chesapeake & O. R. Co.*, 116 S. W. 733, 736, 132 Ky. 322.

A claim for permanent injury done to property by the location of railroad tracks in the street in front of the same is a "claim for the taking of property." *Kentucky & I. Bridge & R. Co. v. Clemmons* (Ky.) 86 S. W. 1125, 1126.

The limitation on the right to define the uses to which streets and highways may be put must be given such a construction as will not defeat the original purposes of the creation of streets and highways, and where a particular use to which consent has been given by the municipal authorities as authorized by law is in the nature of a public use, and is not more burdensome than other public uses which are within possible contemplation at the time of the creation of the highway, it is not a "taking or damaging" of property within the Constitution, prohibiting the taking or damaging of private property for public use without just compensation. The inauguration of a new use of a highway under proper authority within the general purposes for which the highway was created is not a "taking or damaging" of the property of the abutting owner within the Constitution. *Kipp v. Davis-Daly Copper Co.*, 110 Pac. 237, 240, 41 Mont. 509, 36 L. R. A. (N. S.) 666, 21 Ann. Cas. 1372.

A sale of a franchise by a police jury to a corporation to operate an electric car system over a public road is not a deprivation of property in the abutting owners, prohibited by the Constitution, but the use of the road by the public and abutting owners must not be interfered with. *Friscoville Realty Co. v. Police Jury of Parish of St. Bernard*, 53 South. 578, 580, 127 La. 318.

The occupation of a street by a railroad is not a "taking" of property of an abutting owner who does not own the fee in the street, within the provision of the Constitution, that when property is taken for public use, compensation must be first made; but the occupation of a street by a railroad is a "taking" of the property of one owning the fee of the street within the constitutional provision that, when property is taken for public use, compensation shall be first made or secured by a deposit of money, and such occupation is not a mere damaging for which compensation may be made subsequently. *McCammon & Lang Lumber Co. v. Trinity & Brazos V. Ry. Co.*, 133 S. W. 247, 248, 104 Tex. 8, 36 L. R. A. (N. S.) 662, Ann. Cas. 1913E, 870.

#### Same—Diversion of water

The diversion of the water of a nonnavigable stream by the United States, so as to deprive a landowner of its natural flow adjacent to and upon his premises, for the pur-

pose of improving the navigation of other navigable waters, is a "taking of property" of such landowner, within the meaning of the fifth amendment to the Constitution, which entitles him to just compensation therefor. *Cohen v. United States*, 162 Fed. 364, 367.

#### Same—Easement of access

A "taking" of private property for public use, within statutes and constitutional provisions forbidding the same without compensation, may result without conversion of the property or any part thereof, as where the right of ingress and egress over a street to and from abutting lands is obstructed. *Foster Lumber Co. v. Arkansas Valley & W. R. Co.*, 95 Pac. 224, 226, 227, 20 Okl. 583, 30 L. R. A. (N. S.) 231.

The discontinuance or vacation of a street in such a manner as to prevent access to the property of an adjoining owner is a "taking" of property within the constitutional inhibition, and cannot be lawful without compensation to such owner. *Ridgway v. City of Osceola*, 117 N. W. 974, 975, 139 Iowa, 590.

Where the grade crossing commissioners created by Laws 1888, c. 345, as amended by Laws 1890, c. 255, abolished a grade crossing without encroaching on private property of abutting owners, there was no "taking" of property within the Constitution, though the structures impaired to some extent the access of the abutting owners to their premises from which damages resulted. In *re* Grade Crossing Com'rs of City of Buffalo, 94 N. E. 188, 190, 201 N. Y. 32.

#### Same—Flowing land

Ordinarily the overflowing of land in exercising a water right or by a milldam is a "taking" within the meaning of that word in the statutes relating to eminent domain. *Gaylord v. Sanitary Dist. of Chicago*, 68 N. E. 522, 524, 204 Ill. 576, 63 L. R. A. 582, 98 Am. St. Rep. 235.

The construction of a levee by a levee district, created by the Legislature, to protect lands from inundation by flood waters of a river does not "take" or damage for public use, within Const. art. 2, § 22, land between the river and the levee, though the levee obstructs sloughs and bayous, not forming natural outlets of the river, of sufficient capacity to relieve the river from the increased flood water, injuring the land, thereby raising the flood waters on the land. *McCoy v. Board of Directors of Plum Bayou Levee Dist.*, 129 S. W. 1097, 1100, 95 Ark. 345, 29 L. R. A. (N. S.) 396.

Flowage of lands by a village raising a dam used in operating an electric light plant is a "taking" within Const. c. 1, art. 2, prohibiting the taking of private property for public use, if such taking by the village is for a public use. *Doty v. Village of Johnson*, 77 Atl. 866, 868, 84 Vt. 15.

In order that the flooding of lands resulting from the construction of a dam on a stream by the United States for the improvement of navigation shall constitute a "taking" of the land within the meaning of the fifth constitutional amendment, and entitle the owner to recover compensation therefor, it must amount to a permanent flooding and an actual ouster of the owner, the effect of which is the practical destruction of the value of the land. There is not such taking where the land was previously subject to overflow each year in time of freshets, to such extent that it had not been cultivated for many years, and the only effect of the dam was to increase such overflows in extent and frequency, the land for the most part being free from water practically all the time; and in such case there can be a recovery only with respect to such portion as is permanently covered. *Coleman v. United States*, 181 Fed. 599, 603.

The flooding of lands consequent upon the private erection of a dam under the authority of legislation enacted in the exercise of the police power to subserve the drainage of lowlands does not amount to a "taking," which requires compensation to be made to the owner in order to afford the due process of law guarantied by Const. U. S. Amend. 14, when such flooding can be prevented by raising the height of the dikes around the lands. Where there is a practical destruction or material impairment of the value of one's lands, there is a "taking" which demands compensation, but otherwise where his land is merely put to some extra expense in warding off the consequences of the overflow. *Manigault v. Springs*, 26 Sup. Ct. 127, 132, 199 U. S. 473, 50 L. Ed. 274.

#### **Same—Injuring adjoining property**

Consequential injury to an abutting owner, caused by a work of public necessity and convenience performed within the limits of a public street on which his property abuts, is not a "taking of property" for public use within the Constitution. *Morris v. City of Indianapolis*, 94 N. E. 705, 710, 177 Ind. 369.

Where property adjoining a highway was damaged because of the negligent construction of a ditch therein, such damages would not constitute "a taking of or an injury to private property" for which the county would be liable. *Zavalla County v. Akers* (Tex.) 91 S. W. 245.

Under Const. art. 1, § 16, providing that no private property shall be taken or damaged for public or private use without just compensation, the damage must be to the property itself or its appurtenances, or it must affect some right or interest which the owner enjoys in connection with his property, not shared with or enjoyed by the public generally. Plaintiff sold a lot in the middle of a block to a railroad company, and as part

payment took a corner lot across the street. The company commenced construction of its road across the first lot; the corner lot not abutting on the right of way. Plaintiff brought action to compel the condemnation of the corner lot. Held that, while his property may be rendered less valuable by reason of the smoke and noise and close proximity to the road, it is only such damage as the public would generally suffer, and is not a "taking" of private property within Const. art. 1, § 16. *Clute v. North Yakima & Valley Ry. Co.*, 114 Pac. 513, 514, 62 Wash. 531.

#### **Controlling appropriation of water**

Since the Legislature has power in the exercise of the state's police power to authorize the supervision and control of the appropriation and distribution of the public waters of the state, such supervision cannot constitute the "taking of private property for public or private use without just compensation" within the meaning of the Constitution; not invading any rights of private property. *Hamp v. State*, 118 Pac. 653, 662, 19 Wyo. 377.

#### **Constructing reservoir**

The title of an act referred to an agreement between two towns as "relating to the building of a water basin in said town." The statute authorized the "taking" of all lands which the city deems necessary to carry out the agreement. This means to carry out the plan which the agreement plainly suggests, namely, the construction of a great reservoir, involving general changes in the roads, and providing a place from which the town, as well as the city, may take its supply of water. The instrument of taking, although it recites previous statutes, gives as the foundation of the right the agreement and the statute above referred to, and ends with these words: "All of which lands and water rights said board deems necessary to take in carrying out said agreement." This is equivalent to a statement that the taking of all the lands is under the latest statute. *Burnett v. City of Boston*, 53 N. E. 379, 380, 173 Mass. 173.

#### **Constructing sidewalk**

Under Const. § 242, declaring that municipal corporations taking private property for public use shall make just compensation for property taken, injured, or destroyed, where a city unlawfully constructed a sidewalk on plaintiff's land, to the extent that it occupied his land it amounted to "taking" without compensation. *City of Clinton v. Franklin* (Ky.) 83 S. W. 142, 143.

#### **Conveying by tax deed**

By a tax deed the property of a citizen is conveyed for a consideration that moves to the public, and not to the owner of the property, and it may be said to be a "taking of private property for public use," which can only be done in all cases by a strict com-

pliance with the law authorizing it. *Lowenstein v. Sexton*, 90 Pac. 410, 411, 18 Okl. 322.

#### **Deductions from teachers' salaries for pensions**

Deductions from the monthly salaries of persons holding positions under the school law authorized by P. L. 1907, p. 371, § 219, to form the Teachers' Retirement Fund, do not constitute the "taking" of private property for public use without just compensation; the salary to be paid being the net amount, and not the gross amounts, in computing such deduction. *Allen v. Board of Education of City of Passaic*, 79 Atl. 101, 103, 81 N. J. Law, 135.

#### **Destruction of franchise**

The charter of a turnpike company possessing the right, in consideration of its building and keeping a turnpike in repair, to exact tolls for 25 years, and as much longer as the state shall fail to purchase the road, is a contract, and the interest of the company in the turnpike, whether called a franchise or an easement, is a property right, and its practical destruction in whole or in part is a "taking of property," within the Constitution. *City of Belleville v. St. Clair County Turnpike Co.*, 84 N. E. 1049, 1051, 234 Ill. 428, 17 L. R. A. (N. S.) 1071.

#### **Discontinued condemnation proceedings**

Proceedings by the United States to condemn land for a public building or other governmental purpose may be dismissed at any time before the actual acceptance of the property and payment therefor, until which time there is no "taking" of the property, and the United States is not subject to the payment of costs or damages to the landowners on such dismissal. *United States v. Dickson*, 127 Fed. 774, 775.

Under Const. art. 1, § 6, declaring that private property shall not be "taken" for public use without just compensation, an appropriation of claimant's property for the purpose of underpinning the walls incident to the construction of canal improvements, anticipating the approval of the plans for the underpinning which were never approved, was void; the canal location being subsequently changed so as to obviate all necessity for the appropriation of any part of claimant's property. *Ontario Knitting Co. v. State of New York*, 125 N. Y. Supp. 57, 63, 69 Misc. Rep. 145.

#### **Erection of boom**

Acts done in the exercise of governmental powers which do not directly interfere with private property do not constitute a "taking" so as to require compensation, so that a boom company which succeeded to the state's rights over its tide lands did not, by erecting a boom therein, take any property of upland owners, so as to require compensa-

tion. *Grays Harbor Boom Co. v. Lownsdale*, 104 Pac. 267, 268, 54 Wash. 83.

#### **Establishing separate schools for negroes**

Act March 8, 1901 (Acts 1901, p. 205, c. 28, art. 9), providing for separate schools for white and colored children, and that schoolhouses shall be built by the county, but that it shall be at no expense on account thereof, but the school district shall keep such house in repair, and the county shall be at no expense where districts at the passage of the act have schoolhouses for that class of children, white or colored, that are fewer in number in the district, is not unconstitutional because of interference with property rights without just compensation. *Board of Education of City of Kingfisher v. Board of Com'rs of Kingfisher County*, 78 Pac. 455, 458, 14 Okl. 322.

#### **Exercise of police power**

The rule that private property may not be "taken" or damaged for public use without compensation does not apply to injury, damage, or loss of property incidental to the exercise of the police power in the promotion of the public welfare. *People v. Eberle*, 133 N. W. 519, 522, 167 Mich. 477.

The limitation on the power of eminent domain, that property shall not be "taken" or damaged for public use without adequate compensation, does not of itself impose any restriction on the proper employment of the police power on any subject lying within its sphere in a proper and lawful manner. *Houston & T. C. Ry. Co. v. City of Dallas*, 84 S. W. 648, 650, 98 Tex. 396, 70 L. R. A. 850.

#### **Expropriation synonymous**

The terms "taking" or "expropriation," as used in Acts 1896, p. 142, No. 96, providing that all claims for damages to the owner caused by the taking or expropriation of land for public works shall be barred by two years' prescription, must be construed as equivalents. *Amet v. Texas & P. Ry. Co.*, 41 South. 721, 722, 117 La. 454.

#### **Health regulations**

Reasonable municipal health regulations under the authority of the state are not void, as "taking" private property without just compensation. *State v. Robb*, 60 Atl. 874, 876, 100 Me. 180, 4 Ann. Cas. 275.

Uncompensated obedience to a regulation ordained to secure the public health and safety is not a "taking of private property," within the inhibitions of the state or federal Constitution. *Cincinnati, I. & W. Ry. Co. v. City of Connersville*, 83 N. E. 503, 507, 170 Ind. 316.

The provision of Laws 1901, p. 912, c. 334, § 100, as amended by Laws 1902, p. 937, c. 352, § 47, requiring all school sinks in existing tenement houses in cities of the first class to be removed does not violate the con-

stitutional provision against "taking" private property for public use without just compensation, in so far as it applies to existing buildings. *Tenement House Department of City of New York v. Moeschen*, 72 N. E. 231, 233, 179 N. Y. 325, 70 L. R. A. 704, 103 Am. St. Rep. 910, 1 Ann. Cas. 439.

Though a riparian owner's right to the reasonable use of the water of a pond includes the right to bathe and swim therein, such right was not primary, but incidental to the ownership of the land, and hence a regulation of the State Board of Health prohibiting bathing in a pond from which a city derived its water supply was not unconstitutional as depriving a riparian proprietor of his property without compensation. *State v. Morse*, 80 Atl. 189, 191, 84 Vt. 387, 34 L. R. A. (N. S.) 190, Ann. Cas. 1913B, 218.

#### Improvement of navigable stream

Improvements under the drainage act of March 29, 1899 (Starr & C. Ann. St. 1896, c. 42), which lower the waters of a navigable stream, requiring abutting owners to excavate and deepen the stream, the lowering is a "taking or damaging" of private property for public use without just compensation, within Const. art. 2, § 13. *Beldler v. Sanitary Dist. of Chicago*, 71 N. E. 1118, 1120, 211 Ill. 628, 67 L. R. A. 820.

Wood creek having been a public highway from the earliest times, having been reserved as a common highway for the benefit of the public by a crown patent, the state could improve it for navigation by incorporating it into the Barge Canal system without compensation to riparian owners for inconvenience from their inability thereafter to maintain a bridge previously constructed over it as a method of access to their lands, though the condition of the creek had changed, and it had practically ceased to be used by the public for navigation with modern vessels of magnitude, or the public had practically ceased to use it as a common highway for travel, as the exercise of an existing right is not such a "taking" within Const. art. 1, § 6, providing that private property shall not be taken for public use without just compensation, as to entitle riparian owners to compensation. *Champlain Stone & Sand Co. v. State*, 123 N. Y. Supp. 546, 553, 66 Misc. Rep. 434.

#### Improvement of street

The word "taken," as used in the Constitution of Washington, providing that no private property shall be taken or damaged for public use without just compensation, and the statute enabling cities to exercise the right of eminent domain for the taking and damaging of property for public uses, does not mean the same as "damaged." Where a city in condemnation proceedings acquired the right to lower the grade of property abutting on a street 77 feet below the average level of abutting property, and to slope such

property back from the street to prevent the soil from sliding into the street, the construction of the slope was not a "taking" of the abutting property, but merely a damaging thereof, within the Constitution and the statute. *Compton v. City of Seattle*, 80 Pac. 757, 759, 38 Wash. 514.

The fact that a city, after taking a portion of lots for widening a street, awarded compensation therefor, and then assessed the remainder for benefits accruing by reason of the improvement, did not constitute a "taking of property without just compensation." In *re City of Seattle* (Wash.) 85 Pac. 45, 46.

A change in a street to the damage of adjacent property is not a "taking of private property," for which the municipality is liable for damages under the constitutional provision forbidding the taking of private property for public use without just compensation. *Bramlett v. City Council of Greenville*, 70 S. E. 450, 452, 88 S. C. 110.

Bringing a street to an established grade by excavating in front of an abutting lot, to such an extent that the soil becomes loose and slides under the street, did not constitute a "taking" of property. *Talcott Bros. v. City of Des Moines*, 109 N. W. 311, 316, 134 Iowa, 113, 12 L. R. A. (N. S.) 696, 120 Am. St. Rep. 419 (citing 8 Words and Phrases, p. 6852).

A change of grade in a street, regularly and properly made by a municipal corporation, with the acts required to complete the improvement confined within the limits of the street, was not, as to abutting owners, a "taking" of property for public use, and they had no right of action for impairing the use of their property by rendering the access thereto more difficult. *McCullough v. Village of Campbellsport*, 101 N. W. 709, 710, 123 Wis. 334.

Where plaintiff's premises were separated from the street by a narrow strip of land, and the grading of the street by municipal authorities caused such strip and a substantial portion of plaintiff's property to subside and fall, so as to injure the premises, there was an actual appropriation of the soil to the extent of such injury, amounting to the "taking" of such premises for public purposes, rendering the city liable. *Damkoehler v. City of Milwaukee*, 101 N. W. 706, 707, 124 Wis. 144.

A charge of the cost of paving a sidewalk as a lien on abutting lots of different proprietors, according to the front-foot rule, without limiting the cost of the improvements by the special benefits received by such abutting lots, may be imposed by the Legislature, or by a city exercising delegated legislative powers, and is not a "taking" of private property for public use without compensation. *Wilzinski v. City of Greenville*, 37 South. 807, 808, 85 Miss. 393.

**Inspection of mining claims**

Code Civ. Proc. § 1314, authorizing an inspection of mining claims in an action to determine adverse claims thereto, is not unconstitutional, as in violation of Const. art. 3, § 14, prohibiting the taking or damaging of private property without just compensation, since such temporary invasion is not a "taking." *State ex rel. Parrot Silver & Copper Co. v. District Court of Second Judicial Dist.*, 73 Pac. 230, 237, 28 Mont. 528.

**Laying gas pipes**

The laying of pipe lines by a gas company without the consent of the landowner or lawful appropriation is a "taking," within the constitutional inhibition against the taking or damaging of private property for a public use before payment of compensation therefor. *Lovett v. West Virginia Cent. Gas Co.*, 65 S. E. 196, 198, 65 W. Va. 739, 24 L. R. A. (N. S.) 230.

**Laying tile drain**

The right to enter upon land to lay and maintain a tile drain is a "taking of property for public use," within the constitutional provision requiring compensation. *Drainage Com'rs of Dist. No. 8 in Town of Oakwood v. Knox*, 86 N. E. 636, 637, 237 Ill. 148.

**Lowering tunnel**

Where a street railroad company, owning lands on both sides of the Chicago river, built a tunnel in the bed of the river between such lands, an ordinance of the city of Chicago requiring a lowering of the tunnel at the company's expense was not a "taking" or damaging of the company's property, within the constitutional provision for compensation to owners whose property is taken or damaged for public use. *West Chicago St. R. Co. v. People ex rel. City of Chicago*, 73 N. E. 393, 396, 214 Ill. 9.

**Moving railroad tracks**

An order by the Public Service Commission compelling the railroad company to remove its tracks was not a "taking of property without compensation"; such property being held subject to the exercise of the state's police power. *Bacon v. Boston & M. R. R.*, 76 Atl. 128, 143, 83 Vt. 421.

**Penalty for failure to establish depot**

Under Act Feb. 2, 1907 (Acts 1907, p. 6), requiring a railroad within 60 days to establish a depot, subject to a penalty for failure to do so, it is not liable for the penalty, it having been an impossibility to comply with it in such time; otherwise, the statute would "take" one's property without just compensation, in violation of the Constitution. *State v. St. Louis, I. M. & S. R. Co.*, 108 S. W. 508, 85 Ark. 422.

**Platting a street**

"The platting of a street through land of a private owner is not a 'taking' of the land. It is simply the expression of a purpose to

take it when occasion for the opening of the projected street arises." In *re South Twelfth Street in City of Allentown*, 66 Atl. 568, 569, 217 Pa. 362.

**Prohibiting advertisements**

Under St. 1903, p. 121, c. 158, § 1, providing that the metropolitan park commission and the officers having charge of public parks may make such reasonable rules as to the display of signs, posters, or advertisements in or near public parks and parkways as they may deem necessary, a rule of the commission forbidding the erection or display on any land or the outside of any building of any sign or advertisement within such distance of any public park as shall render the words or devices plainly visible to the naked eye within the park without the written permission of the commission so interferes with the use of property for advertising purposes as to amount to a "taking" of property for public use without compensation. Nor is such rule reasonable within the meaning of the statute, as applied to advertisements not of indecent or immoral tendencies, or signs not dangerous to the physical safety of the public. *Commonwealth v. Boston Advertising Co.*, 74 N. E. 601, 602, 188 Mass. 348, 69 L. R. A. 817, 108 Am. St. Rep. 494.

Building Code of City of New York, § 144, provides that any sign or advertising device supported or attached over or above any building, etc., shall be deemed a "sky sign," and prohibits such signs from being constructed more than nine feet above the front wall of a building at any part. Relator seeks to erect a sky sign on a building to a greater height than permitted by an ordinance enacted pursuant to the building code, having leased the right to erect signs on the building, and respondent refused to issue a permit on the ground that its erection would violate the ordinance. Held that the ordinance constituted a "taking of property" without compensation, in that it arbitrarily limited the erection of signs above the height stated, and it was not justified as a police regulation. *People ex rel. M. Wineburgh Advertising Co. v. Murphy*, 113 N. Y. Supp. 855, 857, 129 App. Div. 260.

**Protection against fire**

Act May 3, 1909 (P. L. 417), requires exits, fire escapes, fire extinguishers, and fire preventives for buildings of a certain character, such as theaters, public halls, and other places where persons assemble or the public resort, "other than buildings situated in the cities of the first and second classes." The provisions of the act are enforceable by state officers, no duty to be performed, nor responsibility to be incurred, being imposed upon any city, county, borough, or school district officer, and the fees of any such officer are not regulated thereby, and it has nothing to do with the revenues of counties, cities or townships. Held, that the act is a

proper police regulation and does not involve a "taking," injury to, or destruction of property for public use without just compensation within the express inhibition of Const. art. 16, § 8. *A. L. Roumfort Co. v. Delaney*, 79 Atl. 653, 655, 230 Pa. 374.

#### **Reassessment for street improvements**

Laws 1903, p. 572, c. 354, amending Rev. St. 1898, § 1210e, and providing for reassessment of benefits and damages for street improvement in an action brought by a lot owner to recover damages arising from a failure to make a proper assessment, is not repugnant to Const. art. 1, § 13, prohibiting the "taking" of private property without just compensation. *Haubner v. City of Milwaukee*, 101 N. W. 930, 933, 934, 124 Wis. 153.

#### **Rebuilding bridge**

"Injury may often come to private property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no 'taking' of such property within the meaning of the constitutional guaranty against the deprivation of property without due process of law, or against the 'taking' of private property for public use without compensation." The imposition upon a railway company of the entire cost of removing and rebuilding a railway bridge and culvert, made necessary by the proposed widening and deepening of the channel of a creek by drainage commissioners acting under the authority of the Illinois farm drainage act of July 1, 1885, does not amount to a "taking" of private property for public use, which requires compensation in order to afford the due process of law, guaranteed by the federal Constitution, which requires that compensation be made when private property is taken for public use. *Chicago, B. & Q. Ry. Co. v. Illinois*, 26 Sup. Ct. 341, 346, 200 U. S. 561, 50 L. Ed. 596, 4 Ann. Cas. 1175; *Id.*, 72 N. E. 219, 221, 212 Ill. 103.

The action of the Secretary of War in requiring changes in a bridge over an interstate waterway within a specified time and after the parties have been held conformably to Act March 3, 1899, § 18, enacted to secure navigation against unreasonable obstruction, is not such a "taking for public use" of private property as must, under the federal Constitution, be proceeded by the making of or sufficiently securing compensation to the owners of the bridge. President, etc., of the *Monongahela Bridge Co. v. United States*, 30 Sup. Ct. 356, 360, 216 U. S. 177, 54 L. Ed. 435.

A notice to a bridge company to make alterations in a bridge over an interstate waterway conformably to the act of March 3, 1899, was not a "taking of property" within the meaning of the Constitution. *Hannibal Bridge Co. v. United States*, 31 Sup. Ct. 603, 606, 221 U. S. 195, 55 L. Ed. 699.

#### **Removal of building from land taken**

It is within the power of the Legislature to provide that when it is possible to remove a building so it can be readjusted to premises not taken, it shall not be a "taking" within the Constitution, and Laws 1907, c. 153, § 10, providing that in such a case the measure of damages to the building shall be the cost of readjusting or removing it, is constitutional. *City of Tacoma v. Bonnell*, 109 Pac. 60, 62, 58 Wash. 593.

#### **Repairing ditches**

Act April 15, 1902, § 3 (95 Ohio Laws, p. 155), providing for the cleaning and keeping in repair of public ditches, drains, etc., and providing that, when a ditch needs to be cleaned out, the county auditor, on notice filed, shall direct the county surveyor to make any necessary repairs, is not unconstitutional, as in conflict with article 1, § 19, providing that private property shall not be "taken" for public use without compensation. *Taylor v. Crawford*, 74 N. E. 1065, 1067, 72 Ohio St. 500, 69 L. R. A. 805.

Where a city has a prescriptive right to maintain a ditch of a certain capacity over plaintiff's land, it has a right to clean out the ditch and maintain it in its previous condition; but it has no right to double its width and depth, and thus take from the plaintiff his property, for this can only be done in a legal and constitutional way, and to widen the ditch and thus take the land is as much a "taking" without just compensation, in violation of plaintiff's constitutional rights, as it would have been to construct the ditch at a place where none had previously existed. *City of Owensboro v. Brocking (Ky.)* 87 S. W. 1086.

#### **Requiring company to supply water gratis**

An ordinance fixing water rates, and requiring a private company to supply, without charge, water to charitable, religious, and educational institutions, constituted a "taking" and appropriation of the property of such company. *City of Chicago v. Rogers Park Water Co.*, 73 N. E. 375, 378, 214 Ill. 212.

#### **Requiring license to sell liquor**

*Burns' Ann. St.* 1901, § 3927, giving a city power to require a license to sell intoxicating liquors within four miles of its corporate limits, does not contravene Const. art. 1, § 21, providing that no man's property shall be "taken" without just compensation. *Jourdan v. City of Evansville*, 72 N. E. 544-546, 163 Ind. 512, 67 L. R. A. 613, 2 Ann. Cas. 96.

#### **Restricting cutting of trees**

The question of what constitutes a "taking" of private property in the constitutional use of the term has been much considered and variously decided. In the earlier cases and in the older states the provision has been

construed strictly. In some states in later cases it has been construed more widely to include legislation formerly not considered within the provision. Still more recently, however, the tendency seems to be back to the principles enunciated in the earlier cases. Legislation to restrict or regulate the cutting of trees on wild or uncultivated land by the owner thereof, etc., without compensation therefor to such owner, in order to prevent or diminish injurious droughts and freshets, and to protect, preserve, and maintain the natural water supply of springs, streams, ponds, and lakes, etc., and to prevent or diminish injurious erosion of the land and the filling up of the rivers, ponds, and lakes, etc., would not operate to "take" private property within inhibition of the Constitution. While such legislation might restrict the owner of wild and uncultivated lands in his use of them, might delay his taking some of the product, might defer his anticipated profits, and even thereby might cause him some loss of profit, it would nevertheless leave him his lands, their product, and increase untouched and without diminution of title, estate, or quantity. He would still have large measure of control and large opportunity to realize values. He might suffer delay, but not deprivation. While the use might be restricted, it would not be appropriated or "taken." Such legislation would be within the legislative power, and would not operate as a "taking" of private property, for which compensation must be made. In re Opinion of the Justices, 69 Atl. 627, 628, 103 Me. 506, 19 L. R. A. (N. S.) 422, 13 Ann. Cas. 745.

#### **Seizure of property used in liquor traffic**

The Carnichael Act, passed August 9, 1909 (Acts 1909, p. 8), and the Fuller Act, passed August 25, 1909 (Acts 1909, p. 63), providing for the issuance of an injunction against liquor nuisances, and authorizing seizures of chattels used in carrying on such nuisances, are not unconstitutional as in effect authorizing a "taking" of private property for public use without compensation, as such constitutional provision does not prevent proper provisions for the forfeiture and confiscation of property used to commit crime. *Fulton v. State*, 54 South. 688, 694, 171 Ala. 572.

#### **Use of railroad property**

To take from a railroad company the exclusive right to the use of its property, or any part thereof, and limit its use therein to a particular purpose, and give another railroad company an equal or joint right in the use of it for that purpose, is a "taking" within the meaning of Const. 1902, §§ 58, 159 (Code 1904, pp. ccxxii, ccviii). *Louisville & N. R. Co. v. Interstate R. Co.*, 62 S. E. 369, 370, 108 Va. 502.

To constitute a "taking of property" it is not necessary that there should be an exclusive appropriation, a total assumption of pos-

session, or an absolute and total conversion of the entire property. Any serious abridgment or interruption of the common and necessary use of property may amount in law to a taking, and entitle the owner to compensation within the Constitution, providing for compensation for a taking of property. Where a city council has by ordinance legally granted to one street railway company the right to construct its railway over a particular part of a designated street, and the company accepts the grant and enters on and takes possession of the right of way, a subsequent grant by the city council or its successor in office, the board of control, of the same right of way or a substantial part thereof to another street railway company for like purposes, will not of itself confer upon the second grantee the right to enter upon and take possession of the right of way so granted, where such entry and possession will materially and injuriously interfere with, interrupt, and abridge the first grantee's use and enjoyment of the right of way; and where the second grantee threatens and is about to take possession of the right of way under and by virtue of its grant without the consent and against the will of the first grantee, and without having appropriated the right so to do, it will be restrained from so doing by injunction. *Hamilton, G. & C. Traction Co. v. Hamilton & L. Electric Transit Co.*, 69 N. E. 991, 994, 69 Ohio St. 402.

#### **Vacation of street**

"The legal vacation by a city of streets and alleys, is not a 'taking' \* \* \* without compensation." *Scrutchfield v. Choctaw, O. & W. R. Co.*, 88 Pac. 1048, 1050, 18 Okl. 308, 9 L. R. A. (N. S.) 496 (quoting with approval from *City of East St. Louis v. O'Flynn*, 10 N. E. 395, 119 Ill. 200, 59 Am. Rep. 795).

#### **TAKING (In Larceny)**

To constitute "a taking," in larceny, the property need only be separated from the owner, so that its removal from one place to another feloniously, intending to convert it to one's own use, is sufficient. *State v. De Luca* (Del.) 77 Atl. 742, 743 (2 Boyce) 158.

By the "taking" necessary to the offense of robbery is implied that the robber must be in possession of the thing taken, and the offense is not actually completed without such taking, and the thing taken must be of some value and taken from the peaceable possession of the owner. *State v. McAllister*, 63 S. E. 758, 761, 65 W. Va. 97 (citing 2 Russ. Crimes, 100).

A "taking," to constitute theft, need not be a taking from the actual possession of the owner; but a taking of property without his consent, when not in his actual custody, with intent to deprive him thereof and to appropriate it to the use of the person taking, constitutes theft. *Rose v. State*, 106 S. W. 143, 144, 52 Tex. Cr. R. 154.

The words "taking and carrying away," as used in defining larceny, mean that the thief has so far succeeded in removing the property that it is completely and permanently lost to the owner. If the wrongdoer by trespass obtain complete possession and control of an item of personal property belonging to another, with the felonious intent to deprive the owner thereof, and carries it or moves it in the slightest degree from the place where he finds it, the asportation is complete, and the crime of larceny has been committed. *State v. Rozeboom*, 124 N. W. 783, 785, 786, 145 Iowa, 620, 29 L. R. A. (N. S.) 37.

#### **Taking from the person**

The phrase "taking from the person," as used in defining the crime of robbery, does not mean that the goods are actually on the person in the strict sense of that term; but the offense may be committed by forcibly and violently taking property from the presence of the owner, such taking being from the person in a legal contemplation. *O'Donnell v. People*, 79 N. E. 639, 642, 224 Ill. 218, 8 Ann. Cas. 123 (citing *State v. Calhoun*, 34 N. W. 194, 72 Iowa, 432, 2 Am. St. Rep. 252; *Clements v. State*, 11 S. E. 505, 84 Ga. 660, 20 Am. St. Rep. 385; *Crawford v. State*, 17 S. E. 628, 90 Ga. 701, 35 Am. St. Rep. 242; *Turner v. State*, 1 Ohio St. 422; *Hill v. State*, 60 N. W. 916, 42 Neb. 503; *Croker v. State*, 47 Ala. 53; *Houston v. Commonwealth*, 12 S. E. 385, 87 Va. 257).

If accused and others caused another's purse to be dropped upon the ground by jostling him, etc., in their effort to commit the larceny, their taking it from the floor was a "taking from the person." *People v. Carroll*, 128 Pac. 4, 6, 20 Cal. App. 41.

#### **Taking with intent to steal**

Where, on a trial for a violation of Pen. Code 1895, § 194, providing that, if any person intrusted with money shall fraudulently convert the same, he shall be punished as therein prescribed, the court repeatedly instructed that the evidence must show, beyond a reasonable doubt, the "fraudulent conversion" of the money intrusted to defendant, it was not necessary to go beyond the statutory definition, and further charge that the conversion must have been with intent to steal; a "fraudulent conversion," in the statutory definition of the offense, being synonymous with "taking with intent to steal" in ordinary larceny. *Hagood v. State*, 62 S. E. 641, 644, 5 Ga. App. 80.

#### **TAKING ACCOUNT OF STOCK**

"Taking an account of stock" is commonly used to denote ascertainment and valuation of items in an inventory. *Kipp v. Laun*, 131 N. W. 418, 422, 146 Wis. 591.

#### **TAKING APPEAL**

The "taking of an appeal" is a matter of procedure, and consists in taking the statu-

tory steps to transfer the case to a higher court; and it can only be taken when allowed by law. *Stutsman v. City of Cheyenne*, 113 Pac. 322, 324, 18 Wyo. 499.

Filing an appeal bond and obtaining an order of the trial court granting an appeal from an appealable interlocutory order is not "taking an appeal," within the meaning of *Burns' Ann. St. Supp.* 1905, § 659; but an appeal is taken only when the same is taken by filing the appeal bond required, and the completion of all the steps necessary to give the appellate court jurisdiction. *Barney v. Elkhart County Trust Co.*, 79 N. E. 492, 493, 167 Ind. 505 citing *Elliot's Appellate Procedure*, §§ 107, 109; *Terre Haute & L. Ry. Co. v. Indianapolis & N. W. Traction Co.*, 78 N. E. 661, 663, 167 Ind. 193).

#### **TAKING BAIL**

See Bail.

#### **TAKING BY REPRESENTATION**

Code, art. 46, § 19, provides that the realty of an intestate who leaves no children shall descend to his brothers and sisters and their descendants in equal degree, equally. Section 21 provides that if no brother or sister or any descendant be living then it shall descend to the father, if living, and if not to the mother, and if no mother be living then to the grandfather on the part of the father, and if no such grandfather living then to the descendants of such grandfather. Section 27 provides that in the descending or collateral line children of deceased parents shall by representation be considered in the same degree as the parent would have been if living, but that there shall be no representation admitted among collaterals after brothers' and sisters' children. Held that, where an intestate left no nearer relatives, grandnieces took to the exclusion of first cousins; the expression "taking by representation" being altogether different from "taking by inheritance," and applying only when parties seek to be considered in the same degree as a deceased parent would have been, if living. *Hoffman v. Watson*, 72 Atl. 479, 782, 109 Md. 532.

#### **TAKING BY THE SELLER**

The taking of property sold upon condition by a marshal in replevin at the suit of the seller was not a "taking by the seller," within *Lien Law* (Laws 1897, p. 541, c. 418) § 116, requiring a seller on condition to retain the property for 30 days on retaking it, to enable the buyer to comply with the contract; the taking by the marshal placing the property in custodia legis. *Sigal v. Frank E. Hatch Co.*, 113 N. Y. Supp. 813, 61 Misc. Rep. 332.

#### **TAKING ORDERS**

Whether denominated "taking an order" or "making a contract" of sale is merely a different way of characterizing the transac-



tion described in an information for violation of the liquor law forbidding any person to take or receive an order or to contract for the sale of intoxicating liquor with any person in the state. Taking an order is in substance the making of an executory contract of sale, and the making of a contract for the sale of intoxicating liquor would be established by proof that an order therefor was taken. The words "did then and there contract for a sale" do not refer to a completed sale, but to a sale agreed on only, and in this sense there is no substantial difference between that transaction and "taking an order." *State v. Sherman*, 107 Pac. 33, 35, 81 Kan. 874, 135 Am. St. Rep. 403.

The phrase "taking orders," as used in Sess. Laws 1901, p. 155, § 8, declaring that the act shall not apply to runners traveling for wholesale houses and taking orders, does not contemplate that the runner shall have the goods with him at the time of the sale and deliver them, but in the common acceptance of the phrase the agent or runner sells the goods by sample, taking orders therefor, and thereafter delivers the goods. In re Abel, 77 Pac. 621, 622, 10 Idaho, 288.

#### TAKING POSSESSION

A factor has no lien upon the goods of the principal unless he holds possession of the goods, and hence a factor acquired no lien on the product of a mill under a contract whereby the factor was to have exclusive sale of its products at a stipulated commission and was to advance 75 per cent. of the net cash value of the goods on hand stored in mill and under which the factor advanced money. The act of the factor's agent, who visited the mill with the mill president and superintendent and took an inventory of all the cloth on the looms and in the basement and warehouse and stated that he took possession of it as the property of the factor and appointed the superintendent as its agent to take charge of the cloth, where the president did not give his consent to the taking of the cloth, which remained in its former position, and the superintendent had no authority to transfer possession thereof to a stranger, did not amount to a "taking possession" of the cloth by the factor so as to give it a lien. *Garrison v. Vermont Mills*, 68 S. E. 142, 143, 152 N. C. 643.

#### TAKING TESTIMONY

In a constitutional sense, the viewing by the jury of the place of the crime is not the "taking of testimony." *State v. Suber*, 71 S. E. 466, 468, 89 S. C. 100.

#### TAKING WATERS

Under St. 1886, c. 240, § 2, authorizing a "taking" of the waters of Knowles' brook, and a purchase of all land necessary for the preservation and purity of such waters for the water supply of a town, land may be

purchased with the expectation of obtaining the waters of Knowles' brook by percolation into wells on the land without "taking" the brook. *Inhabitants of Stoughton v. Paul*, 53 N. E. 272, 173 Mass. 148 (citing and explaining *Bailey v. Inhabitants of Woburn*, 126 Mass. 416, 418, 419, and citing *Hollingsworth & Vose Co. v. Foxborough Water Supply Dist.*, 42 N. E. 574, 165 Mass. 186, 188).

St. 1846, c. 167, authorized the city of Boston to take the water of Long pond, etc., and the water which may flow into and from it, and any other ponds or streams within the distance of four miles from said Long pond, and any water rights connected therewith, and also to take land around the margin of Long pond and all land necessary to construct reservoirs, etc. Section 6 provided that the city should be liable for all damages that should be sustained by any persons in their property by "taking of any land, water, or water rights," or by the constructing of any aqueducts, etc., and if the owner of any "land, water, or water rights" shall not agree with the city on the damages, he may apply by petition for the assessment of his damages at any time within three years from the "taking of said land, water, or water rights." Section 8 provided that "no application shall be made to the court, for the assessment of damages for the taking of any water rights, until the water shall be actually withdrawn or diverted by the said city under the authority of this act; and any person or corporation, whose water rights may be thus taken and affected, may make his application aforesaid, at any time within three years from the time when the waters shall be first actually withdrawn or diverted as aforesaid." It was held that it was not entirely clear what is meant by the distinction between the "taking" of water and the "taking" of water rights, but it was suggested that, in general, the taking of a pond or stream with the water in it is a taking of the land and of the water of the proprietors of the pond or stream where the taking is made, and is also a taking of the water rights of such other persons as have the right to use the water elsewhere, such as lower proprietors on a stream, and that it was plain, however, whatever the distinction might be, that under the statute, when what is called "land" or "water" is taken the petition must be filed within three years from the taking, and that when what are called "water rights" are taken the petition must be filed within three years from the time the water is actually withdrawn or diverted, and that this implied that what is called "taking" of water rights is a taking for the purpose of ultimately withdrawing or diverting the water for the use of the city. *Dwight Printing Co. v. City of Boston*, 41 N. E. 285, 164 Mass. 247.

The taking of a deed of land on a brook, with the right to lay a pipe and construct an

aqueduct, the erection of a dam and the construction of a reservoir on the brook, and the diversion of its water into a 10-inch main for use by the inhabitants of the city of Pittsfield, having been done professedly under the authority of St. 1892, p. 164, c. 185, providing for an additional water supply for the city of Pittsfield, are a "taking of water," within the meaning of that act. *Bryant v. City of Pittsfield*, 85 N. E. 739, 740, 199 Mass. 530.

### TAKING WITHOUT DUE PROCESS

Deductions from the monthly salaries of persons holding positions under the school law authorized by P. L. 1907, p. 371, § 219, to form the Teachers' Retirement Fund, do not constitute the "taking" of property without due process of law; the salary to be paid being the net amount, and not the gross amounts, in computing such deduction. *Allen v. Board of Education of City of Passaic*, 79 Atl. 101, 103, 81 N. J. Law, 135.

Ballinger's Ann. Codes & St. § 6371, providing for the appointment of an agent for absent heirs to take charge of the estate for their benefit, section 6372, providing for his bond, section 6373, providing that, when the estate shall remain in the agent's hands unclaimed for one year, it shall be sold under order of the court, and the proceeds, less costs, be paid into the county treasury, section 6374, relating to liability on the agent's bond, and section 6375, relating to payment of the proceeds of the sale to the owner, are not violative of Const. U. S. Amend. 14, providing that property shall not be taken without due process of law, since the proceedings by which an heir acquires an inheritance is not a "taking" of his property, though it may be sold without his will, as, while the legal title may vest in heirs immediately upon the ancestor's death, it vests subject to administration under the direct provisions of Ballinger's Ann. Codes & St. § 4640, so that the title may be divested by administration. *Bickford v. Stewart*, 104 Pac. 263, 265, 55 Wash. 278, 34 L. R. A. (N. S.) 623, 628.

The levying of a special assessment for local improvement does not constitute "taking" of property without due process of law. *Riley v. Carrico*, 110 Pac. 738, 739, 27 Okl. 33.

While a statute of a state requiring a railroad company to transport a particular commodity within the state for less than cost does not involve the "taking" of property without due process of law within the prohibition of the fourteenth amendment of the United States Constitution, so long as the railroad company obtains a fair revenue from the whole of its intrastate business, it does not follow that such a rate to be unreasonable and unjust within Const. art. 284, giving authority to the Railroad Commission to fix reasonable and just rates for railroads must also be obnoxious to the fourteenth amendment. *Morgan's Louisiana & T. R. &*

*S. S. Co. v. Railroad Commission of Louisiana*, 53 South 890, 901, 127 La. 636.

Any destruction, interruption, or deprivation of the usual and ordinary use of property amounts to a "taking" without due process of law, in violation of the Constitution. *Knowles v. New Sweden Irr. Dist.*, 101 Pac. 81, 86, 16 Idaho, 217.

### TALK

See Cross-Talk.

### TALKED WITH

To say that a layman "talked with" a physician when he obtained medicine from him meant the same thing as saying that he "consulted" the physician. In an action on an insurance policy, the insurer defended on the ground that a warranty in the application that the insured had not consulted a physician for a certain length of time before his application was untrue. An instruction, requested by the defendant, was that if the insured talked with a doctor with regard to his health, and if the doctor gave the insured certain medicine for some ailment, the verdict should be for the defendant. Before giving the instruction the court changed the words "talked with" to "consulted." Held, that this change was not improper. *Winn v. Modern Woodmen of America*, 137 S. W. 292, 295, 157 Mo. App. 1.

### TAMPERING WITH A WITNESS

"But the phrase 'tampering with a witness' is only the name for the offense defined by statute as being committed, 'if any person shall willfully or corruptly \* \* \* endeavor to hinder or prevent any person from appearing \* \* \* as a witness, or from giving evidence in any action or proceeding with intent thereby to obstruct the course of justice.' The offense is committed by endeavoring to prevent any person, whether subpoenaed as a witness or not, from appearing and giving evidence. Defendant was guilty of the offense described in the statute, if he willfully and corruptly endeavored to prevent another from appearing as a witness, or from giving evidence, with intent to obstruct the course of justice." *State v. Bringgold*, 82 Pac. 132, 135, 40 Wash. 12, 5 Ann. Cas. 716.

### TANGIBLE OR INTANGIBLE PROPERTY

St. 1891, c. 425, § 1, providing for a collateral legacy tax on property within the commonwealth, whether "tangible or intangible," applies to real estate within the state, and cash bonds of railroad companies of other states, and bonds of the United States, when held or deposited within the state. *Callahan v. Woodbridge*, 51 N. E. 176, 177, 171 Mass. 595 (citing and adopting *In re Whit-*

ing's Estate, 44 N. E. 715, 150 N. Y. 27, 34 L. R. A. 232, 55 Am. St. Rep. 640; In re Houdayer's Estate, 44 N. E. 718, 150 N. Y. 37, 34 L. R. A. 235, 55 Am. St. Rep. 642; State v. Dalrymple, 17 Atl. 82, 70 Md. 294, 3 L. R. A. 372; Alvany v. Powell, 55 N. C. 51).

### TANGIBLE PROPERTY

Other tangible property, see Other.

The taxable property in the state of Kentucky may be divided into tangible and intangible. "Tangible property" may itself be divided into that owned by steam railroad corporations, distilled spirits, and all other tangible property. The tangible property, in addition to that of steam railroad corporations and distilled spirits, consists of three classes, to wit, lands, town lots, and personalty. Personalty is divided into that subject to equalization and that not so subject; that not so subject consisting of cash, accounts, notes, bonds, and stocks. *Louisville & N. R. Co. v. Coulter*, 131 Fed. 282, 284.

"Tangible property" is that which is capable of being possessed or realized, which is readily apprehensible by the mind, and is real, substantial, and evident. A contract for the sale or realty, containing an unqualified promise to pay, and on which the purchaser promises to pay, a remainder of the purchase price at a certain time, the seller holding the legal title as security for the fulfillment of such promise, creates a debt from the purchaser to the seller which is "tangible" personal property, and therefore taxable notwithstanding a provision for a forfeiture upon a failure to pay the remainder of the purchase price. *Williams v. Board of Com'rs of Osage County*, 114 Pac. 858, 859, 84 Kan. 508, 34 L. R. A. (N. S.) 1221 (quoting and adopting the definitions in Gen. St. 1909, § 9215, and *Webst. New Int. Dict.*).

Tax Law (Consol. Laws 1909, c. 60, § 260, provides that in determining the separate values of the property within and without the state covered by a mortgage, for the purpose of ascertaining the proportion of the indebtedness secured by the mortgage taxable thereunder, the State Board of Tax Commissioners shall consider only the value of "tangible property" covered by each mortgage; section 250 provides that "real property" and "real estate" shall include everything a conveyance or mortgage of which can be recorded as a conveyance or mortgage of real property; section 253 provides that a tax is imposed upon the principal debt, which under any contingency, may be secured by a mortgage on real property situated in the state; and Real Property Law (Consol. Laws 1909, c. 50) §§ 33, 290, 291, declares estates for years to be chattels real, and that leases, excepting a lease not exceeding three years, can be recorded. Held, that real property was "tangible property," and that in determining the proportion of such a mortgage of

real property to be taxed the value of the mortgagor's leasehold interests in property without the state was to be regarded as "tangible property." *People ex rel. American Ice Co. v. State Board of Tax Com'rs*, 138 N. Y. Supp. 344, 349, 153 App. Div. 532.

### TANK

See Expansion Tank; Septic Tank.

A tank of any kind, as defined by Webster is "an artificial receptacle for liquids; a large basin or cistern." As used in a statute imposing a tax on each oil depot in the state, wherein petroleum or other oils are stored in bulk or tank, the word "tank" is to be construed as referring to oils stored in large oil tanks holding hundreds or thousands of barrels of oil, which are in common use, and not to oils stored in barrels in warehouses or sheds. *Standard Oil Co. v. Commonwealth*, 82 S. W. 1020, 1022, 119 Ky. 75.

### TANK BASIS

See Buyers' Tank Basis.

### TANKAGE

See Garbage Tankage.

### TANNIN OR TANNIC ACID

Extract of nutgalls, containing a considerable percentage of tannic acid, which can be obtained therefrom in its commercial form only by a long series of chemical combinations and precipitations, held not to be sufficiently "similar in material" to "tannin or tannic acid" as to be dutiable at the rate applicable to those materials, by virtue of the similitude clause in the Tariff Act of 1897. *W. N. Proctor & Co. v. United States*, 139 Fed. 586; *United States v. W. N. Proctor & Co.*, 145 Fed. 126, 131, 76 C. C. A. 96.

### TANTAMOUNT

Where it would have been proper to have instructed that silence in a hypothetical case stated was in the nature of an admission, a charge that it was "tantamount" to an admission was substantially correct; the difference in meaning between the two expressions being very slight, and any inaccuracy being eliminated when the jury were told that, if they found the facts as contended by the commonwealth, they would give to such facts such weight as they considered them entitled to. *Commonwealth v. McCabe*, 39 N. E. 777, 779, 163 Mass. 98.

### TAP

A contract to furnish water for public purposes contained this clause: "Said first party agrees to furnish water at its mains, without extra charge, for the following municipal purposes: \* \* \* For eighteen

(18) taps or faucets, in computing which each orifice beyond the main shall be counted as one tap, except that in the town hall and in schoolhouses one faucet may be connected with all the water-closets and urinals in any one building." In addition to the water charged in the account annexed, plaintiff has for many years furnished without charge water for the city hall with thirteen separate taps or faucets, for the city farm with six faucets, and for the city farm stable with one faucet; each building being connected with the main by one service pipe. The plumbing for each water-closet and for the urinal in the town hall is entirely separate and distinct from that of each other. Held, that each of these faucets was an orifice beyond the main and must be counted as one "tap." *Public Works Co. v. City of Old Town*, 66 Atl. 723, 724, 102 Me. 306.

#### TAPPING HOLE

In the open-hearth furnaces in an iron mill in which iron is melted is a channel with an opening at the bottom called a "tapping hole," through which the molten metal is drawn or let out of the furnace. *Illinois Steel Co. v. Coffey*, 68 N. E. 751, 205 Ill. 206.

#### TAPE

Narrow woven cotton strips bearing "featherstitch" or "herringbone" ornamentation, used largely for binding seams, but commercially known as "featherstitch braids" at and prior to the enactment of Tariff Act July 24, 1897 (30 Stat. 181, c. 11, U. S. Comp. St. 1901, p. 1662), which shifted braids from the lower duty of the notions schedule (paragraph 320) to the higher duty of the trimmings schedule (paragraph 339), without any change of phraseology to indicate that it was the purpose to depart from the settled commercial meaning of the word "braids," must be deemed dutiable at 60 per cent. under the trimmings schedule, as cotton braids, and not at 45 per cent. under the notions schedule, as "bindings" or as "tapes," especially in view of the settled administrative construction to such effect. *United States v. Baruch*, 32 Sup. Ct. 306, 223 U. S. 191, 56 L. Ed. 399.

#### TAPE FILM

A claim of a reissued patent of "a camera having a single stationary lens" is the same as a claim in the original patent of "a single camera," and a "single sensitized tape film" is "a tape film." *Edison v. American Mutoscope & Biograph Co.*, 144 Fed. 121, 123.

#### TAPE FUSE

There are two kinds of fuse in use in mines, known as "tape fuse" and "string fuse," distinguished outwardly by their coverings; the tape fuse being wound with tape, and the string fuse with string. The interior portion of the tape fuse consisted of a thread of cotton and a train of fine black

powder extending through its entire length, incased and inclosed by jute thread. In the string fuse the jute thread which formed the immediate covering of the powder train was inclosed by gutta percha, while the corresponding covering of the double tape fuse was a preparation of coal pitch. *Wilita v. Interstate Iron Co.*, 115 N. W. 169, 170, 103 Minn. 303, 16 L. R. A. (N. S.) 128.

#### TAPIOCA

"The merchandise [tapioca flour], though entered at the custom house at San Francisco by the importers under various names, such as tapioca, sago, and root flour, is all the same substance, viz., the starch grains contained in and derived from the root botanically known as '*Jatropha manihot*.' In the West Indies the root is known as 'cassava' or 'manioc'; in Brazil as 'mandioc'; but all these names indicate the same thing, without change of condition or character. There are two varieties of the root, one of which is very poisonous, and both varieties contain a large portion of starch. The starchy substance constituting the importations involved in this controversy consists of the starch grains obtained from the manihot root by washing, scraping, and grating, or disintegrating it into pulp, which in the poisonous variety is submitted to pressure so as to separate therefrom the deleterious juices. The starch grains settle and the juice is subsequently decanted, leaving as a deposit a powder, which, after repeated washings with cold water and after being dried, is nearly pure starch, and is insoluble in cold water. This is the substance in controversy. If sufficient heat and motion are afterwards applied to this substance, a mechanical change takes place. The grains become fractured and thereby agglutinated. The latter substance is partly soluble in cold water, and is the granulated tapioca known as 'pearl' and 'flake' tapioca of commerce. The importations in question are from China, and are made chiefly for the purpose of supplying Chinese laundrymen, who use the flour as a starch and to a slight extent for food purposes. Its use for starch purposes in the laundry is, however, limited to the Chinese, except that in some instances in San Francisco it is so used in their business by white laundrymen by mixing it with wheat or corn starch. Wheat and corn and potato starch are the starches commonly used in the United States. Tapioca flour is also used in the Eastern states by calico printers and carpet manufacturers to thicken colors, and in the manufacture of a substitute for gum arabic and other gums. It is also sometimes used for sizing cotton goods, and in addition as an adulterant in the manufacture of candy and other articles. Among the white people dealing with the Chinese on the Pacific Coast the substance in question is commonly known

as 'Chinese starch.' In the general importing markets of the United States it is commercially known as 'tapioca flour,' and in those markets the term 'tapioca' includes that article in three forms, viz., flake tapioca, pearl tapioca, and tapioca flour. The substance in question is not imported into San Francisco by others than Chinese." *Chew Hing Lung & Co. v. Wise*, 20 Sup. Ct. 320, 176 U. S. 157, 166, 44 L. Ed. 412.

## TARGET

See Switch Target.

## TARIFF

See Proportional Tariff.

## TARIFF ACT

See Articles Within Tariff Act.

## TARIFF RATE

"Tariff rate" can mean nothing but a regular schedule rate as distinguished from a "special rate," though common carriers may have two special rates applicable to shipments of a given class of property. A shipping contract, reciting that the charge for transportation was at the tariff rate, is a contract for the rate charged for shipment under a nonrelease contract, though it also recites that the rate is less than the rate charged for shipment at the carrier's risk. *Holland v. Chicago, R. I. & P. Ry. Co.*, 123 S. W. 987, 993, 139 Mo. App. 702.

When a shipper's contract recites that the rate charged is the "tariff rate," it is to be construed as the highest rate a carrier can charge, and such a recital will control over a recital that the rate was less than the rate charged for shipments at the carrier's risk. *McElvain v. St. Louis & S. F. R. Co.*, 131 S. W. 738, 744, 151 Mo. App. 126.

## TAVERN

While an inn or "tavern" is something more than a place where liquor is sold, it cannot be questioned that the most striking feature of the license to keep an inn or tavern under the Inns and Tavern Act is the right it gives to sell spirituous liquors. *Conover v. Gregson*, 60 Atl. 31, 32, 72 N. J. Law, 103.

### Inn or hotel synonyms

There is no legal distinction between an "inn," or "tavern," and a "hotel"; but, if there be such, there is no practical difference between them, such as would render regulations imposed by Act N. J., April 13, 1906, § 4, commonly known as the "Bishop's Law" (P. L. p. 203), subjecting inns and taverns and hotels to the restrictions mentioned in the section, unless such inns and taverns have at least ten spare rooms and beds for the accommodation of boarders, transients, and travelers, necessary and appropriate in the

case of small hotels, and not in the case of such inns or taverns. The section, therefore, means that all inns, taverns, and hotels, unless they have at least ten spare rooms and beds for the accommodation of boarders, transients, and travelers, are subject to the restrictions. *Meehan v. Board of Excise Com'rs of Jersey City*, 70 Atl. 363, 365, 75 N. J. Law, 557.

## TAVERN KEEPER

One may be a bona fide "tavern keeper," notwithstanding the receipts from the bar are larger than those from the tavern proper. *Schneider v. Commonwealth (Ky.)* 111 S. W. 303, 304, 20 L. R. A. (N. S.) 107.

## TAX—TAXATION

See Back Taxes; Business Tax; Collateral Inheritance Tax; County Tax; Direct Tax; Double Taxation; Duplicate Taxation; Equal and Uniform Taxation; Excessive Tax; Exemption (From Taxation); Franchise Tax; General Tax; Graduated Tax; Gross Earnings Tax; Improvement Fund Tax; Inheritance Tax; Legacy Tax; Levee Tax; License, Regulate, and Tax; License Tax; Lineal Inheritance Tax; Mulct Taxes; Occupation Tax; Octroi Tax; Ordinary Tax; Paid Tax; Payment of Taxes; Poll Tax; Privilege Tax; Progressive Tax; Property Tax; Public Tax; Raise Money by Taxes or Assessment; Road and Bridge Tax; Road Tax; Same Taxes; Sinking Fund Tax; Special Tax; State Tax; Succession Tax; Suit for Taxes; Time for Collection of Taxes; Uniform Rule of Taxation; Uniform Taxation; Unpaid Tax.

All other taxes, see All Other.

Discharge of tax, see Discharge.

Escaped taxation, see Escape.

Excise tax, see Excise.

In lieu of taxes, see In Lieu of.

Levy of taxes, see Levy.

Registered taxes as municipal claim, see Municipal Claim.

Subject to taxes, see Subject to.

Voluntary payment of, see Voluntary Payment.

See, also, Assess; Assessment.

The crucial attributes of a "tax" are that it is a toll upon property without the consent of the owner, and the money secured is to be applied toward governmental expenses of the body politic for whose benefit the imposition is to be made. *Heerwagen v. Cross-town St. Ry. Co.*, 86 N. Y. Supp. 218, 225, 90 App. Div. 275.

A "tax" is a pecuniary burden imposed for the support of the government. *City of Savannah v. Cooper*, 63 S. E. 138, 140, 131 Ga. 670.

"A 'tax' is a rate or sum of money assessed on the person or property of a citizen by the government for the use of the nation or state." Webster's Dict. Taxes are burdens or charges imposed by the Legislature on persons or property to raise money for public purposes. *Etna Fire Ins. Co. v. Jones*, 59 S. E. 148, 149, 78 S. C. 445, 13 L. R. A. (N. S.) 1147, 125 Am. St. Rep. 818.

A "tax" is a tribute on property in return for the protection which the government affords its owner. *Buster & Jones v. Wright*, 82 S. W. 855, 865, 869, 5 Ind. T. 404 (citing *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 10; *Desty, Tax'n*, 53).

A "tax" is an enforced proportional contribution levied upon persons, property, or income for governmental needs. *Pittsburgh Rys. Co. v. Pittsburgh*, 60 Atl. 1077, 1079, 211 Pa. 479.

The word "taxes" means a charge levied on person or property to raise general revenue to support the government. *Brownell Improvement Co. v. Nixon*, 92 N. E. 693, 695, 48 Ind. App. 195.

"Tax," as used in a constitutional provision providing for the levy of a tax as a condition precedent to the valid issuance of bonds, means a fixed rate of per cent. of the assessed value to be collected annually, without reference to the amount that would be realized each year as values might advance or decline during the life of the bonds. *Pettibone v. West Chicago Park Com'rs*, 74 N. E. 387, 392, 215 Ill. 304.

A "tax" on a civil privilege is fixed as to amount by the classification of the persons or subjects required to pay the tax, and the Legislature may impose such a tax and fix the amount thereof and classify the subjects on which the tax is imposed, so long as the classification is reasonable. *Pocahontas Consol. Collieries Co. v. Commonwealth*, 73 S. E. 446, 448, 113 Va. 108.

"A 'tax' is an exaction of sovereignty, and not something derived from an agreement." *People ex rel. Nassau Electric R. Co. v. Grout*, 103 N. Y. Supp. 975, 119 App. Div. 130.

A "tax" is not a "punishment." *Muir's Adm'r v. City of Bardstown*, 87 S. W. 1096, 1098, 120 Ky. 739.

A "tax" has been variously defined as a burden, or charge imposed, or proportional contribution levied, by the sovereign, for the support of the government and for all public needs or purposes. *Louisiana Ry. & Nav. Co. v. Madere*, 50 South. 609, 124 La. 635.

"The word 'tax' is not infrequently used in a general sense as denoting a burden or charge, and not in the strict legal sense of the charge or burden imposed by the state for the purposes of revenue for its support." *People of State of New York ex rel. Metro-*

*politan St. Ry. Co. v. State Board of Tax Com'rs*, 25 Sup. Ct. 705, 712, 199 U. S. 1, 50 L. Ed. 65, 4 Ann. Cas. 381.

A "tax" is a liability created by statute. *State v. Chicago & N. W. R. Co.*, 112 N. W. 515, 520, 132 Wis. 345 (quoting and adopting definition in *State v. Certain Lands in Redwood County*, 42 N. W. 473, 40 Minn. 512).

"Taxes" are burdens or charges imposed by the Legislature on persons or property to raise money for public purposes. *City of Austin v. Nalle*, 120 S. W. 996, 102 Tex. 536.

"Taxes" are enforced contributions levied for public needs, and are the property of the citizens demanded and taken by the government to enable it to discharge its functions, and the needs of the government constitute both the occasion and the limitation of the taxing power. *Madary v. City of Fresno*, 128 Pac. 340, 343, 20 Cal. App. 91.

"'Taxes' are defined to be burdens or charges imposed by legislative authority, on persons or property, to raise money for public purposes, or, more briefly, an imposition for the supply of the public treasury." *State ex rel. Nettleton Case*, 81 Pac. 554, 556, 39 Wash. 177, 1 L. R. A. (N. S.) 152, 109 Am. St. Rep. 874.

Generally speaking, a "tax" is a pecuniary burden laid on individuals or property for the purpose of supporting the government. *State of New Jersey v. Anderson*, 27 Sup. Ct. 137, 140, 203 U. S. 483, 495, 51 L. Ed. 284.

"'Taxation' is the absolute conversion of private property for public use, and its validity rests on the use." *State ex rel. Consolidated Stone Co. v. Houser*, 104 N. W. 77, 79, 125 Wis. 256, 110 Am. St. Rep. 824 (quoting *Attorney General v. City of Eau Claire*, 37 Wis. 400, 438).

Comp. St. 1901, c. 77, § 182, expressly defines a tax to be "any tax, special assessments, or costs, interest, or penalty imposed upon property." *City of Omaha v. Hodgskins*, 97 N. W. 346, 347, 70 Neb. 229.

As every one's tax is his share of public expense an unequal division of that expense is not "taxation." Any scheme for a disproportional division of public expense is not "taxation." "Taxation" is a division among the people of the city of the expense of their own government of themselves—a division made by themselves, through their own agents in pursuance of their original contract. *Thompson v. Kidder*, 65 Atl. 392, 393, 74 N. H. 89, 12 Ann. Cas. 948 (quoting *Edes v. Boardman*, 58 N. H. 580, 589).

"'Taxation' is a mode of raising revenue for public purposes only." *Mayor, etc., of Hyattsville v. Smith*, 66 Atl. 44, 45, 105 Md. 318 (quoting and adopting *People ex rel. Detroit & H. R. Co. v. Township Board of Salem*, 20 Mich. 452, 4 Am. Rep. 400).

"A 'tax' is the means by which a burden primarily borne by the state is transferred to the citizen. \* \* \* Three things are essential to a 'tax,' as that term is understood by our Constitution: First, the ascertainment of a sum certain, or that can be rendered certain, to be imposed on the collective body of taxpayers; second, a legal imposition of that sum as an obligation on the collective body of taxpayers; third, an apportionment of such sum among individual taxpayers, so as to ascertain the part or share that each should bear. \* \* \* The first two acts above described, namely, the ascertainment of a sum to be imposed on the collective body of taxpayers and its imposition by a legislative declaration to that effect, are essentially legislative acts, or acts proper directly to the law-making function of the government. \* \* \* The third act, namely, the apportionment of the whole sum imposed by way of tax on the collective body of taxpayers upon the separate individuals composing that body, is usually an administrative act, performed under specific statutory directions, ascertaining the mode and time of its performance." *Rice v. Shealey*, 50 S. E. 868, 870, 71 S. C. 161 (quoting and adopting definition in *Morton v. Comptroller General*, 4 S. C. 430, 453).

"The power of 'taxation,' indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in addition to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the Legislature, and a taking of property without due process of law." Due process of law is denied a Kentucky corporation by a tax assessed under the authority of Ky. St. § 4020, upon its rolling stock permanently located in other states and employed there in the prosecution of its business. *Union Refrigerator Transit Co. v. Commonwealth of Kentucky*, 26 Sup. Ct. 36, 37, 199 U. S. 194, 50 L. Ed. 150, 4 Ann. Cas. 493.

The power of "taxation" is the power to take from the owner that which is his to help defray the expense of the protection received from the government, and, if the power is illegally exercised, it is an invasion of private right, and, in the absence of specific limitation, the party injured may resort to the

courts to vindicate his right against those who attempt such invasion by any form of action which he could use against any other wrongdoer with respect to the same class of injury. *Western Union Telegraph Co. v. Trapp*, 186 Fed. 114, 120, 108 C. C. A. 226.

#### Assessment for improvements

The assessment of benefits for local improvements has never been regarded as a "tax," or termed such in legislative proceedings in our public or private laws, or in popular intercourse. *Board of Improvement of Paving Dist. No. 5 of Ft. Smith v. Sisters of Mercy*, 109 S. W. 1165-1167, 36 Ark. 109.

"It is apparent on the face of the Constitution that the framers of that instrument did not use the word 'taxes' and the term 'special assessments' as equivalents of each other, or that either included the other." *Farnham v. City of Lincoln*, 106 N. W. 666, 668, 75 Neb. 502.

A "special assessment" is a "tax" in the sense that it is an enforced contribution from the property owner for the public benefit, but not in the sense that it is a burden, as he receives an equivalent in the shape of the enhanced value of his property, and only property benefited by the improvement may be assessed, the district being determined legislatively but the amount of the tax is determined judicially, and according to the benefits. Although possessing many points of similarity, special assessments and taxes are inherently different and the same rule of construction where the words are used in statutes will not be indiscriminately applied. *State v. Furstenau*, 129 N. W. 81, 83, 20 N. D. 540.

Rev. Laws 1902, c. 13, § 86, providing that no action to recover back a "tax" shall be maintained, unless commenced within three months after payment of the tax, applies both to an action to recover back an ordinary municipal tax imposed for general purposes and to an action to recover a local improvement assessment. *Wheatland v. City of Boston*, 88 N. E. 769, 770, 202 Mass. 258.

"An assessment for benefits by the construction of levees by a levee district is not a "tax," and cannot therefore be legally objected to because nonuniform, or not in proportion to the value of the property. *Des Moines & Mississippi Levee Dist. No. 1 v. Chicago, B. & Q. R. Co.*, 145 S. W. 35, 39, 240 Mo. 614, 39 L. R. A. (N. S.) 543.

Where a contract with brokers for the sale of lots required defendant to furnish a certificate of title, showing the property clear of incumbrances, except " \* \* \* taxes assessed, but not due and payable," defendant was bound to clear the property from all street assessments; the word "tax" being ordinarily used to refer only to taxes assessed for state, county, or city purposes, and not to designate street assessments for public

improvements. *Alderson v. Houston*, 96 Pac. 884, 886, 154 Cal. 1.

The word "assessment" is not included in the word "taxes," so that a warranty in a deed against all incumbrances except "taxes" makes the warrantor liable for an improvement assessment. *Sanders v. Brown*, 47 S. W. 461, 463, 65 Ark. 498.

An assessment for a public improvement is not a "tax," within the rule that a life tenant must pay ordinary taxes, and, where a public improvement is of a permanent nature, the assessment therefor may be equitably divided between the life tenant and remainderman, but, where the improvement is of a temporary character benefiting the life interest only, the assessment must be paid wholly by the life tenant. *Troy v. Protestant Episcopal Church*, 56 South. 982, 983, 174 Ala. 380.

There is a distinction between a tax in its ordinary sense and a local assessment for municipal purposes, and under a contract of lease giving the lessee an option to purchase when the amount of rent paid reaches a specified sum, in which the lessee agrees to pay all "taxes" on the premises, the lessee is not liable for a sewer assessment. *Johnson v. Dairymple*, 123 S. W. 1020, 1023, 140 Mo. App. 232.

The word "taxes" has two well-recognized meanings, one inclusive and the other exclusive of special assessments for local improvements. Which meaning is intended, where the word is used by a written contract, must be determined by the context. Where a company owning a line of railroad grants to another company a right to the joint use thereof for a term of 999 years in consideration of the payment of a stated annual sum, to be increased by interest upon any amounts expended for the permanent improvements by the owner by joint consent, the contract further providing that the expenses of maintaining the property shall be divided in proportion to the use made of it, and that the "taxes" on property jointly used shall be included in the cost of maintenance, the word "taxes," as so used, is to be construed as including such special assessment. *Chicago Great Western Ry. Co. v. Kansas City N. W. R. Co.*, 88 Pac. 1085, 1086, 75 Kan. 167, 12 Ann. Cas. 588 (citing Cent. Dict.).

Though special assessments for local improvements are an exercise of the taxing power, special assessments for the construction of a drainage system, levied on the land specially benefited, are not "taxes" within Const. art. 12, §§ 4, 11, providing that taxes shall be levied and collected by general laws, and for public purposes only, and prohibiting the Legislature from levying taxes on the inhabitants or property in any county or municipal corporation for county or municipal purposes. *Billings Sugar Co. v. Fish*, 106

Pac. 565, 566, 40 Mont. 256, 135 Am. St. Rep. 636.

Laws 1909, c. 295, which added sections 1210h1, 1210h2, 1210h3, and 1210h4, is under the subhead entitled, "General Taxes; Reassessment When Assessment Void"; the first section providing that, whenever any action is commenced to set aside any sale of lands for the nonpayment of taxes or to cancel any tax certificate or restrain the issuing of bonds, the plaintiff shall, as a condition precedent, deposit the amount of the taxes, interest, and charges thereof. Held that, while there is a distinction between a tax and a general assessment, yet the word "tax" is broad enough to include a special assessment; and as the added sections are general in their nature, and as section 1210h mentions both general taxes and special assessments, the deposit must be made in case of an attack on a special assessment. *Wisconsin Real Estate Co. v. City of Milwaukee*, 138 N. W. 642, 643, 151 Wis. 198.

St. 1898, § 1164, providing that any person aggrieved by the levy and collection of any unlawful tax by any town, city, or village may maintain an action for the recovery of all money so collected, and in case any such town, city, or village shall pay a judgment recovered after having paid over to the county treasurer the state and county tax levy collected as part of such unlawful tax, it shall be credited by the county treasurer with the amount so paid on the tax for the ensuing year, is found under the subhead of "miscellaneous provisions" among statutes relating to "the assessment and collection of special taxes." Held that, as the statute as first enacted did not include the words "city" and "village," but merely provided for an action against towns, and as the word "tax," while generically broad enough to include special assessments, appears to relate only to general assessments, no action may be maintained under this statute to recover a special assessment for public improvement paid to the city and by it paid to the contractor. *Marine Co. v. City of Milwaukee*, 138 N. W. 640, 641, 151 Wis. 239.

Where a testator bequeathed unto his wife for life the total income of his estate after deducting taxes, special assessment for sewer improvements equaling about five years income are not to be deducted as taxes; the word "taxes" ordinarily meaning the annual amounts levied upon persons or property for governmental purposes, and not special assessments for benefits of public improvements. *Schmidt v. Schmidt*, 84 Atl. 629, 632, 80 N. J. Eq. 364.

#### Same—Commutation

The provisions of section 4, art. 9, of the Constitution, against commutation for "taxes," do not apply to special assessments to pay for local improvements levied upon the property benefited thereby; and municipal



authorities have power to settle and compromise suits involving the validity of such special assessments, notwithstanding that section. The Constitution does not use the word "taxes" and the term "special assessments" as equivalents of each other. *Farnham v. City of Lincoln*, 106 N. W. 666, 667, 75 Neb. 502.

#### Same—Eminent domain distinguished

The "levy" of special assessments for street improvements is the exercise of a species of the "taxing power" of the state, and not of the right of "eminent domain." *New York, C. & St. L. Ry. Co. v. City of Hammond*, 83 N. E. 244, 245, 170 Ind. 493.

#### Same—Equality and uniformity

A special assessment for local improvement is not a "tax," within the meaning of the constitutional requirement that all taxes shall be uniform throughout the state. *Riley v. Carrico*, 110 Pac. 738, 739, 27 Okl. 33.

"Taxation," within the constitutional requirement that all "taxation" shall be uniform, refers only to taxes of a general nature, and does not apply to local improvements. *Anderson v. Lower Merion Tp.*, 66 Atl. 1115, 1120, 217 Pa. 369.

Special assessments authorized by Drainage Law (Acts 1909, c. 185) § 11, are not "taxes," within Const. art. 2, § 29, providing that the General Assembly shall have power to authorize the several counties and incorporated towns to impose taxes for county and corporate purposes in such manner as may be prescribed by law, and that all property shall be taxed according to value, etc.; and hence they may be properly levied according to the benefit found to be derived from the improvement by the property assessed. *State ex rel. v. Powers*, 137 S. W. 1110, 1112, 124 Tenn. 553.

Acts 1905, p. 585, c. 278, authorizing the levy of special assessments for municipal improvements on abutting property benefited thereby, is not in violation of Const. art. 2, §§ 28, 29, requiring that all property be equally and uniformly taxed according to its value throughout the state, and authorizing counties and incorporated towns to impose taxes on property according to value on principles established in regard to state taxation; special assessments not being "taxation," within such provisions. *Arnold v. City of Knoxville*, 90 S. W. 469, 115 Tenn. 195, 3 L. R. A. (N. S.) 837, 5 Ann. Cas. 881.

#### Same—Exemptions

The word "taxes," in Const. art. 9, § 3, exempting homesteads from sales under judgments, except for taxes, etc., includes all assessments or impositions authorized under the taxing power, so that homesteads are not exempt from the lien of special assessments for local improvements. *Shibley v. Ft. Smith & Van Buren Dist.*, 132 S. W. 444, 449, 96 Ark. 410.

A street improvement assessment, not made in accordance with the Constitution and laws regulating the levy and assessment of ad valorem taxes, is not a "tax," within Const. art. 16, § 50, exempting the homestead from forced sale for any debt except, among others, taxes due thereon. *City of Beaumont v. Russell*, 112 S. W. 950, 953, 51 Tex. Civ. App. 351.

A "tax" has reference to the general revenues for the purpose of maintaining and carrying on the government, where the benefits are alike enjoyed by all, and where no special benefits are enjoyed. Consequently a special assessment, levied to defray the cost of a public improvement, is not a "tax," within Const. art. 7, § 2, exempting school districts from taxation. *In re Howard Avenue North in City of Seattle*, 86 Pac. 1117, 1118, 44 Wash. 62, 120 Am. St. Rep. 973, 12 Ann. Cas. 417.

Section 3 of the private act of December 20, 1860, conferring corporate powers upon plaintiff, which provides that a certain amount of plaintiff's ground, together with the property thereon, "shall be exempt from all taxation, state, county, municipal, and special during the existence of this charter," does not exempt such property from assessments for local improvements; the word "tax" not including assessments, and the word "special" as used with "taxation" referring to special taxes levied and collected in the manner of general taxes, such as road and school taxes, and not to local assessments. *Board of Improvement of Paving Dist. No. 5 of Ft. Smith v. Sisters of Mercy*, 109 S. W. 1165, 1167, 86 Ark. 109.

Under an act of incorporation providing that the property of the corporation should not be subject to taxes and "assessments," the words "taxes" and "assessments" are not synonymous, but have a different meaning, and thereunder the corporation is exempt from "assessments" of special benefits from local improvements, as well as from taxes for general revenue for public use. *State v. Mayor, etc., of City of Newark*, 36 N. J. Law, 478, 479, 13 Am. Rep. 464.

The word "assessments," as used in statutes providing for a gross earnings tax, means a burden not included in the word "taxes," and that they exempt the property used for railroad purposes of railway companies paying the gross earnings tax, not only from all general and ordinary taxes, but from all local, special, or extraordinary assessments or charges. *In re Drainage Ditch No. 6*, 109 N. W. 993, 99 Minn. 454.

"While in a general sense it may be said that a betterment assessment is a kind of tax, still we think that there is a well-understood difference in the meaning of the two terms as generally used in our statutes. The word 'tax' is used when one is speaking of the annual tax, or any other tax which forms a

part of the general burden for public purposes, while the word "assessment" is used to designate the amount to be paid into the public treasury as a part of the benefit specially received by reason of some local improvement. The first is a burden, inasmuch as it adds nothing to the value of the estate taxed. The second simply requires the landowner to share with the public the special benefit received by the local improvement, and it cannot be assessed unless there be such benefit, and even then not beyond that. The value of the estate is always diminished by the first, but never by the second. This distinction between the usual legal signification of the words seems, as above stated, to be quite generally recognized in our statutes." Hence an exemption "from taxes" does not exempt from assessment for benefits due to a street improvement. *Boston Asylum & Farm School for Indigent Boys v. Charles*, 62 N. E. 961, 962, 180 Mass. 485.

The right to "taxation" is essential to the existence of government, and all property of every description is subject to taxation, unless it has been specifically exempted, and all laws exempting property will receive a strict construction, and nothing will be held to be within the exemption which does not clearly appear so to be, and there is a distinction between general taxation and special assessment, and property exempt from general taxation is not necessarily exempt from special assessment. Under Const. 1870, art. 4, § 26, providing that the state shall not be a defendant in any suit, and article 8, § 2, providing that all school lands shall be faithfully applied to school purposes, and article 12, § 6, of the school law, providing that no part of the principal of any township or county school fund shall be expended, lots outside of section 16, donated by Congress, the title to which is in the board of education of a city, are not specially exempted from street improvements. *City of Chicago, to Use of Schools, v. City of Chicago*, 69 N. E. 580, 581, 207 Ill. 37 (citing *People ex rel. Davis v. City of Chicago*, 17 N. E. 56, 124 Ill. 636; *In re Swigert*, 6 N. E. 469, 119 Ill. 83).

#### **Assessment of road labor**

Levies payable in labor on highways, though in the nature of a tax, are not understood as embraced in the term "tax"; and statutory provisions for assessment are not applicable to it unless made so by express terms. *State v. Ide*, 77 Pac. 961, 965, 35 Wash. 576, 67 L. R. A. 280, 102 Am. St. Rep. 914, 1 Ann. Cas. 634.

#### **As costs**

A judgment for costs in a criminal prosecution is not a debt "due as taxes" levied by the state, within the exception in Bankr. Act 1898, § 17, and is satisfied by discharge of the judgment debtor in bankruptcy. *Olds v. Forrester*, 102 N. W. 419, 420, 126 Iowa, 456.

#### **As debt**

See Debt.

#### **As incumbrance**

See Incumbrance.

#### **Indebtedness for taxes collected**

An indebtedness of a bankrupt to a county for taxes collected by him as county tax collector and not accounted for, or which should have been collected, and for which he is liable under the law of the state, is not one for "taxes" legally due and owing by the bankrupt to the county, and as such entitled to priority in the payment over the claims of general creditors. *In re Waller*, 142 Fed. 883, 886.

#### **Judgment distinguished**

See Judgment.

#### **As judicial act**

See Judicial Act.

#### **As liability**

See Liability.

#### **License or license fee**

"The term 'tax' has come to be applied to all sorts of exactions which swell the public funds, stopping short only of fines imposed as punishment for criminal occurrences. Laws requiring payment to the state of compensation for the enjoyment of a privilege, such as that of a foreign corporation to do business within the state, or requiring contribution to the public treasury as mere police regulation, such as license fees of hawkers or peddlers and saloon license fees, are commonly called 'taxes.' In a broad sense, most of them are referable to the taxing power, though probably no one would regard them as taxes in a constitutional sense." *State v. Chicago & N. W. Ry. Co.*, 108 N. W. 594, 602, 128 Wis. 449.

License taxes, imposed by a municipal corporation for revenue, are "taxes," within Const. art. 11, § 12. Hence the power to collect them can be vested in municipalities only by general laws. *Ex parte Jackson*, 77 Pac. 457, 458, 143 Cal. 504.

In a multitude of cases the words "license" and "tax" are used interchangeably, and some courts treat of them as meaning the same thing. But, when they endeavor to sustain the law or ordinance requiring a license, they locate the authority under the police power of the state, and not its taxing power, for by such shifting of authority some constitutional limitations are avoided. In other cases the charter or enabling act of the city expressly defined the power to license or tax. *Pegg v. City of Columbus*, 89 N. E. 14, 20, 80 Ohio St. 367, 23 L. R. A. (N. S.) 453 (citing *Tomlinson v. City of Indianapolis*, 43 N. E. 9, 144 Ind. 142, 36 L. R. A. 413).

The line of demarcation between a business or "occupation tax" and a license law,

or between a tax and a license, is very plain in theory, but often very dim in municipal practice. A "license" to carry on a business or trade has been defined to be an official permit to carry on the same, or perform other acts forbidden by law, except to persons obtaining such permit. Bouv. Law Dict. A "tax" is a pecuniary burden imposed for the support of the government. It has been defined to be the enforced proportional contribution of persons and property levied by the government and for all public needs. A "specified tax" upon all agents and representatives of packing houses, and upon all agents and representatives of dealers in packing house goods or products having a place of business or stock of merchandise in the city and selling to customers therein, is a vocation or "occupation tax." City of Savannah v. Cooper, 63 S. E. 138-140, 131 Ga. 670.

A municipality sustains a dual relation to its streets and thoroughfares—that of sovereign and proprietor. In the latter capacity a municipality may under certain circumstances contract for the use of its streets. A municipal charge for the use of the streets for any lawful purpose is the exercise of the city's right of proprietorship, and is not the imposition of a privilege or license tax. "A 'tax' is a demand of sovereignty. A toll is a demand of proprietorship." But the grant of authority to a telegraph company to set its poles in the street for a fixed rental, when accepted and acted upon, became an irrevocable contract, and the city could not set it aside, or arbitrarily increase the rental above that obligated to be paid. City Council of Augusta v. Augusta & A. Ry. Co., 61 S. E. 992, 993, 130 Ga. 815, 124 Am. St. Rep. 197.

Power conferred on cities of the first class to regulate a business includes the power to license; a license fee not being a "tax" upon an occupation, but a compensation for issuing the license, for keeping the record, and for municipal supervision. Carpenter v. Little Rock, 142 S. W. 162, 164, 101 Ark. 238.

The burden imposed by Laws 1909, p. 654, on manufacturers of, and dealers in, intoxicating liquors, except wines and spirits produced from fruits grown in the state, is not a "tax" within Const. art. 10, §§ 6, 7, providing what property shall be exempt from taxation, and the statute is not invalid because exempting from its operation wines or spirits made from grapes or fruits grown in the state. State v. Parker Distilling Co., 139 S. W. 453, 463, 236 Mo. 219.

The new charter of the city of Baltimore (section 6), authorizing the mayor and council "to license, tax, and regulate all businesses, trades, avocations or professions," conferred on the city the power to impose a charge on commission merchants for the privilege of selling in the city market; such charge being a tax for revenue, and not a license or regu-

lation tax. Meushaw v. State, 71 Atl. 457, 460, 109 Md. 84.

Buffalo City Charter (Laws 1891, p. 137, c. 105) § 17, subd. 6, as amended by Laws 1904, p. 83, c. 31, empowering the city to enact an ordinance imposing a "tax" on automobiles "for the privilege" of operating the same on its streets, and to prohibit such use in case of nonpayment of the tax, and to provide a penalty for violation of the ordinance, is repealed by a later act, the Motor Vehicle Law (Laws 1904, p. 1316, c. 538) § 4, subd. 8, providing that the city shall have no power to pass, maintain, or enforce ordinances requiring from owners of automobiles "licenses" or permits to use the streets, or prohibiting them from the free use thereof; a tax for the privilege of operating automobiles on the streets being but a license. City of Buffalo v. Lewis, 108 N. Y. Supp. 450, 452, 123 App. Div. 163.

The word "tax," in Const. § 180, requiring every act enacted by the General Assembly levying a "tax" to specify distinctly the purpose for which the "tax" is levied, and no "tax" levied for one purpose shall be devoted to another, when considered in connection with sections 171, 172, 174, and 181, providing what property shall be exempt, and authorizing the General Assembly by general laws to provide for the payment of license fees on franchises, etc., does not include a license tax, and an act levying a license tax need not specify the purpose for which the "tax" is levied. Brown-Foreman Co. v. Commonwealth, 101 S. W. 321, 324, 125 Ky. 402.

"Where the fee is imposed for the purpose of regulation, and the statute requires compliance with certain conditions in addition to the payment of the prescribed sum, such sum is a license proper, imposed by virtue of the police power; but where the fee is exacted solely for revenue purposes, and payment of such fees gives the right to carry on the business without the performance of any further conditions, it is a tax." The tax imposed on social clubs by Acts 1902-04, pp. 155, 226, c. 148, cl. 144, requiring social clubs which keep liquors on sale to pay \$2 for every member of the club in lieu of all other taxes, is, in view of the provisions of the statute looking to the regulation of such clubs, requiring them to make reports as to their membership, officers, dues, etc., and providing for a forfeiture of their charters for failure to make such reports, a license tax, within the meaning of Code 1904, § 1042, authorizing a city or town to impose a tax in addition to the state tax for the privilege of doing anything for which a "license tax" is required within the city or town, and consequently an additional tax may be imposed by the town in which the club is located. Town of Phebus v. Manhattan Social Club, 52 S. E. 839, 840, 105 Va. 144.

Code Iowa, § 5006, provides a penalty by fine and imprisonment for selling cigarettes in violation of its provisions; and section 5007 imposes an annual tax on every cigarette dealer, which tax is declared to be in addition to all other taxes and penalties, and shall constitute a perpetual lien on all property used in connection with the business, but that payment of the tax shall not be a bar to prosecution under any law prohibiting the manufacture and sale of cigarettes. Held, that such imposition constituted a "tax," within Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), providing that the bankruptcy court shall order the trustee to pay all taxes legally due by the bankrupt, in advance of the payment of dividends to creditors; the word "tax" in the latter section not being used in any restricted sense, but broadly to include all obligations imposed by the state and general governments under their respective taxing or police power for governmental or public purposes. *In re Otto F. Lange Co.*, 159 Fed. 586, 588.

A "license tax" imposed on a telegraph company for carrying on its business in a certain town is a "tax" in the ordinary acceptance of the term, and is within the provision of the tax laws which provides that the collection of taxes shall not be stayed or prevented by an injunction. *Western Union Tel. Co. v. Town of Winsboro*, 50 S. E. 870, 872, 71 S. C. 231.

As used in Const. art. 8, § 1, providing that taxes shall be levied upon such property as the Legislature shall prescribe, and declaring that the rule of taxation shall be uniform, the words "taxes" and "taxation" include taxation by means of excise or duty upon occupations and privileges. *Nunne-macher v. State*, 108 N. W. 627, 639, 129 Wis. 190, 9 L. R. A. (N. S.) 121, 9 Ann. Cas. 711.

By "taxation" is meant the providing of revenue for the ordinary expenses of state or municipal government. The license fee provided for in Laws 1903, p. 232, c. 120, § 15, imposed on persons selling milk, and authorizing the collection thereof by the meat and milk inspector, which office is created by the act, is not a tax, though required to be paid into the state treasury. *State v. McKinney*, 74 Pac. 1095, 1099, 29 Mont. 375, 1 Ann. Cas. 579.

The registration fee of \$2 required by St. 1903, p. 507, c. 473, § 1, providing for the registration of automobiles, is a license fee, and not a "tax for revenue." *Commonwealth v. Boyd*, 74 N. E. 255, 256, 188 Mass. 79, 108 Am. St. Rep. 464.

A "tax," as ordinarily understood, is a contribution demanded by a sovereign from his subjects as one evidence of their allegiance, in return for his protection. A demand of a certain amount by the Choctaw Nation

for the privilege of doing business is simply a license or permit fee, and not a tax, in the ordinary acceptance of that term. *Zevely v. Welmer*, 82 S. W. 941, 943, 5 Ind. T. 646.

An ordinance enacted by the board of supervisors of the city and county of San Francisco is entitled "An ordinance imposing a license for the purpose of regulation upon persons \* \* \* selling \* \* \* malt or fermented liquors \* \* \* in quantities of one quart or more, less than five gallons, when the same is contained in sealed packages, and not to be drunk on the premises where sold, \* \* \* requiring a permit therefor." The ordinance makes it unlawful to sell such liquors "without first having obtained a permit therefor from the board of police commissioners, and paying the license fee herein provided"; requires any person doing such act to procure a license, paying therefor "a license fee of \$150 per annum"; requires application for renewals to be passed upon by the board of police commissioners, and declares that the ordinance and "the license herein imposed" are enacted to regulate the business described. The charter of the city and county of San Francisco (article 2, c. 2, § 1) authorizes the board of supervisors to make all necessary police regulations; and subdivision 15 authorizes it to impose "license taxes," but provides that no license taxes shall be imposed upon one who, at any fixed place of business, sells goods, etc., except such as require permits from the board of police commissioners, as provided in this charter. Held, that the ordinance was enacted solely for regulation, and not for revenue, and the license imposed was a "license tax" within subdivision 15, so that the board had no power to impose it, since, while a "tax," technically, only includes charges imposed for producing revenue, and not for purposes of regulation under the police power, the term "license tax," as used in the statutes and by the courts, includes license charges of every character, whether imposed for revenue or police regulations, or both. *John Rapp & Son v. Kiel*, 115 Pac. 651, 653, 159 Cal. 702.

A federal court of bankruptcy, in determining whether a state imposition is a "tax," within Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563, requiring priority of payment thereof, will not be bound by the decisions of the state courts, unless the state decisions have authoritatively expounded the substance of the question, and not merely given the name "tax" to an exaction which is not such. If the Legislature of a state gives the name "tax" to an exaction which is not a tax, and if the courts of the state join in the misnomer, surely the bankruptcy courts are not required to disregard the substance of the thing, to the detriment of other claimants. The state courts may authoritatively expound the substance, and the federal courts

will adopt such expositions; but whether the substance constitutes a tax or not is independent of the name. The discussion was as to whether the imposition of a license fee or franchise tax was a tax within the meaning of Bankr. Act 1898, § 64a. The court said: "If it be conceded that the word 'taxes,' in section 64a, includes every contribution to the support of government which any state may exact from the persons, occupations, and possessions of its citizens and corporate subjects, is the charge in question a tax? It is not a capitation tax, for it is not laid upon corporations by the head. It is not an occupation tax, for it has no regard to the business in which the corporations engage. It is not a property tax, for it pays no heed to the extent or value of property, as the Constitution requires." In re Cosmopolitan Power Co., 137 Fed. 858, 862, 70 C. C. A. 388.

"License," in its proper sense, is distinct from "taxation," and an exemption from one does not include an exemption from the other. *City of Trenton v. Humel*, 114 S. W. 1131, 1132, 134 Mo. App. 595.

A "license" is a price paid for a privilege, while a tax is an enforced proportional contribution levied upon persons, property, or income for governmental needs. *Pittsburgh Ry. Co. v. Pittsburgh*, 60 Atl. 1077, 1078, 211 Pa. 479.

A "license," as distinguished from a "tax," which has for its object the raising of revenue, is essentially a grant of a special privilege to one or more persons not enjoyed by citizens generally, or at least not enjoyed by the class of citizens to which the licensee belongs. The fee or charge often exacted therefor is in law supposed to cover the cost of issuing the license and the expenses incident to regulating and controlling the business, though it may ultimately result in a source of revenue. To relieve a law imposing a burden or tax upon persons or property from the operation of the constitutional provision relative to taxation, and to impress upon it the quality of a license, it must have for its primary object the granting of some privilege or the imposing of some restraint. *Reser v. Umatilla County*, 86 Pac. 595, 597, 48 Or. 326, 120 Am. St. Rep. 815.

#### **Same—Corporation fee**

The bonus required by Act Pa. Feb. 9, 1901 (P. L. 5) § 3, to be paid to the state by a corporation on an increase of its capital stock, is not a "tax" and is not entitled to preference as such, under Bankr. Act July 1, 1898, c. 541, § 64a, 30 Stat. 563. *Commonwealth of Pennsylvania v. York Silk Mfg. Co.*, 192 Fed. 81, 82, 112 C. C. A. 613; In re *York Silk Mfg. Co.*, 188 Fed. 735.

The obligation of a Pennsylvania corporation, through its treasurer, to collect from the Pennsylvania holders of its obligations

a tax of four mills by deducting it from the interest due them, is not a "tax" on the corporation, and an account settled therefore by the state officers is not entitled to a priority in the distribution under the bankrupt law. Penalties imposed on a corporation for failure to return increase of capital stock, file reports, etc., are not "taxes" within the meaning of any law, and are not entitled to priority under the bankruptcy act, and under Bankr. Act July 1, 1898, c. 541, § 57 (j), 30 Stat. 560 (U. S. Comp. St. 1901, p. 3443), cannot be allowed except for the amount of the pecuniary loss sustained by the act or transaction out of which the penalty arose. A penalty is a fine or punishment or forfeiture, and does not become an obligation until imposed by lawful authority, and the penalties so imposed on the corporation are different from penalties for nonpayment of taxes; the latter being exacted in lieu of interest, while those on the corporation are by way of punishment. In re *York Silk Mfg. Co.*, 188 Fed. 735, 738.

The tax imposed on corporations by Act March 20, 1905, as amended, imposing a license tax on all domestic corporations, with certain exceptions, and all foreign corporations doing business in the state, forfeiting the charter or right to do business in the state on failure to pay, is not a "tax" upon property within Const. Art. 13, § 1, requiring all property to be taxed in proportion to its value, being a license fee for the privilege of existing as a corporation in case of domestic corporations, and for the privilege of doing business within the state in case of a foreign corporation. *Kaiser Land & Fruit Co. v. Curry*, 103 Pac. 341, 346, 155 Cal. 638.

The tax imposed on corporations and persons operating oil wells, by Acts 29th Leg. p. 358, c. 148, is a "tax" on the occupation of owning, controlling, or managing oil wells producing oil, and not an ad valorem tax, and therefore does not violate the state Constitution, fixing the rate of taxation. *Producers' Oil Co. v. Stephens*, 99 S. W. 157, 158, 44 Tex. Civ. App. 327.

#### **As municipal property**

See *Municipal Property*.

#### **As obligation**

See *Obligation*.

#### **Support of insane relatives**

"Taxes" are the enforced proportional contributions from persons and property levied by the state by virtue of its sovereignty for the support of government and for all public needs; and Code, § 2297, which declares that public support of insane persons shall not release relatives liable therefor, and that they shall be responsible to the county for sums paid by it to the state for the hospital expenses of such insane persons, does not impose a "tax," within a constitutional requirement that every law which imposes a tax

shall distinctly state the tax and the object to which it is to be applied, etc. *Guthrie County v. Conrad*, 110 N. W. 454, 456, 133 Iowa, 171 (citing 1 Cooley, Tax'n, 1; *Hanson v. Vernon*, 27 Iowa, 28, 1 Am. Rep. 215).

#### **Tax on earnings and receipts**

A provision in a municipal franchise to a gas company for the payment to the city of a percentage of the company's gross receipts is not a provision for the payment of a "tax," but merely a provision for the payment of a consideration for the privilege. *Hanford Gas & Power Co. v. City of Hanford*, 124 Pac. 727, 729, 163 Cal. 108.

"A 'tax' has been defined as a forced contribution from a citizen to the state to be applied for governmental purposes." Hence, where a street surface railway company pays to a city a certain sum under an agreement between the parties whereby a percentage of its gross receipts previously payable was reduced in consideration of its granting transfers to passengers thereafter, it is in the nature of a "tax," under *Laws 1899*, p. 1593, c. 712, § 46, and should be deducted from the special franchise tax. *Heerwagen v. Cross-town St. Ry. Co.*, 71 N. E. 729, 730, 179 N. Y. 99 (citing *Davies, System of Taxes*, p. 1).

If it be conceded that the aid of firemen is a public purpose, then an act requiring fire insurance companies to pay annually a specified sum on premiums to create a pension fund for disabled firemen would fall under the head of "taxation," for all the requirements are fulfilled, namely that it is an imposition on person or property by the government for a public purpose. *Ætna Fire Ins. Co. v. Jones*, 59 S. E. 148, 149, 78 S. C. 445, 13 L. R. A. (N. S.) 1147, 125 Am. St. Rep. 818.

A "tax upon earnings" is a tax which at least covers and includes, unless double taxation is intended, all property necessarily held and used to make that income, including the enjoyment of a franchise, and a tax upon the franchise of a railway company impairs the obligation of a charter exemption from any property tax other than one based on its net profits. *Wright v. Georgia R. & Banking Co.*, 30 Sup. Ct. 242, 246, 216 U. S. 420, 54 L. Ed. 544.

"A business tax measured by gross earnings is a 'tax upon the business which is actually performed,' and is not a 'tax upon property' in any sense, while a tax levied by valuation on the right to do business is a tax upon property, irrespective of whether or not any business or occupation has been carried on. It seems clear that the property tax, based upon the value of the franchise, and a business or occupation tax, based upon the gross earnings, of a public service corporation, are in no wise identical as to the subject of taxation, and do not constitute double taxation in any sense." *Lincoln Traction Co. v. City of Lincoln*, 121 N. W. 435,

437, 84 Neb. 327 (quoting and adopting definition in *Nebraska Telephone Co. v. City of Lincoln*, 117 N. W. 284, 82 Neb. 59, 28 L. R. A. [N. S.] 221).

#### **Tolls**

A toll of \$2 per pole per year, imposed by a city on telegraph companies using its streets, is not a "tax" in the ordinary sense, but is in the nature of a special charge for the use of the streets, and the expense and inconvenience caused to the city and the public thereby, and is reasonable in amount and valid. *Western Union Telegraph Co. v. City of Richmond*, 178 Fed. 310, 324.

#### **Water rents**

Water rents due to a municipality, which are levied on property annually as a tax is levied and made a lien in like manner, are "taxes," within *Bankr. Act* July 1, 1898, c. 541, § 64a, 30 Stat. 563, which a trustee in bankruptcy is required to pay when levied against property of the estate in his possession. In re *Industrial Cold Storage & Ice Co.*, 163 Fed. 330, 392.

"Water rates are not 'taxes,' within the meaning of those constitutional provisions which require a uniformity of taxation." *Powell v. Duluth*, 97 N. W. 450, 451, 91 Minn. 53.

Where water was delivered to leased premises through meters, the charge being determined by the quantity of water consumed, the water rate was not a "tax," within *Code Civ. Proc.* § 2231, subd. 3 (*Laws 1901*, p. 211, c. 466, § 474), authorizing summary dispossession proceedings for a tenant's failure to perform a covenant to pay "taxes." *Kleinsteins v. Gonsky*, 118 N. Y. Supp. 949, 950, 134 App. Div. 266.

#### **TAX APPRAISER**

As position, see *Position*.

#### **TAX BILL**

As contract, see *Contract*.

#### **TAX BOOKS**

In *Comp. St.* 1881, c. 77, art. 1, § 83, providing that the taxes assessed on personal property should be a lien upon the personal property of the persons assessed from and after the time the tax books were received by the collector, the words "tax books" mean the tax list with warrant attached. *Platte Valley Milling Co. v. Malmsten*, 113 N. W. 229, 230, 79 Neb. 730.

#### **TAX CERTIFICATE**

The term "tax certificate," as used in the statute limiting to one year the time within which an action may be commenced to cancel a tax certificate, includes a certificate issued on a sale of property for nonpayment of an assessment of benefits for street improvements. *Pratt v. City of Milwaukee*, 68 N. W. 392, 393, 93 Wis. 658.

A "tax certificate" does not pass title to the land, but is a written certification by the county treasurer of the facts as to the sale of real estate, and is the legal evidence on which the purchaser is entitled to a deed or the redemption money, and prima facie evidence of the correctness of the facts recited therein. *Keller v. Hawk*, 91 Pac. 778, 779, 19 Okl. 407.

#### TAX COLLECTOR

A "tax collector" is a public officer, and is so treated in the statute relating to the collection of taxes and the compensation of the collector. *Massie v. Harrison County*, 105 N. W. 507, 508, 129 Iowa, 277.

A "tax collector" is one whose duty it is to enforce the collection of taxes, the tax gatherer, the agent of the county to collect its dues, and does not refer to a county treasurer, to whom the taxes were paid over by the person intrusted with the collection thereof. *Hubbell v. Board of Com'rs of Bernalillo County*, 86 Pac. 430, 13 N. M. 546.

#### TAX COMMISSIONER

As officer, see Officer.

As county officer, see County Officer.

#### TAX DEED

As color of title, see Color of Title.

As grant, see Grant.

Conveying by tax deed as taking, see Taking (In Eminent Domain).

Deed as including, see Deed.

#### TAX DISTRICT

Under Laws 1896, p. 800, c. 908, § 8, providing that every person shall be taxed in the "tax district" where he resides for all personalty owned by him or under his control as trustee or executor, and that, where property is in the possession of two or more persons as executors or trustees, each shall be taxed for an equal portion thereof, each borough of the city of New York must be considered a separate tax district. *People ex rel. Moller v. O'Donnel*, 75 N. E. 540, 541, 183 N. Y. 9.

Laws 1896, c. 908, § 24, as amended by Laws 1901, c. 550, § 2, provides for the assessment of a tax on bank shares and for its distribution among the tax districts in which the bank shares are taxable. Tax Law, § 2, defines a "tax district" as a political subdivision of the state having a board of assessors authorized to assess property therein. Held, that a county is not a "tax district," within the meaning of such statute. *People ex rel. Lawyer v. Board of Sup'rs of Schoharie County*, 79 N. Y. Supp. 145, 146, 39 Misc. Rep. 162.

Tax Law (Laws 1896, p. 801, c. 908, as amended by Laws 1898, p. 1277, c. 537, and by Laws 1902, p. 504, c. 200) § 10, provides that, when a farm is separated by a line between two tax districts, it shall be assessed

to the owner residing thereon where he resides. Laws 1896, p. 796, c. 908, § 2, subd. 1, defines a "tax district" as a political subdivision of the state, having a board of assessors authorized to assess property therein for state and county purposes. A portion of a farm was situate within a village having a board of assessors without authority to assess property therein for state and county purposes, and a portion thereof was situate outside of the village, and the owner resided on the latter portion. Held, that an assessment of the part within the village for village purposes was not invalid, on the ground that the farm was assessable only in the district in which the owner resided, notwithstanding Village Law (Laws 1897, p. 401, c. 414) § 104, requiring village assessors to prepare an assessment roll of the persons and property taxable within the village "in the same manner and form" as is required for the preparation of a town assessment roll. *People ex rel. Champlin v. Gray*, 77 N. E. 1172, 1173, 185 N. Y. 196.

Tax Law (Laws 1896, p. 802, c. 908) § 13, provides that bank stock shall be assessed in the tax district where the bank or banking association is located, and not elsewhere, whether the stockholders reside in the tax district or not; and by Laws 1901, p. 1350, c. 550, § 24, as amended by Laws 1902, p. 384, c. 126, and Laws 1903, p. 565, c. 267, the tax is to be distributed under direction of the board of county supervisors to the cities, towns, villages, school and other districts in a certain proportion. By subdivision 1 of section 2 of the tax law, as first enacted (chapter 908, p. 796, Laws 1896), it is provided: "Tax district" as used in this chapter means a political subdivision of the state having a board of assessors authorized to assess property therein for state and county taxes." Such subdivision of said section has never been changed. Held, that the tax is not payable only to tax districts as defined in section 2, but villages and school districts are entitled to their proportion. *People ex rel. Village of Chatham v. Board of Sup'rs of Columbia County*, 75 N. E. 1133, 182 N. Y. 556.

Tax Law, art. 2, § 24, provides for the assessment of taxes on bank stock, and authorizes the distribution and apportionment of such taxes between the "town, city, village, school and other tax districts," in the respective counties in which the stock is taxable. Section 2 of the tax law defines a "tax district" as a political subdivision of the state, having a board of assessors authorized to assess property for state and county purposes. Held that, conceding that village and school districts are not statutory tax districts, because they have no officials authorized to assess property for taxation, the words "other tax districts" nevertheless refer to statutory tax districts, and a county is not such a district as to be entitled to taxes col-

lected on bank stock. *City of Utica v. Board of Sup'rs of Oneida County*, 95 N. Y. Supp. 839, 840, 109 App. Div. 189.

Village Law (Laws 1897, c. 414) § 104, provides that the village assessors shall prepare an assessment roll of the persons and property taxable in the village in the same manner and form as required by law for the preparation of a town assessment roll. Tax Law, § 2, subd. 1, provides that "tax district" as used in the chapter means a political subdivision of a board of assessors authorized to assess property therein for state and county purposes. Section 29 provides that realty of nonresidents of the tax district shall be designated in a separate part of the assessment roll, and, if it be part of a lot, such part must be identified by boundaries or otherwise, and, if a part of a tract, that part or the part not liable must be described. Held, that section 104 referred to Tax Law, §§ 21, 29, 30, regulating town assessments, so that villages were "tax districts" within section 2, subd. 1, and in assessing the property of nonresidents a description of the property as a certain number of acres situated on a certain side of a road named, within certain farms of larger acreage, was insufficient, so as to make a tax sale under such assessment void. *Buffalo Loan, Trust & Safe Deposit Co. v. Depew Mfg. Co.*, 121 N. Y. Supp. 900, 902, 86 Misc. Rep. 630.

The part of section 1, subsec. "k," Laws 1910, c. 382, which only authorizes a levy for taxes upon property in the particular part of the village designated upon application of a certain number of residents thereof, violates the Bill of Rights, art. 15, requiring every person to contribute his proportion of taxes according to his actual worth in property; that provision practically exempting such part of the village from taxation, since a "taxing district" implies a district subject to taxation by law, and not at the option of its inhabitants. *Curtis v. Mactier*, 80 Atl. 1066, 1069, 115 Md. 386.

Under Ky. St. § 3006, giving to a city a lien on real estate within its limits for taxes due it, and the statutes providing the manner in which the city shall enforce the lien, and in view of sections 4151, 4152, providing that, where real estate is sold for taxes and the state becomes the purchaser, the purchase shall be for the benefit of the state, county, and taxing district, a sale to the state of real estate for delinquent state, county, or district taxes does not impair a city's lien for taxes due it, where the tax title to property is perfected in the state and the property is sold in satisfaction of the tax claims without making the city a party, the lien of the city for taxes due it remains unimpaired, and the purchaser from the state takes it incumbered with such lien, though the "taxing district" referred to in sections 4151 and 4152 does not mean city, but refers to school district or some subdivision of the

county other than a city where a tax may be authorized by law. *Kentucky Lands Inv. Co. v. Fitch*, 137 S. W. 1040, 1042, 144 Ky. 273, Ann. Cas. 1913A, 672.

Where a town includes a city and school district which overlap in part, and in such part the tax levy exceeds the maximum rate of 3 per cent., and under the amended revenue law, providing that certain taxes are to be extended at full rate and others not to be reduced below a certain minimum per cent., the town tax rate is the only one subject to reduction, the reduction must apply to the entire town, and not merely to the part where the excess exists, as a "taxing district," within the meaning of the law, is the municipality which levies the tax that is to be scaled, since the opposite construction would render the statute violative of Const. art. 9, § 9, requiring that all municipal taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same. *People ex rel. Ehrhardt v. Chicago & A. R. Co.*, 93 N. E. 298, 247 Ill. 458.

#### TAX EXECUTION

A "tax execution" is final, not mesne, process. No further proceeding is necessary upon it than to levy and collect it. It is more nearly analogous to an execution issued on judgment in a common-law suit. The garnishment issued upon it is more like a garnishment based upon a final judgment. *Baxter & Co. v. Andrews*, 62 S. E. 42, 44, 131 Ga. 120, 30 L. R. A. (N. S.) 268.

#### TAX EXEMPTION

As contract, see Contract.

#### TAX FERRET

A person engaged in the business of searching for property omitted from taxation is known as a "tax ferret." *Stevens v. Henry County*, 75 N. E. 1024, 1027, 218 Ill. 468, 4 L. R. A. (N. S.) 339, 4 Ann. Cas. 136.

#### TAX FOR EDUCATION

A tax to maintain a public library is not a "tax for education," within Const. § 184, prohibiting a tax for education other than in common schools, till it has been authorized at an election, provided that the tax now imposed for educational purposes and for the Agricultural and Mechanical College shall remain till changed by law; this having reference to a tax for a school. *Ramsey v. City of Shelbyville*, 83 S. W. 116, 117, 119 Ky. 180, 68 L. R. A. 300.

#### TAX FORFEITURES

Where a contract for the preparation of abstracts of title provided that the abstractor should receive a certain price per page for "tax forfeitures," etc., such term, construed most strongly against the abstractor, who made the contract, did not include all the antecedent steps in relation to the as-



seessment of taxes. *McVeigh v. Chicago Mill & Lumber Co.*, 132 S. W. 638, 642, 96 Ark. 480.

### TAX LEASE

As conveyance, see Conveyance.

### TAX LIEN

Lien as including, see Lien.

The "foreclosure of tax liens" authorized by the act of 1903 means the lien created by the record of the list of lands sold in the county clerk's office, and not the lien created by the levying of the tax by the common council. *City of Rochester v. Fourteenth Ward Co-op. Bldg. Lot Ass'n*, 75 N. E. 692, 695, 183 N. Y. 23; *City of Rochester v. Rochester Ry. Co.*, 79 N. E. 1010, 1012, 187 N. Y. 216 (citing *City of Rochester v. Fourteenth Ward Co-op. Bldg. Lot Ass'n*, 75 N. E. 692, 183 N. Y. 23).

### TAX LIST

Return of, see Return.

A "tax list" is a public record required to be made by the county clerk, and in which he is required to transcribe the several assessments, and to enter into distinct columns the description of lands and lots and values, and each description of tax, and to apportion the tax among the respective funds to which it belongs according to the number of mills levied for each of said funds, showing a summary of each distinct tax. *Holthaus v. Adams County*, 105 N. W. 632, 633, 74 Neb. 861.

### TAX PROCEEDING

As civil proceeding, see Civil Action—Case—Suit, etc.

A "tax proceeding" is an action to enforce a lien, and not a mere action to recover the amount of a debt. The judgment enforcing the lien should state facts sufficient to show for what taxes the lien is to be enforced. *Rankin v. Porter Real Estate Co.*, 97 S. W. 877, 878, 199 Mo. 345.

"A 'tax foreclosure proceeding,' in this state, is a proceeding against property, and is in no sense an action against the person of the owner of such property. Its purpose is to charge such property with its just proportion of the public revenues, and the state's dominion over the land exists for that purpose without regard to its ownership. When, therefore, the Legislature provided that the lien for taxes might be foreclosed in the courts against the person to whom the land was assessed, whether that person was or was not the owner of the property, it acted within its powers, and the person foreclosing acquires a legal title by a proceeding as the statute directs." *Rowland v. Eskeland*, 82 Pac. 599, 601, 40 Wash. 253 (quoting and adopting the definition in *Allen v. Peterson*, 80 Pac. 849, 38 Wash. 599; *Woodward v. Taylor*, 73 Pac. 785, 75 Pac. 646, 33 Wash. 1; *Washington Timber & Loan*

*Co. v. Smith*, 76 Pac. 267, 34 Wash. 625; *Williams v. Pittock*, 77 Pac. 385, 35 Wash. 271; *Morrison v. Shipman*, 79 Pac. 632, 37 Wash. 171; *Spokane Falls & Northern Ry. Co. v. Abitz*, 80 Pac. 192, 38 Wash. 8).

### TAX RECEIPT

A "tax receipt" is like any other receipt for money paid, and is only prima facie evidence of payment. *Johnson v. Pinson*, 56 S. E. 238, 239, 127 Ga. 144.

Under Rev. St. 1899, § 1870, making personal taxes a lien against the real property of the taxpayer, a "tax receipt," which the treasurer, as collector of taxes, is required to give, is more than a mere acknowledgment of the payment of a specific sum of money, and is written evidence showing that all taxes against the realty have been paid, and so long as taxes upon the personal property of a taxpayer remain unpaid a tax collector is not obliged to receive the tax on the realty and receipt for the same. *Ricketts v. Crewdson*, 81 Pac. 1, 2, 13 Wyo. 284.

### TAX ROLL

See Each Line of Tax Roll.

### TAX SALE

See Void Tax Sale.

"A 'tax sale' is an official fact, which is presumptively valid, and hence prima facie divests the original owner's title and right to possession." *Nind v. Myers*, 109 N. W. 335, 341, 15 N. D. 400, 8 L. R. A. (N. S.) 157.

There is no sale of personal property for taxes levied on it as the term "sale" is ordinarily understood when applied to tax proceedings. *Citizens' Savings & Trust Co. v. School Sisters of Notre Dame*, 139 N. W. 439, 441, 151 Wis. 619.

Gould's Dig. c. 148, § 111 et seq., provided for the immediate execution of a tax deed to the purchaser, without any preceding certificate of purchase, and declared such deed to vest a good and valid title in the grantee, and authorized redemption by the original owners within a year from the sale. Subsequently the execution of the deed was postponed by law until the expiration of the period of redemption, and provision was made for the issuance of a certificate of purchase at the sale. *Sand. & H. Dig.*, § 6624, prescribes the formalities of the deed, and declares that it shall vest all the title and interest of the former owner, and all claim of the state and county to the lands, in the purchaser. Section 4819 provides that no action for the recovery of lands against any person who may hold the same by virtue of a purchase at a tax "sale" shall be maintained unless plaintiff or his predecessor in interest was seized of the lands in question within two years next before the commencement of the action. Held, that limitations, under section 4819, run from the date of the deed executed in pursuance to section 6624,

and not from the date of the sale and certificate of purchase. *Haggart v. Ranney*, 84 S. W. 703, 705, 73 Ark. 344 (citing *Harvey v. Douglass*, 83 S. W. 946, 73 Ark. 221; *Stephens v. Holmes*, 26 Ark. 48; *Worthen v. Fletcher*, 42 S. W. 900, 71 Ark. 386; *Crill v. Hudson*, 74 S. W. 299, 71 Ark. 390).

### TAX SALE PURCHASER

See Purchaser.

As owner, see Owner.

### TAX TITLE

A "tax title" is generally regarded as a definite grant from the sovereignty, which bars all other titles, of record or otherwise, and imports an absolute paramount title as against the world. It is generally accepted that a tax title is a new title, which takes its status, not from the date of the tax judgment sale, but from the date of the tax lien. *Oakland Cemetery Ass'n v. Ramsey County*, 108 N. W. 857, 858, 98 Minn. 404, 116 Am. St. Rep. 377.

### TAX VOTED AND LEVIED

Where taxpayers petitioned for the voting and levying of a tax for a public improvement, and inserted in the petition specified conditions, among which was the enactment of a statute by the Legislature and the adoption of a constitutional amendment, and a constitutional amendment was thereafter adopted, providing that "the special tax for a public improvement voted by the property taxpayers of the city of New Orleans on June 6, 1899, and levied by the city council, is hereby ratified, and its validity shall never be questioned," the words "tax voted and levied" had reference to the tax voted and levied subject to the conditions imposed by the taxpayers in their petition. *State ex rel. Saunders v. Kohnke*, 33 South. 793, 803, 109 La. 838.

### TAX WARRANT

Execution distinguished, see Execution (Writ of).

### TAXABLE CREDIT

A contract giving a mere option to purchase land in the future on the terms specified is not a "taxable credit" within the meaning of the tax laws. In re *Shield Bros.*, 111 N. W. 963, 964, 134 Iowa, 559, 10 L. R. A. (N. S.) 1061.

### TAXABLE VALUE

The true test of a "taxable value" is the producing value to the owner. An individual's true worth, for the purposes of taxation, consists of his real and personal property; but, in the case of a corporation, its franchise, its borrowing power, its earning capacity, its real worth, are not represented merely by its visible property and shares of stock. The taxable value of the corporation is its bonded indebtedness, together with its stock. *Consolidated Gas Co. v. City of Baltimore*, 61

*Atl.* 532, 537, 101 Md. 541, 1 L. R. A. (N. S.) 263, 109 Am. St. Rep. 584 (citing *Simpson v. Hopkins*, 33 Atl. 714, 82 Md. 478).

In a statute providing that property subject to taxation shall be valued at its actual value and assessed at 25 per centum of such value, which assessed value shall be taken as the "taxable value" of the property, the term "taxable value" is not synonymous with or equivalent to "the value of the taxable property." *N. W. Halsey Co. v. City of Belle Plaine*, 104 N. W. 494, 496, 128 Iowa, 467.

### TAXATION OF COSTS

As proceeding, see Proceeding.

### TAXED

The words "assessed" and "taxed," in *Sess. Laws 1903*, c. 73, § 29, were used interchangeably by the Legislature, and were intended to express the same meaning. *State ex rel. Palmer v. Fleming*, 97 N. W. 1063, 1070, 70 Neb. 529.

### TAXES DUE

The words "taxes due," employed in *Act Aug. 21, 1905*, providing that all taxes due the state and county, by persons residing in the new county or upon property included within the limits of the new county, at the time of its creation, shall be payable to the tax collector of the county from which the territory was taken, did not exclude the collection of regular annual county taxes, though they had not actually been levied before the approval of the act. *Pope v. Matthews*, 54 S. E. 152, 153, 125 Ga. 341.

### TAXING OFFICER

Other taxing officer, see Other.

### TAXING POWER

The "taxing power," acting within its legitimate sphere, is one which knows no stopping place until it has accomplished the purpose of which it exists, namely, the actual enforcement and collection from every object of taxation of its proportionate share of the public burdens; and, if prevented for any reason, it may return again and again until the tax is collected. *Anderson v. Ritterbusch*, 98 Pac. 1002, 1009, 22 Okl. 761.

The "power of taxation" is an incident to sovereignty, and as stated in *McCulloch v. Maryland*, 17 U. S. (4 Wheat.) 316-428, 4 L. Ed. 579: "The power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government shall choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the Legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state thereby give to their government a right of

taxing themselves and their property, and, as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently upon the interests of the legislator and upon the influence of the constituents over their representatives to guard them against this abuse." And as stated in *Cooley's Constitutional Limitations*, 678: "The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of such authority as exercises it. It reaches to every trade and occupation, to every object of industry, use, or enjoyment, to every species of possession, and it imposes a burden which, in case of failure to discharge it, may be followed by seizure or sale, or confiscation, of property. No attribute of sovereignty is more pervading, and at no point does the power of the government affect more constantly and intimately all the relations of life than through the exactions made under it." As stated in *State Tax on Foreign-held Bonds*, 82 U. S. (15 Wall.) 300, 319, 21 L. Ed. 179: "It may touch property in every shape—in its natural condition, in its manufactured form, and in its varying transmutations. \* \* \* It may touch business in the almost infinite forms in which it is conducted—in professions, in commerce, in manufactures, in transportation. Unless restrained by provisions of the federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited." *I. M. Darnell & Son Co. v. City of Memphis*, 95 S. W. 816, 818, 116 Tenn. 424.

The distinction between the "police power" and the "taxing power" is that, while the "taxing power" is exercised for the raising of revenue and is subject to certain limitations, the "police power" is exercised only for the purpose of promoting the public welfare, and though this end may be attained by taxing or licensing occupations, the object must always be regulation, and not the raising of revenue. *Robinson v. City of Norfolk*, 60 S. E. 762, 764, 108 Va. 14, 15 L. R. A. (N. S.) 294, 128 Am. St. Rep. 934.

#### TAX-PAID SPIRIT STAMPS

"Tax-paid spirit stamps," as they are technically called, are nothing more than receipts authorized to be issued by the government to indicate the payment of taxes on distilled spirits, and under the law as amended can only be issued to the distiller and are therefore without value, except for the purpose for which the same are issued, and that purpose can be ascertained by an inspection of the stamps. Under these circumstances, such stamps do not constitute the basis for an action against the government in the hands of one to whom they were not issued, and who does not sustain the relation

of a distiller to the government. *Harkins v. Williard*, 146 Fed. 703, 707, 77 C. C. A. 129.

#### TAXPAYER

See Property Tax Payer.

As beneficially interested, see Beneficially Interested.

As trustee of express trust, see Trustee of Express Trust.

One owning an interest in a store in partnership with his father is a "taxpayer" within Ky. St. § 4464 (*Russell's St. § 5736*), authorizing petitions by voters who are taxpayers for a graded school election, though the store is assessed in the name of his father; the tax being paid out of the firm assets. *Ralls v. Sharp's Adm'r*, 131 S. W. 998, 1000, 140 Ky. 744.

A personal covenant in a lease that the lessee will pay the taxes assessed against the property of the lessor mentioned in the lease does not, as between the taxing district and the lessee, make the lessee the owner or "taxpayer," within the meaning of the general tax act approved April 8, 1903 (P. L. p. 394), and hence entitle him to notice of proceedings by the owner to apportion taxes upon the leased property and other property of the lessor and owner. *New Auditorium Pier Co. v. Taxing Dist. of Atlantic City*, 65 Atl. 855, 856, 74 N. J. Law, 303.

A resident taxpaying corporation may maintain a bill as a "taxpayer" to restrain illegal acts of its officials in appropriating public funds. *Wolff Chemical Co. v. City of Philadelphia*, 66 Atl. 344, 345, 217 Pa. 215.

Under Rem. & Bal. Code § 94, providing that no person shall be competent to serve as a juror in the superior courts of the state unless he be an elector and a taxpayer of the state a "taxpayer" is a person owning property in the state subject to taxation and on which he regularly pays taxes, but a showing that a juror was not a taxpayer of the county in which the trial was held was not sufficient to disqualify him. *Lasityr v. City of Olympia*, 112 Pac. 752, 754, 61 Wash. 651.

Comp. Laws, § 5007, requiring an election for the removal of the county seat when three-fifths of the qualified electors of the county, each elector being a taxpayer thereof as appears by the last assessment roll, who have taken the oath for registration of electors, shall petition the county commissioners therefor, and section 5010, providing that every petition shall be accompanied by the certificate of the registry agent where the petitioners reside, showing that they are qualified electors, as appears by the registry list, or by affidavits filed in his office of persons not registered at the last general or special election, but who are qualified electors, require a petitioner to be a taxpayer whose name appears on the last assessment roll and requires him to be a qualified elector

as shown by the lists of the last general or special election or by affidavit that he is a qualified elector, and the fact that one may have failed to register for a special election does not disqualify him where he possesses the substantial qualifications and is a taxpayer and voter as indicated. Persons who appear on the assessment roll as paying taxes only in a partnership capacity are "taxpayers," within Comp. Laws, § 5007. *State ex rel. Kaufman v. Martin*, 106 Pac. 318, 319, 32 Nev. 197.

Under Revenue Law 1898, p. 346, providing that the word "person" or "persons," "taxpayer" or "taxpayers," shall be held to include firms, companies, associations, and corporations, debts due on open account to a nonresident are taxable at the domicile of the debtor, when they have arisen out of a business carried on in the taxing state, and form part of the capital of the business. *General Electric Co. v. Board of Assessors*, 46 South. 122, 123, 121 La. 116; *National Fire Ins. Co. v. Board of Assessors*, 46 South. 117, 118, 121 La. 108, 126 Am. St. Rep. 313.

Civ. Code 1901, par. 2182, authorizing in any school district the submission to the "taxpayers of the district" the question of the issuance of bonds, when read, as it must be, in connection with paragraph 2185, providing that the election shall be held, except as otherwise provided in the title, in conformity with the general election laws, and in connection with paragraph 2186, providing that the money for the redemption of the bonds shall be raised by taxation on the taxable property in the district, and, in connection with paragraph 2176, making every adult person, who is a citizen of the United States, and who has been a resident of a school district for 30 days, and who is a parent or guardian of a child of school age residing in the district, or who has paid a tax during the preceding year, entitled to vote at any school district election, etc., is not ambiguous and uncertain for failing to provide whether taxpayers include only residents of the district, or nonresidents who are taxpayers, and the persons qualified to vote at such an election are those possessing the qualifications prescribed in paragraph 2176, and the phrase "taxpayer of the district" is limited to those who pay taxes on property within the district, and the paragraph so construed is not in conflict with the organic act (Rev. St. U. S. 1878, § 1860), relating to the qualifications of voters. *Hicks v. Krigbaum*, 108 Pac. 482, 484, 13 Ariz. 237.

## TAXIMETER CAB

The term "taximeter cab" includes, as shown by the evidence, a motor cab. *Lynch v. Robert P. Murphy Hotel Co.*, 112 N. Y. Supp. 915, 916.

## TEA

As provisions, see Provisions.

"Tea" is defined to be leaves of a shrub or small tree of the genus *Thea* or *Camellia*. The shrub is a native of China or Japan. There are other kinds of tea, such as sage tea and camomile tea, etc. The latter are the restricted uses of the word. When one is asked to take a cup of milk or a cup of tea, it would not be necessary to ask what is meant. *State v. Carmody*, 91 Pac. 446, 448, 50 Or. 1, 12 L. R. A. (N. S.) 828.

## TEACHER

See Qualified Teacher; Senior Teacher.

As city officer, see Officer.

As member of learned profession, see Learned Profession.

As minister, see Minister.

Removal, see Remove—Removal.

In construing a statute, a word should not be given a limited or specialized meaning, unless such meaning is made by legislative enactment; hence, in the act of 1900 (94 Ohio Laws, p. 305), relative to the teacher's pension fund, the word "teacher," not being specifically restricted in its meaning, will comprehend within its purview such instructors as shall have spent a part of the time required in teaching in schools not supported in whole or in part by public taxation. *Venable v. Schafer*, 28 Ohio Cir. Ct. R. 202, 204.

A statute punishing any guardian of any female under the age of 18 years, or any other person to whose care such female shall have been confided, who shall carnally know her, includes a schoolteacher, and the relation of "teacher" and pupil exists as well after the child reaches home as it does in the schoolroom. It exists on Sunday as well as on a school day. *State v. Hesterly*, 81 S. W. 624, 627, 182 Mo. 16, 103 Am. St. Rep. 634.

Greater New York Charter (Laws 1901, c. 466) § 1090, provides that principals, teachers, and all other members of the teaching staff shall be appointed by the board of education, on the nomination of the board of superintendents, and that such nomination shall be made, except in case of high schools, or training schools for teachers, for the several local school board districts, and the principals, teachers, etc., shall be assigned to duty to such schools as the board shall determine, but, when practicable, teachers shall be appointed for districts in the boroughs where they reside, and that teachers and principals may be transferred from one school to another by the board, provided that a teacher shall not be transferred from a school in one borough to a school in another without his consent; and it further provides that, for all purposes affecting the transfer of teachers, the principal of the school to which it is pro-

posed to transfer a teacher shall have a seat in the board of superintendents. Section 1091, for other purposes, refers to teachers and principals as "such teacher," indicating that the word "teacher," included both classes. Held, that a principal could be transferred to a school in another borough without his consent; the word "teacher," as used in section 1090, not including a principal. *Barringer v. Board of Education of City of New York*, 125 N. Y. Supp. 540, 541, 140 App. Div. 903.

The limitation of the right to teach a public school, imposed by Ky. St. § 4503 (Russell's St. § 5692), providing that a certificate of the third class shall not entitle the holder to teach in any district reporting 55 or more pupils, includes assistant teachers and principals; and an assistant, employed in such a school under section 4366 (section 5591), authorizing the employment of an assistant holding a certificate of qualification, must have the qualifications prescribed. One who teaches in a public school when he has no license to do so cannot recover compensation. *Flanary v. Barrett*, 143 S. W. 38, 146 Ky. 712, Ann. Cas. 1913C, 370.

#### TEACHER'S PENSION

Deduction from salaries, see Taking (In Eminent Domain).

#### TEAM

##### As including harness and vehicle

Plaintiff brought replevin for a pair of horses, a buggy, and a set of harness. The answer averred that on a certain day the property was in the possession of M., who left the horses on a city street for more than three hours, without food or shelter, which constituted cruelty to the animals and a violation of an ordinance, requiring defendant, as city marshal, to take up, feed, and shelter the horses, which he did, putting them in the stable of D., who notified M. thereof, whereupon M. directed that the team be brought to him, but afterwards ordered the team to be taken back to the stable. The answer made no mention of the buggy or harness. A witness testified that he remembered the night defendant took the team and buggy. This was the only declaration tending to show defendant seized the vehicle, and there was no testimony as to the harness. Held, that the word "team," as used in the pleadings and testimony, would be treated as including the vehicle and harness, as well as the horses. *Krebs Hlop Co. v. Taylor*, 97 Pac. 44, 45, 52 Or. 627.

#### TEAM TRACK

A "team track" is described as a siding on a railroad for loading and unloading cars when freight comes in car load lots. *Chicago & E. I. R. Co. v. Chestnut Bros. (Ky.)* 89 S. W. 298, 299.

#### TEAM WORK

"Team work" means work done by a team as a substantial part of a man's business, as in farming, staging, express carrying, drawing of freight, peddling, the transportation of material used or dealt in as a business. This is clearly distinguishable from what is circumstantial to one's business, as a matter of convenience in getting to and from it, or as a means of going from place to place to solicit patronage, or to settle or make collections, or to see persons for business purposes. It is plainly distinguishable from family use and convenience, pleasure, exercise, or recreation. Two horses used by a business man in driving from his home to his place of business, in driving his family about for pleasure and occasionally used by him to make business trips, are not "work horses" within a statute exempting two work horses from execution. *Tishomingo Sav. Inst. v. Young*, 40 South. 9, 11, 87 Miss. 473, 3 L. R. A. (N. S.) 693, 112 Am. St. Rep. 454, 6 Ann. Cas. 776.

#### TEAMSTER

As laborer, see Laborer.

#### TEAR

See Ordinary Wear and Tear.

#### TECHNICAL

##### TECHNICAL ERROR

The "technical errors or defects" mentioned in the statute, for which a reversal will not be granted, mean such as do not affect a substantial right and could not in reason have changed the result. *People v. Bonier*, 72 N. E. 226, 229, 179 N. Y. 315, 103 Am. St. Rep. 880.

Under St. 1893, § 5330, declaring that on an appeal the court must give judgment without regard to "technical errors," the appellate court cannot reverse a criminal case where accused had a fair and impartial trial, though technical errors intervened; the appellate court being established to correct mistakes which deprive a party of a substantial right. *Martin v. Territory*, 78 Pac. 88, 89, 14 Okl. 598.

##### TECHNICAL RELEASE

A "technical release" is an instrument under seal or some other form of satisfaction which legally imports full payment. The difference between a "technical release" and a "satisfaction in fact" is that in one case the law regards the claim as paid and will not allow the party to deny by proof, while in the other the claim was in fact paid. *Ryan v. Becker*, 111 N. W. 426, 427, 136 Iowa, 273, 14 L. R. A. (N. S.) 329 (citing *Eastman v. Grant*, 34 Vt. 387; *Bloss v. Plymale*, 3 W. Va. 393, 100 Am. Dec. 752; *Miller v. Beck*, 79 N. W. 344, 108 Iowa, 575).

**TECHNICAL TOTAL LOSS**

"Technical total loss," as used in a marine policy, is synonymous with "constructive total loss," which takes place when the subject insured is not wholly destroyed, but its destruction is rendered highly probable, or the privation of it, though not quite irretrievable, is such that its recovery is exceedingly doubtful, or too expensive to be worth the attempt. *Murray v. Great Western Ins. Co.*, 25 N. Y. Supp. 414, 416, 72 Hun, 282 (quoting from 2 Arn. Ins. [6th Ed.] p. 951).

**TECHNICALLY VESTED**

A servient estate, which is given to a donee by will, not absolutely, with absolute power of disposition, but subject to be defeated by his death before attaining a certain age, is a "technically vested estate." *Title Guarantee & Trust Co. v. Ward*, 164 Fed. 459, 467 (citing *Vanderbilt v. Eldman*, 25 Sup. Ct. 334, 196 U. S. 490, 49 L. Ed. 563).

**TECHNICALITY**

See *Extreme Technicality*.

**TELEGRAM**

As commerce, see *Commerce*.

Transmission of, as commodity, see *Commodity*.

See, also, *Transmit—Transmission*.

A "telegram" is a message transmitted by the telegraph. *Western Union Tel. Co. v. Hill*, 50 South. 248, 163 Ala. 18, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058.

**TELEGRAPH**

Telegraphing as interstate commerce, see *Interstate Commerce*.

A "telegraph" is an apparatus or machine used to transmit intelligence to a distant point by means of electricity. *Western Union Tel. Co. v. Hill*, 50 South. 248, 251, 163 Ala. 18, 23 L. R. A. (N. S.) 648, 19 Ann. Cas. 1058.

**Telephone included**

The term "magnetic telegraph lines," as used in *Sayle's Ann. Civ. St. Tex.* 1897, art. 698, providing that corporations created for the purpose of constructing and maintaining "magnetic telegraph lines" are authorized to set their poles and other fixtures, along any of the public roads, etc., includes "telephone lines"; the latter being but another method of accomplishing the one purpose, the transmission of messages by electricity. *City of Texarkana v. Southwestern Telephone & Telegraph Co.*, 106 S. W. 915, 916, 48 Tex. Civ. App. 16 (quoting *San Antonio & A. P. Ry. Co. v. Southwestern Telephone & Telegraph Co.*, 55 S. W. 117, 93 Tex. 313, 49 L. R. A. 459, 77 Am. St. Rep. 884).

The phrase "to grant the right of way," in subsection 22 of section 11 of the charter act of cities of the first class (chapter 37, p.

84, Laws 1881; section 53, c. 122, p. 187, Laws 1903), construed with section 74 of the general telegraph act (article 8, c. 23, Gen. St. 1868), gives to cities of the first class the right to determine and designate the streets and alleys of the city which may be occupied and used by the posts and wires of telegraph companies and telephone companies. *City of Wichita v. Missouri & K. Telephone Co.*, 78 Pac. 886, 889, 70 Kan. 441.

In determining the liability of a telephone company for negligence in the transmission or delivery of a message, a telephone company will be treated as a telegraph company; "telegraph" including any apparatus for transmitting messages by means of electric signals, and a "telephone" being a "telegraph." *Rehearing, McLeod v. Pacific Telephone Co.*, 94 P. 568, denied. *McLeod v. Pacific States Telephone & Telegraph Co.*, 95 Pac. 1009, 52 Or. 22, 18 L. R. A. (N. S.) 954, 16 Ann. Cas. 1239.

There are authorities which hold that, in the construction of statutes, the word "telegraph" embraces "telephone" and that statutes concerning telegraph companies include telephone companies as well. But the Arkansas statute, declaring that "telegraph" companies shall be liable for mental anguish or suffering on account of negligence "in receiving, transmitting, or delivering messages," does not include "telephone" companies. A telephone company does not "receive, transmit, and deliver" a message in the ordinary acceptation of those words. It merely furnishes to the patron facilities for carrying on a conversation at long distance. *Southern Tel. Co. v. King*, 146 S. W. 489, 491, 103 Ark. 160, 39 L. R. A. (N. S.) 402 (citing *Northwestern Telephone Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 79 N. W. 315, 76 Minn. 334).

The Supreme Court of California, in construing section 591 of the Penal Code, which makes it a penal offense for any person to maliciously take down or injure any line of telegraph, held that the word "telegraph," as used in such section, included in its meaning "telephone." *Pol. Code Cal. § 4480*, provides that with relation to each other the provisions of the four Codes are to be construed as though parts of the same statute. Held that, under such rule and decision, *Civ. Code Cal. § 536*, which provides that "telegraph corporations may construct lines of telegraph along and upon any public road or highway \* \* \* within this state," must be construed by a federal court as including telephone corporations, and as authorizing them to construct and maintain their lines in the streets of cities and towns without first procuring the consent of the municipal authorities. *Sunset Telephone & Telegraph Co. v. City of Pomona*, 172 Fed. 829, 834, 97 C. C. A. 251.

The words "telegraph corporations," as used in *Civ. Code, § 536*, prior to its repeal and re-enactment by *St. 1905, p. 492*, authoriz-

ing telegraph corporations to construct lines along or on any public road or highway, etc., could not be construed to include telephone companies, under the rule that grants contained in public statutes must be strictly construed in favor of the public. *Sunset Telephone & Telegraph Co. v. City of Pasadena*, 118 Pac. 796, 799, 161 Cal. 265.

The words "telegraph line," in Acts 1849-50, c. 111, Code 1858, § 1316, Acts 1875, c. 142, § 8, and Acts 1885, c. 66, giving to a telegraph corporation the right to construct a "telegraph line" along any public highway or street of any city, do not include a telephone line. *Home Telegraph Co. v. Mayor and City Council of Nashville*, 101 S. W. 770, 773, 118 Tenn. 1, 11 Ann. Cas. 824.

### TELEGRAPH COMPANY

As common carrier, see Common Carrier.

As engaged in quasi public employment, see Quasi Public Employment.

As public service corporation, see Public Service Corporation.

A "telegraph company" is a quasi public corporation, private in the ownership of its stock, but public in the nature of its duties; and hence it follows, both upon reason and authority, that the failure of a "telegraph company" to promptly and correctly transmit and deliver a message received by it is a breach of a public duty imposed by operation of law. *Green v. Western Union Tel. Co.*, 49 S. E. 165, 166, 136 N. C. 489, 67 L. R. A. 935, 103 Am. St. Rep. 955, 1 Ann. Cas. 349 (citing *Cashion v. Western Union Tel. Co.*, 32 S. E. 746, 124 N. C. 459, 45 L. R. A. 160; *Landle v. Western Union Tel. Co.*, 32 S. E. 886, 124 N. C. 528; *Cogdell v. Western Union Tel. Co.*, 47 S. E. 490, 135 N. C. 431).

A "telegraph company" is a public service corporation engaged in a public utility, and in receiving, transmitting, and delivering messages should be treated as an independent principal or contracting party, and be held liable both in contract and tort, the same as other principals. *Strong v. Western Union Telegraph Co.*, 109 Pac. 910, 920, 18 Idaho, 389, 30 L. R. A. (N. S.) 409, Ann. Cas. 1912A, 55.

### Railroad company

*Kirby's Dig.* § 7947, making "telegraph companies" liable for mental anguish or suffering from negligence in the delivery of a message, applies to railroad companies doing a telegraph business. *Arkansas & L. Ry. Co. v. Stroude*, 91 S. W. 18, 19, 77 Ark. 109, 113 Am. St. Rep. 130.

### TELEGRAPH OPERATOR

A "telegraph operator" is different from a "train dispatcher," in that the operator ordinarily is not invested with any control over the running of trains, and he does not occupy the position of a train dispatcher merely because he transmits or delivers orders for the

movement of trains, so that his negligence cannot be said to be the negligence of the company. *Strotzman v. St. Louis, I. M. & S. R. Co.*, 109 S. W. 769, 779, 211 Mo. 227 (citing *McKaig v. Northern Pac. Ry. Co.*, 42 Fed. 288; *Cincinnati, N. O. & T. P. R. Co. v. Clark*, 57 Fed. 125, 6 C. C. A. 281; *Baltimore & O. R. Co. v. Camp*, 65 Fed. 952, 13 C. C. A. 233; *Oregon Short Line & U. N. R. Co. v. Frost*, 74 Fed. 965, 21 C. C. A. 186; *Price v. Detroit, G. H. & M. R. Co.*, 12 Sup. Ct. 936, 145 U. S. 651, 36 L. Ed. 843; *Slater v. Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; *Dana v. New York Cent. & H. R. R. Co.* [N. Y.] 23 Hun, 473; *Monaghan v. New York Cent. & H. R. R. Co.* [N. Y.] 45 Hun, 113; *Reiser v. Pennsylvania Co.*, 25 Atl. 175, 152 Pa. 38, 34 Am. St. Rep. 620).

### TELEGRAPH OR TELEPHONE LINES

See Line of Telegraph or Telephone Poles.

The right to maintain "a telegraph or telephone line or lines," when construed as a right appurtenant to the right to maintain the pipe lines, does not import an unlimited number of wires, but only such as may be reasonably necessary for the maintenance and operation of the pipe line. Decree (Ch. 1907) 65 A. 747, reversed. *Northeastern Telephone & Telegraph Co. v. Hepburn*, 69 Atl. 249, 251, 73 N. J. Eq. 657.

### TELEGRAPH PROPERTY

As real property, see Real Property.

## TELEPHONE

See Extension Telephone.

Service by telephone, see Service (In Practice).

Telephoning as interstate commerce, see Interstate Commerce.

See, also, Telegraph or Telephone Lines; Transmit—Transmission.

A "telephone" is a instrument by which two persons may talk to each other. *Gilpin v. Savage*, 112 N. Y. Supp. 802, 805, 60 Misc. Rep. 605.

The word "telephone" implies the transmission of intelligence, messages, or sound to a far point. *Doty v. American Telephone & Telegraph Co.*, 130 S. W. 1053, 1056, 123 Tenn. 329, Ann. Cas. 1912C, 167.

### As convenience

See Convenience—Convenient.

### As instrument alone

A franchise to a telephone company which fixes the rates for business and office use, for residence, for party line residence service, business extension telephones, and residence extension telephones, and which provides that at such time as the exchange of the company shall have in operation a specified number of telephones in the city it may increase the rates, does not contemplate in

counting the telephones that business extension telephones or residence extension telephones shall be counted as telephones, for a "telephone," when technically defined, means only the instrument itself, but, when considered with reference to the use to be made of it, it must be accompanied with the necessary apparatus for the reception and transmission of messages, and an "extension telephone" is an instrument consisting of bell, receiver, and transmitter connected with a telephone which appears numbered on the list, and is used solely through such numbered instrument without any independent connection with the switchboard. *Panhandle Telephone & Telegraph Co. v. Amarillo (Tex.)* 142 S. W. 638, 639.

The word "telephone," as used in a municipal ordinance constituting a contract between the city and a telephone company, containing a provision for furnishing to the citizens telephone service at a specified rate for business places and dwellings per annum, is used as including all improvements, equipments, and appliances essential in the operation of a telephone to make it most effective in use. *Charles Simon's Sons Co. v. Maryland Telephone & Telegraph Co.*, 57 Atl. 193, 197, 99 Md. 141, 63 L. R. A. 727.

**As telegraph**

See *Telegraph*.

**TELEPHONE BUSINESS**

As public business, see *Public Business*.

The "telephone business" consists of two well-defined branches—the long-distance system, and exchanges for the local business of cities and villages. *State ex rel. Northwestern Tel. Exch. Co. v. City of Thief River Falls*, 113 N. W. 1057, 1058, 102 Minn. 425.

**TELEPHONE COMPANY**

As public service corporation, see *Public Service Corporation*.

As quasi public corporation, see *Quasi Public Corporation*.

A "telephone company" is a common carrier of intelligence, engaged in a public service, holding itself out to the public, in consideration of certain fees exacted, as able, ready, and willing to enter into contracts which will place persons in direct communication with each other; and it may also hold itself out to render other services, such as the transmission of messages, its liability being measured by the duty assumed. *Jones v. Cumberland Telephone & Telegraph Co.*, 130 S. W. 994, 995, 140 Ky. 165.

"A 'telephone company' is a public quasi corporation when it serves the public." A city council cannot prevent the lessee of a stall in the public market from employing telephonic service, provided the rights of others are not affected and legitimate ordinances of the municipality are not disregarded. *Swayze v. City of Monroe*, 40 South. 926, 928, 116 La. 643.

A "telephonic system" is simply a system for the transmission of news. It is, perhaps, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. But relator was not entitled to mandamus against a telephone company to compel the installation of a telephone, where she admitted being a prostitute and keeper of a bawdyhouse in which she desired the telephone installed. *Godwin v. Carolina Telephone & Telegraph Co.*, 48 S. E. 636, 136 N. C. 258, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203 (quoting and adopting definition in *Commercial Union Tel. Co. v. New England Tel. & Tel. Co.*, 17 Atl. 1071, 61 Vt. 241, 5 L. R. A. 161, 15 Am. St. Rep. 893, and citing *Chesapeake & P. Telephone Co. v. Baltimore & O. Telegraph Co.*, 7 Atl. 809, 811, 66 Md. 399, 414, 59 Am. Rep. 167).

**TELEPHONE LINE**

The term "telephone line," in a resolution of the council of a city granting the right to a telephone exchange company to occupy the streets, alleys and public grounds within the city, to place therein its poles, wires, and fixtures constituting its telephone line within and through the city, refers to the line the company is at the time constructing through the country, and refers only to its long-distance line. *State ex rel. Northwestern Tel. Exch. Co. v. City of Thief River Falls*, 113 N. W. 1057, 1058, 102 Minn. 425.

The words "telephone line," in a resolution granting the right to a company to construct a telephone line within and through a city, cannot be construed to limit the grant to the construction of a single through line, to the exclusion of an exchange. *City of Vermillion v. Northwestern Tel. Exch. Co.*, 189 Fed. 289, 294, 111 C. C. A. 21.

A "telephone line" is a public utility. *St. Louis, I. M. & S. R. Co. v. Batesville & W. Tel. Co.*, 97 S. W. 660, 661, 80 Ark. 499 (citing *Joyce, Electric Lines*, § 275).

**TELEPHONE MESSAGE**

Sending a telephone message, see *Send*.

**TELEPHONE PROPERTY**

As real property, see *Real Property*.

**TELL**

An indictment for perjury, which charges that accused falsely testified that he never went to a bank and "told" the bank not to loan to a third person money to meet an obligation, etc., sets forth the perjurious matter, as against the objection that it fails to name the bank officer to whom accused made the statement; for, though the word "tell" imports oral communication, it may be employed where the communication is by writing. *People v. Bradbury*, 103 Pac. 215, 217, 155 Cal. 808 (citing *Stand. Dict.*).



**TELLER****TELLER'S CHECK**

For all practical purposes in modern mercantile transactions, a "teller's check" is but a substitute for a certified check, and much more closely resembles it than it does a bill of exchange, strictly speaking; and it is none the less a check because drawn by an executive officer of the bank upon the institution he serves. *Hannon v. Allegheny Bellevue Land Co.*, 44 Pa. Super. Ct. 266, 273.

**TELLTALES**

"Telldales" are ropes suspended from a wire across the track to give warning of a low bridge. *West v. Chicago, B. & Q. Ry. Co.*, 179 Fed. 801, 802, 103 C. C. A. 293.

"Telldale signals" are straps of leather attached to a wire extended over a railroad track to warn those working on box cars of the proximity of a "low bridge." *Koller v. Chicago, St. P., M. & O. Ry. Co.*, 129 N. W. 220, 221, 113 Minn. 173.

"It was further in evidence that there were warning ropes suspended above the track on each approach to the bridge and about 25 or 30 yards off, called 'telldales.' These ropes were intended to notify brakemen to stoop, and they were suspended at such a distance as to strike the heads of the brakemen as they passed." *Hedrick v. Southern R. Co.*, 48 S. E. 830, 831, 136 N. C. 510.

**TEMPERATE**

The word "temperate" means "moderate; showing moderation; not excessive, lavish, or inordinate." Temperate damages are such as would be a reasonable compensation for the injury, and are more than nominal damages. *Hilton v. Jesup Banking Co.*, 57 S. E. 78, 79, 128 Ga. 30, 11 L. R. A. (N. S.) 224, 10 Ann. Cas. 987 (quoting and adopting the definition in Cent. Dict.).

**TEMPORARY**

"Temporary," as used in the rule against damages to an abutting owner for a temporary street obstruction while constructing an improvement, is the opposite of "permanent," and means a period commensurate with reasonable prosecution of the work. *Lefkovitz v. City of Chicago*, 87 N. E. 58, 238 Ill. 23.

**TEMPORARY ABANDONMENT**

"Temporary abandonment" of school land, so as not to lose the rights of a purchaser, must be an abandonment continuing "no longer than the facts justified. Thus, if plaintiff abandoned the land under a well-grounded fear of death or a serious bodily injury, and the facts, if any, that justified such abandonment had continued since that

time to the present, the abandonment would be considered temporary, unless plaintiff had abandoned the land permanently." *Jones v. Wright (Tex.)* 92 S. W. 1010, 1013.

**TEMPORARY AILMENTS**

As disease, see Disease.

**TEMPORARY DAMAGES**

"Temporary damages" are such as are recoverable from time to time as they accrue. *McHenry v. City of Parkersburg*, 66 S. E. 750, 751, 66 W. Va. 533, 29 L. R. A. (N. S.) 860.

**TEMPORARY IMPAIRMENT OF POWER TO EARN MONEY**

"Temporary impairment of the power to earn money" is another expression for "loss of time." *Cincinnati, N. O. & T. P. R. Co. v. Silvers (Ky.)* 126 S. W. 120, 123.

**TEMPORARY INJUNCTION**

See, also, Injunction Pendente Lite.

A "temporary injunction" is a preliminary order of court, and granted at the outset or pending an action, forbidding the performance of threatened acts described in the complaint until the rights of the parties have been determined; and defendants must obey a temporary injunction as construed in the light of the purpose of the original suit, as shown by the complaint and the relief prayed for. *Deming v. Bradstreet*, 84 Atl. 116, 119, 85 Conn. 650.

A court or judge has no jurisdiction to grant a "temporary injunction" until the beginning of a proper action in which such order may be had. *Ex parte Sharp*, 124 Pac. 532, 533, 87 Kan. 504, Ann. Cas. 1913E, 460.

A "temporary injunction" is in effect a restraining order. *Castleman v. State*, 47 South. 647, 649, 94 Miss. 609.

A "restraining order" is an order granted to maintain the subject in controversy in statu quo until the hearing of an application for a temporary injunction, and hence is distinct from a "temporary injunction." *Ex parte Grimes*, 94 Pac. 668, 670, 20 Okl. 446.

The chief distinction between a "temporary order of injunction" and a mere "restraining order" until the application is fully heard is that the temporary order of injunction does not by its terms indicate or contemplate that a further hearing on the application is to be had before the application is finally acted upon. *State ex rel. Keefe v. Graves*, 117 N. W. 717, 718, 82 Neb. 282.

Though the terms "temporary injunction" and "restraining order" are often used synonymously, a "restraining order" is effective only until an application for an injunction shall be heard; a "temporary injunction" is a restraining order effective until the trial of the action in which it is issued. The effect, and not the name by which

an order may be called, determines to which of two classes it properly belongs. *State v. Johnston*, 97 Pac. 790, 791, 78 Kan. 615.

The only purpose of a "temporary injunction" is to maintain the status quo until plaintiff may have an opportunity for a trial on the merits. *Gillman v. Talley*, 119 N. W. 144, 145, 140 Iowa, 718.

The sole object of a "temporary injunction" being to preserve the subject of controversy in the condition in which it is when the order is made till opportunity for a full and deliberate investigation, an order to a sheriff to return articles distrained and taken in his charge is improper. *Evans v. Mayes*, 62 S. E. 207, 208, 81 S. C. 188.

### TEMPORARY INJURY

A "permanent injury" to real property, as distinguished from a temporary or continuing injury, is one of such a character, and existing under such circumstances, that it will be presumed to continue indefinitely. A "temporary or continuing injury" is one that may be abated or discontinued at any time. *Worden v. Bielenberg*, 138 N. W. 314, 315, 119 Minn. 330.

### TEMPORARY INSANITY

Drunkenness is frequently characterized by law writers as "temporary insanity." *Waldron v. Angleman*, 58 Atl. 568, 569, 71 N. J. Law, 166.

### TEMPORARY LOAN

A "temporary loan" within Const. Amend. art. 22, limiting municipal indebtedness, but providing that the adoption of the article shall not apply to temporary loans to be paid out of money raised by taxation during the year in which they are made, is one made for a temporary purpose, to be paid during the municipal year in which it is made and from taxes assessed and collected within the same year, and if such loan, though temporary in its inception, or any part thereof, is carried over into the next municipal year, it loses its temporary character and becomes a debt of the city within the inhibition of said article, limiting a municipal indebtedness to 5 per cent. of the city valuation. *Blood v. Beal*, 60 Atl. 427-431, 100 Me. 30.

### TEMPORARY OBSTRUCTION

The presence of vehicles does not constitute a "temporary obstruction" of a street, within a municipal ordinance requiring every person using a vehicle on any street to drive at the right of the center of the street, but providing that, if the street is temporarily obstructed, such person may use the traveled part thereof, regardless of which side of the center of the street such traveled part may be. *State v. Larrabee*, 115 N. W. 948, 104 Minn. 37.

### TEMPORARY PRIVILEGE

The erection of buildings for the storage of tools and machinery used in the completion of the subway requiring three or more years for such work, and also used for the generation of compressed air power, is permanent in a special sense with reference to the completion of work, and their erection and maintenance are not a "temporary privilege," granted by Laws 1892, c. 556, § 4, prohibiting the use of streets except for such temporary purposes as the proper authorities may grant to facilitate the work. *Bates v. Holbrook*, 64 N. E. 181, 183, 171 N. Y. 460.

### TEMPORARY PURPOSE

That a corporation borrowing money gave its note therefor payable in 30 days justifies the conclusion that it borrowed for "temporary purposes," for which alone, under Laws 1851, c. 122, § 5, it had power to borrow. *Leighton v. Leighton Lea Ass'n*, 131 N. Y. Supp. 561, 566, 74 Misc. Rep. 229.

### TEMPORARY RECEIVER

The term "temporary receiver" perhaps might better be confined to the mere custodian receiver, who is often appointed, upon the filing of the bill, under the general equity power of the court, in order to preserve the assets from waste until the hearing can be had which will determine whether the corporation is to be disabled or not, and its assets vested in a receiver. *Gallagher v. Asphalt Co. of America*, 58 Atl. 403, 408, 87 N. J. Eq. 441.

### TEMPORARY RESTRAINING ORDER

As injunction, see Injunction.

## TEMPTATION

"Temptation" is not always invitation. As the common law is understood, it does not excuse a trespass because there is a "temptation" to commit it, or hold property owners bound to contemplate the infraction of property rights because the "temptation" to untrained minds to infringe them might have been foreseen. A mere "temptation" is not an allurement sufficient to legally constitute an invitation to enter the premises of another. *Paolino v. McKendall*, 53 Atl. 268, 272, 24 R. I. 432, 60 L. R. A. 133, 96 Am. St. Rep. 736; *Wilmot v. McPadden*, 65 Atl. 157, 160, 79 Conn. 367, 19 L. R. A. (N. S.) 1101.

Plaintiff's intestate, a boy 7½ years old, was killed on a Sunday afternoon by the falling of a brick chimney attached to a dwelling house which was being demolished by defendants. The bricks, supporting the chimney, were left in a safe condition by defendants at the close of work on Saturday, the day before, but were removed by deceased and another child while playing on the first floor of the house without defendants' permission. The lot on which the house was situated was

not fenced. The building was left unguarded, and no means were taken to prevent persons from trespassing on the land. Held that, though defendants might have contemplated that children would be attracted to the house and that such accident might occur, they were not liable for the death of decedent, since, in the absence of a neglect of some legal duty, the duty was not imposed on them of protecting children from yielding to temptation to unlawfully enter the premises. *Willmot v. McPadden*, 65 Atl. 157, 160, 79 Conn. 367, 19 L. R. A. (N. S.) 1101 (quoting and adopting the definition in *Holbrook v. Aldrich*, 46 N. E. 115, 168 Mass. 16, 36 L. R. A. 493, 60 Am. St. Rep. 364).

## TEN BLOCKS

San Francisco Charter, art. 2, c. 2, § 1, subd. 27, as amended February 5, 1903 (St. 1903, p. 596), precluding authorization of the joint use by two or more street railways of more than "ten blocks," means ten consecutive blocks. *Platt v. City and County of San Francisco*, 110 Pac. 304, 312, 158 Cal. 74.

## TEN SUCCESSIVE

See Successive.

## TEN YEARS

See First Ten Years.

## TENANCY

See Existing Tenancies; Joint Tenancy; Landlord and Tenant; Ordinary Tenancy; Periodic Tenancy.  
Subject to tenancy, see Subject To.

### TENANCY AT SUFFERANCE

See Tenant at Sufferance.

### TENANCY AT WILL

See Tenant at Will.

### TENANCY FOR YEARS

See Tenant for Years.

### TENANCY FROM MONTH TO MONTH

See Tenant from Month to Month.

### TENANCY IN COMMON

See Tenant in Common.  
Equally as creating, see Equally.  
Equally divided as creating, see Equally Divided.  
Share and share alike as creating, see Share and Share Alike.  
See, also, Joint Tenancy.

A devise of land to testator's two daughters jointly created an estate in common and not a joint tenancy, under Rev. St. 1899, § 4600 (Ann. St. 1906, p. 2499), providing that every interest in real estate, if granted or devised to two or more persons other than executors and trustees, or husband and wife,

shall be a "tenancy in common," unless expressly declared in the grant or devise to be a joint tenancy. *Cohen v. Herbert*, 104 S. W. 84, 87, 205 Mo. 537, 120 Am. St. Rep. 772.

### TENANCY IN SEVERALTY

Share and share alike as creating, see Share and Share Alike.

## TENANT

See Cotenant; Eviction (Of Tenant); Joint Tenant; Substitution of Tenant; Subtenant.

A "tenant" is defined to be one that holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, at will, or upon sufferance. *Powers v. Ingraham* (N. Y.) 3 Barb. 576, 579.

"A 'tenant' is one who occupies the lands or premises of another in subordination to the other's title and with his assent, express or implied; but, in order to create the relation, the two elements must concur." *Francis v. Holmes*, 118 S. W. 881, 883, 54 Tex. Civ. App. 608 (quoting and adopting definition in 1 Wood, Landl. & Ten. § 1); *Alexander v. Gardner*, 96 S. W. 818, 819, 123 Ky. 552, 124 Am. St. Rep. 378 (citing Wood, Landl. & Ten. § 1; Tayl., Landl. & Ten. § 14); *Sharpe v. Mathews*, 51 S. E. 706, 707, 123 Ga. 794.

The word "tenant," in Shannon's Code, § 5093, declaring that unlawful detainer is where the defendant either by contract or an assignee of a tenant, etc., has reference to the relation of landlord and tenant, and not to the more remote meaning which the word bears when used in the expression "tenants by the curtesy," "tenants in common," and the like. *Shepperson v. Burnette*, 92 S. W. 702, 116 Tenn. 117.

Under a statute prescribing punishment of a tenant for keeping a disorderly house on leased premises, one gaining a temporary entry into a house, and using it, not for profit, but for the purpose, on the part of himself and others, during two nights and one day, of having carnal intercourse with a woman shown to have been a prostitute, is not a "tenant," but a mere trespasser. *Bates v. State*, 76 S. W. 462, 463, 45 Tex. Cr. R. 420.

In an agreement between a father and daughter, providing that the daughter continue to live in certain premises and make it a home for her sister, who lived with her, "without becoming a tenant," until further agreement between the parties, the words "without becoming a tenant" are used in a broad and colloquial sense, and have particular reference to the payment of the rent, and are not used in the strict technical sense of the word "tenant" in the expressions "tenant for life," "tenant for years," etc. *Disley v. Disley*, 75 Atl. 481, 482, 30 R. I. 366.

**Cropper distinguished**

One who takes land of another and agrees to cultivate the same and deliver to the owner one-third of the crop is a "tenant" and not a mere "cropper." A "tenant" is one who rents land and pays for it either in money or a part of the crops, or the equivalent. A "cropper" farms the land and is paid for his work in a part of the crop. *Hansen v. Hansen*, 129 N. W. 982, 983, 88 Neb. 517.

"The distinction between a tenant and a cropper is that a tenant has an estate in the land for a given time, and a right of property in the crops, and hence makes the division thereof between himself and the landlord in case of an agreement upon shares, while a cropper has no estate in the land, nor ownership of the crops, but is merely a servant, and receives his share of the crops from the landlord, in whom the title is." *Taylor v. Donahoe*, 103 N. W. 1099, 1100, 125 Wis. 513.

**Lodger distinguished**

Ordinarily the landlord supplies a lodger with furnished rooms, the care and occupation of which the landlord has; the "lodger" merely having the use of rooms without the exclusive possession, while the "tenant" has exclusive possession. *Mathews v. Livingston*, 85 Atl. 529, 531, 86 Conn. 263, Ann. Cas. 1914A, 195.

**As occupant of land**

See Occupant—Occupier.

**TENANT AT SUFFERANCE**

"At common law a 'tenancy at sufferance' was created when a person came into possession of land lawfully and held over wrongfully after his estate had ended. The tenancy was of a most shadowy character, and the landlord could re-enter and bring ejectment for possession without the necessity of prior demand or notice to quit." *Wolfer v. Hurst*, 82 Pac. 20, 47 Or. 156, 8 Ann. Cas. 725.

An "estate at sufferance" is where one comes into possession of land by lawful title, but keeps it afterwards without title, as where a lessee for a year holds after the term expires without any fresh lease from the owner. *Cook v. Howard*, 117 Pac. 320, 59 Or. 372. See, also, *Sharpe v. Mathews*, 51 S. E. 706, 708, 123 Ga. 794 (citing *Godfrey v. Walker*, 42 Ga. 562, 575; *Willis v. Harrell*, 45 S. E. 794, 118 Ga. 906).

"A 'tenancy at sufferance' arises when a man comes into possession lawfully, but holds over wrongfully after the determination of his interest, differing in this respect from a 'tenancy at will,' where the holding is by the landlord's permission." One who enters into the possession of land under a deed, claiming in good faith the land as his own, cannot be summarily evicted from the premises as a "tenant at sufferance." *Sharpe v. Mathews*, 51 S. E. 706, 708, 123 Ga. 794

(quoting and adopting definition in 1 Tayl. Landl. & Ten. [9th Ed.] § 64).

A "tenancy by sufferance" is where a person who has originally come in possession by a lawful title holds such possession after his title has determined. *J. W. Reccius & Bro. v. Columbia Finance & Trust Co.*, 86 S. W. 1113, 120 Ky. 478 (quoting and adopting the definition in *Mendel v. Hall*, 76 Ky. [13 Bush] 232, and *Irvine v. Scott*, 3 S. W. 163, 85 Ky. 262).

A "tenancy at sufferance" arises where the tenant wrongfully holds over after his term, differing from a tenancy at will, where the possession is by permission of the landlord. *Thompson v. Baxter*, 119 N. W. 797, 798, 107 Minn. 122, 21 L. R. A. (N. S.) 575.

An "estate at sufferance" is created by the laches of the owner or landlord, and his assent, express or implied, that the tenant might continue in possession, or the acceptance of rent, converts an estate at sufferance into an estate at will, or a tenancy from year to year. *Powers v. Ingraham* (N. Y.) 3 Barb. 576, 579 (citing *Rowan v. Lytle* [N. Y.] 11 Wend. 616).

A vendor, retaining possession after performance by the purchaser, is not only subject to ejectment, but is liable for damages; and he does not, by continuing in possession, become by that act itself a "tenant by sufferance." *Teller v. Schulz*, 108 N. Y. Supp. 325, 327, 123 App. Div. 883.

Where a lease is made for a term of one year ensuing, with the privilege of continuing the lease from year to year at the same terms at a fixed monthly rental, it creates a lease for one year with the privilege of extending it for one more year, and after that time, if the lessee holds over without a written extension, though the monthly rental is paid, the lessee under Laws 1906, p. 126, c. 5441, § 4, is a "tenant by sufferance," and has no right to hold the leased premises after notice terminating the lease. *Brown v. Markham*, 48 South. 39, 42, 56 Fla. 202.

A "tenant by sufferance" has no estate or title, but only a naked possession, without right and wrongfully, stands, in no privity to the landlord, at common law is not liable for rent and is not entitled to notice to quit, and his continued possession is due wholly to the forbearance of the landlord in not evicting him, and no contractual relation, apart from statute, arises out of such possession. *Benton v. Williams*, 88 N. E. 843, 844, 202 Mass. 189 (citing *Warren v. Lyons*, 25 N. E. 721, 152 Mass. 310, 9 L. R. A. 353; *Edwards v. Hale*, 91 Mass. [9 Allen] 462; *Haynes v. Aldrich*, 31 N. E. 94, 133 N. Y. 287, 28 Am. St. Rep. 636; *Delano v. Montague*, 58 Mass. [4 Cush.] 42).

**TENANT AT WILL**

Where lands or tenements are let by one man to another, to have and to hold to him

at the will of the lessor, by force of which lease the lessee is in possession, in this case the lessee is called "tenant at will," because he hath no sure or certain estate; for the lessor may put him out at what time it pleaseth him. Such tenant was not entitled to notice to quit, but the law gave him the ripened corn which he had sown, and free entry, egress, and regress to cut and carry it away. This tenancy at will was attended with so many inconveniences that the courts in England early raised an implied contract for a year, and added that the tenant could not be removed at the end of the year without six months' previous notice. Tenancies at will there are held to be estates from year to year merely for the sake of notice to quit. As to every other purpose they are regarded as mere tenancies at will. Where a person enters into possession of the land of another with his assent, under a contract to purchase the same, the vendor may maintain ejectment against him, after default in either of the payments stipulated in the contract, without the previous service of a notice to quit. *Powers v. Ingraham* (N. Y.) 3 Barb. 576, 579 (citing *Rising v. Stannard*, 17 Mass. 282; *Ellis v. Paige* [Mass.] 1 Pick. 43; *Phillips v. Covert* [N. Y.] 7 Johns. 1; *Bradley v. Covell* [N. Y.] 4 Cow. 349; *Jackson ex dem. Wood v. Salmon* [N. Y.] 4 Wend. 327).

"An 'estate at will' is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor." Its definition has been so extended as to also include estates at the will of the lessee. Where an oil and gas lease did not state the time in the granting clause for the lease to run, but the habendum clause recited that the lessee, his heirs and assigns, were to hold the premises for 2 years and as long thereafter as oil or gas was found in paying quantities, not exceeding in whole 25 years, and no oil or gas was found within the 2 years, the lease terminated absolutely at the end of 2 years. *Brown v. Fowler*, 63 N. E. 76, 78, 65 Ohio St. 507 (quoting and adopting the definition in 4 Kent, Comm. 110). See, also, *Wiggin v. Woodruff* (N. Y.) 16 Barb. 474, 478 (citing 4 Kent, Comm. 110).

"Where one goes into possession of land under an invalid lease, his tenancy, at its inception, is a tenancy at will." *Israelson v. Wollenberg*, 116 N. Y. Supp. 626, 627, 63 Misc. Rep. 293 (quoting and adopting definition in 24 Cyc. p. 1039).

Possession under an invalid conveyance or contract of sale creates a tenancy at will, and where a tenant goes into possession under an invalid lease his tenancy at its inception is merely a "tenancy at will." A "tenancy at will" is an estate which simply confers a right to the possession of the premises leased for such indefinite period as both parties shall determine such possession shall continue. The estate may arise by implication, as well as by express words. *Tate v.*

*Gainnes*, 105 Pac. 193, 194, 25 Okl. 141, 26 L. R. A. (N. S.) 106 (quoting and adopting definition in *Rogers v. Hill*, 64 S. W. 536, 3 Ind. T. 562; *Cunningham v. Holton*, 55 Me. 33, 36).

A "tenancy at will" is created where tenements are let by one to another, to have and to hold to him at the will of the lessor by force of which lease the lessee is in possession. *Stafford v. Adair*, 57 Vt. 63, 65 (adopting definition in *Coke on Littleton*, § 63; 4 Kent, Comm. 382; 1 Hill. Real Prop. 382).

Under Rev. St. 1899, § 4110, providing that all verbal contracts for the leasing of buildings in cities shall be held to be tenancies from month to month, and may be terminated by either party on a written notice, a tenant under a verbal lease for 11 months of city property is a "tenant at will." *Gerhart Realty Co. v. Welter*, 83 S. W. 278, 279, 108 Mo. App. 248.

An instruction that, where one rents from another without any definite time for duration of possession, the landlord may terminate the tenancy by reasonable notice to quit, and that a "tenancy at will" is where one person lets land to another to hold at the will of the landlord, etc., sufficiently states that, to constitute a tenancy at will, there must not only be a tenancy for an indefinite time, but it must be understood to be subject to the will of the landlord, and such instruction is not subject to criticism on the ground that the statute provides that a tenancy shall be understood to be for one year, unless it is stipulated to be for a shorter term. *Laurens Telephone Co. v. Enterprise Bank*, 72 S. E. 878, 881, 90 S. C. 50.

A lease for a definite and permissible term, but which reserves to the lessee an option to terminate it before the expiration of the term does not create a mere "tenancy at will," within the operation of the rule that an estate at the will of one party is equally at the will of the other. *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 807, 72 C. C. A. 213.

The characteristics of a "tenancy at will" are uncertainty respecting the term and the right of either party to terminate it by proper notice, and these features must exist, whether the tenancy be express or by implication of law. *Thompson v. Baxter*, 119 N. W. 797, 798, 107 Minn. 122, 21 L. R. A. (N. S.) 575.

"A 'tenancy at will' is essentially indeterminate by its own terms. It will not end at any certain time by its own mere force." *J. W. Reccius & Bro. v. Columbia Finance & Trust Co.*, 86 S. W. 1113, 120 Ky. 478.

Where parties leased by parol from a brewer certain premises, they to remain as long as they wanted, and the rental to be determined by the number of barrels of beer purchased from the lessor, and to be

payable just as the beer bill was payable, they were "tenants at will." *Lyons v. Philadelphia & R. R. Co.*, 58 Atl. 924, 925, 209 Pa. 550.

The continued occupation of a tenant after the expiration of his term with the knowledge and consent of his landlord and the payment and receipt of rent at the same rate and upon the same rent days as were required by the lease is evidence sufficient to show an agreement for "tenancy at will." A possession recognized by the parties as based upon such stated rent payments, is ordinarily inconsistent with a mere occupancy devoid of any substantial right on the part of the tenant, which characterizes a tenancy by sufferance. *Benton v. Williams*, 88 N. E. 843, 844, 202 Mass. 189.

"A 'tenancy at sufferance' arises when a man comes into possession lawfully but holds over wrongfully after the determination of his interest, differing in this respect from a 'tenancy at will,' where the holding is by the landlord's permission." *Sharpe v. Mathews*, 51 S. E. 706, 708, 123 Ga. 794 (quoting and adopting definition in 1 Tayl. Landl. & Ten. [9th Ed.] § 64).

#### TENANT BY THE CURTESY

See Curtesy.

#### TENANT BY ENTIRETY

See Entirety (Estate by).

As freeholder, see Freeholder.

As owner, see Owner.

As tenant in common, see Tenant in Common.

#### TENANT FACTORY

Labor Law (Laws 1897, p. 482, c. 415) art. 6, § 86, as amended by Laws 1907, p. 1049, c. 490, requires the owner, agent, or lessee of a factory to provide in each work-room thereof sufficient ventilation and make such persons otherwise liable to a penalty. Section 94, as added by Laws 1906, p. 303, c. 178, and amended by Laws 1908, p. 1217, c. 426, § 2, provides that the term "owner" shall mean the owner of the freehold or the lessee, and defines the term "tenant factory" as a building, separate parts of which are occupied by different persons, and one or more of which parts is so used as to constitute a factory, and makes the owner of such tenant factory responsible for the non-observance of section 86, and provides that the lessee shall permit the owner to enter the premises to comply with the law. Held, that where the owner of a building leases the lower floor under a lease requiring the tenant to observe such regulations, and the latter partitions the floor, puts in workbenches, stoves, etc., thereby creating poor ventilation, the owner is personally liable, though he did not create the condition, and though the tenant may be also liable. *People ex rel. Williams v. Eno*, 119 N. Y. Supp. 600, 602, 134

App. Div. 527. See, also, *Minsky v. Weller*, 116 N. Y. Supp. 628, 629, 63 Misc. Rep. 244.

#### TENANT FOR YEARS

See Estate for Years.

#### TENANT FROM MONTH TO MONTH

A "tenancy from month to month" arises where no definite time is agreed upon and the rent is fixed at so much per month, and is terminable at the expiration of any period for which rent has been paid. *Thompson v. Baxter*, 119 N. W. 797, 798, 107 Minn. 122, 21 L. R. A. (N. S.) 575. See, also, *Brill v. Carsley*, 84 Pac. 57, 58, 2 Cal. App. 331.

Where one goes into possession of land under an invalid lease and pays a monthly rent, he becomes a "tenant from month to month." *Israelson v. Wollenberg*, 116 N. Y. Supp. 626, 627, 63 Misc. Rep. 293 (citing 24 Cyc. p. 1034, B, 2; *Id.* p. 1035, b).

Under Rev. St. 1899, § 4110, providing that all verbal contracts for the leasing of buildings in cities shall be held to be tenancies from month to month, and may be terminated by either party on a month's written notice, a verbal lease for 11 months of city property constitutes a "tenancy from month to month," which may be terminated by the landlord on 30 days' notice. *Gerhart Realty Co. v. Welter*, 83 S. W. 278, 279, 108 Mo. App. 248.

Under Rev. St. 1899, § 4110 (Ann. St. 1906, p. 2234), declaring an agreement for the occupation of a house or other building in a city not made in writing to be a "tenancy from month to month," and permitting either party to terminate it on one month's notice, a tenant from month to month who vacates without giving one month's notice is liable for the rent for the succeeding month. *Sessinghaus v. Knoche*, 118 S. W. 104, 106, 137 Mo. App. 323.

Where a tenant occupied a tenement at a certain rental per month, under a verbal agreement, he was a "tenant from month to month," under Rev. St. 1899, § 4110 (Ann. St. 1906, p. 2234), providing that all agreements for the leasing or occupation of tenements in cities, not made in writing and signed by the parties or their agents, shall be deemed tenancies from month to month. *Haumueller v. Ackermann*, 130 S. W. 91, 92, 150 Mo. App. 141.

#### Tenancy by the month distinguished

"A 'tenancy from month to month,' which may be determined on notice, is said to be in the nature of a tenancy at will. It is created by agreement, or it may be implied from the manner in which the rent is paid. A lease for an indefinite term with monthly rent reserved creates a tenancy from month to month. It is a continuing one, and not a new tenancy, by the renewal at the beginning of each month." In unlawful detainer,

where a tenancy is by the month, a definite period, as distinguished from a tenancy for an indefinite period, as from month to month, no notice to quit is necessary, but a demand for possession and refusal to renew such monthly tenancy; and if the ground of the action be for a breach of contract to pay rent, demand for the rent at the time and place stipulated are conditions precedent to right of such action. *Bennett v. Hollinger*, 66 S. E. 502, 66 W. Va. 385 (citing 24 Cyc. p. 1024; 1 McAdam, Landl. & Ten. § 40).

### TENANT FROM YEAR TO YEAR

"Tenancies from year to year" by implication are the results of judicial legislation as a measure of equity and sound policy. *Griswold v. Town of Branford*, 68 Atl. 987, 989, 80 Conn. 453.

"Tenancies from year to year" grew at an early date by judicial construction out of the old tenancies at will, to obviate the difficulties of which the courts raised an implied lease for a certain period, and ingrafted upon it a rule of law that the tenancy could not be terminated, even at the end of the period, without previous notice. Such tenancy could arise by express contract, while, upon the other hand, it might have arisen by implication; as where a tenant held over after the expiration of a lease with the consent of the landlord and continued to pay a periodical rental, the law raised another term equivalent to the period of payment. These tenancies were determinable by notice, the length of time of which to be given was according to whether the tenancy was strictly from year to year or less, as from quarter to quarter, or month to month, and the like. The right to determine the tenancy by notice was an inseparable incident of the holding, and was exercisable by either the landlord or the tenant, being for the mutual benefit of both; but the parties to such a tenancy could alter the notice necessary to determine it, and could agree to a notice of less duration or period, or they might have waived it entirely by a writing under their hands. *Wolfer v. Hurst*, 82 Pac. 20, 21, 47 Or. 156, 8 Ann. Cas. 725.

A lease of land for one year, with the privilege of continuing it from year to year so long as both parties may agree, creates a "tenancy from year to year." *Hatfield v. Lawton*, 95 N. Y. Supp. 451, 108 App. Div. 113.

"An agreement to pay rent is an essential element of a 'tenancy from year to year,' and the times at which it is payable must have reference to a yearly holding, such as by the year, quarterly, or some aliquot part of a year." A tenant's holding over and paying monthly rent beyond the term of a lease for a year relating to urban premises, in which lease rent is reserved by the month and is payable at monthly periods, does not alone

imply renewal by the year, but a renewal of the tenancy by the month is implied. *Kaufman v. Mastin*, 66 S. E. 92, 93, 66 W. Va. 99, 25 L. R. A. (N. S.) 855 (quoting and adopting statement in Washb. Real Prop. § 798).

### TENANT IN COMMON

Ouster by tenant in common, see Ouster.

"Tenants in common" are not privies. "They do not claim under each other. They may claim their several titles from entirely different sources. In this respect they differ from joint tenants and coparceners." As said in *Co. Litt.*, "tenants in common are they which have lands or tenements in fee simple, fee tail, or for terms of life, etc., and they have such lands or tenements by several titles, and not by a joint title; and none of them know of this several, but they ought by law to occupy these lands or tenements in common." *Allred v. Smith*, 47 S. E. 597, 599, 135 N. C. 443, 65 L. R. A. 924.

Plaintiff and defendant contracted to purchase lands, and in order to complete the purchase caused the lands to be conveyed to parties who advanced the purchase price; it being understood between plaintiff and defendant and such parties that the lands should be reconveyed to plaintiff on repayment of the advances, and it being agreed between plaintiff and defendant that each should have an equal share in the lands, and each contribute one-half to the moneys paid or to be paid. Subsequently plaintiff notified defendant that, in case he did not meet his portion of the amount necessary to complete the payment of the advances, plaintiff would make the payment, and refuse to recognize any claim on the part of defendant. Defendant failed to make any payment, and plaintiff sued to quiet title. Held, that plaintiff and defendant were "tenants in common," and plaintiff was not entitled to enforce a forfeiture, and defendant was entitled to a decree declaring him to be owner of an undivided one-half interest in the lands, on the payment of one-half of the purchase price and any other sums plaintiff might have paid, with interest. *Anderson v. Snowden*, 87 Pac. 356, 358, 44 Wash. 274, 120 Am. St. Rep. 998.

Civ. Code, § 683, declares that a joint interest is one owned by several persons in equal shares, acquired by a single will or transfer, when expressly declared to be a joint tenancy; and section 686 provides that every interest created in favor of several persons in their own right is an interest in common, unless declared in its creation to be a joint interest. Held that, where a note and mortgage were executed in favor of several persons, they held as "tenants in common," so that on the death of one the entire title did not vest in the others by right of survivorship. *Conde v. Dreisam Gold Min. & Mill. Co.*, 86 Pac. 825, 828, 3 Cal. App. 583.

A lessor and lessee under a cropping contract are "tenants in common" in the crop,

and if the lessee mortgages his interest, the mortgagee is subrogated only to the lessee's rights and interest, and to the extent of his mortgage is a tenant in common with the lessor, so that, in order to claim as against the lessor, the mortgagee must fulfill the lessee's contract. *Abernethy v. Uhlman*, 93 Pac. 936, 938, 52 Or. 359.

A widow, to whom dower has been assigned and set off by metes and bounds, is not a "tenant in common," "joint tenant," or "coparcener" with the owner of the fee, within Gen. Laws 1909, c. 330, § 4, authorizing joint tenants, coparceners, and tenants in common to sue for partition, since her estate is a life estate in severalty in the entire premises within the metes and bounds, and she may not sue for partition. *Newell v. Willmarth*, 76 Atl. 433, 30 R. I. 529, 19 Ann. Cas. 807.

Plaintiff, who resided on a farm, contracted to let defendant occupy free of rent one of the tenement houses on the farm and carry on the same for a term of years. Each party was to furnish certain things for the farm, and each have produce for his family use without accounting for it. Defendant, according to plaintiff's claim, was to sell everything produced and divide the profits with plaintiff each month, and according to his own claim the products were to be divided; each party selling his half. Held, that plaintiff and defendant were tenants in common of the products of the farm. *Mead v. Owen*, 67 Atl. 722, 723, 80 Vt. 273, 13 Ann. Cas. 231 (citing *Aiken v. Smith*, 21 Vt. 172; *Frost v. Kellogg*, 23 Vt. 308; *Willmarth v. Pratt*, 56 Vt. 474; *Willard v. Wing*, 39 Atl. 632, 70 Vt. 123, 67 Am. St. Rep. 657; *Sowles v. Martin*, 56 Atl. 979, 76 Vt. 180; *Hunt v. Rublee*, 58 Atl. 724, 76 Vt. 448).

*Burns' Ann. St. 1901*, § 3341, enacts that all conveyances and devises made to two or more persons shall be construed to create estates in common and not in "joint tenancy," unless it shall be expressed therein that the grantees or devisees so hold the same in joint tenancy and to the survivor of them, or it shall manifestly appear from the terms of the instrument that it was intended to create a "joint tenancy." Testator's will gave his wife his lands for life, and recited that at the decease of the wife testator desired that the lands "be owned equally and jointly" by his children, or, in case of the decease of any of the children, "his or her share to descend to the heirs of their bodies, if any, and, if not, to those surviving." Held, that the estate granted the children was a "tenancy in common." *Taylor v. Stephens* (Ind.) 72 N. E. 609, 611; *Id.*, 74 N. E. 980, 983, 165 Ind. 200.

Though parties who had joined in the building of a telephone line, each of the parties building a certain section, were not strictly and technically "tenants in common," their

rights in and relationship to the property were so analogous to the rights of tenants in common in the property held in common that one of them was entitled to the same relief against the others as one cotenant would be entitled to against another cotenant seeking to interfere unlawfully with the legitimate use and enjoyment of the common property. *Hancock v. Tharpe*, 60 S. E. 168, 169, 129 Ga. 812.

Where a grantor conveys the fee in land to himself and others, he becomes a "tenant in common with the grantee." *Green v. Cannady*, 57 S. E. 832, 835, 77 S. C. 193.

Under Gen. St. 1882, §§ 2035-2037, providing that the real and personal property of a married woman shall be her separate property, and giving her power to convey and devise the same, and giving her a right to contract, where a grant is made to a husband and wife in the absence of any express intention of conveying the whole to the survivor, they become "tenants in common." *Green v. Cannady*, 57 S. E. 832, 834, 77 S. C. 193 (quoting the definition in 1 *Sharswood's Blackstone*, 181).

#### Community property

Community property undisposed of by a decree of divorce is thereafter held by the divorced parties as "tenants in common." *Tabler v. Feverill*, 88 Pac. 994, 996, 4 Cal. App. 671.

#### Joint tenants distinguished

Under the statute of Arkansas, every interest in real estate granted or devised to two or more persons is deemed to be a tenancy in common, unless expressly declared to be a joint tenancy. *Lester v. Kirtley*, 104 S. W. 213, 216, 83 Ark. 554.

#### As owner

- See Owner.

#### As privy

See Privy—Privy.

#### Tenant by entirety

Where a husband and wife hold as tenants by the entirety, a divorce operates to dissolve the estate by the entirety, after which they hold as "tenants in common." *Hayes v. Horton*, 81 Pac. 386, 387, 46 Or. 597. *Contra*, *Alles v. Lyon*, 66 Atl. 81, 83, 216 Pa. 604, 10 L. R. A. (N. S.) 463, 116 Am. St. Rep. 791, 9 Ann. Cas. 137.

#### Water right

To constitute a "tenancy in common" in a water right there must be a right to unity of user of the water, and if such right is destroyed the common tenancy ceases to exist. *Norman v. Corbley*, 79 Pac. 1059, 1060, 32 Mont. 195; *City of Telluride v. Davis*, 80 Pac. 1051, 1052, 33 Colo. 355, 108 Am. St. Rep. 101.



**TENANTABLE**

See Untenantable.

**TEND**

The use of the word "tend" does not contemplate conjecture. It contemplates that the testimony has a tendency to prove the allegations of the complaint, and not some other theory inconsistent therewith. *Shaw v. New Year Gold Mines Co.*, 77 Pac. 515, 516, 31 Mont. 138.

An instruction that certain circumstances tended to establish accused's guilt, but were not alone sufficient to warrant a conviction, was not on the weight of the evidence, but was a statement that the circumstances might be considered in determining the issue; the word "tend" meaning to move in a certain direction, to be directed as to an end, object, or purpose. *Hogue v. State*, 124 S. W. 783, 785, 93 Ark. 316.

**TENDING**

Under Code Cr. Proc. 1895, art. 781, providing that a conviction cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect accused with the offense, and article 769, declaring that, in a prosecution for seduction, no conviction can be had unless the testimony of prosecutrix is corroborated by other evidence tending to connect accused with the offense, a prosecutrix is sufficiently corroborated when there are any facts that tend to show that accused committed the offense, and it is error to attempt to lay down a rule as to what particular issues of the case shall be corroborated; the word "tending," meaning to be directed as to any end, object, or purpose. *Nash v. State*, 134 S. W. 709, 713, 61 Tex. Cr. R. 259.

**TENDING TO A BREACH OF THE PEACE**

Under Consolidation Act (Laws 1882, c. 410) § 1458, declaring that any threatening or insulting behavior in a public place that tends to a breach of the peace, constitutes disorderly conduct, the words "tending to a breach of the peace" mean such behavior on the part of one which might be resented either forcibly or by loud and boisterous language, regardless of what action is in fact taken by those who are subjected thereto; and the offense is committed by a physical interference with the complainant leaving an elevator, by an assault by jostling complainant with intent to commit robbery from the person, although the fact of the robbery be in doubt. *People v. Cohen*, 136 N. Y. Supp. 163, 165.

**TENDER**

As car, see Car.

As freight car, see Freight Car.

**TENDER**

See Legal Tender; Valid Tender.

"Tender" is an offer by a debtor or other person, who is under an obligation, to pay such debt or to perform such obligation, the actual payment or performance being prevented, by the refusal of the creditor or person entitled to performance, to accept the same. *Cape Fear Lumber Co. v. Small*, 66 S. E. 880, 882, 84 S. C. 434.

"To constitute a 'tender,' there must be a definite offer to pay on the one hand and an unqualified refusal to accept on the other." *Supreme Tent, Knights of Maccabees of the World, v. Fisher*, 90 N. E. 1044, 1046, 45 Ind. App. 419.

Readiness to tender is not equivalent to "tender." *Cooley v. Bergstrom*, 60 S. E. 220, 221, 3 Ga. App. 496.

A "tender" of an uncertified check is sufficient, if it is not objected to on the ground that it is uncertified. *Bunte v. Schumann*, 92 N. Y. Supp. 806, 807, 46 Misc. Rep. 593.

Where, in an action to recover the purchase price of land sold under parol agreement repudiated by the vendor, the court instructed that it was a question for the jury whether plaintiff did ever "tender" the full amount, and that if he did not he was not entitled to recover, plaintiff, not having asked for more specific instructions, could not complain of the court's use of the word "tender." "It is doubtless true that this word, as commonly used in such a connection, imports nothing more than the manifestation of a present readiness, willingness, and ability to perform, provided the other party will perform on his part." *Cave v. Osborne*, 79 N. E. 794, 795, 193 Mass. 482 (citing *Cook v. Doggett*, 84 Mass. [2 Allen] 439, 441).

**Actual or manual production**

In order to constitute a valid "tender," there must be actual ability, accompanied by immediate physical possibility of reaching out and laying hold of the thing to be delivered and the making of a manual proffer thereof, or of placing it in such a position that the person to receive it may lay hold of it if he chooses. *Greenwood v. Watson*, 171 Fed. 619, 621, 96 C. C. A. 421.

Actual production of money is essential to a "tender." *Bolton v. Amsler*, 95 N. Y. Supp. 481.

A sufficient "tender" imports, not only readiness and ability to perform, but actual production of the thing to be delivered. *Leask v. Dew*, 92 N. Y. Supp. 891, 893, 102 App. Div. 529 (quoting and adopting definition in *Eddy v. Davis*, 116 N. Y. 247, 22 N. E. 362); *Alpern v. Farrell*, 117 N. Y. Supp. 706, 709, 133 App. Div. 278.

**Deposit necessary**

The Civil Code has not changed the definition of the term "tender." That term still

means what is always meant, an offer of performance. The Code has substituted the requirement of deposit of the thing tendered, at the risk of the creditor, in place of the common-law requirement that a "tender" must be kept good by a readiness to pay and the payment into court. The Code has also made this further innovation on the common law with respect to the effect of a "tender": That a mere "tender" of the debt is no longer sufficient, as at common law, to extinguish a mortgage or pledge of property, but to have that effect the "tender" must be kept good by a deposit of the thing tendered subject to the order of the creditor. *Brown v. Smith*, 102 N. W. 171, 174, 13 N. D. 580.

#### Equivalent to payment

"For the purpose of avoiding \* \* \* the loss of any rights or privileges, the 'tender' is the exact equivalent of payment, and it does not have to be repeated. \* \* \* Tender, when rejected, operates as payment." *O'Donnell v. Chamberlin*, 91 Pac. 39, 41, 36 Colo. 395, 10 Ann. Cas. 931 (quoting 8 Words and Phrases, pp. 69, 110). See, also, *Leet v. Armbruster*, 77 Pac. 653, 143 Cal. 663.

"Tender" is not payment; it is merely an offer to pay. *Silver v. Moore*, 84 Atl. 1072, 1073, 109 Me. 505.

#### Liability admitted

"A 'tender,' when made, is an admission of an amount due equal to the sum tendered, and while a verdict may be rendered for more than the amount tendered, it cannot be rendered for less. And this, too, although the tender be defective, or even be offered in a case where it cannot be legally made or pleaded, and for such reasons be held unavailable to save costs." Where, in a suit to enforce a mechanic's lien, the owner of the property tenders a sum less than that claimed, such tender is an admission of the validity of the lien to that extent, and the court should decree its enforcement for the amount tendered, even though it is adjudged that the lien is invalid. *Wm. Cameron & Co. v. Campbell*, 141 Fed. 32, 36, 72 C. C. A. 520 (quoting and adopting definition in *Denver, S. P. & P. R. Co. v. Harp*, 6 Colo. 420).

A "tender" in an answer or during the progress of the trial, does not necessarily admit the validity of the plaintiff's cause of action. *Craw v. Abrams*, 94 N. W. 639, 640, 68 Neb. 546.

#### Mutual promises

In a case of a "tender," the money must be offered unconditionally, and the offer is an acknowledgment that it is absolutely due; but in case of concurrent promises, or where it is payable upon the performance of some act by the opposite party, no such unconditional offer of tender is required. *Douglas v. Hustead*, 65 Atl. 670, 673, 216 Pa. 292.

The "tender" of purchase money by a purchaser is not absolute and unconditional, so that he can under no circumstances withdraw it, but is conditional upon the vendor carrying out the terms of the contract on his part, and a tender of money is not invalid because coupled with a demand for the performance of a reciprocal duty enjoined by law upon the person to whom the tender is made. *Alpern v. Farrell*, 117 N. Y. Supp. 706, 709, 133 App. Div. 278.

#### Unconditional offer necessary

"A 'tender' is an offer by a debtor, or other person who is under an obligation, to pay such debt, or perform such obligation; the actual payment or performance being prevented by the refusal of the creditor, or person entitled to perform it, to accept the same." An offer by a guarantor to pay an overdue note, if the holder wishes him to do so, accompanied by a display of a sufficient amount of money for the purpose, does not necessarily amount to such a "tender" of payment as will release him from liability, although the creditor says that he prefers the note to the cash. The offer is made contingent upon the creditor's desiring him to make the payment. *Crane v. Renville State Bank of Renville, Minn.*, 85 Pac. 285, 286, 73 Kan. 287.

#### Offer synonymous

The word "offer" is frequently used by courts and text-writers as synonymous with "tender," and it may be properly so used with reference to articles capable of manual delivery and actually produced. But with respect to heavy articles of merchandise, situated at a distance from the place to which they must be transported, if restored to the vendor, the phrase "offer to return" is more commonly and aptly applied to express a willingness, or to make a proposal to rescind the contract and return the goods. In order to work a rescission, it is not sufficient for the purchaser, who has taken delivery of the goods at the vendor's place of business, to give notice to the vendor that he holds the goods subject to his order, or that the goods are at a designated place subject to his disposal. The goods must be returned to the place where accepted, unless, upon an "offer to return," such offer is refused by the vendor. *Mundt v. Simpkins*, 115 N. W. 325, 326, 81 Neb. 1, 129 Am. St. Rep. 670 (quoting and adopting definition in *Milliken v. Skillings*, 36 Atl. 77, 89 Me. 180).

#### Tender of bill of exceptions

Where, on the day limited, appellant filed a purported bill of exceptions, consisting of the stenographer's notes of a former trial of the case, this was no "tender" of a bill of exceptions, within the meaning of the Code, and the court could not, on a subsequent day, give leave to file a bill of exceptions. *City of Catlettsburg v. May*, 131 S. W. 15, 16, 140 Ky. 367.

**Tender of deed**

To constitute a valid "tender" of a deed, a deed duly executed must be produced by the vendor to the vendee, so that the vendee may see that it is regular in form, and that it conveys the estate he bargained for. Where the agent of a vendor of land states to the vendee that he has in his pocket a deed of the vendor, but does not produce it and give the vendee an opportunity to examine it, it is not a sufficient "tender." *Leferts v. Dolton*, 66 Atl. 527, 217 Pa. 299, 118 Am. St. Rep. 913.

**Tender of freight**

To entitle a shipper to the statutory penalty for refusal to receive freight for shipment, it is not enough to constitute a "tender" that he place the freight on the carrier's platform or simply asking the agent when the freight can be shipped, but there must be an actual tender, though it is not essential that any particular language be used, but it is sufficient if the language amount in common understanding to a tender and refusal. *Wampum Cotton Mills v. Carolina & N. W. Ry. Co.*, 64 S. E. 586, 587, 150 N. C. 608.

Where a shipper placed lumber on a car with the carrier's consent, and demanded a bill of lading, which was refused, and went to the agent of the carrier several times and asked if he had shipped the car load, and he said he had not, and plaintiff refused to unload the car, there was a tender and refusal to ship on each day from the time the goods were placed in the car until they were finally shipped. *Garrison v. Southern Ry. Co.*, 64 S. E. 578, 583, 150 N. C. 575.

**Tender of judgment**

Under Revisal 1905, § 860, authorizing a "tender of judgment," a tender must be of a judgment against all defendants, and must be made in behalf of all of them. A tender by one of two defendants against whom a judgment has been rendered before a justice of the peace, made by the one who appealed to the superior court before the perfecting of the appeal, by merely tendering a sum less than the judgment in full settlement of the judgment is not a "tender" within Revisal 1905, § 860, authorizing a tender of judgment. *Wyatt v. Wilson*, 67 S. E. 501, 502, 152 N. C. 276.

**Tender of resignation**

A "tender" is an offer requiring acceptance, but the word is not always used in its technical sense, and, where a member of a club tenders his resignation to take effect immediately, it requires no acceptance. *People ex rel. Haas v. New York Motor Boat Club*, 129 N. Y. Supp. 365, 368, 70 Misc. Rep. 603.

**TENDERED**

See Business Tendered.

**TENEMENT**

"Tenements". and "hereditaments" include every species of realty, as well corporeal as incorporeal. In *re Handley's Estate*, 57 Atl. 755, 757, 208 Pa. 388.

"The word 'tenements' has never been construed in a will, independently of other circumstances, to pass a fee." *Story, J.*, in *Wright v. Denn ex dem.* Page, 10 Wheat. 205, 238, 6 L. Ed. 303.

A house upon land to which its owner has no title, but in which he claims and enjoys the right of peaceable possession, is a "tenement," within *Wilson's Rev. & Ann. St. 1903*, § 5086, authorizing the proceedings to try questions concerning unlawful detention of lands or tenements, and, if the same are held unlawfully, to cause restitution. *Polson v. Parsons*, 104 Pac. 336, 337, 23 Okl. 778, 25 L. R. A. (N. S.) 104.

While the word "tenement," etymologically speaking, would cover any sort of a house which is of a permanent nature and could be holden, it also sometimes means a community house occupied by persons of small means, the distinguishing characteristics of which are the use in common of certain facilities by people crowded into insufficient space and deprived of many of the essentials of privacy, decency, and health. *Lignot v. Jaekle*, 65 Atl. 221, 223, 72 N. J. Eq. 233.

**Term for years**

The word "land" comprehends ground, soil, or earth, pastures, woods, springs, wells, lakes, ponds, and all things which have become a fixed part of the soil. The word "tenement," in its ordinary meaning, means a "house," which is the subject of tenure, and includes, not only corporeal hereditaments, which are or may be held, but also all inheritances issuing out of any of these inheritances, or concerning or annexed to or exercised within the same, though they lie not in tenure. "Tenement" is a word of greater scope than "lands," and though, in its vulgar acceptance, is only applied to houses and other buildings, yet, in its original, proper, and legal sense, it signifies anything that may be holden, provided it be of a permanent nature, whether of a substantial and sensible, or of an unsubstantial, ideal, kind. The term "hereditaments" includes rights unconnected with land, but generally used as the widest expression for real property of all kinds, being divided into real hereditaments, which are lands and tenements, and personal hereditaments, which are rights concerning neither lands nor tenements. As so defined, neither the term "tenement" nor "hereditament" includes in law a lease of lands for years. *Orchard v. Wright-Dalton-Bell-Anchor Store Co.*, 125 S. W. 486, 494, 225 Mo. 414.

**TENEMENT HOUSE**

A "tenement house" is defined to be a dwelling house or an apartment in a building used by one family, often, in modern usage, an inferior dwelling house, rented to poor persons, or a dwelling erected to be rented. *State v. Rowland Lumber Co.*, 69 S. E. 58, 59, 153 N. C. 610.

Tenement House Act, Laws 1901, p. 908, c. 334, § 82, provides that in every tenement house a proper light shall be kept burning by the owner in the public hallways upon both the first and second floor during the nighttime. The statute requires, in order to constitute a tenement house within the statute, that it shall be occupied by at least three families who have a common right "in the halls, stairways, yards, waterclosets, or privies, or some of them." Plaintiff's husband rented the first southerly store and the northerly apartment in the building, the first floor thereof consisting of two stores, in the south one of which plaintiff's husband conducted a confectionery business, and next to it on the north was a dry goods store, and plaintiff lived in the apartments over the dry goods store, and defendant and his family lived over the confectionery store. There was a hall on the first floor between the two stores and stairs leading from it to the second floor, which divided the apartments of plaintiff and defendant. That part of the building occupied by plaintiff and defendant was a separate house; there being no communication between it and the dry goods store, and the occupants of that store did not use the hall or stairs. Held, that the statutory requirement of three families was lacking to constitute it a tenement, and there was no evidence that the families had a common right to the halls, yard, etc., except the yard, which plaintiff was permitted to use, but, even if there were three families, including the dry goods store, and they had a common right to the yard, it did not constitute the building a tenement, as the statute required a common right in the halls, etc., or "some" of them, which necessitated a common right in more than one of the accessories named to constitute the building a tenement, and hence defendant was not liable for injuries resulting to an occupant from his failure to light the halls as required by statute. *Aldrich v. Lane*, 110 N. Y. Supp. 897, 899, 126 App. Div. 427.

**Apartment house distinguished**

A restrictive covenant in a deed against "tenement houses" is not to be construed as relating to first-class apartment houses having all the conveniences and appliances of the best order of houses, and externally in their architecture of the character and appearance corresponding with first-class dwellings in the immediate neighborhood. *Kitching v. Brown*, 87 N. Y. Supp. 75, 77, 92 App. Div. 160; *Id.*, 73 N. E. 241, 243, 180 N.

Y. 414, 70 L. R. A. 742 (quoting and adopting definition in Cent. Dict.); *Marx v. Brogan*, 98 N. Y. Supp. 88-90, 111 App. Div. 480.

Laws 1901, c. 334, regulating, tenement houses in cities of the first class, by section 2, subd. 1, defined a "tenement house" as any house or building, or portion thereof, rented to be occupied as a residence of three families or more, living independently of each other, and doing their cooking, or by more than two families on any floor so living and cooking, but having a common right to the halls, stairways, yards, water-closets, or some of them. Section 95 declares that in every tenement house hereafter erected there shall be a separate water-closet in a separate compartment within each apartment, provided that, where there are apartments consisting of but one or two rooms, there shall be at least one water-closet for every three rooms. Pursuant to Greater New York Charter (Laws 1897, c. 378) § 647, authorizing the city to amend its Building Code, the city defined an "apartment house" to include every building which should be intended or designated for, or used as, the home of three or more families or households, living independently of each other, and in which every such family or household shall have provided for it a kitchen, set bath tub, and water-closet, separate and apart from each other, and that such building should be under the control of the building department of the city of New York. Held that, since the Building Code was a special act and was not in conflict with the tenement house act, the Building Code was not repealed by the tenement house act either for repugnancy or inconsistency, so that, where the compartments in plaintiff's building contained a separate water-closet, set bath tub, and a separate kitchen, it was an apartment house within the jurisdiction of the building department, and not a tenement house within the jurisdiction of the tenement house commissioner. *Grimmer v. Tenement House Department of City of New York*, 97 N. E. 884, 886, 204 N. Y. 370; *Id.*, 119 N. Y. Supp. 812, 816, 134 App. Div. 896.

The term "apartment or community house" is not synonymous with "tenement," in a covenant precluding the erection of any tenement, apartment, or community house. *McClure v. Leaycraft*, 90 N. Y. Supp. 233, 234, 97 App. Div. 518.

**As dwelling**

See Dwelling—Dwelling House.

**Garage**

The term "tenement house," as used in a building restriction in a deed, does not include a garage and storeroom. *Jones v. Williams*, 106 Pac. 166, 168, 56 Wash. 588.

**TENEMENT HOUSE DEPARTMENT**

As municipal department, see Municipal Department.

**TENEMENTUM**

See *Liberum Tenementum*.

**TENOR**

An indictment for forgery, the essence of which consists in the publication or fabrication of a written instrument, must profess to set out the instrument according to its tenor, except where the instrument is in the possession of accused, destroyed, or for some other reason is not accessible to the grand jury, when the excuse for not setting it out must be distinctly averred. The word "tenor," as so used, imports an exact copy—that the instrument is set forth in the very words and figures. *People v. Tilden*, 90 N. E. 218, 219, 242 Ill. 536, 31 L. R. A. (N. S.) 215, 134 Am. St. Rep. 341, 17 Ann. Cas. 496.

Where an indictment for uttering a forged note contained the words "tenor, purport, and effect" in referring to the instrument forged, the word "tenor" imported an exact copy of the note, while the words "purport and effect" only meant the substance of the instrument, and were surplusage, being included in the word "tenor," and not in conflict therewith. *Teague v. State*, 110 S. W. 224, 225, 86 Ark. 126.

Bonds of a municipality contained recitals as follows: "This bond is one of a series numbered from 1 to 23 inclusive of like tenor and date." The bonds in suit were Nos. 17 to 23, inclusive, and were for \$500 each. Held, that the use of the word "tenor" fairly imported that the other bonds were for the same amount, and that a purchaser was charged with notice of such fact, and that such bonds were the last of the series and consequently illegal, since the aggregate amount far exceeded the limit placed upon the indebtedness of the municipality by the state Constitution. *St. Lawrence Tp. v. Furman*, 171 Fed. 400, 402, 96 C. C. A. 356, 17 Ann. Cas. 1244.

**TENPIN ALLEY**

The statutes use the terms "tenpin alley" and "bowling alley" interchangeably. In the act levying occupation taxes (Rev. St. 1895, art. 5049, p. 1016), every nine or ten pin alley, or any other alley used for profit, by whatever name called, constructed or operated upon the principle of a bowling alley, etc., is amenable to the tax. Webster also defined "tenpin alley" and "bowling alley" as in effect synonymous. An indictment charging in the same count a violation of the occupation law, in that accused pursued the occupation of running a tenpin alley "and" bowling alley for profit without procuring a license, is not vitiated by the use of "and," even if the terms "tenpin alley" and "bowling alley" be not in effect synonymous. *O'Neal v. State*, 100 S. W. 919, 51 Tex. Cr. R. 100.

**TENT**

As private residence, see *Private Residence*.

As public place, see *Public Place*.

**TENTATIVE TRUST****Deposit**

A suggested or proposed trust, not completed or consummated, is a "tentative trust." A trust created by a father by his depositing money in a bank in his name, in trust for a son, terminates ipso facto on the son's death in the lifetime of the father, and thereafter the fund remains the property of the father, unimpressed by any trust. In re *United States Trust Co. of New York*, 102 N. Y. Supp. 271, 272, 117 App. Div. 178.

A deposit made in a bank by one person in his own name for another is merely a "tentative trust," and is revocable at will, unless the depositor completes the gift by some unequivocal act during his lifetime, or dies before the beneficiary, without revocation. *Tierney v. Fitzpatrick*, 107 N. Y. Supp. 527, 528, 122 App. Div. 623.

**TENURE**

The word "tenure" is a term of extensive signification, and while it means the mode by which one holds an estate in land, it imports any kind of a holding, from mere possession to the owning of the inheritance. *Bothin v. California Title Insurance & Trust Co.*, 96 Pac. 500, 502, 153 Cal. 718.

The word "tenure," in the subtitle to section 80 of the act to provide a government for the territory of Hawaii (Act April 30, 1900, c. 339, 31 Stat. 156), in the provision for appointment and tenure of officers has a more extended meaning than "term." "Tenure" is the right to hold an office for an indefinite time. "Term" denotes a period of time with fixed limits. *W. J. Robinson v. United States*, 42 Ct. Cl. 52, 56.

**TERM**

See *Adjourned Term*; *Civil Term*; *Criminal Term*; *Day During the Term*; *During the Term*; *Entire Term*; *Extra or Special Term*; *First Day of the Term*; *First Term*; *Fixed and Limited Term*; *Next Regular Term*; *Next Term*; *Regular Term*; *Special Term*; *Subsequent Term*; *Trial Term*. Balance of unexpired term, see *Balance*. End of term, see *End*.

Extending term, see *Extend—Extension*.

Where a lease provided that it was for a term of five years, 1905 to 1909, inclusive, and gave the lessee an option to purchase at any time during his "term" by paying \$1,280, the "term" within which the option could be exercised was the period of five years be-

tween 1905 and 1909, inclusive. *Lee v. Cochran*, 47 South. 581, 582, 157 Ala. 311.

A guaranty in a lease of a street railroad of the payment of dividends to stockholders of the lessor during the "term of this lease" is to be construed as meaning during the existence of the lease, and not during the term for which it was made. *Pennsylvania Steel Co. v. New York City Ry. Co.*, 198 Fed. 721, 764, 117 C. C. A. 503.

#### **Estate synonymous**

The word "term," as used in the law of landlord and tenant, signifies "not only the limitation of time, or period granted to the lessee for the occupation of the premises, but it also includes the estate and interest in the land that pass during such period." *We-ander v. Claussen Brewing Ass'n*, 84 Pac. 735, 736, 42 Wash. 226, 114 Am. St. Rep. 110, 7 Ann. Cas. 536 (quoting 1 Tayl. Landl. Ten. [9th Ed.] § 16).

Under Rev. Civ. Code 1903, § 1238, subd. 5, providing that an agreement for the leasing of real estate for a longer period than one year is invalid, unless the same, or some note or memorandum thereof, be in writing, an oral lease of real estate for one year for a term beginning a day or two in the future is valid, since the meaning of the word "term" is that period which is granted for the lessee or tenant to occupy and have possession of the premises. It is the estate or interest which he has in the land itself by virtue of the lease from the time it vests in possession. *Paulton v. Krelser*, 101 N. W. 46, 18 S. D. 487, 5 Ann. Cas. 827.

Testatrix declared: "I devise and bequeath to [beneficiary named], of L., Mass., my cottage and all it contains at N., Mass.—to use for the term of five years or longer." The beneficiary was not of kin to testatrix. The will gave pecuniary and specific legacies. The will contained no residuary clause, and did not dispose of the most valuable real estate of testatrix. Held, that the beneficiary acquired an estate for life in the cottage and its contents; the word "term" expressing equally an estate for years or life, and the words "or longer," if given effect, showing an intention to create an estate for life. *Dow v. Abbott*, 84 N. E. 93, 97, 197 Mass. 283.

The word "term," in the rule that a tenant who parts with the entire term in his lease is an assignor and the instrument is an assignment, means something more than the mere time for which the lease is given, and the instrument must convey not only the entire time for which the lease runs, but the entire estate conveyed by the lease. *Davis v. Vidal*, 151 S. W. 290, 292, 105 Tex. 444, 42 L. R. A. (N. S.) 1084.

#### **Employment**

A judgment of conviction of a teacher of music of the crime provided for in Rev. St. § 7024, having sexual intercourse with a fe-

male pupil, will not be reversed because the evidence fails to disclose that the term of employment was for a definite length of time. where the fact is that the teacher was employed to give a certain number of lessons at a stated price per lesson, nothing being provided as to the time within which the lessons should be given. The word "term," as used in this statute, was not intended to mean a definite period, but the time during which the teacher continues to fill his engagement and, by virtue of his employment, has unusual opportunities for such unlawful practice. *Easley v. State*, 29 Ohio Cir. Ct. R. 568, 571.

#### **TERM INSURANCE**

A contract whereby a person insured is required to pay from one assessment period to another the actual cost of insurance during that period, without paying an additional sum to make up a deficit in future years, when the cost of carrying the risk on the member's life becomes greater, is for "term insurance," and the policy has no actual net value. *Mutual Reserve Life Ins. Co. v. Roth*, 122 Fed. 853, 856, 59 C. C. A. 63.

#### **TERM OF CHARTER**

See During Term of Charter.

#### **TERM OF COURT**

Regular term\* of court, see Regular Term. See, also, Session.

A "term of court" is that period of time provided by or in pursuance of some public law within which the court may hold its sessions and transact its business; the term continuing from the time appointed by law to final adjournment, or until the lapse of the term by operation of law. *State v. Maddock*, 115 Pac. 426, 427, 58 Or. 542.

A "term of court" is not the same thing as the court itself, and is no more than a period of time within which certain functions of the court must be exercised. Its end comes only by adjournment, or by the arrival of the date designated by law for the beginning of another term of the same court for the same county. *Territory ex rel. Hubbell v. Armijo*, 89 Pac. 267, 268, 14 N. M. 205.

A "term of court" is regarded in law as but one day or a unit of time, and all acts done within the term are regarded as contemporaneous. *People ex rel. Naber v. Wells*, 99 N. E. 606, 607, 255 Ill. 450.

A "term of court," although continuing for weeks or months, is regarded by the law as but one day. During the term at which a judgment or decree is entered the record remains in the breast of the court, and the court may, at any time during the term, amend it, or set it aside on its own motion or for good cause shown, as justice and the right of the case may seem to require. The court retains jurisdiction of the parties and

the subject-matter of the litigation until the end of the term, and the judgment or decree does not become final or pass beyond its control until that time. *Krieger v. Krieger*, 77 N. E. 909, 911, 221 Ill. 479 (citing and adopting 11 Cyc. p. 732; *Stahl v. Webster*, 11 Ill. 511; *Smith v. Vanderburg*, 46 Ill. 34; *Edwards v. Irons*, 73 Ill. 583; *Shannahan v. Stevens*, 28 N. E. 804, 139 Ill. 428).

A "term of court" expired when the court left the bench, after sitting an extra day to sign judgments on the conclusion of all jury trials. *Hardee v. Timberlake*, 75 S. E. 799, 800, 159 N. C. 552.

A "term of court" has been defined to signify the period from the first day of the term fixed by law until court is adjourned to the next court in course. Where by statute a term of the circuit court was to be held in one of the counties of the circuit on the first Monday in December, in another county on the second Monday, and in a third county on the third Monday, and the judge of such court adjourned the September term of S. county on November 30th until December 30th, in order to hold such December terms, the September term of S. county was not terminated, and a justice's judgment in forcible entry, rendered during such adjournment, was rendered in term time, within the meaning of Rev. St. 1899, § 3370, requiring appeals from such judgments, when rendered in term time, to be returned within six days after such rendition. *Warner v. Donahue*, 72 S. W. 492, 494, 99 Mo. App. 37.

The act of 1903 (Acts 1903, p. 83) which makes a grand juror who has served at any term of the superior court ineligible to serve at the next succeeding term does not disqualify grand jurors of a regular term to serve as such at an adjourned term of such regular term. *Hall v. State*, 62 S. E. 539, 4 Ga. App. 841.

#### As court

The words "two courts," in Judiciary Act 1789, c. 20, 1 Stat. 73, organizing federal courts and providing that there shall be held annually in each district "two courts," etc., mean two terms of a court. *Geiger v. Tacoma Ry. & Power Co.*, 141 Fed. 169, 176.

#### As regular term

"Where a statute speaks of 'terms of court,' the terms fixed by law are meant, not special terms appointed by the court." *Stafford v. Mingo County Court*, 51 S. E. 2, 58 W. Va. 88 (quoting and adopting definition in *Tompkins v. Clackamas Co.*, 4 Pac. 1210, 11 Or. 364; *Smith v. Cutler* [N. Y.] 10 Wend. 591, 25 Am. Dec. 580).

Code Va. 1904, p. 1633, § 3060, provides in section 3062 that there may be tried at special "term" any civil case not tried at the last preceding "term," any motion cognizable by the court, any criminal case which could be tried at a regular term, and any

controversy ready for hearing at law or in chancery, though it could not have been heard at the preceding term; and section 3024, p. 1612, provides that, where the reasons stated in a petition for quo warranto are legally sufficient, the writ shall be returnable to the next "term" of the court. Held, that a writ of quo warranto may not be returned to a special "term"; the phrase "next term," in section 3024, referring to a regular "term," and the matter not being within section 3062. "The word 'term' in some instances may include both regular and special terms. But, as a general rule, when a statute speaks of terms of court, the regular terms fixed by law are meant, and not the special terms appointed by the courts or judges." *Stultz v. Pratt*, 49 S. E. 654, 655, 103 Va. 536 (citing *Commonwealth v. Justices of Court of Sessions of Norfolk*, 5 Mass. 435; *Smith v. Cutler* [N. Y.] 10 Wend. 590, 25 Am. Dec. 580; *Tompkins v. Clackamas*, 4 Pac. 1210, 11 Or. 364, 366).

The word "term," in Const. art. 5, § 17, providing that the county court shall hold a "term" for criminal business at least once in every two months, and section 29, providing that the county court shall hold at least four terms for criminal business annually as may be provided by the Legislature, or by the commissioners' court of the county, and such other terms as may be fixed by the commissioners' court, relates to such regular terms as may be provided by law; and Code Cr. Proc. 1895, art. 572, providing that, when any person charged with a misdemeanor in the county court shall desire to make speedy disposition of his case on the plea of guilty, the judge shall be authorized to make a special session to dispose of the cause, is unconstitutional, it being beyond the power of the Legislature to authorize county judges to call indiscriminately special terms to suit themselves in order to take pleas of guilty. *Ex parte Cole*, 101 S. W. 249, 250, 51 Tex. Cr. R. 166.

#### Session distinguished

The act of the Legislature of 1906 (House Bill No. 460), providing for holding the county court at Prague, in Lincoln county, uses the words "term" and "session" interchangeably. *Rakowski v. Wagoner*, 103 Pac. 632, 633, 24 Okl. 282.

Local Option Law (Laws 1905, p. 47, c. 2) § 10, provides that the county court, 11 days after election, or as soon thereafter as practicable, shall hold a "special session," and, if a majority of the votes are for prohibition, the court shall immediately make an order declaring the result of the vote and absolutely prohibiting the sale of intoxicating liquors, etc. Held, that the court, by announcing the result of the election at a special session called during general term, did not invalidate the proceedings; the words "special session," as used in the act, not being syn-

onymous with "special term" (the word "term" signifying "the space of time during which the court holds a session"), and the word "session" as used referring to a temporary sitting of the court, for the transaction of special business assigned to them, which may occur either during a general or special term, and, if all members are present for such purpose, it is immaterial as to how it was called, or when, providing the time prescribed by the act for such special sitting has elapsed. *State v. Edmunds*, 104 Pac. 430, 432, 55 Or. 236 (quoting and adopting definition in *Bouv. Law Dict.*).

The session of a judicial court is called a "term." *Emerson v. Missouri, K. & T. Ry. Co. of Texas*, 82 S. W. 1060, 37 Tex. Civ. App. 110 (citing *Webst. Int. Dict.*).

The word "session," as used in Rev. St. § 1038, providing that any district court may by order entered on its minutes remit any indictment pending thereon to the next session of the circuit court for the same district, is used as meaning an actual sitting of the court for the transaction of business, and not in the sense of "term." *United States v. Dietrich*, 126 Fed. 659, 660.

The word "term," as used in Act No. 30, p. 56, of 1878, providing that, in all criminal cases in which appeals are allowable under the Constitution, the party desiring to appeal shall file his motion in open court, and that the motion must be filed in the courts other than those of the First judicial district, during the term at which the sentence shall have been rendered, means the session during which the court is actually open, as contradistinguished from the continuous session of ten months, provided for by article 117 of the Constitution. *State v. Vicknair*, 43 South. 635, 636, 118 La. 963.

#### As time of session

In law the word "term" is defined as "the time in which a court is held or is open for the trial of causes." So where plaintiff filed an affidavit for an appeal without bond, as required by Rev. St. 1895, art. 1401, whereupon the court made an order certifying that plaintiff, by presenting such affidavit "within term time," has made proof of his inability to pay the costs of appeal or give security therefor, and is permitted to prosecute his appeal on said affidavit in lieu of a cost bond on appeal, and such certificate was dated May 12, 1904, and showed that the term of court began March 7 and ended May 14, 1904, it was held that the words "within term time" showed that the court was in session when the order was made. *Emerson v. Missouri, K. & T. Ry. Co. of Texas*, 82 S. W. 1060, 37 Tex. Civ. App. 110 (citing *Webst. Int. Dict.*).

A court is defined as "the persons officially assembled under authority of law at the appropriate time and place for the administration of justice," while the word

"term," when used with reference to a court, signifies the space of time during which the court holds a session. A "session" signifies the time during the term when the court sits for the transaction of business. Therefore there is a clear distinction between "the adjournment of court" and the "adjournment of the term." *Parrott v. Wolcott*, 106 N. W. 607, 608, 75 Neb. 530 (citing *Webst. Dict.*; *Black, Law Dict.*).

The phrase "term of court," in Laws 1903, p. 218, c. 112 § 1, providing that every jury commissioner shall be disqualified to select jurors for two successive terms of court, means a term which is held when the term is opened by a proper judicial officer impaneled and business transacted. It then becomes a term of court within the meaning of the law. Laws 1903, p. 218, c. 112, § 1, provides that every jury commissioner shall be disqualified to select jurors for two successive terms of court. By Laws 1903, p. 175, c. 71, § 3, the regular terms of the superior court of L. county were fixed to be held on the first Monday of March and September in each year; but by Laws 1905, p. 204, c. 89, § 1, the time of holding such term was changed to the second Monday of April and October, so that there was no term of such court in March, 1905. Held, that the fact that commissioners who selected the jury for the April, 1905, term, at which accused was tried and convicted, were also the commissioners who should have selected jurors for the preceding March term, had one been held, did not disqualify them to select jurors for such April term. *Territory v. Emilio*, 89 Pac. 239, 240, 14 N. M. 147.

A "term of court," within Rev. Codes 1905, § 9791, providing that during each term of court at which a grand jury has been summoned and impaneled, the state's attorney shall file an information against persons accused of crime, etc., means a term of court actually held, and not one that may be held; and a criminal action should not be dismissed for failure to file an information at a term of court at which a defendant cannot be regularly tried by a jury. *State v. Fleming*, 126 N. W. 565, 566, 20 N. D. 105.

Under Cr. Code, § 390, accused, if committed to prison, must be tried before the end of the second term of the court having jurisdiction of the offense, and a term at which no jury is called and only equity business transacted is still "a term of the court having jurisdiction of the offense." *Critser v. State*, 127 N. W. 1073, 1074, 87 Neb. 727.

In *Conklin v. Ridgely*, 1 N. E. 261, 262, 112 Ill. 36, 54 Am. Rep. 204, the court said: "Under the earlier organization of the courts of England, the 'terms' of the court were four periods in each year, commencing and ending on fixed times, and the vacations embraced all the days not included in the terms." *Himmelberger-Harrison Lumber Co. v. Keener*, 117 S. W. 42, 47, 217 Mo. 522.



An alternative writ of prohibition was issued March 29, 1912, by the Appellate Division for the First Department on application to enjoin a special proceeding pending in the Second Department, on which day the Appellate Division for that department, before adjournment of the March term, but in recess, handed down decisions, and on which day its judges were in attendance at the courthouse and ready to assemble as a court to attend to any business presented. Code Civ. Proc. § 2093, provides that a writ of prohibition issued by an Appellate Division can be granted only at a "term of the Appellate Division" of the judicial department embracing the county wherein the special proceeding is brought, in which the matter to be prohibited originated, unless a term of the Appellate Division of said department is not "in session," when it may be granted by the Appellate Division in an adjoining judicial department. Held, that the Appellate Division for the Second Department was "in session" when the alternative writ was issued, and that the Appellate Division of the First Department was without jurisdiction. *People ex rel. Whitman v. Woodward*, 134 N. Y. Supp. 910, 911, 150 App. Div. 180.

#### As time set

In North Dakota there are no "terms" of the district court, in the common-law sense of that word. The district court is always open, and its functions are exercised by a single judge, whose every act as a judge is deemed to be the act of the court. Rev. Codes 1899, §§ 5176, 5178. There are times and places fixed by law for the trial of cases, and no issue of fact can be forced to trial except at such times and places. These sessions for the trial of cases are called "terms"; but that word, as applied to the sessions of the district courts, has lost its common-law meaning, and the district court can exercise its inherent power to grant relief, on motion, from an irregular judgment or order, at any time, unless the time for so doing has been limited by law. *Martinson v. Marzolf*, 103 N. W. 937, 940, 14 N. D. 301.

Under Ballinger's Ann. Codes & St. § 4606, providing that in proceedings for the probate of a nuncupative will a citation shall be directed to the widow or next of kin that they may contest the will, and section 6083, declaring that in all cases where citations are issued in probate proceedings they shall be served at least 10 days "before the term at which" they are made returnable, a citation in proceedings for the probate of a nuncupative will must be served at least 10 days before the time set for the hearing, the word "term" in the statute being obsolete by reason of the abolition of statutory terms, and meaning "time"; and hence, where the citation was not only not served but was made returnable on the day it was issued, the court had no jurisdiction. In *re Sullivan's*

*Estate*, 82 Pac. 297, 300, 40 Wash. 202, 111 Am. St. Rep. 895.

A recognizance to a police court unauthorized to sentence the prisoner followed Pub. St. c. 212, § 53, relating to conditions of recognizances, without distinguishing between cases where the court could impose sentence and those where it could only hold the accused for trial before the superior court. Held, in view of section 63, providing that an action on a recognizance shall not be defeated for a defect of form, where it shows to what court appearance is required, and the magistrate's authority to take it, the words inapplicable to the case should be rejected as surplusage, or "term" be construed to mean "time," and "sentence" to mean "order," so as to compel an appearance at the "time" expressed therein to await the "order" of the police court. *Reed v. Police Court of Lowell*, 52 N. E. 633, 635, 172 Mass. 427 (citing *State v. Crowley*, 60 Me. 103).

#### TERM OF OFFICE

See Continuance in Office; Existing Term of Office; Unexpired Term.  
His term of office, see His.

Ordinarily the word or words "term" or "term of office," when used in reference to the tenure of office, mean a fixed and definite period of time. *State ex rel. Polk v. Galusha*, 104 N. W. 197, 201, 74 Neb. 188; *Gibbs v. Morgan*, 39 N. J. Eq. 126, 128.

The words "term of office" may indicate the statutory period for which an officer is elected; but the words may also mean a period shorter than that for which the particular officer was elected, as his "term of office" may be terminated before the expiration of the statutory period by impeachment, resignation, or death. P. L. 1906, p. 76, placing all county clerks on a salary, and requiring payment of all fees, costs, and perquisites, etc., into the county treasury, declares (section 5 [page 78]) that it shall take effect so far as respects such offices, at the expiration of the terms of the present officers; and Const. art. 7, § 2, par. 6, provides that county clerks shall be elected and hold office for five years. Held, that the "term of office," in section 5, was restricted to the term during which the then present clerk was entitled to receive compensation, so that, respondent's predecessor having died in office after the act took effect, but before the expiration of his term, respondent, on being appointed to fill the vacancy, began a new term, and was therefore entitled to a salary only. *Board of Chosen Freeholders of Atlantic County v. Lee*, 70 Atl. 925, 926, 76 N. J. Law, 327.

The appointment to the office of brigadier general of militia is governed by Const. 1901, § 276, providing that the Governor shall, with the advice and consent of the Senate, appoint all general officers, whose terms of office shall be four years. Held, that since at common

law, even when the term of an office has been fixed and a vacancy happens, the term does not survive, but reverts to the sovereign to be filled again for the full term prescribed by law, and as the term of an office is simply a definite period of time, the provision of the Constitution that the term of such general officers shall be four years applies to an appointment made long after the expiration of the term of the first brigadier general, and the second appointee takes for a period of four years. *Clark v. State* (Ala.) 59 South. 259, 261.

Laws 1905, p. 221, § 4, provided that the salary of the Adjutant General should be \$2,000 per annum, and that the Governor shall appoint the Adjutant General, who shall hold office during the term of the Governor, and may be removed by him at his pleasure. Laws 1909, p. 674, § 3 (Rev. St. 1909, § 8334), fixes the salary of the Adjutant General at \$2,500 per annum. Held, that, despite Const. art. 14, § 8, providing that the compensation of state officers shall not be increased during their terms of office, an Adjutant General appointed under Laws 1905, and holding over under Laws 1909, was entitled to the additional compensation, for he was removable at the pleasure of the Governor and hence had no "term of office," for a term of office, as well as any term, implies the existence of a definite boundary. *State ex rel. Rumbold v. Gordon*, 142 S. W. 315, 316, 238 Mo. 168, Ann. Cas. 1913A, 312.

Laws 1901, p. 197 (Ann. St. 1906, §§ 8145—4 to 8145—8), creating the office of factory inspector, and requiring the Governor within a specified time thereafter, with the advice and consent of the Senate, to appoint a factory inspector, who shall hold office for four years, empowers the Governor to fix the commencement and ending of the term, and, where he fixed the end of the term, the appointee's term expired on that date, in absence of other provisions continuing the term; "term of office" being a fixed and definite period of time. *State ex inf. Major ex rel. Sikes v. Williams*, 121 S. W. 64, 66, 222 Mo. 268, 17 Ann. Cas. 1006.

Const. art. 4, § 26, prohibiting any increase of salary of a state officer during his term, whether the expression "his term of office" is synonymous with his incumbency of the office under a particular election or appointment, or is synonymous with the full term of the office created by article 7 for justices of the Supreme Court, is not so free from doubt as not to be open to solution by judicial construction. The language "his term of office," in Const. art. 4, § 26, may be regarded as treating the term of office of the justice of the Supreme Court created by Const. art. 7, or any particular incumbency thereof, whether of a full term or part of a term. *State ex rel. Bashford v. Frear*, 120 N. W. 216, 217, 138 Wis. 536, 16 Ann. Cas. 1019.

The phrase "term of office," in Const. art. 11, § 9, providing that compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office, etc., applies only to officers who have a fixed and definite term, and does not apply to appointive officers, who hold at the pleasure of the appointing power, and the constitutional inhibition does not apply to the office of deputy county surveyor, the incumbent of which holds under an appointment of the county surveyor at his pleasure. *Harold v. Barnum*, 96 Pac. 104, 8 Cal. App. 21.

A deputy, appointed by an officer to hold during the pleasure of such principal, does not hold for a term, within Const. art. 23, § 10, prohibiting the change of the salary of any public officer after his election or appointment, or during his "term of office," except by a law enacted before such election or appointment. *Board of Com'rs of Muskogee County v. Hart*, 119 Pac. 132, 134, 29 Okl. 693, 37 L. R. A. (N. S.) 388.

Rev. St. 1898, § 3290, providing that a judge may settle and sign a bill of exceptions after he ceases to be judge, is not in violation of Const. art. 8, § 5, limiting the "term of office" of district judges to four years. *Larkin v. Saltair Beath Co.*, 83 Pac. 686, 688, 30 Utah, 86, 3 L. R. A. (N. S.) 982, 116 Am. St. Rep. 818, 8 Ann. Cas. 977.

"There is a difference between the 'right of incumbency' and the 'term of office.' If one who is in office becomes ineligible to hold it longer—as that he moves out of the district—his term of office does not thereby expire, although his right of incumbency ceases. His successor is elected or appointed to fill out his unexpired term." And one continuing to exercise the functions of notary public after his appointment and qualification as postmaster is not guilty of violation of the statute making it a misdemeanor to hold and pretend to exercise an office after his term has constitutionally or legally expired. *Palmer v. Commonwealth*, 92 S. W. 588, 589, 122 Ky. 693.

Const. art. 6, § 25, declaring that the compensation of judges of the superior and circuit courts in Cook county shall not be changed during their continuance in office, refers to the "term of office," and not to the individual, so that Laws 1901, p. 207, providing that judges of the circuit and superior courts of Cook county hereafter to be elected shall receive \$10,000 per year, instead of \$7,000, does not entitle a judge, elected after the passage of the act to complete the unexpired term of a judge elected before the passage of the act, to receive a salary of \$10,000. *Foreman v. People ex rel. McEwen*, 71 N. E. 35, 37, 209 Ill. 567.

Under Const. § 161, which prohibits change of a county officer's salary during "his term of office," one appointed county jailer

for the unexpired part of a four-year term, which commenced in 1910 before the taking effect of Laws 1910, c. 61, is not entitled to the increased compensation provided by that act, though appointed after it took effect. *Bosworth v. Ellison*, 147 S. W. 400, 402, 148 Ky. 708.

### TERM OF RECORD

By the act of 1862, incorporated into Revision 1871, c. 78, § 6, the county commissioners for Cumberland were required to hold "annual sessions" on the first Tuesdays of January and June. By the act of 1883 (Rev. St. c. 78, § 6) they are required to hold "annual sessions," viz., "terms of record," on the first Tuesdays of January and June, and regular sessions on the first Tuesdays of each month; that is, terms of record twice yearly, with sessions thereof monthly, to be held regularly on the first Tuesday of each month. In certiorari to quash their proceedings because they did not file their report for the location of a way at their next regular session after the hearing, it was held that the "regular sessions" were but statute adjournments of the preceding term of record, and that such report should be filed at the next record term. The words "terms of record," in the act of 1883, have the same significance and are synonymous with the words "regular session," in chapter 78, § 6, of the Revisions of 1871 and 1883, and these latter words in chapter 78, § 6, of the Revision of 1883, were inaptly used in contrast with the former. *State ex rel. Inhabitants of Harpswell v. Cumberland Co. Com'rs*, 2 Atl. 880, 881, 78 Me. 100.

### TERMS

See *Easy Terms*; *On Reasonable Terms*; *Regular Terms*.

On a wife's motion to open a default judgment against her in an action for divorce for adultery, on the ground that the summons and complaint had not been served on her, the court found that service had been made, but opened the default on condition of payment of costs and disbursements to date and motion costs. Held, that the condition was not within the discretion given the court by Code Civ. Proc. § 724, to relieve from default judgments on "such terms as justice requires"; it being a mere sham to give her a right to defend her honor only on condition of a payment she was unable to make, and she being lawfully dependent on the plaintiff for support. *Fox v. Fox*, 127 N. Y. Supp. 989, 991, 143 App. Div. 483.

A resolution adopted by a city council pending a dispute with a street railroad company as to its franchise rights with respect to fares, etc., on certain streets, which permitted the company to continue operations from time to time "upon the same terms and conditions now prevailing in the city, whether due to contract agreement or not," though

made when the city knew that the company was collecting extra fares on certain lines which were without the city limits when the franchises for such lines, which authorized extra fares, were granted, did not recognize the company's right to charge extra fares on such lines; the word "prevailing" having no technical meaning and as used signifying that which is common, in operation, or prevalent, while the words "terms" and "conditions" mean the propositions and limitations which comprise the agreement and govern the parties, defining their obligations, and, as applied to an ordinance giving a franchise, signifying the boundary, limit or extent of the grant. *City of Detroit v. Detroit United Ry.*, 139 N. W. 56, 59, 173 Mich. 314.

*Rem. & Bal. Code*, §§ 8809, 8813, 8823, 8834, authorizing the registration of land title on application to the superior court, and providing that the court finding that the applicant has not proper title shall dismiss the application, and declaring that the applicant may dismiss his application at any time before final decree on terms, limits the jurisdiction of the superior court and reserves to an applicant the absolute right to dismissal on terms before final decree, and an applicant may complain of the denial of absolute dismissal, though not prejudiced thereby; the word "terms" meaning such penalty as the court may impose, so as to save the opposing party harmless from loss, and which can be satisfied by the payment of a fixed sum of money. *Krutz v. Dodge*, 119 Pac. 188, 189, 66 Wash. 178, Ann. Cas. 1913C, 869.

*Acts 1882, No. 36* (V. S. 3902-3904 [P. S. 4486-4488]), requiring railroads to give all persons "reasonable and equal terms \* \* \* facilities and accommodations" for the transportation of freight, etc., must be construed in the light of *Acts 1882, No. 37* (V. S. 3896), authorizing a railroad corporation to establish rates, etc., and, when so done, it requires a railroad corporation to make rates reasonable and equal as required by the common law, and it is but declaratory of the common law defining the rights and obligations of carriers; the words "facilities and accommodations" relating to the incidents of transportation, the word, "terms" signifying rates. *State v. Central Vermont R. Co.*, 71 Atl. 194, 196, 81 Vt. 463, 130 Am. St. Rep. 1065.

The use of the word "terms" in an affidavit accompanying a plea to set aside an office judgment, instead of the statutory word "demand," does not vitiate the affidavit; it being clear that it was used as the equivalent of "demand," although in doing so the affiant misused the word. *Ceranto v. Trimboli*, 60 S. E. 138, 139, 63 W. Va. 340.

Where an oil and gas lease, which in its beginning purported to be an absolute grant of all the oil and gas in the land, further provided that the grant was made on the terms which thereafter followed, the word

"terms" was broad enough to make the provisions which followed the consideration or conditions of the lease. *Logansport & Wabash Valley Gas Co. v. Null*, 76 N. E. 125, 126, 36 Ind. App. 503.

Pol. Code 1895, § 345, declaring that an advertisement for bids by a county shall embrace such specifications as will enable the public to know the character of the work and the "terms" and time of payment, does not require an advertisement for bids for a courthouse, under section 344, to state the exact or approximate price at which the contract will be let. *Pilcher v. English*, 66 S. E. 163, 166, 133 Ga. 496.

Inasmuch as Sess. Laws 1903, p. 73, c. 59, provides, in relation to sales of land acquired by a county pursuant to tax foreclosure proceedings, that the county commissioners may fix "the terms" upon which the sale shall be made, and that the sale must be made for cash, the board of county commissioners are authorized to require the sale to be made subject to confirmation by the board. *Phillips v. Welts*, 82 Pac. 737, 738, 40 Wash. 501 (citing *State ex rel. MacKay v. Phillips*, 79 Pac. 313, 36 Wash. 651).

### TERMS AND CONDITIONS

The words "terms and conditions" in the provision of an order for goods, just above the buyer's signature, that "no terms or conditions are recognized except those expressed in this order," do not so certainly include warranties as to exclude parol evidence of express warranties of quality. *Eureka Elastic Paint Co. v. Bennett-Hedgpeth Co.*, 67 S. E. 738, 739, 85 S. C. 486.

### TERMS AND CONDITIONS, RIGHTS AND PRIVILEGES

Ordinarily, in the use of legal phraseology, the phrase "terms and conditions, rights and privileges," is not employed to convey power over or relating to the time or period through which the tenure dealt with by the acts is intended to run, but conveys power over or relates to the means, the methods, and the incidents connected with the exercise of such tenure. Such plainly was meant to be the signification of the phrase as used in the acts of 1859, 1861, and 1865, relating to the incorporation of the Chicago city railways, and granting rights thereto in the streets of the city, and providing that the railways shall be constructed, furnished, and operated in such manner and on such terms and conditions and on such rights and privileges as the common council by contract may prescribe. *Govin v. City of Chicago*, 132 Fed. 848, 855.

### TERMINAL

A carrier adopted demurrage rules for coal cars at a terminal at which it maintained two yards for cars until called for. The

yards were about four miles apart, and one yard was a mile and a half from dumping piers. The average time to take a car out of the yards and place it on the piers to unload was from 30 minutes to an hour. Both yards were used as the terminal point, and cars placed in either yard could be released when ordered by the shipper, and there was no evidence that, if the cars had been brought to the yard nearest to the dumping piers instead of to the other yard, the detention of the cars would have been less than it was. Held to justify a finding that both yards were a part of the "terminal," within the demurrage rules. *Pennsylvania R. Co. v. Marshall*, 182 N. Y. Supp. 41, 43, 147 App. Div. 806.

### TERMINAL CHARGE

#### Demurrage

Demurrage charged for the detention of cars in loading or unloading is a "terminal charge," required to be shown by the schedules of rates filed and published by an interstate railroad company by the terms of the interstate commerce act. *Lehigh Valley R. Co. v. United States*, 188 Fed. 879, 885, 110 C. C. A. 513; *United States v. Philadelphia & R. Ry. Co.*, 184 Fed. 543.

### TERMINAL COMPANY

As common carrier, see Common Carrier.

Since there is no distinct statutory provision in this state for the incorporation of a "terminal company," such a company must be organized under the general railroad law, and while a company incorporated for the purpose of building a terminal or other short line of railroad for commercial purposes should describe itself in its name, it does not follow that it is any the less a railroad company, though it may select the name "Terminal Company." *Bridwell v. Gate City Terminal Co.*, 56 S. E. 624, 626, 127 Ga. 520, 10 L. R. A. (N. S.) 909.

### TERMINAL FACILITY

A track which branches off entirely from the existing line of a railroad to a distant objective point of connection with private tracks of a cotton compress company having no track connection with a river is not a "terminal facility," or a turnout or switch, within the meaning of Acts Tenn. 1903, c. 216, authorizing the construction of such tracks. *City of Memphis v. St. Louis & S. F. R. Co.*, 183 Fed. 529, 539, 106 C. C. A. 75.

### TERMINAL POINT

By the "terminal point" of a railroad is not meant the depot as located but the terminus as fixed at a city or town, and where a railroad charter fixed its terminus at a city, the railroad, having authority to abandon one depot site in the city for another, had authority to condemn land for a new site; such act not being a change of its terminus. *Chicago*

& N. W. R. Co. v. Chicago Mechanics' Institute, 87 N. E. 933, 937, 239 Ill. 197.

Under St. § 1790, making it the duty of railroad companies and of owners of lands adjoining the right of way to construct and maintain a good and lawful fence to the extent of one-half each along the division line of the right of way and the land of adjoining owners, and section 1793, providing that all corporations and persons owning or operating railroads "as aforesaid shall erect and maintain cattle guards at all terminal points of fences constructed along their lines, except at points where such lines are not required to be fenced at both sides, and at public crossings," the "terminal points" at which cattle guards are required to be constructed are points where the parallel fencing for any reason stops and not points at which the road enters and leaves a farm. McKee v. Cincinnati, N. O. & T. P. Ry. Co.'s Receiver, 43 S. W. 241, 102 Ky. 253.

## TERMINATE—TERMINATION

See Final Termination.

### Contract

Good cause for, see Good Cause.

### Lease

The taking of leased property in fee by eminent domain is a "termination of the lease," within Rev. Laws, c. 181, § 1, providing that, when the lessee holds possession without right after the termination of the lease by notice to quit or otherwise, the person entitled thereto may recover possession by summary proceedings. City of Boston v. Talbot, 91 N. E. 1014, 1017, 206 Mass. 82.

Rev. St. 1895, art. 2519, making one who willfully and without force holds over any tenement after the "termination" of the time for which it was let to him, or the person under whom he claims, after demand for possession thereof, guilty of forcible detainer, applies to all cases where the landlord seeks to recover possession from the tenant, or one holding under him, on the ground that the lease has terminated, whether by expiration of the term or by the termination of the lease under any contingency on the occurrence of which it is expressly provided in the contract that it shall terminate, and its termination by breach of covenant not to sublet without consent does not oust the jurisdiction of the justice's court, on the ground that the fact of the breach and the right of re-entry therefor should be tried in the district court. Walther v. Anderson, 114 S. W. 414, 417, 52 Tex. Civ. App. 360.

### Prosecution or suit

It may be said that a prosecution may be regarded as "terminated" when it has been disposed of in such a manner that it cannot be revived, so that the prosecutor, if he intends to proceed further, must institute pro-

ceedings de novo. Hurgren v. Union Mut. Life Ins. Co., 75 Pac. 168, 169, 141 Cal. 585.

The dismissal of a criminal prosecution with costs against the prosecutor on his failure to produce evidence in support of the charge is such a "termination" of the prosecution as will enable the accused to sue for malicious prosecution. Graves v. Scott, 51 S. E. 821, 823, 824, 104 Va. 372, 2 L. R. A. (N. S.) 927, 113 Am. St. Rep. 1043, 7 Ann. Cas. 480.

## TERMINATING SOCIETY

A "terminating society" is one which ceases to exist when the shares of stock have attained to the value of the sum fixed by the articles of the association. Cunningham v. Mutual Loan & Building Ass'n of City of Passaic, 62 Atl. 307, 308, 72 N. J. Law, 175.

## TERMINUS

Change of terminus, see Change.

## TERRITORIAL LIMITS

In the Constitution dividing the state into counties and magisterial districts, cities, and towns, and fixing the "territorial limits" of each, making them distinct and separate from each other for the purpose of taxation, the words "territorial limits" mean the actual boundaries of each of such subdivisions as the same are fixed by law. Robinson v. City of Norfolk, 60 S. E. 762, 763, 108 Va. 14, 15 L. R. A. (N. S.) 294, 128 Am. St. Rep. 934.

## TERRITORIAL SUBDIVISION

County as, see County.

## TERRITORY

See Best Interests of Territory; Contiguous Territory; Debt Accruing to Territory; Defined Territory; Inhabited Territory; Local Option Territory; Organized Territory; Wild-Cat Territory.

A "territory" of the United States is a portion of the country not included within the limits of any state and not yet admitted as a state into the Union, but organized under the laws of Congress, with a separate Legislature under a territorial Governor and other officers appointed by the President and Senate of the United States. Porto Rico is a "territory," within the meaning of the provision of Rev. St. U. S. § 5278 (U. S. Comp. St. 1901, p. 3597), authorizing the executive authority of any state or territory to make requisition for the extradition of fugitive criminals. People of State of New York ex rel. Kopel v. Bingham, 81 N. E. 773, 189 N. Y. 124, affirmed 29 Sup. Ct. 190, 191, 211 U. S. 468, 53 L. Ed. 286. See, also, In re Kopel, 148 Fed. 505, 507 (citing De Lima v. Bidwell, 21 Sup. Ct. 743, 182 U. S. 1, 45 L. Ed. 1041; In re Lane, 10

Sup. Ct. 760, 135 U. S. 447, 34 L. Ed. 219; *Ex parte Morgan*, 20 Fed. 298, 305).

Alaska is a "territory" of the United States within the meaning of the act of June 29, 1906 (34 Stat. 584, c. 3591, U. S. Comp. St. Supp. 1909, p. 1150), extending the provisions of the interstate commerce act to carriers engaged in the transportation of passengers or property from one state or territory of the United States to any other state or territory, or from one place in a territory to another place in the same territory. *Interstate Commerce Commission v. United States ex rel. Humbolt S. S. Co.*, 32 Sup. Ct. 556, 558, 224 U. S. 474, 56 L. Ed. 849; *United States v. Interstate Commerce Commission*, 37 App. D. C. 266.

A "territory" of the United States is not a sovereignty, and such legislative powers as it may possess are delegated ones, granted or withheld at the will of Congress. *Territory v. Alexander*, 89 Pac. 514, 515, 11 Ariz. 172.

**As state**

See **State**.

## TEST

See **Bursting Test**; **Dugas Test**; **Hammer Test**; **Water Absorption Test**.

## TEST ACCEPTED

Plaintiff contracted to sell all the prunes on his trees, estimated at 35 tons, more or less, the contract reciting: "For prunes running orchard run (60 to the pound) when dried, \$95 per ton (with variations of \$1.00 per point up or down). All prunes to be good merchantable quality. Test accepted at 53." The words in parentheses were erased when the contract was executed. Held, that by the words "orchard run" was meant all the prunes in the orchard, without reference to size in grading, and the phrase "Test accepted at 53" meant that the prunes had been tested and accepted, and that the result was 53 to the pound, and did not mean that defendant should be liable only for such prunes as conformed to the test. *Ross v. Frank*, 108 Pac. 1025, 13 Cal. App. 88.

## TESTAMENT

An instrument from a husband to his wife, containing apt words of conveyance and directing her to hold the property on certain trusts for the grantor, the trustee, and the grantor's children, and reserving a right to direct conveyances by the trustee to others and a power to revoke the entire instrument, was a "deed" and not a "testament." "To determine the character of an instrument, as to its being a will or a 'deed,' it is necessary to ascertain the intention of the maker from the whole instrument, read in the light of surrounding circumstances. If the intention at the time of the execution of the instrument

was to convey a present estate, though the disposition be postponed until after his death, it is a 'deed'; but if the intention was that it should not convey any vested right or interest, but should be revocable during his life, it is a will." *Cribbs v. Walker*, 85 S. W. 244, 245, 74 Ark. 104 (quoting and adopting definition in *Bunch v. Nicks*, 7 S. W. 563, 50 Ark. 367).

## TESTAMENTARY

See **Letters Testamentary**.

The term "testamentary" does not include every provision by which a person may in his lifetime direct or control the disposition which may be made of his property or his estate after his death. A valid testamentary provision is a provision made by will, duly executed in substantial conformity to law. It speaks from the death of the testator, and not earlier, and until that time the title, legal or equitable, remains unchanged in the testator, and he may sell, convey, and dispose of the same as fully and completely as if no will had ever been made by him. No right, title, or interest of any kind in the thing bequeathed passes to the devisee or legatee until the death of the testator, and not then if it appears that he has disposed of the devise or bequest during his lifetime. But the disposition of property after the death of the owner, the uses it shall be devoted to, and the designation of the persons who shall then come into its beneficial use and enjoyment, is often effectually accomplished otherwise than by will. For example, the owner of real estate may without any valuable consideration make and execute an ordinary deed of conveyance to a designated grantee, and deposit the same in the hands of a third person, to be delivered to the grantee only upon the death of the grantor, and such conveyance is held to be operative, even though made without knowledge or express consent or acceptance of the grantee. *Lewis v. Currutt*, 106 N. W. 914, 916, 130 Iowa, 423.

## TESTAMENTARY CAPACITY

See, also, **Mental Capacity**; **Sound Mind and Memory**.

"Testamentary capacity" means sufficient mind to know the extent and value of testator's property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment toward him, their capacity and necessity, and that he shall have sufficient memory to retain all such facts in his mind long enough to have his will prepared and executed. *Lehman v. Lindenmeyer*, 109 Pac. 956, 958, 48 Colo. 305; *Hoffbauer v. Morgan*, 88 N. E. 337, 338, 172 Ind. 273 (citing *Walt v. Westfall*, 68 N. E. 271, 161 Ind. 648, 662; *Teegarden v. Lewis*, 40 N. E. 1047, 145 Ind. 98, 101; *Id.*, 44 N. E. 9, 145 Ind. 98; *Burkhart v. Gladish*, 24 N. E. 118,

123 Ind. 337; *Cline v. Lindsey*, 11 N. E. 441, 110 Ind. 337.

To constitute "testamentary capacity" a testator need not possess sufficient mind and memory to know the exact extent and value of his property. *Friedersdorf v. Lacy*, 90 N. E. 766, 768, 173 Ind. 429.

One making a will, who has sufficient mind to know and understand the business in which he is engaged, who has sufficient mental capacity to know and understand the extent and value of his estate, the number and names of the persons who would naturally be supposed to be the objects of his bounty, their deserts with reference to their conduct and treatment toward him, and who can keep these things in his mind long enough to have his will prepared and executed, has "testamentary capacity." *Terry v. Davenport*, 83 N. E. 636, 639, 170 Ind. 74.

In order to constitute "testamentary capacity," it is necessary that testator at the time of signing the will be capable of knowing what his property is and who are the natural objects of his bounty, and be able to understand the natural consequences and the effect of executing the will; but it is not necessary that he should have sufficient capacity to hold all those things in his mind at the same time, though the absence of either element will render him incompetent. *Norton v. Clark*, 97 N. E. 1079, 1083, 253 Ill. 557. See, also, *Dowie v. Sutton*, 81 N. E. 395, 401, 227 Ill. 183, 118 Am. St. Rep. 266.

In order to have "testamentary capacity," testator must have sufficient mind and memory to intelligently understand the nature of the business in which he is employed, and the extent of the property constituting his estate and which he intends to dispose of, and to recollect the objects of his bounty. *Hartley v. Lord*, 80 Pac. 433, 434, 38 Wash. 221.

A person has "testamentary capacity" who understands the nature of a testament or will, viz., that it is a disposition of property to take effect after death, and who is capable of remembering generally the property subject to his disposition and the persons related to him by the ties of blood and of affection, and also of conceiving, and expressing by words, written or spoken, or by signs, or by both, any intelligible scheme of disposition. If the testator has sufficient intellect to enable him to have a decided and rational desire as to the disposition of his property, this will suffice. *Slaughter v. Heath*, 57 S. E. 69, 71, 127 Ga. 747, 27 L. R. A. (N. S.) 1 (quoting and adopting the definition of Page on Wills, pp. 108-111, § 94 et seq.); *Wynne v. Harrell*, 66 S. E. 921, 133 Ga. 616 (quoting and adopting definition in *Slaughter v. Heath*, 57 S. E. 69, 127 Ga. 747, 27 L. R. A. [N. S.] 1).

The court, in a will contest, having charged Civ. Code 1895, §§ 3267, 3268, defining

the capacity essential to make a will, and that, if testator had intellect sufficient to enable a party to have a rational desire as to the disposition of his property, his desire must be decided in distinction from the ravings of a madman, the silly pratings of an idiot, childish whims of imbecility, or the excited vagaries of a drunkard, and if he had sufficient mental ability to know that he owned his property, and had a decided opinion as to what disposition he wished to make of it, and did make that disposition of it, then he had "testamentary capacity," a further instruction that, whether testator was wise or unwise, if he was not totally deprived of reason, so as to render him mentally unfit to make such a disposition of his property as to know what he was doing, he had capacity, was not error. *Wynne v. Harrell*, 66 S. E. 921, 133 Ga. 616.

"It is as necessary, in order to have 'testamentary capacity,' for one to have such sensibilities as will enable him to know the obligations he owes to the natural objects of his bounty, as it is for him to have the capacity to know the nature and value of his estate, and a fixed purpose to dispose of it." *McDonald's Ex'rs et al. v. McDonald*, 85 S. W. 1084, 1085, 120 Ky. 211, 117 Am. St. Rep. 579 (citing *Murphy's Ex'r v. Murphy* [Ky.] 65 S. W. 165; *Wise v. Foote*, 81 Ky. 10; *Woodford v. Buckner*, 63 S. W. 617, 111 Ky. 241).

One to possess "testamentary capacity" must understand the ordinary affairs of life, the value and extent of his property, the number and names of the persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment of him, their capacity and necessities. *Turner v. Anderson*, 139 S. W. 180, 186, 236 Mo. 523. See, also, *Hughes v. Rader*, 82 S. W. 32, 52, 183 Mo. 630 (quoting and adopting the definition in *Sehr v. Lindemann*, 54 S. W. 537, 153 Mo. 276); *Knapp v. St. Louis Trust Co.*, 98 S. W. 70, 77, 199 Mo. 640 (quoting *Brinkman v. Rueggelick*, 71 Mo. 553; *Farmer v. Farmer*, 31 S. W. 926, 129 Mo. 530; *Hamon v. Hamon*, 79 S. W. 422, 180 Mo. 685).

A person has "testamentary capacity" who is capable of comprehending all his property and all the persons who reasonably come within the range of his bounty, and who has sufficient intelligence to understand his ordinary business and to know what disposition he is making of his property. *Holton v. Cochran*, 106 S. W. 1035, 1064, 208 Mo. 314; *Luebbert v. Brockmeyer*, 138 S. W. 92, 96, 158 Mo. App. 196.

The test of "testamentary capacity" is that testator have capacity to retain in memory, without prompting, the extent and condition of his property, and comprehend to whom he is giving it, and be capable of appreciating the deserts and relations to him of others, whom he excludes as beneficiaries;

the test relating, not to the moral quality of the act done, but to testator's mental capacity to do what he did, and not whether he actually appreciated the deserts of and relation to him of one excluded, but whether he had the capacity to do so, and it not being required that he correctly ascertain the legal status of each person apparently standing in natural relation to him. In the exercise of reason he may move upon false or insufficient evidence, or by mistake of law, and thus exclude from his bounty those whom, but for his error, he would have recognized; but stupid error, either in his reasoning or conclusion, is not lack of testamentary capacity. *Taylor v. McClintock*, 112 S. W. 405, 411, 87 Ark. 243.

An instruction, in a will contest, that in determining the issue as to the soundness of mind and "testamentary capacity" of testator, before the jury can find in favor of the will, they must believe from a preponderance of the evidence that, at the signing and execution thereof, testator had sufficient understanding to comprehend the nature of the transaction that he was engaged in, the nature and extent of his property, and to whom he desired to give it, and was giving it, without the aid of any other person, and unless the proponent of the will has shown, by such preponderance of evidence, that he did possess all these requisites, they should find that the writing introduced was not his will. Held, that the instruction was correct. *Mowry v. Norman*, 122 S. W. 724, 726, 223 Mo. 463.

The test of one's "testamentary capacity" is necessarily the same, whether his insanity be attributable to dementia or insane delusion. *Huffaker v. Beers*, 128 S. W. 1040, 1041, 95 Ark. 158.

The test of "testamentary capacity" is not whether the person who has made a testamentary disposition of his property was of a high order of intelligence, but whether he knew what he desired to do with his property, and was able to call to mind those to whom he wished to give it, and associate the property to be given with the particular beneficiary in each case. *Salinas v. Garcia* (Tex.) 135 S. W. 588, 590.

One who is able to know and understand the business in which he is engaged, and who knows that the paper he is executing is a disposition of his property to take effect after his death, and who remembers generally the nature and amount of his property and the persons he desires shall share in his estate, and who conceives and expresses by words or signs an intelligible scheme of disposition, has "testamentary capacity." *Berst v. Moxom*, 138 S. W. 74, 77, 157 Mo. App. 342.

While a person who has mental power to understand and transact ordinary business has capacity to make a will, it must not be

understood that such degree of mental power and vigor is requisite to "testamentary capacity." Mental perception and power to think and reason of a lesser degree may be all that is requisite to the full understanding of everything involved in the execution of a will. The real question is: Did testator, at the time of making the instrument purporting to be his will, have such mind and memory as enabled him to understand the particular business in which he was then engaged? In *re Brannan's Estate*, 107 N. W. 141, 142, 97 Minn. 349 (quoting and adopting definition given in *Ring v. Lawless*, 60 N. E. 881, 190 Ill. 520).

Where testatrix had sufficient mental powers to call to mind the particulars of her business and the affairs of life, and to retain them for such a time as to perceive and understand their obvious relations and to form a rational judgment in relation to them, she had "testamentary capacity." In *re Mullan's Will*, 122 N. W. 723, 724, 140 Wis. 291.

To be competent to make a will, a testator must possess a mind capable of exercising judgment, reason, and deliberation, and of weighing the consequences of his will and its effect to a certain degree upon his estate and family. In *re Walker's Will*, 128 N. W. 386, 388, 152 Iowa, 154.

An instruction that a person of sufficient mental capacity to make a will is one who has "full and intelligent" knowledge of the act he is engaged in, and "full" knowledge of the property he possesses, etc., does not call for too high a degree of capacity, at least where it is further stated that it was enough if testator had an intelligent knowledge of the nature of the instrument he was executing, and sufficient strength of mind to know and comprehend the natural objects of his bounty, the nature and extent of his estate, and the distribution he wished to make thereof. In *re Law's Estate* (Iowa) 138 N. W. 531, 533.

Although testator may be weak and infirm, yet if he has sufficient mental capacity to know the objects of his bounty, the extent of his property, and the effect of his will upon his property, this is all that is required to constitute "testamentary capacity." *Stull v. Stull*, 96 N. W. 196, 202, 1 Neb. (Unof.) 389 (citing *O'Connor v. Madison*, 57 N. W. 105, 98 Mich. 183).

The true standard of "testamentary capacity" is the ability clearly to discern and discreetly to judge of all those things and all those circumstances which enter into the nature of a rational, fair, and just disposition of his property. *Bidwell v. Piercy*, 63 Atl. 261, 268, 71 N. J. Eq. 83 (citing *Thorp v. Smith*, 54 Atl. 412, 65 N. J. Eq. 400).

The test of "testamentary capacity" is whether testator's mind was sufficiently sound to enable him to know and understand



the business in which he was engaged when he executed his will, and weakness alone will not invalidate a will if there was mind and memory enough to direct the disposition of the property intelligently. *In re McNitt's Estate*, 78 Atl. 32, 33, 229 Pa. 71.

Mere belief in Spiritualism does not, *ipso facto*, constitute an "insane delusion," rendering the believer wanting in "testamentary capacity." *Steinkuehler v. Wempner*, 81 N. E. 482, 486, 169 Ind. 154, 15 L. R. A. (N. S.) 673.

A man may be peculiar and even insane upon some special topic, and yet have "testamentary capacity"; the question not being whether he says or does absurd things at certain times, but whether, at the particular time of executing his will, he knows what his duties and obligations are and what he desires to do in respect of them. *Calligan v. Haskell*, 128 N. Y. Supp. 293, 294, 143 App. Div. 574.

### TESTAMENTARY DISPOSITION

Subjects connected with testamentary disposition, see Subject.

### TESTAMENTARY EXPENSE

Where a woman domiciled in England died possessed of personal property in England and Pennsylvania, and left two wills, one disposing of her Pennsylvania property and the other of her English property, and the latter provided that testamentary expenses and the duty on all legacies bequeathed free of duty should be paid out of the English property, the estate duty payable to the British government under St. 57 and 58 Vict. c. 30, is a "testamentary expense" payable out of the English property alone. *In re Kortright's Estate*, 85 Atl. 109, 110, 237 Pa. 138.

### TESTAMENTARY MIND

One who has not mind and memory enough to understand the ordinary affairs of life, the nature of his property, the number and names of the persons who are the natural objects of his bounty, their capacity and necessity, has not a "testamentary mind." *Crum v. Crum*, 132 S. W. 1070, 1073, 231 Mo. 626.

### TESTAMENTARY TRUSTEE

Code Civ. Proc. § 2472, gives each surrogate jurisdiction to control and settle the accounts of testamentary trustees, and to remove them and appoint a successor. Section 2514 provides that, unless a contrary intent is expressly declared or plainly apparent from the context, the expression "testamentary trustee" includes every person who is designated by a will or by any competent authority to execute a trust created by will. 2 Rev. St., pt. 2, c. 6, tit. 3, § 66, as amended by Laws 1850, c. 272, as amended by Laws 1866, c. 115, as amended by Laws 1867, c. 782,

as substantially re-enacted by Laws 1871, c. 482, was re-enacted as Code Civ. Proc. § 2802, as amended by Laws 1885, c. 518, and permits any trustee created by will or appointed by any competent authority to execute any trust created by will to file at any time an intermediate account and to annually render and finally judicially settle his accounts before the surrogate having jurisdiction, and provides that in such annual accountings the surrogate shall have commissions, etc. Before the amendment of 1885, section 2802 merely provided that a testamentary trustee could at any time file an intermediate account and the vouchers in support of it with the surrogate having jurisdiction of the estate. Held that, while under section 2802 a trustee appointed by the Supreme Court upon the death of the testamentary trustee could file intermediate accounts and render annual accounts to the surrogate's court, neither that section, construed in view of the amendment thereto, nor the other sections of the Code, authorized the Surrogate's Court to allow a final voluntary accounting by such trustee upon the termination of the trust; only the Supreme Court which appointed the trustee having jurisdiction of such accounting. *Runk v. Thomas*, 123 N. Y. Supp. 523, 526, 138 App. Div. 789.

### TESTATOR

See Presence of the Testator.

The word "testator" applies to "testatrix," irrespective of the act concerning statutes, because "testatrix," as Webster defines it, means "a female testator." *Walker v. Hyland*, 56 Atl. 268, 271, 70 N. J. Law, 69.

### TESTIFY

To "testify" is to make a solemn declaration, verbal or written, to establish some fact. *Ex parte Welborn*, 141 S. W. 31, 34, 237 Mo. 297.

The word "testify" ordinarily means the making of any statement under oath in a judicial proceeding. *State v. Murphy*, 107 N. W. 470, 475, 128 Wis. 201 (citing 8 Words and Phrases, pp. 6932, 6933).

### Production of documents

Statements compiled by employees of a corporation from its books and records, which were before a grand jury and produced to the grand jury by an officer of the corporation in a subpoena duces tecum, do not constitute testimony given or documentary evidence produced by such officer within the meaning of Act Feb. 25, 1903, c. 753, § 1, 32 Stat. 904, which grants immunity in certain cases to a witness "on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise"; the preparation or production of the statements in such case being

the act of the corporation, and not of the witness. *Helke v. United States*, 192 Fed. 83, 87, 90, 112 C. C. A. 615.

## TESTIMONY

See Direct Testimony; Expert Evidence or Testimony; Involuntary Testimony; Material Evidence or Testimony; Negative Testimony; Phonographic Report of Testimony; Positive Testimony; Taking Testimony.

More testimony, see More.

Such testimony, see Such.

The word "testimony" means a statement made by a witness under oath in a legal proceeding. *Poe v. State*, 129 S. W. 292, 295, 95 Ark. 172; *Southern Pine Lumber Co. v. Ward*, 85 Pac. 459, 463, 16 Okl. 131; *Edelstein v. United States*, 149 Fed. 636, 640, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236.

"Testimony" is evidence given orally, and it does not include documents. *State v. Winney*, 128 N. W. 680, 681, 21 N. D. 72.

"Testimony," in legal as well as in common usage, signifies a statement of facts by witnesses, and to disprove the testimony of a witness is to disprove the facts testified to by him. *Clark v. State*, 63 S. E. 606, 5 Ga. App. 605.

The word "testimony," as used in the statute granting immunity to a witness, but reserving the right to prosecute for perjury, is broad enough to include statements that are false. *State v. Murphy*, 107 N. W. 470, 475, 128 Wis. 201 (citing 8 Words & Phrases, pp. 6932, 6933).

The word "testimony," in a stipulation providing that evidence taken in a suit shall be used, not only in that case, but also in another case, the same as if the said "testimony" had been taken for each of the cases respectively, embraces all the evidence, whether written or oral. *United States v. Luce*, 141 Fed. 385, 390.

The word "testimony," as used in Code 1896, § 1797, providing that the execution of any instrument of writing attested by witnesses may be proved by the "testimony" of the maker thereof, without producing or accounting for the absence of the attesting witnesses, means the statement of the maker as a witness on the stand or before a commissioner, not his declarations out of court, nor evidence of them given by another witness on the stand. *Sledge v. Singley*, 37 South. 98, 99, 139 Ala. 346.

Code Civ. Proc. § 872, subd. 4, requires the affidavit for an order for the examination of a party before trial to set forth "that the testimony of such person is material and necessary," etc. Rule 82 of the general rules of practice requires the affidavit to specify the acts and circumstances "which show that the examination of the person is material and necessary." Held, the change of termi-

nology from "testimony" in the section to "examination" in the rule does not change the meaning. *Cherbuliez v. Parsons*, 108 N. Y. Supp. 321, 322, 123 App. Div. 814.

### Evidence distinguished

While strictly "testimony" and "evidence" are not synonymous terms, the former, as used in a statute which provides that after the testimony on both sides, the state's counsel shall open and conclude the argument to the jury, except that, if the defendant introduces no "testimony," his counsel shall open and conclude after the testimony on the part of the state is closed, means either oral or documentary evidence. *Hargrove v. State*, 45 S. E. 53, 117 Ga. 706.

A charge that if any witness has willfully testified falsely, the jury are at liberty to wholly disregard his testimony "except so far as the same is corroborated by other creditable testimony in the case" is not erroneous, because using the word "testimony" instead of "evidence"; the two words being synonymous as commonly understood. *State v. Winney*, 128 N. W. 680, 681, 21 N. D. 72.

While some authorities define the words "testimony" and "evidence" as technically different, making "evidence" the more comprehensive term, in common expression, even in courts, they are used synonymously, and charges are not faulty because "testimony" is referred to, where technically "evidence" might be the more proper term. *Jones v. City of Seattle*, 98 Pac. 743, 745, 51 Wash. 245.

The term "testimony" is not as comprehensive as "evidence," and in fact is but a species or kind of evidence; but in a certificate to the stenographer's transcript, certifying that the foregoing is a true, full, and correct transcript of the testimony and other proceedings had on the trial, the term "testimony," when coupled with the expression "other proceedings," may be treated as synonymous with "evidence," making the certificate equivalent to a statement that it contained all the evidence. *Mitchell v. Jensen*, 81 Pac. 165, 167, 29 Utah, 346.

There is a difference between the terms "evidence" and "testimony." The former is the more comprehensive term, and includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. The latter in common acceptation embraces only the statements of witnesses upon oath, and does not include proof by writings or from other sources. A statement that the record contains all the "testimony" will, however, ordinarily be taken to amount to a statement that it contains all the "evidence." *Dibble v. Dimick*, 38 N. E. 724, 725, 143 N. Y. 549.

"The words 'testimony' and 'evidence' are not synonymous terms. Testimony is

evidence; but evidence may or may not be testimony, or may consist of more than testimony. The word 'testimony' is a restricted term, consisting only of the statements of witnesses; while the word 'evidence' is a comprehensive term, embracing not only testimony, or the statements of witnesses, but also documents, written instruments, admissions of parties, and whatever may be submitted to a court or jury to elucidate an issue or prove a case." Bouvier defines "testimony": "The statement made by a witness under oath or affirmation." Black defines "testimony": "Any species of proof or probative matter legally presented at the trial of an issue by the act of the parties, and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention." Hence, "testimony" is not the proper word to be employed in a bill of exceptions to show that it contains all the evidence, and to warrant an assignment of error that the evidence is insufficient to support a decision. *Crooks v. Harmon*, 81 Pac. 95, 96, 29 Utah, 304.

A certificate of the official stenographer "that the above and foregoing \* \* \* contains a full and correct transcript of my stenographic notes of the testimony taken and oral proceedings had on the trial," and an order of the judge settling the bill of exceptions reciting that the foregoing is "a correct transcript of the proceedings herein," do not show that the bill of exceptions contains all the evidence; the word "testimony" including only the oral statements of the witnesses while testifying, and not being synonymous with the word "evidence" including any species of proof submitted to a court or jury. *Carter v. Cummings-Nielson Co.*, 97 Pac. 334, 335, 34 Utah, 315 (citing 3 Words & Phrases, p. 2523).

In an action to recover a balance due on a building contract, an instruction that the facts must be decided by the jury from the "testimony," even if erroneous, as excluding by the use of the word "testimony," in place of "evidence," the documentary evidence in the case, was not misleading, where the concluding sentence directed the jury not to consider anything but the "evidence" introduced before them. *Fitzgerald v. Benner*, 76 N. E. 709, 716, 219 Ill. 485.

The statement in the printed record of appeal that "this was all the 'testimony' introduced on the trial of this cause" is not the equivalent of the statement that "this was all the evidence introduced on the trial of this cause." An assignment of error in relation to the evidence will not be considered, unless the record shows affirmatively that all of the evidence is made a part of the record by a bill of exceptions. The word "testimony" is not synonymous with the word "evidence." *Guarantee Gold Bond Loan & Sav-*

*ings Co. v. Edwards*, 104 S. W. 624, 629, 7 Ind. T. 297.

What witnesses say under oath is "testimony," and so much of it as impresses the mind of the judge as the truth is "evidence"; and it is by "evidence," and not by "testimony," that the judge must be governed in passing upon questions of fact. *Mick v. Mart* (N. J.) 65 Atl. 851.

#### Qualification of witness essential

The word "testimony," or "to testify," implies the usual preliminary qualification of taking an oath to speak the truth. Such an implication is so reasonable and well understood among lawyers and legislators that we would do violence to common intelligence to impute to Congress any other intention in the legislation in question, providing that no "testimony" given on the examination of a bankrupt shall be offered against him in any criminal proceeding. *Edelstein v. United States*, 149 Fed. 636, 640, 79 C. C. A. 328, 9 L. R. A. (N. S.) 238.

"The use of the phrase 'testimonial evidence' must not be understood as applicable exclusively to assertions made on the witness stand. Any assertion, taken as the basis of an inference to the existence of the matter asserted is testimony, whether made in court or not. Assertions made on the witness stand are merely the commonest class of testimonial evidence. The qualifications of a witness are equally essential in the use of extrajudicial assertions." Thus, where a statute provides that those of unsound mind at the time of their production for examination are incompetent, it is error to admit in evidence a confession of accused, made two days after the commission of the offense, without permitting him the opportunity to show that he was of unsound mind when it was made. *State v. Berberick*, 100 Pac. 209, 215, 38 Mont. 423, 16 Ann. Cas. 1077, (quoting 1 Wigmore, Ev. § 479).

#### As record

See Record.

## TEXAS

### TEXAS FEVER

"Texas fever" is a deadly disease of cattle. *Wilson v. Missouri, K. & T. R. Co.*, 108 S. W. 590, 591, 129 Mo. App. 658; *North & Douglas v. Woodland*, 85 Pac. 215, 217, 12 Idaho, 50, 56, 57, 6 L. R. A. (N. S.) 921.

### TEXAS RED RUST-PROOF OATS

Where a sale of "Texas red rust-proof oats" was made through a broker, in a suit by the purchaser against the seller for damages alleged to have resulted from the delivery of oats of a different kind, it is competent for the broker to testify that the contract of sale was made with reference to the mutual understanding of the purchaser and

broker that "Texas red rust-proof oats" included only oats raised in the state of Texas, and that no contrary understanding of this trade term was known to the trade. *W. O. Brackett & Co. v. Americus Grocery Co.*, 56 S. E. 762, 763, 127 Ga. 672.

## TEXT-BOOK

Uniform series of text-books, see Uniform Series.

## TEXTURE

Similar texture, see Similar.

In the tariff act provision that unenumerated articles shall be dutiable at the rate applicable to enumerated articles which they resemble in "texture," etc., "texture" does not relate to liquids, but only to the structure of woven fabrics. *Stratton v. Komanda & Co.*, 148 Fed. 125, 126.

## THALWEG

"The term 'thalweg' is commonly used by writers on international law in definition of water boundaries between states, meaning the middle, or deepest, or most navigable, channel. And while often styled 'fairway,' or 'midway,' or 'main channel,' the word itself has been taken over into various languages." The deep-water sailing channel, or "thalweg," emerging from the mouth of Pearl river and extending eastwardly to the north of Half Moon Island, through the Mississippi Sound and Cat Island Pass, between Cat Island and Isle à Pitre, and through Chandeleur Island Sound, northeast of the Chandeleur Islands, to the Gulf of Mexico, is the true boundary line between the states of Mississippi and Louisiana, under the act of April 8, 1812, admitting Louisiana into the Union, with a boundary described as extending along the middle of the Iberville river and Lakes Maurepas and Pontchartrain to the Gulf of Mexico, and thence bounded by the said Gulf to the mouth of the Sabine river. *State of Louisiana v. Mississippi*, 26 Sup. Ct. 408, 421, 202 U. S. 1, 50 L. Ed. 913.

## THAN

See Not Less Than.

## THAT

See For That.

Where by his will testator creates an estate in fee in his eldest son, and then provides "that in case" the devisee "dies without issue his property herein specified becomes the property of" testator's second son, the word "that" must be construed as "but" or "provided that." *In re Carothers' Estate*, 119 Pac. 926, 928, 161 Cal. 588.

## THAT IS TO SAY

See, also, Videlicet.

The words "that is to say," as used in a will whereby the testator, after giving the real estate to his wife, devised to his daughter his personal property, and in fee simple all the real estate, "that is to say that if at the death of my wife my daughter, M., shall then be living the fee to said real estate shall vest in her," etc., clearly mean the same as if the testator had said "by this I mean that if," etc., or "provided if at the death of my wife," etc. *Orr v. Yates*, 70 N. E. 731, 734, 209 Ill. 222.

## THAT WHEREAS

See For That Whereas.

## THE

The word "the," as used in an act entitled "An act providing for the manner of adopting children," implies that the remedy indicated shall be exclusive. *Succession of Dupre*, 41 South. 324, 326, 116 La. 1090.

An indictment beginning "In the name and by the authority of the state of Texas" is not insufficient under the constitutional requirement that an indictment begin "In the name and by authority of the state of Texas." The use of the article "the" before the word "authority" does not add to or vary the sense and meaning of the constitutional requirement. *Spencer v. State*, 90 S. W. 638, 639, 48 Tex. Cr. R. 580.

### As all

The phrase "the evidence," as used in an instruction, means all the evidence. *Adams v. Pease*, 113 Ill. App. 856, 360.

The definite article "the" has sometimes been construed to mean "all of the." Thus Code, § 4019, providing that, when "the" property of a person shall be seized by process, the debts owing to employes for labor within 90 days shall be preferred debts and paid in full, requires that "all the property" of a debtor should be seized before labor claimants could have preference. *Anundsen v. Standard Printing Co.*, 105 N. W. 424, 426, 129 Iowa, 200 (citing *Born v. Home Ins. Co.*, 81 N. W. 676, 110 Iowa, 383, 80 Am. St. Rep. 300; *State v. Mateer*, 62 N. W. 684, 94 Iowa, 42).

### As designating a particular object

The article "the" directs what particular thing or things are to be taken or assumed as spoken of, and determines what particular thing is meant. It is used before nouns with a specifying or particularizing effect, so that its use immediately preceding "state" in the constitutional requirement that indictments shall conclude "against the peace and dignity of the state," points out the state whose peace and dignity has been offended, and its omission in the indictment is a fatal defect.

State v. Campbell, 109 S. W. 706, 712, 210 Mo. 202, 14 Ann. Cas. 403.

## THE JURY

See Jury.

## THEATER

See Proprietor of Theater.

A "theater" is a building especially adapted to dramatic, operatic, or spectacular representations; a playhouse. *People v. Klaw*, 106 N. Y. Supp. 341, 351, 55 Misc. Rep. 72 (quoting and adopting the definition in *Stand. Dict.*).

A "theater" is a playhouse, a building for the representation of a theatrical performance. *Gould v. State* (Tex.) 146 S. W. 172, 179.

The word "theater," as used in section 8369, Rev. Codes, making it a misdemeanor to keep open and maintain a theater on Sunday, means a theatrical performance or entertainment and does not include all shows, though a "show" includes a theatrical performance. *State v. Penny*, 111 Pac. 727, 729, 42 Mont. 118, 31 L. R. A. (N. S.) 1155.

The word "opera" is different in meaning from the words "opera house," in that the former may have no relation to the building in which it may be rendered, and so a "theater" may mean a place where plays are produced, whereas a "theater building" may be such, whether plays are produced therein or not. In a suit to recover for the construction of a modern \$30,000 "theater building" according to agreement, the costs for the bare building, the usual, necessary, permanent equipment such as plumbing, heating, and lighting apparatus, seats, curtains, and scenery adapted to and intended for use in that particular building, may be recovered, but not for the piano, furniture, carpets, and similar articles, movable and practically as well adapted to use elsewhere, as the latter are not essential parts of a "theater building." *Neher v. Viviani*, 110 Pac. 695, 698, 15 N. M. 400.

### Moving picture show

Under Pen. Code 1895, art. 199, prohibiting the opening on Sunday of places of public amusement, including theaters and such other amusements as are exhibited and for which an admission fee is charged, the word "theater" does not mean the building, but the performance or exhibition given; and, while a moving picture show is not a theater, it falls within the prohibition of the statute as one of "such other amusements" prohibited. *Ex parte Lingenfelter*, 142 S. W. 555, 559, 64 Tex. Cr. R. 30.

A moving picture show is within Rev. Codes, § 6825, forbidding the conducting on Sunday of any "theater," playhouse, circus, or show or any such place of public amuse-

ment. *Ex parte Bossner*, 110 Pac. 502, 503, 18 Idaho, 519.

Under Rev. Code 1852, amended to 1893, p. 56, c. 117, § 1, providing that no person, etc., without having first obtained a proper license therefor, shall be engaged in, etc., any trade, that is to say, exhibiting circuses, etc., and section 5 providing that every building, etc., where theatrical performances are exhibited, shall be deemed a circus within the meaning of this act, one maintaining a moving picture show must procure a license; the word "theatrical" meaning of or pertaining to a theater or scenic representation resembling the manner of dramatic performers. *State v. Morris* (Del.) 76 Atl. 479, 480, 1 Boyce, 330.

## THEATER TICKET

A ticket of admission to a race track, a theater, a concert, or any such entertainment, is a mere revocable "license." *Buenzle v. Newport Amusement Ass'n*, 68 Atl. 721-723, 29 R. I. 23, 14 L. R. A. (N. S.) 1242.

A "theater ticket," or a ticket to any other place of amusement, is a mere license, revocable at the pleasure of the theatrical manager. It does, however, constitute a contract between the proprietor and purchaser of the ticket to the extent that the proprietor is bound to perform or respond in damages for breach of his contract, but he is not liable in an action for trespass or tort. *Taylor v. Cohn*, 84 Pac. 388, 47 Or. 538, 8 Ann. Cas. 527.

"A 'theater ticket' is a license issued by the proprietor, pursuant to the contract, as convenient evidence of the right of the holder to admission to the theater at the date named, with the privilege specified, subject, however, to his observance of any reasonable condition appearing upon the face thereof. The license, although granted for consideration, is revocable for a violation of such condition by the holder of the ticket in the manner specified therein." *Collister v. Hayman*, 76 N. E. 20, 21, 183 N. Y. 250, 1 L. R. A. (N. S.) 1188, 111 Am. St. Rep. 740, 5 Ann. Cas. 344 (citing *Purcell v. Daly* [N. Y.] 19 Abb. N. C. 301; *Burton v. Scherpf*, 83 Mass. [1 Allen] 133, 79 Am. Dec. 717; *McCrea v. Marsh*, 78 Mass. [12 Gray] 211, 71 Am. Dec. 745; *Greenberg v. Western Turf Ass'n*, 73 Pac. 1050, 140 Cal. 357; *Pingrey's Extraordinary Contracts*, § 509; *Wandell's Law of the Theater*, 221; *Goddard's Bailments & Carriers*, § 333).

## THEATRICAL PERFORMANCE, PANORAMAS, ETC.

A company giving an entertainment consisting of panoramic reproductions of battles of the Anglo-Boer war, with portrayal of military maneuvers, but with no circus rings, trapeze acting, wild beasts, or clowns, is assessable with a license tax, under Acts 1902-03, p. 205, c. 148, § 108, providing for the as-

assessment of a license tax upon "theatrical performances, panoramas, etc.," and not under section 111, providing for a license tax upon "shows, circuses, and menageries." *Boer War Spectacle v. Commonwealth*, 60 S. E. 85, 86, 107 Va. 653.

## THEFT

See Loss by Theft.

See, also, Fraudulent Taking; Larceny.

"Theft," or larceny, is the felonious taking and carrying away of the personal property of another with intent to convert it to the use of the taker without the consent of the owner. *State v. Stewart* (Del.) 67 Atl. 786, 788, 6 Pennewill, 435.

A taking, to constitute "theft," need not be a taking from the actual possession of the owner; but a taking of property without his consent, when not in his actual custody, with intent to deprive him thereof and to appropriate it to the use of the person taking, constitutes theft. *Rose v. State*, 106 S. W. 143, 144, 52 Tex. Cr. R. 154.

Under Pen. Code 1895, art. 862, providing that it is not necessary, to constitute "theft," that possession and ownership of the property be in the same person, and that one has possession who exercises actual care, control, and management of the property, whether lawfully or not, an allegation, in an indictment for breaking and entering a house with intent to take personalty, that such property belonged to a certain person, was supported by proof that he had the exclusive care, control, and management of the property. *Clark v. State*, 125 S. W. 12, 13, 58 Tex. Cr. R. 181.

To constitute "theft" under Pen. Code 1895, art. 861, punishing "theft by false pretext," the fraudulent intent must exist at the time of obtaining the goods and the representations must be false, while to constitute "theft" under section 377, relating to "theft by conversion by bailee," the goods must have been obtained under contract of bailment, and the fraudulent intent must be conceived subsequent to obtaining possession. *Price v. State*, 91 S. W. 571, 49 Tex. Cr. R. 131.

In a conversion under bailment, the fraudulent matters occur after obtaining lawful possession of the property. If the fraudulent purpose existed at the time of getting the property, and false pretenses were employed to get possession, with the then existing purpose of appropriating the property, and appropriation did occur, it would be "theft" under the general statute, and not under the statute with reference to conversion under a contract of hiring or borrowing. *Pickrell v. State*, 132 S. W. 938, 940, 60 Tex. Cr. R. 572.

A foot race was arranged between H. and W.; one T. being H.'s backer, and defendant G. being W.'s backer. Prosecutor

gave T. a sum of money to bet on the race, on the latter's promise that it, or an equivalent sum, should be returned, whatever the outcome of the contest; prosecutor not intending to part with his money. The money was placed in a satchel, and after the race G. and W. claimed the same, and it was turned over to them. Held, that such acts constituted "theft," as defined by White's Ann. Pen. Code, art. 858, and not "swindling" or "fraudulent conversion by a bailee," though the money was obtained by fraudulent pretext. *Glasgow v. State*, 100 S. W. 933, 935, 50 Tex. Cr. R. 635.

### Criminal intent

To constitute "theft," the fraudulent intent to convert to the taker's own use must exist at the time of taking; for, if the original taking is not fraudulent, no subsequent appropriation of the property would constitute theft. *Richards v. State*, 116 S. W. 587, 588, 55 Tex. Cr. R. 278.

To constitute "theft," the taking must be fraudulent. *Young v. State*, 83 S. W. 808, 47 Tex. Cr. R. 468.

Under Pen. Code 1895, art. 861, providing that the taking must be wrongful, so that, if the property came into the possession of the person accused of theft by lawful means, the subsequent appropriation of it is not theft, but if the taking was with intent to deprive the owner of the value thereof, and appropriate the property to the use and benefit of the person taking, and the same is so appropriated, the offense of "theft" is complete where, in a prosecution for theft of a mule, which defendant took and sold, it appeared that he had the owner's consent to the taking of the mule, but not to the selling thereof, it was necessary to prove that he intended at the time of taking the mule to appropriate it, in order to convict him of theft. *Flagg v. State*, 103 S. W. 855, 856, 51 Tex. Cr. R. 602.

### Embezzlement distinguished

"Embezzlement" partakes largely of the qualities and nature of "theft," in that it is a peculiar way of converting money obtained by virtue of a trust relation. The fraudulent idea pervades embezzlement, as it does theft. The difference mainly in the two offenses consists in the manner of obtaining possession of the property and the time the fraudulent intent was conceived. *Leach v. State*, 81 S. W. 733, 46 Tex. Cr. R. 507.

One assisting a person, having possession, as employé, of horses of another, in driving them away with the purpose of appropriating them, is guilty of "embezzlement," and is not guilty of "theft." *Pearce v. State*, 98 S. W. 861, 862, 50 Tex. Cr. R. 507.

### Larceny synonymous

"Larceny" is only another name for stealing or "theft." *State v. Fair*, 76 Pac. 731, 733, 35 Wash. 127, 102 Am. St. Rep. 897.

To "steal" a domestic animal, in violation of Wilson's Rev. & Ann. St. 1903, § 2480, punishing stealing of live stock, is larceny in the sense in which "larceny" is used in section 5224, providing that, when property taken in one county by larceny has been brought into another, the jurisdiction of the offense is in either county; the words "steal," "larceny," and "theft" having the same meaning. *Cox v. Territory*, 2 Okl. Cr. 668, 104 Pac. 378-380 (citing *Hughes v. Territory*, 8 Okl. 28, 56 Pac. 708; *And. Law Dict.*; *Webst. Int. Dict.*).

#### Swindling distinguished

See Swindle—Swindling.

### THEFT FROM THE PERSON

See, also, Larceny from the Person.

"Theft from the person" is the form of theft in which the property is taken from the person. *Miles v. State*, 103 S. W. 854, 855, 51 Tex. Cr. R. 587.

To constitute "theft from the person," it is not essential that it occur in a concealed manner and out of the observation of others; and where money was taken without the victim's knowledge, and while he was asleep or stupefied, the spectators being misled by accused's statement that the victim was his brother, the theft was privately done, within the statute. *Black v. State*, 104 S. W. 897, 898, 52 Tex. Cr. R. 8.

"Theft from the person" may be either wholly unknown to the person whose property is stolen, and privately, or it may be taken from his person so suddenly as to prevent effective resistance. *Johnson v. State*, 117 S. W. 964, 965, 55 Tex. Cr. R. 411; *Grant v. State*, 127 S. W. 173, 174, 59 Tex. Cr. R. 123.

A guest at a hotel, on retiring placed his pants, in a pocket of which was his pocket-book, with \$72 in money, under his head. The proprietor during the night entered his room, secured the pants, and stole the money. Held not to show a "theft from the person." *Gibson v. State* (Tex.) 100 S. W. 776.

### THEIR

#### As its

The word "their," as used in Laws Ga. 1833, p. 264, relating to the charter of the Georgia Railroad Company, and providing that the stock of the company and its branches shall be exempt from taxation for a fixed period, and after that shall be subject to a tax not exceeding a specified per cent. per annum on the net proceeds of their investments, does not refer to the shareholders who should become interested in the enterprise, but refers to the corporation, and is used in the same sense as if the pronoun "its" had been used instead of "their." *Georgia R. & Banking Co. v. Wright*, 132 Fed. 912, 914.

### THEIR CHILDREN

Where a widow with one child married a widower with six children, and two children resulted from the marriage, and he took out a policy of insurance, payable to the wife, in trust for herself and "their children," his children by the first wife were entitled to their share in the proceeds. The words "their children" might be used in one connection to designate the children having a common parentage, and in another connection to designate the children of the husband and the children of the wife spoken of. Neither law nor common usage has affixed such unvarying meaning to the word "their" as to prevent its appropriate use for the latter purpose. *Lehman v. Lehman*, 64 Atl. 598, 599, 215 Pa. 344.

### THEIR DEATH

Testatrix directed that a fund be set apart sufficient in amount to produce an income of \$6,000 a year, and out of such income to pay her brother \$4,000 each year, and another brother \$2,000 a year for the term of their natural lives, respectively, and after "their death" the capital of the fund to go to other persons named. Held, that the words "their death" must be construed to mean "after their respective deaths." *Collins v. Wardell*, 54 Atl. 417, 419, 65 N. J. Eq. 366.

### THEIR HEIRS

Where an estate in lands is granted to a husband and wife for life, with remainder to "their heirs," the presumption of law is that the heirs of each, as a separate class, take a moiety of the remainder. *Irvin v. Stover*, 67 S. E. 1119, 1122, 67 W. Va. 356.

### THEIR HEIRS AT LAW

The words "their heirs at law," in a deed directing a trustee to pay rents to decedent and his first wife and at their death to convey to "their heirs at law," mean heirs of decedent and such wife, and not the heirs of survivor; decedent's second wife thus taking no equitable interest under the deed. *Crandall v. Ahern*, 85 N. E. 886, 887, 200 Mass. 77.

### THEN

The word "then" does not always imply consecutiveness; afterwards, later, at another time, being some of its meanings. *Ventress v. Town of Clayton*, 51 South. 763, 764, 165 Ala. 349.

The word "then" as used in connection with the devise of property, has been held to be an adverb of time, but the general rule is that it does not point to the time, but indicates the event. In *re Fitzpatrick's Estate*, 81 Atl. 815, 816, 233 Pa. 33, Ann. Cas. 1913B, 320.

A will read: "Upon the death of my said wife and all of my first named three sisters, I will the other two-thirds 'then' to those

who would 'then' be entitled thereto under the intestate laws." Held, that as first used "then" is a conjunction, meaning "in that event," and that as used in the second connection it is an adverb of time, meaning "at that time." *Wood v. Schoen*, 66 Atl. 79, 81, 216 Pa. 425.

The word "then," as used in a deed of trust stipulating that, in case of the absence from the county of the trustee, another person should become his successor, and in the absence of the trustee and his successor "then the then sheriff of said county, \* \* \* who shall thereupon become their successor to the title \* \* \* with all the powers, duties and obligations thereof," may sell, etc., plainly has reference to whosoever is sheriff at the time of the default. *McNutt v. Mutual Ben. Life Ins. Co.*, 79 S. W. 703, 704, 181 Mo. 94.

A deed of trust conveyed the property to the "sheriff of W. county," in trust, etc., to hold the same to such grantee and to his successor or successors in trust, and to his or their assigns forever. It further provided that if the grantor made default in certain conditions, at the option of the holder, the "then" acting sheriff of W. county, might sell the property, etc. Held, that time of foreclosure was the potential consideration in the interest of the grantor to which time the word "then" referred, so that the acting sheriff at the time the creditor elected to institute foreclosure proceedings was the sheriff authorized to make the sale. *Feller v. Lee*, 124 S. W. 1129, 1133, 225 Mo. 319.

In Bankr. Act, § 60, subds. "a," "b," as amended by Act June 25, 1910, c. 412, § 11, subds. "a," "b," 36 Stat. 842, providing that if at the time of transfer by an insolvent debtor or entry of judgment against him, the judgment or transfer "then" operates as a preference, and the person receiving it shall then have reasonable cause to believe that it would effect a preference, etc., the word "then" refers to the time the judgment was entered. *Galbraith v. Whitaker*, 138 N. W. 772, 774, 119 Minn. 447, 43 L. R. A. (N. S.) 427.

As used in Code Civ. Proc. § 390, providing that, where a cause of action which does not involve real property within the state accrues against a person who is not "then" a resident of the state, an action cannot be brought thereon in the state after the expiration of the time limited by the law of his residence for bringing a like action, etc., the phrase "not then a resident of the state" must be construed with the other phrase, "the law of his residence." The word "then" in the first phrase obviously refers to the point of time referred to immediately before this phrase, namely, the time when the cause of action accrued. Hence the phrase "law of his residence" means the law of the debtor's residence at the time the cause of

action accrued, and not at the time when the action was commenced. *Utah Nat. Bank v. Jones*, 96 N. Y. Supp. 338, 339, 109 App. Div. 526.

#### As at that time

A will devising testator's land to his widow for life, and providing that after her death the remainder of the estate should go to testator's son and daughter, share and share alike, and in case of their death "then" to their children only, and, if no children are left by them, that the survivor of testator's children should inherit the other's share, did not give the son and daughter an estate in fee; they being entitled to nothing more than a life estate in any contingency, the word "then" as used, being an adverb of time, and meaning "at that time." If either of them dies leaving children, the estate vests in such children; on death of either without leaving children, the life estate vests in the survivor; and upon his death leaving children, they would take the whole estate in full. If both of testator's children die without children, the fee becomes intestate property. *Kleinhans v. Kleinhans*, 97 N. E. 1077, 1078, 253 Ill. 620.

Act March 5, 1874 (P. L. p. 27; 2 Gen. St. 1895, p. 1923, § 35), provides that, when a building on leased premises is injured by fire without fault of the lessee, the landlord shall repair the building as speedily as possible, or, in default thereof, the rent shall cease until the building shall be put in complete repair, and that, in case of total destruction of the building, the rent shall be paid up to the time of such destruction, and then and from thenceforth shall cease unless the parties have otherwise stipulated in their lease. Held, that the statute does not give a tenant an option to be availed of within a reasonable time as to whether he will terminate the lease or not, but the word "then" in the clause, "and then and from thenceforth," refers to the time of destruction making the lease terminate at that time, in the absence of a contrary provision in the lease, and, where the lessee has paid an installment of rent in advance, he may recover from the lessor such portion thereof as would have been earned after the destruction of the premises. *Carley v. Liberty Hat Mfg. Co.*, 79 Atl. 447, 448, 81 N. J. Law, 502, 33 L. R. A. (N. S.) 545.

Where a will gave testator's wife a life estate in all his real and personal property, and provided that at the death of the wife all his property should be sold and converted into money, and that "then," after the payment of the debts of the wife and a specific legacy, an equal division should be made among all the children, the distribution between the children was to be made after the death of the widow, the sale of the property, and the payment of the obligations referred to. *Nelson v. Nelson* (Ind.) 72 N. E. 482, 485.



**Death of taker referred to**

Under a deed to a mother for life, "then" to the heirs of her body forever, the heirs take a future contingent, and not a vested, interest, within Civ. Code, §§ 694, 780, declaring that a future interest is vested when there is a person in being who will have a right to immediate possession on the ceasing of the precedent interest, and that when a remainder on an estate for life is not limited on a contingency defeating such precedent estate it is deemed to be intended to take effect only on the death of the taker; the word "then" referring to the time of the expiration of the life estate. *Hall v. Wright*, 120 Pac. 429, 431, 17 Cal. App. 502.

**Death of testator referred to**

A will created a trust, and provided that on the death of the beneficiary the fund should pass to testator's sister and two brothers, and should be equally divided between them, and that "after" the fund for the trust was set aside the residue should go in trust for the benefit of his father and mother for life, and thereafter to his sister and brothers. The provision as to the residue was as follows: "After my executrix and executors have paid my just debts and set aside the aforesaid sum \* \* \* then it is my will and I give and bequeath to my said executrix and executors all the rest, residue and remainder of my estate real and personal, in trust, however, and for the uses and purposes following," etc. It was contended that the creation of the residuary trust "after" the prior created trust indicated an intention to exclude from the residuary trust all of that which was included in the former trust, and the words "after" and "then" were relied on as indicating such intentions. It was held, however, that these words were to be considered words of description, rather than of exclusion and limitation, and the provision of his will creating a residuary estate was deemed to speak as of the date of his death, so it would include all property that had been devised or bequeathed to others, including a legacy which had lapsed. *Langley v. Westchester Trust Co.*, 73 N. E. 44, 46, 180 N. Y. 326.

**As in that case or event**

A life estate in all of the testator's property, real and personal, as given to his wife, who is charged with the administration of the estate for the benefit of herself and the other beneficiaries named in the will, is not enlarged into a fee simple estate in either the real or personal property by the phrase, describing the property to go over, "whatsoever what may be left," nor in such case is a fee simple estate in remainder, defeasible by the death of the devisee without leaving a child or children surviving him, enlarged into an absolute estate in fee simple by the insertion, after the naming of the event the happening of which shall divest the estate, of the phrase

"then the estate left over." The word "then" is not used in the chronological, but the sequential, sense, and means the same as the words "in that case," or "in that event." *Behrens v. Baumann*, 66 S. E. 5, 7, 66 W. Va. 56, 27 L. R. A. (N. S.) 1092.

Where in a will there is a devise to a son, and if he dies without lineal descendants living at the time of his decease "then" over, these words are not by themselves, without assistance from other parts of the will, sufficient to create an estate by implication in the lineal descendants; but the son takes a fee defeasible upon his death without lineal descendants living at the time of his decease, and in the event of lineal descendants living at the time of the son's decease his fee becomes absolute, and such descendants have no interest under the will as against his grantee. *Anderson v. United Realty Co.*, 86 N. E. 644, 647, 79 Ohio St. 23.

**Time of enjoyment referred to**

Adverbs of time, such as "upon," "then," "from and after," etc., in the devise or bequest of a remainder limited upon a life estate, are construed to relate merely to the time of enjoyment of the estate, and not to the time of its vesting in interest. *Staples v. Mead*, 137 N. Y. Supp. 847, 850, 152 App. Div. 745.

The words "then to pay after the termination of the life estate" do not mean a gift in future, but a present gift, and vest the remainder upon the death of testator, but postpone the enjoyment of the gift until the death of the life tenant. *In re Allison*, 102 N. Y. Supp. 887, 892, 53 Misc. Rep. 222.

**THEN AND THERE**

Where the day and date of the first fact alleged is given, and the others are stated as having "then and there" occurred, it is to be inferred that the facts alleged were coexistent—occurring at the same point of time. *State v. Hand*, 58 Atl. 641, 71 N. J. Law, 137.

The words "then and there" as used in an indictment merely bring forward prior averments of date and venue, and do not otherwise enlarge the description of the offense. *Shaw v. United States*, 165 Fed. 174, 175, 91 C. C. A. 208.

The words "then and there" being used in an indictment simply to avoid repeating the time and place at which the offense is charged to have been committed, their omission in the conclusion of the indictment or elsewhere is immaterial, where the time and place of the offense is sufficiently charged in the beginning thereof. *State v. Seiberling*, 127 S. W. 106, 107, 143 Mo. App. 318.

An indictment alleging that accused, at a county, on a date specified, sold liquor to persons named, "minors under the age of 21 years," sufficiently charges that the sale was made to minors in the county on the date

mentioned without the words "then and there" immediately preceding the quoted words. The words "then and there" in an indictment refer to some former allegation, and are only necessary when it is essential to refer to such former allegation. *State v. Holden*, 127 S. W. 399, 400, 142 Mo. App. 502.

An indictment, charging a physician with issuing a prescription for intoxicating liquor which was not "then and there" to be used for medicinal purposes, was not defective in the use of the quoted words; their effect being to charge the offense as at any time within the limitation of the crime and at any place in the county, and not at the immediate time and place. *State v. Pomeroy*, 147 S. W. 144, 145, 163 Mo. App. 288.

The formal part of an indictment recited that: "At the November, 1908, term of the district court of Carter county, state of Oklahoma, begun and held in the city of Ardmore in said county, on the 9th day of November, 1908, the grand jury of said county, good and lawful men, legally drawn and summoned according to law, and then and there examined, impaneled, sworn, and charged according to law, do present and find," etc. Held that the words "then and there" have direct reference to the expression "at the November, 1908, term of the district court," and not to the phrase "on the 9th day of November, 1908," so as to identify the grand jury which returned the indictment as one which was impaneled on the 9th of November, and which was discharged on November 19th prior to the commission of the offense charged. *Fooshee v. State*, 108 Pac. 554, 556, 3 Okl. Cr. 666.

The words "then and there," used in an indictment charging a seduction of a female who was "then and there an unmarried female of previous chaste character," refer to the time of and immediately before the seduction. *State v. Sortviet*, 110 N. W. 100, 101, 100 Minn. 12.

Where the charging part of an indictment for murder is in one sentence, and the word "feloniously" is so connected with subsequent portions of the sentence as to modify them by a fair interpretation, it is unnecessary to repeat the word in connection with each act constituting the crime; but where the pleader uses words to describe the intent with which the assault was made, the words "then and there," used in connecting the infliction of the mortal wound with a felonious intent, will be interpreted to refer to the time and place merely, and not as a vehicle to carry the intent with which the assault was made through the indictment so as to modify the intent in making the mortal wound. *Wright v. United States*, 90 Pac. 732, 733, 18 Okl. 510, 11 Ann. Cas. 995.

Where the third count of an indictment, referring to the first count, alleged that defendant "did on the day and date and in the

county and state aforesaid," etc., the omission of the word "there" from the expression "then and there," in the charging part of the indictment, did not render it defective; such expression having reference to the previous time and place alleged. *Manovitch v. State*, 96 S. W. 1, 2, 50 Tex. Cr. R. 260.

When an act is done, and time and place alleged, and it is averred that then and there another act occurred, and other acts are alleged in the same manner, this necessarily imports that all the acts were coexistent, and that they occurred at the same time. The word "then" refers to a precise time. *Burns' Rev. St. 1901, § 8678* (Acts 1897, p. 316, § 1), authorizes dealers in beverages to file with the circuit court clerk a written description of the trade-mark, initial, etc., stamped upon their bottles, and provides for the recording and publication thereof for not less than two weeks in a newspaper in the county, and also for the recording of the description in the office of the secretary of state. Section 8680b (Acts 1897, p. 316, § 5) punishes any one filling, buying, selling, etc., any bottle belonging to a dealer who has complied with section 8678, with the intent to defraud such dealer. An indictment under section 8680b charged the offense as committed on the same day on which it was returned, and alleged that the dealer had "then and there and theretofore" filed with the circuit court clerk the required description, which had been recorded, and that the clerk "then and there" caused a copy to be published "for not less than two weeks" in a certain newspaper, and that such description was "then and there also filed" with the secretary of state, and by him "then and there" recorded. Held, that the indictment was bad for failing to show that the dealer had complied with section 8678, and that the required publication had taken place before the purchase constituting the offense occurred. *State v. Barnett*, 65 N. E. 515, 516, 159 Ind. 432.

#### As instantly

A statement in an indictment that the deceased "then and there instantly died" is a sufficient allegation that the death occurred within a year and a day after the assault. *Commonwealth v. Snell*, 75 N. E. 75, 77, 189 Mass. 12, 3 L. R. A. (N. S.) 1019.

#### As time and place previously mentioned

Where an indictment for permitting gambling on premises stated the date of the offense and laid the venue in a certain county of the state, it was sufficient to refer thereafter in the indictment to the time and place by using the words "then and there." *De Los Santos v. State* (Tex.) 146 S. W. 919, 920.

An indictment alleging that a local option election was held on a certain day, and thereupon an order prohibiting sales was made, and that defendant "then and there"

sold liquor, is bad. The words "then and there" refer back to the date before alleged when the local option election was held, and show a sale at a time when the same could not be unlawful. *O'Reilly v. State* (Tex.) 85 S. W. 89.

An indictment alleging that defendants on a certain date "then and there being, and acting together, did 'then and there' \* \* \* feloniously take, steal, and ride away" three horses belonging to two different persons, sufficiently alleged that the animals were taken at the same time and place, so that it was proper to charge the stealing of all animals in one indictment. *State v. Clark*, 80 Pac. 101, 46 Or. 140.

In an affidavit for violating the local option law, it was alleged that at an election held it was determined that the sale of intoxicating liquors should be prohibited in justice precinct No. 4, in a county and state named, and the necessary orders made and publication had, and that thereafter, on a date specified, a person named "did then and there sell intoxicating liquors" to a person named. The information followed the complaint, except that, instead of the words "then and there," the words "thereafter in said justice precinct" were used. Held, that there was no variance between the affidavit and the information as to the place where the alleged sale took place; both affidavit and information charging the offense to have been committed in prohibited territory. *Moreno v. State*, 143 S. W. 156, 157, 64 Tex. Cr. R. 660.

An information charging that in a certain town, voting precinct, and county of the state, while a public election was being held on a certain day, defendant then and there unlawfully and willfully gave to another intoxicating liquor, sufficiently charged, by the use of the words "then and there," that the offense was committed in the town specified. *Walker v. State* (Tex.) 151 S. W. 318.

The words "then and there," as used in an indictment, have reference to the day before named therein. *State v. Bonney*, 34 Me. 223, 225.

#### THEN LIVING

Under a will which directs trustees, on the death of testator's child, to convey the principal of the share so held for such child's benefit to such child's lawful issue then living by representation, but if such child shall die without leaving lawful issue living at the time of such child's death, then upon such child's death to add the principal of the share held for such child's benefit equally to the shares held for the benefit of any other children "then living," the words "then living" as first used refer to the death of the child, and not of the testator. *Clarke v. Fay*, 91 N. E. 328, 329, 205 Mass. 228, 27 L. R. A. (N. S.) 454.

Testatrix devised a residuary estate in trust to pay the income to her brothers for life and survivor, with remainder to the issue of one of them, and provided that, on the death of the brothers leaving no issue "then living," the "then remaining" property should be divided into three parts, one part to be divided equally between three cousins, the children of an uncle, one part to be divided equally between two cousins, the children of an aunt, and one part to an uncle, and, in case of the "previous decease" of either of the cousins or of the uncle leaving issue, the share of the deceased should be paid to such issue by right of representation, and, if there were no issue "then living," the share should be divided equally among the survivors of the cousins and the uncle, or the whole to the survivor of them. The last surviving brother, both of whom died without issue, survived a cousin, a child of the aunt, who died leaving no issue, and the uncle leaving two daughters. Held, that the words "then living," "then remaining," and "previous decease" referred to the period of distribution, and testatrix intended that the survivors should be ascertained at the period of distribution, and the share of the deceased cousin must be divided equally between the four surviving cousins, to the exclusion of the children of the deceased uncle. *Hall v. Hall*, 95 N. E. 788, 789, 209 Mass. 350.

Testator devised land in trust for the benefit of his brother J. for life, with provision that if J.'s wife survived J., one-third of the income was to be paid her during her life, and the remaining two-thirds were to be divided among J.'s children in the proportion of three-eighths to A. and five-eighths equally to his other children then living during the life of their mother, and that immediately after the death of J. and wife said real estate should be vested in the children of J. in the same proportion as mentioned as to the income, and that if any of the children be then deceased, under age and without issue, the surviving children of J. should take the share of said decedent in the same proportions, but if either of said children be then deceased, leaving lawful issue, such issue should take the share that the deceased parent would have taken if living. Held, that the interest which a child of J. took under the will was a vested remainder, and not contingent on his surviving his parents, or subject to be divested by his dying before them without issue, he being of age when he died; the words "then living," applying only to the division of the income. *Jacobs v. Whitney*, 91 N. E. 1009, 1012, 205 Mass. 477, 18 Ann. Cas. 576.

A will after giving life estates, provided that at the death of the life tenants, or in case "I should survive" them, "then at my death \* \* \* I give" certain property, "to the three youngest children then living of" one of such persons. Held that the phrase

"then living" refers to the words "at my death," rather than to the death of the life tenants, vesting the estates in such children at the death of testator subject to the life estates. *Van Deusen v. Van Deusen*, 122 N. Y. Supp. 718, 719, 138 App. Div. 357.

A testator bequeathed to his wife the income from funds for her life, also a cash legacy and personal property, and devised to her their homestead for life; and a later item of his will declared that it was his intention that the provisions in favor of his wife should have precedence over all other gifts, devises, or legacies. Another clause declared that it was his wish that his executors should have ample time in which to administer and settle his estate, so that no property should be unduly sacrificed by a speedy sale. The testator also bequeathed to trustees, on the death of his wife, a part of the fund of which she was given the income for life for the establishment of a children's hospital, which fund, upon the failure of the city to comply with certain conditions, was to pass into and become a part of the residue, and to be distributed to the then living children of the testator's brothers and sisters. The testator gave specific legacies to his nephews and nieces, who were his heirs, and also gave specific legacies to his brothers and sisters, besides giving them the remainders in part of the funds bequeathed to his wife. The residuary clause recited that all the rest and residue of the testator's estate, "after providing for the devises, bequests and legacies" mentioned, and after so much thereof as may be necessary to defray the expense of taxes on his homestead and keeping the same in repair for the benefit of testator's wife, was devised and bequeathed to the then living children of his brothers and sisters. Held that, if the testator intended there should be a number of residuums, to be distributed from time to time, his intention would be carried out, but the idea would give a new meaning to the term "residuum" or "residuary estate," which means that which is left when all the debts and particular legacies are discharged; but, in view of the testator's solicitude for his wife, and the fact that part of the fund of which she was given a life income was directed to be disposed of as part of the residuum, and in view of the use of the word "after," which ordinarily denotes subordination as to time, the will created only one residuum, which was not to be distributed until after the death of the testator's wife; the words "then living" referring to the death of the wife. In *re Stark's Will*, 134 N. W. 389, 395, 149 Wis. 631.

The words "if then living," in a will providing that "in case of the decease of either of my said three sons before the decease of their mother, leaving lawful issue, the issue of such deceased son shall take by representation the share the parent would be entitled to if then living, and in case of default of such issue, then my said executors shall pay

over to my surviving sons equally the portion of said trust property herein bequeathed to the son so dying without issue," refer to the time when interest or principal is payable out of the share of a son who had died leaving no issue. *Hendricks v. Hendricks*, 69 N. E. 736, 738, 177 N. Y. 402.

#### THEN ON HAND

The words "then on hand," in a contract between plaintiff and defendant, in one of the clauses of which it was agreed that, on the execution of a certain license to defendant by a patentee, plaintiff would execute and deliver to defendant a bill of sale of all its property "then on hand" at plaintiff's factory, on receiving from defendant a specified cash sum, plainly means, not on hand at the time the contract was signed, but that might be on hand at a future date, to wit, upon the execution of the license, and such contract is a mere option, and does not bind defendant to pay the sum named on the execution of the license. *New York Pelton Floor Co. v. Tucker & Vinton*, 89 N. Y. Supp. 410, 411, 43 Misc. Rep. 429.

#### THEN OWNED

In an agreement providing for the sale of stock of a member of a corporation, together with its proportion of the surplus, to the other stockholders, the expressions "then owned," "the stock of the deceased," "his entire holdings of stock," were used in referring to the disposition of the stock of members dying or retiring from the concern. Held, that the agreement embraced new stock created from the surplus. *Jones v. Brown*, 50 N. E. 648, 649, 171 Mass. 318.

#### THEN REMAINING

A will gave testator's widow the sole use and benefit of all the property during her life and while unmarried, and provided that on her marriage a certain distribution should be made, and also provided that at her death unmarried there should be a certain distribution of the estate "then remaining." The will directed payment of debts and certain expenses, and the assets included quite an amount of live stock. The use of the phrase "then remaining" did not show an intention to authorize the widow to sell real estate. The widow had no right to use the corpus of the estate, either real or personal, without accounting for the same to those who, on her death or remarriage, should become entitled to the fee. *Thompson v. Adams*, 69 N. E. 1, 3, 205 Ill. 552.

Testatrix devised a residuary estate in trust to pay the income to her brothers for life and survivor, with remainder to the issue of one of them, and provided that, on the death of the brothers leaving no issue "then living," the "then remaining" property should be divided into three parts, one part to be divided equally between three

cousins, the children of an uncle, one part to be divided equally between two cousins, the children of an aunt, and one part to an uncle, and, in case of the "previous decease" of either of the cousins or of the uncle leaving issue, the share of the deceased should be paid to such issue by right of representation, and, if there were no issue "then living," the share should be divided equally among the survivors of the cousins and the uncle, or the whole to the survivor of them. The last surviving brother, both of whom died without issue, survived a cousin, a child of the aunt, who died leaving no issue, and the uncle leaving two daughters. Held, that the words "then living," "then remaining," and "previous decease" referred to the period of distribution, and testatrix intended that the survivors should be ascertained at the period of distribution, and the share of the deceased cousin must be divided equally between the four surviving cousins, to the exclusion of the children of the deceased uncle. *Hall v. Hall*, 95 N. E. 788, 789, 209 Mass. 350.

#### THEN SURVIVING

A testator, survived by a widow and six children, directed that the residuary estate should be held in trust to pay the income to the widow, and on her death to divide the estate into as many equal shares as "I may have children living at the time of the decease of my said wife \* \* \* or issue of any deceased child living at such division," and provided that, if any of the children should die leaving no issue, the share set apart to any child so dying should be divided among his children "then surviving," share and share alike. Held, that the words "then surviving" referred to the time of the death of a child without issue, and survivorship was a condition precedent to any child becoming entitled to any interest in the share of a child dying without issue, and the share of a son of testator, who died without issue after the death of a brother and sister leaving issue, went to the surviving children of testator, to the exclusion of grandchildren. *Davies v. Davies*, 113 N. Y. Supp. 872, 875, 129 App. Div. 379.

#### THEOLOGICAL OR RELIGIOUS SEMINARY

The holding of morning exercises in the public schools, consisting of the reading by the teacher without comment of nonsectarian extracts from the Bible, King James' version, and repeating the Lord's Prayer and the singing of appropriate songs, in which the pupils are invited, but not required to join, does not convert the schools into a "sect or religious society, theological or religious seminary" or a "sectarian school," within Const. art. 1, § 7, and article 7, § 5, providing that no money shall be appropriated from the treasury for the benefit of any sect or reli-

gious society, theological or religious seminary, or for the support of any sectarian school; a "theological or religious seminary" being a place for the preparation of men for the ministry, or for the teaching of religious doctrines. *Church v. Bullock*, 109 S. W. 115, 117, 104 Tex. 1, 16 L. R. A. (N. S.) 860, affirming (Tex.) 100 S. W. 1025.

#### THEORY

See Association Theory.

The "theory of the case" refers to the facts on which the right of action is claimed to exist, and if the facts stated as the basis of a right to recover are sufficient, either at common law or by statute, the complaint is good as against a demurrer, though the pleader himself may have been mistaken as to the law awarding him his right. *Pittsburgh, C., C. & St. L. Ry. Co. v. Rogers*, 87 N. E. 28, 31, 45 Ind. App. 230; *State ex rel. Millice v. Petersen*, 75 N. E. 602, 604, 36 Ind. App. 269.

#### THEORETICAL SECTIONS

See Corresponding Theoretical Sections.

#### THERE

See Then and There.

#### THERE IS NO CHANGE

An applicant for a life insurance policy, instead of being required by the examiner to answer specific questions in the application, signed a statement written by the examiner across the blank questions which were identical with those answered on a previous examination by the same examiner for insurance in another company. The statement asserted that the answers on such previous examination "still held good, and are valid in regard to this examination." Held, that such statement was a reiteration of the truth of the statements given on the prior examination, and the words "there is no change from last examination" did not mean that each question was read and answered. *Fletcher v. Bankers' Life Ins. Co. of City of New York*, 116 N. Y. Supp. 1105, 1106, 62 Misc. Rep. 546; *Id.*, 119 N. Y. Supp. 801, 135 App. Div. 205.

#### THEREAFTER

Under Rev. St. 1879, § 1574, making it an offense to remove or cause to be removed and placed in a public road any dead animal or other nuisance, to the annoyance of the citizens, and providing that if such nuisance be not removed within three days thereafter it shall be deemed a second offense, the term "three days thereafter" means three days after conviction, and an indictment which, in order to supply a basis for a prosecution for a failure to abate a continuing nuisance within three days after conviction, pleads a continuance of the nuisance from the time it

was created until the filing of the information, does not charge two distinct offenses, and hence is not bad for duplicity. *State v. Murray*, 140 S. W. 899, 902, 237 Mo. 158.

It being clear from the record of a prosecution for violation of an ordinance by breach of the peace in using offensive language that "thereafter," in an instruction claimed to have exonerated defendant if he used the language after the marshal shot his brother, was used, and must have been understood, not in the sense of after the affair was a past matter, but in the sense of not before the wrongful conduct of the marshal in assaulting defendant and shooting at his brother running from arrest for a misdemeanor, its use is not ground for reversing an acquittal. *City of Stanberry v. O'Neal*, 150 S. W. 1104, 1107, 166 Mo. App. 709.

In a statute providing that judges of the supreme, district, and county courts shall be elected at the first general election, and "thereafter" at the general election next preceding the time of the termination of their respective terms of office, the word "thereafter" can have no other meaning than that, at the general election next preceding the time of the termination of each and every subsequent term of office as they shall follow each other in succession, a successor shall be elected. *State ex rel. Polk v. Galusha*, 104 N. W. 197, 200, 74 Neb. 188.

An instruction that "if you believe from the evidence that the conductor of defendant requested of plaintiff his fare or ticket a short time after leaving the depot," and that he thereafter again requested the plaintiff to produce his ticket or pay his fare, and that he failed to do so, whereupon he was required to leave the train, "you will find for the defendant," is faulty, in that it fails to state that plaintiff was entitled to a reasonable time to pay his fare. A "short time" after leaving the depot might mean one second, five minutes, or more, being a relative term, and might be either a reasonable time or not, and so the word "thereafter" might mean immediately, or any subsequent time after the first demand. *Seaboard Air Line Ry. v. Scarborough*, 42 South. 706, 712, 52 Fla. 425.

The word "hereafter" pertains to something that will occur in the future. Webster defines it as a future existence or state; in time to come, or some future time or state. Where under the terms of an original contract 10 per cent. of the contract price was to be retained until the final completion of the work and an assignment of the contract provided that the assignee should have all the compensation "hereafter accruing," the words "hereafter accruing" reserved the 10 per cent. earned at the time of the assignment of the contract to the assignor. *Ercanbrack v. Faris*, 79 Pac. 817, 818, 10 Idaho, 584.

An order giving plaintiffs 30 days to make and serve a case-made, and giving defendant 5 days after service to suggest amendments, the case to be signed and settled on 2 days' notice of either party at "any time thereafter," fixes no time for settling and signing a case-made when the trial judge's term of office has expired. *State ex rel. Lauder et al. v. Lewis*, 83 Pac. 619, 72 Kan. 234 (citing and adopting *Mowery v. Wilson State Bank*, 72 Pac. 539, 67 Kan. 128; *Butler v. Scott*, 75 Pac. 496, 68 Kan. 512).

#### THEREAT

The word "thereat," in Const. art. 11, § 8, declaring that a freeholder's charter should be submitted to the qualified electors of the city at a general or special election, and that, if a majority of the electors voting thereat shall ratify it, it shall be submitted to the Legislature, refers to the particular phrase "general or special election," and has exactly the same meaning as if the sentence had read, "if a majority of such qualified electors voting at such election shall ratify the same." *City of Santa Rosa v. Bower*, 75 Pac. 829, 830, 142 Cal. 299.

#### THEREBY

The words "and thereby" in an instruction are synonymous with the phrase "in consequence thereof." *Pope v. Chicago City Ry. Co.*, 113 Ill. App. 503, 507.

Where an indictment charges that D. "did unlawfully and from a premeditated design to effect the death of one G. make an assault on the said G., and a certain pistol, which then and there was loaded with \* \* \* leaden bullets and by him the said D. had and held in his hand, he, the said D., did then and there unlawfully and from a premeditated design to effect the death of the said G., shoot off and discharge at and upon the said G., thereby and by thus striking the said G. with the said leaden bullets, inflicting on and in the body of the said G. one mortal wound," etc., the homicidal act or efficient cause of death is charged to have been perpetrated from a premeditated design to effect death, although the words "from a premeditated design to effect death" are not repeated when the infliction of the mortal wound is charged, since these words, previously alleged, are connected with the mortal stroke by the words "thereby and by thus." The word "thereby" in the indictment signifies "by that means," or in consequence of the preceding allegations, and refers to all that precedes it, both as to the act of firing the pistol and to the premeditated design with which the pistol was discharged. *Daniels v. State*, 41 South. 609, 611, 52 Fla. 18 (citing *Union Rolling Mill Co. v. Gillen*, 100 Ill. 52; *Lieuallen v. Mosgrove*, 54 Pac. 200, 202, 664, 33 Or. 282).

"Thereby," as used in an instruction that it was negligence on the part of a railroad company to run its trains through a city

at a speed prohibited by law, and if the railroad did so run its trains and "thereby" injured or destroyed the property of a person who was himself in the exercise of reasonable care, it would be liable, meant that the railroad must have injured the property by so running at a prohibited speed; the word "thereby" referring to the unlawful speed, and the instruction therefore requiring the unlawful speed to be the proximate cause of the injury. *Chicago & E. I. R. Co. v. Crose*, 73 N. E. 865, 869, 214 Ill. 602, 105 Am. St. Rep. 135.

The word "thereby," as used in a count alleging that, while plaintiff was engaged in leaving defendant's car at a station to which he had been carried therein, defendant's servant in charge or control of the car, acting in the line and scope of his authority as such, wantonly or intentionally caused the car to start or jerk, and "thereby" wantonly or intentionally caused plaintiff to suffer the injuries set out, must be given a natural significance, and is the equivalent of "in that way," and hence was insufficient to aver wantonness or an intention on the part of defendant's servant to inflict the injuries, in the absence of an averment or showing of purpose to inflict the injury. *Birmingham Ry., Light & Power Co. v. Brown*, 43 South. 342, 343, 150 Ala. 327.

#### THEREFOR

See Value Therefor.

The word "therefor" is defined as meaning for that, or this, or it. *Ercanbrack v. Faris*, 79 Pac. 817, 818, 10 Idaho, 584.

#### THEREFROM

Where the evidence showed that plaintiff's injuries were permanent, a charge that the jury, in estimating the damages, should consider plaintiff's "loss of time and such damages, if any, as you may from the evidence find it is reasonably certain he will suffer in the future therefrom," did not authorize damages for loss of time which plaintiff might suffer in the future, for the word "therefrom," in the charge, referred to damages plaintiff would suffer in the future as a result of the injuries. *Hales v. Raines*, 130 S. W. 425, 428, 146 Mo. App. 232.

#### THEREOF

Testator bequeathed all the residue of his estate to his wife for life with power to make such disposition thereof as might be necessary for her comfort and support. Held, that the word "thereof" meant "of that" and "that" was a demonstrative pronoun referring to "estate" as its antecedent, and hence the widow's power of sale was not limited to her life estate, but included a sale of the fee of such property as was reasonably necessary for her comfort and support. *Griffin v. Nicholas*, 123 S. W. 1063, 1067, 224 Mo. 275.

In Act June 23, 1911 (P. L. 1123), entitled "An act establishing in each county a board of viewers \* \* \* and providing for the charges upon the respective counties in the matter of salaries, costs and expenses thereof," the word "thereof" refers, not to the immediate antecedent, but to the board of viewers to be established in each county. In *re Reber's Petition*, 84 Atl. 587, 590, 235 Pa. 622.

#### THEREON

The word "thereon," in Rev. St. c. 93, § 53, providing that whoever labors at cutting, hauling, or sawing of spool timber, or in the manufacture of spool timber into spool bars, has a lien thereon for the amount due him for his personal services, etc., embraces both the spool timber and the spool bars before named in the section. *Chamberlain v. Wood*, 60 Atl. 706, 707, 100 Me. 73.

#### THERETO

"Thereto," in an affidavit of merits stating that "deponent has fully and fairly stated his defense to said action and all the facts relative thereto to his counsel," refers to "action." *Larocque v. Conhaim*, 92 N. Y. Supp. 99, 101, 45 Misc. Rep. 234.

#### THERETOFORE

As heretofore

See Heretofore.

#### THEREUNTO

Civ. Code, § 1741, provides that no agreement for the sale of real estate is valid unless in writing, subscribed by the party to be charged, "or his agent thereunto authorized in writing," and validates any agreement for the sale of real estate which is either subscribed by the owner or his agent, authorized in writing; the word "thereunto" being an elliptical form of expression for the phrase "to do that." *Bacon v. Davis*, 98 Pac. 71, 72, 9 Cal. App. 83.

#### THEREUPON

According to Webster the word "thereupon" means "immediately; at once; without delay." But under Const. 1870, art. 5, § 16, providing that every bill passed by the assembly shall, before it becomes a law, be presented to the Governor, and that, if he approve, he shall sign it, "and thereupon it shall become a law," and that any bill which shall not be returned by the Governor within 10 days after its presentment to him shall become a law, as if he had signed it, unless the assembly shall by an adjournment prevent its return, in which case it shall be filed, with the Governor's objections, in the office of the secretary of state 10 days after such adjournment, or become a law, the Governor has 10 days within which to consider a bill, and the mere fact that he has signed it does not cause it to become a law while it remains in his possession within the time limited,

but he may reconsider his action. People ex rel. Partello v. McCullough, 71 N. E. 602, 604, 210 Ill. 488.

From a statement in the record that the hearing began on a certain date, where each successive step in the case, including the settling and signing of the bill of exceptions is introduced by the term "thereupon," without naming any other date, it will be inferred that one step followed another without delay, and that all occurred on the date named in the entry. Humbarger v. Humbarger, 83 Pac. 1095, 1096, 72 Kan. 412, 115 Am. St. Rep. 204 (citing Dewey v. Linscott, 20 Kan. 684; Hill v. Wand, 27 Pac. 988, 47 Kan. 340, 27 Am. St. Rep. 288).

Construing the words "upon making the resolution as aforesaid," in an allegation, in an action to recover a delinquent stock assessment, that upon the making of the resolution as aforesaid, the secretary caused notice of the assessment to be published, as including the element of time, they may be held to have been used in the sense of "forthwith" or "thereupon," both of which words, when used in reference to time, are generally construed to mean without delay or lapse of time, and the complaint is not altogether lacking in the statement of a fact from which the inference may be drawn that the notice was published at the time of the passage of the resolution in pursuance of which it was given. Bottle Min. & Mill. Co. v. Kern, 99 Pac. 995, 996, 9 Cal. App. 527 (citing 8 Words and Phrases, p. 6954).

A corporation comes into existence only when it has substantially complied with Rev. Codes, §§ 3808, 3825, as amended by Laws 1909, c. 106, and section 3817, requiring the filing of articles of incorporation and a certified copy thereof with the clerk of the county and the secretary of state, and authorizing the secretary of state to issue his certificate to the corporation, "thereupon the persons signing the articles and their associates and successors shall be a body politic and corporate"; the term "thereupon," whether taken to signify "in consequence of which," or "immediately after," or "in consequence," clearly importing into the statute the meaning that all the statutory steps, when taken, create a corporation. Merges v. Altenbrand, 123 Pac. 21, 23, 24, 45 Mont. 355.

Rev. St. 1899, §§ 1394, 1395, provide that, to organize a fraternal beneficial association, there must be articles of agreement by at least three persons, who must submit the articles to the circuit court for its approval, the formal decree of which shall be attached to the articles of agreement and recorded by the recorder of deeds and filed with the secretary of state, who shall issue a certified copy of the articles, which becomes the charter of incorporation, and "thereupon" the petitioners, their associates and successors, shall be a body corporate, by the corporate

name designated in the charter, which, together with the articles, shall be evidence of the incorporation of the association. Held, that the statute makes the certificate of the secretary of state the final act of incorporation; the word "thereupon," as used, meaning that, upon the issuance of the certified copy of the articles with prior certificates attached, the association becomes a body corporate. Sloan v. Loyal Fraternal Home Ass'n, 123 S. W. 57, 59, 139 Mo. App. 443.

#### As immediately

"Thereupon" means "upon that or this; immediately; at once; without delay." Hence minutes which show the presence of accused during the trial up to the time the jury retired and then recite: "Defendant thereupon waived the polling of the jury. \* \* \* Defendant thereupon waives time for sentence and elects to be sentenced at this time"—sufficiently show his presence when the verdict was rendered. State v. De Lea, 93 Pac. 814, 816, 36 Mont. 531 (quoting and adopting the definition of Webst. Dict.).

"Thereupon," as used in St. 1891, p. 196, relating to street improvements, and providing that, after certain publications of notices of street improvements, the street superintendent shall thereupon cause to be conspicuously posted, etc., means upon those precedent conditions, and does not mean immediately, but that the posting shall follow within a reasonable time. Porphyry Paving Co. v. Ancker, 37 Pac. 1050, 1051, 104 Cal. 340.

Code Civ. Proc. § 1118, providing that within five days after the time for filing statements in election contests the county clerk must notify the superior court of statements filed, and it shall "thereupon" order a special session on a day not less than 10 nor more than 20 days from the date of the order, is not mandatory in the sense that the order must be issued upon the same day the court is notified of the contest, the word "thereupon" not necessarily meaning "immediately"; so that, where the sheriff failed to serve citation upon contestee as prescribed by statute, the court could vacate the original order calling a special session and make another designating a day for hearing the contest after issuance of an alias citation: Code Civ. Proc. § 1121, giving it all powers necessary to a determination of the contest. Hagerty v. Conlan, 115 Pac. 762, 765, 15 Cal. App. 643.

A party against whom judgment is rendered May 22, 1908, and who, within time properly extended, served on his adversary a case made on October 1, 1908, which on the same day was returned with a waiver of suggestion of amendments, did not abandon his appeal where he has the case-made duly signed and settled, on proper notice, on December 12th; Comp. Laws 1909, §§ 6074, 6075, requiring that a case-made, after settlement, shall thereupon be filed with the



papers in the case; the word "thereupon" not being used as meaning "immediately," though such word is one of the synonyms of "thereupon." *Denver, W. & M. Ry. Co. v. Adkinson*, 119 Pac. 247, 249, 28 Okl. 1.

Under Code Civ. Proc. § 1118a, providing that within five days after the end of the time allowed for filing statements of contested elections the county clerk must notify the superior court of all statements filed, and the court shall thereupon order a special session to be held not less than 10 nor more than 20 days from the date of the order, the word "thereupon" does not necessarily mean immediately, and a delay of six days in making the order for the special session was not unreasonable. *Dudley v. Superior Court in and for Los Angeles County*, 110 Pac. 146, 148, 13 Cal. App. 271.

## THERMOSTAT

A rule of a heating company requiring the installation of a "thermostat," i. e., an automatic regulator of heat, was reasonable, and, where it appeared that there was no contract with the heating company to furnish heat for any definite time, and that the Railroad Commission was to be appealed to as to whether a thermostat should be put in, the heating company could not be enjoined from disconnecting its pipes on the plaintiff's refusal to install a thermostat. *Walbridge v. Berlin Public Service Co.*, 138 N. W. 44, 46, 151 Wis. 69.

## THESE

### THESE CONVEYED PREMISES

Where a deed conveying the west half of a building also gave the grantee the sole use and occupancy of the middle basement and cellar, the basement and cellar being divided into three parts by east and west partitions, but reserved the right to pass through "these conveyed premises" to the grantor's remaining part of the building, the phrase "these conveyed premises," included the east middle basement and cellar, so that the grantor could pass through that part as well as the other parts conveyed. *McWilliams v. McNamara*, 70 Atl. 1043, 1047, 81 Conn. 310.

## THEY

A will provided that the estate be equally divided between testator's wife and three children, to be theirs during their natural life, and to the children and heirs of their bodies, if any they have at the time of their death, if not, to revert to the estate in gross and be again divided between testator's wife and children and to their heirs, "they" to take a life estate only; and all the grandchildren to take only such share as their deceased parent would have taken. Held, that the quoted word "they" would be construed to refer to the children of the testator, and

not to any grandchild who might share in the lapsed share of a child who had died without issue, since the dominant purpose of the will was to vest the life estate in his wife and children, and remainder in fee to his grandchildren. *Davenport v. Collins*, 51 South. 449, 96 Miss. 716.

## THIEF

The word "thief," in its ordinary acceptation, imputes the crime of larceny, and is actionable per se; but if the word be spoken of the plaintiff in relation to a past act or transaction known to the hearers, and which was not larceny or indictable as a crime, the use of such word is not actionable. *Merrill v. Marshall*, 113 Ill. App. 447, 450.

To speak of one as a "thief" is only prima facie actionable per se, malice being the gravamen of the charge; and where the word is used as a mere term of abuse, or relates to a transaction that was fraudulent, but not criminal, defendant is not bound to strict proof. *Eddy v. Cunningham*, 125 Pac. 961, 962, 69 Wash. 544.

### THIEF BOTE

"Thief bote" is when a party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute, and is frequently called "compounding of felony," and formerly was held to make a man an accessory. *State v. Hodge*, 55 S. E. 626, 627, 142 N. C. 665, 7 L. R. A. (N. S.) 709, 9 Ann. Cas. 563 (citing *Russ. Cr. 194*; *Bish. Cr. Law*, 648; *Black, Law Dict.* 240; 8 Cyc. p. 492).

## THING

See Incorporeal Thing; Matter or Thing; Valuable Thing.

Any article or thing, see Any.

Other thing, see Other.

The word "thing" is defined as "that which is or may become the object of thought; that which has existence or is conceived or imagined as having existence; any object, substance, attribute, idea, fact, circumstance, event, etc. A thing may be material or ideal, animate or inanimate, actual, possible, or imaginary." And the word "operation" is defined as "the course of action or series of acts by which some result is accomplished; process. In surgery, the act or series of acts and manipulations performed upon a patient's body, as in setting a bone, amputating a limb, extracting a tooth, etc." An indictment under the federal statute for mailing a letter giving information where and how and of whom and by what means articles and things designed and intended for the procuring of an abortion might be obtained states an offense, where it sets out a letter written to defendant inquiring for some medicine or other means for accomplishing such result,

and a letter, alleged to have been mailed by defendant in reply, which, when read in connection with the letter of inquiry, in effect offers for a stated consideration to effect the desired result by some treatment or operation, although the particular means is not specified; the word "thing," as used in the statute, being a comprehensive term, which includes any kind of treatment or operation. *United States v. Somers*, 164 Fed. 259, 261, 262 (quoting and adopting definition in Cent. Dict.).

Greater New York Charter, Laws 1901, p. 323, c. 486, § 780, authorizing the marshal to enter any building to examine "the stoves and pipes thereto, ranges, furnaces, and heating apparatus of every kind whatsoever, including the chimneys, flues, and pipes with which the same may be connected, engine rooms, boilers, ovens, kettles, and also all chemical apparatus or other things which in his opinion may be dangerous in causing or promoting fires," and empowering the fire commissioner to require the owner to "alter, remove, or remedy the same," does not authorize the commissioner to require an owner to make changes in a dumb-waiter shaft extended from the basement to the roof, but without connection with the outer air at the roof, though the same will communicate a fire once started in one part of the building to the rest of the building, since the same cannot be designated "things" within the statute. *Lantry v. Mede*, 111 N. Y. Supp. 833, 834, 127 App. Div. 557.

### THING IN ACTION

See Chose in Action.

### THING IN CONTROVERSY

The phrase "thing in controversy," in Act Cong. March 1, 1895, c. 145, § 4, 28 Stat. 696 (Ind. T. Ann. St. 1899, § 48), providing that the commissioner's court shall have exclusive jurisdiction "where the amount or value of the land or of the property or thing in controversy does not exceed \$100," designates any and every thing which may arise in dispute between two or more parties, and the commissioner's court has jurisdiction of an action for trespass to realty, based on an unlawful entry thereon and removal of earth therefrom, where the damages claimed do not exceed \$100. *Choctaw, O. & G. R. Co. v. Loper Bros.*, 98 S. W. 150, 151, 6 Ind. T. 432

### THING OF VALUE

Where an indictment for burglary charged that defendant, with intent to steal, broke into a store "in which goods, merchandise or watches, things of value," were kept for use, sale, or deposit, etc., the words "things of value" were used as descriptive of the term "watches" only; and, it being unnecessary to aver or prove that the goods and merchandise had value, it was immaterial that there was no evidence as to the value of a watch alleged to have been stolen and found

in defendant's possession, or as to the things kept in the store, it having been proved that goods were kept for sale in the store as alleged. *McCormick v. State*, 37 South. 377, 378, 141 Ala. 75.

### Dog

A dog not only is property, but is a "thing of value"; and the owner may maintain an action against one who wantonly and maliciously kills or injures his dog. *Columbus R. Co. v. Woolfolk*, 58 S. E. 152, 153, 128 Ga. 631, 10 L. R. A. (N. S.) 1136, 119 Am. St. Rep. 404.

### THINGS PUBLIC

"Public things" are those the property of which is vested in the whole nation, and the use of which is allowed to all the members of the nation. Of this kind are navigable rivers, seaports, roadsteads and harbors, highways and beds of rivers, as long as the same are covered with water. Hence it follows that every man has a right freely to fish in the rivers, ports, roadsteads and harbors. The use of the banks of navigable rivers or streams is 'public.' Accordingly every one has a right freely to bring his vessels to land there, to make fast the same to the trees which are there planted, to unload his vessels, to deposit his goods, to dry his nets, and the like. Nevertheless, the ownership of the river banks belongs to those who possess the adjacent lands." Civ. Code La. arts. 453, 455. *State v. Bayou Johnson Oyster Co.*, 58 South. 405, 408, 130 La. 604.

### THINK

See As She Thinks Proper; I Think.

### As believe

"The word 'think' has various meanings. Its meaning must be ascertained from the connection in which it is used in a sentence. Some of its meanings, according to Webster, are 'to form an opinion by reasoning; to judge; to conclude; to believe.' An instruction that if the jury should find in favor of plaintiff they should assess her such damages as they think, under the evidence, would compensate her for the pain and suffering she has endured by reason of her injuries, and such further sum as they think would fairly compensate plaintiff for the injuries sustained, can be as well understood by the jury as if the word 'believe' or 'find' had been used instead of the word 'think.' *Ilges v. St. Louis Transit Co.*, 77 S. W. 93, 95, 102 Mo. App. 529.

### As recollect or remember

"Think" may mean "to cognize, apprehend, grasp intellectually" and is often equivalent to "recollect, recall." Cent. Dict. It is also defined as "to call to mind, remember, recollect," and "to call anything to mind, exercise recollection, have remembrance." Stand. Dict. It is also defined by

Webster as meaning, among other things, "to recollect or call to mind." Therefore, when a witness prefaces a statement of facts by the words "I think," it does not necessarily mean that he is merely giving conjecture and guess as to the fact. *Boice v. Ulster & D. R. Co.*, 105 N. Y. Supp. 83, 120 App. Div. 643.

The ordinary presumption is that a witness who uses the expression "I think" means that his observation is indistinct or his recollection uncertain regarding the matter testified to, rather than that he is without personal information on the subject. *Losey v. Atchison, T. & S. F. Ry. Co.*, 114 Pac. 198, 201, 84 Kan. 224, 33 L. R. A. (N. S.) 414.

### THINK BEST

Where testator made specific devises of his real estate, and also directed the sale of a portion, and division of the proceeds among named beneficiaries, a subsequent provision of the will appointing executors to dispose of his property as they "think best" merely vested in the executors a discretion as to the time and manner of selling the property he had directed sold. *Thompson v. Thompson* (Ky.) 87 S. W. 790, 792.

## THIRD

### THIRD PARTY

The former owner and grantee of a tract of land sold and conveyed for nonpayment of taxes thereon is a "third party," within the meaning of the proposition of law that the acts of an officer de facto will be sustained in any proceeding, collateral or direct, in the interest of third parties or the public. *Old Dominion Building & Loan Ass'n v. Sohn*, 46 S. E. 222, 228, 54 W. Va. 101.

A mortgagor's grantee who has promised to pay the mortgage debt to the holder of the mortgage as a consideration for the transfer is not a "third party" in contemplation of *Kirby's Dig.* § 5399, requiring payments on the mortgage to be entered on the margin of the record in order to extend the operation of the statutes of limitation as to third parties. *Kenney v. Streeter*, 114 S. W. 923, 925, 88 Ark. 406.

Civ. Code Ga. 1895, § 2776, provides that when property is sold by a conditional sale, in order for the reservation of title to be valid as against "third parties," it shall be evidenced in writing and not otherwise, and the written contract shall be executed and attested in the same manner as mortgages on personal property, but, as between the parties themselves, the contract as made shall be valid and may be enforced whether evidenced in writing or not, and section 2777 declares that conditional bills of sale must be recorded within 30 days after their date, and in other respects must be governed by the laws regulating the registration of mort-

gages. Held, that the term "third parties," as used in section 2776, and in accordance with the general law, meant creditors having a lien on the property conditionally sold, and not ordinary creditors, and that, as to the latter, the conditional sale contract was valid though not recorded. *John Deere Plow Co. v. Anderson*, 174 Fed. 815, 817, 98 C. C. A. 523. See, also, *Southern Pine Co. v. Savannah Trust Co.*, 141 Fed. 802, 810, 73 C. C. A. 60.

### THIRD PERSON

The term "third person" in *Laws 1900*, p. 130, c. 90, providing that a conveyance of land, etc., between husband and wife shall not be valid as against any third person, unless the conveyance be acknowledged and filed for record, includes only any person in a position to be prejudiced by the secret conveyance; and hence, where a wife conveyed property to her husband by an unrecorded deed valid as to her, and her husband insured it, the deed was not void as to the insurance company, since, as nobody but insured or his wife could be the real owner, and the wife had parted with her interest to insured, the company could not have been prejudiced. *Groce v. Phoenix Ins. Co.*, 48 South. 298, 299, 94 Miss. 201, 22 L. R. A. (N. S.) 732.

The term "third person," as used in 2 *Starr & C. Ann. St. Ill.* c. 95, § 1, providing that a chattel mortgage shall not be valid as against the interests of any third person unless possession shall have been delivered, or unless the instrument shall be recorded, etc., includes every one outside of the immediate parties to the instrument and their privies, both the mortgagor's trustee in bankruptcy and his simple contract creditors, though not having reduced their claims to judgment. *In re Beckhaus*, 177 Fed. 141, 146, 100 C. C. A. 561.

The words "third persons," as used in *Ky. St.* § 2128 (*Russell's St.* § 4631), declares that a gift, transfer, or assignment of personal property between husband and wife shall not be valid as to third persons, unless in writing, acknowledged, and recorded as chattel mortgages, etc., do not include any person not a party to the transaction who has no interest in the property, and who does not sustain to the donor the relation of creditor, or to the property that of an innocent purchaser, and hence an heir of a husband could not object to the validity of a gift made by him to his wife because not evidenced by a writing under such section. *McWethy's Adm'x v. McCright*, 133 S. W. 1001, 1002, 141 Ky. 816.

The acts of a de facto officer are valid as to third persons and the public, and by "third persons" is meant those persons having business of an official character with such officer, and not third persons in the usual legal sense in which the term is used.

State v. Ely, 113 N. W. 711, 712, 16 N. D. 569, 14 L. R. A. (N. S.) 638.

## THIRDS

See Dower.

The words "dower" and "thirds" in themselves have each a uniform, established meaning, both in law and in common usage; the former meaning a widow's life estate in one-third of the inheritable real estate of which the husband was seised during coverture, and the latter meaning her absolute estate in one-third of her husband's personal property remaining after payment of his debts. Where a will, creating a trust, provided for division of the trust fund into shares and a conveyance of the shares to beneficiaries, subject to dower and thirds of testator's wife, and a codicil provided for the capitalization of the widow's dower and thirds, by the widow's "dower and thirds" was meant a third interest for life in the real property and an absolute third interest in the personal property, but not an absolute third in both real and personal property. *Shipley v. Mercantile Trust & Deposit Co.*, 62 Atl. 814-816, 102 Md. 649.

Plaintiff, who agreed to release and quitclaim to defendant, her son, her "dower and thirds" in all the real property owned by her deceased husband at the time of his death in consideration of certain monthly payments for her support to be made by defendant, contended that the expression "dower and thirds," etc., meant no more than would be expressed by the single word "dower," and that, as a right to an allotment of dower was not recognized in California, where some of the real property was situated, she was not bound to convey an interest in such lands; the word "thirds" referring only to personal property. Held, that the word as used in the contract referred to the actual interest in the California real estate to which plaintiff succeeded, and that she was bound to convey the same; the provision of the contract where the word was used relating only to real estate of the deceased, and the disposition of his personal property being completely provided for in other parts of the contract. *Gail v. Gail*, 112 N. Y. Supp. 96, 99, 127 App. Div. 892.

## THIRTY DAYS

Where the official journal of a parish is published on every Saturday, a statute requiring that a notice of election "shall be published for 30 days in the official journal of the parish" is complied with if the notice is published in the official journal five consecutive Saturdays and the election is held 32 days after the first publication. *Lower Terrebonne Refining & Manufacturing Co. v. Police Jury of Parish of Terrebonne*, 40 South. 443, 444, 115 La. 1019, 112 Am. St. Rep. 291.

## THIS

Revenue Act (Hurd's Rev. St. 1909, c. 120) § 276, declares that, if any property shall have been omitted in the assessment of any year or number of years, the same, when discovered, shall be listed and assessed by the assessors. Section 277 provides that if the tax on property liable to taxation has been prevented from being collected for any year, it shall be added to the tax for any subsequent year. Section 278 declares that no such charge for tax and interest for previous years as provided for in the "preceding" section shall be made against any property prior to the date of ownership of the person owning such property at the time the liability for such omitted tax was first ascertained, provided that the owner of the property, if known, assessed under "this" and the "preceding" section shall be notified by the assessor or clerk as the case may require. Held, that the word "this" in section 278 did not refer to an assessment under that section, which contained no provision for assessment, but referred to section 277, and the word "preceding" to section 276, and, since the assessment which before the revenue act would have been made under section 276 by the assessor is now made by the board of review, the notice required by the proviso of section 278 must be given prior to the assessment of omitted property by the board of review, so that the statute is not unconstitutional as failing to provide for due process of law in the assessment of such omitted property. *People ex rel. Edgar v. National Box Co.*, 93 N. E. 778, 779, 248 Ill. 141.

## THIS ACT

Acts 1903, p. 408, c. 177, prohibited the running at large of certain animals in certain counties, and was amended by Acts 1905, p. 670, c. 316, section 1 of which provided that chapter 177, p. 408, of the published Acts of 1903 be so amended as to strike out section 2 and provide that "this act" shall only apply to counties adopting it by a majority vote. Held, that the words "this act" referred to the act of 1903, as amended, and not solely to the act of 1905. *Wright v. Cunningham*, 91 S. W. 293, 294, 115 Tenn. 445.

## THIS AGREEMENT

One paragraph of a contract stipulated that the party of the first part "will not again engage in the manufacture and sale of regalia, alone or in conjunction with others, within five years of the date of this agreement, under penalty of five thousand dollars liquidated damages, to be paid to the party of the second part if 'this agreement' is violated." Held, that the forfeiture named applies only to this paragraph of the agreement, and not to any other paragraph of the agreement. *Floding v. Floding*, 73 S. E. 729, 731, 137 Ga. 531.

**THIS ARTICLE**

Denver City Charter 1893, art. 7, § 62 (Sess. Laws 1893, p. 225, c. 78), provides that no action or proceeding shall be commenced to review any assessments authorized by "this article" unless commenced within 90 days after the passage of the ordinance making the final assessment. Held, that such article did not apply to sidewalks constructed under the charter of 1885, as amended by Laws 1889, the assessment for which was levied as provided by Charter 1885, art. 10, and not under the charter of 1893. *City of Denver v. Dunning*, 81 Pac. 259, 260, 33 Colo. 487, 3 Ann. Cas. 674.

Election Law (Laws 1911, c. 891) § 56, provides that any action or neglect of members of a political convention or committee, or of any inspector of primary election, or of any public officer or board, with regard to the right of any person to participate in a primary election, convention, or committee, or to enroll with any party, or with regard to any right given to, or duty prescribed for, any voter, political committee, officer, or board, by "this article," shall be reviewable by summary proceedings, etc., before the Supreme Court, or a justice thereof, within the judicial district where the transaction, act, or neglect of duty took place. Held, that the phrase "this article" is not limited to article 4, which does not prescribe any duties for inspectors of primary elections, but includes articles 4a and 4b, supplemental to article 4, regulating primary elections and conventions. *In re Ward*, 137 N. Y. Supp. 659, 660, 78 Misc. Rep. 15.

**THIS DAY SOLD**

The words "this day sold" indicate a present sale. *Yick Sung v. Herman*, 83 Pac. 1089-1091, 2 Cal. App. 633.

**THIS STREAM**

Where the state forest, fish, and game commission passed an order prohibiting fishing in Canada creek in the town of Lee, and its tributaries within the town, for three years, but the alleged regulations filed in the town clerk's office did not identify the stream, except by the words "this stream," the copy filed was fatally defective for indefiniteness. *People v. Worden*, 79 N. E. 1013, 1015, 187 N. Y. 322.

**THIS UNION**

The phrase "this union," used in Const. U. S. art. 4, § 3, providing that new states may be admitted by Congress into this Union, means a union of states equal in power, dignity, and authority, each competent to exert that residuum of sovereignty which is not delegated to the United States by the Constitution itself. *Coyle v. Smith*, 31 Sup. Ct. 688, 690, 221 U. S. 559, 567, 55 L. Ed. 853.

**THIS YEAR**

Where a contract of employment terminated on the 15th day of December, and on the 23d day of that month the employé, in conversation with his employer, referred to the previous contract and requested to be employed for "this year," his proposal should not be interpreted as a proposal for employment from the 23d to the close of the year; but the unmistakable inference is that he wanted to be hired for another year, running either from the expiration of his first contract or from the date of the conversation. *Embrey v. Hargadine-McKittrick Dry Goods Co.*, 91 S. W. 170, 171, 115 Mo. App. 130.

The statutory limitation on the power of the county board to contract for bridge building to cost a sum not greater than the amount of money on hand in the county bridge fund derived from a levy of "previous years" and two-thirds of the levy of the "current year," gives no authority to the board to take into account the levy of the "current calendar year" prior to the making of such levy. Until it is made, there is no "levy of the current year." Ordinarily, the terms "this year," "current year," or "the previous year," mean in each instance the calendar year in which the event under discussion took place and the one before it, but the Legislature did not have this meaning in putting the words into this statute. *Clark v. Lancaster County*, 96 N. W. 593, 599, 69 Neb. 717.

**THOROUGHLY DESTROYED**

The lease, under which plaintiff rented five stories of a six-story building, provided for adjustment of rent if the building was partially destroyed by fire, and that if it was thoroughly destroyed either party might cancel the lease. A fire destroyed about 14 per cent. of the entire building and destroyed the entire brick wall on one side, the greater part of that on another side, most of the tile partitions on four floors, and practically all of the wood and plaster work, but leaving its foundation, the greater part of the steel frame, and many other parts intact, so that it could be restored for less than one-half of the cost of building it. Held, that the building was "thoroughly destroyed," so as to entitle the lessor to cancel the lease. *City of Paris Dry Goods Co. v. Spring Valley Water Co.*, 101 Pac. 678, 679, 10 Cal. App. 212.

**THOUGHT**

"Belief" is that conviction which follows from the consideration of facts or evidence, while a "thought" may be no more than a mere conceit or fancy. *Sloss-Sheffield Steel & Iron Co. v. O'Neal*, 52 South. 953, 955, 169 Ala. 83.

**THOUGHTLESSLY**

The word "thoughtlessly," as used in the rule that a person approaching a crossing is

required to stop, look, and listen, and, if he omits to do so and walks "thoughtlessly" upon the track, he cannot recover, means to take such step without due attention and care. *Wheeler v. Oregon R. & Nav. Co.*, 102 Pac. 347, 355, 16 Idaho, 375.

## THREAD

See Ordinary Threads.

As embroidery cottons, see Embroidery.

In its ordinary meaning, the word "thread" is a twisted filament of a fibrous substance, as cotton, flax, silk, or wool, spun out to considerable length. In a specific sense, "thread" is a compound cord, consisting of two or more yarns firmly united together by twisting. Cent. Dict. A secondary meaning is "a fine filament, or thread-like body of any kind; as a thread of spun glass; a thread of corn silk." Cent. Dict. Consequently a fine band of rubber filamentous in form may properly be called a "thread." *Haskell Golf Ball Co. v. Perfect Golf Ball Co.*, 143 Fed. 128, 130.

In the Tariff Act provision relating to "cotton cloth in which other than the ordinary warp and filling threads have been introduced in the process of weaving to form figure," the term "threads" is used in a sense including the remnants thereof so introduced, clipped off where appearing at intervals on the back of the fabric. *R. B. Maclea Co. v. United States*, 167 Fed. 688.

### THREAD OF A LAKE

Every abutting owner on a lake is entitled to the land under water in front of his premises to the "thread of the lake," which, where there is no outlet or inlet, passed through the center of the lake along its longest diameter. *Calkins v. Hart*, 118 N. Y. Supp. 1049, 1053, 64 Misc. Rep. 149.

### THREAD OF A STREAM

The "thread of a stream" is the middle line between the shores, irrespective of the depth of the channel, taking it in the natural and ordinary stage of the water. The channel and the thread of the river are entirely different. The channel may be one side of the thread of the river or the other. *Inhabitants of Warren v. Inhabitants of Thomaston*, 75 Me. 329, 332, 46 Am. Rep. 397.

The "thread of the stream," when called for as a boundary line of private estates, is the middle line between the shores, irrespective of the depth of the channel, taking them in the natural and ordinary stage of the water, at medium height, neither swollen by freshets nor shrunk by droughts. *State v. Munice Pulp Co.*, 104 S. W. 437, 445, 119 Tenn. 47 (quoting definition in *Branham v. Bledsoe Creek Turnpike Co.*, 69 Tenn. [1 Lea] 704, 27 Am. Rep. 789).

Where one bank of a nonnavigable stream is much steeper than the other, plac-

ing the thread of the stream, as measured from highwater mark, on an exposed sand bar on one bank, when the water is low, the "thread of the stream" should be ascertained by measuring from the low-water mark. *Micelli v. Andrus*, 120 Pac. 737, 740, 61 Or. 78.

## THREAT

See, also, Intimidation.

A "threat," within Gen. St. 1902, § 1296, subjecting to punishment any person who shall threaten or use any means to intimidate any person to compel him against his will to do or abstain from doing any act which such person has a legal right to do, is a menace of such nature as to unsettle the mind of the person on whom it operated. *State v. Stockford*, 58 Atl. 769, 773, 77 Conn. 227, 107 Am. St. Rep. 28.

"A 'threat' is any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent. Such a threat, coupled with the damage necessarily flowing from it in the prosecution of a conspiracy to do an unlawful thing, is sufficient to constitute a good cause of action." Where an association of retail druggists in a certain city and wholesale druggists formed a combination to maintain a maximum schedule of prices, and in pursuance of the plan refused to sell to plaintiff, a retailer who had refused to join the combination, and coerced and intimidated vendors of like commodities by means of threats to blacklist and boycott such vendors if they sold to plaintiff, whereby such vendors were deterred from selling to plaintiff, the parties to the combination were liable to plaintiff for resulting damages to his business. *Klingel's Pharmacy of Baltimore City v. Sharp & Dohme*, 64 Atl. 1029, 1032, 104 Md. 218, 7 L. R. A. (N. S.) 976, 118 Am. St. Rep. 399, 9 Ann. Cas. 1184 (citing 8 Cyc. p. 639).

A "threat" is defined to be a menace of such a nature as to unsettle the mind of the person on whom it is intended to operate, and to take away from his acts that free, voluntary action which alone constitutes consent. *Bouvier* says that the threat must be such as to operate to some extent, at least, on the mind of the one whom it was intended to influence. A "threat" of any public accusation, as well as one by formal complaint and course of law, is within V. S. § 4921 (P. S. 5735), declaring a punishment for a person who maliciously threatens to accuse another of crime with intent to extort money. *State v. Louanis*, 65 Atl. 532, 533, 79 Vt. 463, 9 Ann. Cas. 194.

A "threat," within Rev. St. 1899, § 1863 (Ann. St. 1906, p. 1285), providing that accused, charged with carrying a concealed weapon, may show that he has been threaten-

ed with great bodily harm, or had good reason to carry the weapon in necessary defense, etc., is a menace or declaration of purpose or intention to do great bodily harm to the person of another, or to injure or destroy his property, or to unlawfully invade his home. *State v. Dees*, 109 S. W. 800, 801, 129 Mo. App. 293.

An indictment charging that defendant "did by a written communication threaten injury to A. G., etc.," is a sufficient allegation that there was a delivery to A. G., being substantially the words of the statute (L. O. L. § 1929); a "threat" being a declaration of a purpose to work an injury to another and designedly put forth by the individual making the threat, either directly or indirectly, so as to operate upon the mind of the person threatened, and a "communication" being that which is communicated or imparted; intelligence; news; a verbal or written message; and these two words in the indictment include not only the utterance of the threat, but also the bringing the same to the notice of the person threatened. *State v. Scott*, 128 Pac. 441, 442, 63 Or. 444 (citing 8 Words and Phrases, p. 8964).

Where defendants accused the state's witness of the crime of adultery, and for that reason demanded that he pay them money, and the witness at first refused, but after being subjected to maltreatment, and being held a prisoner in the defendants' room, yielded to their demand and executed a check, the primary cause of the issuance of the check was the wrongful accusation, and the defendants were guilty of extortion by means of a "threat" to make a wrongful accusation of crime. *State v. Barr*, 120 Pac. 509, 510, 67 Wash. 87.

Allegation that an employer required an employé to agree not to remain a member of a labor organization as a condition of retaining the employment does not show a "threat"; a "threat" involving the use of some impelling force against the will or desire of the person threatened. *State ex rel. Smith v. Daniels*, 136 N. W. 584, 586, 118 Minn. 155.

A petition alleging that defendant said to plaintiff that he "could have sent another man after" the plaintiff did not amount to a "threat" to prosecute for a criminal offense in the absence of an averment that in the community where the language was used the language was well understood to mean a "threat" to send the sheriff with a warrant. *Bond v. Kidd*, 50 S. E. 934, 122 Ga. 812.

A threat "to proceed against you criminally" is equivalent to a "threat" to accuse a person of a crime, within the meaning of Pen. Code, §§ 558, 560, relating to threats. *People v. Eichler*, 26 N. Y. Supp. 998, 1000, 75 Hun, 28.

#### Advice distinguished

For an officer to merely tell accused to tell the truth is advice merely, and not a

"threat," within Code Cr. Proc. § 395, authorizing evidence of a confession, unless procured by threats. *People v. Randazzio*, 87 N. E. 112, 114, 194 N. Y. 147.

#### As cruelty

See Cruelty.

#### As duress

See Duress.

#### As misdemeanor

See Misdemeanor.

### THREATENING LETTERS

A letter charging the addressee with having deprived the writer of money and with offenses, and stating that things the addressee and another had done and said would cost more than \$700, that the writer hoped the addressee would "get out of the N. L. of H., and not be turned out," and that the writer thought she would make charges against the addressee's husband "in the Masons" as soon as litigation should end, etc., is insufficient on its face to constitute a "threatening letter," within Code 1906, § 1377, providing punishment for sending such letters. *State v. Jamlson*, 54 South. 843, 99 Miss. 248.

### THREE

#### Three days

Const. art. 4, § 12, providing that every bill which shall have passed both houses shall be presented to the Governor, and, if not returned to the house in which it originated within "three days," Sundays excepted, shall become a law, does not require a bill to be returned in three calendar days, but allows three days, during each of which the house where the bill originated is in session so that it may be returned to it. *State ex rel. Corbett v. South Norwalk*, 58 Atl. 759, 760, 77 Conn. 257.

A "three days' notice" of a meeting of appraisers in condemnation proceedings is a notice given three days before the meeting is to be held. One publication in a daily paper is a notice, and if it is made three days in advance of the time set it is a "three days' notice." A requirement that at least three days in the official city paper shall be given of the meeting of the appraisers in condemnation proceedings is satisfied by the publication of a notice in one issue of such paper nine days before the time set. *Harrison v. Newman*, 80 Pac. 599, 600, 71 Kan. 324 (citing *Philadelphia, W. & B. R. Co. v. Shipley*, 19 Atl. 1, 72 Md. 88).

Where judgment was rendered on January 24th, an application for a new trial entered on January 27th was not entered within "three judicial days" from rendition of the judgment, as required by statute. *Harlan v. Braxdale's Adm'r* (Ky.) 35 S. W. 918.

#### Three days thereafter

See Thereafter.

**Three consecutive weeks**

The phrase "three consecutive weeks," as used in Wilson's Rev. & Ann. St. 1903, § 6021, providing that the treasurer shall give notice of the sale of real property for delinquent taxes by publication once a week for "three consecutive weeks," means 21 days, and where the first publication of notice for a delinquent tax sale was made November 2d, and the last publication November 16th, and the sale was made on November 20th, the sale was void. *Cadman v. Smith*, 85 Pac. 346, 348, 15 Okl. 633.

**Three successive weeks**

Section 4, c. 48, p. 61, Acts 1905 (section 896, Burns' Ann. St. Supp. 1905), provides that proof of service by publication shall show "publication for three successive weeks in a weekly newspaper of general circulation, \* \* \* the last publication to be five days before the day set for the hearing." Held, that the phrase "publication for three successive weeks" means three successive publications in a weekly newspaper on its weekly days of issue, and that a publication for a full period of 21 days is not required. *Southern Indiana Ry. Co. v. Indianapolis & L. Ry. Co.*, 81 N. E. 65, 66, 168 Ind. 360, 13 L. R. A. (N. S.) 197 (citing *Bachelor v. Bachelor*, 1 Mass. 256; *Swett v. Sprague*, 55 Me. 190; *Alexander v. Alexander*, 41 N. W. 1065, 26 Neb. 68).

**Three times successively**

See Successively.

**THREE-CARD MONTE**

"Three-card monte" is said to be a sleight of hand game or trick played with three cards, one of which is usually a court card. The performer throws the cards face down upon a table in such a manner as to deceive the eye of the onlooker, who is induced to bet that he can pick out the court card. While the cards are manipulated by one person alone, who is commonly called the "dealer," the game is generally known and understood to be a confidence game, and is also declared by the statute to be a confidence game or swindle known as "three-card monte." *State v. Edgen*, 80 S. W. 942, 944, 181 Mo. 582 (citing *Stand. Dict.* p. 1147).

**THREE FEET WIDE IN THE CLEAR**

An entrance hall is "three feet wide in the clear" to the rear of the stairway, as required by Tenement House Act (Laws 1901, p. 895, c. 334) § 20, it being in fact 3 feet 5 inches in width for all such distance, except that a chimney breast 4 feet wide extends into it from the side wall 1 foot. *Umberg v. Neinken*, 112 N. Y. Supp. 618, 619, 128 App. Div. 165.

**THREE-FIFTHS OF THE VOTERS**

The phrase "three-fifths of the voters voting at such election" contained in Const. art. 8, § 6, providing that no municipal cor-

poration shall become indebted exceeding a certain amount without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, means three-fifths of the voters who vote upon the proposition, and not necessarily three-fifths of all the votes cast at the election. *Fox v. City of Seattle*, 86 Pac. 379, 380, 43 Wash. 74, 117 Am. St. Rep. 1037.

**THREE-NOTCHED ROAD**

A "three-notched road" is a road the trees along the side of which are marked with three notches. *Brumley v. State*, 103 S. W. 615, 617, 83 Ark. 236.

**THREE STRANDS OR CORDS**

The Tariff Act provision relating to gloves stitched with more than "three single strands or cords" does not include gloves having but three points each, each point having three distinct rows of stitching, though the stitching shows nine chains of embroidery on the outside of the backs of the gloves and nine single rows of stitching on the inside. *United States v. La Fetra*, 172 Fed. 297, 298.

**THREE WITH THE PRIVILEGE OF FIVE**

See With the Privilege.

**THRESHING MACHINE**

As farming utensil, see Farming Tools and Utensils.

**THROUGH**

See By or Through; By, Through, or Under; Put Through.

V. S. 3921 (P. S. 4505), inflicting a penalty if a person having control of a detached engine or engine with a passenger train attached runs it into or through a passenger depot at a speed exceeding four miles an hour, was intended to apply only to passenger depots covering the main tracks of the railroad into and through which trains running on such tracks must pass; the word "into" being used in the sense of "inside of" or "within" and "through," meaning from end to end or from side to side of, into or out of at the opposite, or at another point. *Flint's Adm'r v. Central Vermont R. Co.*, 73 Atl. 590, 591, 82 Vt. 269.

**As into**

A subscription to a railroad provided that it was in consideration of the railroad's contract to construct and operate a road "through or into" a certain town. Held, that while the words "through or into" definitely express the thought that the road was intended to go inside the city limits, "into" carrying the notion of entering, and "through" of passing in and then out of the city boundaries, the contract was nevertheless substantially performed by the construction of a new line to a point outside the city where a



junction was made with an old road, over which trains were transported from the new line into the city. *St. Louis, M. & S. E. R. Co. v. Houck*, 97 S. W. 963, 966, 120 Mo. App. 634.

### THROUGH BILL OF LADING

A bill of lading which acknowledges the receipt of merchandise consigned to a point in another state, names the route and railroads over which the shipment is to be made, contains an agreement by the initial carrier to deliver to the next connecting carrier, and provides that as to each carrier upon the route the service is to be rendered in accordance with the conditions stated therein, is a "through bill of lading," having reference to the usual method in use by connecting carriers. *Standard Oil Co. of New York v. United States*, 179 Fed. 614, 621, 103 C. C. A. 172.

### THROUGH FREIGHT

As the term is ordinarily employed, "through freight" is that which comes to a railroad company from some other road, or which starts at some point on one line, but in order to reach its destination is turned over to a connecting carrier. It requires the services of two or more railways. *Hill v. Wadley Southern Ry. Co.*, 57 S. E. 795, 799, 128 Ga. 705.

### THROUGH THE MOTHER

"From and through," as used in a statute making children capable of inheriting from and through their mother, and giving them the right to distributive shares of the personal estates of any of their kindred on the part of their mother, includes inheritance directly from the mother and indirectly from any one to whom or from whom kinship can be traced through her, either in ascending or descending line. By the use of the word "from" it was the intention of the Legislature to allow the child to inherit real property from the mother direct; the descent being direct on her death. "Through" means by means of, the channel by means of which. From is direct. "Through" is indirect as well. "Through" lets in any one to whom or from whom the blood of kinship can be traced through the mother. Wherever the blood of kinship can be traced "through the mother," there follows the right to inherit either in ascending or descending line. *Berry v. Powell*, 105 S. W. 345, 348, 47 Tex. Civ. App. 599.

### THROUGH ROUTE

The Missouri Pacific Railway Company received car loads of beer in St. Louis for transportation to Leadville, Colo., issuing receipts therefor showing contents, weight, destination, and consignee, and that the shipment was received subject to its uniform bill of lading, to be delivered to the consignee and routed over the line of the Denver & Rio Grande Railroad Company. At Pueblo, Colo., it turned the cars over to the latter company,

which moved them to Leadville on a local waybill, showing the consignor and consignee and the rate and charge of each company. The two companies had no established joint rate between St. Louis and Leadville, but they constantly exchanged traffic between such points; each charging its own local rate to and from Pueblo. The total freight was collected by one, either from the consignor or consignee, and daily settlements were made between them. Held, that such course of business was in fact the establishment of a "through route" between the two points, within the meaning of section 6 of the Interstate Commerce Act, as amended by Act June 29, 1906, c. 3591, § 2, 34 Stat. 586, which requires the filing of schedules of the "separately established rates" applied by a carrier on through traffic, when there is a through route, but no joint rate, and that such rate established by the Denver Company was within the terms of the act, and as a part of the through charge was subject to regulation by the Interstate Commerce Commission under section 15 of the act as amended. *Denver & R. G. R. Co. v. Interstate Commerce Commission*, 195 Fed. 968, 973.

Under the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380), as amended March 2, 1889 (25 Stat. 855, c. 302, § 1), requiring several common carriers operating a "through line" engaged in interstate commerce to file schedules of rates constituting the basis of a through interstate rate, each carrier, though operating a line wholly within a state, which line is a portion of a through route engaged in interstate commerce through a common arrangement between several connecting carriers, is bound to comply with such act. *United States v. New York Cent. & H. R. R. Co.*, 153 Fed. 630, 632 (citing *Consolidated Forwarding Co. v. Southern Pacific Co.*, 9 Interst. Com. R. 205; *United States v. Wood*, 145 Fed. 405; *Gulf, C. & S. F. R. Co. v. Hefley*, 15 Sup. Ct. 802, 158 U. S. 98, 39 L. Ed. 910).

### THROUGH SHIPMENT

See Contract for Through Shipment.

### THROUGH TICKET

"Through tickets," in the form of coupons, are to be regarded as distinct tickets for each road, sold by the first company as agent for the other companies. The rights and liabilities of the parties are the same as if the purchase had been made of the defendants at their station." *McCullum v. Southern Pac. Co.*, 88 Pac. 663, 667, 31 Utah, 494 (quoting and adopting definition in *Knight v. Portland, S. & P. Ry. Co.*, 56 Me. 234, 96 Am. Dec. 449, and citing 4 Elliott, R. R., § 1596).

### THROW

### THROW OUT

The words "throw out," in *Rev. St. 1908*, § 1884, declaring it a felony for one to will-

fully and maliciously throw out a switch, remove, or in any manner loosen a rail, or place any obstruction on a railroad, with the intention of derailing a train, clearly include a willful and malicious displacement of a switch in any manner, with intent to cause a train, or any part of it, to leave the track on which it is running, so that it is error to admit testimony of a different and narrower meaning of the word. *People v. Feehan*, 111 Pac. 241, 242, 48 Colo. 535.

### THROWING

Raw silk, in the skein as drawn from the cocoon in a single thread formed by several filaments, must be subjected to the process of "throwing," which consists of winding, twisting, doubling, and redoubling the raw silk, before it can be used in manufacture. *Klots v. U. S.*, 139 Fed. 606, 607, 71 C. C. A. 590.

### THUS

Where an indictment charges that A. "did unlawfully and from a premeditated design to effect the death of one B. make an assault on the said B., and a certain pistol, which then and there was loaded with \* \* \* leaden bullets and by him the said A. had and held in his hand, he, the said A., did then and there unlawfully, and from a premeditated design to effect the death of the said B., shoot off and discharge at and upon the said B., thereby and by thus striking the said B. with the said leaden bullets, inflicting on and in the body of the said B. one mortal wound," etc., the homicidal act or efficient cause of death is charged to have been perpetrated from a premeditated design to effect death, although the words "from a premeditated design to effect death" are not repeated when the infliction of the mortal wound is charged, since these words, previously alleged, are connected with the mortal stroke by the words "thereby and by thus." The word "thus" means "in the way just indicated." *Daniels v. State*, 41 South. 600, 1, 52 Fla. 18.

### TICKER

A "ticker" is an instrument which by means of a type wheel actuated by electrical pulse, automatically prints in plain, ordinary type, upon a strip of paper, messages transmitted electrically from a distance. *National Tel. News Co. v. Western Union Tel.*, 119 Fed. 294, 295, 56 C. C. A. 198, 60 L. A. 805.

### TICKET

See Commutation Ticket; Lottery Ticket; Railroad Ticket; Theater Ticket; Through Ticket.

As fare, see Fare.

Passenger ticket as contract, see Contract.

Passenger ticket as property, see Property.

Shipper's ticket, see Shipper's Pass—Shipper's Ticket.

### TICKET AGENT

A ticket agent of a local railway company, who sells through joint tickets over the local line within the state and also over a foreign line beyond the state with which the local railway company has a joint traffic agreement, is not a "ticket agent" of the foreign company on whom process may be served, under Rev. Laws 1905, § 4110. *Slaughter v. Canadian Pac. R. Co.*, 119 N. W. 398, 400, 106 Minn. 263.

### TICKET SPECULATOR

"A 'ticket speculator' is one who sells tickets at an advance over the price charged by the management. A clause in a theater ticket providing that, if sold by the purchaser at the sidewalk, it would be refused at the door, is valid and enforceable as against all subsequent purchasers, where its purpose is to prevent purchase of tickets by ticket speculators to resell at an advance. *Collister v. Hayman*, 75 N. E. 20, 21, 183 N. Y. 250, 1 L. R. A. (N. S.) 1188, 111 Am. St. Rep. 740, 5 Ann. Cas. 344.

### TIDE

#### TIDE LAND

"Tide land" is land over which the tide ebbs and flows. *Woodward v. Davidson*, 150 Fed. 840, 842.

"Tide land" is that which is daily covered and uncovered by the ordinary ebb and flow of normal tides. *State ex rel. Ellis v. Gerbing*, 47 South. 353, 356, 56 Fla. 603, 22 L. R. A. (N. S.) 337; *People ex rel. State Board of Harbor Com'rs v. Kerber*, 93 Pac. 878, 879, 152 Cal. 731 (citing *People ex rel. Teschemacher v. Davidson*, 30 Cal. 379; *Rondell v. Fay*, 32 Cal. 354; *City of Oakland v. Oakland Water Front Co.*, 50 Pac. 277, 118 Cal. 160, 125 Am. St. Rep. 93).

In the absence of legislative definition, "tide lands" are the lands between the lines of ordinary high tide and mean low tide. *Pearl Oyster Co. v. Heuston*, 107 Pac. 349, 350, 57 Wash. 533, 135 Am. St. Rep. 1007.

According to the legislative definition, "tide lands" are all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, except in front of cities where harbor lines have been established or may be established, where such tide lands shall be those lying between the line of ordinary high tide and the inner harbor line, and excepting oyster lands. It cannot be shown, by way of collateral attack on a deed from the state, that lands sold and conveyed by the state as second-class "tide lands" were in fact "oyster lands," subject to purchase under a subse-

quent application therefor. *Welsh v. Callvert*, 75 Pac. 871, 872, 34 Wash. 250.

"Tide lands" are such as are covered and uncovered by the flow and ebb of the ordinary or neap tides, and constitute the seashore which the state controls, and land extending to the line indicated by high-water mark at ordinary or neap tide is the subject of private ownership. *Elchelberger v. Mills Land & Water Co.*, 100 Pac. 117, 122, 9 Cal. App. 628.

Sand bars not uncovered by the "mean lower low water," but sometimes exposed when the tide fell below the zero line, by reason of a strong wind or abnormal barometric conditions, are parts of the bed of the stream, and not "tide lands," which alone the state land board, under the power given them by Laws 1891, p. 189, to sell tide flats not adjacent to the shore and situate in the tide waters of the Columbia river is authorized to sell and convey. *Van Dusen Inv. Co. v. Western Fishing Co.*, 124 Pac. 677, 680, 63 Or. 7.

Plaintiff sued to restrain the State Land Board from leasing certain tide lands, and alleged that plaintiff was engaged in fishing for salmon in the Columbia river, which were hauled upon the shore of tide lands described, of which plaintiff was the owner by mesne conveyances from the state, and also of the accretions thereto, that a survey had been made of an imperceptible accumulation of land by natural causes in front of plaintiff's land, and that T. had applied to the board for a lease thereof, which, if granted, would prevent plaintiff from pursuing its business. Plaintiff, though alleging that the lands in controversy were covered by water to a depth of four to six feet for a large part of the day, also charged that the land lay between ordinary high and low tide in the river. Held, that the land could reasonably be inferred to be "tide lands," part of an island, within Laws 1907, p. 206, providing that no accretions to islands previously sold by the state should be leased, and that no tide or overflowed lands except those connected with the shore should be sold until 10 years after the approval of the act. *Taylor Sands Fishing Co. v. Benson*, 108 Pac. 126, 127, 56 Or. 157.

**As private property**

See Private Property.

**As public land**

See Public Land.

**Submerged lands**

"Tide lands," as used in Const. art. 15, § 3, providing that all tide-lands within two miles of any incorporated city or town in the state fronting on the waters of any harbor, estuary, bay, or inlet used for navigation shall be withheld from grant or sale to private persons, partnerships, or corporations, are not limited to lands covered and uncover-

ed by daily efflux and reflux of the tide, but embrace lands properly described as submerged lands. *San Pedro, L. A. & S. L. R. Co. v. Hamilton*, 119 Pac. 1073, 1074, 161 Cal. 610, 37 L. R. A. (N. S.) 686.

**TIDE WATERS**

The terms "tide waters" and "navigable waters" are used synonymously in England. *Olds v. Commissioner of State Land Office*, 112 N. W. 952, 958, 150 Mich. 184 (quoting and adopting *Illinois Cent. R. Co. v. Illinois*, 13 Sup. Ct. 110, 146 U. S. 387, 36 L. Ed. 1018).

**TIE**

As timber, see Timber.

**TIGER**

See Blind Tiger.

**TIGHT**

See Water-Tight.

The words "seaworthy," "seaworthiness," and "tight and sound," as used in reference to a vessel, mean the sufficiency of such vessel in materials, construction, equipment, and outfit for the trade or service in which it was employed. *Paddock-Hawley Iron Co. v. Providence-Washington Ins. Co. of Providence*, R. I., 93 S. W. 358, 360, 118 Mo. App. 85.

An agreement in the charter party to deliver the ship "tight," staunch, and strong is not necessarily violated, notwithstanding she may have an accumulation of grass, shells, and barnacles. *Glasgow Shipowners' Co. v. Bacon*, 139 Fed. 541, 542, 71 C. C. A. 329.

**TIGHT MORTGAGE**

A "tight mortgage" is one which allows no days of grace or a limited number after default in paying interest or principal before foreclosure proceedings may be begun. *Cunningham v. McCready*, 69 Atl. 82, 83, 219 Pa. 594 (citing *And. Law Dict.* 689).

**TILE**

So-called "Welsh quarries" are not dutiable as "tiles," but as "brick, other than fire brick," which they closely resemble in material, quality, texture, and the use to which they are put, within the meaning of the so-called "similitude clause." *Traitel Bros. v. United States*, 131 Fed. 994, 995.

**TILE DRAIN**

As permanent structure, see Permanent Structure.

**TILL**

Until synonymous

Act Aug. 31, 1909 (Laws 1909, p. 305), provided that respondent's term as jury com-

missioner under appointment made by the Governor ran "till the first Monday after the second Tuesday in January, 1911," and that on the expiration of each term the Governor should appoint successors who should hold office for three years from the expiration of the term of their respective predecessors. Held, that the word "till" meant "up or down to; as far as; until," the words "to," "till," and "until" being synonymous, and, "until" being primarily a word of exclusion, respondent's term did not include any part of the first Monday after the second Tuesday in January, and hence, since the term of the existing Governor did include that day, there was a vacancy in the office of jury commissioner which the Governor had power to fill by appointment. *Oberhaus v. State ex rel. McNamara*, 55 South. 898, 902, 173 Ala. 483.

Bouvier's Law Dictionary defines the word "to" as a term of exclusion, unless by necessary implication it is manifestly used in a different sense. Webster recognizes the words "to," "till," and "until" as synonymous in the sense here used. The Century Dictionary gives like recognition as to the use of these words. Where on the 25th day of February, plaintiff in error was allowed to the 15th day of March to make and serve a case for the Supreme Court, the time granted expired at 12 o'clock midnight, March 14th. *Maynes v. Gray*, 76 Pac. 443, 69 Kan. 49, 105 Am. St. Rep. 146, 2 Ann. Cas. 518.

## TILLER

Farmer distinguished, see Farmer.

## TILLING

See Farming.

## TIMBER

See Deaden Timber; Land, Timber and Timber Rights; Logs and Other Timber Products; Logs and Round Unmanufactured Timber; Logs, Lumber, and Other Timber; Lumber and Timber; Pine Timber; Round Timber; Saw Timber; Squared Timbers; Standing Timber; Your Timber.

All merchantable pine timber, see All.

As appurtenance, see Appurtenance—Appurtenant.

As interest in land, see Interest (In Property).

As personal property, see Personal Property.

As real estate, see Real Property.

Merchantable timber, see Merchantable.

Remove timber, see Remove—Removal.

White oak timber, see White Oak.

"Timber" is such stuff as is suitable for building and allied purposes. *Gulf Yellow Pine Lumber Co. v. Monk*, 49 South. 248, 159 Ala. 318.

"Timber" is a generic word, meaning "trees," felled or standing, to be used for building. *Kaul v. Weed*, 53 Atl. 489, 490, 203 Pa. 586.

"Timber" used as a generic term, according to Webster, means that sort of wood which is proper for buildings, or for tools, utensils, furniture, carriages, fences, ships, and the like; usually said of felled trees, but sometimes said of those standing, and not the articles in their completed state, for the manufacture of which the timber may be used. *Butler & Barrow v. McPherson Bros.*, 49 South. 257, 95 Miss. 635.

The term "timber" as commonly used in this country, signifies either growing trees, or large sticks, and is not commonly applied to small pieces or rails or cordwood into which the larger pieces may be worked up. *Anderson v. Miami Lumber Co.*, 116 Pac. 1056, 1058, 59 Or. 149.

In England the term "timber" does not include all kinds of wood, what kind of wood in England is deemed to be timber depends on custom. In this country the term "timber" when applied to standing trees, generally means such as are suitable for use in the erection of buildings or in the manufacture of tools, utensils, furniture, carriages, fences, ships, and the like. *Lord v. Meader*, 60 Atl. 434, 435, 73 N. H. 185 (citing *Alcott v. Lakin*, 33 N. H. 507, 509, 66 Am. Dec. 739; *Jackson v. Brownson* (N. Y.) 7 Johns. 227, 235, 5 Am. Dec. 253).

Generally the word "timber," as used in a contract selling standing timber, unless modified or controlled by other expressions, in the contract means such trees as are fit to be used in buildings or similar construction; that is, trees of a size fit to be used in the construction of dwellings or ships; trees too small to be used for these purposes, not, strictly speaking, being considered as timber, although their products are utilizable for the construction of interior work in dwellings, or for the manufacture of tools and other appliances. *Broad River Lumber Co. v. Middleby*, 194 Fed. 817, 819, 114 C. C. A. 521.

A deed, reserving to grantor the "timber" growing on certain lands, retained title to all trees then of a size suitable to make lumber, not including saplings or undergrowth. *Hicks v. Phillips*, 147 S. W. 42, 148 Ky. 670.

The meaning of the word "timber" has more or less flexibility, depending upon time, place, and circumstances, as well as the language in which it is employed, and may be shown to include cordwood. *Fogo v. Boyle*, 109 N. W. 977, 978, 130 Wis. 154 (citing 8 Words and Phrases, pp. 6972, 6973).

To show the meaning of the word "timber" in a contract of sale of what "timber" the seller had on the land in the neighborhood, evidence of what business the buyer

was engaged in as known by the seller, and of what was the common acceptance of the word in that business and in that locality, is admissible. The meaning of the word is not so accurate a designation of what was sold as to preclude investigation of the meaning of the word. *Kerl v. Smith*, 51 South. 3, 4, 96 Miss. 827.

The word "timber," as used in a lease of land for the purpose of cutting "all and singular timber suitable for sawmill purposes growing on" the land, includes green and growing timber, and not all timber on the land suitable for sawmill purposes at the time of the execution of the lease, since the word "timber" is used to denote green wood of the age of 20 years or more, such as oak, ash, elm, beach, maple, walnut, hickory, poplar, cypress, pine, gum, and other forest trees. *Handcock v. Massee & Felton Lumber Co.*, 56 S. E. 1021, 127 Ga. 698 (citing *Dickinson v. Jones*, 36 Ga. 97).

The word "timber," as used in Act Feb. 25, 1901 (P. L. 11), protecting timber on forestry reservations, is not confined to trees of such size that planks, boards, shingles, and other lumber may be made therefrom. It applies to saplings and other small growing woods on the lands of the commonwealth. *Commonwealth v. La Bar*, 32 Pa. Super. Ct. 228, 231.

In a contract for the sale and cutting of "timber," which provides that the vendee agrees "to draw all of said timber off the lot on or about April 12th, \* \* \* after which date he has no further right on said premises or in any timber left therein," the word "timber" includes, not only the standing timber, but all timber cut, but not drawn off, on that date. *McNeil v. Hall*, 94 N. Y. Supp. 920, 923, 107 App. Div. 36.

#### **As firewood**

Where a party, by a written contract, purchased all the timber on certain land except certain kinds, and there was nothing to show that by the word "timber" the parties meant to include all growing trees of any size, but there was evidence that they only intended to include those large enough for construction purposes, the purchaser was not entitled to cut trees which, because of their size, were fit only for firewood. *Balderson v. Seeley*, 125 N. W. 37, 38, 160 Mich. 186, 136 Am. St. Rep. 428, 19 Ann. Cas. 1049.

#### **Growth synonymous**

Where one conveyed to another "all the timber and growth of timber" on certain land, with the privilege of at all times entering on the land and removing the timber, the instrument included timber to be subsequently grown; "timber" being defined as wood or forest land, and the term "growth" being defined as that which has grown or is growing, anything produced, a

product, the words in such circumstances not being synonymous. *Baker v. Kenney*, 124 N. W. 901, 904, 145 Iowa, 638, 139 Am. St. Rep. 456.

#### **Land**

As land, see *Land*.

Where a broker's contract employed him to purchase timber options for a percentage of the net profits from the sale of the timber, and certain land was purchased in order to obtain the timber thereon, the word "timber" in the contract of employment could not be extended to include the land, so as to entitle the broker to a percentage of the net profits of the sale of the land, as well as the timber. *Wilson v. James*, 106 Pac. 618, 619, 57 Wash. 143.

#### **Lumber**

Where, in a suit by attachment the affidavit set up a lien for stumpage, under Code 1907, § 4814, for timber sold, and the complaint charged for lumber sold, but also claimed under a lien for stumpage under the statute, which gives a lien for timber sold, the word "lumber," as used therein, is synonymous with "timber," when considered in connection with all the averments of the complaint and the affidavit, as against an objection that there was a fatal variance between the pleading and proof, since it can reasonably be construed to harmonize with the affidavit and evidence showing a sale of timber, as distinguished from lumber. *Sligh v. Frix*, 51 South. 601, 602, 165 Ala. 230.

#### **Railroad ties**

Where an instrument conveying all the timber and logs suitable to be manufactured into cross-ties, also provided that, after the expiration of the time fixed in the contract, all the timber left should revert to the seller, the word "timber" will not be construed to include manufactured cross-ties, but means growing trees and logs. *Johnson v. Truitt*, 50 S. E. 135, 136, 122 Ga. 327. See, also, *Mahan v. Clark*, 68 Atl. 667, 669, 219 Pa. 229, 12 Ann. Cas. 729 (citing *Johnson v. Truitt*, 50 S. E. 135, 122 Ga. 327).

A deed of land reserved to the vendors the title to all timber of the land which they could remove not later than a specified date, and provided that all the timber thereon which should not be removed by that date should belong to the vendees. Held, that "timber" meant any timber standing or lying on the ground in its natural state, and railroad ties manufactured from trees on the land at a cost of 15 cents each, the greater part of their value being the result of skill and labor expended in their manufacture, were not timber, and the vendees did not become the owners thereof, where they were still on the land at the expiration of the contract date for removal of the timber. *Butler & Barrow v. McPherson Bros.*, 49 South. 257, 95 Miss. 635.

**Saw logs**

The lien given by Civ. Code 1895, § 2809, persons furnishing sawmills with "timber and logs," applies to timber and logs severed from the soil by human agency, and not to standing trees, though sold to be severed from the realty by the purchaser and converted into lumber or logs for his mill. *Ray v. Schmidt & Co.*, 68 S. E. 1035, 7 Ga. App. 380.

**Slabs**

Slabs are not included in the material designated as "lumber and timber" in the statute giving a lien on the lumber and timber for services in cutting logs. *Engl v. Harris*, 100 N. W. 1046, 1048, 123 Wis. 407.

**TIMBER FOR SAWMILL PURPOSES**

See Suitable for Sawmill Purposes.

"Timber" is not a word of invariable meaning. It may be used to designate wood suitable for building houses or ships, or for use in carpentry, joinery, etc., or trees cut round and squared, or capable of being squared or cut into beams, rafters, boards, etc., or growing trees suitable for constructive purposes, or trees generally, or woods, or a single tree of wood, whether suitable for use in construction or already in use. Cent.

Or the body, stem or trunk of a tree. *Rev. Dict.*, Rawle's Revision. The meaning given the term depends upon the context in which it is used, and sometimes upon the occupation of the person who uses the term. In construing a contract where the word appears, it is not only proper, in defining what is intended by the parties, to look to the terms of the contract, but also to the occupation of the contracting parties and the purposes for which the contract was entered into. An owner of land entered into a contract with the proprietor of a sawmill for the sale of "all the timber for sawmill purposes," on a given parcel of land. A portion of the purchase money was to be paid on as the "sawmill was located ready for sawing on said land." If this amount was not paid, the mill was to be removed from the land before "sawing any timber on." There were stipulations "that the stumps from which such sawmill timber is to be cut shall be two feet high, and not more than two feet from the ground, and, no timber is to be cut from said land \* \* \* that is less than 14 inches in diameter"; that stumps less than two feet high, or any cut less than 14 inches in diameter, be a violation of this contract and a forfeiture thereof"; and that the buyer to have twelve months in which to saw timber." Held, that only such portions of trees as were capable of being sawed under the contract. *Penn v. Avera*, 52 S. E. 324, 124 Ga. 147.

*United States v. Stores*, 14 Fed. 824; *Lumber Co. v. Gaskin*, 50 S. E. 164, 122 Ga. 2).

A deed conveying all of a lot of land, save and except "the timber on said lot of land suitable for turpentine purposes and the timber thereon suitable for sawmill purposes, except dead timber for plantation purposes, which is hereby reserved by said" grantor "unto himself, his heirs, and assigns, with the privilege of utilizing the same for turpentine purposes, within and during a period of five years from the date of this instrument, and with the privilege to him, the said grantor, to cut and remove the timber on said lot of land suitable for sawmill purposes within and during the space and period of eight years from the date of the instrument, the said grantor to have the further privilege of such ingress and egress in, from, upon, and over said lot of land as may be necessary for the removal of said timber and turpentine products therefrom," reserves to the grantor, for sawmill use during the specified time, all the dead timber on the land suitable for sawmill purposes, with the right to the grantee to have and enjoy during this time so much thereof as may be necessary for plantation use. *Lankford v. Peterson*, 56 S. E. 774, 127 Ga. 666 (citing *Gray Lumber Co. v. Gaskin*, 50 S. E. 164, 122 Ga. 342).

**TIMBER LANDS**

Rev. Codes, § 1580, provides that timber lands and lands chiefly valuable for timber must be sold for cash on the day of sale. Section 1599 provides that timber and timber lands belonging to the state may be sold by the State Board of Land Commissioners, at their option upon installments. Held, that state lands covered with timber which has been previously sold by the state, and the purchaser granted a fixed period in which to enter upon the land and remove the timber, is "timber land," within the sections, and, when sold, must be sold subject to section 1599. *Pike v. State Board of Land Com'rs*, 113 Pac. 447, 452, 19 Idaho, 268, Ann. Cas. 1912B, 1344.

Rev. St. 1892, § 1469, giving a right to enjoin trespass to real estate to any person "claiming to own timbered lands," does not confer such right on one claiming to own only the "turpentine boxes," or the turpentine in the trees with the privilege of cutting, boxing, and scraping the same. *Hall v. Horne*, 42 South. 383, 386, 52 Fla. 510 (citing *Doke v. Peek*, 34 South. 896, 45 Fla. 244, 110 Am. St. Rep. 70; *McDonald v. Padgett*, 35 South. 336, 46 Fla. 501).

**TIME**

See Additional Time; Apparent Solar Time; At Any Time; At Said Time; At Such Time; At the Time; Before the Time; Considerable Time; Cooling Time; Determinable Future Time; During Further Time; For Stated Time; For the Time Being; From Time to Time; Full Time; Further

Time; In Time; Lapse of Time; Long Time; Loss of Time; Mean Time; Ordinary Time; Payable at a Determinable Future Time; Prior in Time; Proper Time; Reasonable Time; Short Time; Standard Time; Straight Time; Unity of Time; Unreasonable Time; Whole Time; Within a Specified Time; Without Time Limit.

Any time, see Any.

Extension of time, see Extension.

In an action on a note and to foreclose a mortgage securing the same, plaintiff's petition alleged that the instruments were executed on the 10th day of December, 1892; and a supplemental petition alleged that, at the time defendants executed the instruments, defendants were not living on the land, or occupying it as a homestead. Defendants' plea was that at the time the instruments were executed the land involved was being occupied as a homestead. Held, that the word "time," as used in the supplemental petition, referred to the date given in the original petition, and hence the issue raised was whether the premises were occupied as a homestead December 10, 1892. *De-laney v. Walker*, 79 S. W. 601, 602, 34 Tex. Civ. App. 617.

A lease, contemplating construction by lessee of a building before a designated date, provided for semiannual payments of a percentage of profits earned for the half year, authorized issue by lessee of interest-bearing bonds before completion of the building, required a monthly deposit by lessee for a fund out of which to pay rent, taxes, insurance, interest, and as a sinking fund for payment of the bonds, and provided deduction from profits if any payment should be made "at the time of and not prior to the time of the respective actual payments thereof." Held, that the word "time" referred to the half-year period at expiration of which the net profit should be calculated and paid, and payments during a half-year period where there was no income could not be carried forward to a succeeding half-year period and deducted from income during such profit-earning period. *Grosse v. Barman*, 100 Pac. 348, 353, 9 Cal. App. 650.

#### As referring to a day

The publication of a notice 20 successive "times" in a daily newspaper is equivalent to a publication for 20 successive "days." *White v. Bates*, 84 N. E. 906, 909, 234 Ill. 276.

Under the statute providing for the election by the members of the bar of a special county judge "if at the time" appointed to hold court the judge does not appear, the special judge may be elected on the first day of the term, but may be ousted by the subsequent appearance of the regular judge. *Porter v. State*, 86 S. W. 767, 768, 48 Tex. Cr. R. 125.

#### As solar or standard time

"When the Legislature prescribes the times at which a term of the court shall begin and shall end, the true time at the place of holding the court is meant; and the true "time" is to be determined by the instant at which the sun passes the meridian of the place for which it is to be calculated, and not by the time of its passage at some other place." Therefore, in determining the "time" of the expiration of a term of court, limited by statute to a certain day, "solar time," and not "standard" or railroad time, should be used, though the community has generally adopted standard time. *Texas Tram & Lumber Co. v. Hightower*, 96 S. W. 1071, 1072, 100 Tex. 126, 6 L. R. A. (N. S.) 1046, 123 Am. St. Rep. 794.

#### TIME CHECK

A "time check," issued by a contractor, or his foreman, to a laborer, containing a memorandum of the time of labor and the amount he is entitled to receive therefor, is the evidence and symbol of his claim for such labor. The indorsement in blank of such a check and a delivery thereof is an assignment in writing of the claim for labor, as required by the statute. *Small v. Smith*, 139 N. W. 133, 135, 120 Minn. 118.

#### TIME FOR ANSWERING

As used in Comp. St. § 200, providing that the defendant, at any time before the time for answering expires, may apply for a discharge of the attachment, the phrase "time for answering" refers to the time in which the defendant shall appear and answer the summons, as required by section 68, subd. 3. *Vaughn v. Dawes*, 17 Pac. 114, 115, 7 Mont. 360.

#### TIME FOR COLLECTION OF TAXES

Const. Amend. 2, Kirby's Dig. § 2767, and Acts 1907, p. 1256, provided as one of the qualifications of a voter that he should exhibit a poll tax receipt or other evidence that he had paid his poll tax "at the time of collecting taxes next preceding the election," and by Const. Amend. 9, Kirby's Dig. § 2772, Acts 1893, p. 245, and Acts 1909, p. 945, § 4, the "time for collecting taxes" is defined as the period between the first Monday in January and the last Saturday next preceding the first Monday in July, on which last-named date the collector is required by law to make his final settlement in the county court, and declares that any person liable to pay full taxes and who has paid the same at any time within the dates named shall, if possessed of the other qualifications required by law of an elector, be entitled to vote at any election held in the state at any time before the first Monday in July of the year succeeding that in which the payment was made. Held, that the "time for collection of taxes" within such constitutional amendment has reference to

a period already expired next before the day of election at which the elector proposes to vote; and hence electors otherwise qualified who were required to pay full tax, but who had not done so, and obtained a receipt therefor during the time for collecting taxes between the first Monday in January and the Thursday preceding the first Monday in July the year 1909, were not qualified electors entitled to vote or eligible to election office at a school election held in May, 1910, though they may have paid their full tax during the time for collecting taxes in 1910 prior to the election in May, prior to the expiration of the time for collecting taxes, it not being a payment within the constitutional provision "at the time of collecting taxes next preceding such election." *White McHughes*, 133 S. W. 1026, 1027, 97 Ark.

### TIME OF ACCIDENT

The words "time and place," in a statute defining a description in the notice of the time and place of the occurrence of the injury, mean a statement of the day and hour of the injury, and a description of the locality where the person injured received the direct injury from the negligent act, as nearly as these facts can be given. *Peck v. Fair Haven & Westport R. Co.*, 58 Atl. 757, 758, 77 Conn. 161; *Wright v. City of Omaha*, 110 N. W. 754, 755, 124 Neb. 124.

### TIME OF ASSESSMENT

In assessing a tax upon the property liable to taxation in any town or city, two references to time must inevitably be made: (1) the point of time must be taken to which the values of all the property shall be reduced simultaneously, and the value of each parcel of property at that point of time must be estimated and affixed to it. (2) Some period of time must be occupied by the assessors in the work of receiving statements, making estimation of values, reckoning the tax, writing out and filing the roll. Both of these times may be called the "time of making the assessment"; but one is important to the taxpayer, and the other is not. It is material to the taxpayer when or during what period of time the work of the board of assessors is performed, except that portion of which consists in receiving his return; but of the utmost importance to him to have his property valued as of the same time with the other property in the town, and to know the time the assessors had in mind when they valued its value. *Matteson v. Warwick & Watery Water Co.*, 68 Atl. 577, 579, 28 R. I. 1.

### TIME OF BANKRUPTCY

The Bankrupt Act defines "time of bankruptcy" to mean the date when the petition is filed. *Shute v. Patterson*, 147 Fed. 506, 83 C. C. A. 75.

### TIME OF LAST SICKNESS

See Last Sickness.

### TIME OF RENDITION OF JUDGMENT

See Rendition of Judgment.

### TIME OF SALE

The "time of sale" mentioned in the amendment to the act relative to the sale of lands, approved March 19, 1912 (P. L. p. 131), is referable to a day, that is, the day of sale. Therefore it is as though the act read "the last publication (of the notice of sale) to be not more than seven days prior to the day appointed for selling," etc. *Trenton Trust & Safe Deposit Co. v. Fitzgibbon & Crisp Carriage & Wagon Co.*, 84 Atl. 1042, 81 N. J. Eq. 1.

### TIME OF SUIT

When the charter of a bank declares that the stockholders of a bank shall be individually liable, "at the time of suits," for the ultimate payments of debts of the bank, in a given proportion, no cause of action arises against the stockholders until there has been a suit by a creditor against the bank, and the statute of limitations does not begin to run in favor of the stockholders until after the date of such a suit. *Wheatley v. Glover*, 54 S. E. 626, 627, 630, 125 Ga. 710.

### TIME OF WAR

See In Time of War; War.

### TIME SAVED IN LOADING

Under a charter providing that dispatch money is to be allowed the charterer for "time saved in loading," the phrase "time saved in loading" means the amount of time saved to a vessel from the time allowed for loading by the charter. *Pool Shipping Co. v. Samuel*, 200 Fed. 36, 40, 118 C. C. A. 264.

### TIME SPECIFIED

Where a car company agreed to make and deliver a number of cars to the railway company on or before April 1, 1900, subject to delays from unavoidable contingencies, but that, if it failed to deliver the cars "within the time specified," it would forfeit and pay to the railroad company, as liquidated damages, \$5 per day for every car so delayed, the "time specified" in the damage clause meant all the time specified for the delivery of the cars in the earlier part of the contract (that is to say, a time on or before April 1, 1900, plus the time during which the delivery might be delayed by the unavoidable contingencies), and the car company was not liable for the stipulated damages during that time. *Pressed Steel Car Co. v. Eastern R. Co.*, 121 Fed. 609, 615, 57 C. C. A. 635.

### TIMEKEEPER

A "timekeeper" is a person who keeps, marks, regulates, or determines the time. Specifically, a person who keeps a record of the time spent by the workmen at their work;



one who notes and records the time at which something takes place, or the time occupied in some action or operation, or the number of hours of work done by each of a number of workmen. *Jenkins v. Penn Bridge Co.*, 53 S. E. 991, 993, 73 S. C. 526 (quoting definition in Cent. Dict.).

Acts 1905, p. 538, provides that the wages of a railroad employé shall continue after his discharge, where such employé requests his foreman or timekeeper to send his wages to any designated station and request is not complied with within seven days from the time it is made. Plaintiff, a station agent, on discharge, made demand for his wages to his successor. He did not designate the station at which the wages were to be sent. Held, that the division agent who appointed him was plaintiff's "foreman" or the "keeper of his time" within the statute, and since his request did not comply with the statute, he was not entitled to wages after discharge. *St. Louis, I. M. & S. R. Co. v. McClerkin*, 114 S. W. 240, 241, 88 Ark. 277.

## TIMOMETER

A "timometer" is an instrument for automatically recording elapsed time in minutes as well as in seconds, used specifically in recording the length of time a long-distance telephone has been used. *Calculagraph Co. v. Wilson*, 132 Fed. 20, 25.

## TIN PLATE

Manufactures of, see Manufactures—  
Manufactured Articles.  
Wholly of tin plate, see Wholly.

## TINWARE

See Sale of Tinware.

## TIPPERS

In unloading coal from a vessel, the coal was hoisted by buckets, and raised so far above the level of the apron or platform as would allow the bucket to clear the wheelbarrow that was to receive the coal. The men who unloaded the coal were called the "tippers" and "wheelers." *Garant v. Cashman*, 66 N. E. 599, 600, 183 Mass. 13.

## TIPPLE

To "tipple" is to drink intoxicating liquors, and to "take a dram" is the same thing. *City of Joplin v. Jacobs*, 96 S. W. 219, 119 Mo. App. 134.

In view of prior legislation on the liquor traffic, the word "sale" in the title of Acts 1909, c. 1, entitled an act to prohibit the "sale" of intoxicating liquors as a beverage near a schoolhouse, where a school is kept, whether the school be in session or not, includes all sales without regard to their form

or character; and the word "tipple," in section 1, declaring it unlawful "to sell or tipple" any intoxicating liquors as a beverage within four miles of such a schoolhouse, denotes a subdivision of the more comprehensive term "sale," as used in the title, and its equivalent "to sell" as used in the body; and the word "or," between "sell" and "tipple," is used in a disjunctive sense, the prohibition not being against tipple sales alone, but as well against any other sales; and the words "as a beverage" refer to a sale of liquor, not necessarily to be consumed by the immediate purchaser, but to be finally used, when it reached the consumer, as a beverage, so that a sale in wholesale quantities of intoxicating liquors, by a manufacturer thereof to a wholesaler, with only a general and promiscuous purpose, includes a beverage sale, within the prohibition of the statute. *J. W. Kelly & Co. v. State*, 132 S. W. 193, 195, 123 Tenn. 516.

The word "tipple," in the act of 1877, means to sell to be drunk at the place of sale. *State v. Wilson*, 91 S. W. 195, 198, 115 Tenn. 725 (quoting and adopting the definition in *Harney v. State* [Tenn.] 8 Lea, 113).

## TIPPLING HOUSE OR SHOP

See, also, Grogshop.

A "tippling house" is a place where spirituous liquors are sold and drank in violation of law (*Bouv. Law Dict.*); or, as defined by this court under our statute, a place where spirituous liquors are sold without license in less than a quart, or in any quantity to be drank at the place (*Dunnaway v. State* [Tenn.] 9 Yerg. 350; *Sanderlin v. State* [Tenn.] 2 Humph. 315). The word "tipple," in the act of 1877, means to sell to be drank at the place of sale. *State v. Wilson*, 91 S. W. 195, 198, 115 Tenn. 725 (quoting and adopting the definition in *Harney v. State* [Tenn.] 8 Lea, 113).

In some jurisdictions, there is a distinction made between a "dramshop" and a "tippling house," in others, no distinction is recognized. Both are places where intoxicating liquors may be purchased at retail. In a legislative sense, there is a recognized difference and distinction made between them in Missouri. The Legislature has designated a licensed place for the sale of intoxicating liquors as a dramshop, and to be a dramshop, as known to the law, it must be licensed. The charter of cities of the third class does not authorize the suppression of the dramshop known as such by the general law. Such cities have no power, either under the authority to suppress tippling houses or under the general law regulating dramshops, to adopt an ordinance making it unlawful for a keeper of a dramshop to allow women to enter the dramshop and obtain liquor. *City of Joplin v. Jacobs*, 96 S. W. 219, 119 Mo. App. 134.

Whether or not a "restaurant" is a dramshop or "tippling house" depends upon the character of the business that is carried on therein. *Denver, City Ordinance 2, No. 102, § 1*, providing that no person or corporation within the city shall directly or indirectly sell or give away any intoxicating malt liquors, to be drank on the premises or sold or given away, without a license obtained from the city, was applicable to a person who was a bona fide restaurant owner, and who sold liquor only to customers to be drank only in connection with a meal. *Scanlon v. City of Denver*, 88 Pac. 157, 38 Colo. 401.

A "tippling house" is a place where intoxicating liquors are sold and drank, where one may tipple or drink intoxicants at the place. The drinks may be either sold or taken away. *Territory v. Robertson*, 92 Pac. 145, 19 Okl. 149.

The words "tippling shop," in *Wilson's Case*, 103, § 388, providing that the city council shall have power to regulate, prohibit, and suppress "tippling houses," etc., mean the modern common saloon, where liquors are kept and sold as a place to be drank at the bar, and it may be either a licensed or an unlicensed saloon. *Territory v. Robertson*, 92 Pac. 144, 145, 19 Okl. 149.

A saloon or dramshop is a "tippling house," within the meaning of *Rev. St. 1899, § 43*, prohibiting the keeping open of a drinking shop on Sunday. *State v. Meagher*, 114 Mo. App. 266 (citing *Webster v. Worcester*, Dicts. and Bouv. Law Dict. defining "tippling house"; *Werner v. Washington*, 29 Fed. Cas. 705; *Woods v. Commonwealth* [Ky.] 1 B. Mon. 74; *Hussey v. State*, 28 S. E. 54; *Williams v. State*, 28 S. E. 624; *Ga.* 511, 39 L. R. A. 269; *Mohrman v. State*, 32 S. E. 143, 105 Ga. 709, 43 L. R. A. 70 *Am. St. Rep.* 74; *State v. Heckler*, 104 Mo. App. 417; *State v. Kurtz*, 64 Mo. App. 123; *State v. Lucas*, 67 S. W. 971, 94 Mo. App. 123.

A barroom is a "tippling house," within the law requiring such places to be closed on Sunday. *Kolman v. State*, 58 S. E. 1070, 2 Ga. App. 648.

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See *Clincher Title*.

..E

**legislative act.**

See *Restrictive Title*.

Expressed in the title, see *Express*.

The "title" of an act is no part thereof; it may be looked to for aiding and determining the intent of the lawmakers. *Proc. v. Territory*, 92 Pac. 389, 390, 18 Okl.

The "title" of an act is no part thereof, and a law having no title is not invalid. *Loewen v. Myers*, 88 Pac. 1046, 1047, 18 Okl. 300 (citing *Choctaw, O. & G. R. R. Co. v. Alexander*, 7 Okl. 591, 54 Pac. 421).

The "title" of an act, within Const. art. 3, § 16, requiring that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, is a conclusive index to the legislative intention. The framers of the Constitution in using such term evidently meant that the title to the act should indicate both to the lawyer and the citizen the general scope and purpose of the legislative intent, and that such title should put the citizen on notice of the proposed legislation. *State v. Coffin*, 74 Pac. 962, 967, 9 Idaho, 338.

Under the Constitution, providing that the object of a statute must be single and must be expressed in its title, the "title" of an act is in the nature of a label by which the object of the act is displayed, and is not a table of contents, nor an index to everything that the statute enacts. *Gottuso v. Baker*, 77 Atl. 1038, 1039, 80 N. J. Law, 520.

The word "title," in Const. art. 3, § 35, providing that no bill shall contain more than one subject, which shall be expressed in its title, implies that the title need not be as full as the act itself. The purpose of the constitutional provision is merely to reasonably apprise the legislators of the contents of the bill, to the end that surprise and fraud in legislation may be prevented. The title of Laws 1901, c. 117, entitled "An act to prohibit railroad and railway companies or corporations from permitting Johnson grass or Russian thistles from going to seed on their right of way," and fixing a penalty, is sufficient to sustain a provision for damages to persons injured, and so much of the statute as authorizes a recovery of such damages is not in violation of the Constitution. *Doepenschmidt v. International & G. N. R. Co.*, 101 S. W. 1080, 1081, 100 Tex. 532.

#### **TITLE (To Property)**

See *Assertion of Title by the Commonwealth*; *Assurance of Title*; *Chain of Title*; *Cloud on Title*; *Color of Title*; *Complete Title*; *Doubtful Title*; *Equitable Title*; *Full Title*; *General Title*; *Good and Marketable Title*; *Good and Perfect Title*; *Good and Sufficient Title*; *Good Title*; *Inchoate Legal Title*; *Just Title*; *Land Title*; *Legal Title*; *Legitimate Title*; *Marketable Title*; *Outstanding Title*; *Perfect Title*; *Satisfactory Title*; *Perfect Title*; *Plea of Title*; *Record Title*; *Regular Chain of Title*; *Regular Title*; *Reservation of Title*; *Respecting Title to Land*; *Right, Title, and Interest*;

Royal Title; Slander of Title; Tax Title; Trespass to Try Title; Undisputed Title.

All right, title, and interest, see All. Change of title, see Change.

Gift of income as conveying title, see Income.

Indisputable title, see Indisputable.

Involving title, see Involve.

Merchantable title, see Merchantable.

Suit affecting, see Affecting.

"Title" is the means whereby a man hath the just possession of his property. *Holcombe v. Trenton White City Co.*, 82 Atl. 618, 634, 80 N. J. Eq. 122; *Adams v. Hopkins*, 77 Pac. 712, 717, 144 Cal. 19; *Stryker v. Meagher*, 107 N. W. 792, 76 Neb. 610 (quoting and adopting definition in *Bouv. Dict.*); *State v. Welde* (S. D.) 135 N. W. 696, 701.

The word "title," as used in a deed from a mortgagor to a mortgagee, stipulating that the mortgage was not to be considered as merged in the title, but was to be held as protection to title, meant the title as it existed at the time of the conveyance, and which was then the subject of consideration. The purpose of this provision in the deed was to protect the grantee against any liens or charges on the title which might have intervened intermediate the execution of the mortgage and the deed. *Coon v. Smith*, 88 N. Y. Supp. 261, 262, 43 Misc. Rep. 112.

"In strictness, the word 'title' is applicable only to real estate; but it is also sometimes used to denote a similar attribute of personal property. When so used, it has a kindred meaning and contemplates some specific tangible thing having some resemblance to real property in its characteristics which justifies the borrowing of the term. It is rarely, if ever, used to denote the ownership or transitory and intangible objects." *Jones v. Gould*, 149 Fed. 153, 157, 80 C. C. A. 1.

The word "title" is sometimes used in the signification of a regular chain of transfer from or under the sovereignty of the soil. It is sometimes used in the sense of the particular conveyance under which a man holds his property. *Fall v. Fall*, 106 N. W. 412, 113 N. W. 175, 184, 75 Neb. 104, 121 Am. St. Rep. 767 (citing 8 Words and Phrases, p. 6979).

Possession under a claim of ownership in itself constitutes "title" in a low degree. It is sufficient to give plaintiff standing to bring an action against those who have no title at all. *Waller v. Julius*, 74 Pac. 157, 68 Kan. 314.

"Possession" means actual control of property by physical occupation, while "title" is the means whereby one holds possession of his land. *Collar v. Ulster & D. R. Co.*, 131 N. Y. Supp. 56, 60, 72 Misc. Rep. 274.

"Possession" is prima facie evidence of, and one of the elements of, title, and a court

has no power to take it from a man without a hearing, since to do so would be to violate the maxim that no man shall be condemned in person or deprived of title without a day in court and due process. *Powhatan Coal & Coke Co. v. Ritz*, 56 S. E. 257, 261, 60 W. Va. 395, 9 L. R. A. (N. S.) 1225 (citing *Bettman v. Harness*, 26 S. E. 271, 42 W. Va. 433, 36 L. R. A. 566; *Crossland v. Crossland*, 44 S. E. 424, 53 W. Va. 108).

The word "title" in Comp. Laws 1909, § 5621, providing that, where a petition has been filed, the action is pending so as to charge persons with notice thereof, and while pending no interest can be acquired by a third person against the plaintiff's title to the subject-matter, includes an action or claim to enforce a vendor's lien. *Holland v. Co-field*, 112 Pac. 1032, 27 Okl. 469.

While Code Civ. Proc. § 1632, makes a conveyance on foreclosure a bar against each party to the action and every one claiming under him "by title accruing after the filing of notice of pendency of the action," the authority for filing the notice is section 1670, and its effect is prescribed in section 1671 as "constructive notice to a purchaser or incumbrancer of the property affected thereby," and the word "title" does not extend to that acquired by infants by inheritance. *Gruner v. Ruffner*, 119 N. Y. Supp. 942, 943, 134 App. Div. 837.

Plaintiff leased certain premises to defendant under a lease which expired May 1, 1912, and on June 16, 1911, plaintiff's agent wrote defendants, stating that at a meeting of the executive committee of the trustees of plaintiff corporation "it was voted to grant you, if you so desire, a lease of the premises now occupied by you for three years after the expiration of your present lease. \* \* \* If you desire a five years lease they will be willing to grant two additional years \* \* \* both under same conditions as present lease," to which defendants replied, requesting plaintiff's agents to "please to have a new lease made as per your letter of June 16th for three years, and the two year renewal clause at the prices mentioned," and stating that defendants would be in on the same day to sign the lease. Held, that such equitable rights as defendants acquired under such instruments did not constitute "title" in defendants, as that word was used in Gen. St. 1902, § 1081, providing that in actions of summary process, if it be found that defendant is plaintiff's lessee and holds over after the termination of his lease, etc., and defendant does not show a title in himself, judgment should be rendered for plaintiff, so that defendants could not rely on such instruments as a defense to summary proceedings. *Giering & Bentley v. Hartford Theological Seminary*, 84 Atl. 930, 932, 86 Conn. 208.

Under Civ. Code, arts. 2642, 2656, providing that delivery of an incorporeal right may

affected by the giving of the title, and deriving that without delivery there is no giving in payment, a giving by a debtor and a receipt by the grantor of open accounts is a title, without notice to the debtors on the accounts; "title" meaning the material evidence of the incorporeal right, and an open account not being evidenced by such a title as to serve for the purpose of delivery. *Lehman Dry Goods Co. v. Lemolne*, 56 South. 324, 129 La. 382.

"Grantor had already used the necessary proper words to make an absolute, vest title by the instrument in his children, when he provided that the conveyance would not take effect until after his death, in the title should immediately vest, he necessarily meant, if we are to give effect to what he was doing, to use the word 'title' in connection as a synonym of 'possession,' which at his death should pass to the grantor. Such a construction comports, as we have shown, with the general tenor of the will, and is sanctioned by reason and authority." *McLain et al. v. Garrison*, 89 S. 284, 285, 39 Tex. Civ. App. 431.

Under Act June 4, 1897, providing that cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner may relinquish the tract to the government, and select thereout a tract of vacant land open to settlement, not exceeding in area the tract covered by his claim or patent, the owner herein referred to is one holding both the legal and equitable title to the patented land. At the time of the application for such exchange the officers of the land department should obtain knowledge from any source as to the title which the applicant proposed to relinquish was one obtained by the perpetration of fraud, it would be the duty of the department to reject the application, because the title which in the hands of such person is tainted with fraud, and therefore voidable, is not the kind of "title" which the law contemplates the government shall receive in exchange for its lands. *United States v. Hyde*, Fed. 545, 549.

#### **Estate in fee**

"Title" does not necessarily mean a fee estate, but covers all the lesser estates in land. *Snodgrass v. Copple*, 101 S. W. 1091, 203 Mo. 480 (quoting 8 Words and Cases, p. 6980).

As used in Laws 1882, c. 239, amending St. § 4269, providing that when defendant shall have in good faith acquired a title interest upon land, and enters under the same believing such title to be valid, and thereafter have cut timber therefrom, the plaintiff, if he shall recover, shall recover only the actual damage sustained by reason of such cutting. The word "title" does not mean a valid title in fee, but it must mean title apparent-

ly good, but which in fact for some reason is invalid. *Befay v. Wheeler*, 53 N. W. 1121, 1123, 84 Wis. 135.

#### **As ownership**

"Title" is the right to or ownership in land. The sale of land involved the sale of title, and is affected by the transfer of title. Titles sold and transferred may be good, bad, or doubtful, absolute or limited. The same title may be satisfactory to one purchaser and not to another. One might be quite willing to buy a doubtful title, while another would not be satisfied with a marketable title so limited as to involve a special risk of litigation in his use of the property purchased." *Lieberman v. Beckwith*, 65 Atl. 153, 154, 79 Conn. 317, 8 Ann. Cas. 271.

The term "title," used in speaking of an abstract of title to land, means "ownership." A contract to sell real estate, which requires the vendor to furnish "a complete abstract of title \* \* \* in ample time" for the purchaser to have the same examined within a specified time, "and if said title is found to be good" the vendor shall execute a deed, and the purchaser shall pay part cash and execute notes for the balance, requires the vendor to furnish an abstract of title showing good title before the purchaser is obliged to do anything under the contract, or before he incurs any liability thereunder. *Bowles v. Umberson (Tex.)* 101 S. W. 842, 844.

#### **As right of possession**

The legal "title" to real property carries with it the right of possession, which is sufficient under Rev. Laws 1905, § 4073, to authorize an action to recover the same from one in possession without right or title. *Norton v. Frederick*, 119 N. W. 492, 494, 107 Minn. 36.

The term "title," in Comp. Laws 1897, providing that any claim of title to lands made by plaintiff in his declaration shall be deemed to be admitted by defendant, unless he files a bond and pays fees, costs, etc., does not embrace the fact of possession, nor any right founded on possession of land. It is synonymous with the right of possession. An allegation in a declaration in an action of trespass, under Comp. Laws 1897, § 11204, to recover damages for cutting down and carrying away trees, that defendant cut down and carried away without leave of plaintiff, "the owner thereof, \* \* \* trees of great value, \* \* \* then and there being and standing \* \* \* on the land of said plaintiff," is not an allegation of title to the land on which the trees stood, within the meaning of section 786. *Reynolds v. Maynard*, 100 N. W. 174, 175, 137 Mich. 42.

#### **Claim or grant distinguished**

A "claim" is, not only legally speaking, but in ordinary parlance, clearly distinguishable from a "grant" or a "title." A "claim" is defined in the Century Dictionary (verbo "Claim") as "the thing claimed or demanded ;

specifically, a piece of public land which a squatter or settler marks out for himself with the intention of purchasing it when the government offers it for sale; as, 'he staked out a claim.'" "A 'grant,' on the contrary, has a distinctly broader meaning. It implies an acquired right, and is described by Mr. Bouvier as applicable to the conveyance of incorporeal rights. But in the larger sense the term comprehends anything that is granted or passed from one to another, and is applied to every species of property. It therefore necessarily implies a 'title' or vested right in the grantee from the grantor, or has a much more pregnant signification than 'claim.'" *Corkran Oil & Development Co. v. Arnaudet*, 35 South. 747, 754, 111 La. 563.

#### **Interest distinguished.**

The word "interest," as used in a fire insurance policy declaring that the policy shall be void if any change shall take place in the interest, title, or possession of the subject of insurance, is not synonymous with title, but means some right different from title. It cannot mean a greater estate than title, since title, as used in the policy, is intended to mean estate. The word must therefore be used in contradiction to "title," as including any right in the property less than title. Therefore, if the insured is the owner of the title, the word "interest" has no application. *Garner v. Milwaukee Mechanics' Ins. Co.*, 84 Pac. 717, 718, 73 Kan. 127, 4 L. R. A. (N. S.) 654, 117 Am. St. Rep. 460, 9 Ann. Cas. 459.

The word "interest," when applied to property, has a variable meaning. It may be used as synonymous with "estate" or "title," or may denote something less than an estate or title. The word "interest," as used in an insurance policy, is not synonymous with "title." It means some right different from "title." It cannot mean a greater estate than "title," since "title" is used to mean the entire estate in such a policy, and, when used in contradiction of title, means any right in property less than title, and the word "interest" as used in a judgment holding that plaintiff's title to certain real estate is valid, and that defendants had no right or claim thereto and no estate or interest therein, is sufficient to cover a mortgage lien. *Hillyard v. Bancher*, 118 Pac. 67, 69, 85 Kan. 516.

The words "interest" and "title," as used in a policy, which provides that it is to be void if any change other than by death of insured takes place in the interest, title, or possession of the subject of insured, are not synonymous. The word "interest" is broader and more comprehensive than the word "title." It embraces both a legal and equitable right. The doctrine contended for, that when the condition is against a change in the title there is no breach unless there is a change in the legal title, and that since the insured retains the legal title the policy is not avoided by a trans-

fer of the equitable title, cannot be applied to a condition against a change of interest. The true test is whether the vendor has dominion over the property insured, and, if he has, a change in interest has been affected and the policy is void. *Brickell v. Atlas Assur. Co.*, 101 Pac. 16, 19, 10 Cal. App. 17 (quoting *Brighton Beach Racing Ass'n v. Home Ins. Co.*, 99 N. Y. Supp. 219, 113 App. Div. 728; *Id.*, 82 N. E. 1124, 189 N. Y. 526).

There is a change of "title," as well as of "interest" and "possession," within a fire policy declaring it void in case of any change in the interest, title, or possession of the insured property, where insured, the owner in fee of the insured property, makes a contract of sale of it, declaring that deed shall pass when final payment is made, and that the purchaser shall pay all taxes and assessments levied against the property subsequent to contract, and shall have the right to occupy the property before passing of title, as tenant of the seller, without pay, and the purchaser goes into possession and is not in default. The word "interest" is broader and more comprehensive than the word "title," since it embraces both legal and equitable rights, and the words are not synonymous. The true test is whether the vendor has parted with the absolute control and dominion over the property insured. In this case, there was a change in possession within the meaning of that word as used in the policy. While the agreement designates the occupancy of the vendee as that of a tenant of the vendor without pay or rent, the contract gives and secures to him more than the rights and interests of a tenant. He is charged with the liabilities, and entitled to enforce the rights, of a purchaser in possession, and cannot be ejected as a tenant regardless of such rights. The possession of the vendee is absolute and exclusive of the vendor, as long as he performs the contract. *Brighton Beach Racing Ass'n v. Home Ins. Co.*, 99 N. Y. Supp. 219, 221 (citing *Lett v. Guardian Fire Ins. Co.*, 125 N. Y. 82, 25 N. E. 1088).

#### **Receiver's receipt**

"Although 'title' does not finally pass from the United States until the issuance of a patent, it is well settled that the receiver's receipt issued to a homestead entryman in possession and claiming land under Rev. St. U. S. § 2290, constitutes ample 'title' to enable him to maintain or defend a suit concerning the land." *Thompson v. Basler*, 84 Pac. 161, 148 Cal. 646, 113 Am. St. Rep. 321.

#### **TITLE BOND**

Though a "title bond" cannot take the place of a recorded deed, and is insufficient to pass the legal title, it gives the holder an equitable right superior to a claim of title upon the part of a purchaser or creditor with notice. Where a bond for title was executed, in which the vendee agreed to pay the price

work as a mechanic to be performed on a mill at the vendor's election, at any time within five years from date, and no part of the work was done on the mill, because it was abandoned by the vendors, but it was agreed at the value of certain work and material furnished by the vendee in the erection of a dwelling house for one of such vendors should be credited on the price, the vendee was entitled to a conveyance on payment of the consideration in money, less the value of the work and materials furnished for the house, dated as of the date they were furnished. *McGuire v. Whitt* (Ky.) 80 S. W. 474, 475.

#### TITLE BY ADVERSE POSSESSION

A "title acquired by adverse possession" is a title in fee simple, and is as perfect a title as one by deed from the original owner by patent or grant from the government. *Cornely v. Andrews*, 82 Pac. 899, 901, 40 Wash. 580, 1 L. R. A. (N. S.) 1036, 111 Am. St. p. 983 (citing 1 Cyc. 1135, B; 1 Am. & Eng. c. of Law [2d Ed.] 883).

#### TITLE BY LIMITATION OR PRESCRIPTION

The essential elements constituting "title limitation" are defined by Rev. St. 1895, s. 3343, 3347, 3348, 3349, declaring that any person who has the right of action for the recovery of any lands shall institute his suit before within ten years after the accrual of his cause of action, etc. *Logan v. Meads*, S. W. 210, 212, 43 Tex. Civ. App. 477.

Possession of land for over 15 years, to constitute "title by prescription or limitation," must be hostile and adverse as against the owner. One who has title to a quarter section, and by mistake as to the boundary line occupies a strip in an adjoining section owned by another, without any intention to take or hold land beyond the section line, or to occupy land which does not belong to him, will not acquire title to such strip by adverse possession. *Scott v. Williams*, 87 Pac. 550, 551, Kan. 448.

#### TITLE BY POSSESSION

Rights arising under the mining laws of the United States are classified as title in fee simple, "title by possession," and the common equitable possession. The first vests in the grantee an indefeasible title, while the second vests a title in the nature of an easement only. The first, being an absolute grant by purchase and obtained without condition, is not defeasible; while the second, being a mere right of possession and enjoyment of the land without purchase and upon condition, may be defeated at any time by the failure of the party in possession to complete the condition, viz., to perform the labor or make the improvements required by the statute. *O'Connell v. Pinnacle Gold Mines Co.*, 131 Fed. 106, (quoting and approving definition given in *Enson Mining & Smelting Co. v. Alta Min-*

*ing & Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762).

#### TITLE BY RELATION

See Relation (In Contract, Conveyance, or other Transaction).

#### TITLE GUARANTEED

By the phrase "title guaranteed," in a receipt for the purchase price of land, the vendors impliedly agreed to convey a good and sufficient title. *Goldstein v. Hensley*, 88 Pac. 507, 508, 4 Cal. App. 444.

#### TITLE IN FEE

A "title in fee" is a full and absolute estate beyond which and outside of which there is no other interest or right. *Balley v. Henry*, 143 S. W. 1124, 1127, 125 Tenn. 390.

Under Laws 1895, c. 986, authorizing the taking of land for the construction of a bridge and approaches by title in fee, the term "title in fee" must be construed in the light of the purposes for which the statute was enacted; and hence the lands taken for the bridge and its structural approaches were necessarily taken in fee simple absolute, because their taking was accompanied by a physical entry and appropriation on the part of the city, to the exclusion of the public and adjoining owners, but in the case of land taken for widening of streets and changing of street lines, because this was simply a taking of "title in fee" for the purposes to which such lands were to be devoted, that is, for streets in which the adjoining owners and the general public would have the easements pertaining to public streets. In re *Harlem River Bridge*, 66 N. E. 584, 586, 174 N. Y. 28.

#### TITLE INSURANCE

"The sole object of 'title insurance' is to cover possibilities of loss through defects that may cloud or invalidate titles." It "is not mere guesswork, nor is it a wager. It is based upon careful examination of the muniments of title and the exercise of judgment by skilled conveyancers. A policy of 'title insurance' means the opinion of the company which issues it as to the validity of the title, backed by an agreement to make that opinion good in case it should prove to be mistaken, and loss should result in consequence to the insured." "Title insurance" is "a contract to indemnify against loss through defects in the title to real estate or liens or incumbrances thereon." *Foehrenbach v. German-American Title & Trust Co.*, 66 Atl. 561, 563, 217 Pa. 331, 12 L. R. A. (N. S.) 465, 118 Am. St. Rep. 916 (quoting and adopting definition in 1 Cooley, Ins. 12).

#### TITLE LEGALLY INSUFFICIENT

A stipulation that the purchaser will buy, unless the title be "legally insufficient," means no more than a marketable title, and cannot support the construction that the ven-

dor undertook to sell a title which appeared perfect on the records, or to make a showing of title deeds which were entitled to record. *Cowdery v. Greenlee*, 55 S. E. 918, 920, 126 Ga. 786.

### TITLE OF NOBILITY

See Confer Title of Nobility.

### TITLE OR BOUNDARIES OF LAND

An action for damages for fraud inducing a purchase of realty does not affect the "title or boundaries of land," within St. 1893, § 1562 (Wilson's Rev. & Ann. St. 1903, § 1872), providing that the probate court shall not have jurisdiction of any matter wherein the "title or boundaries of land" may be in dispute. *Newell v. Long-Bell Lumber Co.*, 78 Pac. 104, 14 Okl. 185.

### TITLE OR INTEREST

The phrase "disclaim any title or interest," in Wilson's Rev. & Ann. St. 1903, § 4779, providing that where defendants "disclaim any title or interest" in land, the subject-matter of the action, they shall recover their costs, is not satisfied by a defendant limiting his disclaimer to "any right or interest in his own right," where he has an inchoate interest by virtue of his marital relations. *Moore v. Wallace*, 82 Pac. 825, 16 Okl. 114.

### TITLE PAGE

A preliminary page in a periodical which followed advertisements and preceded general reading matter, containing in display type the name of the publication and also the volume, number, and date of the issue, and a copy of which was deposited as the title to obtain copyright protection, must be considered the "title page" within the meaning of Act June 18, 1874, c. 301, 18 Stat. 78, upon which or the page following the copyright notice is required to be printed, rather than a subsequent page containing the title in smaller type but without volume, number, or date, and the printing of such notice on the latter page only was not such a compliance with the express requirement of the statute as will sustain an action for infringement. *Freeman v. The Trade Register*, 173 Fed. 419, 424.

### TITLE TO REAL ESTATE

It is now well settled "that to give the Supreme Court jurisdiction under Const. art. 6, § 12, because the 'title to real estate' is involved, it must appear that the title to real estate will, in some way, be directly affected by the judgment to be rendered in the case. It is not sufficient that the question of title may be incidentally, collaterally, or necessarily inquired into, to settle the issues. The judgment to be rendered must directly affect the title itself to the real estate. If the judgment rendered by the lower court could be satisfied by the payment of money, without affecting the title to real estate, the case would not fall within our appellate ju-

risdiction under this provision of the Constitution." *Lawson v. Hammond*, 90 S. W. 431, 433, 191 Mo. 522 (quoting and adopting definition in *Price v. Blankenship*, 45 S. W. 1124, 144 Mo. 209, and citing *Rothrock v. Cordz-Fisher Lumber Co.*, 47 S. W. 907, 146 Mo. 57, *Bradley v. Milwaukee Mechanics' Ins. Co.*, 49 S. W. 867, 147 Mo. 634; *Edwards v. Missouri, K. & E. Ry. Co.*, 50 S. W. 89, 148 Mo. 513; *Force v. Van Patton*, 50 S. W. 906, 149 Mo. 446; *Bethune v. Cleveland, St. L. & K. C. Ry. Co.*, 51 S. W. 465, 149 Mo. 606; *Cox v. Barker*, 51 S. W. 1051, 150 Mo. 424; *Bonner v. Lisenby*, 57 S. W. 735, 157 Mo. 165; *Ozark Land & Lumber Co. v. Robertson*, 59 S. W. 69, 158 Mo. 322; *Turney v. Sparks*, 59 S. W. 73, 158 Mo. 365; *Bruner Granitoid Co. v. Klein*, 70 S. W. 687, 170 Mo. 225; *Klingelhoef v. Smith*, 71 S. W. 1008, 171 Mo. 455; *Balz v. Nelson*, 72 S. W. 527, 171 Mo. 682; *Porter v. Kansas City & N. C. R. Co.*, 74 S. W. 992, 175 Mo. 96; *State ex rel. South Missouri Pine Lumber Co. v. Dearing*, 79 S. W. 454, 180 Mo. loc. cit. 63; *Christopher v. People's Home & Sav. Ass'n*, 79 S. W. 899, 180 Mo. 568; *State ex rel. Reed v. Elliot*, 79 S. W. 696, 180 Mo. 658).

A dispute regarding boundaries does not in a proper sense involve the "title to real estate," and hence a jury trial in such cases cannot be demanded as a matter of right. *Mathis v. Strunk*, 85 Pac. 590, 591, 73 Kan. 595.

An action which has for its object, in part, the setting aside of a deed of trust of real estate as without consideration and fraudulently procured, involves "title to real estate," and an appeal therein to the Court of Appeals must be certified to the Supreme Court. *Long v. Greene County Abstract & Loan Co.*, 122 S. W. 3, 138 Mo. App. 321.

A suit to set aside a deed for fraud directly involves "title to real estate," within the Constitution, defining the jurisdiction of the Supreme Court, and when appealed to the Court of Appeals will be transferred to the Supreme Court. *Schroeder v. Turpin*, 122 S. W. 1, 138 Mo. App. 320.

An appeal from an order sustaining a motion to quash an execution levied on real estate claimed by defendant to be exempt as his homestead, before the sale of the property, did not involve the "title to real estate," so as to confer appellate jurisdiction on the Supreme Court. *Lawson v. Hammond*, 90 S. W. 431, 433, 191 Mo. 522.

A case presenting the question whether one is entitled to a homestead right in certain land, so that it will be exempt from execution, does not involve "title to real estate," within Const. art. 6, § 12, giving the Supreme Court jurisdiction in cases involving "title to real estate," for to give the Supreme Court jurisdiction it must appear that the "title to real estate" will in some way be

directly affected by the judgment to be rendered in the case. *Snodgrass v. Copple*, 101 S. W. 1090, 1091, 203 Mo. 480.

"Title to real estate" is generally defined to be "the means whereby the owner of lands has the just possession of his property." *Hefferman v. Scholder*, 119 N. Y. Supp. 520, 524, 134 App. Div. 579.

Where real estate is held under and by virtue of some right in the property, so that the right of possession cannot be determined without adjusting the right in the property itself, then the "title to real estate" is "drawn in question," within the meaning of the statute, stating that "justice courts cannot try actions which involve title to real estate, or in which such title is drawn in question." *Stone v. Blanchard*, 126 N. W. 766, 768, 87 Neb. 1.

In cases of pure trespass on lands, "title to real estate" is not so involved as to confer jurisdiction on the Supreme Court under Const. art. 6, § 12 (Ann. St. 1906, p. 218), though it may be incidentally involved, and must be shown on trial. *Hill v. Hopson*, 120 S. W. 29, 31, 221 Mo. 103.

## TO

See As To; Equal To; Extend To; From and To; Go To; Up To and Including.

### As by

"To the tenant," as used in Rev. St. Tex. 1895, art. 3238, providing that a preference lien for unpaid rents on the goods of a tenant, given by article 3251, shall not attach to goods sold and delivered in good faith in the regular course of business to the tenant, should be construed to read "by the tenant," to carry out the evident intention of the Legislature. *Freeman v. Collier Racket Co.*, 105 S. W. 1129, 1130, 44 Tex. Civ. App. 177 (citing *Marsalls v. Pitman*, 5 S. W. 404, 68 Tex. 627).

Rev. St. 1895, art. 3251, provides for a preference lien for unpaid rent on the goods of a tenant. Article 3238 provides that such lien shall not attach to goods sold and delivered in good faith in the regular course of business "to the tenant." Held, that the quoted words would be construed to read "by the tenant," to carry out the evident intention of the Legislature. *Freeman v. Collier Racket Co.*, 105 S. W. 1129, 1130, 44 Tex. Civ. App. 177.

### As exclusive or inclusive

The word "to," employed in an act fixing the boundaries of a right of way to Salt Lake City, is a word of exclusion, and excludes the terminus of the railroad, which was then located near the business portion and center of the city. *Moon v. Salt Lake County*, 76 Pac. 222, 224, 27 Utah, 435.

The description in a notice of sale for taxes of the property as lots "1 to 24," does

not exclude lot 24 by reason of the use of the word "to," as such word is not necessarily a term of exclusion, but one whose meaning is to be ascertained by the reason and sense in which it is used. *Stough v. Reeves*, 95 Pac. 958, 959, 42 Colo. 432.

The expression in a grant, "to the head of the cove, thence around the western side of the cove," includes the cove and the flats. *Whitmore v. Brown*, 61 Atl. 985, 987, 100 Me. 410.

The description in a grant, "to the shore and then by the shore," unqualified, excludes the shore which is the flats between high and low water mark; the words "to the shore" being a phrase of exclusion. *Whitmore v. Brown*, 61 Atl. 985, 987, 100 Me. 410 (citing *Dunton v. Parker*, 54 Atl. 1115, 97 Me. 461; *Proctor v. Maine Central R. R. Co.*, 52 Atl. 933, 96 Me. 458).

The word "to" has no one specific meaning in a legal sense though it is generally a word of exclusion. Thus, if a boundary of land extends to a field the field itself will not to be included in the boundary. *Bloch Queensware Co. v. Smith*, 80 S. W. 592, 593, 107 Mo. App. 13.

### Same—Computation of time

"\* \* \* The word 'until' (or 'to') will be treated as inclusive if a purpose to use it in that sense is manifest." The affidavits to the effect that, when an order was made extending a time, to settle the bill of exceptions until December 4th, the court had been adjourned to December 3d, that it was not certain that the judge would arrive at the county seat before the close of business hours on that day, and that it was understood that court would be in session on the 4th, afforded no ground for interpreting the order as including the 4th as a part of the time within which the bill might be settled. *State v. Burton*, 78 Pac. 413, 414, 70 Kan. 199 (citing and distinguishing *State v. Bradbury*, 74 Pac. 231, 67 Kan. 808; *State v. Horine*, 78 Pac. 411, 70 Kan. 256).

*Bouvier's Law Dictionary* defines the word "to" as a term of exclusion, unless by necessary implication it is manifestly used in a different sense. Webster recognizes the words "to," "till," and "until" as synonymous in the sense here used. The *Century Dictionary* gives like recognition as to the use of these words. Where on the 25th day of February plaintiff in error was allowed to the 15th day of March to make and serve a case for the Supreme Court, the time granted expired at 12 o'clock midnight March 14th. *Maynes v. Gray*, 76 Pac. 443, 69 Kan. 49, 105 Am. St. Rep. 146, 2 Ann. Cas. 518.

"To," used as a conjunction, being synonymous with "till" or "until," permission to file a brief, extended "to March 3d," expires March 2d, as affecting appellee's right to dismissal of the appeal. *Myers v. Winona In-*



terurban Ry. Co., 98 N. E. 131, 132, 50 Ind. App. 258 (citing 8 Words & Phrases, p. 6985).

Act Aug. 31, 1909 (Laws 1909, p. 305), provided that respondent's term as jury commissioner under appointment made by the Governor ran "till the first Monday after the second Tuesday in January, 1911," and that on the expiration of each term the Governor should appoint successors who should hold office for three years from the expiration of the term of their respective predecessors. Held, that the word "till" meant "up or down to; as far as; until," the words "to," "till," and "until" being synonymous, and, "until" being primarily a word of exclusion, respondent's term did not include any part of the first Monday after the second Tuesday in January, and hence, since the term of the existing Governor did include that day, there was a vacancy in the office of jury commissioner which the Governor had power to fill by appointment. *Oberhaus v. State ex rel. McNamara*, 55 South. 898, 902, 173 Ala. 483.

An entry of an appeal "to the January term" means to the first day of the term; no particular date being mentioned. *Swain v. London & Lancashire Fire Ins. Co.*, 38 South. 3, 49 Fla. 397.

The word "to" has no one specific meaning in a legal sense, though it is generally a word of exclusion. Its meaning is ascertained from the reason and sense in which it is used. Generally, if the time named as limiting an extension is designated by a word which includes an extended and indefinite number of days, as to a certain term of court, then the word "to" would limit the time to the first day of such period. "To the October term," where the time to file a bill of exceptions is extended to that time, means to the first of the term—that is, up to and including the first day; and if it is not filed until the second day of that term it is too late. *Bloch Queensware Co. v. Smith*, 80 S. W. 592, 593, 107 Mo. App. 13.

#### As into

The word "to" means "into"; as, where a corporation was authorized to construct a road to the city of Hudson, the word "to" meant "into." *People v. Klammer*, 100 N. W. 600, 601, 137 Mich. 399 (citing *President, etc., of Farmers' Turnpike Road v. Coventry*, 10 Johns [N. Y.] 389).

In a conveyance the words "to," "on," "by," "at," "along," a nontidal stream presumptively carry title as far into the stream as the grantor possesses. *Leary v. Jersey City*, 189 Fed. 419, 428.

The incorporation of a railroad to run from one place "to" another place does not require it to stop at the corporate limits of the latter place; but it may fix its terminus at such location in that place as shall be agreed upon between it and the municipal

authorities. *Central of Georgia R. Co. v. Union Springs & N. R. Co.*, 39 South. 473, 474, 144 Ala. 639, 2 L. R. A. (N. S.) 144 (citing *Miles, Em. Dom. § 115*; *President, etc., of Farmers' Turnpike Road Co. v. Coventry* [N. Y.] 10 Johns. 389; *Rio Grande R. Co. v. City of Brownsville*, 45 Tex. 88).

#### As of

Of construed as to, see *Of*.

Defendant employed plaintiff as a traveling salesman, agreeing to pay a salary of \$1,800 per year, to allow \$1,200 for traveling expenses, and to pay a commission of 5 per cent. in excess "to \$40,000" sales made by plaintiff and shipped by defendant. Held, that the use of the word "to" was a mere grammatical error, the intention of the parties being that plaintiff was only to receive commissions on sales made by him in excess of \$40,000, and that the preposition "to" should give place to "of" with which it was synonymous. *Ettenson v. Mendelson*, 133 N. Y. Supp. 283, 284, 75 Misc. Rep. 307.

#### As on or over

Where a bonus contract provided for payment when the electric railway line was put in operation from B. "to the strip of land above described," it did not require that the road should be operated "on or over" such strip. *Boise Valley Const. Co. v. Kroeger*, 105 Pac. 1070, 1072, 17 Idaho, 384, 28 L. R. A. (N. S.) 968.

#### As within

The word "to" means within, not up to. A street railroad company was required to run its cars to a certain village. It was not a compliance to construct its road up to the boundary line of the village. *Houghton County St. Ry. Co. v. Common Council of Village of Laurium*, 98 N. W. 393, 395, 135 Mich. 614.

Where a resolution provides for a sewer from Seventy-First street "to" Seventy-Third street, and the ordinance provides for a sewer from Seventy-First street to the main sewer in Seventy-Third street, which street is 66 feet wide with the main sewer in the middle, there is no variance between the resolution and the ordinance, as the word "to" as used in the resolution may be properly held to mean to a point within Seventy-Third street. *City of Chicago v. McChesney*, 88 N. E. 560, 561, 240 Ill. 174 (citing *And. Law Dict. 1037*; *President, etc., of Farmers' Turnpike Road v. Coventry* [N. Y.] 10 Johns. 389; *McCartney v. Chicago & Evanston Railroad Co.*, 112 Ill. 611).

#### TO AND ALONG

A deed conveying a lot, bounded on a highway, describing the lot by metes and bounds running "to and along the highway," carries the fee to the center of the highway. *Western Union Telegraph Co. v. Krueger*, 74 N. E. 25, 26, 36 Ind. App. 348.

**TO APPEAR OR ANSWER**

See Held to Appear or Answer.

**TO APPLY ON ACCOUNT**

Where defendant's merchandise account with plaintiff included not only an original indebtedness for goods sold, which was partly secured by mortgage, also charges representing subsequent sales, remittances made by plaintiff "to apply on account" did not constitute a direction that the remittances be applied in payment of the subsequent charges, as distinguished from the items secured. "The import of the words 'to apply on account,' when referring to a remittance of a named sum, and not qualified by more definite terms, is simply that the payment made is a payment in part of a debt exceeding the amount then paid." *Frutig v. Trafton*, 83 Pac. 70, 71, 2 Cal. App. 47.

**TO ARRIVE**

See Selling to Arrive.

**TO AUDIT**

The meaning of the phrase "to audit," when applied to claims against towns, cities, or counties, is well understood. To audit is to hear, to examine an account, and in its broader sense it includes its adjustment or allowance, disallowance, or rejection. The verb "audit" as here used, means simply to examine, to adjust, and it clearly implies the exercise of judicial discretion. So whenever a board of auditors has the power to examine and adjust accounts against a town or city and acts within its jurisdiction, its decision, in the absence of fraud or collusion, is final. It cannot be attacked collaterally. Whether a claim is a proper charge, in a case where it is doubtful and rests upon disputed evidence, and what its amount shall be, are matters for the sole determination of the board. And, however mistaken it may be, so long as it keeps within its jurisdiction and acts in good faith, the audit of the board cannot be assailed. No court may question the exercise of its discretion or may re-examine the facts to determine whether it would have reached a different conclusion. *City of Syracuse v. Roscoe*, 123 N. Y. Supp. 403, 408, 66 Misc. Rep. 317 (citing *People ex rel. Myers v. Barnes*, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; *People ex rel. Hamilton v. Board of Sup'rs of Jefferson County*, 35 App. Div. 242, 54 N. Y. Supp. 782; *People ex rel. Brown v. Board of Apportionment and Audit*, 52 N. Y. 224; *People ex rel. Benedict v. Board of Sup'rs of Oneida County*, 24 Hun, 413; *People ex rel. Ryan v. Green*, 5 Daly, 254).

**TO BALANCE ACCOUNT**

The words "to balance account," of which "to bal. acct." are well known abbreviations, when used by a debtor in connection with the payment of money to a creditor, mean the

difference between the debits and credits of an existing unliquidated or disputed account, and are equivalent to the phrases "in full payment of account" and "in full of account." *Lafrentz & Karstens Co. v. Cavanagh*, 166 Ill. App. 306, 310.

**TO BE**

See Be—Being.

**TO BE ADMINISTERED**

The term "property to be administered," as used in a petition for the assessment of a transfer tax, is synonymous with "property subject to administration." In *re Collins Estate*, 93 N. Y. Supp. 342, 104 App. Div. 184.

**TO BE BROUGHT WITHIN ONE YEAR**

Revisal 1905, § 59, provides that where a person's death is caused by the wrongful act of another such as would have entitled the injured person, if living, to an action for damages therefor, the person or corporation causing the injury shall be liable to an action for damages, "to be brought within one year" after such death by decedent's administrator, etc. Held, that the words "to be brought within one year" constitute a condition annexed to the cause of action, and not a statute of limitation, which must be pleaded. *Gulledge v. Seaboard Air Line Ry. Co.*, 60 S. E. 1134, 1135, 147 N. C. 234, 125 Am. St. Rep. 544.

**TO BE DONE BY**

Rev. Codes Mont. § 5653, provides that one who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified, and separately to every person injured by such act. Held, that the phrase "to be done by" implies on the part of the indemnitee an agreement or obligation to commit the tort in question, as if the phrase were "an act required (or demanded or requested) to be done by" the indemnitee, and as so construed, the section is merely declaratory of the common law. *Northam v. Casualty Co. of America*, 177 Fed. 981, 984.

**TO BE ELECTED**

Under Civ. Code, § 305, providing that corporate powers must be exercised by a board of directors "to be elected" from among the holders of the stock of the corporation, a mortgage executed by a corporation's president and secretary, in pursuance of a resolution of its board of directors who were named in the articles of incorporation as its board of directors for the first year is valid. *Middleton v. Arastraville Min. Co.*, 79 Pac. 889, 890, 146 Cal. 219.

**TO BE PROSECUTED**

Laws 1891, p. 109, § 3, providing that all questions relating to probate matters in the county court shall be determined by it, and from such decisions appeals or writs of certi-

orari shall lie to the district court, "to be prosecuted" as in civil cases, is limited to the manner of perfecting the appeal or of completing the transfer by certiorari from the county court to the district court, and does not deal with the procedure in the district court, and does not repeal Mills' Ann. St. § 1034, for the words "to be prosecuted" cannot be construed as including the matters of procedure and the order of trial, or as applying to any of the other steps connected with the consideration and determination of the cause de novo in the district court. In re Shapter's Estate, 99 Pac. 35, 38, 44 Colo. 547.

#### TO BE SHIPPED PROMPT

See Prompt.

#### TO BE USED

A provision in a deed that the premises conveyed to the trustees of a church and their successors forever are "to be used as a church location" does not operate as a condition or restriction limiting the use by the grantees to the purposes of a church location. Downen v. Rayburn, 73 N. E. 364, 365, 214 Ill. 342, 3 Ann. Cas. 36.

Where testator devised the remainder of his estate to his widow with full power to sell, exchange, invest, and reinvest the same, remainder to his children, the widow acquired no right to sell or dispose of the property during her life except as an incident to her life tenancy, and had no authority to encumber the property by lease or otherwise beyond the termination of her life estate; the words "to be used and disposed of during her life" meaning that she should have the control and management of the property as long as she lived. Powers v. Wells, 91 N. E. 717, 719, 244 Ill. 558.

By the phrase "to be used in common," as applied to an easement, it was intended that where the easement as such became appurtenant to the land conveyed, the right granted was not exclusive. O'Brien v. Murphy, 75 N. E. 700, 701, 189 Mass. 353.

The phrase "to be used or occupied," in Laws 1905, p. 131, providing that any person keeping any room and occupying the same with any book, instrument, or device to register bets on speed contests to take place within the state, or any person who registers such a bet, or, being the owner, lessee, occupant, or person in charge of any room, knowingly permits the same "to be used or occupied" for any such purpose, or therein keeps or employs any device for the purpose of recording such bets, or becomes the custodian for hire of any money for any purpose contrary to the provisions of the section, shall be guilty of a felony, implies that the building or booth is to be used or occupied by some person, and not used or occupied by a book, instrument, or device which could have no purpose of recording or registering a bet; and

hence an indictment should charge who the person was whom accused permitted to use and occupy the room, but, if his name is unknown, should so charge and allege that such person used and occupied the room with a book, etc., for the purpose of registering bets. State v. Oldham, 98 S. W. 497, 502, 200 Mo. 538.

#### TO BELIEVE

See Ground to Believe.

#### TO COME

As used in the Houston city charter of 1903 providing that all delinquent taxes due the city for the year 1875, up to and including the year 1896, and for all years to come, may be collected by suit, the words "to come" mean all coming after 1896. City of Houston v. Dooley, 89 S. W. 777, 778, 40 Tex. Civ. App. 371.

#### TO THE DAMAGE

The purpose of the conclusion in a declaration, "to the damage," is to give notice to defendant of the extent of plaintiff's claim, and where there is an entire absence of such conclusion it may be treated as notice to the defendant that nominal damages only will be insisted upon. Weber v. Morris & E. R. Co., 35 N. J. Law, 409, 414, 10 Am. Rep. 253.

#### TO EFFECT DEATH

See Effect Death.

#### TO EXCESS

The expression "to excess," in reference to the use of intoxicating liquors, is equivalent to "excessively" or "intemperately." Moore v. Prudential Ins. Co., 87 N. Y. Supp. 368, 92 App. Div. 135.

#### TO HAVE AND TO HOLD

While the deed in question contains the words that it "is not to take effect until the death of the grantors," it also contains the words "do hereby sell and convey," "to have and to hold," and "said party of the first part hereby covenants with the said party of the second part that he will warrant the title hereby conveyed." These words aptly convey a present estate, and it is not presumed that one part of the deed was intended to conflict with another. Its proper construction is that the grantee takes a present estate, vesting at the time of its delivery, but taking effect and possession of the father and mother (grantors). An instrument in the form of a deed, placed beyond recall in the hands of a third person and providing that it shall not take effect until the death of the grantor, in the absence of a controlling reason to the contrary, is to be construed to mean that the title is to vest at once; the enjoyment only being postponed until the death of the grantor. Nolan v. Otney, 89 Pac. 690, 691, 75 Kan. 311, 9 L. R. A. (N. S.) 377 (quoting and

adopting definition in *Hunt v. Hunt*, 82 S. W. 998, 119 Ky. 39, 68 L. R. A. 180, 7 Ann. Cas. 788).

The purpose of a habendum clause in a will, creating a trust and providing that each beneficiary, as he attains a specified age, may demand and receive a share of the trust property "to have and to hold" the same to him and his heirs forever, is to limit, define, and make clear the estate granted, and the clause shows testator's intention to give the beneficiaries a fee simple estate. In *re Blake's Estate*, 108 Pac. 287, 293, 157 Cal. 448.

Testator bequeathed all his property, real and personal, to his wife, to have, hold, use, and dispose of as she might see fit during her life, giving to her full power and authority to sell, convey, and transfer all or any part of the same, fully and absolutely, so as to pass complete title to purchasers or grantees from her, and that whatever of such property or its proceeds remained in her hands at her death should go to their daughters. Held, that though the words "to have and to hold," if standing alone, in connection with the words "during her life," would be effective to qualify the estate devised so as to vest the widow with a life estate only, yet when coupled with the words "use" and "dispose of" as she might see fit, they indicated that the whole title was intended for the widow's use and disposition, and hence the will conferred on her full authority to sell or mortgage the fee, under B. & C. Comp. §§ 5336, 5573, providing that a devise of real property shall be taken as a devise of all the testator's interest subject to his disposal, unless it clearly appeared from the will that he intended to devise a lesser estate. *Bilger v. Nunan*, 186 Fed. 665, 668.

#### TO ME KNOWN

A certificate of acknowledgment, reciting that the grantor was to the officer "personally known," imported merely an acquaintance with the person acknowledging the instrument, and was not the equivalent of a certificate that the individual acknowledging the instrument was "to me known," which was a certificate that the person acknowledging the instrument was known to the officer as the grantor of the deed on which the certificate was indorsed. *Carolan v. Yoran*, 93 N. Y. Supp. 935, 936, 104 App. Div. 488.

#### TO A MORAL CERTAINTY

It was not error to strike out the words quoted, in an instruction that the jury must be satisfied "to a moral certainty" beyond a reasonable doubt as to accused's guilt, since the words stricken were synonymous with the phrase "beyond a reasonable doubt." *Stewart v. State*, 115 S. W. 374, 375, 88 Ark. 602.

The expressions "beyond a reasonable doubt" and "to a moral certainty" are synonymous, and each simply means that the proof must be such as would satisfy the judgment

and consciousness of the juror that the crime charged had been committed by the defendant and that no other reasonable conclusion was possible. *People v. Bonifacio*, 82 N. E. 1098, 1100, 190 N. Y. 150 (citing *Hopt v. Utah*, 120 U. S. 430, 439, 7 Sup. Ct. 614, 30 L. Ed. 706).

The phrases "to a moral and reasonable certainty" and "beyond a reasonable doubt," as applied to the quality of proof, are identical in meaning. *Austin v. State*, 64 S. E. 670, 6 Ga. App. 211.

#### TO SIXTY DAYS

The extension of time to make the case for this court "to sixty days" we construe to mean the same as if the word "to" had been omitted. *Haas v. Tough*, 72 Pac. 856, 857, 67 Kan. 253.

#### TO SUPPOSE

See Induce to Suppose.

#### TO THAT EFFECT

See Effect.

#### TO THE WALL

See Retreat to the Wall.

#### TO WHICH HE BELONGS

See Belong—Belonging.

#### TO WIT

The phrase "to wit" in a contract between a husband and wife, referring to the date of their wedding, has not the materiality of that phrase when used in a pleading. *Sawyer v. Churchill*, 77 Vt. 273, 59 Atl. 1014, 1015, 107 Am. St. Rep. 762.

#### As or

See Or.

#### TOBACCO

See Filler Tobacco; Smoking Tobacco; Wrapper Tobacco.

As medicine, see Medicine.

"It [30 Stat. 151, c. 11] defines 'wrapper tobacco' as meaning that 'quality of leaf tobacco known commercially as wrapper,' and 'filler' to mean 'all leaf tobacco unmanufactured not commercially known as wrapper tobacco.'" *Rothschild & Bro. v. United States*, 21 Sup. Ct. 197, 200, 179 U. S. 470, 45 L. Ed. 277.

"Leaf tobacco consists of three classes, 'wrappers,' 'fillers,' and 'binders.' 'Wrappers' are leaves suitable for the outside finish of a cigar; 'fillers' are leaves that make up the main body of the cigar; and 'binders' are the secondary or inside wrapper, and hold together the loose material which constitutes the filling." *Falk v. Robertson*, 11 Sup. Ct. 41, 42, 137 U. S. 231, 34 L. Ed. 645.

"Scrap," or sweepings from the floor of a tobacco warehouse or factory, retains the

name and quality of tobacco, so as to be dutiable under Tariff Act July 24, 1897, Schedule F. par. 215, 30 Stat. 169, 194, as tobacco manufactured or unmanufactured. *Latimer v. United States*, 32 Sup. Ct. 242, 223 U. S. 501, 504, 56 L. Ed. 528.

## TOGETHER

See *Live Together; Working Together*.

The word "together," as used in Rev. St. Utah 1898, § 1343, defining fellow servants as all persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and working "together" at the same time and place to a common purpose, etc., means physical nearness at the time of the injury coupled with the common purpose of the labors of the two servants; the nearness required being only that which should arouse in the one a reasonable appreciation of probable danger from the neglect of the other. *Lukic v. Southern Pac. Co.*, 160 Fed. 135, 137.

## TOGETHER WITH

Under a conveyance of upland adjoining a lake, "together with" certain rights and privileges to be exercised on the waters of the lake by the grantee, those rights and privileges were granted as appurtenant to the upland, and not in gross. *Mitchell v. D'Olier*, 53 Atl. 467, 68 N. J. Law, 375, 59 L. R. A. 949.

Under Comp. Laws, § 345, providing that, after the issuance of the patent on townsite land, the corporate authorities or judge to whom the patent shall issue shall execute to the persons entitled thereto, a deed in fee simple for such lots on payment of their due proportion of the purchase money, together with their proportion of such sum as may be necessary to pay for the streets, alleys, squares, and public grounds, not to exceed 50 cents for each lot, etc., the words "together with" show that the limitation of 50 cents was the maximum that could be apportioned to buy all the land within the townsite, inclusive of that within the streets, alleys, squares, and public grounds, and does not apply merely to the amount for the streets, alleys, squares, and public grounds. *State ex rel. Jennett v. Stevens*, 116 Pac. 601, 603, 34 Nev. 128.

Flats do not pass as appurtenant to the upland, when they are outside the express boundaries in the grant, even though the grant contains the words "together with all the privileges and appurtenances thereto belonging." *Smallidge v. Brown*, 61 Atl. 985, 988, 100 Me. 410.

## TOKEN

False token, see *False Pretense*.

A passenger's ticket accepted as a fare is a mere token that the fare has been paid,

for a "token" is a symbol that betokens something; that is, that carries within itself that which it signifies. *Shelton v. Erie R. Co.*, 66 Atl. 403, 407, 73 N. J. Law, 558, 9 L. R. A. (N. S.) 727, 118 Am. St. Rep. 704, 9 Ann. Cas. 883.

## TOLERABLY

The word "tolerably," when used in law, is not necessarily synonymous with "reasonable." *York v. City of Everton*, 97 S. W. 604, 607, 121 Mo. App. 640.

## TOLL

"To 'toll a title' does not mean to draw that title to another. Bouvier defines the term 'toll' as follows: 'To bar, defeat, or take away, as to toll an entry into lands is to deny or take away the right of entry.' 2 Bouv. Law Dict. p. 598. In its proper legal sense, the original title is tolled—that is, it is defeated and taken away; but it is not tolled in the sense of being kept alive and drawn to the adverse holder." *Earnest v. Little River Land & Lumber Co.*, 75 S. W. 1122, 1126, 109 Tenn. 427.

### Tax distinguished

A "toll" is different from a tax, as the former is payable at a locality where a passageway belonging to another has been used. *State ex rel. Lacoste v. Vigneaux*, 58 South. 135, 137, 130 La. 424.

A municipality sustains a dual relation to its streets and thoroughfares, that of sovereign and proprietor. In the latter capacity a municipality may under certain circumstances contract for the use of its streets. A municipal charge for the use of the streets for any lawful purpose is the exercise of the city's right of proprietorship, and is not the imposition of a privilege or license tax. "A tax is a demand of sovereignty. A 'toll' is a demand of proprietorship." But the grant of authority to a telegraph company to set its poles in the street for a fixed rental, when accepted and acted upon, became an irrevocable contract, and the city could not set it aside, or arbitrarily increase the rental above that obligated to be paid. *City Council of Augusta v. Augusta & A. Ry. Co.*, 61 S. E. 992, 993, 130 Ga. 815, 124 Am. St. Rep. 197.

## TOLL BRIDGE

As common carrier, see *Common Carrier*.  
As highway, see *Highway*.

The fact that the upper portion of a bridge is used as a railroad bridge does not affect the character of the bridge as a "toll bridge," so as to require a toll bridge license. *Southern R. Co. v. Mitchell*, 37 South. 85, 89, 139 Ala. 629.

A bridge constituting an integral part of a railroad roadway is not a "toll bridge" because the railroad company illegally charges

more for carrying persons over the bridge than for carrying them the same number of miles on either side of the bridge, and it is not taxable under Rev. St. 1899, § 9387 (Ann. St. 1906, p. 4315), authorizing the taxation of toll bridges. *State ex rel. Pearson v. Louisiana & M. R. R. Co.*, 114 S. W. 956, 959, 215 Mo. 479.

## TOLL ROAD

As highway, see Highway.

"A 'toll road' is a public highway, differing from ordinary public highways chiefly in this: That the cost of its construction in the first instance is borne by individuals or by a corporation having authority from the state to build it, and, further, in the right of the public to use the road after its completion, subject only to the payment of toll. The acceptance by the corporation of the franchise to construct the road, and the operation thereof constitute a dedication of the same as a public highway." *State ex rel. Hines v. Scott County Macadamized Road Co.*, 105 S. W. 752, 759, 207 Mo. 54, 13 Ann. Cas. 656 (citing *Virginia Cañon Toll Road Co. v. People ex rel. Vivian*, 45 Pac. 398, 22 Colo. 429, 37 L. R. A. 711).

## TON

See Gross Ton; Long Ton; Per Ton.

Where a freight contract engaged steamship room between New York and Rio de Janeiro for "approximately 1500/2000 tons," electrical machinery and apparatus, and also contained the schedule fixing dead weight and space rates at the steamer's option, the word "ton" should be construed to mean a dead weight long ton, notwithstanding an option authorizing the ship to charge freight at space rates. *Herr v. Tweedie Trading Co.*, 181 Fed. 483, 487, 104 C. C. A. 231.

## STONE

See Overtones.

## TONGS

See Skelping Tongs.

## TONNAGE

See Registered Tonnage.

A contract with a proposed railroad, securing to it a percentage of all the "tonnage" moved by rail incident to the operation of salt works, and referring to the "tonnage" into and out of a city named, contemplates both the incoming and outgoing "tonnage" incident to the operation of the works. *Lone Star Salt Co. v. Texas Short Line Ry. Co.* (Tex.) 86 S. W. 355, 362.

## TONNAGE DUTIES

"Tonnage duties" are duties upon vessels in proportion to their capacities. *Way v.*

*New Jersey Steamboat Co.*, 133 Fed. 188, 192 (citing *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 24 L. Ed. 118).

"Duty of tonnage" is a charge for the purpose of entering, or trading, or lying in, a port or harbor, and can only be imposed by the government. *Parkersburg & O. R. Transp. Co. v. City of Parkersburg*, 2 Sup. Ct. 732, 736, 107 U. S. 691, 696, 27 L. Ed. 584.

A city ordinance exacting from boats wharfage for each time of coming within the city harbor and landing at any public wharf, to be estimated upon the tonnage of the boats, and exempting boats from such wharfage when they land on portions of the wharf where no money has been expended by the city to facilitate the landing of vessels, does not exact a duty on tonnage within Const. U. S. art. 1, § 10, cl. 3, prohibiting a state from laying any duty on tonnage without the consent of Congress, but provides merely for wharfage. *City of St. Louis v. Eagle Packet Co.*, 114 S. W. 21, 26, 214 Mo. 638.

## TONTINE INSURANCE

A "tontine contract" of insurance is a life policy, and, in addition an agreement by the insurer to hold all the premiums collected on the policies forming the class for a specified period called the "tontine period" or period of distribution, and after paying death losses, expenses, and other losses out of the fund so accumulated, to divide the remainder among those who are alive at the end of the tontine period, and who have maintained their policies in force. *Equitable Life Assur. Society of United States v. Winn*, 120 S. W. 153, 155, 137 Ky. 641, 28 L. R. A. (N. S.) 558.

"Tontine insurance" is an agreement to divide the "surplus" to which all of a class had contributed, among those who outlived the term agreed upon, and who persisted as paying members. It is a species of hazard, in which the strong and the rich have the greater chance of winning, although they pay no more for it. The plan is forbidden altogether by the laws of some states. The "surplus" of a mutual life insurance company belongs equitably to the policy holders who contributed to it, in the proportion in which they contributed to it. Under section 88, c. 690, p. 1869, Laws 1892, of New York, the share of a policy lapsed for nonpayment of premium (after having been in force three years) must be applied to the purchase of extended insurance unless the policy holder has elected to take paid-up insurance therefor. The words "dividend additions" as used in the New York statute, refer to that part of the premiums charged which was "loaded" onto the premium in excess of its share of expenses and losses sustained. Such additions, and the earnings thereon, which constitute the "surplus," must be valued and applied in buying extended insurance for lapsed policies in force three years or longer, in the

same way that the "reserve" of the policy is required to be valued and applied in purchasing such extended insurance. *United States Life Ins. Co. in the City of New York v. Spinks (Ky.)* 96 S. W. 889, 890, 894, 13 L. R. A. (N. S.) 1053.

A "tontine policy" is "a policy of insurance in which the policy holder agrees, in common with other policy holders under the same plan, that no dividend, return premium, or surrender value shall be received for a term of years, called the 'tontine period'; the entire surplus from all sources being allowed to accumulate to the end of that period, and then divided among all who have maintained their insurance in force." *Equitable Loan & Security Co. v. Waring*, 44 S. E. 320, 332, 117 Ga. 599, 62 L. R. A. 93, 97 Am. St. Rep. 177 (quoting definition in Cent. Dict.).

## TOO LOW

*Farm Drainage Act (Hurd's Rev. St. 1908, c. 42, § 99)* § 25, provides that, on appeal to the county court from the decision of the commissioners, the jury are authorized to find whether the land was marked too high or too low in the classification. Held, that the words "too low" refer to a case where a landowner has filed objections before the commissioners that the land of some owner other than himself has been classified too low and who is seeking to have the classification raised. *People ex rel. Whitlock v. Green*, 90 N. E. 248, 249, 242 Ill. 455.

## TOO REMOTE

In an action for personal injuries, an objection to evidence as to what plaintiff's earning capacity was 20 years before as being "too remote" will be taken to mean that the time and place of such earning are too distant in time and space from where he was injured to have any relevancy to the issue as to impairment of earning capacity by reason of his injuries. *El Paso Electric Ry. Co. v. Murphy*, 109 S. W. 489, 490, 49 Tex. Civ. App. 586.

## TOOK

In a slander action, there was a fatal variance between an allegation that defendant said that plaintiff "stole" a sheep from defendant's pasture, that defendant caught it and put it back, that there was wool on the fence where plaintiff took the sheep out, and that if defendant could make his child a witness he could make it "warm" for plaintiff, and proof that defendant said that plaintiff "took" the sheep, etc.; the word "stole" importing a crime, as the word "took" does not. *Renaker v. Gregg*, 144 S. W. 89, 90, 147 Ky. 368.

Under Rev. St. 1899, § 1916, providing that any person receiving stolen property

knowing the same to have been stolen shall be punished, etc., it was not necessary that an information for such offense should allege that defendant "took" the goods into his possession for the purpose of aiding the thief, or with the fraudulent intent to deprive the owner thereof. *State v. Richmond*, 84 S. W. 880, 884, 186 Mo. 71.

The words "took, stole and carried away," in an instruction that defendant is guilty of grand larceny if she stole, took, and carried away the property, is bad in failing to state the nature of the taking, as the words are not as particular as the words used in a statute which requires that a taking must be wrongful and with a felonious intent in order to constitute a sufficient indictment. *State v. Campbell*, 18 S. W. 1109, 108 Mo. 611.

## TOOLS—TOOLS OF TRADE

See Common Tool of Trade; Hand Tool; Simple Tool; Working Tools.

A bank burglar insurance policy, stipulating that insurer assumes responsibility for the felonious abstraction of money from the bank safe by any person who shall have made entry into the safe by means of tools or explosives directly thereon, and for money forcibly taken from the part of the bank partitioned off by guard rails for the use of its officers, but exempting the insurer from liability where there is an inner steel burglar-proof chest, unless the money is taken from the chest by an entry effected into it by the use of tools or explosives directly thereon, and for loss by robbery commonly known as hold-up, unless the working force is at work in the bank, does not make the insurer liable for a loss by hold-up at night, where after the money was put into the safe, and the force at the bank had left, an officer thereof was held up and required to open the bank and safe; the word "tool" referring to burglars' tools and explosives. *Maryland Casualty Co. v. Ballard County Bank (Ky.)* 120 S. W. 301, 303.

### Automobile

An automobile is not exempt from levy and attachment under 1 Civ. Code 1902, § 2631, as amended by the act approved February 20, 1904 (24 St. at Large, p. 412), exempting from attachment "tools and implements of trade." *Eastern Mfg. Co. v. Thomas*, 64 S. E. 401, 82 S. C. 509.

### As baggage

See Baggage.

### Bowling alley

A bowling alley is not exempt from execution under Gen. St. 1901, c. 38, § 3, subd. 8, as the necessary "tools and implements" of any person used in carrying on his trade or business. *Williams v. Vincent*, 79 Pac.

121, 122, 70 Kan. 595, 68 L. R. A. 634, 109 Am. St. Rep. 469.

#### Canoe

A bankrupt, who is a professional guide for hunters and fishermen, and as such registered under the laws of Maine, is entitled to the exemption of a canoe as a "tool" of his trade or occupation, under Rev. St. Me. c. 83, § 64, par. 6. In re Mullen, 140 Fed. 206, 207.

#### Coal

A "tool" is a mechanical implement—any implement used by a craftsman or laborer at his work. Where a contract for the excavation and refilling of a sewer trench provided that plaintiff should furnish all "labor and tools," and excavate the trench to the depth required, and that defendants should furnish all "suitable and proper material," coal used to generate power in plaintiff's engine, used in the work of excavation, was within the term "labor and tools," rather than the term "materials." Camardella v. Holmes, 89 N. Y. Supp. 616, 617, 97 App. Div. 120.

#### Cream separator

A cream separator is a "tool or instrument" of a farmer, within the meaning of Iowa Code, § 4008, and is exempt as such thereunder on his bankruptcy. In re Hemstreet, 139 Fed. 958, 960.

#### Hand car

A hand car used by a railroad company to transport its laborers cannot be held, as a matter of law, to be ipso facto a "tool" used by employes, in the sense that the company is relieved from inspecting it. Chicago, I. & L. Ry. Co. v. Tackett, 71 N. E. 524, 525, 33 Ind. App. 379.

#### Horse, harness, and buggy

The horse, harness, and buggy of an insurance agent, a resident of the state, and the head of a family, used and kept by him in carrying on the insurance business, and necessary to the successful prosecution of such business, are "tools and implements" used as such by the debtor for the purpose of carrying on his business, under a statute exempting the necessary tools and implements of any mechanic, miner, or other person, used and kept for the purpose of carrying on his trade or business. Wilhite v. Williams, 21 Pac. 256, 257, 41 Kan. 288, 13 Am. St. Rep. 281.

#### As merchandise

See Merchandise.

#### Paper cutter

A paper cutter, weighing 685 pounds, and a card cutter, weighing from 3 to 8 pounds, both being machines operated by hand, necessary in conducting the business of a printer, the head of a family residing in the state, are exempt, under Comp. Laws 1909, § 3346, subd. 5, providing that there shall be reserv-

ed to every family residing in the state, exempt from forced sale for payment of debts, all "tools," apparatus, etc., belonging to and used in a trade. Brummage v. Kenworthy, 112 Pac. 984, 985, 27 Okl. 431, Ann. Cas. 1912C, 607.

#### Potato planter, sprayer, or digger

A potato planter, sprayer, or digger, mounted on wheels and drawn by animals, is not exempt from attachment, under Rev. St. c. 83, § 64, par. 6, as a "tool necessary for the debtor's trade or occupation"; the statute not being designed to protect an extensive trade. Martin v. Buswell, 80 Atl. 828, 829, 108 Me. 263.

#### Rifle

A bankrupt, who is a professional guide for hunters and fishermen, and as such registered under the laws of Maine, is not entitled to the exemption of a rifle as a "tool" of his trade or occupation under Rev. St. Me. c. 83, § 64, par. 6. In re Mullen, 140 Fed. 206.

#### Saw machinery

A traction engine and the appliances commonly used in connection with such an engine for sawing wood and making lumber are "tools and implements" exempt to an owner who is a resident of the state and the head of a family, under Gen. St. 1901, § 3018, subd. 8. Reeves & Co. v. Bascue, 91 Pac. 77, 76 Kan. 333, 123 Am. St. Rep. 137.

#### Tram railroad

A tram railroad was not a "tool" nor a "machine," nor an "appliance" of a manufacturing business, within Rev. St. 1899, § 8486, taxing manufacturers on tools, machinery, and appliances. State ex rel. Western Tie & Timber Co. v. Pulliam, 135 S. W. 443, 444, 283 Mo. 229.

#### Watch and chain

A watch and chain are not exempt as a timepiece constituting a part of the "tools of trade" of a barber, where among such tools there was also a clock. In re Everleth, 129 Fed. 620.

## TOPMAN

In the construction of a bridge, a man employed to hook chains from a derrick to the stone on a freight car, so as to enable the derrick to lift the stones off of the cars, was called a "topman," and the term "booker," when used in connection with railroad work and dealing with the construction of bridges, is equivalent to the term "topman." Southern Indiana Ry. Co. v. Harrell (Ind.) 66 N. E. 1016, 1017.

## TOPPING LIFT

The "topping lift," the breaking of which caused the injury sued for, was used to hold up a boom by which a heavy skid was to be



raised from a lighter, so as to bring one end of it to the rail of a ship, to facilitate discharge of cargo into the lighter. It consisted of a wire cable, which extended from the end of the boom to a block on the mast, and thence to the deck. *The King Gruffydd*, 131 Fed. 189, 65 C. C. A. 495.

## TORMENT

Revisal 1905, § 3299, relating to cruelty to animals, enumerates as subjects protected from cruelty any useful beast, fowl, or animal, and provides that the words "torture," "torment," or "cruelty" shall include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is permitted. Held, that poisoning chickens is within the purview of the statute. *State v. Bossee*, 59 S. E. 879, 145 N. C. 579.

## TORPEDO

See Signal Torpedo.

## TORT

See Executor De Son Tort; Sounding in Tort.

Judgment for tort as debt, see Debt.  
Liability for tort as debt, see Debt.

Pollock, in his treatise on Torts, defines a "tort" to be "an act or omission (not being merely a breach of duty arising out of a personal relation or undertaken by contract) which is related to harm suffered by a determinate person in the following ways: (1) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of; (2) it may be an act in itself contrary to law, or omission of specific legal duty which causes harm not intended by the person so acting or omitting; (3) it may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should, with due diligence, have foreseen and prevented; (4) it may, in special cases, consist merely in not avoiding or preventing harm which the party was bound absolutely or within limits to avoid or prevent. A special duty of this kind may be (1) absolute; (2) limited to answering for harm which is assignable to negligence. In some positions a man becomes, so to speak, an insurer to the public against a certain risk; in others, he warrants only that all has been done for safety that reasonable care can do." *Drum v. Miller*, 47 S. E. 421, 423, 135 N. C. 204, 65 L. R. A. 890, 102 Am. St. Rep. 528.

"Tort" is an actionable wrong, and may result from an intentional or willful act or from negligence, and a tortious act consists of the commission or omission of an act by one without right, whereby another receives some injury in person, property, or reputa-

tion. *Western-Union Telegraph Co. v. Ford*, 70 S. E. 65, 67, 8 Ga. App. 514 (quoting 8 Words and Phrases, p. 7007).

Conduct, though improper and causing a loss to another, is not a "tort," unless a legal, as distinguished from a moral, right is violated, and the damage conforms to the legal standard, except where it is presumed, as in the case of nominal damages. *Hardison v. Reel*, 70 S. E. 463, 464, 154 N. C. 273, 34 L. R. A. (N. S.) 1098.

One commits a "tort" and becomes liable therefor in damages, where he commits some act unauthorized by law, or omits something which by law he ought to do, and by such act or omission either infringes some absolute right of another or causes such other person some substantial loss of money, health, or material comfort, beyond that suffered by the rest of the public. *Acker, Merrill & Condit Co. v. McGaw*, 68 Atl. 17, 20, 106 Md. 536.

The word "torts" in legal phraseology does not include all wrongful acts done by one person to the injury of another, but only those for which individuals may demand legal redress, or those which give rise to an action for damages. *Sims v. Sims*, 72 Atl. 424, 425, 77 N. J. Law, 251.

### As obligation

See Obligation.

### As wrong independent of contract

"The word 'tort' means nearly the same thing as the expression 'civil wrong.' It denotes an injury inflicted otherwise than by mere breach of contract, or, to be more nicely accurate, a 'tort' is one's disturbance of another in rights which the law has created, either in the absence of contract, or in consequence of a relation which a contract had established between the parties." *Welborn v. Dixon*, 49 S. E. 232, 235, 70 S. C. 108, 3 Ann. Cas. 407 (quoting and adopting the definition in 26 Enc. of Law [1st Ed.] 72).

A "tort," in its legal sense, is a wrong independent of contract. Mere breach of a contract cannot be converted into a tort by showing that failure to perform upon the part of the one committing the breach had resulted in great inconvenience, trouble, annoyance, and hardship to the other party to the contract. *Milledgeville Water Co. v. Fowler*, 58 S. E. 643, 129 Ga. 111, Civ. Code 1895, § 3807.

An action in tort is not necessarily dependent on the existence of a contractual relation between the wrongdoer and the person injured; a "tort" being an injury inflicted otherwise than by breach of contract, and being a disturbance of another's legal rights for which the law gives redress. *Peru Heating Co. v. Lenhart*, 95 N. E. 680, 683, 48 Ind. App. 319.

"In *Andrews' Stephen's Pleading*, 107, this definition of a 'tort' is given: 'A tort in contemplation of English law, consists in a violation of a duty imposed by the general law upon all persons occupying the same relation which is involved in a given transaction or *res gestæ*.' Our Civil Code of 1895 (section 3807) declares a tort to be 'a legal wrong committed upon the person or property independent of contract'; and that such legal wrong may be 'the violation of some private obligation by which damage accrues to the individual.' The 'private obligation' here referred to evidently means a private duty arising either from the law or from a relation created by contract express or implied. Civ. Code 1895, § 3810. It is well recognized that a tort may result from the violation of a duty which is itself the consequence of a contract (see Civ. Code 1895, § 3812), or, as expressed in *City & Suburban Railway of Savannah v. Brauss*, 70 Ga. 368: 'If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded upon a contract. In such a case the liability arises out of a breach of duty incident to and created by the contract, but is only dependent upon the contract to the extent necessary to raise the duty. The tort consists in the breach of duty.'" *Wolff v. Southern Ry. Co.*, 60 S. E. 569, 571, 130 Ga. 251 (citing *Louisville & N. R. Co. v. Spinks*, 30 S. E. 968, 104 Ga. 692; *Milledgeville Water Co. v. Fowler*, 58 S. E. 643, 129 Ga. 111).

The dividing line between "breaches of contract" and "torts" is often dim and uncertain. There is no definition of either class of defaults which is universally accurate or acceptable. In a general way, a "tort" is distinguished from a "breach of contract," in that the latter arises under an agreement of the parties, whereas the tort ordinarily is a violation of a duty fixed by law, independent of contract or the will of the parties, although it may sometimes have relation to obligations growing out of or coincident with the contract, and frequently the same facts will sustain either class of action. A complaint alleging that plaintiff became a passenger of defendant, to be carried on one of its cars, and, in consideration of five cents paid, defendant agreed "safely to carry" plaintiff, and "to treat him properly and carefully," and that, after he had passed onto a platform at a station to take a train, defendant through its employes, in violation "of the terms of said contract," assaulted him, states a cause of action for "breach of contract," and not in "tort." *Busch v. Interborough Rapid Transit Co.*, 80 N. E. 197, 198, 187 N. Y. 388, 10 Ann. Cas. 460 (citing *Rich v. N. Y. C. & H. R. R. Co.*, 87 N. Y. 382, 390).

As a general proposition, torts are wrongs committed wholly irrespective of contract, but a tort may arise in connection with

a breach of contract by a common carrier, where the law lays an obligation upon the carrier to perform his duty in the premises, and this obligation is breached, and in such case there is an obligation imposed both by contract and by law upon the carrier, and the breach of the contract operates as a "tort" through entailing as well a breach of the obligation imposed by law, and the tort though independent of, is in a measure dependent on, the contract. *Trout v. Watkins Livery & Undertaking Co.*, 130 S. W. 136, 140, 148 Mo. App. 621.

"A 'tort' is a violation of legal duty, and may involve as one of its elements a breach of contract." *Lindh v. Great Northern Ry. Co.*, 109 N. W. 823, 824, 99 Minn. 408, 7 L. R. A. (N. S.) 1018.

The word "tort" denotes an injury inflicted otherwise than by a mere breach of contract, and in speaking of personal actions in form *ex delicto* the courts usually and ordinarily understand them to be actions for the redress of wrongs unconnected with contract. *Wartman v. Empire Loan Co.* (Tex.) 101 S. W. 499, 501.

Where defendant by blasting caused rock to fall into a stream where plaintiffs were to erect a pier for defendant, the injury was not a nuisance, since the term "nuisance" involves the idea of continuity or recurrence of the acts causing the injury, while a "tort," constituting an invasion of personal or contract right, expends its force in one act, though the injurious consequences may be of long duration. *McCalla v. Louisville & N. R. Co.*, 50 South. 971, 972, 163 Ala. 107.

A "tort" is any civil wrong or injury, a wrongful act not involving a breach of contract, for which an action lies.—*Jewett v. Ware*, 60 S. E. 131, 132, 107 Va. 802.

There are authorities which, in a broad discussion of "torts" or in a general definition of them, say that "the violation of a legal right" or "breach of legal duty" is a tort, and to this effect is the definition quoted from *Bouvier's Law Dictionary*, tit. "Torts," p. 1125; and while this definition may be technically true in a certain sense, it is not accepted as a correct definition as applied to pleading and forms of action. To hold the rule as here insisted upon would be to abolish special pleading—that is, special counts in a declaration in any case for violation of contract or violation of legal duty growing out of contract; and practically, under such views, all actions *ex contractu* and sounding in damages would be brought under the common counts. No standard writer on the subject of torts lays down the rule, or discusses the breaches of contracts, or the breach of legal duty arising from contracts, under such head. "A tort is an act or omission giving rise, in virtue of the common-law jurisdiction of the court, to a civil remedy which is not an action of contract."

"A tort may be distinguished from a contract, in that a contract involves the agreement of at least two parties, whereas a tort as such involves no agreement." Where plaintiff claimed the right to recover from his brokers by reason of their failure to require margins of a lender of stock borrowed by defendants to cover a short sale for plaintiff, defendants' breach of duty, if any, was a breach of contract, and not a tort, which plaintiff could waive, and sue on the common counts in assumpsit. *Morris v. Jamieson*, 68 N. E. 742, 748, 205 Ill. 87 (quoting *Cooley*, Torts [2d Ed.] 2, and 1 Hill, Torts, 1).

#### **Delivery of wheat by warehouseman**

A warehouseman, who had received wheat for which he had issued receipts, shipped the wheat to the assignee of the receipts without any demand by the assignee. L. O. L. § 6038, provides that no person operating any warehouse shall ship, or in any manner remove from his custody, any grain for which a receipt is given, without written consent of the holder of the receipt; and succeeding sections make the receipts negotiable, and violations of the provisions of the act punishable by fine and imprisonment. Held, that the shipment in this case did not fall within the purview of the statute, because there was no conversion by the warehouseman; and the shipment, although possibly a breach of contract, was not a "tort," which is sometimes defined as a breach of duty established by municipal law for which a suit for damages may be maintained. *Diamond Roller Mills v. Moody*, 126 Pac. 984, 986, 63 Or. 90.

#### **Failure to furnish water**

Judgments against a water company in actions to recover the value of property alleged to have been destroyed by fire, as a result of the failure of the company to exercise reasonable care to furnish an adequate supply of water, are judgments for torts, within the meaning of Code N. C. 1883, § 1255, subordinating the lien of corporate mortgages to judgments for torts committed by the corporation. *Guardian Trust & Deposit Co. v. Fisher*, 26 Sup. Ct. 186, 188, 200 U. S. 57, 50 L. Ed. 367.

#### **Taking usury**

"An 'action in tort' strictly speaking, and as it is commonly understood, is one in which the complainant seeks to recover damages for defamation of character, the wrongful and forcible taking of his property or injury to it, or for unlawful violence reflected upon his person." Such an action has never been founded and sustained on a wrongful act committed, such as the taking of usury, by the consent of the injured party, or in which he actively participated, and an action under Rev. St. 1895, art. 3106, to recover a penalty for receiving usury is not an "action in tort." *Wartman v. Empire Loan Co. (Tex.)* 101 S. W. 499, 501.

#### **TORT ACTION**

As chose in action, see *Chose in Action*.

#### **TORT-FEASOR**

See *Joint Tort-Feasors*.

#### **TORTURE**

Under Penal Law (Consol. Laws 1909, c. 40) § 180, defining "torture" or cruelty to animals to include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted, whether piercing of the fins of green turtles and tying them by means of thongs while they were being transported to New York caused unjustifiable physical pain, was for the jury. *People ex rel. Freel v. Downs* (Mag. Ct.) 136 N. Y. Supp. 440, 443.

Revisal 1905, § 3299, relating to cruelty to animals, enumerates as subjects protected from cruelty any useful beast, fowl, or animal, and provides that the words "torture," "torment," or "cruelty" shall include every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is permitted. Held, that poisoning chickens is within the purview of the statute. *State v. Bossee*, 59 S. E. 879, 145 N. C. 579.

#### **TOTAL**

##### **TOTAL DESTRUCTION**

See, also, *Wholly Destroyed*.

A lease of a wireless telegraph outfit provided that when once installed it should not be removed to any other vessel or place without the lessor's consent, and gave the lessor the right to resume possession; also gave the lessor, in case of the lessee's abandonment, or any use otherwise than as provided in the contract, special remedies by injunction, etc. The lease also provided for payment by the lessee of the reasonable value of any instrument, or parts, lost or destroyed, not exceeding \$1,000 for total loss or destruction, otherwise than by unavoidable accident or detention, and \$50 per month in case of the unauthorized removal or detention of any instrument, until their destruction or loss without the lessee's fault was satisfactorily proved. Held, that a sale of the vessel on which the wireless apparatus was installed, by a receiver, without special reference to such apparatus, did not constitute a "total destruction," thereof, so as to entitle the lessor to an allowance out of the proceeds of the steamer of the \$1,000 and \$50 per month under such provision in the lease. *Massie Wireless Telegraph Co. v. Enterprise Transp. Co.*, 175 Fed. 6, 9, 10, 99 C. C. A. 146.

Provision in a lease that the "total destruction" of the building shall terminate the obligation of paying rent was not enforceable on a partial destruction, though it rendered the premises untenable for the

purposes of the lease until repairs were made. *Booraem v. Morris*, 64 Atl. 953, 74 N. J. Law, 95.

### TOTAL DISABILITY

See, also, Wholly Disabled.

"Total disability," as used in an accident policy, "does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation. Total disability exists, although the insured is able to perform a few occasional acts, if he is unable to do any substantial portion of the work connected with his occupation. It is sufficient to prove that the injury wholly disabled him from the doing of all substantial and material acts necessary to be done in the prosecution of his business, or that his injuries were of such a character and degree that common care and prudence required him to desist from his labors so long as was reasonably necessary to effect a speedy cure." *Pacific Mut. Life Ins. Co. v. Branham*, 70 N. E. 174, 176, 34 Ind. App. 243 (quoting and adopting definition in *Kerr, Ins.* 386).

"Total disability," as used in an accident insurance policy, does not mean a state of absolute helplessness. Insured might have been able to walk, he might have been able to ride on the car to his physician's office, and still might have been entirely incapacitated for work or business, and one so incapacitated is totally disabled within the meaning of the policy. *Unitel States Casualty Co. v. Hanson*, 79 Pac. 176, 177, 20 Colo. App. 393 (quoting *Mutual Benefit Association v. Nancarrow*, 18 Colo. App. 274, 71 Pac. 423, 424).

A contract of insurance with a fraternal insurance company provided for the payment of a certain benefit whenever a member thereof, by reason of disease, accident, or otherwise, became totally and permanently disabled from following his usual or regular business, occupation, or profession. A member, who was a pharmacist and engaged in running a drug store, was accidentally shot in the left arm, and it was amputated at the shoulder joint, and no other injury was alleged to have been sustained. In an action upon the contract of insurance, it is held that the loss of the left arm alone does not constitute a "total disability," within the terms and meaning of the contract. *Smith v. Supreme Lodge of Order of Select Friends*, 61 Pac. 416, 62 Kan. 75.

"Total disability" is necessarily a relative matter, and must depend chiefly on the peculiar circumstances of each case, and on the occupation and employment and capabilities of the person injured. It does not mean absolute physical disability on the part of the insured to transact any kind of business pertaining to his occupation, and may exist although the insured is able to perform occasional acts, if he is unable to do any sub-

stantial portion of the work connected with his occupation. *Brotherhood of Locomotive Firemen and Enginemen v. Aday*, 134 S. W. 928, 930, 97 Ark. 425, 34 L. R. A. (N. S.) 126.

A benefit certificate provided a payment for "total disability," defined as follows: "Suffering by means of a physical separation of the loss of four fingers of one hand at or above the third joint, \* \* \* provided the above amputations occur" to one after he becomes a member of the beneficiary department. Held, that proof of loss by separation of three fingers of the hand above the third joint, and of an injury to the other finger which impaired to the extent of 50 per cent its usefulness, but did not warrant a physical separation of any part of such finger, did not entitle insured to payment as for a total disability. *Mady v. Switchmen's Union of North America*, 133 N. W. 472, 473, 116 Minn. 147.

Where a benefit certificate provided that in case of "total disability" of the member, which rendered him unable to carry on or conduct any vocation or calling, half the amount that would have been due in case of death should be paid to him, but there was nothing to indicate insured's vocation or calling, the words "total disability" should be construed to mean a total inability to follow the vocation or calling which insured was engaged in at the time he was injured. *Foglesong v. Modern Brotherhood of America*, 97 S. W. 240, 241, 121 Mo. App. 548.

### TOTAL ESTATE

A will provided that legacies should be paid in full in case testator's total estate amounted to \$300,000, but if less than that sum the legacies should abate in proportion. Held, that by "total estate" only such property as was left after the payment of debts and expenses was meant. *In re Gans' Will*, 114 N. Y. Supp. 975, 978, 130 App. Div. 454.

### TOTAL EVICTION

A "total eviction" exists where the tenant is deprived of the whole of the premises leased, and it is "partial" when the tenant is deprived of a substantial part of the premises. *Jackson v. Paterno*, 108 N. Y. Supp. 1073, 1076, 58 Misc. Rep. 201.

### TOTAL FAILURE OF PROOF

Where the petition on a fire insurance policy alleges a written settlement with the insured, evidence of a parol settlement was not a "total failure of proof" within Comp. Laws 1909, § 5673, providing that when the allegation of the claim or defense to which the proof is directed is unproven, not in some particular or particulars only, but in its general scope and meaning, it is a failure of proof, but such proof is a variance within sections 5673 and 5674, providing that no variance is to be deemed material unless it have actually misled the adverse party to

his prejudice, and, when a variance is not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment without cost. *Merchants' & Planters' Ins. Co. v. Crane*, 128 Pac. 260, 261, 36 Okl. 160.

### TOTAL INABILITY

See Continuous Total Inability.

A provision in an accident policy that it insured against "total inability to perform any part of the duties" of insured, who was a merchant, cannot be construed literally, but means inability to perform any substantial part of the business. *James v. United States Casualty Co.*, 88 S. W. 125, 127, 113 Mo. App. 622.

### TOTAL INCAPACITY

Under a benefit certificate payable in case insured should become totally incapacitated to perform manual labor, "total incapacity" means inability to perform sustained manual labor so as to enable one to earn or assist in earning a livelihood. A condition of absolute and complete incapacity to do any manual labor ought not to be regarded as the true construction of the language of the certificate. One who has power to use his hand or hands at labor for a brief effort only, and who is lacking in power to sustain the effort for a sufficient length of time to make the result thereof of any benefit to him in the way of assisting in his support, is for all practical purposes and in every actual sense totally incapacitated from performing manual labor. *Grand Lodge, Brotherhood of Locomotive Firemen, v. Orrell*, 69 N. E. 68, 69, 206 Ill. 208.

### TOTAL INSURANCE

The words "total insurance," as used in a fire policy for \$4,500, which provided that it should be void if the insured should procure any other insurance on the same property, unless otherwise provided by agreement added to the policy, and which contained the clause: "\$3,500 total insurance permitted, concurrent herewith, on buildings," etc. "Other insurance permitted, concurrent herewith, on stock"—contemplate the entire insurance on the property, and limit the insurance, taking into account the amount written in the policy, and the policy did not authorize \$3,500 additional insurance, and it was forfeited by the insured taking a policy for additional insurance on the same property from another company. *Senor v. Western Millers' Mut. Fire Ins. Co.*, 79 S. W. 687, 689, 181 Mo. 104.

### TOTAL LOSS

See Constructive Total Loss; Technical Total Loss.

See, also, Wholly Destroyed.

A lease of a wireless telegraph outfit provided that when once installed it should

not be removed to any other vessel or place without the lessor's consent, and gave the lessor the right to resume possession; also gave the lessor, in case of the lessee's abandonment, or any use otherwise than as provided in the contract, special remedies by injunction, etc. The lease also provided for payment by the lessee of the reasonable value of any instrument, or parts, lost or destroyed, not exceeding \$1,000 for total loss or destruction, otherwise than by unavoidable accident or detention, and \$50 per month in case of the unauthorized removal or detention of any instrument, until their destruction or loss without the lessee's fault was satisfactorily proved. Held, that a sale of the vessel on which the wireless apparatus was installed, by a receiver, without special reference to such apparatus, did not constitute a "total loss," thereof, so as to entitle the lessor to an allowance out of the proceeds of the steamer of the \$1,000 and \$50 per month under such provision in the lease. *Massie Wireless Telegraph Co. v. Enterprise Transp. Co.*, 175 Fed. 6, 9, 10, 99 C. C. A. 146.

### TOTAL LOSS (In Fire Insurance)

The definition of "total loss," as used in the statute concerning valued policies (Rev. St. 1909, §§ 7020, 7021), has no application to cases of insurance of personal property and the adjustment of loss thereunder. *Sharp v. Niagara Fire Ins. Co.*, 147 S. W. 154, 159, 164 Mo. App. 475.

#### Loss of specific character

A building which in consequence of a fire has lost its identity and character as a building, and has become so far disintegrated that it cannot be properly designated as a building, though some part of it may remain standing, is a "total loss," within Rev. St. 1899, § 7969. *Stevens v. Norwich Union Fire Ins. Co.*, 96 S. W. 684, 688, 120 Mo. App. 88.

Property is to be regarded as having been "wholly destroyed" or a "total loss" within the meaning of an insurance contract, no matter how great a portion thereof may remain unconsumed, if it is so injured that it must be torn down, or that what remains cannot be utilized, in reconstructing the building without incurring a greater expense than if it were not so utilized. *Insurance Co. v. Heckman*, 67 Pac. 879, 64 Kan. 388, 395; *Kinzer v. National Mut. Ins. Co.*, 127 Pac. 762, 763, 88 Kan. 93, 43 L. R. A. (N. S.) 121.

In an action on a fire policy covering an electric power house and equipment, it was proper to instruct that "total loss" does not mean entire destruction of the property, but such destruction as would render it of no value for the purpose for which it was used, or intended to be used, when the policy issued and the fire occurred. *Rogers v.*

Connecticut Fire Ins. Co. of Hartford, 139 S. W. 265, 267, 157 Mo. App. 671.

A building insured against fire is a "total loss" where, though only partly burned, it is rendered unfit for the purpose for which it was constructed, and there is an ordinance or law prohibiting reconstruction. *Calatine Ins. Co. v. Nunn*, 55 South. 44, 45, 9 Miss. 493.

#### TOTAL LOSS (In Marine Insurance)

In the case of insurance on goods from one port to another and until safely landed, where, after a part of the goods are landed, the residue on board are lost, this is frequently denominated a "total loss," though it is really a "partial loss," because the goods landed were not, until all the goods were landed, withdrawn from all the risks against which they were insured, although they were withdrawn from the particular risk by which the loss occurred. *American Ins. Co. v. Griswold* (N. Y.) 14 Wend. 399, 38.

#### TOTAL LOSS OF HAND

It is for the jury to determine whether a total loss of three fingers and an injury to the remaining finger and thumb, which materially interferes with their use, and a cutting away of a part of the palm of the hand, constitute a "total loss of the hand," within the meaning of a by-law of a mutual benefit association, which provides indemnity for any member in good standing suffering, "by means of physical separation, the loss of a hand at or above the wrist joint." *Beber v. Brotherhood of Railroad Trainmen*, 106 N. W. 168, 169, 75 Neb. 183, 11 Am. St. Rep. 782.

#### TOTAL RELINQUISHMENT

"Total relinquishment," required by a testator in order to constitute a loss of his homestead exemption, is not satisfied where the bankrupt owned a business homestead, and, the building being burned, pending reconstruction, the bankrupt leased it for a year with the purpose of renewing it for four years longer, reserving desk room therein, and thereafter used the desk in the building, with certain space for merchandise, in connection with his business as broker. *Duncan v. Ferguson-McKinney & Goods Co.*, 150 Fed. 269, 272, 80 C. C. 157.

#### TALLY AND PERMANENTLY DISABLED

Defendant's beneficiary department, though its constitution and laws (article 8, 6), provided that "any member suffering means of physical separation the loss of two fingers of one hand at or above the second joint or three fingers and thumb of one hand at or above the second joint, or

the loss of one foot at or above the instep, or who shall become totally blind or totally deaf, shall be considered totally and permanently disabled and shall receive the full amount of his beneficiary certificate, likewise any physical disability that may permanently disqualify a member from performing the duties of a switchman, provided that such permanent disability occurred after he became a member of this department or was not caused improperly or through negligence." Held, that the words "totally and permanently disabled" were not limited to a total and permanent disablement arising from the injury specified, but referred to any injury which produced a total and permanent disablement. *Switchmen's Union of North America v. Colehouse*, 131 Ill. App. 349, 353, affirmed 81 N. E. 696, 227 Ill. 561.

#### TOTALLY DISABLED

A beneficiary of an accident policy, disabled to do such work as, considering his ordinary employment, qualifications for affairs, and station in life, could have been expected of him, is "totally disabled" within the meaning of the policy. *Wall v. Continental Casualty Co.*, 86 S. W. 491, 498, 111 Mo. App. 504 (citing *McMahon v. Supreme Council, Order of Chosen Friends*, 54 Mo. App. 468; *Hutchinson v. Supreme Tent of Knights of Maccabees of the World*, 22 N. Y. Supp. 801, 68 Hun, 355; *Wolcott v. United Life & Accident Ins. Ass'n*, 8 N. Y. Supp. 263, 55 Hun, 98; *Gordon v. United States Casualty Co.* [Tenn.] 54 S. W. 98).

#### TOTALLY OR SUBSTANTIALLY DESTROYED

A lease provided that, if the building on the premises should be totally or substantially destroyed, the lease might be determined at the election of the lessors or their successors. Held, that the words "totally or substantially destroyed" imported an effective destruction of the building as such so as to render it entirely untenable and the restoration of it practically the construction of a new building; and, where a fire originated in the central portion of the building and the flames ate their way from the basement to the top, consuming all the floors and roof in that section, or causing them to fall into the basement, and in other sections where the floors had not fallen and partitions were left standing the woodwork was burned off or charred and discolored, and the outer walls were in places thrown "out of plumb," and were condemned by the city, the whole building being rendered untenable, so that the cost of restoring the old building using the unconsumed portion thereof would be from \$27,000 to \$47,000, there was a "total or substantial" destruction within the meaning of the lease. *H. S. Chase & Co. v. Fleming*, 121 N. W. 1055, 1056, 143 Iowa, 452.

## TOUT

Where a publication entitled "Bucket Shop Sharks" spoke of plaintiff as a "tout," it would seem to mean a person who solicits customers, employment, or the like. *New York Bureau of Information v. Ridgway-Thayer Co.*, 104 N. Y. Supp. 202, 205, 119 App. Div. 339 (quoting and adopting definition in Cent. Dict.).

## TOUT TEMPS PRIST ET ENCORE PRIST

"Tout temps prist et encore prist" means that the pleader has always since been ready to pay and still is. *T. Towles & Co. v. Carpenter, Wright & Co.*, 57 S. E. 365, 62 W. Va. 151.

## TOW

### TOWAGE

A provision in a bill of lading for a cargo of coal to be delivered at Portland, Me., which required the consignee "to tow vessel in and out of Back Bay free," is not a contract to pay for the "towage" merely, but to provide the same. *Winslow v. Thompson*, 134 Fed. 548, 548, 67 C. C. A. 470.

"A 'towage service' is aid rendered in the propulsion of a vessel. It is the employment of one vessel to expedite the voyage of another vessel." The owner and master of a steamer engaged in making regular trips between river ports contracted to transport from one of such ports to another, for a stated charge, a locomotive engine. The barge owned and used by him on such trips not being suitable, it was agreed that the owner of the engine should furnish a barge on which to load the same, which was to be returned by the steamer. The steamer issued a bill of lading in the usual form for the barge and engine, and lashed the barge to her side for the voyage. Held, that the contract was one of affreightment, and not of towage. *The Nettie Quill*, 124 Fed. 667, 670 (citing *McConnochie v. Kerr*, 9 Fed. 53).

### Salvage distinguished

If a vessel is in a position which requires "towage" service only, the mere fact that she had previously suffered injury does not change the nature of the service to one of "salvage," unless there are some circumstances of peril, immediate, or to be reasonably apprehended, from which the vessel is relieved, or some hazard encountered or unusual work done by the relieving vessel. *The Robert S. Besnard*, 144 Fed. 992, 1004.

There is no generic difference between "towage" and "salvage." The same service may sometimes be called by either name; but when a court decides that the service calls for "liberality," and holds that a bonus

should be given in order to encourage similar services, then such court should properly and strictly call the service a "salvage" service, for "liberality is salvage, and there is no place for liberality in an action of contract." It often becomes material to draw a distinct line between "salvage" and "towage," because a reward ought sometimes to be given to the crew of the salving vessel and other participants in salvage services, and such reward should not be given if the services were held to be merely "towage." *The Rebecca Shepherd*, 148 Fed. 727, 730, 733 (citing *The J. C. Pfluger*, 109 Fed. 93).

"Towage service" is often distinguished from "salvage service" by the fact that the former is aid rendered in the movement of vessels not in distress, while salvage service is confined to aid rendered to those in distress. It is immaterial to the liability of the insurer under a marine policy whether the loss or damage to which the tug was subjected arose out of a towage or a salvage service, where the policy insured the tug against loss and damage arising from or growing out of any accident caused by collision or stranding resulting from any cause whatever to any other vessel or vessels for which said steamer or its owners may be legally liable. *Ferguson v. Providence Washington Ins. Co.*, 125 Fed. 141, 142.

"A 'towage service' is one which is rendered for the mere purpose of expediting the voyage of a vessel without reference to any circumstances of danger." A steamer with two barges in tow attempted to seek refuge on a dark night with the wind blowing 75 miles an hour, and in attempting to enter the harbor a collision occurred between the two barges, and the rear one was cast adrift half a mile from a shore on which she was being driven by the wind. A tug, in response to signals from the steamer, came to her assistance and at her request went in search of the barge, and having found her, took a line and started with her from the harbor. After proceeding a short distance the line slipped from the tow posts and the barge again went adrift and was driven on shore; the tug being unable to render further assistance, owing to insufficient depth of water. The service performed by the tug was one of salvage, and not of towage. *The S. C. Schenk*, 158 Fed. 54, 59, 85 C. C. A. 384 (quoting *McConnochie v. Kerr*, 9 Fed. 50, 53).

The tug *Dauntless*, with a barge in tow, navigating Chesapeake Bay at night in a gale on the way from Baltimore to Norfolk, was signaled for assistance by another tug having five barges in tow. Anchoring her own barge in Hampton Roads, the *Dauntless* then found that four of the other tug's barges had gone adrift, and was asked to find them and take off their crews. She found three of them anchored in mid-channel a mile east of Thimble Light; the other having been sunk and her crew saved by the lightkeeper.

he three were in great peril, with the seaashing over them and their masters andews in fear of losing their lives. At theirquest the Dauntless undertook to tow them safety and did so, taking first one on whichere were a woman and a child, then theher two. The service commenced at 11:30, and continued until 9 in the morning, duringhich time weather conditions improved buttle, and was attended by considerable danr to the crew, who were obliged to go onard the barges. Held, that the service was t one of "towage," but of "salvage," and e of merit, and that the Dauntless was enled to an award from the one first rescuedual to 12½ per cent. of the value of thessel, cargo, and freight money, and anward of 7½ per cent. from each of the oth-s. *The Carroll*, 163 Fed. 425, 426.

Where the nature of a service rendered is in fact salvage, the burden rests on one to claim it to have been a "towage service" plead and prove a binding contract for e towage. A "salvage service" is a service ich is voluntarily rendered to a vessel eding assistance, and is designed to relieve r from some distress or danger, either prest or to be reasonably apprehended, while a owage service" is one which is rendered : the mere purpose of expediting her voye, without reference to any circumstances danger. Respondent steamship was ored to the pier of an oil company, exding from its yards in which there were a ge number of tanks, when one of the tanks ploded with great violence, the oil became ited, and created a large fire. The tank s about 1,400 feet from the vessel, but ere were other tanks between and 15,000 es of oil on the pier awaiting loading on : ship. It was dark, and the engines of : vessel were not connected with the steam. ld, that the services of a tug which towed : away to a safe place of anchorage were vage services, although the fire did not in t reach the pier, and that the crew were itled to recover salvage in the sum of 0; the owner having settled his claim. e *Lowther Castle*, 195 Fed. 604, 605.

#### TOWPATH

The Supreme Court judicially knows t a "towpath," as applied to land front- the Mississippi river, was an appurtece to navigation belonging to the general ollic; a path traveled by men or animals ing boats. *City of St. Louis v. St. Louis ast Furnace Co.*, 138 S. W. 641, 647, 235 . 1.

#### TOW OF FLAX

"Flax noils" held dutiable as waste, un- the Tariff Act of 1897, and not as "tow flax" by similitude. *G. B. Ritchie & Co. United States*, 141 Fed. 664.

## TOWARDS

Where a school district votes a certain sum "towards" purchasing land and erecting a schoolhouse, they can interpose no objection to a claim made against them under a contract with their committee that a larger sum was expended by the committee than that named in the vote, since the word "towards," instead of imposing a limitation, holds out an intimation that more might be required. *Jenkins v. Doughty Falls Union School Dist.*, 39 Me. 220, 223.

## TOWN

See Compact Part of Town; Incorporated City or Town; Incorporated Town; Organized Town.

Belong to town, see Belong—Belonging. Indebtedness of, see Indebted—Indebtedness.

A "town" is a corporation, as well as a political and governmental subdivision and agency. *Street v. Varney Electrical Supply Co.*, 66 N. E. 895, 896, 160 Ind. 338, 61 L. R. A. 154, 98 Am. St. Rep. 325.

The word "towns," as used in Const. art. 4, § 7, par. 11, providing that the Legislature shall not pass private, local, or special laws regulating the external affairs of "towns" and counties, embraces cities, boroughs, villages, and townships. *Dickinson v. Board of Chosen Freeholders of Hudson County*, 60 Atl. 220, 221, 71 N. J. Law, 589.

The word "town," as used in statutes, has no fixed significance. The word, as used in the Constitution and in various statutes, is held to be of such uncertain meaning, standing alone, that the courts have uniformly applied its use according to the manifest intention of the legislation, as gathered from the occasion and necessity of the act. *Millville Gaslight Co. v. Vineland Light & Power Co.*, 65 Atl. 504, 506, 72 N. J. Eq. 305.

Where the owner of farm lands platted it into lots, blocks, and streets, filing the plat with the county clerk, but there was no acceptance of dedication, no incorporation, and no buildings there but a post office, the land did not become a "town" or "village," within Sand. & H. Dig. § 3712, limiting the homestead therein to one acre. *Clements v. Crawford County Bank*, 40 S. W. 132, 133, 64 Ark. 7, 62 Am. St. Rep. 149.

There is nothing technical or obscure in the meaning of the words "city," "town," and "village." The word "town" is more comprehensive than either of the others. It is a generic word, applicable as well to a city as to a village. In England a city was distinguished from other towns by the fact that it had a cathedral, and was the residence of a bishop, but in this country the name "city" is used ordinarily to designate the larger class of towns. The name "vil-



lage" always carries to the mind the idea of a small urban community. A city is a town, and a village is a town, but the word "city" or "village" indicates the size of the town. *State ex rel. Scott v. Lichte*, 126 S. W. 466, 470, 226 Mo. 273.

#### **As any collection of houses**

The situs of an unincorporated town is not controlled by the platted area thereof without reference to the collection of inhabited houses, which together with the area appurtenant to the same is in the ordinary signification of the word "town," the term carrying with it the idea of a considerable aggregation of people living in close proximity. *Ralls v. Parrish*, 147 S. W. 564, 566, 105 Tex. 253 (quoting 8 Words and Phrases, p. 7020).

#### **As citizen**

See Citizen.

#### **City distinguished**

See City.

#### **As a civil division of territory**

"Cities" and "towns" are territorial subdivisions of the state, created as public corporations for convenience in administration of government, and they exercise only the powers which have been conferred expressly or by necessary implication, and they have a twofold character, the one governmental and the other private; and in the former they execute the functions and possess the attributes of sovereignty delegated by the Legislature, while in the latter they are clothed with the capacities of a private corporation, and may claim its rights and immunities, and are subject to its liabilities. *Higginson v. Slattery*, 99 N. E. 523, 524, 212 Mass. 583, 42 L. R. A. (N. S.) 215.

#### **As corporation**

See Corporation.

#### **As incorporated town**

The word "town," as used in Gen. St. p. 2206 (P. L. 1884, p. 194, § 5), authorizing any city, town or township to make a contract with any city for public water supply does not include boroughs, the word "town" in its ordinary sense means a town corporate. *Rehill v. Mayor, etc., of Borough of East Newark*, 63 Atl. 81, 83, 73 N. J. Law, 220.

#### **As a municipal corporation**

Under General Corporation Law, §§ 2, 3, Town Law, § 2, and General Municipal Law, § 1, a "town" is a "municipal corporation." *Town of Hempstead v. Lawrence*, 122 N. Y. Supp. 1037, 1039, 138 App. Div. 473.

The New York Town Law defines a "town" as a municipal corporation comprising the inhabitants within its boundaries, and formed for the purpose of exercising such powers and discharging such duties of local government and administration of public affairs as may be conferred or imposed

upon it by law; and hence a town is a municipal corporation, which may enter into a lighting contract. *Dunn v. Town of Whites-town*, 185 Fed. 585, 588.

Code Civ. Proc. § 264, provides that no award shall be made on any claim against the state, except upon such legal evidence as would establish liability against an individual or corporation. Canal Law, § 47, provides that no judgment shall be awarded by the Court of Claims for damages from neglect or conduct of any state officer having charge of canals, or from any accident connected with the canals, unless the facts make out a case which would create a legal liability against the state, were they established in court against an individual or corporation. Held, that the phrase "individual or corporation" includes a town; Town Law, § 2, defining a "town" as a municipal corporation comprising the inhabitants within its boundaries. *O'Bryan v. State*, 125 N. Y. Supp. 490, 492, 68 Misc. Rep. 618.

#### **Borough or village**

A complaint in a prosecution for carrying concealed weapons was not defective because in the name of the "village of O.," instead of the "town of O.," though Rev. St. 1899, § 6004, declares that the inhabitants of a village shall be a body politic and corporate by the name and style of "the town of"; the entire statute (sections 6004-6066) using the words "town" and "village" interchangeably, and the complaint having also used them in like manner. *Town of Orrick v. Akers*, 83 S. W. 549, 109 Mo. App. 662.

At the time of the granting of a franchise to a gas company to lay pipes in streets of the "town of Millville and its vicinity" there was a village of Millville situated within the township of Millville. Held, that the words "town of Millville and its vicinity" referred, not to the entire township of Millville, but to the village of Millville and its vicinity. *McCarter v. Millville Gaslight Co.*, 69 Atl. 248, 249, 73 N. J. Eq. 739.

#### **City**

The word "town," as used in Const. art. 6, § 6, providing that vacancies in town offices shall be filled in such manner as may be prescribed by law, is generic, and includes cities. *State ex rel. Gleason v. Gerdink*, 90 N. E. 70, 71, 173 Ind. 245.

The word "town" is often used to embrace cities as well as villages, and when the expression "incorporated town" is used in an act it may include cities, unless the contrary appears from the whole statute to have been the intent of the Legislature. *City of Smithville v. Dispensary Com'rs of Lee County*, 54 S. E. 539, 540, 125 Ga. 559 (citing *Hermann v. Town of Guttenberg*, 43 Atl. 703, 62 N. J. Law, 605; *Odegaard v. City of Albert Lea*, 23 N. W. 526, 33 Minn. 351; *Flinn v. State*, 24 Ind. 286; *City of Indianapolis v. Higgins*,

40 N. E. 671, 141 Ind. 1; 8 Words and Phrases, 7019).

The petition of a public weigher who sought to enjoin an unauthorized weigher from weighing produce which alleged that the plaintiff was the public weigher for the town of S. is not deficient for failing to allege that S. was a city; the word "town" being a generic word which includes cities, boroughs, and villages. *Perry v. Carlisle* (Tex.) 151 S. W. 1155, 1158.

The word "town" is often used as a generic term embracive of all such primary municipal corporations as incorporated cities and villages; and it has become a well-settled rule of construction that the term "town," when used in the general statute, may be applied to or include cities, unless the contrary appears from the whole statute to have been the intention of the Legislature. *Tucker v. Board of Com'rs of Lincoln County*, 97 N. W. 103, 104, 90 Minn. 406.

The word "town" is often used as a generic term, embracing cities as well as villages; and, when the expression "incorporated town" is used in an act of the Legislature, it may include "cities," unless the contrary appears from the whole statute to have been the intent of the legislative body. *Lee v. Tucker*, 60 S. E. 164, 167, 130 Ga. 43 (quoting and adopting the definition in *Mayor & Council of Smithville v. Dispensary Com'rs of Lee County*, 54 S. E. 539, 125 Ga. 559).

There is nothing technical or obscure in the meaning of the words "city," "town," and "village." The word "town" is more comprehensive than either of the others. It is a generic word, applicable as well to a city as to a village. In England a city was distinguished from other towns by the fact that it had a cathedral, and was the residence of a bishop, but in this country the name "city" is used ordinarily to designate the larger class of towns. The name "village" always carries to the mind the idea of a small urban community. A city is a town, and a village is a town, but the word "city" or "village" indicates the size of the town. *State ex rel. Scott v. Lichte*, 126 S. W. 466, 470, 226 Mo. 273.

Rev. Laws 1905, § 1528, granting the right of local option to "towns" and incorporated villages, does not apply to the cities of the state. *Kleppe v. Gard*, 123 N. W. 665, 109 Minn. 251.

Rev. Laws, c. 75, § 42, providing that, if a disease dangerous to public health breaks out in a "town," the board of health shall provide a hospital therefor, applies to cities as well as towns. *Barry v. Smith*, 77 N. E. 1099, 1104, 191 Mass. 78, 5 L. R. A. (N. S.) 1028, 6 Ann. Cas. 817.

Rev. Laws, c. 8, § 5, cl. 23, provides that in construing statutes the word "town" includes "city." Chapter 75, § 42, provides

that, if a disease dangerous to the public health, breaks out in a town, the board of health may cause any sick or infected person to be removed to a hospital, or may leave him in the house where he is. Section 56 provides that, in cases of smallpox, patients shall not be removed from their homes, except in cases in which, in the opinion of the board of health and the attending physician, the cases cannot be properly isolated in the houses where the patients reside. Section 40 provides that each city shall establish one or more isolation hospitals for the reception of persons having smallpox, and subjects towns refusing to comply to a penalty. Section 54 provides that expenses incurred by a town for the preservation of the public health may be recovered in an action of contract. Section 57 provides that reasonable expenses incurred by the board of health in providing for persons infected with smallpox shall be paid by such person, his parents or master, if able; otherwise by the town in which he has a legal settlement. Held, that the failure of a city to establish an isolation hospital, or its failure to remove persons infected with smallpox to a hospital, does not preclude it from recovering expenses incurred on behalf of such persons from the city where they have their legal residence. *City of Haverhill v. City of Marlborough*, 72 N. E. 943, 944, 187 Mass. 150.

Under Pub. Laws 1902, p. 67, c. 980, § 1, providing that the school committee of each town shall elect a superintendent of schools thereof at the first regular meeting of the committee succeeding the annual election thereof, and Gen. Laws 1896, c. 26, § 8, declaring that the word "town" shall include a city, the school committee of a city consisting of three members, one elected at the November election of each year for a term beginning in January following, cannot elect a superintendent to serve under the committee as it will be constituted after the election in November, though the committee from the time of the adoption of the charter, requiring an annual election of a superintendent, had elected a superintendent at any time during the year at its discretion. In re School Committee of Pawtucket, 65 Atl. 301, 27 R. I. 596.

#### District—School district

The title of Laws 1909, c. 23, entitled "An act in amendment of chapter 89 of the Public Statutes and defining the town school district," indicates the statutory definition therein of the word "town," as meaning "district" when referring to school affairs, was not intended to include special school districts; and the word "towns," as used in section 1 of chapter 158, providing that no appropriation of money for common schools provided for in sections 2 and 3 shall be held to apply to towns having an equalized valuation of more than \$7,000 per pupil, etc., the population of which is to be determined by the last federal census and the wealth there-

of by the equalized valuation, does not include special school districts which are carved out of the territory of rich or populous towns, and as to which districts there is no equalized valuation and no law for determining such valuation, and their population is not provable by the last federal census, and hence they are not entitled to share in the appropriation provided for in the sections referred to. In re Opinion of Justices, 75 Atl. 429, 430, 75 N. H. 622.

Priv. Laws 1907, p. 1267, c. 482, authorizes the creation of a school district in the town of Carthage. Section 50 (page 1277) provides that an election shall be held to determine whether taxes shall be levied "for the support of the schools in said town provided for in this act and the purchase of land and the erection of school buildings thereon," and that the money to pay for the land and school buildings "shall only be raised by issuing the bonds of the town, as hereinafter provided for." By subsequent sections, including section 61, the commissioners of the town are directed to issue the bonds for the school district, and it also appears by intentment that the taxes are to be levied only on property and polls within the district. The district as created did not include all the territory embraced within the corporate limits of the town. Held, that the word "town" in section 50 was used with reference to the election required to be held as provided in the act, which election is required to be held, not in the town, but within the district, and that the act did not authorize the levy of a tax for the payment of the bonds on residents of the town outside of the school district who would not be benefited by the maintenance of the school, and hence was not unconstitutional. *McLeod v. Board of Com'rs of Town of Carthage*, 61 S. E. 605, 608, 148 N. C. 77.

#### Parish

Subsequent to 1700 the commons of Kaskaskia were granted to the parish of the Immaculate Conception of Kaskaskia by the French government, which grant was confirmed by a patent of the Governor of Louisiana in August, 1743. In 1763 the territory was ceded by France to Great Britain, and in 1765 taken possession of by the English, and in 1778 acquired by Virginia by conquest. It was ceded to the United States by Virginia in 1784, and by Act Cong. May 1, 1810, c. 40, 2 Stat. 607, and Act Feb. 20, 1812, c. 22, 2 Stat. 677, title to the commons was confirmed to all rightful claimants. By State Const. 1818, art. 8, § 8, all lands granted as a common to the inhabitants of any "town," hamlet, village, or corporation, was guaranteed to remain forever common to the inhabitants of such town, etc. Held, that the word "town" as so used in this and in the subsequent Constitution of 1848 (article 11), and in the Acts of 1851 (Priv. Laws 1851, p. 5), providing for the lease and disposition of such common lands, should be construed as syn-

onymous with "parish" as used in the French patent of 1743, and hence that the title to the common lands was in the inhabitants of the parish and their successors in trust for their common benefit, and not in the inhabitants of the village of Kaskaskia. *Stead v. President, etc., of Commons of Kaskaskia*, 90 N. E. 654, 659, 243 Ill. 239.

#### As place

See Place.

#### Township

See, also, Township.

The word "town," in the supplement to the act to authorize the formation of gaslight corporations, and regulate the same, approved March 14, 1879 (P. L. 1879, p. 316; Gen. St. p. 1613, § 30), is used in its generic sense, and includes townships. Since the word is used with such different meanings, its signification in a particular statute must be determined in view of the object of the statute and the context. *Millville Imp. Co. v. Pitman, Glassboro & Clayton Gas Co.*, 67 Atl. 1005, 75 N. J. Law, 410 (citing *Pell v. Mayor, etc., of City of Newark*, 40 N. J. Law, 550; *Stout v. Borough of Glen Ridge*, 35 Atl. 913, 59 N. J. Law, 201; *Hermann v. Town of Guttenberg*, 44 Atl. 753, 63 N. J. Law, 610).

The word "town" in Act March 14, 1879, amending the gas company act of 1876, authorizing gas companies to lay pipes in certain towns, includes townships. *Millville Imp. Co. v. Pitman, Glassboro & Clayton Gas Co.*, 67 Atl. 1005, 75 N. J. Law, 410.

2 Gen. St. 1895, p. 2199, authorizing the incorporation of companies for the construction, maintenance and operation of waterworks for the purposes of supplying "cities, towns, and villages" with water, includes townships. *Gloucester Turnpike Co. v. American Pipe Co.*, 78 Atl. 708, 710, 77 N. J. Eq. 471.

"The words 'town' and 'township' may be and frequently are used as meaning the same thing," and they were so used in Laws 1901, p. 272, § 2, as amended by Laws 1909, p. 323, requiring the county clerk to ascertain the rates per cent. required as to the property in the respective "towns, townships, districts, incorporated cities and villages" in his county, and providing that where the aggregate of all the taxes, exclusive of state, village, and levee taxes, certified to be extended against any property in any part of any taxing district or municipality, shall exceed 3 per cent. of the assessed valuation, the rate of tax levy shall be reduced in a specified way, and the law requires the clerk to exclude town taxes of an incorporated town before figuring the reduction of the rate referred to, and he cannot reduce such taxes. *Town of Cicero v. Haas*, 91 N. E. 574, 576, 244 Ill. 551 (citing 8 Words and Phrases, p. 7028).

**TOWN AND VILLAGE LOTS**

The term "town and village lots" was used by the inhabitants of Missouri, under each dominion, in the same sense as it was used in that state. *City of St. Louis v. St. Louis Blast Furnace Co.*, 138 S. W. 641, 235 Mo. 1.

**TOWN BOARD**

A "town board" is a tribunal authorized to investigate, examine, and pass upon, according to its own mode of procedure, the accounts against the town presented to it. Its final jurisdiction over claims against the town is plenary, and its determination is conclusive until reviewed by another competent tribunal, and even the board of supervisors cannot review or reverse the action of the town board," but must direct the sums specified in the certificate of audit to be levied on the property of the town. Under Town Laws 1890, p. 1211, c. 589) § 162, as amended by Laws 1897, p. 610, c. 481, authorizing the town board to audit accounts and allow claims against the town, the decision of a town board in allowing a claim for losses in excavating earth, though erroneous because based on an error in the amount of earth excavated, has the verity of a judgment, unless reversed in a proper proceeding, and a supervisor having funds in his hands for the payment of the claim cannot refuse to pay on the ground that the amount allowed is in excess of the sum to which the claimant is entitled. *In re Mefford*, 99 N. Y. Supp. 400-402, 113 App. Div. 529 (citing *Throuth v. Rigney*, 98 N. Y. 222-234; *People ex rel. Myers v. Barnes*, 20 N. E. 609, 21 Ill. 739, 114 N. Y. 317; *People ex rel. Abe v. Matthies*, 72 N. E. 103, 179 N. Y. 19, 174 N. Y. 259; *Bank of Staten Island v. New York City*, 74 N. Y. Supp. 284, 68 App. Div. 231; *People ex rel. Hamm v. Board of Town Auditors*, 59 N. Y. Supp. 615, 43 App. Div. 25).

**TOWN BRIDGE**

Generally speaking, a "town bridge" is wholly within a town, and a village street is wholly within a village; but the legislature having seen fit to provide that a town road, which is intersected by a village plat and crossed by a navigable stream, requiring to be bridged to make a road complete, shall be deemed to be a town road, the bridge a "town bridge" to the same extent that it is a village street and village road as regards the maintenance of the bridge, the meaning of the statute on the subject is perfectly plain. *Village of Bloomington v. Town of Bloomer*, 107 N. W. 974, 979, Wis. 297.

**TOWN CLERK**

Under Rev. St. 1878, § 4971, subd. 17, providing that the word "town" may be construed to include cities, wards, or districts,

unless such construction would be repugnant to the provisions of any act specially relating to the same, and section 433 providing that where a vacancy in a school district office is not filled by the school board, it shall be filled in the case of a joint school district, by the clerk of the town in which the schoolhouse is situated, where the schoolhouse of a joint school district is situated in a city, such a vacancy should be filled by the city clerk. *State ex rel. Ackerman v. Dahl*, 27 N. W. 343, 346, 65 Wis. 510.

The words "town clerk" include under Gen. Laws 1896, c. 26, § 8, a city clerk and the void provision of Gen. Laws 1896, c. 102, § 4, requiring city and town clerks on petition of the electors to insert a proposition for taking a vote on the question whether liquor licenses shall be granted in the warrant calling the town, ward, or district meetings, is not unseverable from the remainder of the section, which requires the petition to be submitted at each general election on the theory that no provision remains for notifying the electors of the vote to be taken, since notice must be given under chapter 37, § 8, requiring notice to the electors of a town meeting prescribed by law to be given by the "town clerk," and since, the Legislature having directed a vote on the question, the town and city clerks must give the notice in their warrants. *Ruhland v. Waterman* (R. I.) 71 Atl. 1, 3.

**TOWN DATUM**

A "town datum" is a certain monument or object, of a permanent character, which has been adopted by the municipality as a base or starting point for the grades and levels of the municipality. *Chicago Consol. Traction Co. v. Village of Oak Park*, 80 N. E. 42, 44, 225 Ill. 9.

**TOWN ELECTION**

The phrase "town election," in *Liquor Tax Law* (Laws 1896, c. 112) § 16, providing that each officer of a town charged by the election law, or by any special act relating to elections in any town, with the duty of preparing official ballots, shall have prepared, "at the time fixed by law for preparing the ballots for a town election occurring next after the passage of this act," ballots for voting on local option, refers to the annual town meeting at which officers are elected, in view of Town Law (Laws 1892, c. 680) § 86, as amended by Laws 1895, c. 810, providing for the preparation of official ballots for the election of town officers but not requiring official ballots for any other elections, and section 12, providing for the election of town officers at the annual town meeting, and section 25, providing for special town meetings, at which specified propositions may be voted on. *People ex rel. Thomas v. Sackett*, 44 N. Y. Supp. 593, 595, 15 App. Div. 290.

**TOWN HALL**

The "town hall" having been burned down, a by-law of a town, requiring notice of the town meeting to be posted at the town hall (St. 1893, c. 417, § 280), was sufficiently complied with by posting the notice at the place where the meeting was to be held. *Commonwealth v. Sullivan*, 42 N. E. 566, 165 Mass. 183.

**TOWN HOUSE**

In the act of 1861, providing that whenever the new town of Skowhegen should vote to build a "town house," which should be located on Skowhegen Island, the Legislature did not intend to limit the action of the people to a particular kind of structure which might be called a "town house," so much as to secure the location of some central place for the assembly of the town meeting, and probably intended no distinction between the terms "town house" and "town hall." *Anderson v. Parker*, 64 Atl. 771, 773, 101 Me. 416.

**TOWN LOT**

As land, see Land.

One town or city lot, see One Lot.

**TOWN MEETING**

Election as including, see Elect—Elected—Election.

**TOWN OFFICER**

As state officer, see State Officer.

Justices of the peace of towns are "town officers," under Const. art. 6, § 17, providing for their election at town meetings, or as directed by the Legislature. *Reid v. Stevens*, 126 N. Y. Supp. 379, 382, 70 Misc. Rep. 177.

**TOWN ROAD**

Generally speaking, a town bridge is one wholly within a town, and a village bridge one wholly within a village; but, the Legislature having seen fit to provide that a "town road" which is intersected by a village plat and crossed by a navigable stream, requiring to be bridged to make a road usable, shall be deemed to be a "town road" and the bridge a town bridge to the same extent that it is a village street and village bridge as regards the maintenance of the bridge, the meaning of the statute on the subject is perfectly plain. *Village of Bloomer v. Town of Bloomer*, 107 N. W. 974, 979, 128 Wis. 297.

**TOWN SCHOOL DISTRICT**

A "town school district" under the statute is a corporate body by necessary implication, separate and distinct from the town, since it has creation by name, in effect, perpetuity of existence, unity of person, and governing boards elected at "town school district" meetings. *North Troy Graded School Dist. v. Town of Troy*, 68 Atl. 1033, 1038, 80 Vt. 16.

**TOWN SUPERINTENDENT**

The terms "town superintendent" and "town superintendent of highways" are used interchangeably under the highway law (Laws 1909, c. 30 [Consol. Laws, c. 25]). *Maxson v. Gale*, 126 N. Y. Supp. 967, 968, 142 App. Div. 335.

**TOWN TREASURER**

A "town treasurer" is not the financial agent of the town. His duty is simply to receive and safely keep the public money and disburse it upon lawful warrant. *Baldwin v. Inhabitants of Prentiss*, 74 Atl. 1038, 105 Me. 469.

**TOWNSHIP**

See Any Township; School Township.

A "township" is a part of the state government. *Frantz v. Autry*, 91 Pac. 193, 211, 18 Okl. 561.

A "township" is clearly to be classed with quasi corporations, and not with municipal corporations. *Hanson v. City of Cresco*, 109 N. W. 1109, 1112, 132 Iowa, 533.

A "township" is not a body corporate, and it cannot sue or be sued. *Davis v. Laughlin*, 124 N. W. 876, 877, 147 Iowa, 478 (citing *Hanson v. Cresco*, 109 N. W. 1109, 132 Iowa, 540).

"Townships" are not corporate bodies, and under Revisal 1905, § 1318, subd. 30, can exercise only such corporate powers as are authorized by the general assembly; and while they and other taxing districts are sometimes referred to as quasi municipal corporations, they are but territorial sections of counties, upon which for appropriate purposes power is conferred to perform local governmental functions. "Townships" are constituent parts of the county organization. *Wittkowsky v. Board of Com'rs of Jackson County*, 63 S. E. 275, 277, 150 N. C. 90.

"Townships" are the lowest grade of municipal corporations, being created for specific purposes, and endowed with limited powers and liabilities, acting through officers duly authorized by the law for that purpose. *Posey Tp., Franklin County, v. Senour*, 86 N. E. 440, 441, 42 Ind. App. 580.

A "township" is but an auxiliary part of the sovereignty of the state. It is a subordinate division of the body politic of the state, and in the absence of an express statute imposing a liability a "township" is not liable for injuries sustained from defects in highways. *James v. Trustees of Wellston Tp.*, 90 Pac. 100, 101, 18 Okl. 56, 13 L. R. A. (N. S.) 1219, 11 Ann. Cas. 938.

A township is a subdivision of a county. To constitute an entire county a single township can scarcely be said to be a division of the county into townships. In the absence of anything to indicate a contrary intention, it must be assumed that the framers of the

Constitution and members of the Legislature in speaking of municipal townships used the word "township" in the ordinary popular sense of the term according to the context and approved usage of the language of Rev. Codes, § 8070, expressly providing for such construction. *State ex rel. Gillett v. Cronin*, 109 Pac. 144, 145, 41 Mont. 293 (citing *And. Law Dict.*; *Chicago & N. W. R. Co. v. Town of Oconto*, 50 Wis. 189, 6 N. W. 607, 36 Am. Rep. 840; *Abbott's Law Dict.*; 8 Words and Phrases, 7032).

"Townships" are quasi corporations formed to exercise purely governmental powers, and, in the absence of an express statute to that effect, are not liable for damages either for the nonexercise of their powers, or for their improper exercise by those charged with their execution. *Cassidy v. City of St. Joseph*, 152 S. W. 306, 309, 247 Mo. 197.

"Townships" are merely quasi corporations, not endowed with the full and plenary powers usually conferred either by charter or by general law upon municipal corporations proper, but only resembling the same in organization and functions. *Wilson v. Ulysses Township, Butler County*, 101 N. W. 986, 988, 72 Neb. 807, 9 Ann. Cas. 1153.

In a suit to quiet title, a stipulation provided that all the surveyed lands in the vicinity were in September, 1850, swamps and overflowed lands, and passed to the state, and that the "townships," including Walker's Lake as meandered on the map, were included by the Secretary of the Interior in the list of lands granted to the state under the swamp land act (Act Cong. Sept. 28, 1850, c. 84). Held, that the word "townships" as used in such stipulation was limited to the townships as surveyed and platted by the government surveyors, and meant the townships according to the surveys and plats, and did not include unsurveyed lands erroneously included within the meandered line of the lake. *Little v. Williams*, 113 S. W. 340, 345, 38 Ark. 37.

#### Cities

"The cities of the state of Kansas are 'townships,' within the meaning of the Constitution and statutes, for the purposes of the election of justices of the peace, and such officers, although elected within a city, are not strictly city officers. *Fee v. Richardson*, 107 Pac. 789, 790, 82 Kan. 190 (quoting *State v. Parry*, 33 Pac. 956, 52 Kan. 1, 21 L. R. A. 660).

#### As district

See District.

#### As municipality

See Municipality.

#### Town

See, also, Town.

Laws 1901, p. 272, § 2, as amended by Laws 1900, p. 323, requiring the county clerk

to ascertain the rates per cent. required as to the property in the respective "towns, townships, districts, incorporated cities, and villages" in his county, and providing that where the aggregate of all the taxes, exclusive of state, village, and levee taxes, certified to be extended against any property in any part of any taxing district or municipality, shall exceed 3 per cent. of the assessed valuation, the rate of tax levy shall be reduced in a specified way, requires the clerk to exclude town taxes of an incorporated town before figuring the reduction of the rate referred to, and he cannot reduce such town taxes, for the words "incorporated villages," as used in the act, include incorporated towns, and the words "town" and "township" as used in the act are synonymous. *Town of Cicero v. Haas*, 91 N. E. 574, 576, 244 Ill. 551 (citing 8 Words and Phrases, p. 7028).

#### TOWNSHIP AFFAIRS

Act May 10, 1901 (Sess. Laws 1901, pp. 253-256), authorizes corporate authorities of certain towns, on the request of the board of park commissioners, to issue bonds; provides that, when issued, they shall be delivered to the board of park commissioners, to be by them sold, and the proceeds used for the purchase and improvement of land selected as sites for small parks or pleasure grounds; limits the indebtedness of the town, to include such bonds; and makes it incumbent on the town authorities to levy a tax to meet the principal and interest. The property to be levied on for the collection of the tax is town property. Held, that the issuance of the bonds and levying of the tax are regulations of "township affairs," and hence the act is within the purview of Const. 1870, art. 4, § 22, providing that no local or special law regulating township affairs shall be passed. *Pettibone v. West Chicago Park Com'rs*, 74 N. E. 387-397, 215 Ill. 304.

#### TOWNSHIP COMMITTEE

"Act April 16, 1896, after providing the method by which a division and apportionment of the assets and liabilities of the township shall be made, declares that 'no such division and apportionment shall be valid unless the same shall be approved by a majority either of the said township or of the said mayor and council' (of the borough). P. L. 1896, p. 270. It appears that in the present case the division and apportionment of assets and liabilities were approved, not by a majority either of the township or of the mayor and council of the borough, but by a majority of the 'township committee' of the township of Orvil. \* \* \* Although it seems probable, from an examination of the other parts of this act, that the Legislature intended to confer the power of approval upon the governing body of the township rather than on the township itself, we cannot say that such intent appears beyond doubt. Not to be able to do this is fatal

to the claim of the plaintiff, for the injection of the word 'committee' into the statute, under such circumstances, would be an act of the Legislature rather than of construction." *Inhabitants of Orvil Tp. v. Borough of Woodcliff*, 45 Atl. 686, 64 N. J. Law, 286.

### TOWNSHIP OFFICE

Under Acts 1905, p. 463, providing that each political township in the county shall be a road district for which a township road overseer shall be elected, the office of road overseer in a certain district in a county is a "township office," within Kirby's Dig. § 2860, providing that a contest of the election of any county or township officer shall be before the county court where not otherwise provided for, so that that court would have jurisdiction of an election contest for the office of road overseer for a certain district. *Condren v. Gibbs*, 127 S. W. 731, 732, 94 Ark. 478.

### TOWNSHIP OFFICER

Under the statutes of Oklahoma (section 3, art. 1, c. 81 [section 6664], Wilson's Rev. & Ann. St. 1903), justices of the peace are "township officers," and are required to reside and hold their office within the township where elected (section 4, art. 1, c. 81 [section 6665], Wilson's Rev. & Ann. St. 1903), and jurisdiction to try and determine causes outside of the township, not being granted, cannot be conferred by agreement of parties. *Leiber v. Argabright*, 105 Pac. 341, 342, 25 Okl. 177.

Act Jan. 20, 1839 (P. L. 337), provides for the election of a board of managers for the relief and employment of the poor in a certain township and makes them a body politic and corporate in law, with all powers of such body. Held, that they are officers of a distinct and separate corporation created by statute, having special powers and duties, and are not "township officers." Hence Act March 10, 1875 (P. L. 6), providing dates on which the "township officers" shall be elected, does not affect the act of 1839. *Commonwealth v. Bowditch*, 66 Atl. 867, 868, 217 Pa. 527.

"The cities of the state of Kansas are 'townships,' within the meaning of the Constitution and statutes, for the purposes of the election of justices of the peace, and such officers, although elected within a city, are not strictly city officers. Their official duties are not limited to the boundaries of the cities in which they are elected, nor by the provisions of the charters or ordinances of the city in which they reside. Their civil and criminal jurisdiction are coextensive with their counties, except as otherwise provided by law. Chapter 230, Laws 1887, does not confer upon women the right to vote for justices of the peace in the cities of the state. In one sense such officers are 'township of-

icers,' rather than city officers." *Fee v. Richardson*, 107 Pac. 789, 790, 82 Kan. 190 (quoting *State v. Parry*, 33 Pac. 956, 52 Kan. 1, 21 L. R. A. 669).

### TOWNSHIP ROAD

Drainage Act May 29, 1879, § 55, authorizing the assessment of benefits for drains against "any public or corporate road or railroad," and apportioning to "the county, state or free turnpike road, to the township, if a township road, to the company, if a corporate road or railroad, such portions of the cost" thereof as to individuals, and providing that, in case such assessment is made in any "township," the commissioners of highways shall cause the same to be levied in the manner provided by Act June 23, 1883, §§ 13-16, does not confer on a drainage district the power to assess benefits to public streets without the consent of the city. *City of Joliet v. Spring Creek Drainage Dist.*, 78 N. E. 836, 843, 222 Ill. 441.

### TOWNSHIP WARRANT

A "township warrant" is an anomalous kind of a contract. It is not a promissory note in any sense of the word. Standing alone, it creates no liability against the township, and in order to sustain an action based upon it the complaint must show by proper averment what it was given for, and, if for goods of any character, that they were suitable, useful, and necessary for the township, and that the township received and used them. *Mitchelltree School Tp. of Martin County v. Carnahan*, 84 N. E. 520, 522, 42 Ind. App. 473.

### TOWNSITE TRUSTEE

As holding an office, see Officer.

## TOYS

A "toy" is "an article constructed for the amusement of children; a plaything, as a doll or Noah's ark; hence, any trifling or amusing object; any bauble or knickknack; trinket; trifle." Ping-pong balls are not "toys," as provided for in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 191, par. 418, but are dutiable under paragraph 17 of said act, Schedule A, § 1, c. 11, 30 Stat. 152, as articles of collusion. *United States v. Strauss Bros. & Co.*, 136 Fed. 185, 187, 69 C. C. A. 201 (quoting and adopting definition in *Stand. Dict.*).

Ping-pong balls, which were sometimes sold as toys before the game of ping-pong was invented, and which have been occasionally sold for the same purpose since the game went out of vogue, but which, when imported, were not intended to be used chiefly as toys, but in the game of ping-pong, are not dutiable as "toys," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418. *United States v. Wanamaker*, 136 Fed. 266, 267 (distinguishing *United States v. Strauss Bros. &*

Co., 136 Fed. 185, 69 C. C. A. 201, and citing *Cadwalader v. Wanamaker*, 149 U. S. 539, 13 Sup. Ct. 979, 983, 37 L. Ed. 837).

"Toys" are playthings for the amusement of children. Imitation roses of celluloid and metal, which are worn as boutonnieres, chiefly by children on occasions of frolic and fun, and are also used as gifts in prize packages, are not "toys," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191, but are dutiable as "artificial \* \* \* flowers," under paragraph 425. *Hamburger & Co. v. United States*, 180 Fed. 632, 633 (citing U. S. v. Cattus, 167 Fed. 532, 93 C. C. A. 64).

The real test of whether an article is a "toy" is its use by children as a plaything; and diminutive penknives with odd-shaped handles, which though they cannot be effectively used for most of the purposes for which an ordinary pocketknife is used, are not in fact used as playthings, are less properly classed as "toys," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191, than as "penknives" under Schedule C, par. 153. *A. Kastor & Bros. v. United States*, 167 Fed. 993, 994.

Artificial shamrocks are not "toys," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191, but are dutiable as "artificial leaves, under paragraph 425, 30 Stat. 191. *United States v. Cattus*, 167 Fed. 532, 533, 93 C. C. A. 64.

The provision for "toys" in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191, does not include small silk flags mounted on slender wooden staffs about 4½ inches long. *Tuska v. United States*, 162 Fed. 814.

Where there was evidence that a 22-caliber Stevens rifle was used for hunting and killing game, and was capable of killing a human being, it was not within Rev. St. 1898, § 49a, prohibiting the use or possession of "any toy pistol, toy revolver, or toy firearm." *Taylor v. Sell*, 97 N. W. 498, 120 Wis. 32.

The provision for "toys" in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 434, 30 Stat. 192, does not include figures of animals, single or groups, which are known in trade as metal novelties, and are generally used as mantel or cabinet ornaments, but are dutiable under paragraph 193. *Samstag & Hilder Bros Co. v. United States*, 154 Fed. 756, 757.

In regard to stuffed skins of domestic chicks and ducklings, used by confectioners and dealers in Easter goods and novelties, held, that they are not "toys" within the meaning of Tariff Act July 24 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191, but "birds, stuffed," under paragraph 493, § 2, Free List, 30 Stat. 196. *Morimura Bros. v. United States*, 141 Fed. 383.

"Toys" made of celluloid, a compound of pyroxylin, are dutiable under the provision in the Tariff Act relating to a number of toys specified "and all other toys not composed of rubber, china, porcelain, parian, bisque, earthen or stone ware and not specially provided for in this act," rather than under a provision relating to "compounds of pyroxylin whether known as celluloid or by any other name." *United States v. Schwarz*, 140 Fed. 302, 304.

The provision for "toys" in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 418, 30 Stat. 191, held not to include fragile, flimsy articles of tinsel, in the shape of rings, stars, etc., which, while they may amuse or entertain children when hung on a Christmas tree, are not suitable to be played with, and, besides being used as Christmas tree ornaments, are employed in shop decorations. *Thanhauser v. United States*, 159 Fed. 228, 232.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 427, 30 Stat. 191, for "fans of all kinds," was, notwithstanding its broad language, not intended to include everything which might be called a fan, and to an exceedingly limited extent used as a fan; and so-called cigar fans and firecracker fans, consisting of small folding fans closing into cases representing cigars, etc., are not dutiable under said provision, but under paragraph 418, 30 Stat. 191, as "toys." *Morimura Bros. v. United States*, 175 Fed. 887, 889.

#### TOY PISTOL

As pistol, see Pistol.

#### TR

The abbreviation "Tr.," in a description of property in an assessment as being "in Los Angeles county in Pellissier Tr.," stood for "tract." *Baird v. Monroe*, 89 Pac. 352, 356, 150 Cal. 560.

#### TRACHOMA

"Trachoma" is a dangerous, contagious disease. *United States v. Williams*, 132 Fed. 894, 895.

#### TRACK

See Double Track; Main Track; Occupied by its Tracks; Outside of Tracks; Public Track; Railroad Track; Roadbed and Track; Side Track; Skeleton Track; Storage Tracks; Street Railroad Track; Team Track.

As railroad, see Railroad—Railway.

Remove tracks, see Remove—Removal.

#### TRACK DELIVERY

Code 1907, § 5604, providing that railroad companies shall deliver freight at their depots or warehouses, or, in case of "track



delivery," shall place loaded cars at an accessible place for unloading within 24 hours after arrival, by the words "track delivery," means tracks maintained by the railroad companies at an accessible place for unloading, for the purpose of delivering freight in car load lots. *Greek-American Produce Co. v. Illinois Cent. R. Co.*, 58 South. 994, 995, 4 Ala. App. 377.

### TRACKMAN

In an action against a railroad for injuries to a passenger in a wreck, where the only issue presented was the unsafe condition of the track, owing to a failure to properly spike and tamp the ties and fill in between them where old ties had been replaced by new ones, and defendant sought to show that skillful trackmen had cared for the track in a careful manner the day before the wreck, the court charged that defendant was bound to exercise "that very high degree of care which a very highly skillful, experienced, and very careful person would exercise under similar circumstances in the conduct of the business." A special charge was also given that the care required was such as a very highly experienced and skillful, and very highly prudent, railroad trackman would have exercised under the circumstances. Held, that the special charge did not limit the degree of care required by the main charge, since "trackmen" were the only men working on the tracks "under similar circumstances," and the term included the roadmaster and section foreman as well as the common section hand. *Norton v. Galveston, H. & S. A. Ry. Co. (Tex.)* 108 S. W. 1044, 1046.

### TRACKS AND RUNNING PARTS

In an injury action against a carrier by a passenger, an allegation that defendant so carelessly repaired and maintained the tracks and the running parts of the passenger car, and so carelessly allowed them to become unsafe, and defective, etc., is too general in respect to how the tracks and running parts of the car were unsafe; the phrase "the tracks and running parts" not being restricted in meaning to wheels and axles, but being broad enough to embrace as much as the phrase "defective brakes and other appliances." *Braunstein v. People's Ry. Co. (Del.)* 77 Atl. 738, 740, 1 Boyce, 310.

### TRACT

See Lots, Blocks, Tracts, and Parcels of Land.

See, also, Tr.

See, also, Parcel.

"A 'tract' is defined as a 'lot, piece, or parcel of land of greater or less size, the term not importing in itself any precise dimensions.' \* \* \* Under the word 'tract' in Anderson's Law Dictionary it is said: 'Does not imply anything as to the size of

the tract of land.' " The failure to enter for taxation a lot lying in an unincorporated village in a separate table under the head of "Town Lots," and the listing of such lot in the land book under "Tracts of Land," do not vitiate the assessment. *Fleming v. Char-nock*, 66 S. E. 8, 9, 66 W. Va. 55, 18 Ann. Cas. 711 (quoting and adopting definition in *Black, Law Dict.* and *And. Law Dict.*).

"The terms 'tract or lot' and 'piece or parcel of real property,' or 'piece or parcel of land,' means any contiguous quantity of land in the possession of, owned by, or recorded as the property of the same claimant, person or company." In this connection the word "contiguous" means land which touches on the sides. Hence two quarters of the same section which only touch at the corner do not constitute, for the purpose of taxation, one tract or parcel of land. *Griffin v. Denison Land Co.*, 119 N. W. 1041, 1043, 18 N. D. 246 (quoting from *Rev. Codes, 1905, § 1480* [*Rev. Codes 1899, § 1176*]).

The usual signification of the word "tract," as applied to land, is contiguity of the parcels of property. Const. § 111, provides that all lands comprising a single tract, sold in pursuance of decree of court or on execution, shall be first offered in subdivisions not exceeding 160 acres, and then offered as an entirety, and the price bid for the latter shall control only when it shall exceed the aggregate of the bids for the land in subdivisions. Code 1892, § 2443, provides that all lands comprising a single tract and wholly described by the subdivisions of the governmental surveys, sold under mortgages and trust deeds, shall be sold as provided in Const. § 111. Land sold under a trust deed had been held for many years as a home place, all as part of one plantation, though 80 acres of it was about half a mile from the balance, but connected with it by a public road. Held, that the lands as a whole comprised only a single tract, and should have been sold as if they lay contiguously. *Provine v. Thornton*, 46 South. 950, 951, 92 Miss. 395.

Laws 1890, p. 376, c. 132, § 32, provides that the assessor shall actually view when practicable and determine the true and full value of each lot of real property listed for taxation and shall enter the value thereof in one column, etc., and the statutes further provide that the term "tract" or "lot" and "piece," or "parcel of real property," and "piece" or "parcel of land," whenever used in the act relating to revenue and taxation, shall be held to mean any contiguous quantity of land in the possession, owned by, or recorded as the property of, the same claimant, person, or company. Held, that under the statutes smaller tracts or subdivisions composing a larger tract could not be assessed as one tract, where the land was owned by different persons under recorded titles or in joint ownership, and assessments in one

tract of different ownerships or estates in different tracts seem to be inhibited, where the different titles are of record. *State Finance Co. v. Myers*, 112 N. W. 76, 78, 16 N. D. 193.

## TRACTION OR ROAD ENGINE

As automobile, see Automobile.

As vehicle, see Vehicle.

*Burns' Ann. St.* 1901, § 2044, providing that any person using a "traction or road engine" on a public street in an incorporated town or city shall send a person in advance not less than 50 yards to warn approaching teams, does not apply to a "steam roller" used in making or repairing city streets. *City of New Albany v. Stier*, 72 N. E. 273, 277, 34 Ind. App. 615.

## TRADE

See Building for Trade or Manufacture; Combination in Restraint of Trade; Common Tools of Trade; Hardware Trade; Place of Trade; Purposes of Trade; Stock in Trade; Tools—Tools of Trade."

Any trade, manufacture, or business, see Any.

Employed in trade, see Employed.

Kind of trade, see Kind.

The words "trade or manufacture" are not technical words, but have common, ordinary meanings. *Sharpe v. Hasey*, 114 N. W. 1118, 1119, 134 Wis. 618.

A "trade" is synonymous with an "exchange," which signifies a transfer of one or more pieces of property for other property. *Colgan v. Farmers' & Mechanics' Bank*, 114 Pac. 460, 464, 59 Or. 469 (citing 3 Words and Phrases, p. 2546).

To say that a match manufacturing company receives letters from "the trade" means that it receives letters from dealers in matches. *Mulholland v. Washington Match Co.*, 77 Pac. 497, 498, 35 Wash. 315.

A two-family house is not in violation of a covenant against the erection of any building to be used or occupied "for any trade, manufacture, etc., or in any objectionable manner whatever." *McDonald v. Spang*, 105 N. Y. Supp. 617, 620, 55 Misc. Rep. 332.

A contract for the sale of asphalt and cement, requiring the seller to furnish to the buyer the materials designated for the latter's exclusive use in his own "trade," did not permit the buyer to make contracts with third parties and require the seller to fill them. *Trinidad Asphalt Mfg. Co. v. Trinidad Asphalt Refining Co.*, 119 Fed. 134, 137, 55 C. C. A. 566.

Where defendant, holding a horse under a conditional sale from S., by which title was reserved in S. until payment of the purchase money and note, made an agreement with

S., on maturity of the note, when part only of it had been paid, that S. should sell to him a mule, and in payment therefor defendant should turn back the horse to S. and pay him an additional sum, and this was done, defendant under his contract of purchase of the horse, having an interest in it which he could sell, and S., on default of payment for it, having a right to affirm the sale and waive reservation of title, which he in effect did, it was held that this amounted to a "trade" of the horse, within a contract by which services furnished by plaintiff were to be paid for on the trading of the horse by defendant. *Snyder v. Slatton*, 123 S. W. 649, 650, 92 Ark. 530.

The owning, controlling, and leasing of theaters, and the producing of plays and entertainments, and the booking of contracts for the production of plays, is not "trade or commerce," within Pen. Code, § 168, subs. 5, 6, prohibiting a conspiracy to commit any act injurious to "trade or commerce." *People v. Klaw*, 106 N. Y. Supp. 341, 350, 55 Misc. Rep. 72 (citing *Webst. Dict.*; *Stand. Dict.*; 2 *Bouv. Law Dict.* 1127; *Jac. Law Dict.*; *United States v. Cassidy*, 67 Fed. 698; *United States v. Coal Dealers' Ass'n*, 85 Fed. 252; *Gibbons v. Ogden*, 22 U. S. [9 Wheat.] 1, 6 L. Ed. 23; *Henderson v. New York*, 92 U. S. 259, 23 L. Ed. 543; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 405, 24 L. Ed. 527).

The word "trade" in its broadest significance includes, not only the business of exchanging commodities by barter, but the business of buying and selling for money or commerce and traffic generally. A corporation chartered for the purpose of erecting a dam and the cutting, storing, and selling of ice, is a "trading corporation" within the statute authorizing trading corporations to wind up their affairs after the expiration of their charter. *Pocono Spring Water Ice Co. v. American Ice Co.*, 64 Atl. 398, 400, 214 Pa. 640 (quoting and adopting definition in *May v. Sloan*, 101 U. S. 231, 25 L. Ed. 797).

Rev. St. § 2078, provides that no person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for and on account of the United States, and any person offending shall be liable to a penalty of \$5,000 and shall be removed from office. *Indian Appropriation Act July 4, 1884*, c. 180, 23 Stat. 94, declares that where Indians are in possession or control of cattle or their increase, which have been purchased by the government, such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong, or to any citizen of the United States whether intermarried with the Indians or not, except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. Held, that the word "trade" was used in section 2078 in its

ordinary sense, to mean the act or business of exchanging commodities either by barter or by buying and selling for money; commerce; traffic; barter; and hence such section prohibited a female industrial school teacher, while employed by the government, from purchasing from Indians cattle furnished by the United States and issued to them. *United States v. Douglas*, 190 Fed. 482, 484, 111 C. C. A. 314, 36 L. R. A. (N. S.) 1075.

#### **As any business for profit**

The charter of the town of Lenoir (Priv. Laws 1909, c. 37, § 1) provides that, in addition to the powers hereinbefore specially conferred, the town shall have all the power incident to corporations of like character under the general laws of the state. Revisal 1905, § 2924, confers on cities and towns the power of annually levying the tax on all trades, professions, etc., carried on within the city. Held, that the town was empowered to impose a license tax of \$5 on every soda fountain maintained in the town; the business of keeping a soda fountain being a "trade" as that term is used in the act, which means any employment or business embarked in for gain or profit. *Lenoir Drug Co. v. Town of Lenoir*, 76 S. E. 480, 481, 160 N. C. 571.

#### **As buying and selling**

"Trade" is the business of exchanging commodities by buying and selling for money. Interstate trade is the business of buying, selling, and exchanging commodities between the states, and parties may be so engaged, even though they act through the agency of carriers. *United States v. American Tobacco Co.*, 164 Fed. 700, 708.

"Trade," within the Bankruptcy Act (Act July 1, 1898, c. 541, § 4b, 30 Stat. 547), is the buying and selling of merchandise or any class of goods, deriving a profit therefrom. *In re Hudson River Electric Power Co.*, 173 Fed. 934, 947.

To "trade" is to engage in the purchase or sale of goods, wares, and merchandise, and a firm engaging in the business of buying standing lumber in large quantities, and cutting and sawing the same, and selling the lumber, is engaged in a trading business, within Gen. St. 1902, § 2342, providing for the assessment for taxation of the property of any trading business. *Jackson v. Town of Union*, 73 Atl. 773, 774, 82 Conn. 266 (citing Cent. Dict.).

#### **Exchange synonymous**

See Exchange.

#### **As occupation or profession**

The word "trade" embraces within its meaning commercial traffic, and it also has a restricted significance, which applies to mechanical pursuits; but in its broad and general sense it covers and embraces all occupations and business, with the possible exception of the learned professions and those that

pertain to liberal arts and the pursuit of agriculture. *Gelse v. Pennsylvania Fire Ins. Co. (Tex.)* 107 S. W. 555.

#### **Sale distinguished**

A sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent; but if the purchase price is paid by the transfer of other property, the transaction is more properly denominated an exchange or "trade." Where, to acquire means of irrigating for lands so as to make them salable, they were transferred to a land and irrigation company, the owners taking stock and bonds therefor, the transaction was a consolidation of interests, and not a sale of the lands, within a contract entitling plaintiff to commissions for services in effecting sales of the lands; and though plaintiff could not recover under a contract entitling him to commissions for effecting sales of lands, where they were conveyed to a corporation, the owners taking stock and bonds therefor, he could recover the reasonable value of his services in bringing about the transaction. *Close v. Browne*, 82 N. E. 629, 632, 230 Ill. 228, 13 L. R. A. (N. S.) 63.

#### **TRADE AND BUSINESS**

The words "trade and business" in Laws 1897, c. 79, by the provisions of which combinations to prevent competition in insurance, or to settle the price thereof, are declared to be a trust and an unlawful conspiracy against trade and business, are intended as a generic term embracing all the transactions and practices mentioned in the act; and the term "trust" is properly made to include combinations or contracts in restraint of competition in insurance. *State v. American Surety Co.*, 135 N. W. 365, 366, 91 Neb. 22, Ann. Cas. 1913B, 973.

#### **TRADE DISCOUNT**

A "trade discount" is a percentage deduction from the regular list or catalogue price of goods. *Smith Table Co. v. Madsen*, 84 Pac. 885, 30 Utah, 297.

#### **TRADE FIXTURES**

As Fixtures, see Fixture.

"Trade fixtures" are articles erected or annexed to the realty by the tenant for the purpose of carrying on a trade, and are removable by him during his term, provided the removal does not affect the essential characteristics of the article removed or reduce it to mass of crude materials. *Field v. Morris*, 129 S. W. 543, 545, 95 Ark. 268.

"Trade fixtures" are personal property placed upon or annexed to the realty by a tenant for the purpose of carrying on a trade or business during the term of the lease, and he has a right to remove them before the expiration of the lease, providing it can be done without destruction and will not materially injure the premises. *Cohen v. Wittemann*,

Y. Supp. 493, 497, 100 App. Div. 338; *Orabony v. Jones*, 19 N. Y. 234; *Talbot v. Apple*, 96 Mass. [14 Allen] 177.

The term "trade fixtures" includes such as coal tipples, mine tracks, incline s, and other appliances or machines are fixed to the realty, which must be ed to the lessee on the land books for ses of taxation. *State ex rel. Dillon v. 56 S. E. 390, 393, 60 W. Va. 483.*

A dummy elevator and sludge table, could be removed from a mining plant out injury to the real estate, were "trade es." *Weeks-Betts Hardware Co. v. Welt Lead & Zinc Co.*, 134 S. W. 85, 37, 10 App. 387.

Fences, windmills, lightning rods, and ring around the house are not such e fixtures" within Comp. Laws 1909, § as may be removed by a tenant who has ad them, unless there is some agreement at effect. *Kilgore v. Lyle*, 120 Pac. 626, 10 Okl. 596.

Heavy plate glass windows and marble lled by a tenant as the front of a store ing cannot be regarded as "trade fix-" which he was entitled to remove, e removal exposed the interior of the ing, though it was accomplished without ching nails, breaking beams, or weaken-he building. *Alden v. Mayfield*, 127 Pac. 5, 163 Cal. 793, 41 L. R. A. (N. S.) 1022, Cas. 1914A, 258.

In the absence of agreement, a lessee remove his trade fixtures while the lease force, and such fixtures include not onlyinery, but buildings erected for trade oses. Under a lease for a long term of ; for manufacturing purposes, a building ed for a plant is a removable "trade fix-" regardless of its size or the materials hich it is made. In re *Montello Brick ks*, 163 Fed. 624, 632; *Montello Brick Co. exler*, 167 Fed. 482, 93 C. C. A. 118.

"Trade fixtures" is a term usually used scribe property which a tenant has plac-n rented real estate to advance the bust-for which the realty is leased, and may, gainst the lessor and those claiming un-him, he removed at the end of the ten-term. Trade fixtures substituted for es-ial parts of the leased premises, and not ions thereto, are not removable and are ured to be permanent additions. *John P. re & Co. v. City of Portland*, 76 Atl. 679, 106 Me. 234, 30 L. R. A. (N. S.) 576, 20 . Cas. 603 (quoting 8 Words and Phrases, 142).

As between landlord and tenant, articles ed by the tenant to the premises for the ose of carrying on the business for which premises were leased are denominated de fixtures," and are removable by the nt. Machinery, which a lessee of mining

premises placed thereon for the operation of the mine, though firmly attached to the realty, is a trade fixture, which he is entitled to remove within a reasonable time after the forfeiture of the lease. *Updegraff v. Lesem*, 62 Pac. 342, 345, 15 Colo. App. 297.

"Trade fixtures" are property placed by a tenant on rented realty to advance the business for which the realty was leased, and which may, as against the lessor and those claiming under him, be removed at the end of the lessee's term. A bar, back bar, mirrors, a hand and foot rail, screens, summer doors, an ice box, radiators, partition doors, chandeliers, and chairs, placed by a tenant in a building leased to him for saloon purposes, were "trade fixtures," which the tenant was entitled to remove; it not appearing that any of the articles were so affixed to the realty that they could not be readily removed. *Webber v. Franklin Brewing Co.*, 108 N. Y. Supp. 251, 252, 123 App. Div. 465.

When a bank, in possession of a building as a tenant, constructed at its own expense a brick vault, on which was placed a steel safe which was necessary in the conduct of its business, and the safe could be removed, and the pieces reassembled and used again for the same purpose, without injury to the safe or to the freehold, it was held that the safe was a "trade fixture," within Civ. Code, § 1019, authorizing a tenant to remove a trade fixture, and the bank, before the termination of the tenancy, could remove it. *Woods v. Bank of Haywards*, 106 Pac. 780, 781, 10 Cal. App. 93.

In New York the rule is that if the article be attached for temporary use, with the intention of removing it and in such a manner that its removal can be effected without substantial injury to the freehold, it will be regarded as a chattel and may be removed by the tenant; but if annexation be permanent in character, or the article be specially adapted for use in the place where it is annexed, it becomes a fixture and cannot be removed. Articles annexed to the realty for the purpose of carrying on a trade are known as "trade fixtures," and are removable by the tenant during his term, if the removal will not materially injure the premises. Where certain rented property was used as a factory, boilers, engines, shafting, hangers, pulleys, etc., placed on the premises by the tenant for use in its business, and removable without material injury to the building, were "trade fixtures," which the tenant was entitled to remove on termination of the lease. *Bergh v. Herring-Hall-Marvin Safe Co.*, 136 Fed. 368, 370, 69 C. C. A. 212, 70 L. R. A. 756 (citing *N. Y. Life Ins. Co. v. Allison*, 107 Fed. 179, 46 C. C. A. 229; *Livingston v. Sulzer* [N. Y.] 19 Hun, 375; *Smith v. Whitney*, 18 N. E. 229, 147 Mass. 479; *Holbrook v. Chamberlin*, 116 Mass. 155, 17 Am. Rep. 146; *Globe Marble Mills Co. v.*

Quinn, 76 N. Y. 23, 32 Am. Rep. 259; Cook v. Champlain Trans. Co. [N. Y.] 1 Denio, 91).

### TRADE-MARK

Infringement of, see Infringement.

A "trade-mark" is a form, symbol, or name appropriated by one who produces or deals in a particular thing or conducts a particular business to designate the origin or ownership thereof. *Italian Swiss Colony v. Italian Vineyard Co.*, 110 Pac. 913, 914, 158 Cal. 252, 32 L. R. A. (N. S.) 439.

A "trade-mark" is an arbitrary distinctive name, symbol, or device to indicate the origin of the product to which it is attached, and, when adopted, becomes the exclusive property of its proprietor. *Sartor v. Schaden*, 101 N. W. 511, 513, 125 Iowa, 696.

A "trade-mark" is a guaranty that the goods to which it is attached are made by its owner. *American Tobacco Co. v. Polacsek*, 170 Fed. 117, 120.

A "trade-mark" or "trade-name" is some symbol by which one man's manufacture is differentiated from another's, and all that is needed for a valid trade-name is that it indicate the manufacture of the owner, whether there are other manufacturers or not. *R. Guastavino Co. v. Comerma*, 180 Fed. 920, 921.

A "trade-mark" is a distinctive name, word, mark, emblem, design, symbol, or device used in lawful commerce to indicate or authenticate the source from which has come, or through which has passed, the chattel on or to which it is affixed. *Western Grocer Co. v. Caffarelli Bros. (Tex.)* 108 S. W. 413, 414.

A "trade-mark" is a name, sign, or symbol which indicates or certifies that a given article or commodity is in reality what it claims or purports to be, and, while in a qualified sense it is property in the hands of its owner, it has no intrinsic value, being merely a certificate of the truth. *Commonwealth v. Kentucky Distilleries & Warehouse Co.*, 116 S. W. 766, 768, 132 Ky. 521, 21 L. R. A. (N. S.) 30, 136 Am. St. Rep. 186, 18 Ann. Cas. 1156.

A "trade-mark" is a distinctive mark of authenticity through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others; consequently, where a patent expires upon an article, the name of the patented article cannot be registered as a trade-mark, its use being free to the public. *Bristol Co. v. Graham*, 109 Fed. 412, 414, 117 C. C. A. 644; *De Nobili v. Scanda*, 198 Fed. 341 (citing *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 31 Sup. Ct. 456, 220 U. S. 446, 55 L. Ed. 536).

A valid "trade-mark" may consist of some novel device, arbitrary character, or

fancy word applied without special meaning, which by use comes to serve the same purpose, and such words and devices indicate sufficiently the true source of the article without particular addition of the name of the manufacturer or dealer. *Avenarius v. Kornely*, 121 N. W. 336, 342, 139 Wis. 247.

A "trade-mark" is any sign, mark, symbol, word, or words which indicate the origin or ownership of an article as distinguished from its quality, and which others have not the equal right to employ for the same purposes. In its strictest sense, it is applicable only to a vendible article of merchandise to which it is affixed. *Ball v. Broadway Bazaar*, 87 N. E. 674, 675, 194 N. Y. 429.

"A 'trade-mark' may consist of a name, or a device, or a peculiar arrangement of words, lines, or figures in the form of a label, which has been adopted and used by a person in his business to designate goods of a particular kind manufactured by him, and which no other person has an equal right to use." As against the commonwealth, no person can claim the right to use the seal of the commonwealth for advertising or commercial purposes. *Commonwealth v. R. I. Sherman Mfg. Co.*, 75 N. E. 71, 189 Mass. 76, 4 Ann. Cas. 268 (citing *Gilman v. Hunnewell*, 122 Mass. 139, 147).

A "trade-mark" is an arbitrary distinctive name, symbol, or device to indicate or authenticate the origin of the product to which it is attached. A word may be purely generic or descriptive, and so not capable of becoming an arbitrary trade-mark. Thus a proper or geographical name is not the subject of a trade-mark. The right to the use of an arbitrary name or device as indicia of origin is protected upon the ground of a legal right to its use by the person appropriating it. *G. W. Cole Co. v. American Cement & Oil Co.*, 130 Fed. 703, 705, 65 C. C. A. 105.

A device or symbol, not adopted for the purpose of indicating origin, manufacture, or ownership, but placed upon an article to denote class, grade, style, or quality, cannot be upheld as technically a "trade-mark." *Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.*, 135 Fed. 625, 632, 68 C. C. A. 263 (citing *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 11 Sup. Ct. 396, 400, 34 L. Ed. 997, 138 U. S. 537, 547).

The primary purpose of a trade-mark is to indicate the producer of the article or commodity on which it is used and to distinguish it from like articles produced by others. A representation of a star cannot by its own meaning indicate the origin or ownership of such an article as lubricating oil, nor, in view of its general use as a symbol, can it be appropriated as a trade-mark, except in connection with other devices or words such as to render the whole character-

ic. Galena-Signal Oil Co. v. W. P. Fuller Co., 142 Fed. 1002, 1007.

The function of a "trade-mark" is to distinguish the products of a manufacturer the objects of commerce, or to point out distinctly the origin or ownership of the article to which it is affixed; that is to say, must of itself or by association indicate the origin or ownership of the article. A trade-mark or trade-name is of no virtue in itself. It becomes of value only through use, and because by use it is an assistance to purchasers of the excellence of the article to which it is affixed as manufactured by the one whose name appears the producer. *Bulte v. Igleheart Bros.*, 17 Fed. 492, 498, 70 C. C. A. 76.

"A 'trade-mark' designates an article of commerce, and is affixed thereto. It is either general or universal, accompanying the article, while a 'trade-name' applies to a business, and is as a rule local. A 'trade-mark' may be infringed anywhere; but not with a 'trade-name.' For instance, that has a hotel called the Irving Hotel or the Metropolitan Hotel in a place does not prevent others from having hotels of the same name in other places; he has an exclusive right to the name in his locality only. Though simple, this illustration is of general application." *Ball v. Broadway Bazaar*, 106 N. Y. Supp. 249, 250, 121 App. Div. 546 (citing *Paul, Trade-Marks*, § 177; *Brown, Trade-Marks*, § 91).

A union label authorized by Labor Law, §§ 15, 16, authorizing labor unions to adopt a label, and prohibiting the wrongful use thereof by others is not a "trade-mark" within Penal Law, §§ 2350, 2354, defining a trade-mark as a mark used to indicate the maker, owner, or seller of an article of merchandise, and punishing the unlawful affixing to an article of the genuine trade-mark of another, and one wrongfully using a union label does not thereby violate the sections of penal law. *People v. Streep* (Sp. Sess.) N. Y. Supp. 172, 174.

A "trade-mark" is a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. It may consist in any symbol, or in any form of words; but, as its office is to point out distinctly the origin or ownership of the articles to which it is affixed, no sign or combination of words can be appropriated as a valid trade-mark which, from the nature of the sign conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose. The word "Rubber" is not a subject of exclusive appropriation as a trade-mark for a flexible waterproof roofing, since, though the roofing contains no rubber, the word is descriptive, and not indicative of origin or ownership.

*Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 31 Sup. Ct. 456, 457, 220 U. S. 446, 55 L. Ed. 536 (quoting and adopting definition in *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 21 Sup. Ct. 270, 179 U. S. 665, 45 L. Ed. 365).

The term "trade-mark" means a distinctive mark of authenticity, through which the products of particular manufacturers or the vendible commodities of particular merchants may be distinguished from those of others. As its office is to point out distinctly the origin or ownership of the articles to which it is affixed, no sign or form of words can be appropriated as a valid trade-mark, which, from the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose. It follows, that the word "Davids" alone is not the subject of a valid trade-mark. *Thaddeus Davids Co. v. Davids*, 165 Fed. 792, 795 (quoting and adopting definition in *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 179 U. S. 665, 672, 677, 21 Sup. Ct. 270, 45 L. Ed. 365).

"A 'trade-mark' is an arbitrary, distinctive name, symbol, or device to indicate or authenticate the origin of the product to which it is attached. An infringement of such trade-mark consists in the use of the genuine upon substituted goods, or of an exact copy and reproduction of the genuine, or in the use of an imitation in which the difference is colorable only, and the resemblance avails to mislead, so that the goods to which the spurious trade-mark is affixed are likely to be mistaken for the genuine product. Unfair competition is distinguishable from the infringement of a trade-mark in this: That it does not involve the exclusive right of another to the use of the name, symbol, or device." *American Brewing Co. v. Bienville Brewery*, 153 Fed. 615, 616.

What makes a mark affixed by a seller to goods produced or selected by him, a technical "trade-mark" (i. e., one whose exclusive use by him, in marking goods of the same like character, will be protected) is that, when it is affixed to goods of that character, it amounts to a representation that they are the goods of the person who has adopted it as his "trade-mark." The office of a trade-mark is to point out distinctly the origin or ownership of the article to which it is affixed, or, in other words, to give notice who is the producer. *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. 357, 364, 366 (citing *Canal Co. v. Clark*, 80 U. S. [13 Wall.] 311, 20 L. Ed. 581).

The term "trade-mark" has been in use from a very early date, and, generally speaking, means a distinctive mark of authenticity, through which the commodities of particular merchants may be distinguished from those of others. It may consist in any symbol, or in any form of words; but, as its

office is to point out distinctively the origin or ownership of the articles to which it is affixed, it follows that no sign or form of words can be appropriated as a valid trade-mark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal truth and with equal right for the same purpose. *W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.*, 62 Atl. 499, 503, 100 Me. 461, 4 L. R. A. (N. S.) 960 (quoting and adopting definition in *Elgin Nat. Watch Co. v. Illinois Watch Case Co.*, 21 Sup. Ct. 270, 179 U. S. 665, 45 L. Ed. 365)

#### **Name of periodical**

The name of a newspaper is in the nature of a "trade-mark," and passes by assignment with the business in which it is used; but, apart from the business, it confers no right of ownership, and so, in a controversy to determine the ownership of a newspaper plant according to the provisions of a will, plaintiffs can have no right in the name of the paper as an element of value, unless the material property itself is held to pass to them under the will. *Seabrook v. Grimes*, 68 Atl. 883, 886, 107 Md. 410, 16 L. R. A. (N. S.) 483, 126 Am. St. Rep. 400.

#### **Trade-name distinguished**

A "trade-mark" has reference to the thing sold, while a "trade-name" embraces both the thing sold and the individuality of the seller. *Eastern Outfitting Co. v. Mannheim*, 110 Pac. 23, 25, 59 Wash. 428, 35 L. R. A. (N. S.) 251.

The difference between the right to the use of a trade-name and a technical trade-mark, is that, while the "trade-name," like a "trade-mark," is attached to the manufactured article, and accompanies it in the market, it may be of such a kind as not to make the right exclusive. *George G. Fox Co. v. Glynn*, 78 N. E. 89, 92, 191 Mass. 344, 9 L. R. A. (N. S.) 1096, 114 Am. St. Rep. 619.

A "trade-mark" is protected by equity on the theory of an absolute property right in the holder, and without reference to questions of fraud or damage, while fraud or damage, express or implied, is essential to entitle the holder to protection in the use of a "trade-name." *Northwestern Knitting Co. v. Garon*, 128 N. W. 288, 290, 112 Minn. 321.

"A 'trade-mark' designates an article of commerce, and is affixed thereto. It is thus general or universal, accompanying the article, while a 'trade-name' applies to a business and is as a rule local. A 'trade-mark' may be infringed anywhere; but not so with a 'trade-name.' For instance, that A. has a hotel called the Irving Hotel or the Cosmopolitan Hotel in a place does not prevent others from having hotels of the same name in other places; he has an exclusive right to the name in his locality only. Though simple, this illustration is of general application." *Ball v. Broadway Bazaar*, 106 N. Y.

Supp. 249, 250, 121 App. Div. 546 (citing *Paul, Trade-Marks*, § 177; *Brown, Trade-Marks*, § 91).

#### **TRADE-NAME**

As property, see *Property*.

Trade-mark distinguished, see *Trade-Mark*.

A "trade-name" relates to a business and its good will, rather than to a vendible commodity. *Ball v. Broadway Bazaar*, 87 N. E. 674, 675, 194 N. Y. 429.

A "trade-mark" or "trade-name" is some symbol by which one man's manufacture is differentiated from another's, and all that is needed for a valid trade-name is that it indicate the manufacture of the owner, whether there are other manufacturers or not. *R. Guastavino Co. v. Comerma*, 180 Fed. 920, 921.

A "trade-name" is a word or phrase by which a business enterprise, or specific article of merchandise from a specific source, is known to the public, and when applied to merchandise is generic or descriptive, and hence not susceptible of appropriation as a trade-mark. *Northwestern Knitting Co. v. Garon*, 128 N. W. 288, 290, 112 Minn. 321.

It is a matter of common observation that persons do business frequently under what is known as a "trade-name," a name adopted for the purpose of giving them an apparent standing in the business community. There is no law preventing the use of a trade-name by an individual. The use by an individual of his name, followed by the term "& Co.," used as a trade-name did not necessarily create a presumption that he had a partner or partners, or that such title included more than one person. *Wiley v. Crocker-Woolworth Nat. Bank*, 75 Pac. 106, 108, 141 Cal. 508.

#### **TRADE PHRASE**

If specifications require a cellar to be a certain depth, it is not a "trade phrase" which fixes the depth of the foundation walls; but it is the duty of the builder to place the walls deep enough to get a sufficient foundation. *Superintendent, etc., of Public School of City of Trenton v. Bennett*, 27 N. J. Law, 513, 520, 72 Am. Dec. 373.

#### **TRADE PURPOSE**

Defendant, without plaintiff's written consent, used plaintiff's name in circulars issued for the purpose of putting on the market a photographic film representing plaintiff in the uniform of a wireless telegraph operator, which film purported to represent the wreck of a vessel, of which plaintiff was wireless operator. The films were leased by defendant for a stipulated price to moving picture exchanges for reproduction and exhibition to the public. Held, that plaintiff could enjoin such use of his name and pic-

ture, and recover damages therefor, under Civil Rights Law, § 61, prohibiting the use for purposes of trade of the name, portrait, or picture of any living person without having first obtained the written consent of such person; such use being for the purpose of "trade" within the statute. *Binns v. Vitagraph Co. of America*, 124 N. Y. Supp. 515, 516, 67 Misc. Rep. 327

### TRADE SECRET

As property, see Property.

The term "trade secret," as usually understood, means a secret formula or process, not patented, known only to certain individuals using it in compounding some article of trade having a commercial value, and does not denote the mere privacy with which an ordinary commercial business is carried on. *In re Bolster*, 110 Pac. 547, 548, 59 Wash. 655, 29 L. R. A. (N. S.) 716.

### TRADE TALK

As false representation, see False Representation.

### TRADE TRANSACTION

See Board of Trade Transaction.

### TRADE UNION

Receiving protection of trade union, see Receive.

A "trade union" or "labor organization" is a combination of workmen usually, but not necessarily, of the same trade or allied trades, for the purpose of securing by united action the most favorable conditions as regards wages, hours of labor, etc., for its members. *Stone v. Textile Examiners & Shrinkers Employers' Ass'n*, 122 N. Y. Supp. 460, 462, 137 App. Div. 655.

A "trade union" in Wisconsin is merely an assemblage of persons. It is in no manner recognized by the law as an entity, separate from its members, except to the extent that a partnership is so recognized. No statute has permitted it to sue or be sued in its common name. Its members may sue or be sued, either by joining all of them, or one or more for all, where the members are so numerous that it is impracticable to bring them all in; but it is the suit of the members, and not of the union, though an injunction may properly go against a trade union by name and operate to restrain all of its members who have knowledge of it, but this is a different thing from fining the union or rendering a judgment for damages against it. *Allis-Chalmers Co. v. Iron Molders' Union* No. 125, 150 Fed. 155, 182.

### TRADE USAGE

A "trade usage," by which words are given an unusual or arbitrary significance in a particular line of business generally or in the locality where the parties reside, must be shown to be of such definite character and

such general acceptance that knowledge thereof by both parties may be reasonably inferred. *Citizens' State Bank of Perry v. Chambers*, 105 N. W. 692, 695, 129 Iowa, 414.

### TRADES SCHOOL

As educational corporation, see Educational Corporation.

### TRADER—TRADESMAN

See Itinerant Trader.

The word "tradesman" has a meaning frequently applied as the opposite of living upon an income or salary. *In re Kingston Realty Co.*, 157 Fed. 299, 302.

A "dealer" is one whose business it is to buy and sell merchandise, goods, and chattels, as a merchant, storekeeper, or broker; the term being synonymous with "trader." *State v. Rosenbaum*, 68 Atl. 250, 251, 80 Conn. 327, 15 L. R. A. (N. S.) 288, 125 Am. St. Rep. 121.

A "trader" originally meant a shopkeeper; a tradesman; but it now in this connection means merely a business man. In the Bankruptcy Act it is given a more restricted meaning. *Peabody v. Citizens' State Bank of St. Charles*, 108 N. W. 272, 276, 98 Minn. 302.

A "trader" is one who makes it his business to buy merchandise, goods, or chattels to sell again for gain; consequently, a corporation engaged principally in the business of renting films or moving pictures is not a trader within the purview of the Bankruptcy Act. *In re Imperial Film Exchange*, 198 Fed. 80, 81, 117 C. C. A. 188.

A "trader" is one who is engaged in trade or commerce, or, more strictly speaking, one who buys and sells goods or merchandise for profit. *First Nat. Bank of Wilkes Barre v. Wyoming Valley Ice Co.*, 136 Fed. 466, 467 (citing *Collier, Bankr.* [5th Ed.] 63; *Brandenburg, Bankr.* [3d Ed.] § 115; *Loveland, Bankr.* [2d Ed.] 148; *In re New York & W. Water Co.*, 98 Fed. 711; *In re Tontine Surety Co. of New Jersey*, 116 Fed. 401).

In the ordinary meaning of the term, a "trader" is one who makes it his business to buy merchandise or goods or chattels and to sell same for the purpose of making a profit. A trader is also said to be one whose business is to buy and sell merchandise or any class of goods deriving a profit from his dealings. *United States Hotel Co. v. Niles*, 134 Fed. 225, 226, 67 C. C. A. 153, 68 L. R. A. 588 (citing *Black, Law Dict.*; 2 *Bouv. Law Dict.* 741).

A single sale is not sufficient to make one a "trader," within the meaning of Code 1906, § 4784, providing that if any person shall transact business as a trader or otherwise, with the addition of the words "agent," "factor," etc., and fail to disclose his principal or partner by a sign upon the place of business,



or if any person shall transact business in his own name without such addition, all the property, stock, money, etc., used or required in such business shall be liable to the creditors of such person. *Durham v. Sildell Liqueur Co.*, 49 South. 739, 94 Miss. 140.

#### **Insurance agent**

Code 1892, § 4234, requiring an agent transacting business as a "trader or otherwise" to disclose the name of his principal under penalty of rendering the property used in the business liable for the agent's debts, does not apply to a person transacting business solely as an insurance agent. *I. L. Lyons & Co. v. Solomon S. Steele & Co.*, 38 South. 371, 372, 86 Miss. 261.

#### **estaurateur**

A restaurateur is not a "trader," nor, so far as his business of cooking and selling food is concerned, is he engaged in "mercantile pursuits," within Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, authorizing involuntary proceedings against traders and persons so engaged. In *re Excelsior Café Co.*, 175 Fed. 294, 296.

### **TRADING CORPORATION**

#### **Advertising business**

A corporation engaged in the business of soliciting advertisements and placing them in newspapers at rates previously obtained from such papers is not engaged in a "trading pursuit," within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, and cannot be adjudged an involuntary bankrupt thereunder. In *re Snyder & Johnson Co.*, 133 Fed. 806.

#### **Boarding and livery stable**

A corporation organized to conduct a general livery and boarding stable business, and engaged in buying, keeping, and hiring its horses and vehicles for profit, and keeping, feeding, and caring for the horses and vehicles of others for hire, not being engaged in buying and selling horses and vehicles or feed as a business, is not a "trading corporation" or one engaged chiefly in mercantile pursuits within Bankr. Act July 1, 1898, c. 541, § 4, cl. "b," 30 Stat. 547, providing that such corporations may become bankrupt. *Gallagher v. De Lancey Stables Co.*, 158 Fed. 381, 382.

#### **Brokerage company**

Where a corporation was organized to carry on a general stock, bond, grain, and brokerage business, and was authorized to trade on its own behalf in stocks, bonds, grains, etc., and lease and dispose of real and personal property, it was subject to adjudication as a bankrupt corporation engaged in "trading or mercantile business." In *re H. R. Leighton & Co.*, 147 Fed. 311, 314 (citing *Collier*, Bankr. [5th Ed.] p. 64; In *re Surety Guarantee & Trust Co.*, 121 Fed. 73, 56 C. C. A. 654; In *re Pacific Coast Ware-*

*house Co.*, 123 Fed. 749; In *re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co.*, 96 Fed. 756; In *re New York Building-Loan Banking Co.*, 127 Fed. 471; In *re Snyder & Johnson Co.*, 133 Fed. 806; In *re United States Hotel Co.*, 134 Fed. 225, 67 C. C. A. 153, 68 L. R. A. 588).

#### **Building and loan association**

The phrase "engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits," as used in Bankr. Act 1898, limiting corporations which may be forced into bankruptcy to such as are engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, is to be taken in its natural and usual meaning, and any corporation which does not come within such meaning cannot be put into bankruptcy. A building and loan association, organized to accumulate a fund from contributions of its members, from which loans were to be made to assist members in purchase of real estate, the profits of which business were divided among its members, is not a corporation engaged principally in trading or mercantile pursuits, within the act. In *re New York Building-Loan Banking Co.*, 127 Fed. 471, 472.

#### **Hotel company**

A hotel company engaged in furnishing rooms and meals to guests is not a corporation principally engaged in "trading or mercantile pursuits," and therefore cannot be adjudged a bankrupt, within Bankr. Act July 1, 1898, c. 541, § 4, 30 Stat. 547. In *re United States Hotel Co.*, 134 Fed. 225, 67 C. C. A. 153, 68 L. R. A. 588.

A corporation organized to procure land for hotel purposes, and to erect, maintain, and manage a hotel, is not a "trading or manufacturing corporation," and its secretary has no authority to execute in its name a note, for accommodation or otherwise, especially where the by-laws require both its president and secretary to sign its obligations. *First Nat. Bank v. Abilene Hotel Co.* (Tex.) 103 S. W. 1120.

A corporation engaged in conducting hotels at various points is not engaged principally in "trading or mercantile pursuits," so as to be liable to an involuntary adjudication in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 4b, as amended although it also maintains two country stores, largely as an incident to the location of its hotels in a thinly settled, mountainous region. *Toxaway Hotel Co. v. J. L. Smathers & Co.*, 30 Sup. Ct. 263, 264, 216 U. S. 439, 54 L. Ed. 558.

#### **Ice company**

A corporation chartered for the purpose of carrying on a wholesale and retail ice business, and which in fact sold not only ice of its own harvesting, but also large quantities which it purchased from third parties,

is engaged chiefly in "trading and mercantile pursuits," within the meaning of Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, and may be adjudged an involuntary bankrupt. *First Nat. Bank v. Wyoming Valley Ice Co.*, 136 Fed. 466, 467.

The word "trade," in its broadest significance, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money or commerce and traffic generally. A corporation chartered for the purpose of erecting a dam and the cutting, storing, and selling of ice, is a "trading corporation," within the statute authorizing trading corporations to wind up their affairs after the expiration of their charter. *Pocono Spring Water Ice Co. v. American Ice Co.*, 64 Atl. 398, 400, 214 Pa. 640 (quoting and adopting definition in *May v. Sloan*, 101 U. S. 231, 25 L. Ed. 797).

#### **Insurance agency business**

A corporation chiefly engaged in conducting the business of a general fire insurance agency is not engaged in a "trading or mercantile pursuit," within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, and is not subject to the act. In *re Moore & Muir Co.*, 173 Fed. 732, 733.

#### **Light and power company**

Electricity generated for the purpose of furnishing light, heat, and power is a product of "manufacture" and a commercial commodity, and a corporation whose business it is to buy electricity and resell it to consumers for such purposes at a profit is engaged principally in "trading," within the meaning of Bankruptcy Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, and may be adjudged an involuntary bankrupt. In *re Charles Town Light & Power Co.*, 183 Fed. 160, 163; *C. B. Nash Co. v. City of Council Bluffs*, 184 Fed. 986, 106 C. C. A. 664.

#### **Realty company**

A corporation engaged in buying and selling improved and unimproved real estate is neither engaged in "trading," nor "mercantile pursuits," within Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797, authorizing adjudication in bankruptcy against a corporation so engaged, the term "trading" being used to indicate the business of buying merchandise or goods or chattels to sell again for profit, and the words "mercantile pursuits" as having to do with trade or commerce of or pertaining to merchants or the traffic carried on by merchants in commercial transactions, the buying and selling of goods or merchandise or dealing in the purchase and sale of commodities habitually as a business, neither term being sufficient to include a dealer in land. In *re Kingston Realty Co.*, 160 Fed. 445, 447, 87 C. C. A. 406.

#### **Renting films for moving pictures**

A corporation engaged principally in the business of renting films for moving pictures is not engaged in "trading or a mercantile pursuit," which renders it subject to adjudication as an involuntary bankrupt under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, as amended. In *re Imperial Film Exchange*, 198 Fed. 80, 81, 117 C. C. A. 188.

#### **Restaurant**

A corporation engaged in operating a restaurant is not a "trader," within Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, authorizing an adjudication against a corporation engaged in trading; a "trader," within such section, being a person who buys goods to sell again without change of form or condition by combination and cooking, as in the case of a restaurateur. In *re Wentworth Lunch Co.*, 159 Fed. 413, 415, 86 C. C. A. 393.

#### **Water company**

An irrigation corporation, organized to furnish water for the irrigation of rice fields, is not a corporation engaged in "trading or in manufacturing or mercantile pursuits," within the Bankruptcy Act. In *re Bay City Irr. Co.*, 135 Fed. 850, 853.

### **TRADING PARTNERSHIP**

A "trading partnership" is one requiring capital and credit. *Hatchett & Large v. Sunset Brick & Tile Co. (Tex.)* 99 S. W. 174, 175.

Partners whose business is to buy and sell cotton seed are a "trading partnership." *Cotton Plant Oil Mill Co. v. Buckeye Cotton Oil Co.*, 122 S. W. 658, 659, 92 Ark. 271.

A firm, engaged in the real estate, loan, and insurance business, which, likewise, buys and sells real estate on its own account, is prima facie a "trading partnership." *Adams v. Long*, 114 Ill. App. 277, 282.

A firm engaged in buying standing timber in large quantities, and cutting and sawing the same, and selling the lumber, is engaged in a "trading or mercantile business," within Gen. St. 1902, § 2342, providing for the assessment of the property of any trading or mercantile business; "to trade" being to engage in the purchase or sale of merchandise, and the word "mercantile" being defined as of or pertaining to merchants, or the traffic carried on by them. *Jackson v. Town of Union*, 73 Atl. 773, 774, 82 Conn. 266.

A "trading partnership" is one that buys and sells, but buying and selling need not be its sole purpose, nor even its most characteristic feature. A partnership for the conduct of manufacturing or mechanical business is none the less a trading one, for the reason that buying and selling in the market is only one of its accidents. *George on Partnership*, 92. In *Klimbro v. Bullitt*, 63 U. S. (22 How.) 256, 16 L. Ed. 313, the rule is stated as follows: "Wherever the business, according to the usual mode of conducting it, im-

ports, in its nature, the necessity of buying and selling, the firm is then properly regarded as a trading partnership." Another statement of the principle is found in several authorities, to wit: If the partnership contemplates the periodical or continuous or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured shape, it is a "trading or commercial partnership." *Marsh, Merwin & Lemmon v. Wheeler*, 59 Atl. 410, 411, 77 Conn. 449, 107 Am. St. Rep. 40.

#### **Mining partnership distinguished**

The principal distinctions between a "trading partnership" and a "mining partnership" are that a member of the latter may assign his interest without the consent of his copartner, and neither the assignment of a partner's interest nor the death of a partner works a dissolution of the partnership; that the assignee of an interest in the partnership becomes a partner without the assent of the other partners, and a member of a mining partnership has not the power to bind his associates by engagements with third persons to the same extent as a member of a trading partnership. *Bentley v. Brossard*, 94 Pac. 736, 743, 33 Utah, 396.

#### **TRADING STAMP**

As commodity, see *Commodity*.

As lottery, see *Lottery*.

As property, see *Property*.

Issue of, see *Issuance—Issue*.

Use of trading stamps as business, see *Business*.

A "trading stamp" is not ordinarily property. It is *sui generis*. It represents a somewhat complicated transaction, and from its nature there are necessary limitations upon the modes in which it may be transferred. A stamp is not merely a token of the company's obligation to redeem it, and of the right of the holder to redemption, but it is also a token or an instrument of another transaction in which the trading stamp company has an interest, and from which it derives its entire profit and its recompense for its outlay in establishing the business. The trading stamp company, having created a demand, in effect, sells to the merchant the right to supply this demand, and to issue to his customers stamps which are at the time of the issue the property of the trading stamp company. The merchant, in a certain sense, is the agent of the company in issuing the stamps to the public. The merchant gets such trade advantage as results from his distribution of the stamps. He pays the trading stamp company for this in proportion to the use that he makes of the trading stamps, paying so much a hundred for the use of the stamps. In the transaction between the company and the merchant, the stamp, once issued, represents so much advertising furnished and paid for. Once is-

sued by the merchant, it is *functus officio* as a token of the sale and use of so much advertising. The trading stamp, when issued, represents a closed transaction between the merchant and the company, as well as an outstanding obligation to redeem the stamp. As a token of voucher of the sale and use of so much advertising, the trading stamp is necessarily a consumable article, an article designed for a single use in an advertising scheme. *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 135 Fed. 833-835.

#### **TRADING STAMP BUSINESS**

The "trading stamp business" consists of the sale of checks or stamps to merchants, who give the same to their customers on purchases of goods, the number of stamps given being determined by the amount of the purchase, which stamps on presentation at the trading stamp store entitle the holders to select any article from an assortment of articles; each article being plainly marked with its value in stamps, and such value not being greater than the market value of the article. *State v. Shugart*, 35 South. 28, 138 Ala. 86, 100 Am. St. Rep. 17.

Where complainant issued to merchants coupons in the form of adhesive stamps, which were given by the merchants to customers as a special discount or inducement for payment of cash, complainant agreeing to advertise the merchants' business and distribute books descriptive of the "trading stamp business" and to maintain a store where the stamps could be redeemed by exchanging them for merchandise, etc., it was engaged in the trading stamp business. *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 128 Fed. 800.

#### **TRADING STAMP COMPANY**

A company conducting a general mercantile business, which gives to purchasers of its goods, paying cash, a check representing 4 per cent. of the purchase, which check may be exchanged for articles in the store or for cash, is not a "trading stamp company," within Ky. St. 1903, § 3224, defining a "trading stamp company" to be one that gives premiums or valuable personal property in exchange for stamps or checks furnished to purchasers of merchandise. *Commonwealth v. Gibson Co.*, 101 S. W. 385, 125 Ky. 440.

#### **TRADITION**

##### **TRADITIONAL EVIDENCE**

The party offering in evidence reputation to prove ancient boundaries must confine his proof to the declarations of persons having competent knowledge of the matter in controversy, and who are since deceased. This species of evidence is very properly denominated "traditional evidence." *Lay v. Neville*, 25 Cal. 545, 554 (citing 1 Greenl. Ev. §§ 130, 145, and notes; 1 Phil. Ev. [Cow. & H. & Edw. Notes] 218, and note 87).

**TRAFFIC—TRAFFICKING**

See Moving Traffic; Public Traffic.

The word "traffic" comprehends every species of dealing in the exchange or passing of goods or merchandise from hand to hand for an equivalent. One engaged in the traffic of whisky is guilty of selling whisky within an ordinance regulating the sale of liquor. *State v. Small*, 63 S. E. 4, 5, 82 S. C. 93, 44 L. R. A. (N. S.) 454.

Laws 1911, c. 106, comprehensively regulating the liquor traffic, repealed by implication all municipal ordinances relating to the sale of intoxicating liquors existing on May 9, 1911, when it went into effect, regardless whether the municipality was "wet" or "dry" territory; the word "traffic" as used in the statute applying to illegal as well as legal sales. *Pleasant Grove City v. Lindsay* (Utah) 125 Pac. 389, 390.

Burns' Ann. St. 1908, § 8351 (Acts 1907, c. 293), relating to liquor licenses, provides that the act shall not apply to wholesale dealers, and defines "wholesale dealers" as those whose "sole business in connection with the liquor traffic is to sell to licensed retail liquor dealers, or to wholesale dealers, druggists," etc. Held, that the word "traffic" means trade, commerce, exchange, or sale of commodities, and hence a wholesale liquor dealer under this section may traffic in the liquor of his own manufacture, as well as those produced by others. *Skelton v. State*, 90 N. E. 897, 173 Ind. 462.

One who personally or by an agent in a local option county sells, furnishes, or gives away intoxicating liquors to be used as a beverage is guilty of "trafficking in intoxicating liquors," in violation of Act March 5, 1908 (99 Ohio Laws, 35), prohibiting the trafficking in intoxicating liquors in local option territory, except as permitted by section 3, and the prohibition under the act extends to the sale, furnishing, or giving away of intoxicating liquors in prohibition territory at the manufactory by the manufacturer or his agent to be used as a beverage, though the sale be in quantities of one gallon or more at any one time. *Scheu v. State*, 93 N. E. 969, 970, 83 Ohio St. 146.

**Deal synonymous**

See Deal—Dealing.

**TRAFFIC EARNINGS**

A policy insuring against loss incurred by a ferry owner through injuries to passengers, for a specified premium, and providing: "This premium is based on the 'traffic earnings' during the period of the policy. \* \* \* If the traffic earnings actually exceed the sums stated above, the assured shall pay the actual premium; if less than the sum stated, the company shall return to assured the unearned premium pro rata"—is not ambiguous as to what earnings were intended, the words

meaning naturally all traffic earnings from whatever source; and parol evidence to show that it was intended that the traffic earnings should be confined to the earnings from the carriage of passengers alone was inadmissible. *Fidelity & Casualty Co. v. Thames Ferry Co.*, 74 Atl. 780, 781, 82 Conn. 475.

**TRAIL**

"We understand that by the use in the finding of the word 'trail,' in connection with the balance of the finding, is meant a way, road, or path suitable for the purpose of driving cattle over or along on their way to a market." *United States v. Andrews*, 21 Sup. Ct. 46, 47, 179 U. S. 99, 45 L. Ed. 105.

**TRAILER**

A car attached to a motor car and pulled by it is called a "trailer." *Denison & S. Ry. Co. v. Randell*, 69 S. W. 1013, 1014, 29 Tex. Civ. App. 460.

**TRAIN**

See Accommodation Train; Elevated Train; Freight Train; Mixed Train; Passenger Train; Railroad Train; Regular Passenger Train; Single Train; Wildcat Train; Wild Train.

Operating train, see Operate.

A "train," within the safety appliance act, is one aggregation of cars drawn by the same engine; but, if the engine is changed, then there is a different train. *United States v. Boston & M. R. Co.*, 168 Fed. 148, 149, 153.

A motor car for passengers operated by a railroad company is a "train," within Acts 1911, p. 275, requiring persons running trains to keep a constant lookout for persons and property on the track. *Central Ry. Co. of Arkansas v. Lindley*, 151 S. W. 246, 247, 105 Ark. 294.

A switch engine drawing six cars of logs from one part of a switching yard to another part thereof is not a "train," within rules laid down by a railroad company for employees in "freight train" service. *Lynch v. Great Northern Ry. Co.*, 128 N. W. 457, 458, 112 Minn. 382.

Code 1896, § 5368, making it an offense for any conductor to run a "train" without a sufficiency of good drinking water thereon, does not apply to a street railroad. *Dean v. State*, 43 South. 24, 25, 149 Ala. 34 (citing *Birmingham M. R. Co. v. Jacobs*, 92 Ala. 187, 9 South. 320, 12 L. R. A. 830).

A bulletin directing all trains to use the right-hand track applied to a light engine; the word "train" being defined in the book of rules as an engine or more than one engine coupled, with or without cars. *Jones v. Pere Marquette R. Co.*, 133 N. W. 993, 996, 168 Mich. 1.

Where a railroad rule relating to yard limits provided that all trains will move under perfect control so as to make an accident impossible, the word "train" did not include a switch engine and two freight cars en route from one end of the yard to the other, but did include a regular freight train moving into the yard from a point outside. *Clary v. Chicago, M. & St. P. Ry. Co.*, 123 N. W. 649, 650, 141 Wis. 411.

The word "train," as used in reference to railroad traffic, means all kinds of trains, freight trains, passenger train, mail train, construction train, etc., and the character of the train is designated by another word. In the term "passenger train" the word "passenger" is used as an adjective to qualify the noun "train." The two words "passenger train" combine to form the name of the thing to which it is applied. Neither word used alone would designate the object intended, but together they constitute the name. The word "regular" is designated to express the character of the train to which it is attributed. It signifies that it is a regular train, whether freight or passenger. *State v. Missouri Pac. Ry. Co.*, 117 S. W. 1173, 1176, 219 Mo. 156 (citing 6 Words & Phrases, p. 5227).

Safety Appliance Act March 2, 1893, c. 196, § 1, 27 Stat. 531, provides that, after January 1, 1898, it should be unlawful for any interstate carrier, by rail, to use any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic, after that date, that had not a sufficient number of cars in it so equipped with power or train brakes that the engineer of the locomotive drawing such train could control its speed without requiring the brakeman to use the common hand brake for that purpose; and Act March 2, 1903, c. 976, § 2, 32 Stat. 943, required that 50 per cent. of the cars should be equipped with air brakes. Held, that such section was not limited to "road trains," but applied to interstate trains, destined to a particular railroad yard, which, before reaching their destination, were operated by a switching crew. *Atchison, T. & S. F. Ry. Co. v. United States*, 198 Fed. 637, 638, 117 C. C. A. 341.

#### Moving cars detached from engine

Acts 1893, p. 129 (Rev. St. 1908, § 2060), provides that where a personal injury is caused to an employé who is himself exercising due care by the negligence of any person in the service of the employer who has the charge or control of any switch, locomotive, engine, or train upon any railroad, the employé, or, upon his death, the persons entitled to sue, shall have the same right to compensation against the employer as though the employé had not been an employé. Decedent was employed in the track

department, and was struck and killed by runaway cars which got loose about a mile and a half from where decedent was struck by the negligence of a brakeman in not setting the brakes where the cars stood detached at a certain station. The train at the station constituted four cars and a caboose, which were detached from the engine and left on the main track in charge of the brakeman without setting the brakes. Held, that the runaway cars constituted a "train" within the statute, so as to make the company responsible for the brakeman's negligence. *Denver & R. G. R. Co. v. Vitello*, 121 Pac. 112, 118, 21 Colo. App. 51.

#### Single engine

An engine and tender, operated over a crossing at night, is a "train," within Kirby's Dig. § 6607, requiring that all persons running trains on any railroad shall keep a constant lookout for persons and property on the track, etc. *Ft. Smith & W. R. Co. v. Messek*, 131 S. W. 966, 967, 96 Ark. 243.

#### TRAIN CREW

A "train crew" consists of the conductor, the engineer, the fireman, and the brakeman. *Forge v. Houston & T. C. R. Co.*, 90 S. W. 1118, 1119, 41 Tex. Civ. App. 81.

#### TRAIN DISPATCHER

"The object of train dispatching is to place in the hands of conductors, who manage the trains of a railroad, proper and safe orders for their guidance. The source of such orders is the office of the 'train dispatcher' from which they emanate, and their destination is the hand of the conductor of the train whose movements they are intended to direct and control. The order is in transitu from the time it leaves the one until it reaches the other, and every agent of the company through whose hands the order passes is necessarily engaged in its transmission until it reaches its ultimate destination." *Virginia & S. Ry. Co. v. Clowers' Adm'r*, 47 S. E. 1003, 1004, 102 Va. 867.

A "telegraph operator" is different from a "train dispatcher," in that the operator ordinarily is not invested with any control over the running of trains, and he does not occupy the position of a train dispatcher merely because he transmits or delivers orders for the movement of trains, so that his negligence cannot be said to be the negligence of the company. *Strotzman v. St. Louis, I. M. & S. R. Co.*, 109 S. W. 769, 779, 211 Mo. 227 (citing *McKaig v. Northern Pac. Ry. Co.*, 42 Fed. 288; *Cincinnati, N. O. & T. P. Ry. Co. v. Clark*, 57 Fed. 125, 6 C. C. A. 281; *Baltimore & O. Ry. Co. v. Camp*, 65 Fed. 952, 13 C. C. A. 233; *Oregon Short Line & U. N. Ry. Co. v. Frost*, 74 Fed. 965, 21 C. C. A. 186; *Price v. Detroit, G. H. & M. Ry. Co.*, 12 Sup. Ct. 986, 145 U. S. 651, 36 L. Ed. 843; *Slater v. Jewett*, 85 N. Y. 62, 39 Am. Rep. 627; *Dana v. New York*

Cent. & H. R. R. Co. [N. Y.] 23 Hun, 473; Monaghan v. New York Cent. Ry. Co. [N. Y.] 45 Hun, 113; Reiser v. Pennsylvania Co., 25 Atl. 175, 152 Pa. 38, 34 Am. St. Rep. 620).

### TRAIN FOR BOTH PASSENGERS AND FREIGHT

An ordinary local freight train carrying a caboose is not a "train for both passengers and freight," within Code 1906, § 4054, limiting the liability of carriers for injuries to passengers on freight trains not so intended. Illinois Cent. R. Co. v. White, 52 South. 449, 55 South. 593, 97 Miss. 91.

A regular local freight train, to which is attached a way car, with compartments for passengers, baggage, trainmen, tools, etc., is not a "train for both passengers and freight," within Code 1906, § 4054, limiting the liability of carriers for injuries to passengers on freight trains not so intended. "Trains intended for both passengers and freight" and "mixed or accommodation trains" are synonymous. White v. Illinois Cent. R. Co., 55 South. 593, 595, 99 Miss. 651.

### TRAINED NURSE

See Nurse.

### TRAINING SCHOOL

As common school, see Common School.

### TRAM RAILROAD

As appliance, see Appliance.

As machine, see Machine.

As tool, see Tools—Tools of Trade.

A tram railroad was not a "tool," nor a "machine," nor an "appliance" of a manufacturing business, within Rev. St. 1899, § 8486, taxing manufacturers on tools, machinery, and appliances. According to the dictionaries, the term "tram railroad" has no settled, well-defined meaning, but is a term often applied to a street railroad carrying passengers. In some places it is commonly used as the equivalent for the term "street railroad." It is also applied to a roadbed and cars for transporting coal and other freight. There are also overhead tramways. State ex rel. Western Tie & Timber Co. v. Pulliam, 135 S. W. 443, 444, 233 Mo. 229.

### TRAMMEL NET

A hoop or barrel net is not a "trammel net," within Kirby's Dig. § 3600, prohibiting fishing with a trammel net, and an indictment charging that accused fished with a trammel net is not sustained by proof that he fished with a hoop or barrel net. Rhoades v. State, 131 S. W. 48, 49, 96 Ark. 63.

A "seine" is a kind of net, but a "trammel net" is not a "seine." Kirby's Dig. § 3600, forbids any person to place in the wa-

ters of the state any seine net, gill net, trammel net, etc., or by any such means to catch fish, and provides, further, that it shall not be unlawful to use a seine with meshes not less than four inches square, and that any person using a seine with meshes less than four inches in width, upon conviction, shall be fined not less than \$25 nor more than \$50. Held, that an indictment, charging that defendant unlawfully caught fish with a net and seine, was void for duplicity. Under Kirby's Dig. § 3600, forbidding any person to place in the waters of the state any seine net, gill net, trammel net, etc., or to catch fish by any such means, and providing, further, that it shall be unlawful to use a seine with meshes not less than four inches square, it is unlawful to use a trammel net, though its meshes are not less than four inches in width; the exception applying only to seines. Rowe v. State, 103 S. W. 613, 614, 83 Ark. 244.

### TRAMWAY

As railway, see Railroad—Railway.

Where a deed conveying mineral rights gave to the grantee free access to the land from any direction, by roads and other passways or means of exit and entrance, the grantee was authorized to construct a "tramway"; such way being within the words "roads and passways." Duncan v. American Standard Asphalt Co. (Ky.) 97 S. W. 392, 393.

### TRANSACT

See Business Transacted.

### TRANSACTIONING BUSINESS

See Gambling Transaction; Office for the Regular Transaction of Business in Person; Personal Transaction; Same Transaction.

Usurious transaction, see Usurious.

See, also, Carry on Business; Doing Business.

"Doing business," as used in statutes prohibiting a foreign corporation from doing business until it has filed a certificate, etc., is equivalent to the words "transacting business," and in most jurisdictions it is held that such statutes have reference to a continuation in some form of business, and do not apply where a foreign corporation does a single act of business within the state. General Conference of Free Baptists v. Berkeley, 105 Pac. 411, 412, 156 Cal. 466.

The phrase "transacting business" in Rev. St. 1895, arts. 745, 746, requiring foreign corporations desiring to transact business in the state to secure a permit, is not necessarily synonymous with doing business, as to do business in the state imports a carrying on of business of the corporation for the purpose of its organization, while the transaction of

business rather imports the idea of isolated transactions. To "do business" is to carry on any particular occupation or employment for a livelihood or gain, as agriculture, trade, mechanic arts, or profession. *S. R. Smythe Co. v. Ft. Worth Glass & Sand Co.*, 142 S. W. 1157, 1159, 1160, 105 Tex. 8.

The words "transaction of business," in Stock Corporation Law (Consol. Laws, c. 59) § 33, providing that a foreign stock corporation, "having an office for transaction of business in this state," shall keep therein a stockbook, which shall be open for inspection by certain persons, and declaring a penalty for refusal of such an inspection, do not necessarily mean that the corporation's main business must be carried on in the state, or something in the nature of that business, or that capital must be employed in the state; but all that is necessary to bring the corporation within the statute is that something related to its business, or part of it, be carried on in the office in the state. *Hovey v. De Long Hook & Eye Co.* (Sup.) 126 N. Y. Supp. 1, 3.

Rev. St. 1899, §§ 1024-1027, relating to foreign corporations, provides that every corporation for pecuniary profit formed in any other state, before it shall be authorized or permitted to transact business in this state, shall have and maintain a public office or place for the transaction of business, etc. In the use of the term "transact business in this state" reference plainly is had to business operations of the corporation carried on within this state through the medium of agents established therein, and which are continuous, or of some duration, and not to the operations of traveling salesmen, nor to isolated or casual business transactions. The right of corporations created under the laws of other states to send itinerant salesmen into this state to solicit and transact business without complying with the provisions of the laws under consideration is expressly recognized in section 1025, and this exception indicates a legislative purpose not to interfere with the free conduct of interstate commerce, but only to require those foreign corporations which seek to establish and maintain some part of their enterprise within the state, and which therefore expect to avail themselves of the benefit and protection of its laws and the use of its courts, to submit themselves to the burdens imposed by its laws on domestic corporations of like character. *Wilson-Moline Buggy Co. v. Priebe*, 100 S. W. 558, 559, 123 Mo. App. 521.

The fact that foreign corporations proposing to do business here are required to establish a place of business within the state makes it clear that the term "doing business" does not mean a single isolated transaction. It is not reasonable to suppose that the Constitution or the statute intended that a foreign corporation, without intending a contin-

uance of its business in the state, could not collect a debt or make any contract or demand that its property rights should be respected, unless it had previously acquired a situs or domicile within our borders. The object of laws of this character is to require foreign corporations which undertake to carry on their business generally in this state to establish a domicile or situs here, so that they shall, like domestic corporations, be within reach of the process of our courts. The term "transacting or doing business," as used in laws of this character, implies continuity, and does not mean a single isolated transaction within the borders of the state, without any purpose of engaging generally in the carrying on of its business here. *State, to use of Hart-Parr Co., v. Robb-Lawrence Co.*, 106 N. W. 406, 408, 15 N. D. 55.

#### Bringing suit

Under a statute authorizing actions against a corporation in any county in which it transacts business or transacted business at the time the cause of action arose, where a corporation instituted suit by attachment in a county and executed and filed an attachment bond in such suit, it thereby "transacted business" in that county, so as to authorize action against it on the bond therein. *Hayworth v. McDonald*, 121 Pac. 984, 986, 67 Wash. 496.

By passively continuing to hold a previously existing and valid lien or title, a foreign corporation is not "transacting business" within the state, within the meaning of Rev. St. 1898, § 1770b, providing that no foreign corporation which has not complied with certain requirements shall transact business in the state. The mere commencement and prosecution of a suit by a foreign corporation to enforce a lien on lands in the state acquired by it through the execution, in the state of its domicile, of bonds and trust deeds, prior to the enactment of Rev. St. 1898, § 1770b, providing that no foreign corporation which has not complied with certain requirements shall transact business in the state, is not a "transaction of business" forbidden by the statute. *Chicago Title & Trust Co. v. Bashford*, 97 N. W. 940, 941, 120 Wis. 281.

Act May 18, 1905 (Laws 1905, p. 124), is entitled "An act to regulate the admission of foreign corporations for profit, to do business in the state," and section 1 provides that, before such corporations shall be permitted to transact any business or exercise any of its corporate powers in the state, they shall comply with the provisions of the act and be subject to all regulations prescribed for domestic corporations. Sections 2 to 5, inclusive, provide the steps for admission of such corporations to the state, and section 6 imposes a penalty for neglect to comply with the act, and in addition thereto forbids any foreign corporation, failing to comply with the

to sue upon any claim, legal or equitable. And, that the terms "doing business" and "transacting business" meant only the transaction of the ordinary business in which the corporation was engaged, and did not include prosecution of actions; and, in view of the title of the act, the inhibition against the exercise of any "corporate powers" did not change its meaning, "corporate powers" referred to those powers or franchises conferred upon the corporation to enable it to prosecute business in which it was engaged, together with those implied powers necessary thereto, so that merely bringing a suit in this way by a foreign corporation was not "transacting business" so as to require compliance with the act before bringing such suit. *Albion Portland Cement Co. v. Jenkins & Reynolds Co.*, 91 N. E. 480, 481, 244 Ill. 354.

#### **Constructing factory**

The construction of a glass factory, including the furnishing of material and labor, constituted the "transaction of business," under Rev. St. 1895, art. 745, requiring foreign corporations to obtain a permit to transact business in the state, though the contract was made outside the state. *Ft. Worth Glass and Co. v. S. R. Smythe Co. (Tex.)* 128 S. 36, 1137.

Rev. St. 1895, arts. 745, 746, provide that a foreign corporation desiring to transact business in the state or to solicit business therein, or to establish a general or special agent, shall obtain a permit to transact business and that no foreign corporation not so permitted, shall maintain any action in this state. Held, that the construction of a factory for a glass factory, including the furnishing of material and labor, constituted the "transaction of business" within the statute, although the contract was made outside of the state. *S. R. Smythe Co. v. Ft. Glass & Sand Co.*, 142 S. W. 1157, 1159, 108 S. 8.

#### **Transacting to furnish amusement in theater**

Rev. St. 1899, §§ 1024, 1025, provide that foreign corporations for pecuniary profit shall not engage in certain acts before being authorized to transact business in Missouri, and section 1026 provides that every such corporation doing business within the state, failing to comply with such conditions, shall be subject to a writ of injunction, and, in addition, shall not be authorized to maintain any suit or action in any of the courts of the state on any demand, whether arising out of contract or tort, etc. Held, where a foreign corporation entered into a contract in Missouri for the furnishing of amusement in a theater without complying with such sections, the contract itself was not a "transaction of business," and the corporation could not maintain an action for breach thereof, though prior to suit brought it assumed the conditions required to enter-

tain the right to do business within the state. *Tri-State Amusement Co. v. Forest Park Highlands Amusement Co.*, 90 S. W. 1020, 1023, 192 Mo. 404, 4 L. R. A. (N. S.) 688, 111 Am. St. Rep. 511, 4 Ann. Cas. 808.

#### **Investigating claim**

An agent of a foreign corporation sent to the state to investigate plaintiff's claim for damages for personal injuries is not "transacting business" for the corporation within Rev. St. 1899, § 570, subd. 4 (Ann. St. 1906, p. 597), authorizing the service of process upon an agent transacting business in the state for a corporation, where it has no office or place of business in the state. *Painter v. Colorado Springs & Cripple Creek Dist. Ry. Co.*, 104 S. W. 1139, 1141, 127 Mo. App. 248.

#### **Joint traffic arrangement**

Where a foreign railway company does not own or operate a railway within the state, but its cars are brought into the state by another railway company under some joint traffic arrangement, the foreign company is not "transacting business" within the state. *Slaughter v. Canadian Pac. Ry. Co.*, 119 N. W. 398, 400, 106 Minn. 263.

Contracts were made in Maryland, through the Merchants' & Miners' Transportation Company, a domestic corporation, for the Central of Georgia Railway Company, a foreign corporation, which the foreign company recognized as binding. The domestic corporation sold tickets and issued bills of lading good over its own line and also over the lines of the foreign corporation, collecting the whole fare in the case of a passenger, and collecting the entire charge for the carriage in the case of freight. An agent within the state was appointed jointly by the two companies to solicit traffic over both lines, which were advertised under the name of the "Central Savannah Line." In the window of the building occupied by the domestic company there was a sign "Central Savannah Line via Central of Georgia Railway & Merchants' and Miners' Transportation Company." In this building the joint agent had his office, and solicited freight for transportation over parts of the entire line. The advertising folders of the Central of Georgia Railway stated that tickets over that line could be purchased at any of the Merchants' & Miners' ticket offices. Held, that the Central of Georgia Railway Company was "transacting business" in Maryland within the meaning of Code Pub. Gen. Laws 1904, art. 23, § 409, providing that any corporation not chartered by the state which shall transact business therein shall be deemed to hold and exercise its franchises within the state, and shall be liable to suit in any of the courts of the state on any dealings or transactions therein. *Central of Georgia Ry. Co. v. Eichberg*, 68 Atl. 690, 694, 107 Md. 363, 14 L. R. A. (N. S.) 389.



**Making contract or sale outside of state**

Under an Indiana statute forbidding the transaction of business in the state by foreign corporations which have not complied with the terms of the act, an order for goods taken by a travelling salesman in Indiana, the goods to be delivered and paid for at Canton, Ohio, is not an Indiana contract, and does not constitute "transacting business" in that state. *Mutual Mfg. Co. v. Alpaugh*, 91 N. E. 504, 506, 174 Ind. 381.

Taking applications for advertising that do not become contracts until accepted by a Pennsylvania corporation in that state, and are performed by insertion of the advertisement in a book published in Pennsylvania, is not a "transaction of business" within the state, in violation of Corporation Act April 21, 1896 (P. L. p. 307) § 97. *Bell Telephone Co. of Philadelphia v. Galen Hall Co.*, 72 Atl. 47, 77 N. J. Law, 253.

The agent of a foreign corporation, which had not obtained from the secretary of state a certificate that it was authorized to do business in this state, negotiated for it a sale of goods to the defendant. The negotiations were carried on in this state and resulted in a written agreement signed in this state by the defendant and the agent, which contained an express stipulation that it was subject to the approval of the home office of the vendor in another state. Held, that the writing did not become a contract, binding the parties thereto, until it was approved by the foreign corporation, and, such sale not being completed until such approval, it was not "transacting business in this state," requiring the obtaining of the aforesaid certificate of the secretary of state before any action could be brought upon any contract made by it, as prescribed in section 98 of "An act concerning corporations," and the supplements thereto (P. L. 1896, c. 185, p. 277). *Low v. Davy*, 83 Atl. 869, 83 N. J. Law, 540.

**Making single loan**

The doing of a single act of business by a foreign corporation, as, the taking of a mortgage to secure a loan, does not bring it within Laws 1905, c. 79, § 102, providing that every foreign corporation, except banking, insurance, and railroad corporations, before "transacting business" in the territory, shall file in the office of the secretary of the territory a copy of its charter. *Goode v. Colorado Inv. Loan Co.*, 117 Pac. 856, 16 N. M. 461.

**Making single sale**

Under Penal Law (Consol. Laws, c. 40) § 440, prohibiting the "transaction of business" under an assumed name without filing the required certificate, a single sale of trees does not constitute a violation of the statute. *People ex rel. Allen v. Whiting*, 123 N. Y. Supp. 769, 770, 68 Misc. Rep. 306.

Rev. Laws Minn. 1905, § 2888, requiring a foreign corporation to maintain a place in

the state for "transacting its business," etc., before it may transact domestic business or sue in domestic courts or hold or dispose of property within the state, does not apply to a single contract to deliver coal to a firm located in that state. *Hunter W. Finch & Co. v. Zenith Furnace Co.*, 92 N. E. 521, 523, 245 Ill. 586; *Id.*, 146 Ill. App. 257-281.

The sale by a foreign corporation of five car loads of cement to one in this state was not "transacting business" in the state in violation of a statute providing that foreign corporations which have not complied with its terms shall not be permitted to transact business in the state; being only a single transaction. *Alpena Portland Cement Co. v. Jenkins & Reynolds Co.*, 91 N. E. 480, 481, 244 Ill. 354.

**Subscription to stock**

New York General Corporation Law (Consol. Laws 1909, c. 23) § 15, provides that no foreign stock corporation other than a moneyed corporation can do business within the state without first having procured a certificate that it has complied with the requirements of law. Held, that a subscription to the stock of a foreign corporation and the issuance of the stock subscribed for to a resident of New York do not constitute a "transaction of business within the state" by the corporation. *Southworth v. Morgan*, 128 N. Y. Supp. 598, 600, 71 Misc. Rep. 214.

**TRANSACTION**

A "transaction" may include a series of occurrences extending over a great length of time. *Fraley v. Fraley*, 64 S. E. 381, 383, 150 N. C. 501.

The word "transaction" is not synonymous with "occurrence." *Excelsior Clay Works v. De Camp*, 80 N. E. 981, 983, 40 Ind. App. 26 (citing *Lake Shore, etc., R. Co. v. Van Auken*, 1 Ind. App. 492, 27 N. E. 119).

A judgment denying probate of a will on the ground of undue influence exerted by an individual is not *res judicata* in an action to set aside a deed executed by testator to such individual at the same time, though the two papers were executed as a part of the same transaction; the word "transaction" meaning the doing or performing of any affair, management of any matter, as the transaction of business; that which is done or in the process of being done. *Courtney v. Courtney*, 129 N. W. 52, 53, 149 Iowa, 645.

Rev. St. 1899, § 4656 (Ann. St. 1906, p. 2536), authorizes a wife to testify for her husband, in a suit against him concerning business transactions directed or conducted by her as his agent. Held, that "transactions" referred to were those had between her acting as his agent and some other person, and did not include a case where he consummated an agreement himself, and only called on her to sign his name to a note be-

cause of his illiteracy. *Fishback v. Harrison*, 119 S. W. 465, 466, 137 Mo. App. 664.

Elkins Act Feb. 19, 1903, c. 708, prohibits any person or corporation from receiving any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce, etc., and declares that every person or corporation who shall accept or receive any such rebates or concession shall be guilty of a misdemeanor, and on conviction be fined, etc. Held, that the gist of the offense was the receipt of a concession, irrespective of whether the property involved was train loads, car loads, or pounds, and consisted of the "transaction," which was not completed until the shipper received a rate different from the established rate, without reference to the size of the shipment. *Standard Oil Co. of Indiana v. United States*, 164 Fed. 376, 386, 90 C. C. A. 364.

Under Code Civ. Proc. § 442, providing that, whenever a defendant seeks affirmative relief against any party to the action relating to or depending upon the contract or transaction on which it is brought, the term "transaction" means some commercial or business negotiation, and not a wrong of violence or fraud, and so, in an action on notes, defendant cannot set up a cross-action for damages because of the improper issuance and levy of an attachment in a former action on such notes. *Clark v. Kelley*, 124 Pac. 846, 847, 163 Cal. 207.

Where, in a suit to compel a defendant to leave complainant's house, he alleged that she had been employed as his servant at \$20 per month, and, though she had been discharged and paid, she refused to leave the house and claimed the right to remain there, a cross-complaint, in which defendant alleged that she had been fraudulently induced to believe that she was complainant's lawful wife, and that her services were reasonably worth \$50 per month, and demanding judgment for the difference, was properly filed as relating to the "transaction" which was the subject of the action. *Mixer v. Mixer*, 83 Pac. 273, 274, 2 Cal. App. 227.

A person sued for broker's commissions cannot have another broker, claiming commissions on the same sale under a different contract, brought in, and his rights, determined in that action under St. 1893, § 2656a, providing that a defendant may have affirmative relief against a person not a party upon his being brought in, but that such relief must involve or affect the contract, transaction, or property which is the subject-matter of the action, the relief sought not affecting the contract or transaction involved, since "transaction" means whatever may be done by one person which affects another's rights and out of which a cause of action may arise, and in this case means the making of the contract sued on, but, if held to include its

performance, it would not be affected by the relief sought, since defendant can show without the presence of the other broker that the purchaser was procured by him. *Schenck v. Sterling Engineering & Const. Co. (Wis.)* 138 N. W. 637, 639.

Defendant's assignor, to assist a clothing house to settle with its creditors, including defendant, took a mortgage on its stock for \$1,700, specified in a note, and as a part of the same "transaction," upon execution and delivery of the note and mortgage, delivered to the mortgagor's attorney his signed personal checks, payable to the creditors, part of which were filled out and mailed the same day and the rest within a few days as soon as the proper amounts were ascertained and paid by him on presentment; the amount so paid being \$1,650, which, with a previous debt due the mortgagee, exceeded the sum for which the mortgage note was given. The affidavit accompanying the mortgage was that it was made to secure the debt specified in the condition thereof, and for no other purpose, and that the same was a just debt, honestly due and owing from the mortgagor to the mortgagee. Held, in a suit by an attaching creditor of the mortgagor to enjoin foreclosure of the mortgage, that a "transaction" meant a group of facts so connected as to be referred to by a single legal name, that it need not be confined to what was done in one day, nor at one time, nor at one place, and that its immediateness was tested by a logical connection and not by closeness of time, and that the word "immediately" implied such convenient time as was reasonably requisite for completing the thing done; and hence that the affidavit conformed to the purpose of the mortgage and verified the justice and validity of the debt sought to be secured thereby. *Herald & Globe Ass'n v. Clere Clothing Co.*, 84 Atl. 23, 25, 86 Vt. 141.

#### In reference to counterclaim

Under Code Civ. Proc. § 501, subd. 1, permitting a counterclaim, if it be a cause of action arising out of the "contract or transaction" set forth in the complaint, the word "transaction" is broader than the word "contract"; so, if the defendant's cause of action arises out of the same transaction out of which plaintiff's arises, it may be pleaded as a counterclaim. *Kneeland v. Pennell*, 96 N. Y. Supp. 403, 405, 49 Misc. Rep. 94 (citing *Ter Kulle v. Marsland*, 31 N. Y. Supp. 5, 81 Hun, 420).

The word "transaction," as used in Rev. Code 1899, § 5274, relating to counterclaims, and authorizing the setting up as a counterclaim of a claim arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim, is broader in meaning than the word "contract," and includes torts. One slander cannot be set up as a counterclaim against another slander, al-

though both are uttered at the same time and place and in the same conversation. *Wrege v. Jones*, 100 N. W. 705, 706, 13 N. D. 267, 112 Am. St. Rep. 679, 3 Ann. Cas. 482.

2 Abb. Law Dict. p. 590, declares that the term "transaction," in a statute limiting counterclaims to demands arising out of the same transaction, intends some commercial or business negotiation, and not a wrong of violence or fraud. Code Civ. Proc. §§ 438, 442, authorizing a counterclaim or cross-complaint where the cause of action arises out of the transaction set forth in the complaint, does not authorize a counterclaim for a trespass on land and injuries to defendant's crops by plaintiff in an action of claim and delivery by plaintiff to recover possession of the cattle. *Glide v. Kayser*, 76 Pac. 50, 142 Cal. 419.

Under Code Civ. Proc. § 501, subd. 1, authorizing a cause of action to be pleaded as a counterclaim, which arises out of the transaction set forth in the complaint as the foundation of the plaintiff's claim or connected with the subject of the action, a cause of action for fraud in inducing a marriage promise is a proper subject of counterclaim in an action for breach of marriage promise, the word "transaction" in the statute not being limited to causes of action arising on the contract, but being broad enough to permit causes of action arising from tort to be subject of counterclaim, and the "transaction" not necessarily being identical in its particular facts and details with that set up in the complaint. *Gross v. Hochstim*, 130 N. Y. Supp. 315, 319, 72 Misc. Rep. 343.

Courts and text-writers have expended much time and learning in attempting to define the meaning of the word "transaction" and of the phrase "subject of the action," as used in the statute relating to counterclaim, which is common to many states, and, it must be confessed, without marked success. Bliss, in referring to this provision, says: "Three classes of counterclaims are here provided for: First, a demand existing in favor of the defendant and against the plaintiff, which arises out of the contract upon which the plaintiff has based his action; second, a demand so existing, which arises out of the transaction—a broader term than contract—upon which the plaintiff has based his action; and, third, a demand so existing which need not necessarily arise out of either the contract or the transaction involved in the action, but is sufficient if it is connected with the subject of the action." Under such a statute (Rev. Codes 1899, § 5274, subd. 1), a mortgagor of chattels may counterclaim for their conversion by the mortgagee when sued on the note secured by the mortgage. *Hanson v. Skogman*, 105 N. W. 90, 91, 14 N. D. 445.

The word "transaction," as used in the statutes relating to counterclaims is intended

to signify something different from and additional to "contract." A contract is a transaction, but a transaction is not necessarily a contract. The word "transaction" is not synonymous with "accident" or "occurrence." A transaction is also defined as "the management or settlement of an affair;" "that which is done;" "transacting or conducting any business; negotiation; management; a proceeding;" and, as ordinarily employed, is understood to mean the doing or performing of some matter of business between two or more persons. It is from the Latin "trans" and "ago" (to carry on). It is not confined to what is done in one day, or at a single time or place. The logical relation of facts determine whether they together constitute a single transaction. In an action, by the assignee of a lessee entitled to remove coal in a tract of land, for coal inadvertently removed therefrom by the adjacent owner, the latter may, under *Burns' Ann. St.* 1901, §§ 353, 354, providing that a claim arising out of the transaction set forth in the complaint may be set up as a counterclaim, set up as a counterclaim a claim arising from plaintiff's assignor inadvertently removing coal from his land. *Excelsior Clay Works v. De Camp*, 80 N. E. 981, 982, 40 Ind. App. 26 (citing *Pom. Rem. & Rem. Rights*, § 769; *Cent. Dict.*; *Webst. Dict.*; *Worcest. Dict.*; *Pelton v. Powell*, 71 N. W. 887, 96 Wis. 473; *Deagan v. Weeks*, 73 N. Y. Supp. 641, 67 App. Div. 410; *Cunningham, Adm'r. v. Speagle*, 50 S. W. 244, 106 Ky. 278; *Roberts v. Donovan*, 9 Pac. 180, 11 Pac. 599, 70 Cal. 113; *Lake Shore, etc., R. Co. v. Van Auker*, 27 N. E. 119, 1 Ind. App. 492, 496; *First Nat. Bank v. Wisdom's Ex'r*, 63 S. W. 461, 111 Ky. 135).

The term "transaction," as used in the statute relating to counterclaims, and providing that a counterclaim must arise out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, is obviously broader than the term "contract," and authorizes matters to be set up as counterclaim which could not be pleaded as arising on the contract relied on by plaintiff. The cause of action arises from the transaction set forth in the complaint when the combination of acts and events, circumstances and defaults, upon which the rights of the parties are based, when viewed in one aspect, result in plaintiff's right of action, and, when viewed in another aspect, result favorably to defendant. The transaction is not necessarily confined by the facts stated in the complaint, but the defendant may set up new facts and show the entire transaction, and counterclaim on that state of facts as the transaction on which plaintiff's claim is founded. In an action to recover damages for the alleged fraudulent acts of defendant, a corporation engaged in the business of buying, selling, and dealing in grain, provisions, etc., for fu-

ture delivery, defendant may set up as a counterclaim a claim based on the fact that it made investments for plaintiff in the purchase of grain for future delivery as outlined in the complaint, and by reason of fluctuation in the market it was necessary, from time to time, to advance money on such purchases to protect the same, and that defendant made a series of such advances, for which judgment was asked. *King v. Coe Commission Co.*, 100 N. W. 667, 668, 93 Minn. 52.

In an action on a contract or tort, a counterclaim may be interposed based on either contract or tort, provided it answers the other requirements of Code Civ. Proc. §§ 501, 502, viz., that it arises out of the contract or transaction pleaded in the complaint as the foundation of plaintiff's claim, or is connected with the subject of the action, or, if the action be on contract, is a cause of action arising on contract, and existing when the action was commenced. Code Civ. Proc. § 500, authorizes defendant to interpose an answer stating any new matter constituting a defense or counterclaim, and section 501 provides that a counterclaim in an action for tort must be a cause of action in favor of defendant and against plaintiff, arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or as the subject of the action. Plaintiff sued defendant for false imprisonment and malicious prosecution arising out of his arrest by a policeman without a warrant for alleged disorderly conduct, constituting or calculated to provoke a breach of the peace by annoying defendant by posting theatrical posters or bills upon a billboard attached to the premises leased to defendant in the city of New York without the consent of the owner and over defendant's protest, and for defendant's alleged malicious prosecution therefor. *Held*, that the "transaction" pleaded as the foundation of plaintiff's claim was in the one case the arrest, and in the other the acts constituting the malicious prosecution and not the posting of the advertisements; and hence defendant was not entitled to counterclaim for damages resulting from the trespass consisting of the unlawful invasion of the premises. *Adams v. Schwartz*, 122 N. Y. Supp. 41, 44-50, 137 App. Div. 230.

#### In reference to joinder of actions

The word "transaction," as used in the statute, authorizing joinder of actions arising out of the same transaction, means whatever may be done by one person which affects another person's right, and out of which a cause of action may arise. *McArthur v. Moffett*, 128 N. W. 445, 448, 143 Wis. 564, 33 L. R. A. (N. S.) 264.

"Transaction," in Code Civ. Proc. § 484, relating to the uniting of actions on claims arising out of transactions connected with the same subject of action, means the do-

ing or performance of any business; the management of any affair; the act of transacting or conducting any business; negotiation; management; a proceeding. *Rogers v. Wheeler*, 85 N. Y. Supp. 981, 985, 89 App. Div. 435 (citing Bouv. Law Dict.; Pom. Code Rem. § 473).

The term "transactions connected with the same subject of action" refers to a different situation than "causes of action arising out of the same transaction." The former applies generally, if not exclusively, to matters which might constitute a source of independent causes of action, yet is so germane to the primary matter, the suit being in equity, as to be regarded really a part thereof. *Emerson v. Nash*, 102 N. W. 921, 922, 926, 928, 124 Wis. 369, 70 L. R. A. 326, 109 Ann. St. Rep. 944.

The word "transaction," as used in Rev. Laws 1905, § 4154, providing for the uniting of causes of action arising out of same transaction or transactions, embraces something more than contractual relations. It includes any occurrences or affairs the result of which vests in a party the right to maintain an action, whether the occurrences be in the nature of tort or otherwise. *Mayberry v. Northern Pac. Ry. Co.*, 110 N. W. 356, 358, 100 Minn. 79, 12 L. R. A. (N. S.) 675, 10 Ann. Cas. 754.

In section 5623 of the statute (Comp. Laws 1909), which provides that several causes of action may be united in the same petition, where they arise out of the same transaction, or transactions connected with the same subject of action, the term "cause of action" means a redressible wrong. Its elements being the wrong and the relief provided. The "subject of action" is a primary right and its infringement. The term "transaction" is used in the first clause with reference to, and expressive of, all the acts, or groups of related acts, which go to make up one entire project, system, or deal, referred to as a "transaction," and in the latter clause it is used to include and encompass only such acts, or groups of acts, as in themselves constitute separate, redressible wrongs; and such wrongs (transactions) are connected with the same "subject of action" whenever they affect, grow out of, or constitute separate infringements of, the same primary right. *Stone v. Case*, 124 Pac. 960, 963, 34 Okl. 5, 43 L. R. A. (N. S.) 1168.

#### Transactions with decedents

"Transaction," within Gen. St. 1901, § 4770, prohibiting a witness to testify in his own behalf as to any transaction had with a decedent, means an action participated in by the witness and the decedent. *Clifton v. Meuser*, 100 Pac. 645, 647, 79 Kan. 655 (citing 6 Words and Phrases, pp. 5365, 5366; 8 Words and Phrases, pp. 7061, 7062).

Notwithstanding an instrument sued on was a "transaction with decedent" within Sayles' Ann. Civ. St. 1897, art. 2302, yet defendant having been called by plaintiff, the administrator, to testify to a part of the transaction, should have been permitted to testify to the whole of it. *Watson v. Dodson*, 121 S. W. 209, 57 Tex. Civ. App. 32.

The test as to what is a "transaction with" the deceased so as to come within the statutory prohibition has been defined by this court in *Van Wagenen v. Bonnot et al.*, Administrators, 74 N. J. Eq. 843, 70 Atl. 143, 18 L. R. A. (N. S.) 400, and, measured by that test, certain testimony given by the plaintiff in this action was erroneously admitted. *Campbell v. Akarman*, 83 Atl. 881, 83 N. J. Law, 567.

The word "transaction," as used in Civ. Code, § 329, providing that no interested person shall testify to any "transaction" had between the deceased person, etc., embraces every variety of affairs, the subject of negotiations, actions, or contracts. *Wilson v. Wilson*, 120 N. W. 147, 148, 83 Neb. 562; *Fitch v. Martin*, 104 N. W. 1072, 1075, 74 Neb. 538 (citing *Smith v. Perry*, 73 N. W. 282, 52 Neb. 738).

The performance of services for a person since deceased, and the determination of their value, does not involve a "transaction personally with the deceased," within St. 1898, § 4069, providing that no party shall testify as to any transaction with a deceased person in a proceeding in which the opposite party sustains his liability under the deceased person. *Boss's Estate v. Baehr*, 113 N. W. 483, 434, 133 Wis. 119.

Under 16 Del. Laws, c. 537, providing that in actions against administrators, in which judgment may be rendered against them, neither party may testify as to any "transaction" with the intestate, a judgment creditor, seeking to enforce a judgment obtained against a decedent, may not testify as to the payment or nonpayment of the judgment by decedent, because payment or nonpayment is a transaction within the statute. *Knowles v. Waller*, 78 Atl. 611, 612, 7 Pennewill, 220.

Code 1904, § 3346, which provides that, where one of the original parties to a "transaction" is incapable of testifying by reason of death, etc., the adverse party shall not testify thereto, prevents a wife, in suing her husband's estate for her distributive share in the estate of her brother, of which her husband was administrator, from testifying whether her husband paid her such distributive share. *McIntyre v. Wright*, 74 S. E. 172, 173, 113 Va. 299 (quoting 8 Words and Phrases, p. 7062).

On the issue as to whether a will was the result of an insane delusion, conceived by testator towards his wife about the time of

his mother's death, testimony of the wife that, while traveling to the mother's funeral on a train, the testator sat several seats behind his wife, and that every time she looked back at him he was "gazing" at her, was not inadmissible as being a "transaction" or "communication" with the testator. *Lanham v. Lanham* (Tex.) 146 S. W. 635, 637.

The testimony of a grantee, when sued by an heir of the deceased grantor to set aside the deed on the ground of nondelivery, that he had the deed in his possession very soon after the date thereof, and that he thereafter kept it among his private effects, does not relate to any "transactions with nor statements made by decedent," within Rem. & Bal. Code, § 1211, and is competent on the issue of delivery. *Bardsley v. Truax*, 116 Pac. 1075, 1076, 64 Wash. 400.

Under Code 1907, § 4007, relating to evidence of transactions with a decedent, a grantor, suing the heirs of the deceased grantee to cancel the deed and expunge it from the record, on the ground that he never executed or acknowledged the deed, may testify that he did not sign or acknowledge the deed, unless it is conclusively shown or conceded that he was a party; a "transaction" between two persons implying action, consent, knowledge, or acquiescence on the part of both. *Blount v. Blount*, 48 South. 581, 582, 158 Ala. 242, 21 L. R. A. (N. S.) 755, 17 Ann. Cas. 392.

In a suit on a note by the administrator of the deceased person, the defendant pleaded usury. A statement, part of which was in the handwriting of the deceased person, was offered in evidence, and the defendant was permitted to testify that this statement was given by the deceased person, and that the various items shown on the statement were intended to represent the usurious transaction, and that he paid a usurious rate of interest for the money. Held, that this testimony related to a "transaction" with the deceased person, and that it was error to admit it. *Wadleigh v. Parker*, 124 Pac. 957, 959, 34 Okl. 213.

"The word 'transaction,' as used in a statute relating to the admissibility of evidence of transactions or communications with deceased persons, has often received judicial interpretation." It is said to mean every variety of affairs which forms the subject of negotiations or actions between the parties. *Whitney v. Brown*, 90 Pac. 277, 278, 75 Kan. 678, 11 L. R. A. (N. S.) 468, 12 Ann. Cas. 768 (citing 8 Words and Phrases, 7062, and quoting from opinion in *Holliday v. McKinne*, 22 Fla. 153).

In an action against the administrator of plaintiff's sister for services rendered during her last illness, evidence that, after going to the sister's home, plaintiff had a conversation or understanding with her concern-

the compensation plaintiff was to receive, is incompetent, as it related to a "transaction" with decedent; a "transaction," within statute, including anything said or done between witness and decedent, or any act or communication in which they both had a part and concerning which decedent, if living, could corroborate or deny witness' statements. *Sheldon v. Thornburg*, 133 N. 1076, 1077, 153 Iowa, 622.

"Transactions and communications," within Code Civ. Proc. § 829, prohibiting evidence of personal transactions and communications between interested persons and a decedent, embrace every variety of affairs which can form the subject of negotiation, interviews, or actions between persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another. *Holland v. Holland*, 90 N. Y. Supp. 8, 211, 98 App. Div. 366 (citing *Holcomb v. Holcomb*, 95 N. Y. 316).

Revisal 1905, § 1631, prohibiting one interested in the event of an action adversely affecting the decedent's personal representative from testifying to a "transaction with decedent," did not prevent a witness, in an action to determine whether an instrument found in decedent's safe was his will, from testifying that witness has papers in the safe himself, on the ground that witness was interested as a member of an advisory committee named in the purported will, and as yet unaccepted trust without compensation; the testimony merely serving to show, from the witness' own conduct, that the safe was a proper depository for a will. *Harper v. Harper*, 62 S. E. 553, 54, 148 N. C. 453.

Code Civ. Proc. 1902, § 400, excludes testimony of a party in interest as to any transaction between such witness and a person deceased against a party prosecuting or defending as assignee or heir of the decedent. Defendant in partition, who claimed as an assignee of a decedent as against heirs of the decedent, offered as a witness to prove the execution of a deed by the decedent to one of the defendants a party who had purchased from that defendant and conveyed to himself. Held, that while a witness was not disqualified under the section because of interest from testifying as to transactions with a deceased person, at which he was present without being a participant, the term "transaction" was very comprehensive, meaning the carrying on or through of any matter or affair, and that as the witness had witnessed the deed and given its validity this was a transaction between him and the deceased grantor in which the witness had participated; and hence he was incompetent to testify to the execution of the deed. *Merck v. Merck*, 71 S. E. 969, 970, 89 S. C. 347, Ann. Cas. 1913A, 937.

The terms "transactions" and "communications," as used in Code Civ. Proc. § 829, which provides that upon the trial of an action a party or person interested in the event shall not be examined as a witness in his behalf or interest, against the executor, administrator, or survivor of a deceased person, concerning a personal transaction or communication between the witness and the decedent, embrace every variety of affairs which can form the subject of negotiations, interviews, or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another. *Wilber v. Gillespie*, 112 N. Y. Supp. 20, 25, 127 App. Div. 604 (quoting and adopting definition in *Holcomb v. Holcomb*, 95 N. Y. 316).

"The test laid down in our decisions in ascertaining what is 'a transaction with' the deceased, about which the other party to it cannot testify, is to inquire whether, in case the witness testified falsely, the deceased, if living, could contradict it of his own knowledge." The proviso in the evidence act (P. L. 1900, p. 363, § 4) relating to testimony as to any transaction with a decedent represented in an action, renders the surviving party to a *donatio causa mortis* incompetent to testify that a closed parcel then delivered remained in statu quo until after donor's death, and as to its contents when opened, since such testimony would establish by necessary inference its contents at the time of delivery, on which point the deceased, if living, could contradict the survivor. *Van Wagenen v. Bonnot*, 70 Atl. 143, 144, 74 N. J. Eq. 843, 18 L. R. A. (N. S.) 400 (citing and adopting *Smith v. Burnet*, 35 N. J. Eq. 314, 322; *Woolverton v. Van Syckel*, 81 Atl. 603, 57 N. J. Law, 393; *Provost v. Robinson*, 33 Atl. 204, 58 N. J. Law, 222; *Dickerson v. Payne*, 48 Atl. 528, 66 N. J. Law, 35).

"Webster defines 'transaction' as follows: '(1) The doing or performing of any business; the management of any affairs; performance. (2) That which is done; an affair; as the transaction of the exchange.' It is defined in Anderson's Dictionary of Law to be 'whatever may be done by one person which affects another's rights and out of which a cause of action may arise.' Under Code 1896, § 1794, providing that a person having a pecuniary interest in the result of a suit or proceeding shall not testify against the party to whom the interest is opposed as to any 'transaction' with a deceased person whose estate is interested in the result or proceeding, a physician is incompetent to testify in his own behalf, in an action for services against a decedent's estate, as to the number of visits he made to deceased, what he did for him, and how he relieved his suffering." *Duggar v. Pitts*, 39 South. 905, 906, 145 Ala. 358, 8 Ann. Cas. 146.

The court did not err in permitting Mrs. Hilley, the plaintiff, to testify, over objections made, as follows: "Captain Hall [the husband and agent of Mrs. Hall, the defendant] came to my house while Mr. Shindlebower was living; was there while Mr. Shindlebower was there on one occasion before Shindlebower left only a few days. With Captain Hall was his son, Dr. Hall. Heard no conversation between my husband and Captain Hall, or Mr. Shindlebower and Captain Hall, on that occasion in regard to the property, except Captain mentioned something about the cistern. Captain Hall inquired of me the dimensions of the house. I gave them to him—how many rooms there were, and the sizes of them. Nothing said on that occasion by me and Mr. Hilley to Captain Hall with reference to the improvements, only what was said concerning the back porch and the cistern. My husband spoke to Mr. Hall's son; said we had one of the best cisterns in Polk county, as well as I recollect; said he put a good substantial porch there. Mr. Hilley just spoke up in this way—says: 'I have built one of the best cisterns in Polk county, and I have built a porch.'" This testimony was objected to on the grounds: (a) "That it occurred in the presence of W. M. Shindlebower. (b) That said testimony about improvements tended to set up the alleged title of the plaintiff, and to affect adversely the defendant's title; it appearing that W. M. Shindlebower was dead." Such conversation was neither a "transaction" nor a "communication" between the plaintiff and the deceased, or between the deceased and any one else. *Hall v. Hilley*, 76 S. E. 566, 139 Ga. 13 (citing *Ray v. Camp*, 36 S. E. 242, 110 Ga. 818 (2); *Reid v. Sewell*, 36 S. E. 937, 111 Ga. 880 (1)).

*Sayles' Ann. Civ. St. 1897*, art. 2302, provides that, in an action by a personal representative, neither party shall be allowed to testify against the other as to any transaction with, or statement by, decedent, unless called to testify thereto by the opposite party. In an action on an instrument, certifying that defendant had received specified sums of money to loan for plaintiff's intestate, and that he had advanced to her specified sums, leaving a balance due her, the administrator asked defendant whether the instrument was in his handwriting, to which he answered it was. Thereupon defendant's counsel offered to prove that defendant had made a mistake in the instrument, and that he should have credited himself with a certain additional sum, which evidence was excluded as relating to a transaction between decedent and defendant. Held that, notwithstanding the instrument was a "transaction with decedent," within article 2302, yet defendant, having been called by the administrator to testify to a part of the transaction, should have been permitted to testify to the

whole of it. *Watson v. Dodson*, 121 S. W. 209, 57 Tex. Civ. App. 32.

In an action in the husband's name against an executor to recover for services rendered testator, in which plaintiff's wife was in effect a party, the recovery being for the community estate, the wife testified that she rendered services for testator by milking, cooking, and performing other housework, and that her husband would take testator every place he wanted to go, and waited on him all over the place in tending to the stock, etc., and plaintiff testified that he cut wood, fed the cattle, put up the hay, etc., harnessed the buggy, and carried testator almost every place there was anything to see to, and that when he moved to testator's farm he took with him corn and pork and other provisions and the corn was fed to his and testator's horses, and the other supplies, as well as groceries bought by plaintiff, were eaten by him and testator. 1 *Sayles' Ann. Civ. St. 1897*, art. 2302, provides that in actions against executors as such neither party can testify to transactions with testator unless called by the opposite party. Held, that the witness' testimony that her husband took testator every place he wanted to go, and waited on him all over the place in feeding, etc., and carried him almost every place there was anything to see to, as well as plaintiff's testimony that groceries purchased by him were used by testator, was as to "transactions" with testator, and not admissible, but the other testimony was admissible. *Wells v. Hobbs*, 122 S. W. 451, 453, 57 Tex. Civ. App. 375.

## TRANSCRIBE

As spread, see Spread.

Technically the word "transcribe" means to write across or over. As generally used, it means to reduce to writing, and, as applied to notes of a stenographer as he is required to translate his notes before he can transcribe them, his translation can be as accurately expressed in words as in writing, and such translation would be as binding on his conscience as his certificate to the notes transcribed. *Wilmoth v. Wheaton*, 105 Pac. 39, 40, 81 Kan. 29.

## TRANSCRIPT

See Stenographic Transcript.

"A 'transcript,' according to its derivation and as generally used and understood, is in effect a copy; \* \* \* a copy of an original writing or deed." The filing of an abstract of a judgment of a justice in the clerk's office of the circuit court is not a compliance with a statute requiring a transcript of such judgment to be filed. *Steringer v. John Mackie & Co.*, 49 S. E. 942, 943, 57 W. Va. 63 (citing and adopting *Bouv. Law Dict.*).

The clerk of the district court is entitled fees for "copying" the papers provided in Code Cr. Proc. 1895, art. 623, on fee of venue, as well as for making the transcript" mentioned in article 622; a "y" being equivalent to a "transcript." *Availle v. Stephens*, 119 S. W. 842, 843, Tex. 514.

Under Sand. & H. Dig. Ark. § 5273, which provides that each city council shall cause to be provided for its clerk's office a seal, such seal shall be affixed to all "transcripts," etc., which it may be necessary to authenticate under the provisions of this act, a writ of habeas corpus is not a "transcript." *Con- v. City of Eureka Springs*, 135 Fed. 566,

Under a statute providing that a justice grants an appeal shall send to the clerk the common pleas a transcript of the proceedings, the phrase "transcript of proceedings" does not include notice of appeal. According to the usual practice, a transcript consists of a copy of the docket which the justice is required by statute to keep and the papers as are necessary for the trial in the cause on appeal. *Lazarus v. Martling*, 188, 189, 73 N. J. Law, 84.

By "transcript of the evidence," as used in Acts 1905, p. 219, c. 112, providing for the preservation by court stenographers of the record of trials for the information of the court, jury, and parties, and requiring the stenographer to furnish transcripts to parties on payment therefor, and providing that on appeals such transcript shall be used as a record of the case, is meant the document, consisting of the evidence or other proceedings, made up at the request of either party upon payment therefor. *Middlehurst Collins-Gunther Co. (Tex.)* 99 S. W. 1027, 8.

## TRANSFER

See Certificate of Order of Transfer; Fraudulent Transfer; Voluntary Transfer.

See, also, Attorn.

Civ. Code, § 1039, declares a "transfer" to be an act of the parties, or of the law, by which the title to property is conveyed from one living person to another. *Curtin v. Kolsky*, 78 Pac. 962, 963, 145 Cal. 431.

The expression "to sell" and the expression "to transfer property for a price in money" are convertible; and, as a consequence, it is no more possible to sell without transferring ownership than it is possible to sell without selling, or to transfer ownership without transferring ownership, or to do any other thing without doing it. When a sale is made under a suspensive condition, there is no sale until the condition is fulfilled. There is merely a contract that there shall be a sale when the condition is fulfilled.

*Barber Asphalt Paving Co. v. St. Louis Cypress Co.*, 46 South. 193, 197, 121 La. 152.

Where a contract for abstracts of title provided for payment at so much per "transfer," and there was evidence of a custom among abstractors that each of the successive steps leading to a conveyance was treated as a "transfer," and not all the transactions taken together, the abstractor was authorized to make up his account on such theory. *McVeigh v. Chicago Mill & Lumber Co.*, 132 S. W. 638, 642, 96 Ark. 480.

The word "transfer" means "the act by which the owner of a thing delivers it to another person, with the intent of passing the rights which he has in it to the latter." *Bouvier's Law Dict. (Rawle's Rev.)* 1133. One of the definitions given the term by Webster is "to make over the possession or control of; to pass; to convey as a right from one person to another." A bill of sale, reciting the transfer of "all my goods, license, good will, etc., to my saloon," given at the conclusion of negotiations in which the license was considered, and in which it was agreed and understood that the saloon should be run by the buyers under the seller's name and license until the expiration of the license, and in pursuance of which it was so conducted, constitutes a "transfer" of the license, within the prohibition of Rev. St. 1899, § 2992. *Sawyer v. Sanderson*, 88 S. W. 151, 153, 113 Mo. App. 233.

In speaking of the "transfer" of an instrument, it conveys the idea of a delivery. *Crawford v. Hord*, 89 S. W. 1097, 1098, 40 Tex. Civ. App. 352.

The word "convey" or "transfer," as an operative word in a deed, is of equivalent signification and effect as "grant." *State v. Kellther*, 88 Pac. 867, 868, 49 Or. 77 (quoting and adopting definition in *Lambert v. Smith*, 9 Or. 193, citing *Field v. Columbet*, 4 Sawy. 527, 9 Fed. Cas. 12).

The word "transfer," as used in an agreement by which the proprietors of a hotel sold the business and property used therein to a corporation, and as consideration the corporation issued stock to the former proprietors, and agreed to pay a claim against them for goods sold to them and used in the business, and thereafter the seller, in consideration of a sum of money, executed and delivered to the former proprietors a writing, reciting that the sellers agreed to "transfer" the account to the corporation, does not include the extinguishment or satisfaction of a chose in action, either by payment in full or by part payment, which is taken in full satisfaction. There is no meaning of the word "transfer" which carries the idea of an act of extinguishment, or any other idea than that of a passing over of a right or title or property in a thing from one to another. *Miles v. Bowers*, 90 Pac. 905, 907, 49 Or. 429 (quoting and adopting def-



initiation by Justice Folger in *Sands v. Hill*, 55 N. Y. 18).

The words "sell, transfer or assign," as used in section 83, added to chapter 54 of the Code of 1899 by chapter 35, p. 93, of the Acts of 1901, authorizing a corporation to sell, transfer, or assign corporate property, do not authorize the corporation to trade or barter away for any thing other than money. The word "sell" usually applies to tangible property. It is a technical term applicable to the alienation of that kind of property, and especially to personal property. "Transfer or assign" are applicable to choses in action, rights, and privileges, rather than tangible property, and are almost, if not quite, identical in meaning. None of these terms, except the word "sell," indicates what the nature of the consideration shall be. Neither "assign" nor "transfer" is broad enough to cover the consideration. They in no sense define the contract under which they pass title, but simply define the nature of the act by which the title passes. They are more limited than the word "sell," which necessarily involves a price or consideration; but they stop short of indicating whether the property may be disposed of by sale or barter, and hence do not confer a power to trade. *Germer v. Triple-State Natural Gas & Oil Co.*, 54 S. E. 509, 519, 60 W. Va. 143.

A "transfer" is the act by which the owner of a thing delivers it to another with the intent of passing the rights which he has in it to the latter, and a chattel mortgage is not within the meaning of such term. *Noble v. Ft. Smith Wholesale Grocery Co.*, 127 Pac. 14, 17, 34 Okl. 662, 46 L. R. A. (N. S.) 455.

"The word 'transfer' in its literal meaning is broader than 'assignment,' and all the authorities agree in a definition which in effect covers any act by which the owner of any thing delivers or conveys it to another, with the intent to pass his right therein. In like general terms a transferee is one to whom a transfer is made." Within Civ. Code, § 5269, par. 1, providing that in any suit instituted or defended by an assignee, transferee, etc., of a deceased person, the opposite party shall not be permitted to testify in his own favor against such deceased person as to transactions or communications with such deceased person, the opposite party in an action of ejectment by the grantee of a deed from a deceased person is incompetent, as being an assignee or transferee. *Hendrick v. Daniel*, 46 S. E. 438, 439, 119 Ga. 358 (citing and distinguishing *Elliott v. Shaw*, 32 Ohio St. 431).

#### Assignment of mortgage

Civ. Code 1901, par. 735, provides that no instrument affecting real estate is valid against subsequent purchasers for value without notice unless recorded. Paragraph 1135 requires the record of "deeds, grants, transfers, and mortgages \* \* \* which

have been acknowledged," and paragraph 1136 requires every recorder to "keep \* \* \* an index of assignments of mortgages, \* \* \* assignors, \* \* \* when and where recorded," and "an index of mortgages, \* \* \* assignees, \* \* \* when and where recorded." An assignor of a purchase-money mortgage fraudulently released it of record upon a reconveyance of the property and later made a new mortgage to a mortgagee without notice of the assignment, which was promptly recorded. The assignment of the original mortgage was not recorded until later. Held that, as the word "transfer" in paragraph 1135 is broad enough to include assignments of mortgages, the lien of the assigned mortgage was junior to that of the prior recorded instrument. *Newman v. Fidelity Savings & Loan Ass'n*, 128 Pac. 53, 55, 14 Ariz. 354.

An assignment of a mortgage lien is not a "conveyance" or a "transfer" of "any interest" in land covered by the mortgage within the meaning of section 2480, Gen. St. 1906, relating to recording of conveyances and transfers of lands or interests therein. *Garratt v. Fernald* (Fla.) 57 South. 671, 672.

#### As subject of taxation

The original issuance of stock by a corporation is not within Laws 1905, p. 474, c. 241, as amended by Laws 1906, p. 1008, c. 414, imposing a tax on all "sales or transfers" of corporate stock, whether made on or shown by the books of the corporation, or by any assignment in blank, or by any delivery of any paper or other evidence of transfer or sale. *People v. Duffy-McInerney Co.*, 106 N. Y. Supp. 878, 879, 122 App. Div. 336.

#### Distinguished from abandon

The term "transfer" is distinguishable from the term "abandon," in that the latter implies surrender of something deemed useless, while the former implies a thing of value. Where a deed provided that, in case the grantees should abandon the property, it should revert to the grantors, a resale of the property by the grantees did not constitute an abandonment, so as to work a forfeiture. *St. Peter's Church v. Bragaw*, 56 S. E. 638, 690, 144 N. C. 126, 10 L. R. A. (N. S.) 633 (citing 1 Words and Phrases, pp. 4, 5, 11).

#### In bankruptcy law

Transfer as preference, see Preference.

Bankr. Act July 1, 1898, § 1, cl. 25, provides that the word "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. In re Pfaffinger, 154 Fed. 523, 524; *Walter A. Wood Mowing & Reaping Mach. Co. v. Vanstony*, 171 Fed. 375, 382, 96 C. C. A. 331.

To constitute a preference voidable under the Bankrupt Act of July 1, 1898 (30 Stat. 545, c. 541, § 60, as amended by Act Feb. 5, 1903, 32 Stat. 799, c. 487), it is not necessary that the "transfer" of the insolvent's property be made directly to the creditor. It may be made to another, for his benefit. *National Bank of Newport v. National Herkimer County Bank*, 32 Sup. Ct. 633, 635, 225 U. S. 178, 56 L. Ed. 1042.

It is a necessary condition precedent to a preference that there shall have been a "transfer" of property by the bankrupt whereby a creditor is enabled to obtain a greater percentage of his debt than other creditors of the same class, as provided by Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (U. S. Comp. St. 1901, p. 3445), so that, if a conveyance attacked as a preference was originally and remained a nullity as against creditors and the bankrupt's trustee, there was no "transfer" within such definition. *Rosenbluth v. De Forest & Hotchkiss Co.*, 81 Atl. 955, 957, 85 Conn. 40.

In an action by an assignee in insolvency, a sale of goods by the insolvents in the name of their broker's clerk, falsely stating that they belonged to such clerk, was not a "transfer" made in the usual course of insolvent's business. *Jaquith v. Davenport*, 84 N. E. 125, 197 Mass. 397.

Bankr. Act July 1, 1898, c. 541, § 1, subd. 25, 30 Stat. 545, amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797, provides that the term "transfers" shall include the sale and every other and different mode of disposing of or parting with property, as a payment, pledge, mortgage, gift, or security. Section 3, subd. "a," declares that acts of bankruptcy shall consist of a person having (1) conveyed, transferred, concealed, or removed any part of his property, with intent to hinder, delay, or defraud his creditors or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors, with intent to prefer such creditors over other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings as not having at least five days before the sale or final disposition of any property affected by such preference vacated or discharged the same. Held, that where a person, while insolvent, voluntarily confessed judgment in favor of certain creditors, and permitted them to levy executions on and sell his property thereunder without having vacated such sale, such proceedings constituted a "transfer" within clauses 1 and 2 of section 3, independent of clause 3, and therefore limitations against the creditor's right to file a bankruptcy petition ran from the day of the sale, and not from a period five days prior thereto. *In re Nusbaum*, 152 Fed. 835, 836.

Under Bankr. Act July 1, 1898, c. 541, § 60, 30 Stat. 562, defining a "preference," and section 1, subd. 25, 30 Stat. 545, defining a "transfer," and section 3, subd. 3, 30 Stat. 5406, declaring what shall constitute an act of bankruptcy, the act of a debtor, while insolvent, in permitting certain creditors to recover and docket a judgment against her so as to acquire a lien on real estate, and in permitting such judgment to remain a lien until one day before the expiration of four months from the date it was so docketed, constituted a preference and an available act of bankruptcy. *In re Tupper*, 163 Fed. 766, 768-770.

A "transfer" is within Ky. St. § 1910, making every transfer by a debtor in contemplation of insolvency and with a design to prefer a creditor an assignment for the benefit of creditors, when the transferor should know, as a reasonable man, that he was insolvent when the transfer was made, and that its effect would be to prefer one creditor to another; his actual knowledge of insolvency not necessarily being the criterion. *Union Trust & Savings Co. of Maysville v. Taylor*, 134 S. W. 196, 197, 142 Ky. 183.

Under the definition of the term "transfer," as given in the Bankruptcy Act, that it shall include a sale and every other mode of disposing of or parting with property or the possession thereof as a payment, pledge, mortgage, gift, or security, an agreement to transfer property may be construed as an agreement to deliver. *Godwin v. Murchison Nat. Bank*, 59 S. E. 154, 156, 145 N. C. 320, 17 L. R. A. (N. S.) 935 (citing 8 Words and Phrases, p. 7066).

Though the fact that an alleged bankrupt parted with the possession of property levied on under an attachment to the attaching officer conditionally and as security be held to constitute a "transfer" of the property attached, as defined by Bankr. Act July 1, 1898, c. 541, § 1a (25), 30 Stat. 545, it was essential, in order that such transfer should constitute an act of bankruptcy, that it so operate as to constitute a "preference," as defined by section 60a, to wit, that the enforcement of the transfer will enable one of the bankrupt's creditors to obtain a greater percentage of his debt than any other creditor of the same class. *In re Crafts-Rlordon Shoe Co.*, 185 Fed. 931, 933.

Where a bankrupt while solvent assigned a land contract to a bank in consideration of present and future advances to improve buildings on the land, and neither the contract nor the assignment were witnessed or acknowledged so as to be entitled to record, the "transfer" was made when the assignment was delivered to the bank and an advancement made on the faith thereof, and not when a new assignment to the bank's successor was executed and recorded. *In re Sayed*, 185 Fed. 962, 964.

A debtor, who transfers his property to a creditor by voluntarily confessing judgment in favor of the creditor and allowing him to issue execution and make a levy and a sale resulting in the creditor becoming the purchaser, transfers his property within Bankruptcy Act July 1, 1898, c. 541, § 1, subd. 25, 30 Stat. 545, providing that a "transfer" includes a sale and every other mode of disposing of property as a payment, pledge, mortgage, gift, or security. *Grant v. National Bank of Auburn*, 197 Fed. 581, 586.

Bankr. Act, § 1, defines "transfer" as including the sale and every other mode of disposing of or parting with property or the possession thereof absolutely or conditionally. *In re Thomas*, 199 Fed. 214, 232.

Where a creditor procures a judgment against an insolvent debtor, and thereafter procures execution thereon to be issued and levied on personal property of the debtor, and at the execution sale such property is sold and the proceeds of the sale paid to the creditor in satisfaction of the debt, it is held that such execution sale and payment of the proceeds thereof constitutes a "transfer" of his property by the debtor, within the meaning of those words as used in the act. *Galbraith v. Whitaker*, 138 N. W. 772, 774, 119 Minn. 447, 43 L. R. A. (N. S.) 427.

Set-off by a bank of a deposit account due a bankrupt against his liability to the bank on a note is not a "transfer of property" by the bankrupt within Bankr. Act July 1, 1898, c. 541, § 1, subd. 25, 30 Stat. 545, declaring that a transfer shall include the sale and every other and different mode of disposing of or parting with property or the possession thereof absolutely or conditionally as a payment, pledge, mortgage, gift, or security. *Booth v. Prete*, 71 Atl. 938, 939, 81 Conn. 636, 20 L. R. A. (N. S.) 863, 15 Ann. Cas. 306.

#### Same—Deposit in bank

A "transfer" is defined in the Bankruptcy Act of 1898 to include the sale and every other and different method of disposing of or parting with property, or the possession of property absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. Insolvents, by depositing money in a bank on an open account, subject to check, do not thereby make a "transfer of property," within the meaning of the act. *New York County Nat. Bank v. Massey*, 24 Sup. Ct. 199, 201, 192 U. S. 138, 48 L. Ed. 380.

The deposit of money in bank by an insolvent within four months prior to his bankruptcy, on open account, subject to check, does not constitute a "transfer" of property amounting to a preference under Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562, though the bank may be at the time a creditor, and under section 68a, 30 Stat. 565, the bank has the right to set off so much of its claims as equals the balance in such account.

*In re George M. Hill Co.*, 130 Fed. 315, 318, 64 C. C. A. 561, 66 L. R. A. 68 (citing *New York County Nat. Bank v. Massey*, 24 Sup. Ct. 199, 192 U. S. 138, 48 L. Ed. 380).

#### Same—Mortgage

By section 1 of the Bankruptcy Act of July 1, 1898, 30 Stat. 545, the word "transfer" is defined to include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. "The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, \* \* \* and by which the result forbidden by the statute may be accomplished; 'a preference enabling a creditor to obtain a greater percentage of his debt than any other creditors of the same class.'" The giving of a chattel mortgage is a "transfer" of property, as defined by the bankruptcy act, it being a settled law of the state of New York that a chattel mortgage is a sale of the thing mortgaged, and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition. *In re Riggs Restaurant Co.*, 130 Fed. 691, 693, 66 C. C. A. 48 (quoting *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171).

Within the meaning of Bankr. Act 1898, § 1, providing that a "transfer" includes the sale and every other different mode of disposing of or parting with the property or the possession of property absolutely or conditionally as a payment, pledge, mortgage, gift, or security, a mortgage given for the security of a debt is a "transfer." Dissenting opinion of Justice Day in *Keppel v. Tiffin Sav. Bank*, 25 Sup. Ct. 443, 450, 197 U. S. 356, 49 L. Ed. 790.

A conditional transfer of property as a pledge, mortgage, or security is within Bankr. Act, § 3a (2), by the express definition of the word "transfer" given in section 1 (25), and a mortgage made by an insolvent and recorded within four months prior to the filing of a petition in bankruptcy against him, if given with intent to prefer a creditor, constitutes an act of bankruptcy. *In re Edelman*, 130 Fed. 700, 701, 65 C. C. A. 665.

The word "transfer," as used in Bankr. Act July 1, 1898, c. 541, § 60a, 30 Stat. 562, includes "the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. A "mortgage" is a security and a transfer, and subject to the provisions of section 60a, and also of section 60b, providing that if a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudica-

and the person receiving it or to be benefited thereby, or his agent acting therein, have had reasonable cause to believe it was intended thereby to give a preference, it shall be voidable by the trustee; a mortgage creating a preference, under § 60a, is nevertheless not voidable under section 60b, unless the creditor who received it, or is benefited thereby, or his agent, had reasonable cause to believe that it was intended to give a preference by it. *Coder v. Russell*, 152 Fed. 943, 949, 82 C. C. A. 91, R. A. (N. S.) 372.

#### Transfer—Payment

Payment of money is a "transfer" of property within the Bankrupt Act. *Wright v. Metropolitan*, 52 S. E. 141, 142, 140 N. C. 1 (citing *Pirie v. Chicago Title & Trust Co.*, 182 Ill. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171; *Fixen*, 102 Fed. 295, 42 C. C. A. 354, R. A. 605; *Sherman v. Luckhardt*, 70 Mo. App. 320; *Tomlinson v. City of Lexington*, 145 Fed. 824, 826, 76 C. C. A. 400; *Dickenson v. Stults*, 48 S. E. 173, 120 Ga. 632 (citing *Collier*, Bankr. [3d Ed.] 421); *John S. Brittain Dry Goods Co. v. Manshaw*, 75 Pac. 1027, 68 Kan. 734; *Ansley v. Kellogg*, 92 Pac. 222, 224, 41 Colo. 117; *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 45 L. Ed. 1171); *Bank of Oklahoma v. Bank of Oklahoma*, 85 Pac. 469, 470, 101 Okla. 328.

#### Transfer—Fraud of creditors

The taking of a negotiable promissory note by the debtor in settlement of a debt from him on account, even if done to prevent attachment upon trustee process, is not a "transfer," within the meaning of a statute relating to transfers in fraud of creditors. *Whegan Bank v. Cutler*, 49 Me. 315, 316.

#### Transfer—Inheritance tax law

The tax variously called an "inheritance tax," a "legacy tax," a "transfer tax," and a "cession tax," is a "burden imposed by testament on all gifts, legacies, and successions, whether of real or personal property, or of any interest therein, passing to certain persons (other than those specially excepted) by will, by intestate law, or by assignment made inter vivos, intended to take effect at or after the death of the donor. In re *Morris*' Estate, 50 S. E. 682, 110 N. C. 259 (quoting and adopting definition in *Dos Passos* [2d Ed.] § 2).

The title of P. L. 1906, p. 432, c. 228, entitled "An act to amend an act entitled 'An act to tax intestates' estates, gifts, legacies, and collateral inheritance in certain cases,'" is sufficiently comprehensive to include the subject-matter of section 1, subd. 2, thereof, providing that a tax may be imposed on the transfer if by will of property within the state and decedent was a nonresident at death; the word "transfer" being used synonymously with "passing," "change of

title," or "change of possession." *Dixon v. Russell*, 73 Atl. 51, 53, 78 N. J. Law, 296.

The word "transfer," as applied to transfer tax laws, means the passing of property, or of any interest therein, in possession or enjoyment, present or future, without regard to whether the actual possession and enjoyment follows immediately or comes at some future time. Where a vested, though defeasible, interest in remainder passes under a will to the remainderman on the testator's death, though the possession does not pass until the death of the life tenant, the transfer or succession is referred to the time of the death of the testator, and, if that occurred prior to the enactment of the act taxing transfers of property, the remainder is not taxable. In re *Hitchins' Estate*, 89 N. Y. Supp. 472, 477, 43 Misc. Rep. 485.

Laws 1905, c. 368, § 220, subd. 1, provides for a tax upon the transfer of any property or interest therein when the transfer is by will or the intestate laws of the state, from any person dying seised or possessed of property; the term "intestate laws" referring to the statutes governing the descent and distribution of a decedent's property. Real Property Law (Laws 1896, c. 547) § 280, in force when chapter 368 was enacted, provided that the article (relating to descent) did not affect tenancy by curtesy or dower. Held, that an estate by curtesy, not being derived from the wife's estate nor acquired by inheritance, is not taxable under section 220; there being no "transfer" thereof within the section. In re *Starbuck's Estate*, 122 N. Y. Supp. 584, 585, 586, 137 App. Div. 866.

A "transfer tax" must be regarded as a tax, not upon the money which is the subject of the legacy, but upon the passing of that money under the will, in possession or enjoyment. In re *Wolfe's Estate*, 85 N. Y. Supp. 949, 950, 89 App. Div. 349.

The word "transfer," as used in the Transfer Tax Law (Laws 1896, c. 908), is defined in section 242 as including the passing of property or any interest therein in possession or enjoyment, present or future, by inheritance, descent, devise, bequest, grant, deed, bargain, sale, or gift in the manner prescribed in the act. A husband and wife deposited moneys with two trust companies either of them, or the survivor, having power to draw such deposits. In the earlier account the husband's name came first, and in the later one the wife's name came first. The moneys deposited in both accounts previously belonged to the wife, and the checks drawn on the early account were generally signed by the husband to pay household expenses, and the later account was drawn upon by checks signed by the husband with the names on the later account and deposited in the first account and disbursed for family expenses. The husband contributed his whole salary to the household expenses. On the

death of the wife, the balances in the joint accounts were not subject to the transfer tax. *In re Stebbins' Estate*, 103 N. Y. Supp. 563, 565, 52 Misc. Rep. 438.

#### **In will**

The word "transfer," in a provision of a will providing that the income of a trust estate should be paid to testator's daughter, and at her death one-fifth of the principal of the estate shall be transferred as she may by will direct, would not necessarily mean a passing of a title to land by trustees' conveyance, and it would not have that meaning, even if there had been a direction to the trustees to transfer. *In re Dunphy's Estate*, 81 Pac. 315, 317, 147 Cal. 95.

"Transfer," as used in a will in which testatrix bequeathed to her husband the use and benefit of all her property, with full power to use and transfer the same as if it belonged to him in fee, is broad enough to cover a devise of the land, as a devise is a purchase, and if power to will be necessary it is here found. *Pool v. Napier*, 124 N. W. 755, 756, 145 Iowa, 699 (citing *In re Barrett's Will*, 82 N. W. 998, 111 Iowa, 570; *Bulfer v. Willigrod*, 71 Iowa, 620, 33 N. W. 136; *Bills v. Bills*, 80 Iowa, 269, 45 N. W. 748, 8 L. R. A. 696, 20 Am. St. Rep. 418; *Halladay v. Stickler*, 43 N. W. 228, 78 Iowa, 388; *Hambel v. Hambel*, 80 N. W. 528, 109 Iowa, 459; *Channell v. Aldinger*, 96 N. W. 781, 121 Iowa, 297; *Talbot v. Snodgrass*, 100 N. W. 500, 124 Iowa, 681; *Rona v. Meier*, 47 Iowa, 610, 29 Am. Rep. 493; *Steff v. Seibert*, 105 N. W. 328, 128 Iowa, 748, 6 L. R. A. [N. S.] 1186; *Tarbell v. Smith*, 125 Iowa, 388, 101 N. W. 118; *Law v. Douglass*, 107 Iowa, 606, 78 N. W. 212).

#### **Of insured property**

A mortgage or deed of trust for security of a debt is not a "transfer or change of title" to the property, within a policy of insurance, which would render the policy void if made without the consent of the company. *Bushnell v. Farmers' Mut. Ins. Co.*, 85 S. W. 103, 104, 110 Mo. App. 223.

#### **Of negotiable paper**

Where a customer of a bank hands the receiving teller a check drawn by another person on the same bank, at the same time handing him her passbook, and the teller stamps the check paid and enters a credit in the passbook, there is no "transfer" of title to the check, and the bank may, if nothing further is done, charge back the amount of the check to the depositor, if there are not sufficient funds to meet it. *Ocean Park Bank v. Rogers*, 92 Pac. 879, 880, 6 Cal. App. 678.

Civ. Code, § 1039, defines "transfer" as an "act of the parties, or of the law, by which the title to property is conveyed from one living person to another." Notes from a decedent do not come within this definition. Transfer rests upon acts of parties to a con-

tract, as does assignment, which is but a written transfer. *Enscoe v. Fletcher*, 82 Pac. 1075, 1077, 1 Cal. App. 659.

#### **TRANSFER IN CONTEMPLATION OF DEATH**

A "transfer" of securities in trust for the transferror's relatives with life estate reserved to him and power to control the property and to revoke the trust during his life was a transfer "in contemplation of death" within the inheritance tax law (Sanborn's St. Supp. 1906, § 1087—1). *In re Bullen's Estate*, 128 N. W. 109, 112, 143 Wis. 512, 139 Am. St. Rep. 1114.

#### **TRANSFER IN TRANSIT**

Elevator allowances or payments, limited by carriers' schedules to grain unloaded out of cars from the west and loaded into cars for points east, north, and south, is "elevation" and "transfer in transit," within the meaning of Interstate Commerce Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379, declaring that all services in connection with the elevation of the property transported are transportation, as amended by Act June 29, 1906, c. 3591, § 1, 34 Stat. 584, to provide that transportation shall include all services in connection with the receipt, delivery, "elevation," and "transfer in transit." *F. H. Peavey & Co. v. Union Pacific R. Co.*, 176 Fed. 409, 421, 423.

#### **TRANSFER OF HOMESTEAD**

Permission to cross a homesteader's land with an irrigation ditch, in consideration of the use of water therefrom, was not an alienation of the land within Rev. St. § 2288 (U. S. Comp. St. 1901, p. 1385), permitting any settler on public lands, by pre-emption or homestead laws to "transfer any part of his homestead" for the purposes named; the grant being merely of a right of way. *Methow Cattle Co. v. Williams*, 117 Pac. 239, 241, 64 Wash. 457.

#### **TRANSFER OF MORTGAGE DEBT**

A "transfer of the mortgage debt," whether by writing or parol, is in equity the assignment of the mortgage. *Buckheit v. Decatur Land Co.*, 37 South. 75, 76, 140 Ala. 216 (quoting *Denby v. Mellgrew*, 58 Ala. 149).

#### **TRANSFER TAX**

See Inheritance Tax.

#### **TRANSFEREE OF A BUSINESS**

A purchaser of shares of stock in a corporation from another holder was a "transferee of a business," within Pub. Acts Mich. 1905, p. 507, No. 329, § 1, which renders illegal contracts in restraint of trade, and section 6, which declares that the act shall not apply to any contract where the only object of the restraint imposed is to protect the vendee or transferee of a trade, pursuit, vocation, profession, or business, or the good will thereof.

sold and transferred for a valuable consideration, etc., as the transferor was the owner of the corporate business and good will in proportion to his shares. *Buckhout v. Witter*, 122 N. W. 184, 185, 157 Mich. 406.

### TRANSFERRED

The word "transferred," added to a blank indorsement of a note, and followed by the word "to," followed by the name of the indorsee, does not add to nor detract from the legal effect of the indorsement, and the indorser is liable as indorser, and to relieve himself from liability the words "without recourse," or their equivalent, are necessary. *Mayes Mercantile Co. v. Handley*, 98 S. W. 125, 126, 6 Ind. T. 357; *Id.*, 103 S. W. 599, 7 Ind. T. 13.

The word "transferred," as used in Gen. St. 1901, § 740, providing that, when property has paid its full proportion for general sewers in one district, it shall not be transferred to any other and made liable for sewers and drains therein, implies the taking of property out of one district, in which it has paid assessments for such purposes, and putting it into another district, and prohibits the doubling up of assessments against one piece of property in this way. *Shepherd v. Kansas City*, 105 Pac. 531, 532, 81 Kan. 369.

Under Bankr. Act July 1, 1898, c. 541, § 70a (5), 30 Stat. 565, which provides that a trustee in bankruptcy shall be vested with the title of the bankrupt to all property which he could "by any means have transferred," provided that, when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself or his estate, he may pay such surrender value and retain the policy, the proviso does not define and limit what insurance policies shall pass to the trustee, but only excepts from property which would otherwise pass insurance policies which have a surrender value, on payment to the trustee of such value. A policy which authorized the bankrupt to nominate or change the beneficiary at will is property which he might have "transferred," and as such passes under such section to his trustee, unless brought within the exception made by the proviso, although it is in terms payable to a designated beneficiary. In *re Orear*, 178 Fed. 632, 634, 102 C. C. A. 78, 30 L. R. A. (N. S.) 990.

A will drawn entirely by the testatrix, who was an aged woman of education, but unused to technical legal terms, stated her purpose to devote her entire estate to founding and maintaining a temporary resting place for missionary workers, to be called "The House of Rest," and contained the following provisions: "Secondly, I do now give, devise and bequeath all my real estate [describing both real and personal property] to my executors, to be transferred by them to the Woman's Occidental Board of Missions \* \* \*

with the executive committee of the Woman's Presbyterian Mission Society of the Los Angeles Presbytery as trustees and managers thereof. \* \* \* Ninthly, all the residue of my property \* \* \* together with real estate which may be sold at any time, it is my wish to have invested as a permanent fund, allowing the income only to be used in aiding to meet the expenses of the House of Rest." Held that, construed in accordance with the statutory rules governing such wills, it was not the intention of the testatrix by the use of the word "transferred" to create an estate in the executors to be by them conveyed to the trustees, but that the executors should take possession and control of the property for administration under the laws of the estate, and in due course of administration should transfer it on final distribution to the trustees and that, as so construed, the disposition was valid to the extent of one-third of the estate as limited by Civ. Code, § 1313, forbidding charitable devises to the extent of more than one-third of the estate of one leaving heirs. In *re Peabody's Estate*, 97 Pac. 184, 186, 154 Cal. 173.

### TRANSFERRED AND ASSIGNED

A declaration on a note, alleging that it was by indorsement "transferred and assigned" to plaintiff, imported a delivery. *Hibernia Bank & Trust Co. v. Smith*, 42 South. 345, 346, 89 Miss. 298.

### TRANSFERRED TO PROPER COURT OF APPEALS

Acts 1909, pp. 396, 397, increasing the jurisdiction of the Courts of Appeals, provides (page 397) that all unsubmitted cases pending in the Supreme Court, which under the act fall under the jurisdiction of a Court of Appeals, "shall be transferred to the proper Courts of Appeals, to be heard and determined by them." Held, that the words quoted meant that the case should be transferred to the proper Court of Appeals, to be heard and determined in the same manner as if the case had gone there originally; and hence where, pursuant thereto, a case was transferred by the Supreme Court to one of the Courts of Appeals, a subsequent transfer thereof to another Court of Appeals, under provisions of the statute authorizing it, was proper. *Houts v. Jackson*, 128 S. W. 231, 143 Mo. App. 584.

### TRANSFORMER

In electricity, in order to reduce the voltage carried by the main conductor, a mechanism is used which is called a "transformer." This transformer consisted of a primary and secondary coil of wire, separated by micranized cloth, all inclosed in a sheet-iron case filled with oil, the oil serving as additional insulation, the primary coil being connected through the transformer with the main conductor, and the secondary connected

with the service wires inside the shop through the transformer and what is called a main cut-out. *Bice v. Wheeling Electrical Co.*, 59 S. E. 626, 62 W. Va. 685.

## TRANSIENT

A citizen of New York who came to Texas, and had been engaged in business there for 14 months next preceding the filing of a suit, and had been continuously there except for three trips to visit his family in New York, where he also maintained a residence, was not a "transient person," but a resident of the state, entitled to be sued in the county of his residence. *Taylor v. Wilson* (Tex.) 93 S. W. 108, 109.

## TRANSIENT MERCHANT

"Permanent merchants" are those who have a permanent place of business, and "transient merchants" are transitory or temporary traders, who have no intention of locating permanently. *State ex rel. Mudeking v. Parr*, 123 N. W. 408, 409, 109 Minn. 147, 134 Am. St. Rep. 759.

A town ordinance provided that transient merchants, all persons transiently remaining in the town and selling or offering for sale merchandise at retail in temporary places of business, should pay a certain license fee. Held, that the term "transient merchant" relates rather to the business carried on than to the residence of the merchant, and whether a merchant shall be deemed transient depends upon the kind of business transacted, the place where it is conducted, and the duration or intended duration thereof. *Town of Scranton v. Henson*, 130 N. W. 1079, 1081, 151 Iowa, 221.

"Transient merchant" did not include a traveling solicitor for a corporation engaged in selling tea, who took orders for goods similar to samples carried by him, and delivered the orders to the corporation, and who afterwards delivered the goods for the corporation in case the orders were accepted; the corporation keeping the accounts with customers. *State v. Bristow*, 109 N. W. 199, 200, 131 Iowa, 664.

One employed as a traveling salesman, receiving a stated salary and expenses, exposing samples and soliciting orders from consumers, which he sent to his employers, who shipped the goods to the purchasers, was not a merchant, within a city ordinance requiring a "transient merchant" to take out a license. *State v. Nelson*, 105 N. W. 327, 328, 128 Iowa, 740.

Act March 11, 1901, Acts 1901, p. 466, c. 208, § 1 (Burns' Ann. St. 1901, § 7231a), makes it unlawful for any transient merchant to engage in business as such without a license, and section 9, p. 469 (Burns' Ann. St. 1901, § 7231b), confers on cities and towns authority to license and regulate transient merchants

engaging in business therein. Section 8 (Burns' Ann. St. 1901, § 7231h) exempts from the operation of the act, among others, commercial travelers, sales by sample for future delivery, and hawkers and peddlers. Section 6 (Burns' Ann. St. 1901, § 7231f), declares that the words "transient merchant" shall include all persons who engage in any temporary and transient business, either in one locality or in traveling from place to place, selling goods, and who, to carry on such business lease or occupy any building for the exhibition and sale of such goods. A manufacturer of cooking ranges shipped ranges to itself, in care of its agents, to be sold by them, and the ranges were stored in a business room of a city. The manufacturer provided teams and wagons for its agents in hauling the ranges about, and for exhibiting them for sale and selling them, and delivering them when sold. The ranges were not sold or offered for sale while in the storeroom, and none were exhibited for sale in any manner except from the wagons. The doors of the storeroom were frequently left open, and persons went in unmolested and examined the ranges. Held, that the manufacturer was not a transient merchant within the meaning of the act, and not liable to pay a license fee as such. *Clay v. Wrought Iron Range Co.*, 85 N. E. 119, 120, 42 Ind. App. 145.

The word "transient" is a relative term, which, in the absence of any inflexible statutory or legislative definition, may be the source of much vexation and uncertainty. The abuse sought to be avoided by Code, § 700, giving cities power to define by ordinance who shall be considered "transient merchants," to regulate, license, and tax their sales, to regulate, license, and tax itinerant doctors, etc., is the practice of that class of dealers who, with large or small stocks of goods, establish themselves for a few days, weeks, or months in a place, and then move on into other fields, staying nowhere long enough to have acquired a permanent residence, and, while claiming the benefit and protection of the laws of the state, contribute nothing to the local or general public revenue. The provision does not in express terms or by necessary implication give cities the power to exact a license from opticians who fit and adjust spectacles. *City of Waukon v. Fisk*, 100 N. W. 475, 477, 124 Iowa, 464.

## TRANSIT

See *In Transit*; *Milling in Transit*; *Rapid Transit*.

Beginning of transit, see *Beginning*.

## TRANSIT CAR

The term "transit car," used in a contract for the sale of flour by railroad, meant a car already loaded with flour and on its way from the mill to the buyer. *Stock v. Towle*, 54 Atl. 918, 919, 97 Me. 408.

## TRANSITORY ACTION

Actions are deemed "transitory" where the transactions upon which they are founded might have taken place anywhere, but are local when their cause is in its nature, essentially local. An action to recover only the value of ore or timber severed from land is "transitory," and may be maintained wherever the trespasser can be served with summons, although plaintiff therein may be compelled to allege and prove ownership of the land from which the timber is cut, or the ore extracted; but, where the whole or any part of the damages claimed is for injury to freehold, the action is local, and must, if the land is located in this state, be tried, by the express provisions of Code Civ. Proc. Cal. § 392, in the county where the land is situated, or, if the land is located in another state, it must be tried in the courts of that state. *Ophir Silver Mining Co. v. Superior Court*, 82 Pac. 70, 73, 147 Cal. 467, 3 Ann. Cas. 340 (quoting and adopting definition in *Livingston v. Jefferson*, 1 Brock. 209, 15 Fed. Cas. 660).

"Originally the pleader was required to state truly the place where each fact asserted by him occurred, and if issue was joined thereon, the fact was tried by a jury summoned from that neighborhood or venue. Afterwards, when jurors were no longer expected to decide issues of fact upon their own knowledge, a fictitious venue was, in some actions, permitted, and the pleader assigned to his facts, under a *videlicet*, the place in which he desired the trial to be held. These actions were then styled 'transitory.' But this fiction was not allowed when the cause of action was so related to a certain piece of land that it must have arisen on or near the land. Actions for such causes were styled 'local,' and triable only in the vicinity where the land lay." *Defiance Fruit Co. v. Fox*, 70 Atl. 460, 461, 76 N. J. Law, 482 (quoting *Hill v. Nelson*, 57 Atl. 411, 70 N. J. Law, 376, 378).

An action on an injunction bond is "transitory," within Civ. Code Prac. §§ 62-82, defining the venue of actions, and the circuit court of a county in which none of the defendants reside is without jurisdiction. *Smith's Adm'r v. Miller*, 131 S. W. 5, 6, 140 Ky. 308.

An action by a lessor against his lessee for damages for breaches of covenants contained in the lease is a "transitory action," in which the venue may be laid by plaintiff as in other transitory actions. *Clemens Stanger*, 68 Atl. 97, 98, 75 N. J. Law, 287.

Since the Missouri statutes provide for every contingency as to the bringing of actions, the rule of the common law which regarded an action for breach of covenants of seisin and warranty as "local," and not "transitory," was completely altered, and as to such actions such rule of the common law no longer obtains in Missouri; the title to

real estate being only incidentally involved in such action. *Coleman v. Lucksinger*, 123 S. W. 441, 443, 224 Mo. 1, 26 L. R. A. (N. S.) 934.

### Local action distinguished

See Local Action.

## TRANSITORY FRENZY

"Transitory frenzy" is in the eye of the law nothing but vindictive and reckless temper, and is no defense to murder. *Commonwealth v. Renzo*, 65 Atl. 30, 31, 216 Pa. 147.

## TRANSITU

See Stoppage in Transitu.

## TRANSMIT—TRANSMISSION

See Erroneous Transmission.

### Of bill of exceptions

The word "transmit," in a statute requiring the transmission of a bill of exceptions by the clerk to the trial judge for signature, did not mean a personal carrying of the bill and delivery to the judge by the clerk, but was satisfied by any means selected by the clerk which would secure the safe transfer of the bill from his office to the hands of the trial judge without its being tampered with by any one. *Davies v. New Castle & L. Ry. Co.*, 73 N. E. 213, 216, 71 Ohio St. 325.

### Of telegram

To "transmit" is to communicate, to send from one person to another; while the term "delivery," as applied to a telegram, means "transmit" and deliver. *Kirby v. Western Union Tel. Co.*, 58 S. E. 10, 11, 77 S. C. 404, 122 Am. St. Rep. 580.

Act April 8, 1885 (Laws 1885, p. 151, c. 48), requiring telegraph companies to "transmit" messages with impartiality and in good faith in the order of time in which they are received, and providing a penalty for failure to do so, includes prompt delivery as well as transmission. *Western Union Tel. Co. v. Braxtan*, 74 N. E. 985, 987, 165 Ind. 165.

### Of telephone message

There are authorities which hold that in the construction of statutes the word "telegraph" embraces "telephone," and that statutes concerning telegraph companies include telephone companies as well. But the Arkansas statute declaring that "telegraph" companies shall be liable for mental anguish or suffering on account of negligence "in receiving, transmitting, or delivering messages," does not include "telephone" companies. A telephone company does not "receive," "transmit," and "deliver" a message in the ordinary acceptance of those words. It merely furnishes to the patron facilities for carrying on a conversation at long distance. *Southern Telephone Co. v. King*, 146 S. W. 489, 490, 491, 103 Ark. 160, 39 L. R. A. (N. S.)



402 (citing *Northwestern Telephone Exchange Co. v. Chicago, M. & St. P. Ry. Co.*, 79 N. W. 315, 76 Minn. 334).

### TRANSMISSION COMPANY

As defined by the Oklahoma Constitution, the term "transmission company" includes any company, receiver, or other person owning, leasing, or operating, for hire any telegraph or telephone line. *Shawnee Gas & Electric Co. v. State ex rel. Shawnee City Waterworks*, 122 Pac. 222, 223, 31 Okl. 505.

Under Const. art. 9, § 18, giving the Corporation Commission power to regulate all transmission companies doing business in the state in all matters relating to the performance of their public duties and their charges therefor, and section 34, providing that the term "transmission company" shall include any company or other person holding or operating for hire any telegraph or telephone line, and that the term "person" shall include individuals, partnerships, and corporations, the Corporation Commission has supervision of a telephone company owned solely by an individual and operated for hire in all matters relating to the performance of its public duties and charges. *Hine v. Wadlington*, 109 Pac. 301, 126 Okl. 389.

### TRANSMISSION OF ESTATES

The right of "transmitting estates," under a statute making children capable of transmitting estates, and giving them the right to distributive shares of the personal estates of any of their kindred on the part of their mother, contemplates transmission through the mother. *Berry v. Powell*, 105 S. W. 345, 347, 47 Tex. Civ. App. 599 (citing *Ford v. Boone*, 75 S. W. 353, 32 Tex. Civ. App. 550).

### TRANSMITTE

See Microphone Transmitter.

### TRANSPORT (As Emotion)

An instruction that if accused killed decedent in a sudden "transport" of passion on adequate cause, etc., he was guilty of manslaughter, was not prejudicially erroneous as imposing by using the word "transport" a more onerous test than imposed by law; a "sudden transport of passion" being synonymous with that condition where the mind is rendered incapable of cool reflection, and meaning that one is transported beyond the realm of reason. *Waters v. State*, 114 S. W. 628, 630, 54 Tex. Cr. R. 322.

### TRANSPORT—TRANSPORTATION

. See Appliance of Transportation; Being Transported; Conducting Transportation; Immediate Transportation; Service Connected with Transportation; Vehicle for Heavy Transportation.

Cost of transportation, see Cost.

Engaged in transportation from one state to another, see Engaged.

"If a railroad company carries freight beyond its terminal station, when this service is performed either voluntarily or as the result of a contract or custom, it is no less engaged in the 'transportation' of freight than it was when the freight was being carried between the initial point of carriage and the terminal point of carriage; and the words 'transporting' and 'transportation,' which occur in the rule under consideration in the *Dixon Case*, are there used in this very sense. \* \* \* There is nothing in that decision, when taken in the light of the question then under consideration, which can be construed into a ruling that the word 'transportation,' as used in the clause of the act now under consideration, included only service rendered between the initial point of carriage and the terminal station of the railway company." *Augusta Brokerage Co. v. Central of Georgia Ry. Co.*, 48 S. E. 714, 716, 121 Ga. 48 (citing and explaining *Dixon v. Central of Georgia Ry. Co.*, 35 S. E. 369, 110 Ga. 173, and *State v. Wrightsville & T. R. Co.*, 30 S. E. 891, 104 Ga. 437).

The Carmack amendment to the act for the regulation of interstate commerce (Act June 29, 1906, c. 3591, § 7, par. 11, 34 Stat. 595 [U. S. Comp. St. Supp. 1911, p. 1307]) provides that any common carrier, railroad, or transportation company receiving property for transportation shall be liable to the consignor for any loss, damage, or injury caused by it, or by any common carrier, railroad, or transportation company over whose lines such property may pass, and that no contract, receipt, rule, or regulation shall exempt such carrier, railroad, or transportation company from the liability imposed. The act of Congress referred to defines "transportation" as including cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage and handling of property transported. Held, in view of the definition and the broad language of the amendment, the latter must be presumed to have been intended by Congress to go as far as Congress had power to regulate the subject, and to make the initial carrier liable for any loss of property until its interstate shipment was completed, so that an initial carrier would be liable for goods destroyed while still in interstate commerce, but in the hands of a connecting carrier. *Nashville, C. & St. L. Ry. Co. v. Dreyfuss-Well Co.*, 150 S. W. 321, 322, 150 Ky. 333.

Where alcoholic liquors imported from a foreign country were stored in New York,

transmission to New Orleans was not transportation," but a "transportation," the Wilson Act (Act Cong. Aug. 8, 1878, 26 Stat. 313), though the storing in New York was only temporary and the goods were originally intended for New Orleans. *State v. Frederick De Bary & Co.*, 100 La. 892, 894, 130 La. 1090.

the word "transportation" may be used as something more than a free rate; it may also be construed as something other than regular fare, and may be applied to an excursion rate. *Salinger v. Northern Union Tel. Co.*, 126 N. W. 362, 365, 170 Minn. 484.

#### commerce

Interstate Commerce; Interstate Commerce.

#### shipment distinguished

In Black's Law Dictionary "banishment" is defined as a punishment inflicted on criminals by compelling them to quit a place, or country for a specified period of time, or for life. It is inflicted principally on political offenders; "transportation" being the word used to express a similar punishment of ordinary criminals." *United States v. Ju Toy*, 25 Sup. Ct. 644, 649, 198 U. S. 253, 49 L. Ed. 1040.

#### related synonyms

The term "transported," as used in an act with a common carrier for the carrying of a shipment of horses, is equivalent to the term "carried," and quite distinct from the idea of forwarding. *Smeltzer v. Louis & S. F. R. Co.*, 158 Fed. 649, 664.

#### continuous transportation

A transportation from one point to another remains continuous, so long as the intent remains unchanged, no matter what stopovers or transshipments intervene." *The Hudson*, 3 Wall. 514, 553, 18 L. Ed. 200.

#### act of transportation

It is obvious on a little reflection that the cost of moving local freight is greater than that of moving through freight, and it is only obvious that it is almost if not quite impossible to determine the difference with mathematical accuracy." *Chicago, M. & St. P. Co. v. Tompkins*, 20 Sup. Ct. 336, 340, 157 U. S. 178, 44 L. Ed. 417.

#### delay in transportation

The word "transport" means, not only to convey from one place to another, or to remove an object, and Acts 1903, p. c. 590, providing that any railroad failing to "transport" goods received for shipment and billed to any place within the state for a longer period than ten days after receipt of the same, unless otherwise agreed between the parties, shall incur a penalty, etc., refers to a delay in beginning the transportation or starting the

goods from the station of their receipt, and does not require a delivery at their destination within the time specified. *Walker Bros. v. Southern Ry. Co.*, 49 S. E. 84-86, 137 N. C. 163.

According to Webster's International Dict., Century Dict. (vol. 2), and Black's Law Dict. 1184, there is a distinction between the words "transport" and "deliver"; the words being of entirely different origin and signification. To transport an article it must be received and retained by the person charged with the duty, while to deliver an article the person intrusted with the possession must part with it. The word "deliver" is compounded of "de" and "liverare," "to set free; to set at liberty; to give over." Revisal 1905 provides that any railroad, failing to transport within a reasonable time goods received, shall pay a penalty, and declares that it shall be considered that a railroad has transported freight within a reasonable time if it has done so within the ordinary time required. It is evident that the Legislature had in mind the distinction between duty to "transport" and to "deliver," since to transport is the act of the carrier without the intervention or aid of the consignee, while delivery cannot be accomplished without the concurrence of the consignee, and the effect of the statute is to impose the penalty on a railroad for failing to reasonably "transport" goods, as distinguished from a failure to transport and deliver goods to the consignee, and for a failure to perform the first the penalty is imposed, while for a failure to perform the second the consignee may sue for damages. *Alexandre v. Atlantic Coast Line R. Co.*, 56 S. E. 697, 698, 144 N. C. 93 (citing *Bellows v. Folsom*, 27 N. Y. Super. Ct. 43; *United States v. McCready*, 11 Fed. 225; *Walker Bros. v. Southern R. Co.*, 49 S. E. 84, 127 N. C. 163; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. 828, 29 L. Ed. 158; *Moore v. Collins*, 15 N. C. 388; *Hilliard v. Wilmington & W. R. Co.*, 51 N. C. 343; *Chalk v. Charlotte, C. & A. R. Co.*, 85 N. C. 423; *Coble v. Shoffner*, 75 N. C. 42).

Act 1904 (Laws 1904, p. 671), entitled "An act to prevent delays in the transportation of freight by railroads in this state," providing, by section 1, that railroads doing business in the state shall transport freight, received for "transportation within the state," without greater delay than specified, and declaring a penalty for noncompliance, does not apply to interstate commerce, and so does not cover a case of transportation partly out of the state; the delay occurring wholly out of the state. *Hunter v. Charleston & W. C. Ry. Co.*, 62 S. E. 13, 14, 81 S. C. 169; *Frasier v. Charleston & W. C. Ry. Co.*, 62 S. E. 14, 81 S. C. 162 (citing 8 Words and Phrases, pp. 7503, 7504).

**Nature and elements of transportation**

Under Act Cong. June 29, 1906, § 1, the term "transportation" includes cars and other vehicles and all instrumentalities and facilities of shipment or carriage. *Chicago, R. I. & P. Ry. Co. v. Beatty*, 126 Pac. 736, 737, 34 Okl. 321, 42 L. R. A. (N. S.) 988.

As defined by Railroad Rate Act, § 1, the term "transportation" includes, among other things, all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration, or icing, storage, and handling of property transported. *State ex rel. Railroad Commission of Indiana v. Adams Express Co.*, 85 N. E. 337, 338, 171 Ind. 138.

"Transportation," within Act June 29, 1906, c. 3591, includes all facilities of shipment, irrespective of ownership, and all services in connection with the elevation, transfer in transit, and handling of property transported; and a carrier, required to furnish such transportation on reasonable request, cannot refuse the allowance for elevator service on through grain in car loads at terminal points to elevator owners, who, through ownership of the grain, derive an incidental advantage by using the opportunity during the process of elevation to weigh, store, inspect, clean, mix, or otherwise treat the grain. *Union Pac. R. Co. v. Updike Grain Co.*, 32 Sup. Ct. 39, 41, 222 U. S. 215, 56 L. Ed. 171.

The word "transportation," as used in Immigration Act March 3, 1903, c. 1012, § 20, 32 Stat. 1218, provides that any alien, who shall be found a public charge in the United States from causes existing prior to landing, shall be deported at any time within two years after arrival, at the expense, including one-half of the cost of inland transportation to the port of deportation, of the person bringing the alien into the United States, should be given its ordinary meaning, viz., carriage from one place to another. *United States v. Hamburg-American Line*, 159 Fed. 104, 105, 86 C. C. A. 294.

Immigration Act March 3, 1903, c. 1012, § 20, 32 Stat. 1218, provides that any alien who shall be found a public charge in the United States from causes existing prior to landing shall be deported at any time within two years after arrival, at the expense, including one-half of the cost of inland transportation to the port of deportation, of the person bringing the alien into the United States. Held, that the term "transportation," as so used, should be given its ordinary meaning, viz., carriage from one place to another, and that the phrase "cost of inland transportation" therefore only included the cost of carrying the alien from the inland place where he was found to the port of deportation, and that the government was therefore not entitled to recover under such section from the steamship company bringing the deported alien into the United States

any part of the travelling expenses of an officer sent to bring the alien to the port of deportation. *United States v. Hamburg-American Line*, 159 Fed. 104, 105, 86 C. C. A. 294.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 15, 24 Stat. 384, as amended by Act June 18, 1910, c. 309, § 12, 36 Stat. 551, provides that if the owner of property transported under the act directly or indirectly renders any service connected with the transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, or on its initiative, determine what is a reasonable charge, etc. Held, that cartage of sugar from refinery to cars did not constitute "transportation," nor a "service connected with transportation," within such act, for which the carrier was justified in making an allowance under section 15; and that such allowance constituted an illegal rebate. *American Sugar Refining Co. v. Delaware, L. & W. Ry. Co.*, 200 Fed. 652, 655.

Demurrage charged for the detention of cars in loading or unloading is a terminal charge, required to be shown by the schedules of rates filed and published by an interstate railroad company by the terms of Interstate Commerce Act Feb. 4, 1887, c. 104, §§ 1, 6, 24 Stat. 379, 380, as subsequently amended by Act June 29, 1906, c. 3591, §§ 1, 2, 34 Stat. 584, 586, which define transportation as including all the instrumentalities and facilities of shipment and all services in connection with the receipt, delivery, and handling of property transported, and require the filing and publishing of schedules showing all the rates, fares, and charges for transportation, stating separately all terminal charges. *Lehigh Valley R. Co. v. United States*, 188 Fed. 879, 884, 110 C. C. A. 513.

The word "transportation," as used in Act June 29, 1906, c. 3591, § 1, 34 Stat. 584, amending Interstate Commerce Act Feb. 4, 1887, c. 104, § 3, 24 Stat. 380, includes all kinds of instrumentalities of shipment and carriage. *United States v. Baltimore & O. R. Co.*, 165 Fed. 113, 121, 91 C. C. A. 147.

**In violation of law**

A carrier does not "transport" live stock from a quarantined portion of a state into another state, in violation of Act March 3, 1905, c. 1496, § 2, where it is a connecting carrier and receives the stock from the preceding carrier at a point in the state other than the quarantined state for delivery to a point in the same state. *United States v. Baltimore & O. S. W. Ry. Co.*, 32 Sup. Ct. 6, 7, 222 U. S. 1, 56 L. Ed. 68.

Under the provision of Forest, Fish, and Game Law (Consol. Laws 1909, c. 19) § 103, that birds or fish for which there is a close season shall not be transported at any time,

the kind and number are plainly marked on the outside of the package, with the name of the consignor, consignee, initial of the person making the package, and the destination, a person sending a package to a carrier for transportation, not marked as required, is not liable to a penalty; the word "transport" means to carry or convey from one place to another, and applying only to a carrier, and not to a shipper. *People v. Suydam*, 97 N. Y. 558, 859, 204 N. Y. 419.

Under Cr. Code 1902, § 589, providing that no person shall bring into the state or territory "from place to place within the state by wagon, cart, or other vehicle, or by any other means or mode of carriage, any liquors or liquids containing alcohol," "transportation" means to carry or convey from one place to another, and carrying liquor on the highway is a means or mode of carriage. *State v. Henson*, 60 S. E. 234, 235, 79 S. C. 87.

Rest, Fish, and Game Law (Laws 1908, § 103, regulating the "transportation" and game for which there is a close connection includes a shipment or delivery to a carrier. *People v. Montena*, 123 N. Y. Supp. 775, 139 App. Div. 421.

Where sugar alleged to have been adulterated and misbranded was not seized while in transportation, it was not subject to forfeiture under the clause of Pure Food and Drug Act June 30, 1906, c. 3915, § 10, 34 Stat. 771, declaring that any article of food or drug, when adulterated or misbranded, which is being transported from one state, territory, district or insular possession to another for sale, is liable to seizure, condemnation, etc. Under the Pure Food and Drugs Act June 30, 1906, c. 3915, § 10, 34 Stat. 771, provides, in the alternative, that any article of food adulterated or misbranded within the meaning of the act, having been transported, remains in the hands of the owner, unsold, or in original packages, and is liable to be proceeded against by condemnation. Held, that the words "transported" contemplate a transportation in interstate commerce, and not a transportation from one point in a given state, territory, or insular possession to another point in the same state, territory, district or insular possession. *United States v. Forty-Six Packages of Sugar*, 183 Fed. 642, 644.

#### ed synonyms

1 Stat. 187, c. 553, providing that bodies of wild game animals transported into any state or territory shall be subject to the laws of such state or territory, "transported" is used in the sense of "conveyed" from one state to another; and necessary implication excludes from control those game birds, etc., the importation of which is not prohibited. *People v. Silz v. Hesterberg*, 96 N. Y. Supp. 109, 109 App. Div. 295.

#### TRANSPORTATION COMPANY

A belt line railway company having 5 engines and 12 or 15 miles of track, whose business is to intercept cattle traffic some distance from stockyards and transport it over its own line to the yards, for which it is paid by the railroad company employing it to do so, is a "transportation company," within Laws 1905, c. 25, relating to the venue of suits against railroad corporations and assignees, etc., operating any railroad over whose transportation lines freight is carried, so as to prescribe the venue of suits against railroads, express or transportation companies, where any damage arises out of the transportation of freight, and for damages caused by the negligent handling of live stock on its own line. *Texas & P. Ry. Co. v. Henson*, 132 S. W. 118, 103 Tex. 598.

An express company, being by Va. Code 1904, § 1294a(2), declared a "transportation company," is within the terms of Va. Code 1904, § 1294c(24), providing that no contract shall exempt any common carrier from liability which would exist had no contract been entered into. *Southern Express Co. v. Keeler*, 64 S. E. 38, 41, 109 Va. 459.

A company engaged in the business of producing and buying natural gas, which it conveys by means of pipes to a city, where it distributes and sells the same to consumers, is not a "transporting company," within War Revenue Act June 13, 1898, Schedule B, 30 Stat. 464, imposing on persons, firms, corporations, or companies owning or controlling any pipe line for transporting oil or other products, whose gross actual receipts exceed \$250,000, a special tax on the excess of receipts above such amount. *United States v. Northwestern Ohio Natural Gas Co.*, 141 Fed. 198, 201.

#### TRAP

The word "trap," although derived from the Swedish word "trappa," meaning a step or stair, has been known and used as a common English name for igneous rock for more than 100 years. And the words "trappoid," "trappous," "trappose," "trappean," are adjectives related to trap. But the word "trappe" is not and never has been in this country a descriptive name for trap rock. The designation "trappe rock" is unknown to the English language, and if the word "trappe" be known to that language it bears no relationship whatever to rock. The word "trappe" appears to be an obsolete Anglo-Saxon word signifying, not rock, but artifice or stratagem. *John T. Dyer Quarry Co. v. Schuylkill Stone Co.*, 185 Fed. 557, 558, 573.

#### TRAPPE ROCK

See Trap.

**TRAPPER**

In mining, a "trapper" is a doorkeeper in the entry of a mine. *Bare v. Crane Creek Coal & Coke Co.*, 55 S. E. 907, 61 W. Va. 28, 8 L. R. A. (N. S.) 284, 123 Am. St. Rep. 966.

A "trapper" in a mine is one whose duty is to open certain doors in an entry in the mine for cars drawn by mules to pass through, and to immediately close the doors after the cars have passed, and to keep them closed except when cars are passing, to prevent the escape of air which has been forced into the mine, and when cars are stalled in the vicinity of his doors to assist the driver in starting the cars. *Marquette Third Vein Coal Co. v. Dielle*, 70 N. E. 17, 19, 208 Ill. 116.

A person employed in a coal mine in opening and closing doors, and giving signals to approaching trains of coal cars by waving his lamp, is engaged in "trapping." *Ewing v. Lanark Fuel Co.*, 65 S. E. 200, 206, 65 W. Va. 726, 29 L. R. A. (N. S.) 487.

**TRASH**

Wrecking contractors offered to wreck and remove "all the buildings, lumber and material of every nature whatsoever. \* \* \* We agree to measure and pay for said lumber now in buildings, structures or sections before tearing down or wrecking the same and to measure and pay for such lumber as is already down measuring not less than six feet in length before removing the same from the premises." Their offer was accepted, and before buildings should be touched all remaining lumber less than six feet in length and trash were to be removed from the premises by the wrecking company. At a conference of the parties before the making of the contract, nothing was said as to the removal of a spur track which extended onto the grounds on which the buildings were located; and there was no understanding that anything should be taken but the lumber from the wrecked buildings. Held, the ties and rails of such track were not intended to be removed, and, as they were not "trash" within the contract, their removal by the wrecking company could be restrained. *Woodruff v. Bourbon Stock Yards Co.*, 149 S. W. 960, 962, 149 Ky. 576.

**TRAUMATIC NEURASTHENIA**

"Traumatic neurasthenia" means that the nervous system, as the result of a wound or injury, has become weakened, and that there is a lack of power in the nerve centers to perform their functions properly. *Colorado Springs & I. Ry. Co. v. Nichols*, 92 Pac. 691, 694, 41 Colo. 272, 20 L. R. A. (N. S.) 215.

**TRAUMATIC NEURITIS**

As disease, see Disease.

**TRAUMATIC NEUROSIS**

"Medical science treats of a condition currently denominated 'railway spine,' or, in a more technical sense, 'traumatic neurosis.' It is latterly denied by strong authority that any such malady exists as a concussion of the spine or spinal cord, which term is also often used as a synonym for 'railway spine,' but that the symptoms which were supposed to indicate a concussion of the spine are but indications of a concussion of the brain, which may involve a psychic as well as a physical injury, one or both. Such a condition as traumatic neurosis may, it is said, result from actual lesion of the vertebral column, accompanied by immediate and definite signs of such lesion; but it may also result, according to medical science, from a nervous shock or sudden fright, involving a psychical condition, as well as a nervous derangement and impairment, where there are no outward physical or objective signs or indications of physical lesion of any character. \* \* \* Unlike the question first discussed, railway spine, or traumatic neurosis, is not a sequence or result that follows as of course, or may within reasonable inference, from a bruise on the leg, a wrench or sprain of the back, or contusion of the muscles and nerves. Such an affliction or malady may or may not result or spring from injuries of that nature, dependent upon the seriousness or severity of the injuries, and it is not, therefore, necessarily consequent. But it may arise from another and entirely distinct source—that is, from a concussion, followed by a shock of such proportions as vitally to affect and impair the nervous system, or a sudden fright, producing psychic or mental traumatism ('trauma' meaning a wound, and is generally used as synonymous with 'injury'), which may lead to a multitude of derangements and suffering, and this without lesion of the nerves or contusion apparent objectively." *Maynard v. Oregon R. Co.*, 72 Pac. 590, 592, 593, 43 Or. 63.

**TRAUMATIC PNEUMONIA**

"Traumatic pneumonia" is pneumonia resulting from a violent injury. *Johnson v. Continental Casualty Co.*, 99 S. W. 473, 474, 122 Mo. App. 369.

**TRAVEL—TRAVELER—TRAVELING**

See Commercial Traveler; Ordinary Travel.

"To 'travel' is to pass or make a journey from place to place, whether on foot, on horseback, or in any conveyance." "Traveling" is "the act of making a journey; change of place; passage." *Hendry v. Town of North Hampton*, 56 Atl. 922, 924, 72 N. H. 351, 64 L. R. A. 70, 101 Am. St. Rep. 681.

One charged with carrying a pistol at a political meeting in his own county is not

to be within the provision of the statute prohibiting carrying a pistol shall not apply to "travelers" by evidence that three or four days before he borrowed a pistol to carry with him on a visit to his brother in an adjoining county, it not being that he was en route to or from his brother. *Brownlee v. State* (Tex.) 32 S. W. 444.

a prosecution for carrying a pistol, where the defendant lived in an adjoining county to the one in which the town was located in which he was arrested, and that on the point of returning home, having taken his pistol from the place where he was accustomed to deposit it while in the city, sufficient, in the absence of evidence as to the distance of the town from his home, to show that he was a "traveler." *Blackwell v. State*, 31 S. W. 380, 34 Tex. Cr. R. 476.

#### **Deflected by temporary stop**

where the defendant, while driving home from a business trip to another county, stopped in the city for a few minutes at a creditor's office to discuss the debt, did not deprive his character as a "traveler," within the meaning of the statute excepting travelers from the prohibition against carrying pistols. *Hunt v. State*, 107 S. W. 842, 843, 52 Tex. Cr. R. 477.

a passenger in the waiting room of a depot before the arrival of a train which was to take is a "traveler" within the meaning of the law, and has a legal right to remain there. *Texas Midland R. Co. v. General*, 17 S. W. 1004, 1009, 54 Tex. Civ. App.

a prosecution for violating the statute prohibiting carrying a pistol where it appeared that the accused had returned from his place of residence to Kent where he was error to refuse to charge that he had started on a journey, and on his way to the train discovered that he had lost or left his pocketbook, and returned to get it, and had not made any unnecessary delay in pursuing his journey, he was seen with a pistol at the place where he had returned for his pocketbook, he could not be a "traveler," and not guilty. *State v. Campbell*, 115 S. W. 1184, 53 Tex. Cr. R. 131, 131 Am. St. Rep. 811.

who, on a trip, after spending the night at a hotel, went to a saloon, carrying a pistol, was not, at such time, a "traveler," within the exception of the statute as to carrying pistols. *Colson v. State*, 105 S. W. 138, 138 Tex. Cr. R. 138.

where the law authorizing a traveler to carry a pistol, one who goes about some other business not connected with his business ceases to be a "traveler"; but a man who, while on a journey, was merely deflected from his journey to send a doctor to see one of his children, to get some medicine, this did not render him liable to the law. A man who is a traveler is not required to go in

a hurry to his point of destination, and some delay incident to his journey does not deprive him of his defense that he was a traveler. *Irvin v. State*, 100 S. W. 779, 780, 51 Tex. Cr. R. 52.

#### **As determined by purpose**

The primary object of Sunday legislation has been to secure to private citizens the quiet enjoyment of Sunday as a day of rest, and to encourage the observance of moral duties on that day, but not to authorize any arbitrary or vexatious interference with the private habits and comfort of individuals. It is not every act of walking or riding on Sunday that constitutes "traveling," within the meaning of the statute. Walking or riding in the open air in a quiet and civil manner, with no object of business or pleasure, except the enjoyment of open air and gentle exercise, and the consequent promotion of the health, is not in violation of the Sunday law. *Cleveland v. City of Bangor*, 32 Atl. 892, 895, 87 Me. 259, 47 Am. St. Rep. 326 (citing *O'Connell v. Lewiston*, 65 Me. 34, 20 Am. Rep. 673; *Davidson v. City of Portland*, 69 Me. 116, 31 Am. Rep. 253; *Sullivan v. Maine Cent. R. Co.*, 82 Me. 196, 19 Atl. 169, 8 L. R. A. 427; *Barker v. City of Worcester*, 29 N. E. 474, 139 Mass. 74).

While riding on a locomotive was a mode of travel covered by an accident policy insuring one as "contractor, office and traveling," a provision that the policy did not cover death while riding on a locomotive was an inconsistency, and did not preclude a recovery, though insured at the time he was killed was riding on a locomotive. The "traveling" referred to as one of the duties of insured's occupation was travel by the modes and conveyances ordinarily incident to the occupation as a contractor and builder, while not himself participating in the actual work of building or construction. *Ward's Adm'r v. Preferred Acc. Ins. Co.*, 67 Atl. 821, 823, 80 Vt. 321.

A person going from one county to another, or contemplating a journey, about to board a train, is a person "traveling." *Campbell v. State*, 125 S. W. 893, 58 Tex. Cr. R. 349, 21 Ann. Cas. 447.

#### **As guest**

See Guest.

### **TRAVEL AND USE**

To constitute "travel and use," within the meaning of a charter provision that every street that shall not have been traveled or used as a street for six years, shall cease to be a street, there must have been substantial travel or substantial use thereof as a street, but what constitutes substantial use depends largely upon the location of the street in question, and largely on the surroundings and necessities of the case. *Delaware, L. & W. R. Co. v. Syracuse*, 157 Fed. 700, 709.

**TRAVELED PART**

By a "traveled portion of highway" is meant the part that customary travel occupies and takes on the public highway. A telephone company, which places its poles so near the traveled portion of a highway that a person seated on a wagon, with his feet extending about one foot from the side of the wagon, is injured by coming in contact with the poles, is liable for such injury. *Little v. Central District & Printing Telegraph Co.*, 62 Atl. 848, 849, 213 Pa. 238.

Where plaintiff was injured by a defective wagon scale constructed in a street outside of the traveled portion, which scale was being used at the time by the city in connection with plaintiff's employment, plaintiff, in departing from the traveled part of the highway onto the scale, ceased to be a traveler, and was not entitled to recover against the city on a count only charging defendant's failure to perform the duty it owed plaintiff as a traveler. *O'Neil v. City of New Haven*, 67 Atl. 487, 488, 80 Conn. 154.

**TRAVELED PLACE**

In an action against a railway company for injury to a pedestrian who fell into an excavation on defendant's right of way, along a pathway, it was not error to instruct that, for a pathway or a "traveled place" to be characterized as such, it must be used by the public generally and not particular individuals, must be such as is common to all, etc. *Craft v. Seaboard Air Line Ry.*, 75 S. E. 501, 502, 92 S. C. 291.

**TRAVELED PUBLIC ROAD**

That a railroad company permits the public to use a crossing with a switchyard does not make it a public road or street crossing, within a statute requiring signals to be given. A way provided by a railroad company over its own grounds to its depot has been held not to be a "traveled public road," within the meaning of the same statute; but this seems untenable. On the other hand, evidence that a public road has been worked and traveled for 10 or 15 years has been held sufficient to show that it is a traveled public road within the meaning of the same statute. A street in a town, crossing a railroad, dedicated to public use, and used for 25 years by the general public, on which the railroad company has for years itself maintained a crossing for vehicles and foot passengers, and erected a whistling post calling for warning signals, and a warning board at the crossing, having on it the words: "Look out for locomotive. Railroad crossing"—and sometimes worked for repair by town labor, is a public street within the meaning of Code W. Va. 1899, c. 51, § 61, though no order of the town council can be produced showing acceptance by the town or such dedication, or the establishment or recognition of the street by the council.

*Ray v. Chesapeake & O. R. Co.*, 50 S. E. 413, 415. 57 W. Va. 333 (quoting and adopting definition in *Thomp. Neg.* § 1566).

An alley, if it is a public traveled road, is within Rev. St. 1900, § 3140, requiring the bell of a locomotive to be rung at a distance of 80 rods from the place where the railroad shall cross any "traveled road or street." *Irving v. Chicago, R. I. & P. Ry. Co.*, 137 S. W. 1009, 1010, 156 Mo. App. 667.

**TRAVELER ON HIGHWAY**

"A 'traveler' is one who travels in any way." A person riding on a bicycle is a "traveler," within Laws 1893, p. 47, c. 59, § 1, making towns liable for damages to any person traveling on a highway, because of dangerous embankments and defective railings which render it unsuitable for travel. *Hendry v. Town of North Hampton*, 56 Atl. 922, 924, 72 N. H. 351, 64 L. R. A. 70, 101 Am. St. Rep. 681.

The word "travelers," as used in a city ordinance providing that no person shall construct an area into the street in front of any building extending more than five feet, or not provided with a sufficient railing to protect travelers from falling therein, means people who are lawfully using the highway. *Devine v. National Wall Paper Co.*, 88 N. Y. Supp. 704, 707, 95 App. Div. 194.

The primary meaning of the word "traveling" is passing from place to place. Whether an animal which came out of a pasture and walked off a defective bridge on the highway was a "traveler" on the bridge, within the meaning of a statute, or an estray, depends on whether the owner was guilty of contributory negligence. *Howrigan v. Town of Bakersfield*, 64 Atl. 1130, 1131, 79 Vt. 249, 9 Ann. Cas. 282.

A passenger on a street car is a "traveler on a public street," within Gen. St. 1902, § 2039, as amended by Pub. St. 1903, p. 5, c. 4, providing a penalty for obstructing a crossing, to be recovered by any traveler on a public street, etc. *Tracy v. New York, N. H. & H. R. Co.*, 72 Atl. 156, 159, 82 Conn. 1.

**As determined by purpose**

A boy playing games in a street is a "traveler," within Comp. Laws Mich. § 3441, authorizing a recovery by any one sustaining bodily injury on a street because of neglect to keep it in reasonable repair and reasonably fit for travel. *Beaudin v. Bay City*, 99 N. W. 285, 287, 136 Mich. 333, 4 Ann. Cas. 248.

A fireman in the employ of a city, whose duties require him to ride at great speed through the streets on a fire truck, is a "traveler" on the street, within the meaning of a rule that the city is required to keep its streets in a safe condition for the use of travelers thereon. *City of Valparaiso v. Chester*, 96 N. E. 765, 768, 176 Ind. 636.

**TRAVELERS' INSURANCE**

The term "travelers' insurance" may properly be applied to that class of insurance business which specializes in the insurance of the lives of travelers, though the insurance company also has other branches of insurance. It is a generic term, the exclusive use of which as a part of the name of an insurance company cannot be acquired. *Travelers' Ins. Mach. Co. v. Travelers' Ins. Co. of Hartford, Conn.*, 134 S. W. 877, 879, 142 Ky. 23.

**TRAVELING CRANE**

A huge crane, spanning the entire structure of a bridge, on which work was being done, from side to side, movable lengthwise of the bridge upon rails on either side, erected for the purpose of attaching a block and tackle with which to lift and adjust the iron beams as they were removed from their places, was spoken of as a "traveler." *Needs v. American Bridge Co.*, 75 Pac. 480, 481, 68 Kan. 522.

**TRAVELING EXPENSES**

See Actual Traveling Expenses; Necessary Traveling Expense.

**TRAVELING PACE**

See Common Traveling Pace.

**TRAVELING PHYSICIAN**

A physician maintaining four offices in different towns, and keeping an assistant at each place, and treating patients at the places at stated intervals, but having his headquarters at one of the places, where he lives with his family and receives his mail, is not a "traveling physician," within the meaning of a statute imposing an occupation tax on physicians, surgeons, etc., traveling from place to place in practicing their profession. *Adams v. State (Tex.)* 78 S. W. 935.

**TRAVELING SALESMAN**

The words "traveling salesman," as used in Rev. St. Mo. 1899, §§ 1024-1026, requiring foreign corporations for pecuniary profit, doing business in the state, to file articles of incorporation and be subject to local visitation, and the payment of taxes on its business, and expressly excepting from the operation of the statute "drummers or traveling salesmen soliciting business in this state for foreign corporations which are entirely non-resident," mean employes of such corporations employed to go into other states and communities to drum up and solicit business for the houses they represent. *Strain v. Chicago Portrait Co.*, 126 Fed. 831, 835.

Plaintiff was employed by the bankrupts as a bond salesman at the rate of \$3,000 per year, payable monthly. His contract provided that he should devote his entire time to the bankrupts' business in the territory over which he was to work, which would be princi-

pally in the state of Maine; the bankrupts agreeing to pay all traveling expenses while traveling in the bankrupts' business. The bankrupts maintained a branch office at Portland, of which complainant had charge. He also went from place to place in Maine to sell bonds, and conducted correspondence from such branch office on the bankrupts' letter heads and in their name. He had a junior salesman under him, and received bulletins issued by the bankrupts sent to managers of branch offices. Held, that everything done by plaintiff as the manager of the Portland office, was subordinate to the work he did as traveling salesman, and that he was therefore entitled to priority as a "traveling salesman," within Bankruptcy Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563, for the amount due for his services earned within three months prior to the date of bankruptcy proceedings. *In re Gay*, 188 Fed. 392, 394.

Commissions paid to a traveling salesman for his services are "wages," within Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563, as amended Act June 15, 1906, c. 3333, 34 Stat. 267. *In re Dexter*, 158 Fed. 788, 791, 89 C. C. A. 285.

**TRAVELING WAY**

The place in which plaintiff and another were working in a coal mine when plaintiff was injured by falling rock, while designed for a passageway when completed, but which was then completed only a part of the way, held not to have been a "traveling way," within the meaning of the Colorado statute requiring mining companies to timber traveling ways, but in the nature of a room, for which the company was required to furnish the timbers, to be placed by the workmen. *Baldi v. Cedar Hill Coal & Coke Co.*, 173 Fed. 781, 782, 97 C. C. A. 505.

**TRAVERSE**

See Special Traverse.

The word "traverse," when used as a verb, primarily means to lay in a cross direction, to cross, while the participle "traversing" implies adjustable laterally, having a lateral or swinging motion. *National Candy Co. v. Miller*, 160 Fed. 51, 56, 87 C. C. A. 207.

"To 'traverse' is merely to deny." Hence a traverse that merely denies the truth of the answer of a garnishee is sufficient under the statute providing for a traverse in such cases. *Turner v. Rosseau*, 21 Ga. 240, 241 (citing 1 Chitty, Pl. 576, and note).

The plea of non est factum by one alleged to have executed the note sued on should deny in express terms, but if the plea is by the personal representative of the signer of the instrument, or a third person entitled to make the defense, a denial of sufficient knowledge or information to form a belief is sufficient, so that an answer by an executor sued,



on a note which "denies that he has sufficient knowledge or information to form a belief, and he therefore denies the allegations of the plaintiff's petition," and that his testator executed or delivered to the plaintiff a promissory note, as alleged, and that he "denies that he has sufficient knowledge or information to form a belief, and therefore denies that said note is due and no part of it has been paid," except as stated, etc., was sufficient denial under Civ. Code Prac. § 113, providing that a "traverse" is a denial of facts alleged in an adverse pleading or a denial that the pleader has sufficient knowledge or information to form a belief concerning them, though the executor had papers in his possession containing testatrix' signature, so that he could have familiarized himself therewith. *Walsh v. Pearce*, 147 S. W. 739, 741, 148 Ky. 760.

A "traverse," as defined by Civ. Code Prac., § 113, subsec. 7, is a denial by a party of facts alleged in an adverse pleading, if they be presumptively within his knowledge, or a denial of them, or a denial that he has sufficient knowledge or information to form a belief concerning them, if they be not presumptively within his knowledge. Where plaintiffs, in an action for conversion of logs, alleged that they had a recorded deed to the timber in which defendant cut the logs, defendant may not aver want of knowledge or information sufficient to constitute a belief as to matters which would have been disclosed by an inspection of the record. *Johnson v. Asher* (Ky.) 105 S. W. 943, 944.

#### TRAVERSING PARTS OF A MACHINE

Rev. St. 1899, § 6434 (Ann. St. 1906, p. 3217), provides that no minor or woman shall be required to clean any part of the mill, gearing, or machinery in any such establishment while the same is in motion, or to work between the fixed or traversing parts of any machine. Plaintiff, a minor, was injured while operating a sausage machine fixed to a table and alongside of which he worked. Held, that he was not "working between the fixed or traversing parts of a machine," as contemplated by the statute; the "traversing parts of a machine," as used therein, meaning the moving parts thereof. *Stegmann v. Gerber*, 123 S. W. 1041, 1045, 146 Mo. App. 104.

#### TREASON

"Treason" is a breach of allegiance to a government committed by a person owing allegiance to it, and is the greatest crime known to the law. The offense includes a felony and more. *State v. Wilson*, 67 Atl. 533, 80 Vt. 249.

#### TREASON, FELONY, AND BREACH OF THE PEACE

All criminal offenses are comprehended by the terms "treason, felony, and breach of

the peace," as used in Const. U. S. art. 1, § 6, cl. 1, excepting these cases from the operation of the privilege from arrest therein conferred upon Senators and Representatives during their attendance at the sessions of their respective houses, and in going to and returning from the same. *Williamson v. United States*, 28 Sup. Ct. 163, 166, 207 U. S. 425, 52 L. Ed. 278.

#### TREASURE

##### TREASURE TROVE

Lost property distinguished, see *Lost Property*.

"Treasure trove," and its legal status, according to Blackstone, is where any money or coin, gold, silver, plate, or bullion is found hidden in the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the king. But if he that hid it be known, or afterwards found out, the owner, and not the king, is entitled to it. *Ferguson v. Ray*, 77 Pac. 600, 601, 44 Or. 557, 1 L. R. A. (N. S.) 477, 102 Am. St. Rep. 648, 1 Ann. Cas. 1.

Coin, gold and silver plate, and similar articles hidden for safe-keeping and forgotten, or remaining undiscovered by reason of the death of the person who hid them, are technically known as "treasure trove." *Kuykendall v. Fisher*, 56 S. E. 48, 53, 61 W. Va. 87, 8 L. R. A. (N. S.) 94, 11 Ann. Cas. 700.

"Treasure trove" is a name given by the early common law to any gold or silver in coin, plate, or bullion found concealed in the earth or in a house or other private place, but not lying on the ground; the owner of the discovered treasure being unknown. *Weeks v. Hackett*, 71 Atl. 858, 859, 104 Me. 264, 19 L. R. A. (N. S.) 1201, 129 Am. St. Rep. 390, 15 Ann. Cas. 1156.

#### TREASURER

See *County Treasurer*; *Town Treasurer*.

The county "treasurer" is the custodian of the funds of the county after they are collected, as distinguished from the office of a tax collector, whose duty it is to collect taxes. *Hubbell v. Board of Com'rs of Bernallillo County*, 86 Pac. 430, 13 N. M. 546.

One who received the money of a foreign insurance company and handled all its cash in its office in the state was a "cashier" or "treasurer," as used in a statute providing for the service on such an officer of process against the corporation. *Russell v. Pittsburgh Life Ins. & Trust Co.*, 115 N. Y. Supp. 950, 954, 62 Misc. Rep. 403.

A "treasurer" of a city of the second class is an officer whose duties are especially defined by Laws 1898, p. 383, c. 182, § 83, as amended by Laws 1899, p. 1272, c. 581, which do not include the collection of assessments for the construction of a sewer, partly within and partly without such city, nor is such

duty incidental to his official functions. *People ex rel. Williams v. Monroe County Court*, 93 N. Y. Supp. 452, 456, 105 App. Div. 1.

The "treasurer" of a corporation is its fiscal officer, and prima facie checks, drafts, and notes issued in the business of the corporation, signed by him as such officer, are the obligations of the corporation, for they are acts which such an officer would ordinarily perform. *Miners' & Merchants' Bank of London v. Ardsley Hall Co.*, 99 N. Y. Supp. 98, 103, 113 App. Div. 194.

The "treasurer" of a corporation is a mere ministerial agent or employé, and does not possess, by virtue of his office, any implied or ex officio powers of which the courts will take judicial notice. *Taylor v. Sutherland-Meade Tobacco Co.*, 60 S. E. 132, 134, 107 Va. 787.

The "treasurer" of a city is a public officer, who has the custody of the moneys of the city and gives a bond with sureties for their security, and is an independent accounting officer by statute made a depository of the moneys of the city. *City of Newburyport v. Spear*, 90 N. E. 522, 524, 204 Mass. 146, 134 Am. St. Rep. 652.

*Crimes Act 1905* (Burns' Ann. St. 1908, § 2285) § 392, denounces as embezzlement the purloining, secreting, etc., of money deposited with or held by a person, firm, corporation, or association, by its officer, agent or employé, who has access to or possession of the money converted. An affidavit purporting to present a charge of embezzlement alleged that a certain person was treasurer of an Odd Fellows Lodge, "and as such treasurer \* \* \* had control and possession" of a sum of money, "the property of the said \* \* \* order of Odd Fellows," and while such treasurer and so possessed of the money converted it. Held that, although the affidavit does not allege that the money was in possession of such defendant "by virtue of his employment," a "treasurer" is one who is intrusted with money, and "as such" means "in that particular character," so that the allegation that the defendant was a treasurer, and as such had control of the funds which he converted, means that the character of his possession was in his trust relationship, and renders the affidavit sufficient to charge the offense denounced. *Frost v. State*, 99 N. E. 419, 422, 178 Ind. 305.

#### As officer

See Officer.

### TREASURY

See City Treasury; Claim Upon Treasury; Payment into Treasury of State. Expenses of municipal treasury, see Expenses.

### TREASURY STOCK

What is known as "treasury stock" is the regular ordinary stock of a corporation,

upon which certificates in regular form are duly issued and sold. *Williams v. Ashurst Oil, Land & Development Co.*, 78 Pac. 28, 29, 144 Cal. 619.

As used in Act March 5, 1909 (St. 1909, c. 56), regulating the issuance by mining corporations of treasury and promotion stock, and requiring the stamping of certificates therefor, the words "treasury stock" mean stock set aside for the actual development of the property, while "promotion stock" is that issued to those who may originally own the mining ground or valuable rights connected therewith in consideration of their deeding the same to the mining company, or such stock as is issued to promoters for incorporating the company. *State ex rel. Moore v. Manhattan Verde Co.*, 109 Pac. 442, 443, 32 Nev. 474.

### TREATMENT

See Inhuman Treatment.

"Treatment," as used in 94 Ohio Laws, 200, providing that any person shall be regarded as practicing medicine who shall prescribe or recommend for a fee any drug or medicine, appliance, or treatment of whatever nature for the cure or relief of any wound, fracture, bodily injury, or disease, is not limited to an application of remedies, to the curing of disease, nor to the operation of any particular process, but included prayer and absent treatment applied by a Christian Science healer. *State v. Marble*, 73 N. E. 1063, 1065, 72 Ohio St. 21, 70 L. R. A. 835, 106 Am. St. Rep. 570, 2 Ann. Cas. 898.

"Treatment" is defined in the Century Dictionary as the act or the manner of treating in any sense. Rev. St. § 3893, which prohibited the mailing of any letter giving information concerning articles or things designed or intended to procure abortion, is not limited to physical substances capable of transmission through the mail, but includes treatments and operations, etc. *United States v. Somers*, 164 Fed. 259, 262.

Where, in an action on an accident benefit certificate stipulating that insurer should not be liable for death resulting from surgical treatment, the evidence showed that insured died while chloroform was being administered preparatory to an operation, and an attending physician testified that the proximate cause of death was acute dilatation of the heart immediately caused by the chloroform, and that insured's diseased condition did not contribute to his death, the jury could find that surgical treatment did not include the administering of chloroform; "surgery" being defined as the branch of the healing art that relates to external injuries, deformities, and other morbid conditions to be remedied directly by manual operations, "surgical" being defined as being of or pertaining to surgery, "treat-

ment" meaning the act or manner of treating, "remedy" being defined as something used for the cure or relief of bodily disease, and "surgical treatment" meaning treating a disease by means of surgery. *Beile v. Travelers' Protective Ass'n of America*, 135 S. W. 497, 502, 155 Mo. App. 629.

#### As ground for divorce

Any behavior of one party which affects the other physically or mentally is "treatment," within Rev. St. c. 148, § 3, authorizing divorce when either party has so treated the other as seriously to injure health. *Robinson v. Robinson*, 23 Atl. 362, 365, 66 N. H. 600, 15 L. R. A. 121, 49 Am. St. Rep. 632.

### TREATED

A person does not "consult" a physician and is not "treated" for an "ailment" within the meaning of a question in an insurance application, by merely stating to a physician that he has a headache and receiving medicine therefor, without asking or receiving any professional advice. *Modern Woodmen of America v. Miles*, 97 N. E. 1009, 1010, 178 Ind. 105.

### TREATY

Involving treaty, see *Involve*.

A "treaty" is a written contract between sovereigns. Its terms are agreed upon and it is signed by plenipotentiaries or commissioners, who are the authorized agents of the contracting powers; but after such agreement and signature it must be ratified by the governments, and the exchange of ratifications constitutes the delivery. Up to that time it is inchoate and may never take effect. The treaty with Spain, by which Porto Rico was ceded to the United States, did not become effective for the purposes of the tariff laws until the exchange of ratifications, April 11, 1899, and importations of merchandise from Porto Rico prior to that date were subject to duty. *Armstrong v. Bidwell*, 124 Fed. 690, 694.

The commercial reciprocal agreement with France, negotiated under the authority contained in section 3 of the tariff act of 1897 (30 Stat. 151, c. 11), to make reciprocal agreements with reference to certain specified articles, is a treaty within the meaning of Act March 3, 1891, § 5, giving a direct appeal from a federal Circuit Court to the Supreme Court in cases where the validity or construction of any treaty made under the authority of the United States is drawn in question. *B. Altman & Co. v. United States*, 32 Sup. Ct. 593, 596, 224 U. S. 583, 56 L. Ed. 894.

#### As equivalent to a legislative act

The Indians have not been regarded by the United States as independent nations, and "treaties," which are solemn agreements

between nations, when made with Indians, have no greater significance than an act of Congress. *Seneca Nation of Indians v. Appleby*, 112 N. Y. Supp. 177, 189, 127 App. Div. 770.

A "treaty" is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reformations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties, which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The Constitution of the United States places such provisions as these in the same category as other laws of Congress by its declaration that this "Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land." A treaty, then, is the law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined; and when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute. *United Shoe Mach. Co. v. Duplessis Shoe Mach. Co.*, 148 Fed. 31, 36 (quoting and adopting the definition in *Head Money Cases*, 112 U. S. 580, 598, 5 Sup. Ct. 247, 254, 28 L. Ed. 798); *Minnesota Canal & Power Co. v. Pratt*, 112 N. W. 395, 407, 101 Minn. 197, 11 L. R. A. (N. S.) 105 (quoting and adopting the definition of Justice Miller in *Head Money Cases*, 112 U. S. 598, 599, 5 Sup. Ct. 254, 28 L. Ed. 798).

### TREBLE DAMAGES

Damages as including, see *Damage—Damages*.

### TREE

See *Line Trees*; *Shade Trees*.

The word "log," as used in a logging contract, does not mean "tree." *Des Allemands Lumber Co. v. Morgan City Timber Co.*, 41 South. 332, 340, 117 La. 1.

The words "trees" and "wood" are not synonymous. The latter refers to the substance of the former when cut for use. The old maxim is "lignum cum crescere nescit;" (a tree while it grows; wood when it cannot grow). Hence an agreement for the sale of wood on a certain lot of land is an executory sale of goods. *Graham v. West*, 55 S. E. 931, 932, 126 Ga. 624.

**As emblements**

See Emblements.

**As included in term highway**

See Highway.

**As included in term land**

See Land.

**As lumber**

See Lumber.

**As public place**

See Public Place.

**As real estate**

See Real Property.

## TREMBLANS

The "tremblans" is described as a floating or trembling prairie, an unusual formation, consisting of vegetation, part of it decayed, interwoven, and in some places quite consistent. Cattle will browse on its surface in places, and feed on its feuille succulente, or green, nutritious leaves and twigs, which the water keeps fresh. In appearance the prairie tremblante is a verdant meadow, consisting of a large body of water covered with vegetation. It is shaky in many places, yet it does not, as a body, float around over the waters, as has sometimes been said. It is stationary, but not always a safe surface. A heavy step will cause a vibrating motion of the surface extending a number of feet around. *Caillouet & Maginnis v. Coguenhem*, 35 South. 385, 386, 111 La. 60.

## TRESPASS

See Constructive Trespass; Continuing Trespass; Forcible Trespass; Injury and Malicious Trespass to Property; Malicious Trespass.

Element of larceny, see Larceny.

Willful trespass, see Willful—Willfully.

A disturbance of one's peace is not a "trespass" against him, within a statute providing that in a prosecution before a justice of the peace, at the injured party's instance, for any trespass against the person or property of another, not amounting to a felony, except larceny, the costs shall be awarded against him on defendant's acquittal; such provision relating to cases where there is a physical invasion of one's rights. *State v. Wood*, 107 S. W. 431, 432, 128 Mo. App. 642.

While it is true that "trespass" in one sense means an injury or wrong, and in that meaning would include every cause of action, at least in tort, "trespass" has in law a well-ascertained and fixed meaning. It refers to injuries which are immediate, and not consequential. It would be a perversion of language to denominate an act which produced a consequential injury to real or personal property a trespass. One of the best tests by which to distinguish trespass is found in the answer to the question, When was the damage done? If the damage does not come directly from the act, but is simply an after result from it, it is essentially consequential, and no trespass. The Legislature, in providing a three-year limitation for actions for "trespass upon real property," meant to include only such recovery as could have been had through action of trespass at common law. An action for the negligent construction and maintenance of an irrigation canal lawfully built, the water from which overflowed plaintiff's land was not within the purview of that statute; the damages being consequential, and "case" being a proper remedy. *Suter v. Wenatchee Water Power Co.*, 76 Pac. 298, 300, 35 Wash. 1, 102 Am. St. Rep. 881.

The word "trespass," in Rev. St. 1895, art. 3354, § 1, declaring that an action for trespass to property must be brought within two years, includes all tortious acts amounting to a transgression of the rights of another as to his property, but there must be some act done; and a mere failure to perform an act which one owes to another is insufficient, and the failure of a carrier to deliver freight received for transportation is not a trespass. *Davies v. Texas Cent. R. Co.* (Tex.) 133 S. W. 295, 297.

Trespass lies for wrong to the possession of real property, and possession of the plaintiff, wrongful entry by the defendant, and damage therefrom are the necessary elements. The intent of the person entering is immaterial in an action of trespass, if the entry be made without justifiable cause or purpose, or license or title. *Phillips v. Brittingham* (Del.) 77 Atl. 964, 965, 2 Boyce, 173.

It is not a "trespass" for the servant of an innkeeper to go into a room assigned to a guest, though the guest objects thereto. *De Wolf v. Ford*, 104 N. Y. Supp. 876, 878, 119 App. Div. 808.

The word "trespass," in Rev. St. art. 1198, providing that, when the foundation of a suit is some crime, offense, or trespass for which a civil action for damages will lie, the suit may be brought either in the county where the act was committed or that of the defendant's domicile, means any intentional wrong or injury done directly or indirectly to the person or property of another. *Cahn Bros. & Co. v. Bonnett*, 62 Tex. 674, 676.

The taking and carrying away by defendants' servants of timber growing on plaintiff's land constitutes "trespass" at common law, even though done by mistake, and though not done at defendants' instance or direction, or by their consent. *Mishler Lumber Co. v. Craig*, 87 S. W. 41, 42, 112 Mo. App. 454.

#### **As requiring force**

"Trespass" implies force. "For a tort committed with force and intentionally, the immediate consequence of which is injury, 'trespass' is the appropriate remedy." *Plott v. Robertson* (Ala.) 39 South. 771 (citing *Bell's Adm'r v. Troy*, 35 Ala. 184; *Pruitt v. Ellington*, 59 Ala. 454).

Civ. Code 1895, § 5872, provides that suits against joint trespassers residing in different counties may be tried in either. Section 3888 declares that any abuse of, or damage done to, the personal property of another unlawfully, is a "trespass," for which damages may be recovered. Held, that the word "trespass" generally involves the idea of force; but, as used in the Code sections above cited, it is employed in a broader sense, and comprehends any misfeasance, transgression, or offense which damages another person's health, reputation, or property. *Williams v. Inman*, 57 S. E. 1009, 1010, 1 Ga. App. 321.

No justification being shown, defendant is liable in "trespass" where he forcibly entered plaintiff's store, changed the lock, and refused admission to plaintiff, whose property was in the store. *Charron v. Thivierge* (R. I.) 67 Atl. 585.

"Trespass" at the common law was the breaking of a close by force, and it was presumed that damages would accrue from the breaking into or penetrating such close, even if it was no more than the trampling of the herbage therein. *Welch v. Seattle & M. R. Co.*, 105 Pac. 166, 167, 56 Wash. 97, 26 L. R. A. (N. S.) 1047.

#### **Conversion distinguished**

See *Conversion*.

#### **Entry of building or on land**

Any unlawful entry on another's land constitutes a "trespass." *Cochran v. City of Wilmington* (Del.) 77 Atl. 963, 7 Pennewill, 315.

Every unauthorized and unlawful entry into the close of another is a "trespass," and from every such entry against the will of the possessor the law infers some damage. *Brame v. Clark*, 62 S. E. 418, 148 N. C. 364, 19 L. R. A. (N. S.) 1033, 16 Ann. Cas. 73.

An entry by one man on the land of another, when not made under claim or cover of right, is a mere "trespass." *Swope v. Ward*, 84 S. W. 895, 897, 185 Mo. 316.

Defendants' having unlawfully entered plaintiff's dwelling house while plaintiff was

under arrest therein and removed the window sashes, in consequence of which and by defendants' neglect to restore the sashes to their proper place plaintiff and his children were exposed to cold, was a "trespass." *Niles v. Brown*, 56 Atl. 1030, 1031, 25 R. I. 537.

Members of the public usually allowed to enter a public business house will not be considered as naked trespassers, when they are, without objection, peaceably in a public business house, though having no immediate business with the proprietor. *Rollestone v. Cassirer & Co.*, 59 S. E. 442, 444, 3 Ga. App. 161.

Where a contract employing a contractor to repair a dwelling was terminated by the owner in the manner specified by the terms of the contract, and the owner, after terminating it, warned the contractor not to go on the premises, and the contractor disregarded the warning and entered on the premises, he was guilty of a criminal "trespass." *Davis v. State*, 41 South. 681, 682, 146 Ala. 120.

A "trespass" is any act whereby another is injured or any unlawful act committed with violence, actual or implied, to the property of another; any unauthorized entry on another's realty, to its damage. *Collar v. Ulster & D. R. Co.*, 131 N. Y. Supp. 56, 59, 72 Misc. Rep. 274.

"Trespass on real property," as used in *Ballinger's Ann. Codes & St.* § 4800, subd. 1, limiting actions for waste or trespass on real property to three years, contemplates a direct physical invasion of the real estate itself, and does not apply to an action involving mere consequential injuries resulting from the raising of a street grade. *Denney v. City of Everett*, 89 Pac. 934, 935, 46 Wash. 342, 123 Am. St. Rep. 934.

#### **Libel**

The word "trespass" frequently—even generally—conveys the idea of force; but it also includes in its largest sense any transgression or offense against the law of nature, of society, or of the county in which we live, whether it relates to a man's person or property. A libel is a trespass. *Cox v. Strickland*, 47 S. E. 912, 913, 120 Ga. 104, 1 Ann. Cas. 870.

#### **Nuisance distinguished**

The distinction between "trespass" and "nuisance" consists in the former being a direct infringement of one's right of property while in the latter the infringement is the result of an act which is not wrongful in itself, but only in the consequences. In the one case the injury is immediate, in the other it is consequential, and generally results from the commission of an act beyond the limits of the property affected. *Central of Georgia Ry. Co. v. Americus Const. Co.*, 65 S. E. 855, 857, 133 Ga. 392.

**Possession by person injured**

Though the gist of an action of "trespass" is the injury done to plaintiff's possession, plaintiff need only show a constructive possession, especially where the action is against a tort-feasor setting up no claim of title in himself. *Carter v. Maryland & P. R. Co.*, 77 Atl. 301, 305, 112 Md. 599.

"Trespass" is an injury to the possession of another. To entitle plaintiff to recover, he must show that he was in lawful possession of the land on which the trespass was committed, and that the trespass was committed by defendant, or its servants or employes. *Cochran v. City of Wilmington*, 77 Atl. 963, 7 Pennewill, 315.

"Trespass" is an offense against the possession, and an action therefor can be maintained by one not holding the fee. *Roper Lumber Co. v. Elizabeth City Lumber Co.*, 47 S. E. 757, 759, 135 N. C. 744.

To make the action of another in removing a house a "trespass," plaintiff must show possession, actual or constructive, of the house at the time, and, where he relies on constructive possession under title to the land he must show that the house was on his land. *Marbury Lumber Co. v. Lamont*, 53 South. 773, 776, 169 Ala. 33.

One in the actual and exclusive possession of real estate, or chattels real, at the time of a "trespass" thereon by a wrongdoer, or by one having no title or authority from the real owner, may sue therefor, though his occupancy is limited and temporary, and though he has no title. One suing for a trespass to real estate need not show that he had the exclusive possession or use of the premises. *Stanton v. Lapp*, 77 Atl. 672, 675, 677, 113 Md. 324.

"Trespass" is any injury to the possession only, and as larceny at common law consists of a "trespass" committed in the taking of the personal goods or chattels of another with intent to convert them to the taker's use, without the consent of the owner, larceny cannot be committed by one in the lawful possession of goods. *State v. Browning*, 82 Pac. 955, 956, 47 Or. 470 (citing *Johnson v. People*, 113 Ill. 99).

In actions for "trespass to personal property," the gist of the action is the disturbance of plaintiff's possession. *Swank v. Elwert*, 105 Pac. 901, 902, 905, 55 Or. 487.

**Riot distinguished**

See Riot.

**Waste distinguished**

"Technically there is a difference between 'waste' and 'trespass.' 'Waste' is some unauthorized act which goes to the injury or destruction of an estate, committed by one in the rightful possession thereof, while 'trespass' is the act of a mere intruder. But there is no substantial distinction, so far as

the remedy is concerned." Where a complaint, in a suit to restrain the cutting of timber, is framed on the theory of restraining a trespass on land, and plaintiff's evidence showed, not an unlawful trespass, but a rightful entry and the commission of waste, a motion to dismiss the complaint was properly denied, since the relief sought was substantially the same. *Roots v. Boring Junction Lumber Co.*, 92 Pac. 811, 818, 50 Or. 298.

**TRESPASS (Action of)**

"Trespass" is an action sounding in damages, and the compensation for damage recoverable therein is, as the words imply, to be measured by the plaintiff's damage or loss, arising from the defendant's trespass or wrongful act set out in the plaintiff's declaration. This is true alike of all forms of the action of trespass, from assault to the latest development of the action of trespass on the case. *Trustees of Dartmouth College v. International Paper Co.*, 132 Fed. 92, 93.

"Trespass" is a personal action based on possession, and, if neither party be in actual possession at the time of the alleged trespass, the possession will be presumed to be in the one with the superior title. *Waters v. Dennis Simmons Lumber Co.*, 70 S. E. 284, 154 N. C. 232.

A count alleging damages "for a trespass . . . upon the following property: A dwelling house in the possession of plaintiff [describing it] on or about the 14th day of April, 1904, and for taking out of said house the following personal property: One iron bedstead," etc., so far as it alleged a trespass to realty, was sufficient, being according to the recognized form of allegations in such cases as well as following the form prescribed by the Code. A count claiming damages "for a trespass on the following goods and chattels in the possession of the plaintiff: One iron bedstead," etc., was not demurrable for failure to allege a wrongful taking; the word "trespass" ordinarily signifying the unauthorized use of force against the person or property of another. *Hardeman v. Williams*, 53 South. 794, 795, 796, 169 Ala. 50.

**TRESPASS NOTICE**

A written notice warning trespassers may, in a prosecution for maliciously destroying the same be designated in the indictment as a "trespass notice," although the owner of the land had not registered in the registry for posting lands. *Moody v. State*, 56 S. E. 993, 994, 127 Ga. 821.

**TRESPASS ON THE CASE**

"Trespass" implies wantonness, malice, and willfulness, while "trespass on the case" implies only negligence. Hence the owner of an irrigation ditch is not liable for injuries caused by seepage, in the absence of negligence. *Fleming v. Lockwood*, 92 Pac.

962, 964, 36 Mont. 384, 14 L. R. A. (N. S.) 628, 122 Am. St. Rep. 375, 13 Ann. Cas. 263 (citing *Dodson v. Mock*, 20 N. C. 282, 32 Am. Dec. 677).

Comp. Laws 1907, § 2877, subd. 2, providing that actions for trespass on real property shall be commenced within three years, refers to the common-law action of "trespass," which was the remedy for a wrongful entry on lands, and not to "trespass on the case," and hence does not include an action against a railroad company for injuries to the house of one living near the road by the jar of the trains and the emission of smoke and cinders; the limitation applicable to such actions being four years under section 2883, as an action not otherwise provided for. *O'Neill v. San Pedro, L. A. & S. L. R. Co.*, 114 Pac. 127, 128, 38 Utah, 475 (citing 8 Words & Phrases p. 7089).

"Trespass on the case" was a common form of action for the recovery of damages for injuries to such property as growing crops and hay. *Wilkins v. Lee*, 85 Pac. 140, 141, 73 Kan. 321.

#### TRESPASS QUARE CLAUSUM

In an action of trespass quare clausum fregit the object is to recover damages for the trespass, and mere possession will support the action. *Warren v. Wilson*, 71 S. E. 818, 819, 89 S. C. 420.

The gist of an action of "trespass quare clausum" is the injury to the possessory right, and the action will not lie unless plaintiff was in possession at the time of the alleged trespass. *Linn Woolen Co. v. Brown*, 85 Atl. 404, 405, 110 Me. 88. *Inhabitants of Millinocket v. Mullen*, 78 Atl. 1120, 1121, 108 Me. 29; *Munsey v. Hanly*, 67 Atl. 217, 102 Me. 423, 13 L. R. A. (N. S.) 209 (citing *Brown v. Manter*, 22 N. H. 468; 4 Kent, Comm. 120; *Cooley, Torts*, 379).

"Trespass quare clausum fregit" is the proper remedy for a wrongful invasion of another's possession of realty. It lies for injury to the possession, and to sustain the action the plaintiff must establish that he was in the actual or constructive possession of the property at the time the wrong was committed. *Gordner v. Blades Lumber Co.*, 56 S. E. 695, 696, 144 N. C. 110 (citing *State v. Reynolds*, 95 N. C. 616; *Patterson v. Bodenhammer*, 33 N. C. 4; *Smith v. Wilson*, 18 N. C. 40).

"The gist of the action of 'trespass quare clausum fregit' is the disturbance of the possession." The wrong complained of is the trespass, and all else that follows is incidental, and is included in the main offense. *Kentucky Stave Co. v. Page* (Ky.) 125 S. W. 170, 173 (quoting and adopting language of *Foote v. Merrill*, 54 N. H. 490, 20 Am. Rep. 151).

"Trespass quare clausum fregit" is a possessory action, brought because of a dis-

turbance of the peaceable possession of plaintiff. The gist of the action is the wrongful entry, the breaking in upon, and the interruption of the quietude of the plaintiff's possession, and whatever follows in the nature of damages to buildings, fences, crops, or other property is mere aggravation. Possession by plaintiff is indispensable to the action. *Wilkins v. Lee*, 85 Pac. 140, 73 Kan. 321.

"Trespass quare clausum fregit" is an action for breaking the close of another and forcibly and unlawfully entering on another's land. *Morris v. Hazel* (Del.) 77 Atl. 766, 768, 1 Boyce, 324.

#### TRESPASS TO TRY TITLE

The purpose of the action of "trespass to try title" being to establish the plaintiff's title to land, the plaintiff must show title in himself and recover upon the strength of his own and not the weakness of his adversary's title; and hence a complaint which seeks to recover damages for trespass upon stating title in plaintiff and ouster by defendant, and praying damages for the ouster and the possession of the land alleged to be wrongfully withheld, states a cause of action of trespass to try title. *Warren v. Wilson*, 71 S. E. 818, 819, 89 S. C. 420.

#### TRESPASSER

See Joint and Several Trespassers; Joint Trespassers; Willful Trespasser.

One about the premises of another without consent, permission, or license is a "trespasser." *Hern v. Southern Pac. Co.*, 81 Pac. 902, 907, 29 Utah, 127.

If a person is on the land of others without their consent and against their will, he is a "trespasser." If he is a trespasser, he is in fault for being there, and cannot recover if he counts on their negligently injuring him, unless he shows his wrongful entry was the occasion, not the cause, of his injury. *Brown v. Boston & M. R. R.*, 64 Atl. 194, 199, 73 N. H. 568.

A judge who renders an order for commitment and issues a warrant of commitment on it is not necessarily a "trespasser." He is such only when he has assumed a jurisdiction which did not belong to him, and so the whole proceeding is coram non iudice. *McVeigh v. Ripley*, 58 Atl. 701, 703, 77 Conn. 136.

One who was present while a constable was making an arrest, but only went to his aid when he considered the officer was in danger, was not a "trespasser" until ordered off the premises by the owner. *State v. Williams*, 56 S. E. 783, 785, 76 S. C. 135.

A child who climbs into a milk wagon while the driver is absent, and on his return is permitted to ride a short distance, and is injured while the driver is attempting to help her alight by the horse starting, is a "trespasser" in getting into the wagon, and per-

mitting her to ride then and at previous times does not constitute an implied invitation to her to ride. *West v. Poor*, 81 N. E. 960, 196 Mass. 183, 11 L. R. A. (N. S.) 936, 124 Am. St. Rep. 541 (citing *Daniels v. New York & New England Railroad*, 28 N. E. 283, 154 Mass. 349, 13 L. R. A. 248, 26 Am. St. Rep. 253).

Destruction of the common property by a cotenant constitutes him a "trespasser." *Davis v. Poland*, 66 Atl. 380, 382, 102 Me. 192, 10 L. R. A. (N. S.) 212, 120 Am. St. Rep. 480.

Under Rev. St. 1895, arts. 201, 2349, requiring an attachment to be levied as an execution on similar property is levied, and providing that a levy on personalty is made by taking possession thereof, an officer in attaching wood stacked on land must perform such possessory acts or take such undoubted control as to constitute a trespass; a "trespasser" being one who unlawfully enters on or intrudes on another's land, or who unlawfully and forcibly takes another's personalty. *Jones & Nixon v. First State Bank of Hamlin* (Tex.) 140 S. W. 116, 118.

If a marshal, in executing a dispossess warrant, does not act in his official capacity, he is a "trespasser." *Grayrock Land Co. v. Wolff*, 121 N. Y. Supp. 953, 955, 67 Misc. Rep. 153.

Code Cr. Proc. 1895, art. 996, declares that, when any property alleged to have been stolen comes into the custody of an officer, he must hold it subject to the order of the proper court or magistrate, and by article 997, on the trial of a prosecution for theft, the court shall order the property restored to the person appearing to be the true owner. Held that, where an officer making an arrest for theft finds the stolen property with the accused, it is his duty to take charge of it and hold it subject to the order of the magistrate at the examining trial or of the court trying he accused on the charge of theft, and in so doing the officer is not a "trespasser," within the rule that a mere trespasser cannot defend on the ground that title is in a third person. *Murray v. Lyons* (Tex.) 95 S. W. 621, 622.

#### On railroad property

A person on a railroad track a distance from a path used by the public with the acquiescence of the company, and who was not going toward the opening in the railroad fence where the path entered the right of way, is a "trespasser." *Le Duc v. New York & H. R. R. Co.*, 87 N. Y. Supp. 364, 367, App. Div. 107.

This suit having been brought for the recovery of damages alleged to have been sued in consequence of the homicide of the plaintiff's husband, and it appearing that at time of the infliction of the injuries by running of the defendant company's locomotive, which resulted in his death, the deceased, at night, was a "trespasser" on the

track of the company, not at a public crossing, nor at a point which those in charge of the locomotive had reason to apprehend the presence of any person on the track, and there being no allegation showing that the injuries were, by the defendant's servants, willfully or wantonly inflicted, and it appearing from the entire petition that the deceased was killed in consequence of his own gross negligence, no cause of action was set forth, and a general demurrer to the petition should have been sustained. *Atlantic Coast Line R. Co. v. Riley*, 56 Tex. 635, 636.

A person walking across or along a railroad track is not necessarily a "trespasser." *Davis v. Arkansas Southern R. Co.*, 41 South. 587, 591, 117 La. 320.

One who had been walking on a railroad's right of way, and stepped off on a public highway, intending to pursue his journey on the highway as soon as a train passed, is not a "trespasser," and the railroad owed him the same duty as any one else on the highway. *St. Louis & S. F. R. Co. v. Troutman* (Tex.) 138 S. W. 427, 428.

One who, intending to become a passenger, takes a diagonal course from a street to a depot across a switch track, a way which for years to the knowledge of the company's local station agents, without objection or protest, had been used by passengers, is not a "trespasser," but is impliedly invited to take that course, so that the company owes to her the duty of reasonable care in the operation of its cars there, and not merely of not wantonly running her down. *Allenza v. Erie R. Co.*, 138 N. Y. Supp. 1024, 1026, 78 Misc. Rep. 659.

One killed while crossing a railway track along a footpath which had been used by the public and the defendant's employes for many years was not a "trespasser." *Minot v. Boston & M. R. R.*, 66 Atl. 825, 829, 74 N. H. 230.

Where a decedent, killed by a railroad train, was walking lengthwise of the main track on the ties, and was not using the track for crossing purposes, for whatever use in crossing the track had been acquiesced in by the company would not give him the right to travel along the track, he was a "trespasser." *Limb v. Kansas City, Ft. S. & M. R. Co.*, 84 Pac. 136, 73 Kan. 220.

A person accompanying passengers to assist them in entering a train, though not a passenger, is not a "trespasser," as he has at least a tacit invitation by virtue of the relation between it and the passenger, and the carrier must exercise at least ordinary care to avoid injuring him by defective station facilities or approaches thereto. *Chesapeake & O. Ry. Co. v. Parls' Adm'r*, 59 S. E. 398, 399, 107 Va. 408.

A pedestrian who leaves the limits of the highway and attempts to go around a train which has obstructed a crossing for a greater



length of time than is permitted by Pen. Code, § 421, and by municipal ordinance, is not a "trespasser," within the meaning of Railroad Law (Laws 1890, p. 1101, c. 565) § 53, providing that no person other than those connected with or employed upon the railroad shall walk upon or along its track except where the same shall be laid across a highway, in which case he shall not walk upon the track unless necessary to cross the same. *Kurt v. Lake Shore & M. S. R. Co.*, 111 N. Y. Supp. 859, 862, 127 App. Div. 838.

A person walking on a railroad track is a "trespasser," unless it is where the track runs along a highway or public street, which the public have an equal right to use. *Birmingham S. R. Co. v. Fox*, 52 South. 889, 890, 167 Ala. 281.

One who entered a train, having a ticket which he believed to be good and to entitle him to ride on the train, was not a "trespasser," and was entitled to be treated as a passenger, until he was notified that his ticket was not good and he refused to pay his fare. *Gulf, C. & S. F. Ry. Co. v. Bunn*, 95 S. W. 640, 641, 41 Tex. Civ. App. 503.

Where a car was left on a siding to have a safe unloaded therefrom, a person, who went on the car to help unload it and was injured, was not a "trespasser." *Louisville & N. R. Co. v. Farris* (Ky.) 100 S. W. 870, 871.

One on the track of a railroad in the country, not upon a public highway, is a "trespasser." *Hulsey's Adm'r v. Louisville, H. & St. L. Ry. Co.* (Ky.) 87 S. W. 302, 303.

A person who accompanies a passenger onto a train to render her assistance in conformity with the custom acquiesced in by the carrier is not a "trespasser"; and if the carrier has notice of his intention to disembark, it must hold the train a reasonable time to allow him to leave it. *Cooper v. Atlantic Coast Line R. Co.*, 59 S. E. 704, 706, 78 S. C. 562.

One who enters and takes passage in a street car with the consent of the company, and does not refuse to pay fare, is not a "trespasser." *Gabbert v. Hackett*, 115 N. W. 345, 347, 135 Wis. 86, 14 L. R. A. (N. S.) 1070.

Plaintiff, a boy seven years old, was invited by certain of the sectionmen to get on a hand car for a ride. The foreman ordered the men to help the boy on the car, and told him to "hold on tight." He held on until the car had gone 300 or 400 feet when he got dizzy, fell off, and was injured. Held, that he was not a passenger, but was either a licensee or a "trespasser." *Daugherty v. Chicago, M. & St. P. Ry. Co.*, 114 N. W. 902, 903, 137 Iowa, 257.

## TRESTLE

"Trestle," according to the lexicographers, is a support consisting of three or four

legs secured to a top piece. The fact that a patentee described and claimed "a trestle consisting of two pairs of legs" pivoted as shown, whereas by the accepted definition a top piece is essential to constitute a trestle, does not render the claim invalid, where the meaning is plain, and the legs as shown are adapted to be used with any kind of a top piece to complete the trestle, as intended. *Chicago Wooden Ware Co. v. Miller Ladder Co.*, 133 Fed. 541, 546, 66 C. C. A. 517.

## TRIWEEKLY

The term "daily newspaper," in a statute requiring notice of foreclosure sales to be published in daily newspapers, is employed in contradistinction to the term "weekly," "semi-weekly," or "triweekly" newspaper. *Wilson v. Petzold*, 76 S. W. 1093, 116 Ky. 873.

## TRIBLE

Under Code Civ. Proc. § 3228, subd. 5, relating to the recovery of costs in actions in the Supreme Court "tribable" in Kings county, the venue determines the place of trial, and, where the action was triable in Queens county, costs were recoverable, though the amount recovered was under \$500. *Burgdorf v. Brooklyn, Q. C. & S. R. Co.*, 114 N. Y. Supp. 718, 719, 130 App. Div. 253.

Under Code Civ. Proc. § 3228, as amended by Laws 1904, c. 557, providing that in all actions hereafter brought in the Supreme Court, triable in the county of New York, which could have been brought, except for the amount claimed, in the City Court, and in which the defendant is personally served in the county of New York, the plaintiff shall recover no costs unless he recover \$500 or more, where such an action against a resident of New York county was commenced by service of summons on defendant in New York county, the summons naming Westchester county as the place of trial, and at defendant's insistence the place of trial was changed to New York county, but upon plaintiff's motion changed back to Westchester county for convenience of witnesses, and plaintiff recovered only \$125, he was not deprived of his right to costs under the statute, since it was passed to relieve the congested calendars of the Supreme Court of New York county, and the words "tribable in the county of New York," in the statute, refer to the conditions at the time of trial rather than those at the commencement of the action. *Seymour v. Wheeler*, 122 N. Y. Supp. 183, 184, 137 App. Div. 52.

## TRIAL

See As upon the Trial; Awaiting Trial; Before Trial; Beginning of Trial; Called for Trial; Commencement of Trial; During Trial; Either Before or After Trial; Fair Trial; Mistrial;

New Trial; Place of Trial; Proceed to Trial; Public Trial; Retrial; Rule Absolute for New Trial; Sale on Trial; Set for Trial; Speedy Trial.

Any trial, see Any.

Error of law occurring at trial, see Error of Law.

Conclusion of trial, see Conclusion.

See, also, Hearing; Try.

The meaning of the word "trial" is an examination by a test. *People v. Plummer*, 9 Cal. 298, 310.

A "trial" means an investigation into the facts according to the forms of law; it means that, in character, the evidence brought forward in proof of the charge made must be competent and relevant to the issue, and this according to the established rule relating to the admissibility of evidence. *Hunter v. District Court of Polk County*, 102 N. W. 156, 157, 126 Iowa, 357.

"A 'trial' is the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue. When a court hears and determines any issue of fact or of law for the purpose of determining the rights of the parties, it may be considered a trial." *State ex rel. Carleton v. District Court of Lewis and Clark County*, 82 Pac. 789, 791, 33 Mont. 138, 8 Ann. Cas. 752 (quoting and adopting the definition in *Finn v. Spagnoli*, 67 Cal. 330, 7 Pac. 748; *Tregambo v. Comanche Mill & Mining Co.*, 57 Cal. 501).

By general acceptance or use of the word, "trial" includes all the steps taken in the case, from submission to the jury to the rendition of the judgment. *Lindley v. Kemp*, 76 N. E. 798, 800, 38 Ind. App. 355 (citing *And. Law Dict.* 1054; *Bruce v. State*, 87 Ind. 450, 453; *Jenks v. State*, 39 Ind. 1, 9).

The word "trial," as used in Comp. Laws 1887, § 7401, providing for calling a new juror or impanelling a new jury when a juror becomes sick during the trial, is restricted in its significance to the investigation of the facts, commencing after the jury is sworn and ending with the charge of the court. The word is used in a restricted sense, and the trial mentioned in such section terminates with the termination of the investigation of the facts. *State v. Johnson*, 124 N. W. 847, 851, 24 S. D. 590 (quoting *State v. Hazledahl*, 52 N. W. 315, 2 N. D. 521, 16 L. R. A. 150).

A "trial," by Code, § 2130, is defined to be "the judicial examination of the issues between the parties whether of law or fact." Webster defines "trial" as "the formal examination of the matter in issue in a case before a competent tribunal." *Bouvier* adopts the definition of the court in *United States v. Curtis*, 4 Mason, 232, 25 Fed. Cas. 726: "The examination before a competent

tribunal, according to the laws of the land, of the facts put in issue in a cause, for the purpose of determining such issue." *Breed v. Hobart*, 86 S. W. 108, 109, 187 Mo. 140.

A "trial" is a judicial examination of the issues of law or fact in an action, as defined by Civ. Code Prac. § 311. *Davis v. Ferguson* (Ky.) 92 S. W. 968, 970.

The word "trial" in a limited sense relates only to the examination and determination of issues of fact, but in a broader sense includes hearing and determining of issues, whether of law or of fact. *Davis v. Smith*, 66 S. E. 401, 403, 7 Ga. App. 192 (citing 8 Words and Phrases, p. 7095).

Where a witness in proceedings before a referee dies, and before the evidence is finally submitted the referee also dies, on a subsequent hearing before another referee such testimony is not inadmissible on the ground that the former hearing was not a "trial," within Code Civ. Proc. § 830, allowing evidence of a deceased witness taken at a former trial to be interposed, where the parties against whom the testimony was offered had the opportunity to cross-examine such witness. *Taft v. Little*, 70 N. E. 211, 212, 178 N. Y. 127.

"Trial," as used in Code Civ. Proc. § 656, declaring that a new trial is a re-examination of an issue of fact in the same court after a trial and decision by jury or court, refers to an investigation of the issues of fact raised by the pleadings. *Stockton Iron Works v. Walters*, 123 Pac. 240, 242, 18 Cal. App. 373.

Where defendant in a suit in a district court does not appear, and the court determines the case in his absence and renders judgment under District Court Act (P. L. 1898, p. 611) § 146, such hearing and determination is a "trial," within section 17 of said act, limiting the time for new trial to 30 days after judgment. *Rosner v. Cohn*, 79 Atl. 1056, 81 N. J. Law, 343.

A "trial" is an examination of matters of fact in issue. It is a common-law term ordinarily used to denote a step in an action by which issues of questions of fact, are decided. Hence, under Rev. St. U. S. § 724, providing that in the trial of actions at law courts may on motion require the parties to produce books or writings in their possession which contain evidence pertinent to the issue, parties cannot be compelled to produce such evidence in advance of the trial. *Carpenter v. Winn*, 31 Sup. Ct. 683, 684, 221 U. S. 533, 55 L. Ed. 842 (citing 3 Blackstone's Comm. 350; *Bouv. Law Dict.*; *Miller v. Tobin*, 18 Fed. 609, 9 Sawy. 410).

An order vacating a default decree of divorce and allowing defendant to answer in accordance with L. O. L. § 59, is not an appealable order within section 548, providing that appeals will lie from final judgment and

decrees, in effect determining the action and orders setting aside the judgment and granting a new trial, for the order is not a final one determining the suit, and neither is it an order granting a new trial which is defined by section 173 as a re-examination of an issue of fact in the same court after judgment, for this order only vacates a default, and there has been no "trial," which is defined by section 113 as the judicial examination of the issues between the parties. *Taylor v. Taylor*, 121 Pac. 431, 432, 61 Or. 257.

Where defendant and his attorneys, by reason of accident or surprise which ordinary prudence could not have guarded against, were deprived of a fair trial, the remedy is by motion, filed within three days after decision, as provided by Code, § 3756; the term "trial," as used therein, meaning one in which the parties have participated. *Acheson v. Inglis Bros.* (Iowa) 135 N. W. 632, 634.

Code 1906, § 163, extends the provisions of law relating to third persons claiming property levied on by virtue of fieri facias to claimants of property levied upon by attachment, and provides that the trial of the right of property shall not be had until after judgment for plaintiff in the attachment suit. Section 4992 requires plaintiff in execution, where there is a claimant's affidavit, to move for an issue to try the right of property at the same term, and section 4993 provides that, if by plaintiff's default an issue is not made up at the return term, claimant shall be discharged, and, if he fails to join issue at the first term when tendered, the court shall order a writ of inquiry as to the value of the property. Held, that claimant in attachment was not bound to join issue on plaintiff's tender at the return term of the attachment; the word "trial," in section 163, including the making up of the issue of ownership, and contemplating that such issue shall not be made up until final judgment in the principal case. *White v. Roach*, 53 South. 622, 623, 98 Miss. 309.

A motion for judgment in an equity action to reform a deed constitutes a part of the "trial," and the provisions of the Code requiring that actions relating to realty be tried in the county of the venue apply to all parts of the trial, and such motion cannot be made, except at a term of court in the county of the venue. *Tefft v. Greenwich & G. R. Co.*, 95 N. Y. Supp. 205, 206, 47 Misc. Rep. 26.

The "trial" of an action at common law is to be had before a court and jury, and questions as to the admissibility or inadmissibility of individual items of evidence can be ruled on intelligently and fairly only by the judge who is presiding at the trial and is fully informed as to all the circumstances which prior evidence has disclosed. In a proper case a party may be required to produce books and writings, under Rev. St. U. S. § 724, in advance of trial, but such a direction

should only be made when the situation is clearly such that in no other way can the ends of justice be properly subserved. *American Banana Co. v. United Fruit Co.*, 153 Fed. 943.

A motion to quash a summons is not a part of the "trial," within Code Civ. Proc. § 4493, authorizing the granting of a new trial for error of law occurring at the trial, since the "trial" does not commence until an issue of fact is joined. *Buxton v. Alton-Dawson Mercantile Co.*, 90 Pac. 19, 21, 18 Okl. 287.

As defined by Code Civ. Proc. § 265 (Gen. St. 1905, § 5160), a "trial" is a judicial examination of the issues, whether of law or fact, in an action; and a new trial (Code Civ. Proc. § 306; Gen. St. 1905, § 5202) is a re-examination in the same court of an issue of fact after a verdict by a jury, report of a referee, or a decision of a court. The same section provides that the former verdict, report, or decision shall be vacated, and a new trial granted, on the application of the party aggrieved (which section 309 [section 5205] provides must be by motion on written grounds), for certain causes specified affecting materially the substantial rights of such party. Some of the causes specified are any order of the court by which the party is prevented from having a fair trial; that the decision is not sustained by sufficient evidence, or is contrary to law; error of law occurring at the trial and excepted to at the time. Code Civ. Proc. § 306 (Gen. St. 1905, § 5202). Strictly construed, then, as defined by the Code, a "trial" involves the judicial examination of all the issues of law and fact in an action, while a new trial involves only the re-examination of an issue of fact. That this strict construction is not applicable to new trials of ordinary actions, in which the law applicable varies to the varying facts pleaded or proven, is apparent, when we consider the grounds for which new trial "shall be granted" as prescribed, some of which involve only a question of law. These must be re-examined, both on the hearing of the motion for the new trial and upon the new trial, if granted. Issues of law are not ordinarily framed in an action by the petition and answer, or by the answer and reply, in the sense that a proposition of law is asserted in one pleading and denied in another; but such issues may arise in many ways at almost every stage of the action, and are sometimes determinative of the action and sometimes not. Sometimes they arise in the course of the trial, and sometimes before the trial is commenced. It goes without saying that there can be no new trial until there has been a trial; and by a fair construction of the Code it must be such a trial as results or should result in a verdict, a report of a referee, or a decision by the court which involves and determines the facts in issue. Otherwise there could be no new trial "of the issue of fact." It follows,

therefore, that whenever a trial has been had upon issues of fact, which trial results in a verdict, report of a referee, or a decision which determines such facts, either party who feels himself aggrieved may file his motion for a new trial on the grounds and within the time prescribed, and until such motion is disposed of the action is still pending, and the statutory time for preparing a case-made for an appeal does not begin to run. *Darling v. Atchison, T. & S. F. Ry. Co.*, 93 Pac. 612, 613, 76 Kan. 893.

Where a final judgment is rendered as upon default for failure to answer in compliance with a rule, no relief can be obtained by an ordinary motion for a new trial, for the demand is taken as confessed, and there is no "trial" in the true acceptance of that term. *Rooker v. Bruce*, 171 Ind. 86, 85 N. E. 351, 353.

Code Civ. Proc. § 2545, in relation to Surrogate's Courts, provides that an exception may be taken to a ruling by a surrogate upon the trial by him of an issue of fact, including a finding or refusal to find on a question of fact in a case, where such an exception may be taken to a ruling of the court upon a trial without a jury of an issue of fact; and section 2576 provides that an appeal from a surrogate from a decree rendered on the trial of an issue of fact must be heard upon a case to be made and settled by the surrogate, as in making and settling of a case upon an appeal in an action. "When we find these two sections of the Code both referring specifically to 'a trial by the surrogate of an issue of fact,' it is but fair to assume that the framers of the Code used the word 'trial' in the ordinary sense in which it is employed by lawyers and courts, viz., where there was an issue of fact and testimony taken thereon, and that it was not intended to cover every hearing in the surrogate's court, the basis of which may consist solely of affidavits, records, or certified copies of documents; in other words, it is apparent that these provisions of the Code were designed with the intention of making the practice in the Surrogate's Court substantially the same as the practice in the Supreme Court." *In re Schmid*, 98 N. Y. Supp. 921, 922, 50 Misc. Rep. 109.

The term "after the trial," as used in Rev. St. 1895, art. 1379, providing that "after the trial" of any cause either party may make out a written statement of the facts in evidence on the trial and submit the same to the opposite party or his attorney for inspection, etc., is sufficiently broad to embrace the entry of a judgment *nunc pro tunc* as a part of the trial, justifying the court in making and certifying to the statement of facts if judgment was actually entered. *Palmo v. S. W. Slayden & Co.*, 92 S. W. 796, 797, 100 Tex. 13.

### Condemnation proceedings

"In a proceeding for the condemnation of real property, if a defendant interpose an answer to the petition (Code Civ. Proc. § 3365), a 'trial' of the issues thus raised must be had. If judgment be given the answering defendant thereon, he is entitled to costs against the plaintiff; i. e., costs before and after notice of 'trial' and a trial fee. Section 3369. If judgment of condemnation be given, the plaintiff is entitled to like costs against the answering defendant. Section 3372, last clause. The foregoing provisions relate to the 'trial' only; i. e., the 'trial' of the issue raised by an answer to the petition. That is the only 'trial' that is had in a condemnation proceeding. The word does not relate to or designate the hearing before the commissioners at all." *New York, O. & W. R. Co. v. McBride*, 92 N. Y. Supp. 31, 45 Misc. Rep. 516.

### In criminal law

The "trial" of a criminal case does not begin, strictly speaking, until the jury is impaneled and sworn, in view of Comp. Laws, § 4320, stating the order of proceedings of trial. *State v. Jackman*, 104 Pac. 13, 15, 31 Nev. 511 (citing *U. S. v. Curtis*, 4 Mason, 232, 25 Fed. Cas. 726; *Commonwealth v. Soderquest*, 66 N. E. 801, 183 Mass. 199; *Hunnell v. State*, 86 Ind. 431; *Alexander v. Commonwealth*, 105 Pa. 1; 8 Words and Phrases, p. 7099 et seq.).

The word "trial," as used in constitutional and statutory provisions that an accused person upon a trial shall be confronted with witnesses against him, except in certain cases provided for, means a trial by jury. *Pratt v. State*, 100 S. W. 138, 143, 63 Tex. Cr. R. 281.

Conviction upon a plea of guilty is as much a "trial" as is a conviction upon evidence taken. *People ex rel. Burke v. Fox*, 134 N. Y. Supp. 642, 643, 150 App. Div. 114.

The word "trial," as used in Code Cr. Proc. § 308, awarding an allowance to counsel appointed to defend a criminal, authorizes an allowance on a trial resulting in a disagreement. *People ex rel. McAvoy v. Prendergast*, 124 N. Y. Supp. 713, 715, 67 Misc. Rep. 541.

The word "trial," as used in Const. art. 1, § 7, guaranteeing right of trial by jury, meaning an issue of fact presented by a plea of the accused, where the accused, with full knowledge of his constitutional rights, enters a plea of guilty, and presents no issue of fact for trial, there can be no trial, and the conviction is the accused's admission, and takes the place of a verdict of a jury. *Ex parte Dawson*, 117 Pac. 696, 699, 20 Idaho, 178, 35 L. R. A. (N. S.) 1146.

A criminal "trial" begins when the jury are called to be examined as to their quali-

fications. *Simmons v. State*, 114 Pac. 752, 753, 4 Okl. Cr. 490.

The word "trial," as used in Acts 1896, p. 162, No. 113, requiring the court to order the clerk at the time and without delay to take down the facts upon which bills of exceptions were predicated, is not used in criminal matters in that technical sense which restricts its application to a proceeding had after the impaneling of the jury, but applies to all proceedings which take place after the state and accused announce that they are ready, or after they are ordered by the court to proceed with the trial. *State v. Butler*, 38 South. 466, 467, 114 La. 596.

Under the statute providing that whenever the constitutionality of an act is questioned in the trial of a criminal cause the decision of the question shall be reserved and the trial proceed in other respects as if the statute was constitutional, the word "trial" is used in its technical sense, namely, "the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue, for the purpose of determining such issue." *State v. Collins*, 62 Atl. 1010, 1012, 27 R. I. 419 (quoting and adopting definition in *Bouv. Law Dict.*, and citing *State v. Bergman*, 34 N. W. 737, 37 Minn. 407).

Cr. Proc. Act 1898, § 53 (P. L. p. 885), provides that every indictment shall be tried at the term in which issue is joined, or at the term after, unless the court for just cause allows further time for trial, and, if the indictment be not so tried, defendant shall be discharged on his own recognizance. Two indictments were found against petitioner for arson in the April term, 1907, and he was arraigned five days afterwards, and tried on one of the indictments in June, 1907, the jury disagreeing, and no trial was had on the other indictment that term, or on either of them in the September term, but at that term a third indictment was found on which he was tried, the jury also disagreeing on this trial. Petitioner was then remanded until the December term, when he was tried and acquitted on the third indictment, and was discharged on his own recognizance under the statute on the second indictment, but his motion for discharge on the first indictment was denied. Held, while in strictness the word "trial" implies a verdict, the trial required by the statute did not contemplate a verdict, and hence the statute was satisfied by the trial and disagreement in the April term, after which it became inoperative. *State v. Dilts*, 69 Atl. 255, 76 N. J. Law, 410.

As to whether or not a view by a jury in a criminal case constitutes a part of the "trial" of the case there is a diversity of conclusions, which appears to be due largely to a restriction of the term the "trial" to the permanent proceedings in the courtroom, and an effort of the courts to evade the apparent-

ly inevitable result of that construction of the case under consideration. Every step taken in a criminal case, by or in the court wherein the case is pending, from issue joined to verdict rendered, is a step or proceeding "arising during the course of the trial." In this extensive sense the "trial" would include many occasions when the judge need not be personally present, exercising control or conducting the trial. This is the case where the jury are kept together during the entire trial. Between the sessions of the court they are under the control of the sheriff, and if they make an unauthorized visit in a body to the place where the crime was committed, while in charge of that officer, the error may be waived, and the court can consider whether or not the view influenced the minds of the jurors, in ruling on a motion for a new trial. *People v. White*, 90 Pac. 471, 477, 5 Cal. App. 329 (citing *People v. Turner*, 39 Cal. 370; *Warner v. State*, 29 Atl. 505, 56 N. J. Law, 686, 44 Am. St. Rep. 415).

"A man cannot be legally charged with crime where there is no jurisdiction to try him. The fact that he is so legally charged means that he is charged by an authority having a right to try him. A 'right to try' means jurisdiction over the place where the crime has been committed and over the person who commits it. *Ex parte Cheatham*, 95 S. W. 1077, 1081, 50 Tex. Cr. R. 51 (quoting *Ex parte Morgan*, 20 Fed. 308).

"The word 'trial' is not the equivalent of the word 'procedure,' and is less comprehensive. It does not include those acts by which the defendant is brought into court and the issues of law and fact are presented, but relates solely to the examination before the tribunal of the facts or the law put in issue and the determination thereof." Where a municipal ordinance of a city of the third class, with the violation of which defendant was charged, provided that he should be entitled to a trial by jury as in prosecutions before justices of the peace, "and all trials before the recorder shall be conducted in like manner as cases before the justice of the peace," it did not render applicable to such proceedings the practice regulating the procedure in misdemeanor cases before justices of the peace, requiring the filing of an information, signed and verified by the prosecuting attorney, in the police court of the city, but defendant could be properly proceeded against under the statute applicable to cities of the third class on the filing of a sworn complaint by any person. *City of Kirksville v. Munyon*, 91 S. W. 57, 58, 114 Mo. App. 567.

#### Same—Presence of accused

The words "during the trial" mean every substantive step taken by the court in the cause after the indictment is presented by the grand jury to the court, up to and including the final judgment. Every step

taken in the cause, however, does not constitute a separate and distinct trial, but is only a step in or part of the prosecution, which, together with the final adjudication of the case upon its merits, constitute the trial. An order authorizing a sheriff to summon a jury to be present at a subsequent date fixed for the trial of accused was a mere administrative function of the court, and was not a part of the "trial" of the cause at which the presence of accused was required by Rev. St. § 2610, declaring that no person indicted for felony can be tried unless he is personally present during the trial. *State v. Barrington*, 95 S. W. 235, 257, 198 Mo. 23 (citing *Osborn v. State*, 24 Ark. 629; *State v. Montgomery*, 63 Mo. loc. cit. 299).

An application for a continuance of a criminal case is not a part of the "trial," within Rev. St. 1899, § 2610, providing that no person indicted for felony can be tried unless personally present during the "trial"; and hence the failure of the record to affirmatively disclose defendant's presence when his application for a continuance was heard and overruled was not ground for reversal. *State v. Hall*, 87 S. W. 1181, 189 Mo. 262.

#### **Hearing and deciding demurrers or motions on pleadings**

The argument and submission to the court of a motion for judgment on the pleadings on the ground that defendant's answer containing allegations of new matter which were admitted by plaintiff's failure to reply is a "trial" within Code Civ. Proc. § 1004, subd. 1, providing that an action may be dismissed or judgment of nonsuit entered by plaintiff "at any time before trial." *State ex rel. Montana Cent. R. Co. v. District Court of Eighth Judicial Dist.*, 79 Pac. 546, 547, 32 Mont. 37.

A "trial" is the examination before a competent tribunal, according to law, of the facts or law in issue in a cause, for the purpose of determining such issue. The argument and submission to the court of a motion for judgment on the pleadings, on the ground that defendant's answer contained allegations of new matter which were admitted by plaintiff's failure to reply, is a "trial," within Code Civ. Proc. § 1004, subd. 1, providing that an action may be dismissed or judgment of nonsuit entered by plaintiff at any time before trial. *State ex rel. Montana Cent. R. Co. v. District Court of Eighth Judicial Dist.*, 79 Pac. 546, 547, 32 Mont. 37.

The overruling or sustaining of a demurrer to a pleading is not included in "errors of law occurring at the trial," within St. 1893, § 4196 (Comp. Laws 1909, § 5825), since a "trial" does not commence until an issue of fact is joined, so that no error can be assigned thereon that can be reviewed on a

transcript. *Haynes v. Smith*, 119 Pac. 246, 247, 29 Okl. 703.

Where an action is appealed to the Supreme Court, and is remanded for retrial, the circuit court must proceed in the retrial in conformity with the opinion of the Supreme Court, but is not restricted to a trial of the matters adjudicated by the Supreme Court, and the sustaining of a demurrer to an amended petition filed in the circuit court after remand is a "trial" within Rev. St. 1909, § 1967, defining a trial as a judicial examination of issues between parties, whether of law or fact. *McMurray v. St. Louis, I. M. & S. Ry. Co.*, 142 S. W. 479, 481, 161 Mo. App. 133.

Under Rev. Codes 1890, § 5419, declaring that a trial is the judicial examination of the issue between the parties, whether they are issues of law or of fact. The hearing and determination of the issue of law raised by a demurrer to the complaint in the justice court is a "trial." *Walker v. Maronda*, 106 N. W. 296, 297, 15 N. D. 63.

"A demurrer to a complaint interposes an 'issue of law,' the determination of which constitutes a 'trial by court.'" *State v. Richardson*, 85 Pac. 225, 228, 48 Or. 309, 8 L. R. A. (N. S.) 362.

A "trial," as defined by Code Iowa, § 3649, is a judicial examination of the issues of either law or fact in an action, and includes the judicial examination of an issue of law raised by demurrer or plea. *Columbus Junction Tel. Co. v. Overholt*, 102 N. W. 498, 126 Iowa, 579 (quoting and adopting definition in Code Iowa, § 3649, citing *Mathews v. Clayton County*, 44 N. W. 722, 79 Iowa, 510).

#### **In statutes relating to costs**

Code Civ. Proc. § 3301, provides that each clerk of a court of record is entitled, for his services in an action or special proceeding brought in or transferred to the court of which he is clerk, to receive on the trial of the action or the hearing on the merits of the special proceeding, from the party bringing it on, \$1. Held, that since the word "trial" means examination before a competent tribunal, according to the laws of the land, of facts put in issue in a cause to determine such issue, or a judicial examination of the issue between the parties, whether of fact or law, such term, as used in section 3301, did not include a review on appeal, where the record only is examined for the correction of errors, and hence the clerk is not entitled to fees of \$1 for the filing of appellant's brief on appeal to that court. *Rogowski v. Brill*, 132 N. Y. Supp. 370, 371, 74 Misc. Rep. 472.

Rev. St. 1899, § 10116 (Ann. St. 1906, p. 4608), provides that "in every case tried, \* \* \* where an official stenographer is appointed, the clerk of said court shall tax

up the sum of three dollars." Section 690 (page 700) provides that "a trial is the judicial examination of the issues between the parties, whether they be issues of law or fact." Held, that the hearing and granting of a motion for judgment on a stipulation to abide the final result of another case, and the examination of the stipulation and the pleadings in order to render judgment, was not a "trial," and that the stenographer's fee was improperly charged. *Barber Asphalt Pav. Co. v. Field*, 112 S. W. 3, 4, 132 Mo. App. 488.

Plaintiff sued on an account stated, and after a trial it was held that there was no account stated, and the court directed a reference. The case proceeded before the referee, who found the account for plaintiff, and judgment was entered on his findings. Held, that the reference was interlocutory, and not a "trial," within Code Civ. Proc. § 3251, authorizing taxation of \$30 costs for the trial of an issue of fact, and hence plaintiff was entitled to but one trial fee. *Boissevain v. Pope*, 118 N. Y. Supp. 577, 578, 64 Misc. Rep. 292.

Time spent in the settlement of an executor's account, in preparing pleadings, making briefs, ascertaining facts, appearing on an adjournment, or to settle the decree, is no part of the "trial," within the meaning of the Code of Civil Procedure relating to costs. *In re Kredler*, 124 N. Y. Supp. 628, 633, 68 Misc. Rep. 412.

Rev. St. § 823, provides that only the following compensation shall be taxed and allowed to attorneys in the courts of the United States, and section 824 declares that "on a trial before a jury" a docket fee of \$20 shall be allowed. Held, that "trial by jury" contemplated, not only hearing of evidence before a jury, but a determination of the issue, or a final submission for such determination, so that, on a case on trial being settled pursuant to a stipulation before submission, no docket fee was allowable. *Howler v. Chicago, M. & St. P. Ry. Co.*, 166 Fed. 828, 830.

#### **In statutes relating to new trial**

A judgment of the Supreme Court, directing vacation of an order granting a new trial and the entry of a judgment on the verdict, is not a "trial," within Rev. St. 1899, § 803, providing that all motions for new trial and in arrest shall be made within four days after the trial, etc. *Scullin v. Wabash R. Co.*, 90 S. W. 1026, 1027, 192 Mo. 1.

#### **TRIAL ANEW**

See *Hearing Anew*.

#### **TRIAL AT LAW**

The examinations by boards of immigration inspectors of incoming aliens, touching their qualifications, are not "trials at law," so as to entitle Italian immigrants to be represented by counsel within article 23 of

the treaty with Italy, ratified April 29, 1871 (17 Stat. 856). *United States ex rel. Buccino v. Williams (C. C.)* 190 Fed. 897, 900.

#### **TRIAL BY JURY**

See, also, *Try Without Jury*.

The word "trial," in Const. art. 3, § 16, providing that in all criminal prosecutions the accused shall have the right to a trial by jury, is used in its broadest and most comprehensive sense, and includes all proceedings in the progress of the case, after the issues are made up, down to and including a rendition of the verdict, and forbids a charge that accused cannot be found not guilty, even where the facts are not in dispute. *State v. Koch*, 85 Pac. 272, 274, 33 Mont. 490 (citing *State v. Spotted Hawk*, 55 Pac. 1026, 22 Mont. 33).

The word "trial," as used in Const. art. 1, § 7, guaranteeing right of trial by jury, means an issue of fact presented by a plea of the accused, and the court is without jurisdiction to try such issue of fact, if the charge be a felony, and there can be no conviction except upon trial by jury. *Ex parte Dawson*, 117 Pac. 696, 699, 20 Idaho, 178, 35 L. R. A. (N. S.) 1146.

The constitutional provision that the "right of trial by jury" shall remain inviolate "refers to 'the right of trial by jury' as a right well known and commonly understood at the time of its adoption, and it is the right so understood which is secured by it. \* \* \* It is entirely clear, therefore, that the right of trial by jury, which is secured by the Constitution, is the right of trial by jury with which the people who adopted it were familiar, and that was the right which had obtained a fixed meaning in the criminal jurisprudence of the territory, as defined by the statutes which existed prior to and at the time of the adoption of the Constitution." *Smith v. Kunert*, 115 N. W. 76, 77, 17 N. D. 120 (quoting and adopting the definition in *Barry v. Truax*, 99 N. W. 769, 13 N. D. 131, 65 L. R. A. 762, 112 Am. St. Rep. 662).

The "right to jury trial" is the right to the submission to a jury of all the issues of fact in the case on the law given by the court, and the jury determines the rights of the litigants under the law; and the fact that a party entitled to a jury trial is given a jury trial of the most important part of his case, transferred to the equity docket, does not satisfy the law guaranteeing the right of "trial by jury," since the jury in such a case only advises the judge as to certain submitted facts. *John King Co. v. Louisville & N. R. Co.*, 114 S. W. 308, 310, 131 Ky. 46.

Where a jury is impaneled and evidence taken before it on the trial of the cause, it is a "jury trial," though the jury renders its verdict by direction of the court. *Western College of New Mexico v. Turknett*, 125 Pac. 1085, 1086, 17 N. M. 275.

The right of "trial by jury" secured by Const. Bill of Rights, § 7, providing that the right of trial by jury shall be secured to all and remain inviolate, includes the elements of a trial by jury as they were known to and understood by the framers of the Constitution and the people who adopted it. The system of trial by jury in criminal cases, which existed in the state for several years prior to the adoption of the Constitution, gave the state, as well as the defendant on trial for crime, a right to have the place of trial changed when necessary to secure a fair and impartial trial, and the Constitution secured the right thus known and understood. Hence Rev. Codes 1899, § 8122, providing for a change of venue on the application of the state's attorney, when a fair and impartial trial of a criminal case cannot be had in the original county, does not violate the constitutional provision. *Barry v. Truax*, 99 N. W. 769, 771, 13 N. D. 131, 65 L. R. A. 762, 112 Am. St. Rep. 662, 3 Ann. Cas. 191.

A "jury trial" is a public proceeding, as well in respect to the production of proof as to the instruction of the jury by the judge. The parties have a right to be heard in respect to everything transacted, and to bring in review all the proceedings at the trial. *Buffalo Structural Steel Co. v. Dickinson*, 90 N. Y. Supp. 268, 270, 98 App. Div. 355.

"Trial by jury," within the Constitution, is the right which every citizen has to demand that all offenses charged against him shall be submitted to a tribunal composed of honest and unprejudiced men, who will do equal and exact justice between the government and himself, and in order to do so weigh impartially every fact disclosed by the evidence. Such a guaranty would be entirely worthless, if persons were admitted in the jury box who were influenced by passion or prejudice, or who by reason of having formed an opinion as to the merits of the case would be incapable of deciding with perfect impartiality. *State v. Mott*, 74 Pac. 728, 730, 29 Mont. 292 (quoting and adopting definition in *People v. Plummer*, 9 Cal. 299).

"The word 'jury' and the words 'trial by jury' were placed in the Constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument." *State v. McCarthy*, 69 Atl. 1075, 1076, 76 N. J. Law, 295.

A person who is put on his trial in a court presided over by a judge and before a jury of 12 men who agree on a verdict has a "trial by jury" as guaranteed by Const. § 7, and he may not complain because the qualifications of the jurors or the manner of their selection differ from what it was at common law or is changed from time to time to make the system more efficient. *Wendling v. Commonwealth*, 137 S. W. 205, 207, 143 Ky. 587.

The phrase "trial by jury" meant at common law trial by 12 men impartially selected from the county in which the alleged crime was committed, who must unanimously concur as to the guilt of the accused before he could be legally convicted. *State v. Hamsey*, 67 S. W. 620, 623, 168 Mo. 167, 57 L. R. A. 846.

Const. art. 1, § 2, in providing that "trial by jury" in "all cases where it has been heretofore used shall remain inviolate forever," meant that questions of fact shall be determined by juries, and not by the court. *Perlman v. Brooklyn Heights R. Co.*, 137 N. Y. Supp. 917, 918, 78 Misc. Rep. 168.

### Jury of 12

In the statute respecting proceedings for removal of officers, which provides that the trial must be by jury and conducted in all respects in the same manner as the trial of an indictment for a misdemeanor, the phrase "trial must be by jury" was evidently used by the legislators as contemplating that the trial should be by such a jury as may be impaneled in the district court where the venue of this action was placed at that time, which jury consisted of 12 men. *Maben v. Rosser*, 103 Pac. 674, 678, 679, 24 Okl. 588.

### Lunacy proceedings

Gen. St. 1909, § 8470, providing for a jury in lunacy inquests of four persons, one of whom must be a physician, does not violate the right to a "jury trial" guaranteed by the Constitution. *State v. Linderholm*, 114 Pac. 857, 84 Kan. 603, 892.

A statute providing that, when any person indicted for an offense is acquitted by reason of insanity, the jury shall so state in the verdict, and if the discharge of the insane person is deemed dangerous to the community, he may be committed to prison, does not violate the article of the federal Constitution guaranteeing the "right to trial by jury." *Ex parte Brown*, 81 Pac. 552, 554, 39 Wash. 160, 1 L. R. A. (N. S.) 540, 109 Am. St. Rep. 868, 4 Ann. Cas. 488.

### Presence and superintendence of a judge

"Trial by jury," in the primary and usual sense of the term at the common law and in the American Constitution, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict, but it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and, except on acquittal of a criminal charge, to set aside their verdict if in his opinion it is against the law or the evidence. *Archer v. Board of Levee Inspectors of Chi-*



cot County, 128 Fed. 125, 128 (citing Capital Traction Co. v. Hof, 174 U. S. 1, 19 Sup. Ct. 580, 585, 43 L. Ed. 873).

A "jury trial" is not a trial by 12 men, nor by an appellate court, but by 12 men presided over by a judge, who makes his rulings in the course of the trial, while witnesses and parties are present and ready to act. *Aetna Indemnity Co. v. J. R. Crowe Coal & Mining Co.*, 154 Fed. 545, 565, 566, 83 C. C. A. 431.

The trial by jury secured by Const. art. 2, § 19, providing that the right of trial by jury shall remain inviolate, is a trial according to the courts of common law as it existed, and the same in substance as that which was in use when the Constitution was adopted, except as specifically modified by the Constitution, and one of the elements of a jury trial as it existed before admission of the state was power of the trial judge to instruct the jury upon the law. *Baker v. Newton*, 112 Pac. 1034, 1038, 27 Okl. 436.

When the provision of section 31 of the state Constitution was adopted, providing that the right of trial by jury shall remain inviolate, the words "trial by jury" meant in court under the forms of law, with a judge presiding to direct the proceedings in conformity with it. Twelve men in the woods, or on a street corner, were not imagined. Hence Code 1906, § 4910, providing that the circuit court shall not in any case cause plaintiff to enter a remittitur on pain of a new trial, but that if there is no other error committed, except that the verdict is in the opinion of the court excessive, the court shall overrule the motion for new trial, but that the Supreme Court may, where it thinks the verdict excessive, reverse the case, unless remittitur is entered, is unconstitutional and void, as preventing defendants from having a complete disposition of their rights in a forum provided by the organic law for all, and as giving the Supreme Court original jurisdiction. *Yazoo & M. V. R. Co. v. Wallace*, 43 South. 469, 470, 90 Miss. 609, 122 Am. St. Rep. 321.

"The very definition of 'trial' carries with it the idea of the superintendence of a judge." The judge's absence from the courtroom for a part of the time during trial, in a case where the evidence demanded the verdict as rendered, will not be a sufficient reason to reverse the judgment, when such absence was known to counsel, and there was no request to suspend the trial, no objection to the absence, and no motion for a mistrial upon the judge's return. *Horne v. Rogers*, 35 S. E. 715, 719, 110 Ga. 362, 49 L. R. A. 176 (citing *Capital Traction Co. v. Hof*, 174 U. S. 1, 13, 19 Sup. Ct. 580, 43 L. Ed. 873; *Smith v. Sherwood* [Wis.] 70 N. W. 682, 95 Wis. 558; *Thompson v. People*, 32 N. E. 968, 144 Ill. 378; *O'Brien v. People*, 31 Pac. 230,

17 Colo. 561; and citing and disapproving *O'Shields v. State*, 6 S. E. 426, 81 Ga. 301; *Pritchett v. State*, 18 S. E. 536, 92 Ga. 65).

"Trial by jury," in the primary and usual sense of the term, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of 12 men in the presence and under the superintendence of the judge empowered to instruct them on the law and to advise them on the facts, and, except on acquittal of a criminal charge, to set aside their verdict if contrary to the law or evidence." A statute authorizing the Supreme Court to direct a judgment in civil cases, without any further trial by jury, does not violate the guaranty in the state Constitution that the right of trial by jury shall remain inviolate. *Gunn v. Union R. Co.*, 62 Atl. 118, 120, 27 R. I. 320, 2 L. R. A. (N. S.) 362 (quoting and adopting definition in *Capital Traction Co. v. Hof*, 19 Sup. Ct. 585, 174 U. S. 13, 43 L. Ed. 873).

"Trial by jury," in the primary and usual sense of the term at common law and in the American Constitutions, is not merely a trial by jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and, except on acquittal of a criminal charge, to set aside their verdict, if in his opinion it is against the law or the evidence." The verdict of a jury is without effect until it has been approved by the trial judge, except that a verdict of acquittal cannot be set aside to any purpose, in view of Bill of Rights, § 10, providing that no person shall be twice put in jeopardy for the same offense, and Gen. St. 1900, § 2798, providing that, when accused has been acquitted upon a trial, he may, with certain exceptions, plead such acquittal in bar to any subsequent accusation for the same offense. *State v. Lyon*, 109 Pac. 990, 991, 83 Kan. 168 (quoting and adopting definition in *Capital Traction Co. v. Hof*, 19 Sup. Ct. 580, 174 U. S. 1, 43 L. Ed. 873).

#### TRIAL CAUSE

The term "trial cause," as used in Code, § 3659, authorizing the court to make an assignment of trial causes for trial, means a cause in which there is an issue presented to be tried, and does not authorize the assignment of causes for trial before issue joined. *Barber Asphalt Paving Co. v. Standard Fire Ins. Co.* (Iowa) 137 N. W. 1029, 1030.

**TRIAL COURT**

In judicial proceedings it is difficult to have a "trial court" without a trial judge. Where a case is heard in the court of common pleas, the judge who presides at the trial is as much the trial court as he is the trial judge. The person is the same, and the functions and duties are much the same. Where the record shows that the party excepting filed his bill of exceptions with the clerk on the 15th day of August, 1903, that being within the time prescribed for that duty, and that on the 10th of September, 1903, the clerk transmitted the same to the "court," and that the bill was received by the "court," as shown by his indorsement, on the 17th day of September, 1903, signed, "T. I. Gilmer, Judge of the Court of Common Pleas," and where the record further shows that on the 18th day of September, 1903, the bill was signed and returned to the clerk of the court, under the indorsement, "T. I. Gilmer, Judge," and that on the same day the bill was received and filed by the clerk, there has been a substantial compliance with the statute, and it is not error to overrule a motion to strike such bill from the files. *Davies v. New Castle & L. Ry. Co.*, 73 N. E. 213, 215, 216, 71 Ohio St. 325.

**TRIAL DE NOVO**

See, also, *Hearing de Novo*.

While "trial de novo" on appeal means a trial anew, it only requires a new trial as to the questions in issue, and not a re-examination of matters concerning which there was no dispute. In *re Littlefield*, 112 Pac. 234, 235, 61 Wash. 150.

"Trial de novo," as used in Laws 1903, p. 372, providing for such trials in the district court on appeal from the probate court in probate matters, means "to try anew" or a second time; that is, to retry the case on the original papers and the same issues as the case was tried in the probate court. In *re McVay's Estate*, 93 Pac. 28, 32, 14 Idaho, 56.

Under Const. art. 7, § 3, as amended November 8, 1910 (L. O. L. p. xxiv), requiring the Supreme Court on appeal, where either party has attached to the bill of exceptions the whole testimony, to direct the proper judgment, provided it can determine what judgment should be entered, the Supreme Court on appeal, where the whole testimony is attached to the bill of exceptions, must examine the evidence and affirm, modify, or reverse the judgment as is required in appeals in suits in equity, except that in an action at law the court will only consider errors properly assigned, but such review is not a "trial de novo" which implies a re-examination of the original evidence as if no previous hearing had occurred. *Taffe v. Smyth*, 125 Pac. 308, 311, 62 Or. 227.

**TRIAL JUDGE**

Judge as meaning, see *Judge*.

**TRIAL TERM**

Code Civ. Proc. § 3251, subd. 4, provides that on appeal to the Supreme Court from an inferior court, excepting certain appeals from the City Court of New York taken from an interlocutory or final judgment rendered or made at a Trial Term, the successful party shall be entitled to \$20 before argument and \$40 for argument. Held, that the words "trial term" in such section were intended as the equivalent of the former language "in the same court or in a circuit court" in the section prior to the consolidation of the judicial system in 1896, declaring that on an appeal to the Supreme Court from an inferior court, or to the General Term, or from a Superior City Court, or of the New York Marine Court, taken from an interlocutory or final judgment, or from an order granting or refusing a new trial, rendered or made "in the same court or in a Circuit Court," or on appeal, etc., the successful party should be entitled, etc., so that the application of the section was not limited to appeals from interlocutory judgments in actions at law. *Campbell v. Hallihan*, 92 N. Y. Supp. 413, 416, 46 Misc. Rep. 409.

**TRIBE**

See *Indian Tribe*.

**TRIBORD**

The word "tribord" is a French marine term, meaning starboard. The *Charles Tiberghien*, 143 Fed. 676.

**TRIBUNAL**

See *Competent Tribunal*; *Judicial Tribunal*.

**Court-martial**

A court-martial is not a "court" within the meaning of sections 85 and 86, Const., nor within the meaning of section 7810, Rev. Codes 1905; but it is a "tribunal," within the meaning of section 7810, Rev. Codes 1905, and its acts may be inquired into by certiorari. *State v. Peake*, 135 N. W. 197, 199, 22 N. D. 457, 40 L. R. A. (N. S.) 354.

**TRIBUTARY**

Where one has appropriated water from a river, a "tributary" thereof, the waters of which he is entitled to prevent another from diverting, need not be a running natural surface stream which empties into the river. *Ogilvy Irrigating & Land Co. v. Insinger*, 75 Pac. 598-600, 19 Colo. App. 380.

**TRICK**

"Trick" means "to deceive by cunning, or to impose on; to defraud; to cheat."

"Trick" is also defined as a "sly, dextrous, ingenious procedure, fitted to puzzle or amuse, and is synonymous with strategy, wile, fraud, cheat, deception, or delusion. *Meriwether v. Publishers, George Knapp & Co.*, 97 S. W. 257, 268, 120 Mo. App. 354 (quoting *Webst. Dict. and State v. Smith*, 85 N. W. 12, 82 Minn. 342).

A complaint stating that defendant threatened to bring ejectment against plaintiff claiming to own under a pretended deed land which belonged to plaintiff's decedent, that the deed was a forgery and "trick" on defendant's part to secure title and possession of the property, and thereby cheat and defraud decedent's estate, etc., is sufficient to warrant relief either on the theory that the deed was forged or obtained by some fraudulent device; the word "trick" as a noun meaning an artifice or stratagem; a crafty or deceitful contrivance or procedure, and meaning as a verb to deceive by cunning or artifice; to impose on; to defraud; cheat; to effect by deceit or trickery. *Butts v. Purdy*, 125 Pac. 313, 319, 63 Or. 150.

The "trick, device, subterfuge, or pretense" referred to in Ky. St. § 2570, providing that no trick, device, subterfuge, or pretense shall be allowed to evade the operation of the liquor law, is not confined to a mechanical device, such as is frequently used in blind tigers; but where the examination, prescription, and compounding testified to by a witness was a device or trick on the part of accused to evade the law, he was guilty. *Rowe v. Commonwealth (Ky.)* 70 S. W. 407, 409.

## TRIED

See Try.

## TRIM ON

See On and Hung.

## TRIMMERS

Men who, at stated times, lower arc lamps, clean the globes, renew the carbons, and replace the lamps, are called "trimmers." *Lutolf v. United Electric Light Co.*, 67 N. E. 1025, 1026, 184 Mass. 53.

## TRIMMING

The process known as "trimming," in connection with discharging coal from bins, consists in the shoveling of the coal closer to the place of discharge when it ceases to flow freely from the chute. *Burns v. Palmer*, 95 N. Y. Supp. 161, 107 App. Div. 321.

## TRIMMINGS

See Silk Trimmings.

Woven cotton articles from an inch to 2½ inches wide, chiefly used as hat bands

for trimming men's hats, held dutiable as "trimmings" of cotton, under the Tariff Act of 1894. *United States v. Walter H. Graef & Co.*, 127 Fed. 688, 689, 62 C. C. A. 414, reversing *Walter H. Graef & Co. v. United States*, 120 Fed. 1015.

So-called "crochet yokes," made by knitting or crocheting, and used in the yoke of women's vests, are not "trimmings" or lace within the meaning of Tariff Act 1897, par. 339, 30 Stat. 181. *Julius Loewenthal & Co. v. United States*, 147 Fed. 774 (citing *Garrison, Wright & Co. v. United States*, 121 Fed. 149).

While ribbons that must be made up into bows, rosettes, and the like before being used for purposes of trimming or ornamentation are not dutiable as "trimmings," under Tariff Act 1897, par. 390, 30 Stat. 187, goods are so dutiable which are manufactured with ornamentation and characteristic design to be used as a trimming, and intended to be so used without anything further being done to them. *Naday & Fleischer v. United States*, 155 Fed. 303, 304.

In the Tariff Act the term "trimmings" is used in a commercial, rather than a descriptive sense. *Naday & Fleischer v. United States*, 164 Fed. 44, 90 C. C. A. 462.

Ornaments, loops, etc., manufactured separately, but temporarily stitched together in six-yard lengths for convenience and economy in handling and carding, and used singly in decorating garments, are not "trimmings or galoons," within the meaning of the Tariff Act of 1897. *United States v. Hilbert*, 171 Fed. 69, 70, 96 C. C. A. 173.

## TRIP

See Continuous Trip.

Railroad Law (Laws 1890, p. 1114, c. 565) § 104, as amended by Laws 1892, p. 1406, c. 676, § 104, requiring every street railroad company to carry between any two points on the roads over which it has the right to run cars any passenger desiring to make "one continuous trip" between such points for a single fare, and to give the passenger a transfer entitling him to "a continuous trip" to any point on the road, for the promotion of public convenience by the operation of railroads "as a single railroad with a single rate of fare," does not prevent a street railway company authorized by section 4, subd. 8, to regulate the time and manner in which passengers shall be transported, and the compensation to be paid, from adopting regulations requiring passengers making use of transfers to use the same only in the same general direction of their initial trip; "trip" conveying the idea of transportation in one direction, and a continuous trip, like a continuous line, extending in the same general direction. *Kelly v. New York City Ry. Co.*, 84 N. E. 569, 570, 192 N. Y. 97.

The term "dispatch" is a technical one in the postal service, and means a mass of matter to be sent to a certain place at a certain time. The term "trip" is also technical, and refers to the wagon which will carry the whole or a part of the dispatch. *Utah, N. & C. Stage Co. v. United States*, 39 Ct. Cl. 420, 438.

### TRIPLE-TAPE FUSE

"Triple-tape fuse" is a term used to designate a grade of fuse used in blasting. *Curran v. Seattle & S. F. Ry. & Nav. Co.*, 76 Pac. 87, 88, 84 Wash. 512.

### TRIPPLICATE ORIGINAL

Where three copies of a writing are made at the same time by the same impression of a pencil, one of the copies must be regarded as a "triplicate original," and is admissible without notice to produce the original. *Virginia-Carolina Chemical Co. v. Knight*, 56 S. E. 725, 727, 106 Va. 674 (citing *C. & O. R. Co. v. Stock*, 51 S. E. 161, 104 Va. 97).

### TRIPPING

"In mechanics, 'tripping' consists in releasing or setting free some mechanism, and a tripping plate is one performing that function." *Duff Mfg. Co. v. Forgie*, 78 Fed. 626, 631.

### TRITURATE

"Triturate" is to pulverize; to grind in to small particles. *Lewis German & Co. v. United States*, 128 Fed. 467, 468 (quoting *Standard Dict.*).

### TRIVIAL IMPERFECTION

Code Civ. Proc. § 1187, providing that a "trivial imperfection" in a building will not be deemed such a lack of completion as to prevent the filing of any lien, refers to imperfect or defective performance of the work claimed to be done therein, and not to work admittedly uncompleted. It is not determined by its relative cost. *Bianchi v. Hughes*, 56 Pac. 610, 611, 124 Cal. 24.

Code Civ. Proc. § 1187, in relation to mechanics' liens, provides that any "trivial imperfection" in the work shall not prevent a lien. The contract for the making of an addition to a house contained no plans or specifications where windows were to be placed, and the contractor placed two windows in the basement, so that they were not directly under windows in the first story of the house, and the contractor testified, in an action to enforce a mechanic's lien, that he placed the windows in such a manner in order to give the largest amount of furniture room in the basement, and that no request

was made to him to have the windows changed until after the plastering had been put on around them, when he refused unless he should be "paid additional for it, whereupon defendant made the change. The cost of placing the windows in alignment was \$7.50. Held, that the facts warranted a finding that the contractor acted in good faith, and that the failure to place the windows in alignment was a "trivial imperfection." "Trivial imperfections," as used in the Code, relates to the question whether or not there has been a completion of the building, and what constitutes a "trivial imperfection," is a question of fact in each instance. The term refers to imperfect or defective performance of the work upon a building which is claimed to have been completed, and not to a case in which the building is admittedly incomplete and workmen are still engaged in constructing substantial portions of it. *Schindler v. Green*, 87 Pac. 627, 628, 149 Cal. 752 (citing *Bianchi v. Hughes*, 56 Pac. 610, 124 Cal. 27; *Marble Lime Co. v. Lordsburg Hotel Co.*, 31 Pac. 164, 96 Cal. 332; *Willamette Steam Mills Lumbering & Manufg Co. v. Los Angeles College Co.*, 29 Pac. 629, 94 Cal. 229; *Harlan v. Stufflebeem*, 25 Pac. 686, 87 Cal. 508; *Santa Monica Lumber & Mill Co. v. Hege*, 51 Pac. 555, 119 Cal. 376).

### TROLLEY STAND

A "trolley stand" is the means by which the trailing arm carried above a trolley car "is hinged and pivoted to the car, with a capacity for lateral and vertical movement, and is pressed upward by some suitable spring." *Morrin v. Robert White Engineering Works*, 138 Fed. 68, 71 (citing *Thomson-Houston Electric Co. v. Kelsey Electric Ry. Specialty Co.*, 75 Fed. 1005, 22 C. C. A. 1).

### TROUBLE

#### TROUBLE SHOOTER

A "trouble shooter" is a person employed by a telephone company to discover and repair minor troubles attending the telephone service, defective telephones, fallen wires, weakness of batteries, and grounding of wires. *Dow v. Sunset Telephone & Telegraph Co.*, 106 Pac. 587, 588, 157 Cal. 182; *Texarkana Telephone Co. v. Pemberton*, 111 S. W. 257, 259, 86 Ark. 329.

### TROVE

See *Treasure Trove*.

### TROVER

See, also, *Conversion*.

The gist of an action of "trover" is the conversion by defendant of goods to which the plaintiff has the right of possession. *Trustees of Dartmouth College v. International Paper Co.*, 132 Fed. 92, 95; *Wiggs*

*Bros. v. Ringemann*, 45 South. 153, 155 Ala. 189; *Layman v. F. F. Slocumb & Co.* (Del.) 76 Atl. 1094, 1095, 7 Pennewill, 403.

"Trover" is an action to recover damages sufficient to cover the value of personal property wrongfully held by another, while replevin or detinue is primarily an action to recover the property, and a judgment is given only in the absence of ability to secure the specific articles claimed. *Leeper Graves & Co. v. First Nat. Bank of Hobart*, 110 Pac. 655, 660, 26 Okl. 707, 29 L. R. A. (N. S.) 747, Ann. Cas. 1912B, 302.

"Trover" and "detinue" are concurrent remedies, either of which the plaintiff may pursue at his election; trover being an action for damages for the conversion of the property, and detinue being an action for the recovery of the property in specie, or for damages for its unlawful detention. *Brocking v. O'Bryan*, 112 S. W. 631, 632, 129 Ky. 543 (citing 21 Enc. Pl. & Pr. 1025).

"When the common-law system of pleading prevailed, the remedy for different kinds of conversion was the special form of action called 'trover,' established to meet the single case of a loss of goods by the plaintiff, a finding by the defendant and his refusal to deliver the goods so found to the true owner upon specific demand, and applied through operation of a legal fiction to different kinds of conversion." *Semon v. Adams*, 63 Atl. 661, 662, 79 Conn. 81.

#### **Detinue distinguished**

See Detinue.

#### **Replevin distinguished**

See Replevin.

### **TRUANT OFFICER**

As public officer, see Officer.

### **TRUCK**

As warehouse, see Warehouse.

### **TRUCKMAN**

As common carrier, see Common Carrier.

### **TRUE**

See, also, Truth.

The word "true," within the statute requiring an affidavit for a judgment on a bond to state the "true" consideration of the bond, "means that which is frank and actual, rather than that which is precise and technical." *Smith v. Weaver*, 66 Atl. 941, 942, 75 N. J. Law, 31 (quoting and adopting the definition in *Strong v. Gaskill*, 25 Atl. 19, 53 N. J. Law, 665); *Strong v. Caskill* (N. J.) 59 Atl. 339, 341.

#### **As correct**

Where the statute requires that claims filed with an assignee for the benefit of credi-

tors shall be verified by an affidavit that the statement is "true," that the debt is "just," and that there are no credits or offsets, etc., the statute must at least be substantially complied with by a creditor before he is entitled to benefits; and where the affidavit to a creditor's claim omits to say that the statement is "true" and that it is "just," the statement in the affidavit that the account is "correct" is not equivalent to saying that it is "true" and that the debt is "just." An account might be correct, and yet the debt not be just. The Legislature evidently believed, in enacting the statute, that it was more important that the creditor should state that his debt was "true," and that it was "just," than that he should merely make affidavit that it was "correct." *Hughes v. Potts*, 87 S. W. 708, 709, 39 Tex. Civ. App. 179.

#### **As honest or sincere**

In one sense that only is "true" which is conformable to the actual state of things, and in that sense that is untrue which does not express things exactly as they are; but in another and broader sense the word "true" is often used as a synonym of "honest," "sincere," "not fraudulent." *Logan v. Provident Savings Life Assurance Society of New York*, 50 S. E. 529, 532, 57 W. Va. 384.

### **TRUE ACCOUNT**

See Just and True Account.

### **TRUE AND CORRECT**

See Full, True, and Correct Copy.

The words "true and correct transcript" are equivalent to full and complete transcript. *East Coast Lumber Co. v. Ellis-Young Co.*, 45 South. 826, 832, 55 Fla. 256 (citing *Butler v. Owen*, 7 Ark. 369).

### **TRUE AND DETAILED ACCOUNT**

See Full, True, and Detailed Account.

### **TRUE AND JUST**

The statement that an account book is "correct" is equivalent to a statement that it is "true and just." *Presbyterian Church of New Boston v. Emerson*, 66 Ill. 269, 271.

### **TRUE BILL**

A "true bill" was a term indorsed on an indictment under the common law to show that a majority of the grand jurors (amounting to twelve, at least) found the evidence made out a sufficient case to warrant a prosecution. *State v. Graham*, 33 South. 826, 827, 136 Ala. 134.

An indorsement of "true bill" is not necessary to the finding of an indictment, and since a "special presentment" is treated as an indictment in this state, the indorsement "special presentment" on the finding of the grand jury is sufficient as a finding of an indictment. *Barlow v. State*, 56 S. E. 131, 132, 133, 127 Ga. 58 (citing *Groves v. State*,

73 Ga. 205; *Foster v. State*, 41 Ga. 582; 10 Enc. Pl. & Pr. 440; *Martin v. State*, 46 N. W. 621, 30 Neb. 507; *Sparks v. Com.*, 9 Pa. 354; *State v. Williams*, 18 South. 647, 47 La. Ann. 1609; *White v. Com.* [Va.] 29 Gratt. 824; *Tilly v. State*, 21 Fla. 242; *State v. Elliott*, 11 S. W. 566, 98 Mo. 150; *State v. Hogan*, 31 Mo. 342; *State v. Bowman*, 2 N. E. 289, 103 Ind. 69).

### TRUE CASH VALUE

Fair cash value synonymous, see Fair Cash Value.

### TRUE COPY

Copy as meaning true copy, see Copy.

A certified copy of a deed sought to be introduced in evidence contained a certificate, following the certificate of acknowledgment and preceding the certificate of the clerk as to the copy, reciting that "the above \* \* \* is a true and correct copy of the original deed, \* \* \* that the same was presented for registration" on a certain day and hour, and duly registered on a certain hour six days later. Such certificate was signed by the clerk, by his deputy. Held, that such certificate meant only that the record was "true," and not that the instrument recorded was a copy, so as to render the copy sought to be introduced in evidence a certified copy, and hence not admissible under the statute as a recorded instrument. *Williams v. Cessna*, 95 S. W. 1106, 1107, 43 Tex. Civ. App. 315.

### TRUE LINE

The term "a true line," used in a surveyor's field notes in describing the line between two sections, means a straight line. *Lillis v. Urrutia*, 99 Pac. 992, 993, 9 Cal. App. 558.

### TRUE OWNER

Under Civ. Code 1895, § 2801, prior to Act of 1899 (Acts 1899, p. 33), providing that a mechanic's lien must be asserted, if at all, against the true owner of the premises, who is entitled to the statutory notice of such lien, the wife, who furnished all the consideration for the purchase of property, is the "true owner" thereof, though by mistake title was taken in the name of her husband. *Reaves v. Meredith*, 51 S. E. 391, 393, 123 Ga. 444.

### TRUE VALUE

See Full and True Value.

The term "true cash value," as used in the lease, when not modified by other provisions therein, means the fair cash market value. *Sebree v. Board of Education*, 98 N. E. 931, 939, 254 Ill. 438.

"True cash value of property" is defined by the tax law as that value at which it would be taken in payment of a just debt from a solvent debtor. *Great Northern R.*

*Co. v. Snohomish County*, 93 Pac. 924, 926, 48 Wash. 478.

The "true value" of national bank shares for taxation is under ordinary conditions their exchangeable value; that is, their market value; but this rule is not an invariable test of true value under all circumstances. *City of Newark v. Tunis*, 81 Atl. 722, 723, 82 N. J. Law, 461.

Tax Act 1903, § 2, provides that property not expressly exempted or excluded from the act shall be subject to annual taxation at its true value thereunder. Section 12 requires assessors to ascertain the true value of personal property. Held, that, in taxing the shares of a national bank, the "true value" as the basis of the assessment is under ordinary conditions their exchangeable value in the market, and not their book or liquidation value. *City of Newark v. Tunis*, 78 Atl. 1066, 81 N. J. Law, 45.

Allegations as to the "cash value," "fair value," or "true value" of the property, do not come within Sess. Laws 1902, p. 238, § 10, requiring all taxable property to be assessed at its "full cash value." *Humbird Lumber Co. v. Thompson*, 83 Pac. 941, 945, 11 Idaho, 614.

### TRUFFLES

Not dutiable as vegetables, see Vegetable.

### TRUNK

The words "trunk" and "chest" are not synonymous, and therefore an indictment charging theft of a trunk or chest containing articles of clothing, jewelry, etc., is bad for uncertainty in description of the property. *State v. Collett*, 75 Pac. 271, 272, 9 Idaho, 608 (citing *Potter v. State*, 39 Tex. 388).

Though a passenger's baggage declaration specified only a "trunk," without any mention of its contents, it sufficiently complied with section 2802, Rev. St., requiring that, if such baggage contains any dutiable article, it shall be "mentioned." The specification of the "trunk" was equivalent to mention of its contents. *United States v. One Trunk*, 171 Fed. 772, 774.

### TRUNK RAILWAY

An electric railroad company authorized to perform the duties of a carrier of freight and passengers between two cities in different states and all intermediate points is a "trunk railway," within a constitutional provision declaring that no city shall grant any franchise to street railways, etc., except to the highest and best bidder therefor, but that the provision shall not apply to a trunk railway. *Diebold v. Kentucky Traction Co.*, 77 S. W. 674, 678, 117 Ky. 146, 63 L. R. A. 637, 111 Am. St. Rep. 230, 4 Ann. Cas. 445.

## TRUST

See Active Trust; Breach of Trust; Constructive Trust; Contrary to His Trust; Declaration of Trust; Direct Trust; Dry Trust; Executed Trust; Executory Trust; Express Trust; General Power in Trust; General Trust; Gift in Trust; Held in Trust; Implied Trust; In Trust; Involuntary Trust; Office of Trust; Passive Trust; Place of Trust or Profit; Power in Trust; Precatory Trust; Private Trust; Public Trust; Put in Trust; Simple Trust; Special Trust; Statutory Trust; Tentative Trust; Voluntary Trust.

Gift distinguished from voluntary trust, see Gift.

Principal of trust, see Principal.

See, also, General Assignment.

A "trust" in its technical sense is an obligation on a person arising out of the confidence reposed in him to apply property faithfully and according to such confidence. *Weltner v. Thurmond*, 98 Pac. 590, 595, 17 Wyo. 268, 129 Am. St. Rep. 1113; *Maxwell v. Wood*, 111 N. W. 203-204, 133 Iowa, 721 (citing *Perry, Trusts*, § 2); *First State Bank of Le Sueur v. Sibley County Bank*, 105 N. W. 485, 487, 96 Minn. 456; *Allen v. Rees*, 110 N. W. 583, 584, 136 Iowa, 423, 8 L. R. A. (N. S.) 1137.

A "trust," in its simplest form, is that relation between two persons by virtue of which one of them holds property for the benefit of the other. *Cree v. Lewis*, 112 Pac. 326, 327, 49 Colo. 186.

The mere word "trust," in its literal significance, implies the nurturing and sheltering of a sacred confidence, and out of this literal meaning has grown a legal significance, which, though broader in scope and laden with more material functions, has lost none of its elements of sanctity. *McCoy v. McCoy*, 121 Pac. 176, 181, 30 Okl. 379, Ann. Cas. 1913C, 146.

"Trusts" in the broadest sense embrace, not only technical trusts, but also obligations arising from fiduciary relationships. *Rothschild v. Dickinson*, 134 N. W. 1035, 1037, 169 Mich. 200.

"A 'trust' in the most acknowledged sense in which that term is used in English jurisprudence may be defined to be an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof." *Jones v. Byrne*, 149 Fed. 457, 463 (quoting and adopting definition in 2 Story, Eq. Jur. par. 964).

While, in its technical sense, a "trust" is the right, enforceable solely in equity, to the beneficial enjoyment of property, the legal title of which is vested in another, and implies separate coexistence of the legal and the

equitable titles, vested in different persons at the same time; in its more comprehensive sense the term embraces every bailment, every transaction by an agent or factor, every deposit, and every matter in which the slightest trust or confidence exists. *Bowes v. Cannon*, 116 Pac. 336, 338, 50 Colo. 262.

"A 'trust' is where there are rights, titles, and interests in property distinct from the legal ownership. In such cases, the legal title, in the eye of the law, carries with it, to the holder, absolute dominion; but behind it lie beneficial rights and interests in the same property belonging to another. These rights, to the extent to which they exist, are a charge upon the property, and constitute an equity which a court of equity will protect and enforce whenever its aid for that purpose is properly invoked." *Corbin v. Holmes*, 154 Fed. 593, 604, 83 C. C. A. 367.

"The term 'trust' is a very comprehensive one. Every deposit is a direct trust. Every person who receives money to be paid to another, or to apply to a particular purpose, is a trustee. The cases of hirer and letter to hire, borrower and lender, pawner and pawnee, principal and agent, are all cases of express trust, etc. It has never been held, however, that these and the like cases are such technical trusts as to bring them within our limited equity jurisdiction." *Young v. Mercantile Trust Co.*, 140 Fed. 61, 62 (quoting *Chancellor Kent in Kane v. Bloodgood* [N. Y.] 7 Johns. Ch. 90, 11 Am. Dec. 417).

A trust has been defined to be an "equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof." In other words, the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands belong wholly or in part to others. A confidence reposed in one to whom an estate in property is conveyed or set over, that he will permit another to take the profits and enjoy the estate according to terms agreed on. *Wilson v. Kennedy*, 59 S. E. 736, 739, 63 W. Va. 1.

Where a mother turned over money to her son on the understanding that he would pay her interest thereon for life, and that on her death the money should belong absolutely to him, a trust was created, enforceable in equity; a "trust" existing where there are rights, titles, or interests in property distinct from legal ownership, in which case the legal title carries with it to the holder absolute dominion, but behind it lie beneficial rights in the same property belonging to another, which are a charge on the property and constitute an equity which a court of equity will protect. *Frost v. Frost*, 131 N. W. 60, 61, 165 Mich. 591 (quoting 8 Words and Phrases, p. 7120).

A gift made to a third person for the benefit of another creates a "trust," which

will be administered and controlled like other ordinary trusts. *Hall v. Hall*, 93 Pac. 177, 178, 76 Kan. 806.

A gift to a charitable corporation for its corporate purposes is not a "trust" in the eyes of the law. *Smith v. Havens Relief Fund Soc.*, 90 N. Y. Supp. 168, 178, 44 Misc. Rep. 594.

A "trust" is a confidence reposed in some other person than the cestui que trust, for which the cestui que trust has no remedy but by a subpoena in chancery. A devise of land to the vestry of a church, to be used for such church purposes as the rector of the church should direct, was not a devise in trust, but gave the vestry the fee. *Doan v. Vestry of Parish of Ascension of Carroll County*, 64 Atl. 314, 315, 103 Md. 662, 7 L. R. A. (N. S.) 1119, 115 Am. St. Rep. 379 (quoting and adopting definition in 1 Lewin, *Trusts* [1st Amer. Ed.] p. 14).

If the giving of a mortgage to one person as security for a debt due another creates a trust, it is not a "trust in relation to real property," within the meaning of the code provisions relating to trusts. *Anglo-Californian Bank v. Cerf*, 81 Pac. 1077, 1079, 147 Cal. 384.

Where a testator directed his executors on the happening of certain events to pay over his estate to the trustees of a university, to be used for female education of high grade under the management of such trustees, the word "trust," as used in a provision in the event that the trustees "accept the 'trust' hereby created," did not signify a technical legal trust, but referred to the confidence implied by the testator in vesting his property which he intended to devote to a great public work in the university corporation, to be managed by its trustees. *Morgan v. Durand*, 101 N. Y. Supp. 1002, 1009, 51 Misc. Rep. 523.

The only basis for the so-called "savings bank trust," in the absence of proof of gift inter vivos, has been the doctrine of a tentative or revocable trust, which, in the absence of proof of revocation prior to the death of the depositor, took effect as a good trust upon his death. Money was deposited in a savings bank in the name of the depositor, but "in trust for J. S." "J. S." was the maiden name of depositor's sister, who was known by him to be married at the time of the deposit. The interest was drawn by the depositor, and no change in the deposit was made by him on the death of the sister. Held, that no "trust" was created for the sister which became operative on the subsequent death of the depositor. *Garvey v. Clifford*, 99 N. Y. Supp. 555, 557, 114 App. Div. 193.

A bequest to "my friend B, in the confidence that he will use it in the prosecution of his work against the encroachments" of a religious denomination "upon our common

school system," was an "absolute gift," and not a "trust"; the relations of the legatee and testatrix having been those of confidence and deep interest in his work, and the expenses of the work having been in part met by public subscription, and he having never accounted to any one for the funds received. *Poor v. Bradbury*, 81 N. E. 882, 883, 196 Mass. 207.

Where testatrix's husband was given the use of a fund for life, with remainder in any unused portion of the fund to certain persons, there was no "trust" created, within Code Civ. Proc. § 1699, providing for the settlement of accounts of the trustee by the probate court. *Hardy v. Mayhew*, 110 Pac. 113, 117, 158 Cal. 95, 139 Am. St. Rep. 73.

Testator, on the happening of certain events, directed his executor to pay over his estate to the trustees of the University of Rochester, with an express desire that it should be used for purposes of female education in the city of Rochester, under the management of the trustees there, in connection with the university or otherwise, as the trustees might determine; the estate to be held as a perpetual fund, and the income to be used for the purpose named: Held, that the gift was to the trustees in their corporate capacity, or the university, absolutely, it being within the power of the university to devote the same to female education, and no trust was thereby created. The word "trust," as used in the will, was not used in its technical sense, but in the sense that the University of Rochester, upon receiving this property, had a responsibility to carry out, subject to the desires of the testator as set forth in his will. In re *Durand*, 107 N. Y. Supp. 393, 394, 398, 56 Misc. Rep. 235.

The word "trust," in *Hurd's Rev. St.* 1903, c. 3, § 70, relating to the classification of claims against a decedent's estate, providing that, where decedent has received money in "trust" for any purpose, his executor or administrator shall pay out of his estate the amount thus received, and not accounted for, as a claim of the sixth class, applies only to technical trusts, and does not include the liability of a broker and loan agent to repay deposits of customers in his hands for investment. *Felsenthal v. Kline*, 73 N. E. 428, 429, 214 Ill. 121 (citing *Wilson v. Kirby*, 88 Ill. 566; *Svanoe v. Jurgens*, 33 N. E. 955, 144 Ill. 507; *Shipherd v. Furness*, 34 N. E. 1096, 153 Ill. 590).

#### Classification

Trusts are classified into two general divisions, "direct or express trusts" (that is, those springing from agreement of the parties), and "constructive or implied trusts" (that is, those created by the rules and principles of equity). Under this latter class fall all of those trusts known distinctively as "implied" or "constructive," as well as those called "resultant"; in short, all those that



do not spring from the agreement of the parties. \* \* \* A constructive trust is one not created by any words either expressly or impliedly evincing a direct intention to create a trust, but only by the construction and operation of equity in order to satisfy the demands of justice." *Newman v. Newman*, 55 S. E. 377, 379, 60 W. Va. 371, 7 L. R. A. (N. S.) 370.

#### Essentials

The essential elements of a valid "trust" of personal property are a designated beneficiary, a designated trustee, who is not a beneficiary, a fund or other property sufficiently designated to enable title thereto to pass to the trustee, and the actual delivery of the fund or other property or of a legal assignment thereof to the trustee with the intention of passing legal title to him as trustee. *Mersereau v. Bennet*, 108 N. Y. Supp. 868, 873, 124 App. Div. 413 (citing *Von Hesse v. MacKaye*, 32 N. E. 615, 136 N. Y. 114; *Brown v. Spohr*, 73 N. E. 14, 180 N. Y. 201); *Brown v. Spohr*, 73 N. E. 14, 16, 180 N. Y. 201; *People ex rel. Van Norden Trust Co. v. Wells*, 103 N. Y. Supp. 874, 875, 118 App. Div. 881; *People ex rel. Van Norden Trust Co. v. Wells*, 103 N. Y. Supp. 874, 875, 118 App. Div. 881 (citing *Brown v. Spohr*, 73 N. E. 14, 180 N. Y. 201).

Among the four essential elements of a valid "trust" is a designated trustee, who must not be the beneficiary, and such trustee has the right, within the limitations of the law, to make an acceptance of his trusteeship conditional, and such condition, when expressed in the instrument, forms an essential and necessary part thereof, and the validity of the trust is dependent thereon. Where a trustee accepted a trust with the express reservation and condition that he might resign, surrender the trust, and convey the property to the settlor at his desire, his subsequent election to exercise such power and his reconveyance of the property to the settlor terminated the trust, and the rights of the cestuis que trust thereunder. *Schreyer v. Schreyer*, 91 N. Y. Supp. 1065, 1068, 101 App. Div. 456.

Every "trust" has three separate elements, the trust property, trust objects, and trust term; the first relating to the property subjected to the trust, the second to those for whose benefit it may be created, and the third to the time during which it may continue. *Kahn v. Tierney*, 120 N. Y. Supp. 663, 665, 135 App. Div. 897.

To constitute a "trust" there must be a trustee and an estate devised to him and a beneficiary. *Simon v. Burgess*, 127 N. Y. Supp. 147, 148, 71 Misc. Rep. 300.

To constitute a "trust," there must be sufficient words to raise it, a definite subject, and a certain and ascertained object. *Floyd v. Smith*, 51 South. 537, 538, 59 Fla. 485, 37

L. R. A. (N. S.) 651, 138 Am. St. Rep. 133, 21 Ann. Cas. 318.

A "trust" implies two estates or interests—one equitable and one legal; one person, as trustee, holding the legal title, while another, as cestui que trust, has the beneficial or equitable interest. *Sims v. Morrison*, 100 N. W. 88, 90, 92 Minn. 341 (citing *Hospes v. Northwestern Mfg. & Car Co.*, 50 N. W. 1117, 48 Minn. 192, 15 L. R. A. 470, 31 Am. St. Rep. 637); *Watkins v. Bigelow*, 100 N. W. 1104, 1109, 93 Minn. 210.

A "trust" is defined as an obligation arising out of the confidence reposed in one who has the legal title to property conveyed to him that he will faithfully apply and deal with such property according to the confidence reposed. Therein is implied two estates or interests, one equitable and one legal; one person as trustee holding legal title, while another is cestui que trust. Under Code, § 2918, providing that a declaration of trust or powers as to real estate must be executed in the same manner as deeds, where plaintiff conveyed his interest in certain lands to the defendant and another, and in addition to the consideration expressed in the deed it was honestly agreed between the parties that, if the land was subsequently sold above a certain sum, then plaintiff should be entitled to one-third of the excess, or if an offer above that sum was made and the vendees keep the land, then the vendees would pay to plaintiff his share of the trust, the parol agreement went only to the question of consideration and did not amount to a declaration of trust, nor was the effect thereof to create or transfer an interest in lands within the meaning of the statute of frauds (Code, § 4625), and hence the agreement was binding on the parties. *Allen v. Rees*, 110 N. W. 583, 584, 136 Iowa, 423, 8 L. R. A. (N. S.) 1137 (citing *Hospes v. Northwestern Mfg. & Car Co.*, 50 N. W. 1117, 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637).

And it follows that a gift which vests both the legal title and the beneficial ownership of the subject of the gift in the donee is not one in trust, even if it be a conditional one. *Watkins v. Bigelow*, 100 N. W. 1104, 1109, 93 Minn. 210.

#### Particular words unnecessary

No particular terms are necessary to create a "trust," but the intention of the creator of the trust controls; and where he gives to the person to whom he delivers possession of property power to sell it, receive and invest the proceeds, and power to exercise the usual acts of ownership, with specific directions as to how the property and its income is to be disposed of, a trust is created, though such person is designated in the instrument as attorney, instead of trustee. *Mersereau v. Bennet*, 108 N. Y. Supp. 868, 872, 124 App. Div. 413.

Technical words are not necessary to create a "trust," and the courts will consider the situation and relations of the parties, the character of the property, and the purpose of the settlor in determining whether there was a trust; it being sufficient that the language used shows an intention by the settlor to create a trust and clearly shows the trust property, its disposition, and the beneficiary. *Ruhe v. Ruhe*, 77 Atl. 797, 800, 113 Md. 595.

In order to constitute a direct "trust," no particular words are necessary, so long as the intent is clear, but there must be a conveyance or transfer to a person capable of holding it, an object or fund transferred, and a cestui que trust or purpose to which it is to be applied. *City of Austin v. Cahill*, 88 S. W. 542, 548, 99 Tex. 172.

"If there is an intention to create a 'trust,' the trustee may be called in the instrument creating it 'agent,' or by any other similar designation." *Johnson v. Cook*, 50 S. E. 367, 368, 122 Ga. 524.

It is not necessary to use any particular formula of words in order to create a "trust" of personal property, and it is not even necessary that such a trust should be evidenced by any writing. Trust relations will be implied when it appears that such was the intention of the parties, and when the nature of the transaction is such as to justify or require it. Thus, where property was assigned to a corporation, to secure it and indemnify others who became the assignor's sureties on the faith of the pledge, it could sue as trustee of an express trust to reclaim the property pledged from the assignor, who had appropriated it to his own use, if any of the obligations of the assignor for which it was pledged remain undischarged. *Hoffman House v. Foote*, 65 N. E. 169, 171, 172 N. Y. 348.

#### Office as trust

See Office.

#### Statute of limitations

"Trusts" not reached or affected by the statute of limitations are technical and continuing trusts, of which courts of law have no cognizance. Thus, where defendant, as plaintiff's attorney, received \$5,000 in settlement of a claim, agreeing to pay plaintiff \$3,000, retain \$750 for compensation, and pay \$1,250 to other attorneys who assisted, but defendant paid plaintiff only \$2,500, and paid nothing to the other attorneys, the plaintiff's claims against defendant both for the \$500 and \$1,250, which defendant had promised to pay over to the other parties, were not "trusts," but were money claims, subject to statute of limitations. *Sheaf v. Dodge*, 68 N. E. 292, 293, 161 Ind. 270 (quoting and adopting definition in *Raymond v. Simonson* [Ind.] 4 Blackf. 81).

Notwithstanding Rev. St. 1898, § 2081, providing that an express trust may be created, when "fully expressed and clearly de-

fined" on the face of the instrument creating it, officers and directors of a corporation, whose fiduciary capacity is "fully expressed and clearly defined" in the articles of incorporation, are not "trustees" of a technical and continuing trust, cognizable only in equity, so as to be precluded from pleading limitations when sued by a receiver for acts of misfeasance and malfeasance for which they were amenable to an action at law at any time, either by the corporation or its stockholders, or, on insolvency, its creditors; the statute (section 4206) making no exception as against trustees of any kind. *Boyd v. Mutual Fire Ass'n of Eau Claire*, 94 N. W. 171, 174, 116 Wis. 155, 61 L. R. A. 918, 96 Am. St. Rep. 948.

The relation between a principal and an agent who has ceased doing new business for his principal, and whose duty it is merely to collect and remit the money due his principal on outstanding mortgages, is not such a "trust relation" as suspends the running of limitations. *Jewell v. Jewell's Estate*, 102 N. W. 1059, 1062, 139 Mich. 578.

#### Use distinguished

A "use," a "trust," and a "confidence" are one and the same thing, and if an estate is conveyed to one person for the use of another, or upon a trust for another, and nothing more is said, the statute of uses immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used. *Jones v. Jones*, 123 S. W. 29, 34, 223 Mo. 424, 25 L. R. A. (N. S.) 424 (quoting and adopting definition in *Perry, Trusts* [5th Ed.] § 298).

#### TRUST (Combination)

See, also, Monopoly.

A "trust" is "any compact between two or more persons or corporations, affecting any article or commodity of which the public must have a constant supply; the intent and direct tendency of such an arrangement being the creation of a scarcity or the enhancement of the price." In re Charge to Grand Jury, 151 Fed. 834, 835.

A "trust" is a contract, combination, confederation, or understanding, express or implied, between two or more persons, to control the price of a commodity or services for the benefit of the parties thereto, and to the injury of the public, and which tends to create a monopoly. *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 56 S. E. 264, 269, 60 W. Va. 508, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, 9 Ann. Cas. 667; *Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co.*, 55 S. E. 973, 974, 75 S. C. 378, 9 L. R. A. (N. S.) 501, 9 Ann. Cas. 902. See also, *Klingel's Pharmacy v. Sharp & Dohme*, 64 Atl. 1029, 1030, 104 Md. 218, 7 L. R. A. (N. S.) 976, 118 Am. St. Rep. 399, 9 Ann. Cas. 1184.

The combination by stockholders in two competing interstate railway companies to

form a stockholding corporation which should acquire, in exchange for its own capital stock, a controlling interest in the capital stock of each of such railway companies, is a "trust," within the meaning of the anti-trust act of July 2, 1890, c. 647, 26 Stat. 209, which declares illegal every combination in the form of a trust or otherwise in restraint of interstate or foreign commerce. *Northern Securities Co. v. United States*, 24 Sup. Ct. 436, 452, 193 U. S. 197, 48 L. Ed. 679. See, also, *State of Minnesota v. Northern Securities Co.*, 123 Fed. 692, 698.

The term "trust" includes any form of combination between corporations, or corporations and natural persons, for the purpose of regulating production and repressing competition by means of the power thus centralized. It was first used in a narrower sense, we believe, of an organization formed by a combination of several corporations under one direction, by the device of a transfer by the stockholders in each corporation of a majority of the stock to a central committee, who issued to the stockholders in return certificates showing, in effect, that though they had parted with their stock they were still entitled to share in the profits; the purpose being to control competition in production and transportation, and thus the price to the consumer. *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 75 Pac. 89, 95, 29 Mont. 428.

An association of persons and corporations engaged in the business of buying and selling live stock, and practically controlling that business at the place of operation, which has a by-law forbidding its members to buy or sell live stock for others without charging a commission therefor of at least 50 cents on a head, is a combination to carry out restrictions in full and free pursuit of a lawful business, and in virtue of that fact is a "trust," within the terms of chapter 265, p. 481, of the Laws of 1897. *State v. Wilson*, 84 Pac. 737, 738, 80 Pac. 639, 73 Kan. 334, 117 Am. St. Rep. 479.

The term "trust," as used in Gen. St. 1901, §§ 7864, 7868, defining and prohibiting trusts, is intended to apply to combinations and organizations of all kinds created for the purpose of controlling trade, transportation, production, price, or traffic in commercial commodities. *State v. International Harvester Co. of America*, 99 Pac. 603, 605, 79 Kan. 371.

Laws 1900, p. 125, c. 88, defining a "trust" or "combine" as a combination or agreement between two or more persons, etc., (a) in restraint of trade; (b) to limit, increase, or reduce the price of a commodity; (c) to hinder competition, etc.—is severable, and if any provision thereof is invalid it may be eliminated without affecting the validity of other provisions. *State v. Jack-*

*son Cotton Oil Co.*, 48 South. 300, 301, 95 Miss. 6.

To constitute a trust, within the anti-trust law (Rev. St. 1899, c. 143 [Ann. St. 1906, §§ 8965-8992]), there must be a combination of capital, skill, or acts; "combination," as so used, meaning "union" or "association." *State ex inf. Hadley v. Standard Oil Co.*, 116 S. W. 902, 1044, 218 Mo. 1.

Rev. St. 1895, art. 4540, requires every railroad to furnish reasonable and equal facilities upon reasonable and equal rates, to all corporations engaged in the express business, and Acts 1903, p. 119, c. 94, defines a "trust" as a combination of capital, skill, or acts of two or more persons to create or carry out restrictions in the free pursuit of any business authorized by the law of the state, or to prevent or lessen competition in the transportation of merchandise, and makes a "trust" unlawful. Held, that a contract between a railroad company and an express company, whereby the latter was given exclusive privileges, and the former bound itself not to contract with others to do an express business on the road, and agreed that, in case privileges should be accorded others by legislation or judicial proceeding, the express company in question should have credit for the sums paid by other companies, was violative of the anti-trust statute. *State v. Missouri, K. & T. Ry. Co. of Texas*, 91 S. W. 214, 219, 99 Tex. 516, 5 L. R. A. (N. S.) 783, 13 Ann. Cas. 1072.

The anti-trust act (Act 1903, p. 119, c. 94), defining a "trust" as a combination to create restrictions in trade or restrictions in the free pursuit of any business permitted by the law of the state, prohibits a restriction of competition in business which under the laws of the state a person may engage in, but does not prevent an owner of a plantation from giving another the exclusive privilege of selling merchandise thereon. *Redland Fruit Co. v. Sargent*, 113 S. W. 330, 331, 51 Tex. Civ. App. 619.

Under anti-trust law of 1903 (Laws 1903, c. 94), defining a "trust" as a combination of capital by two or more persons to create restrictions in trade or the free pursuit of any business, and defining a "conspiracy" in restraint of trade as an agreement between two or more persons to refuse to buy from or sell to any other person any article of merchandise, a petition, which alleges that a manufacturer of farm implements and vehicles entered into a contract with a dealer therein whereby the manufacturer agreed to give the dealer the exclusive sale of its product, and whereby the dealer agreed not to buy or sell any other makes of like goods, and that the manufacturer and dealer carried the contract into execution to the injury of the people, charges a violation. *State v. Racine Sattley Co. (Tex.)* 134 S. W. 400, 403.

An agreement by the seller of a cotton gin and gristmill not to re-engage in that business so long as the purchasers operated it was not in violation of Laws 1903, c. 94, defining a "trust" as a combination of capital, skill, or acts of two or more persons, and prohibiting combinations to abstain from engaging in or continuing in business. *Malakoff Gin Co. v. Riddlesperger* (Tex.) 133 S. W. 519, 522.

An agreement whereby plaintiff was to give defendant the sole and exclusive right to sell certain automobiles and supplies in a fixed territory for a given length of time is not in violation of Rev. Civ. St. 1911, art. 7796, defining a "trust" as a combination of capital, skill, or acts by two or more persons for specified purposes; there being no combination in this case. *Nickels v. Prewitt Auto Co.* (Tex.) 149 S. W. 1094, 1095.

Under Code 1892, § 4437, defining a "trust" as a combination or agreement between two or more persons, corporations, or firms, inter alia, to place the control of business or the products or earnings thereof in the hands of trustees, or to delegate the control or management of the business of the combining or contracting parties to any other persons than themselves and their proper agents and employes, and after having enumerated the various kinds of contracts which it denominates "trusts," declaring them inimical to the public welfare, the test of a trust and the essentials to its existence is that the contract or combination be, on account of its actual result, obnoxious to public policy, or be in itself and in its necessary effect inimical to the public welfare. *Yazoo & M. V. R. Co. v. Searles*, 37 South. 939, 942, 85 Miss. 520, 68 L. R. A. 715.

Act April 19, 1898 (93 Ohio Laws, p. 143), defining trusts and prohibiting them under penalties, declares in section 1 that a "trust" is a combination of capital, skill, or acts by two or more persons, firms, partnerships, corporations, or associations of persons, or of any two or more of them, for "either, any, or all" of the following purposes, which are thereafter recited, authorizing the punishment by fine and imprisonment of a person who is an active member of, and assists in carrying out the purposes of, an association formed to prevent competition in the sale of an article of merchandise. *State v. Gage*, 73 N. E. 1078, 1079, 72 Ohio St. 210.

St. 1907, c. 530, was entitled an act to define a trust and to provide criminal penalties and punishment of corporations, persons, firms, and associations, or persons connected with them, and to promote full competition in commerce and all classes of business in the state. Section 1 defines a "trust" (1) as a combination of capital, skill, or acts of two or more persons, etc., to create or carry on restrictions in trade or commerce,

and (3) to prevent competition. An information charged accused as the managing agent of a meat company, pursuant to a combination and conspiracy into which they had previously entered with a butchers' association and the individual members thereof to carry out certain agreements, the effect of which would be to destroy free competition in the retail meat business in Sacramento, and in furtherance of this design compelled R., who was engaged in such business there, to pay accused and the meat company higher prices for meats than the accused and the company required the members of the association, each of whom were likewise engaged in such business, to pay for the same character of meats. Held to state all the elements of an offense within the first and third subdivisions of the law, and not defective for not alleging that the meat company, accused, or the association were able to control the meat market; the gravamen of the offense being the combination to prevent competition. *People v. Sacramento Butchers' Protective Ass'n*, 107 Pac. 712, 715, 12 Cal. App. 471.

Under Cobbe's St. 1907, § 12,000 (Gondring Act), declaring it to be a "trust" for two or more persons to create or carry out restrictions in trade, or to make or enter into, or carry out any contract with intent to preclude, or the tendency of which is to prevent free and unrestricted competition among themselves or others in the production, sale, traffic, or transportation of any article of merchandise, product, or commodity, or by which they shall agree to pool, combine, or unite any interest they have in connection with the sale, production, or transportation, that its price might in any way be affected thereby, and the anti-trust act (Laws 1905, p. 636, c. 162), declaring every contract or combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce, illegal, where, on complaint by a member of a lumber dealers' association to the secretary of the association of a sale by a wholesale lumber dealer to one not a retail dealer, the secretary would demand of the wholesaler an explanation of why he had sold to one not a retail dealer, thereby in effect prohibiting a wholesaler to sell to others than a retailer under the implied threat of the destruction of his business with members of the association if he did so, the acts of the secretary were such as to stifle competition and to operate in restraint of trade, and were unlawful, and the officers and directors of the association whose duty it was to know what the secretary was doing, and how he was managing the affairs of the association, and who had frequent meetings at his office, which was the office of the association, were chargeable with knowledge of his acts, though they did not actively participate therein and the secretary, the association and its officers will be restrained from a continuance of such unlawful prac-

tice. *State v. Adams Lumber Co.*, 116 N. W. 302, 312, 81 Neb. 392.

By the act of 1897 combinations to prevent competition in insurance or to settle the price thereof are declared to be a trust. The words "trade and business" in this act are intended as a generic term embracing all the transactions and practices mentioned in the act; and the term "trust" is properly made to include combinations or contracts in restraint of competition in insurance. *State v. American Surety Co.*, 135 N. W. 365, 366, 91 Neb. 22, Ann. Cas. 1913B, 973.

#### TRUST CERTIFICATE

As property, see Property.

#### TRUST COMPANY

In New Jersey legislative usage recognizes safe deposit and trust companies as "trust companies." The title of an act, entitled "An act concerning trust companies," expresses its object to be legislation regulating, not only trust companies incorporated under that designation, but also companies organized under the "act for the incorporation of safe deposit and trust companies." *State v. Twining*, 64 Atl. 1073, 1075, 73 N. J. Law, 683.

The term "trust company," as used in Code Pub. Gen. Laws 1904, art. 81, § 164, imposing an annual tax on the gross receipts of every "trust company," may be regarded as nomen generalissimum for financial and promoting companies. For the purposes of the tax law it may be given its accepted and ordinary meaning, by holding to be appropriate to such corporation all kinds of business which fairly fall within the powers usually found in the charters of such companies or currently conducted by them. *State v. Central Trust Co.*, 67 Atl. 267, 270, 106 Md. 268.

#### TRUST DEED

As perpetuity, see Perpetuity.

Note secured by as estate, see Estate.

The use of the phrase "deed of trust" in Const. art. 13, § 4, providing that a deed of trust by which a debt is secured shall, for the purpose of taxation, be treated as an interest in property, had reference to those deeds of trust in common use which answer the purpose, and have many of the attributes, of a strict mortgage on realty. *Bank of Woodland v. Pierce*, 77 Pac. 1012, 1013, 144 Cal. 434.

The phrase "deeds of trust," within the statute requiring the filing with the complaint of an affidavit setting forth a statement of subsisting mortgages, deeds of trust, and other liens, refers to deeds of trust given as security. *Charles A. Warren Co. v. San Francisco Savings Union*, 96 Pac. 807, 809, 153 Cal. 771.

A "deed of trust" is not a lien, within Civ. Code, § 2872, nor an incumbrance, with-

in Civ. Code, § 1114, so that a claim secured thereby should be presented and allowed as other claims against the estate of a decedent, under the provisions of Code Civ. Proc. § 1475, declaring that, if there be subsisting liens or incumbrances on the homestead of a decedent, the claims secured thereby must be presented and allowed as other claims against the estate. *Weber v. McCleverty*, 86 Pac. 706, 708, 149 Cal. 316.

Under Civ. Code, §§ 865, 866, providing that the grantee of realty subject to a trust acquires a legal estate except as against the trustee, a "trust deed" is substantially a mortgage with power of sale, and the trustor is the holder of the legal title, entitled to exercise the ordinary incidents of ownership subject to the execution of the trust. *Hollywood Lumber Co. v. Love*, 100 Pac. 698, 699, 155 Cal. 270.

"A 'deed of trust' is but a power, coupled, perhaps, with an interest." The power is irrevocable, and does not cease on the death of the mortgagor. *Frank v. Colonial & U. S. Mortgage Co., Ltd.*, 38 South. 340, 341, 86 Miss. 103, 70 L. R. A. 135, 4 Ann. Cas. 541 (citing *Walker v. Brungard* (Miss.) 13 Smedes & M. 723; *Hyde v. Warren*, 46 Miss. 29).

A mortgage or "deed of trust" in the nature of a mortgage is intended as security for the payment of money, or for the performance of some collateral act, and becomes void upon such payment or performance. A "mortgage" does not invest the mortgagee with an absolute and indefeasible title. The equitable title, called the "equity of redemption," remains in the mortgagor. The mortgage is a security for the debt, and creates a lien upon the property in favor of the creditor. There is no difference in legal effect between a mortgage with a power of sale and a deed of trust executed to secure a debt, where the power of sale is placed in a third person. Both are securities for a debt. Both create specific liens on the property; and in both the equitable title or right of redemption remains in the debtor, and is an estate or interest in the property that the debtor may sell, or that may be seized and sold under judicial process by his other creditors, subject to the lien created by the mortgage or deed of trust. The owner of a sawmill property, including the mill, machinery, and logs and lumber, the personalty being subject to a chattel mortgage, entered into a contract with the chattel mortgagee by which he purported to convey and transfer to said mortgagee all of the property, both personal and real, with authority to take possession and to operate the mill, and to sell any and all of the property; the owner agreeing to execute conveyances of the same as required by him. In consideration of such contract the grantee agreed to pay certain indebtedness of the owner, including his own, and to

apply to that purpose all sums received from the operation of the mill or sales of the property, after deducting expenses, the surplus, if any, to be paid over to the grantor. Held, that such contract was not a mortgage, but a trust agreement or deed, which vested the absolute title to the property in the grantee, and that it avoided a policy of insurance, previously issued to the grantor on the property, containing a provision that it should be void if his interest in the property should be or become other than unconditional and sole ownership. *Brecht v. Law Union & Crown Ins. Co.*, 153 Fed. 452, 455 (quoting and adopting definitions in *Ladd v. Johnson*, 40 Pac. 756; 32 Or. 195, 200; *Bartlett v. Teah*, 1 Fed. 768; *Burrill, Assignm.* § 2, and citing *Appolos v. Brady*, 49 Fed. 401, 1 C. C. A. 209; *Richmond v. Mississippi Mills*, 11 S. W. 930, 52 Ark. 30, 4 L. R. A. 413; *Robson v. Tomlinson*, 15 S. W. 456, 54 Ark. 229; *State, to Use of Holliday, v. Benoist*, 37 Mo. 501; *Bank v. Crittenden*, 23 N. W. 646, 648, 66 Iowa, 240, 241; *Sablchi v. Chase*, 41 Pac. 29, 108 Cal. 81; *Monteith v. Hogg*, 20 Pac. 327, 17 Or. 270).

### TRUST EX MALEFICIO

See, also, *Trustee ex Maleficio*.

A "trust ex maleficio" arises on account of the fraud or misconduct of the trustee in taking title, or by virtue of some illegal act upon his part. *Rogers v. Richards*, 74 Pac. 255, 256, 67 Kan. 706.

A "trust ex maleficio" arises whenever a person acquires the legal title to property of another by means of an intentional false or fraudulent verbal promise to hold the same for a certain purpose, and, having thus obtained the title, retains and claims the property as his own. *Chadwick v. Arnold*, 95 Pac. 527, 530, 34 Utah, 48.

Where a trust is impressed upon devised property to enforce the performance of a promise to the testator subject to which it was intended to be devised. It is upon the ground of fraud in holding the property free from the effect of the promise, from which a "trust ex maleficio" arises. *Powell v. Yearance*, 67 Atl. 892, 896, 73 N. J. Eq. 117 (citing *Williams v. Vreeland*, 32 N. J. Eq. 136; *In re Will of O'Hara*, 95 N. Y. 403, 47 Am. Rep. 53).

### TRUST FUND

The emergency fund of a fraternal beneficiary corporation existing under Rev. Laws, c. 119, authorizing such a corporation to create an emergency fund for use for the payment of benefits only, is a "trust fund"; and when a beneficiary has established his right to a death benefit, the corporation comes under a fiduciary relation to the beneficiary, as one of the persons entitled to a share in the emergency fund. *Attorney General v. Su-*

*preme Council, American Legion of Honor*, 92 N. E. 138, 139, 206 Mass. 158.

*Testatrix* provided that in a certain contingency the trustee should pay over "all the aforesaid trust funds," mentioned in certain paragraphs of the will, to a corporation named. Held, that the words "trust funds" meant trust estates, and not trust moneys. *Young v. Du Bois*, 113 N. Y. Supp. 456, 457, 60 Misc. Rep. 381.

### Property of corporation

The "trust fund doctrine" is the rule that the property of a corporation is a trust fund for the payment of creditors, but such property can be called a trust fund "only by way of analogy or metaphor." As between the corporation itself and its creditors it is a simple debtor, and as between its creditors and stockholders its assets are in equity a fund for the payment of its debts. *McIver v. Young Hardware Co.*, 57 S. E. 169, 171, 144 N. C. 478, 119 Am. St. Rep. 970. See, also, *Gallagher v. Asphalt Co. of America*, 55 Atl. 259, 262, 65 N. J. Eq. 258.

While stockholders holding stock paid for by overvalued property would be liable to existing creditors under the equitable principle known as the "trust fund" theory of capital stock, the rule does not apply to subsequent creditors who had knowledge of the fraudulent issue of the stock when they extended the credit. *Johnson v. Tennessee Oil, etc., Co.*, 69 Atl. 788, 791, 74 N. J. Eq. 32.

The assessable stock and the assets of a corporation constitute a "trust fund," not only for the benefit of existing, but also for future, creditors. *Clark v. E. C. Clark Mach. Co.*, 115 N. W. 416, 419, 151 Mich. 416 (citing *American Steel & Wire Co. v. Eddy*, 89 N. W. 952, 130 Mich. 266; *Peninsular Savings Bank of Detroit v. Black Flag Stove Polish Co.*, 63 N. W. 514, 105 Mich. 535; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203).

### TRUST IN INVITUM

A "trust in invitum" is raised in favor of the owner of property by another stealing it and converting it into money. *Lightfoot v. Davis*, 91 N. E. 582, 585, 198 N. Y. 261, 29 L. R. A. (N. S.) 119, 139 Am. St. Rep. 817, 19 Ann. Cas. 747.

Mr. Pomeroy, in his work on *Equitable Jurisprudence* (section 1044), uses the term "trust in invitum," and the learned author well describes how and why the court of equity has resorted to this fiction to facilitate its peculiar jurisdiction and to work out justice in peculiar cases. In every instance where the court creates this quasi trust relation, it must find either actual fraud or some unconscientious conduct. In such case the court will fasten upon the property in the hands of the offending party and will convert him into a trustee of the legal

title. *In re Smith, Thorndyke & Brown Co.*, 159 Fed. 268, 269.

### TRUST PROPERTY

As property, see Property.

### TRUST RECEIPT

The "trust receipt" plan is an arrangement whereby a domestic importer, wishing to import goods from a foreign country, secures a bank or other person which will accept drafts drawn on it for the payment of the imported goods, and to which the bill of lading and other papers are sent, and on receipt of which the goods are turned over to the importer on the execution of a "trust receipt" agreeing to hold the goods in trust for the one advancing the money or, if sold, to pay the proceeds to such person. *In re E. Reboulin Fils & Co.*, 165 Fed. 245, 246; *In re Dunlap Carpet Co.*, 206 Fed. 726, 730 (citing *Century Throwing Co. v. Muller*, 197 Fed. 252, 116 C. C. A. 614; *In re Cattus*, 183 Fed. 733, 106 C. C. A. 171; *In re Coe*, 169 Fed. 1002; *Id.*, 183 Fed. 745, 106 C. C. A. 181); *Munroe v. Philadelphia Warehouse Co.*, 75 Fed. 545-547.

### TRUSTEE

See Board of Trustees; Involuntary Trustee; Person Holding Stock as Trustee; Substituted Trustee.

"A 'trustee,' in the widest meaning of the term, may be defined to be a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another." *Jones v. Byrne*, 149 Fed. 457, 463; *McKeigue v. Chicago & N. W. R. Co.*, 110 N. W. 384, 385, 130 Wis. 543, 11 L. R. A. (N. S.) 148, 118 Am. St. Rep. 1038, 10 Ann. Cas. 551.

A "trustee," in the widest meaning of the term is "a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another," including bailees, factors, and agents, whose duties in their fiduciary capacity are recognized and enforced at common law. *Haggerty v. Badkin*, 66 Atl. 420, 421, 72 N. J. Eq. 473 (quoting and adopting the definition in *Hill, Trustees*, p. 1, and citing and adopting *Willis, Trustees*, p. 1, and *Perry, Trustees*, § 1). And the term includes executors, administrators, guardians, receivers, trustees in bankruptcy, factors, bailees, and agents, and all persons vested with the title or control of property and charged with fiduciary duties in relation thereto for the benefit of another; and beneficiaries of trust property, who are sui juris and whose rights are vested, may deal with and convey their equitable interests in the trust property, and the trustee will be required to convey the legal estate in accordance therewith, if such action be not contrary to the terms of the trust. *McKeigue v. Chicago N. W. R. Co.*, 110 N. W. 384, 385, 130 Wis. 543, 11 L. R. A.

(N. S.) 148, 118 Am. St. Rep. 1038, 10 Ann. Cas. 554 (citing *Hill, Trustees*, § 41, 1 *Lewin, Trusts* [1st Am. Ed.] 491, 2 *Lewin, Trusts*, pp. 684, 692).

Code Civ. Proc. § 2514 defines a "trustee" as any person designated by will or any competent authority to execute a trust created by will. *Runk v. Thomas*, 94 N. E. 363, 367, 200 N. Y. 447.

In equity, a "trustee" is regarded in the light of an instrument or agent for the cestui que trust, and the authority confided to him is in the nature of a power. *Insurance Co. of Tennessee v. Waller*, 95 S. W. 811, 815, 116 Tenn. 1, 115 Am. St. Rep. 763, 7 Ann. Cas. 1078 (citing *Gridley v. Wynant* [U. S.] 23 How. 500, 16 L. Ed. 411).

In a statute providing that, where persons holding stock as executor, administrator, guardian, or "trustee," or in any other representative or fiduciary capacity, may represent the same at all meetings, the word "trustee" means trustees who have the same sort of interest that executors, administrators, and guardians have. *Warren v. Pim*, 59 Atl. 773, 784, 66 N. J. Eq. 353.

The powers of a "trustee" are only such as the settlor or testator confers in his deed or will, and if he provides that the trustee may sell, but shall not incumber or mortgage, that direction is the supreme rule by which the trustee is bound, and whatever the trustee does in disregard of this direction cannot bind the estate committed to him. *Kenworthy v. Levi*, 63 Atl. 690, 691, 214 Pa. 235.

W. deeded land to J., as trustee, with power to mortgage it. J. gave a mortgage beginning, "I, J., as I am trustee" under a deed from W., by virtue of the power in said deed, in consideration of \$2,800, convey said land, with the condition that, if he pay to the said grantee said sum, the deed, and a note signed by him, whereby he promised to pay said sum, should be void, and with the covenant that he would observe the terms of said condition. J. gave a note, whereby he promised to pay the \$2,800, signed "J., trustee." Held, that as the deed of W. gave no power to J. to make a personal promise on behalf of the beneficiaries or trustor, and as Civ. Code, § 2267, providing that a trustee is a general agent for the trust property, that his authority is such as is conferred on him by the declaration of trust and by this chapter, and none other, and that his acts, within the scope of his authority, bind the trust property to the same extent as the acts of an agent bind his principal, gives no such power, and as the note or mortgage contained no stipulation relieving him from personal liability, or requiring the lender to look to the mortgaged property alone as security, he was personally liable on the note. *Hall v. Jameson*, 91 Pac. 518, 520, 151 Cal. 606, 12 L. R. A. (N. S.) 1190, 121 Am. St. Rep. 137.

**As descriptio personæ**

The addition of the word "trustee" after one's signature is merely descriptio personæ. *Coaling Coal & Coke Co. v. Howard*, 61 S. E. 987, 988, 130 Ga. 807, 21 L. R. A. (N. S.) 1051.

And where a bishop held title to the property of the diocese as trustee in accordance with the rules of the church, and for the purpose of raising money for the benefit of a congregation indorsed the note of the congregation as an irregular indorser, with the word "trustee" after his name, he being authorized in his representative capacity to bind the property to the diocese, he was entitled to show, by parol, that he intended to sign in his representative capacity only, and that the payee and indorsee had knowledge of the fact, and that the addition of the word "trustee" was not mere descriptio personæ. *American Trust Co. v. Canevin*, 184 Fed. 657, 659, 107 C. C. A. 543.

The word "trustee," signed to a deed, is not a mere descriptio personæ, but is an essential feature of the deed, for the purpose of putting on inquiry persons thereafter dealing with such trustee in relation to the deed. *Flitcraft v. Commonwealth Title Ins. & Trust Co.*, 60 Atl. 557, 559, 211 Pa. 114.

The word "trustee," added to a party's name in a written instrument, is sufficient to put the purchaser on inquiry as to all the terms and conditions under which it may have been executed. *McLeod v. Despain*, 90 Pac. 492, 497, 92 Pac. 1088, 49 Or. 536, 19 L. R. A. (N. S.) 276, 124 Am. St. Rep. 1066.

The word "trustee," following the name of the grantee in a deed, is notice that he is not the owner of the property, and is sufficient to put all subsequent purchasers from him on inquiry as to the existence and nature of the trust. *Sternfels v. Watson*, 139 Fed. 505, 507.

When dealing with equitable considerations, the affixing of the term "trustee" to the name of an assignee imports that he holds for the benefit of another. *Farrington v. Stucky*, 165 Fed. 325, 328, 91 C. C. A. 311.

The word "trustee," following the name of a grantee in a deed, is notice sufficient to put those dealing with him concerning the property on inquiry as to the existence and nature of the trust. *Snyder v. Collier*, 123 N. W. 1023, 1025, 85 Neb. 552, 133 Am. St. Rep. 682.

An instrument vesting title in one as trustee, without showing on its face the nature of the trust or the name of the beneficiary, vests the fee in the grantee; the word "trustee" being considered as descriptive of the person. *Sansom v. Ayer & Lord Tie Co.*, 139 S. W. 778, 144 Ky. 555.

A conveyance to a person named, followed by the word "trustee," and to his heirs and assigns, is an absolute conveyance,

and the grantee has unlimited power to convey; the word "trustee" being merely descriptive. *Title Guarantee & Trust Co. v. Fallon*, 91 N. Y. Supp. 497, 498, 101 App. Div. 187.

The word "trustee," in an indorsement of a certificate of deposit, is express notice to a purchaser that there is a cestui que trust or beneficiary, and that his rights may not be sacrificed by the trustee in the sale or pledge of the certificate for his own benefit. *Ford v. H. C. Brown & Co.*, 88 S. W. 1036, 1038, 1039, 114 Tenn. 467, 1 L. R. A. (N. S.) 188.

Where a man and wife purchased lands with community funds, and the lands were conveyed to a third person as trustee, the word "trustee" after his name was not sufficient to create a trust for any specific purpose, and even if it did so the purchasers from him would only be required to determine the nature of his trust, and if found to be for convenience of the transfer, or for the purpose of sale, they would acquire the full legal and equitable title. *Davidson v. Mantor*, 89 Pac. 167, 168, 45 Wash. 660.

A contract for the sale of land, describing the vendees as "trustees," without more, prima facie, implies a trust in favor of an undisclosed beneficiary. *Maffet v. Oregon & C. R. Co.*, 80 Pac. 489, 495, 46 Or. 443.

Where defendant set apart money of his own to the amount invested in certain of the installment stock of a loan association, and procured the stock to be issued in the names of his children, respectively, adding his own name as "trustee," and on the maturity of the stock took the check payable to himself as "trustee" for each of the interested children, and invested the proceeds in bank stock for the benefit of his children, and received stock as "trustee" for each of them, and in his own books opened an account between himself as "trustee" for the children and himself individually, declaring that as trustee he held certain shares in the bank, and afterwards received dividends on the stock as trustee, but put the money in his own individual account, from which he paid taxes on the stock and subsequently purchased additional shares, partly with the money belonging to the trust fund and partly with his own money, and on the failure of the bank charged "profit and loss" with the difference between the amount advanced and the amount received in dividends, etc., such acts constituted an irrevocable "trust" of the shares for the benefit of the children. *Fowler v. Gowing*, 152 Fed. 801, 814 (citing *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Duncan v. Jaudon*, 15 Wall. [82 U. S.] 165, 21 L. Ed. 142).

**Agent**

A trustee may be called an "agent" in the instrument creating him, or by any other



similar designation. *Johnson v. Cook*, 50 S. E. 367, 368, 122 Ga. 524.

Under Civ. Code, § 2219, making one who voluntarily assumes a relation of personal confidence with another a "trustee," and, under section 2229, prohibiting use of trust property by the trustee for his own benefit, if defendant, in purchasing bonds as decedent's agent and with decedent's money, received from the sellers, in consideration of the purchase, a stock bonus and did not account for it to decedent, he was chargeable with it as trustee. *Bone v. Hayes*, 99 Pac. 172, 174, 154 Cal. 759.

#### **Directors of corporation**

Directors of a bank are, in a certain sense, undoubtedly to be considered "trustees," but only in that sense in which an agent or bailee intrusted with the care and management of property is considered a trustee. A director more nearly resembles a managing partner. *Stone v. Rottman*, 82 S. W. 76, 82, 183 Mo. 552.

Directors of a national bank, while implied trustees, are not technically "trustees"; and hence directors who had ceased to be such prior to the bank's failure can plead limitations as a defense to a suit by the receiver to recover losses sustained, by their malfeasance or gross negligence. *Emerson v. Gaither*, 64 Atl. 26, 31, 103 Md. 564, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114.

#### **As employer**

See Employer.

#### **Executors and administrators**

A "trustee" is one in whom some estate, interest, or power in or affecting property is vested for the benefit of another; and, while an executor is a trustee in the broadest sense, he is not a trustee in the general acceptance of the term. In *re Hibbler's Estate*, 78 Atl. 188, 189, 78 N. J. Eq. 217.

An "administrator" is the trustee of the creditors. He represents the creditors, and not the deceased. *Succession of Delaneville v. Duhe*, 38 South. 20, 22, 114 La. 62 (citing *Succession of Harkins*, 2 La. Ann. 923; *Judson v. Connolly*, 4 La. Ann. 169). See, also, *Desloge v. Tucker*, 94 S. W. 283, 287, 196 Mo. 587.

#### **As owner**

See Owner.

#### **As party to mortgage**

See Party.

#### **Police pension board**

Act Cal. March 4, 1889, provides for a police pension fund, by directing that certain public money shall be set apart in the custody of the city treasurer, and styles the board of management "trustees," and those entitled to its benefits "beneficiaries." Section 7 of the act gives a widow of a deceased member of the police department, on condi-

tions specified, a designated sum from the fund; and section 14 provides that on the last day of June in each year the surplus of the fund exceeding the average amount per year paid out on account of the fund during three years next preceding shall become a part of the general fund of the municipality. *Held*, that the board charged with the management of the fund are not "trustees" under an express trust for the persons entitled thereto, and limitations begin to run from the time of the accrual of a right to a pension, and not from the repudiation of the claim by the board; and a widow of a policeman, who waited over five years after his death before demanding her pension, was barred by limitations. *Nicols v. Board of Police Pension Fund Com'rs*, 82 Pac. 557, 558, 1 Cal. App. 494.

#### **Public officer**

Public revenues are but trust funds, and the officers but "trustees" for its administration for the people, so that the defense of voluntary payment has no application in case of payment of an excessive amount to the officer. *State v. Young*, 110 N. W. 292, 297, 134 Iowa, 505, 13 Ann. Cas. 345 (quoting and adopting the definition in *Allegheny County v. Grier*, 36 Atl. 353, 179 Pa. 639).

A settlement of a treasurer of the courthouse fund of a county, made with the commissioner appointed by the county court and confirmed, is conclusive except for fraud or mistake, though the commissioner first relied on the treasurer's books, and, after the settlement, the treasurer is merely a debtor for the amount found in his hands, and not a trustee therefor within Ky. St. § 2543 (Russell's St. § 209), so as to prevent the running of limitations in his favor, so that a proceeding to surcharge the settlement on the ground of fraud or mistake must be brought within the time prescribed by statute. *Boyd's Ex'r v. Laurel County*, 131 S. W. 171, 172, 140 Ky. 430.

Congress, by the acts of March 3, 1791, and May 1, 1810, confirmed the claim of the inhabitants of a town to certain lands as commons. The state Legislature by the Acts of January 4, 1827, and February 17, 1841 (Laws 1841, p. 65), authorized the election of a supervisor with certain duties in reference to the commons. By Act Feb. 14, 1855 (Priv. Laws 1855, p. 199), and Act March 21, 1874 (Laws 1873-74, p. 67), the supervisor was authorized to plat and survey the commons and sell the same when authorized by an election to do so, and to hold the money received for certain purposes and to invest the principal in bonds, mortgages, etc., on giving bond. In accordance with the statute, a sale of the commons was ordered, a supervisor appointed for two years, and he was re-elected five times, and in each term gave bond, the sureties on which bonds were different persons. *Held*, that the supervisor, though he gave

bond and was called supervisor, was a "trustee" as to the funds collected for the town inhabitants, and hence a bill to require him to account for moneys misappropriated extending through his entire term was a proper subject of equity jurisdiction. *People v. Bordeaux*, 89 N. E. 971, 972, 242 Ill. 327.

#### As real party in interest

See Real Party in Interest.

#### Referee

Code, § 1312, provides that every inhabitant of the state shall list for the assessor all property subject to taxation in the state, of which he is the owner or has the control or management in the manner herein directed—the property of one under disability by the person having charge thereof, that of a married woman by herself or husband, that of a beneficiary for whom the property is held in trust by the trustee, and the personal property of a decedent by the executor or administrator, or, if there is none, by any person interested therein, etc., Held, that a referee appointed by the court as commissioner to sell property in partition proceedings is not a "trustee" controlling and managing the property within the meaning of the section, and is not personally liable for taxes on contracts made by him for the sale of the lands, since he does not hold or use either the property or the contracts with a view to investing, loaning, or in any way deriving any pecuniary profit for himself or the beneficial owners. In *re Boyd*, 116 N. W. 700, 702, 138 Iowa, 583, 17 L. R. A. (N. S.) 1220.

#### Warehouseman

A warehouseman is a "trustee," within the meaning of Laws 1905, c. 35, § 55, cl. "d" (Code 1906, § 739), making it the duty of every person having custody of personal property as trustee to list it for taxation in the name of the owner; but such custodian is not personally chargeable with the property for the purpose of taxation if he lists it for that purpose in the name of the owner on the request of the assessor. *Hannis Distilling Co. v. Berkeley County Court*, 71 S. E. 576, 579, 69 W. Va. 426.

#### TRUSTEE DE SON TORT

Where the life beneficiary of trust property, whose husband is the trustee, has knowledge of the trust, acknowledges it, and voluntarily intermeddles with the possession, management, and disposition of the estate, taking part of it into her possession, she becomes a "trustee de son tort," and her representatives are estopped to deny her equal and continuous accountability with the trustee with respect to what she had taken into her own possession, in a suit by the remaindermen to recover for her conversion of part of the estate. *Putnam v. Lincoln Safe Deposit Co.*, 83 N. E. 789, 794, 191 N. Y. 166.

#### TRUSTEE EX MALEFICIO

See, also, Trust Ex Maleficio.

One who knowingly takes title to property subject to a trust is a "trustee ex maleficio." *Elliott v. Landis Mach. Co.*, 139 S. W. 356, 360, 236 Mo. 546.

Where plaintiff employed defendant as his agent to purchase certain property, and defendant, falsely representing to the seller that it was necessary that he should take title temporarily, wrongfully procured the deed to be made in his own name, he held title as a "trustee ex maleficio," and was liable at the suit of plaintiff to be compelled to convey. *Harrison v. Craven*, 87 S. W. 962, 966, 188 Mo. 590.

It is a general rule that any one wrongfully possessed of an estate becomes a "trustee ex maleficio," and is answerable to the party injured as cestui que trust; and so, where a bank receives money wrongfully, a trust arises between it and the true owner. *Whitcomb v. Carpenter*, 111 N. W. 825, 827, 134 Iowa, 227, 10 L. R. A. (N. S.) 928.

#### TRUSTEE IN BANKRUPTCY

As aggrieved party, see Aggrieved Party.  
As creditor, see Creditor.

As legal representative, see Legal Representative.

As officer, see Officer.

As purchaser, see Purchaser.

As trustee of express trust, see Trustee of Express Trust.

The "trustee in bankruptcy" is the hand of the court. He stands as its agent to liquidate the assets, to protect them, and to bring them before the court for final distribution. He is not, in fact, more representative of one creditor or claimant than another. The trustee, in the procedure, because he has the legal title to the assets, and is charged with the duty of saving and protecting them, represents the general fund. He is not a purchaser, but, as the title of his office imports, he is trustee for all who have interests and according to those interests. He himself has no interest, and there is nothing in his representation which stands between the court and those who have interests, for the recognition and protection of which they appeal to its authority. In *re Ducker*, 134 Fed. 43, 47, 67 C. C. A. 117.

"A 'trustee in bankruptcy' is defined by the bankrupt act as an officer, and is, in a certain restricted sense, an officer of the court; but he is not an officer of the court in any such sense as a receiver. He takes the legal title to the property, and in respect to suits stands in the same general position as a trustee of an express trust or an executor." *Tiger Shoe Mfg. Co.'s Trustee v. Shanklin*, 102 S. W. 295, 296, 125 Ky. 715, 31 L. R. A. (N. S.) 365 (quoting and approving the definition in *Re Smith*, 9 Am. Bankr. Rep. 603, 121 Fed. 1014).

A "trustee in bankruptcy" is an officer of the court, and is appointed for the purpose of acting for the interests of all the creditors, without favor or partiality. No contract between him and a creditor should be upheld which is calculated to improperly influence his action, or which would tend to make it to his interest to favor one creditor over another. A contract between him and a creditor, whereby the latter agreed, in consideration of the trustee's acceptance of the appointment, to pay him a sum equal to the difference between a certain per cent. on the entire proceeds of the sale and the compensation which he would receive under the statute, is void. *Devries v. Orem*, 65 Atl. 430, 431, 104 Md. 648.

A "trustee in bankruptcy" is an officer of the court, and cannot be subjected to suits by the purchaser of personal property belonging to the estate without leave of the bankruptcy court. *Carney v. Averill*, 85 Atl. 494, 496, 110 Me. 172.

One elected to be "trustee in bankruptcy" does not become a "trustee" in fact until approval by the referee or judge of the selection; and General Order XIII (89 Fed. vii, 32 C. C. A. xvii), which makes a trustee removable by a judge only, does not prevent an appointment by the referee, on his disapproval of the creditors' choice and their neglect or refusal to make another choice. In *re Kellar*, 192 Fed. 830, 832, 113 C. C. A. 154.

#### TRUSTEE OF EXPRESS TRUST

According to Code Civ. Proc. 1902, § 134, a "trustee of an express trust" is a person with whom or in whose name, a contract is made for the benefit of another. *Cousar v. Heath*, 61 S. E. 973, 975, 80 S. C. 466.

One who, in concert with other persons, obtained franchises for the construction of street railways in a city, and, before incorporating, tore up certain existing railways, and contracted, on behalf of himself and those associated with him, to sell certain of the material so torn up, is a "trustee of an express trust," within the meaning of a statute authorizing such a trustee to sue in his own name. *Nelson v. Hirsch & Sons' Iron & Rail Co.*, 77 S. W. 590, 594, 102 Mo. App. 498.

#### Agent

A person executing a lease in his own name, as owner, may maintain unlawful detainer, as "trustee of an express trust," within Civ. Code, § 5, without joining the persons for whose benefit the action is prosecuted. *Houck v. Williams*, 81 Pac. 800, 34 Colo. 138.

#### Factor

A factor is not a "trustee of an express trust," in the strict sense of the term, but he is a "trustee," under Rev. St. 1898, § 2607, defining a trustee of an express trust to include a person with whom or in whose name a contract is made for the benefit of another.

*Beardsley v. Schmidt*, 98 N. W. 235, 237, 120 Wis. 405, 102 Am. St. Rep. 991.

#### Grantee

Under Ballinger's Ann. Codes & St. § 4825, providing that a "trustee of an express trust" may sue without joining the person for whose benefit the suit is prosecuted, one to whom property has been deeded without consideration, and merely to hold title for the grantors and to convey as they might direct, is a proper person to bring an action to quiet title against an assignee of a satisfied mortgage on such property, executed by such grantors prior to the execution of the deed. *Carr v. Cohn*, 87 Pac. 926, 927, 44 Wash. 586.

Where a deed to a city for a money consideration recited that the grantee should hold the land for burial purposes and no other, and after an abandonment of such purpose the grantors sued in equity for a reconveyance and accounting or an injunction, the fact that complainants were nonresidents was of no avail to them as against the 10-year statute of limitations. The city could not be regarded as a "trustee of an express trust," in order to save complainants from the bar of the statute. *Thornton v. City of Natchez*, 41 South. 498, 501, 88 Miss. 1.

#### Guardian

A guardian is not a "trustee of an express trust" within Burns' Ann. St. 1901, § 252, providing that a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted. *Campbell v. Fichter*, 81 N. E. 661, 662, 168 Ind. 645, 11 Ann. Cas. 1089.

Where plaintiff, as the general guardian of an infant, loaned certain of the infant's funds to defendants, taking from them a note and certain stock as collateral, and, at the special instance and request of defendant D., plaintiff delivered the collateral to him to sell for not less than the amount of the loan, after which D., pursuant to a conspiracy with the other defendants, converted the collateral, plaintiff was entitled to sue on the note, and to have the collateral or its proceeds declared a trust fund for plaintiff's benefit, as "trustee of an express trust." *Schlieder v. Wells*, 99 N. Y. Supp. 1000, 1001, 114 App. Div. 417 (citing *Thomas v. Bennett* [N. Y.] 56 Barb. 197; *Bayer v. Phillips*, 10 Civ. Proc. R. [N. Y.] 227).

#### Husband

Where a husband, with his wife's knowledge and consent, and in her presence, entered into a contract for the construction of buildings on her land, he was a "trustee," and entitled to sue in his own name for the breach of the contract, under a statute providing that a trustee of an express trust may sue in his own name without joining the beneficiary, and declaring that a person in whose name a contract is made for the benefit of

another shall be regarded as a "trustee of an express trust." *Simons v. Wittmann*, 88 S. W. 791, 797, 113 Mo. App. 357.

*Burns' Ann. St. 1908, § 251*, provides that every action must be prosecuted in the name of the real party in interest, except as provided in section 252, which provides that a trustee of an express trust may sue without joining with him the person for whose benefit the action is prosecuted, and that a trustee of an express trust within the meaning of the section shall include a person with whom or in whose name a contract is made for the benefit of another. Held, that the word "contract" is not used in a restricted sense, but applies to any kind of contract, and where one as agent was carrying on a jewelry business for his wife and sold jewelry to a third person, taking a note therefor secured by a chattel mortgage as his wife's agent, he was a "trustee of an express trust" as to his wife, and could sue for collection of the note and foreclosure of the mortgage without joining his wife as a party plaintiff. *Owen v. Harriott*, '94 N. E. 591, 593, 47 Ind. App. 359.

#### Partner

A managing partner, or one authorized by joint contract to represent his joint co-party, is not a "trustee of an express trust," within Code Civ. Proc. § 449, authorizing suit by the trustee of an express trust without the joinder of the person for whose benefit the action is prosecuted. *Natter v. Isaac H. Blanchard Co.*, 138 N. Y. Supp. 969, 972, 153 App. Div. 814.

*Rev. St. 1899, § 541 (Ann. St. 1906, p. 578)*, providing that a "trustee of an express trust," within the meaning of the section shall be construed to include a person with whom or in whose name a contract is made for the benefit of another, enlarges instead of restricts the meaning of the phrase "trustee of an express trust," so as to include, not only those who are such trustees under the ordinary rules of equity, but those in whose names contracts are made for the benefit of third persons. Where a lease was taken in plaintiff's name for the benefit of himself and another, and thereafter an interest was assigned to a third person, plaintiff held the leasehold as trustee of an express trust for himself and his partners, and was therefore entitled to sue alone in his own name for a breach of the lessor's covenant of quiet enjoyment, under *Rev. St. 1899, § 541 (Ann. St. 1906, p. 578)*, declaring that a trustee of an express trust may sue without joining with him the person for whose benefit the suit is prosecuted. *Geer v. Boston Little Circle Zinc Co.*, 103 S. W. 151, 153, 126 Mo. App. 173 (citing *Pomeroy*, Code Rem. [4th Ed.] § 100 et seq.; *Weaver v. Trustees of Wabash & E. Canal*, 28 Ind. 112, 119; *Snider v. Adams Exp. Co.*, 77 Mo. 523).

#### Payee

One who holds a draft made payable to himself is a "trustee of an express trust," and may maintain an action thereon in his own name against the acceptor of such draft, even if he has no beneficial interest in the proceeds. *Eagle Mining & Imp. Co. v. Lund*, 94 Pac. 949, 950, 14 N. M. 417.

#### Taxpayer

*Burns' Rev. St. 1901, § 252*, provides that a trustee of an express trust, etc., may sue without joining with him the person for whose benefit the action is prosecuted, and that "a 'trustee of an express trust,' within the meaning of this section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another." In an action by a private taxpayer as relator in the name of the state, and also in his individual capacity, on the bond of a county treasurer, alleging the refusal of the county officers to sue, relator is not a trustee of an express trust. *State ex rel. Stuart v. Holt (Ind.)* 70 N. E. 387, 388.

#### Trustee

A trustee in bankruptcy, maintaining an action in his own name as trustee for the use and benefit of the estate he represents, is a "trustee of an express trust," within the statute providing that an executor, administrator, guardian, or "trustee of an express trust" may bring an action without joining the person for whose benefit it is prosecuted. *West v. Bank of LaHoma*, 86 Pac. 59, 60, 16 Okl. 508.

The creditors, trustees, and the debtor entered into an agreement by which the debtor was to make stated payments to the trustees and to turn over certain life insurance policies, and the creditors agreed to forbear prosecution of their claims. Held, that the trustees are "trustees of an express trust," within Code Civ. Proc. § 449, and required to distribute the funds as provided for in the agreement, and, on default of the debtor to make the payments, could maintain an action against him. *Heppenstall v. Baudouine*, 113 N. Y. Supp. 849, 851, 60 Misc. Rep. 620.

#### TRUSTEE'S SALE

As judicial sale, see Judicial Sale.

#### TRUSTY

The term "trusty," as applied to a prisoner, means trustworthy. *People v. Flanagan*, 66 N. E. 988, 989, 174 N. Y. 356.

#### TRUTH

See, also, True.

#### TRUTHFULLY DISCLOSED

The state anti-trust law provides that, under penalty of fines, a corporation must answer under oath inquiries as to whether it is violating the provisions of such act, provided that no one "shall be subject to any

criminal prosecution by reason of anything truthfully disclosed." Held that, since the act could only apply to acts done within the state, the response to inquiries need not disclose acts done outside the state, to which the laws of other states could alone apply, and therefore the immunity from criminal prosecution was not too narrow, so as to render the act unconstitutional, because it did not cover prosecutions by another state. As the act could not cover trusts founded in regard to interstate commerce, the response to inquiries need not cover acts in relation thereto, to which alone federal laws could apply, and the act was not unconstitutional, because not granting immunity from prosecution under the federal laws. The words "truthfully disclosed" mean only that, it being assumed that the answer made under oath is truthful, no disclosure made therein shall be the basis of criminal action against the affiant, and are not meant as a condition to the immunity from prosecution granted by the statute, and therefore do not render the statute unconstitutional as granting only a limited immunity. *People ex rel. Akin v. Butler St. Foundry & Iron Co.*, 66 N. E. 349, 352, 201 Ill. 236.

## TRY

See Regularly Submit and Try.

The delay within which a recused case should be tried by the judge ad hoc begins to run from the recusation of the judge a quo, and the case is "tried," within the contemplation of the law (Acts 1880, p. 39, No. 40), although dismissed on exception of "no cause of action" filed after the default, and although, on appeal, the judgment of dismissal being reversed, it is remanded for further proceedings. *In re Stewart*, 43 South. 56, 118 La. 476.

A default is not a trial, and the case has not been "tried." *Adams v. Howard*, 14 Vt. 158, 560.

A case is not "tried," even though a counsel for defendant appears, if a default is obtained by the plaintiff. *Goddard v. Fullam*, 38 Vt. 75, 76.

The word "tried," as used in Code Civ. Proc. § 976, providing that an issue of law may be brought and tried as a contested motion, is to be deemed as synonymous with the words "disposed of." *People v. Bleecker St. & F. F. R. Co.*, 124 N. Y. Supp. 786, 787, 67 Misc. Rep. 582.

## TRY WITHOUT JURY

An equity action in which a jury is called to find part or all of the facts is not "tried without a jury," within the meaning of section 5630, Rev. Codes 1899, and is therefore not governed by that section, either as to the manner of trial in the district court or the review in the Supreme Court upon appeal. *Spencer v. Beiseker*, 107 N. W. 189,

191, 15 N. D. 140 (citing *Peckham v. Van Bergen*, 80 N. W. 759, 8 N. D. 595).

## TUBERCULOSIS

See Consumption.

## TUBES

See Boiler Tubes or Flues.

The provision in *Tariff Act 1897*, § 1, par. 152, 30 Stat. 163, for "steel tubes, finished," includes bottle-shaped vessels of steel, which are used in the transportation of gas, and are about four feet long and eight inches in diameter, with one end permanently closed and the other tapered to a neck. *United States v. Liquid Carbonic Co.*, 160 Fed. 455, 456, 87 C. C. A. 671 (citing and adopting *United States v. Downing*, 105 Fed. 1005, 44 C. C. A. 686).

Steel cylinders, severally 19 feet in length and 4 feet in diameter and 35 feet in length and 8 feet in diameter used as storage tanks for illuminating gas, are "tubes finished," within the meaning of the *Tariff Act of 1897*. *United States v. Knauth, Nachod & Kuhne*, 168 Fed. 539, 93 C. C. A. 619.

## TUITION

Under Act May 23, 1907 (P. L. 202), relating to the payment to a school district, in which high school pupils resident of another district are attending, of the pro rata cost of "tuition and school books," the word "tuition" does not include the cost of fuel, light, janitor's salary, and other incidental expenses; nor does it include interest upon bonds of the school district maintaining the high school. *Norristown Borough School Dist. v. Upper Merion Tp. School Dist.*, 49 Pa. Super. Ct. 561, 562.

A bequest of a sum of money "to pay the 'tuition' or education" of orphans or poor children under a certain age meant "to pay for the instruction or school training of orphans; that is, to pay the fee charged by teacher or school for instruction." *Crow ex rel. Jones v. Clay County*, 95 S. W. 369, 370, 196 Mo. 234.

In *Laws 1893*, p. 303, c. 175, giving a surviving parent authority by will or deed to dispose of the "custody and tuition" of their minor children, "custody and tuition" indicates the management of property. "Tuition" implies, not alone the instruction of the minor, but the expenditure of money for that instruction, which is one of the important duties imposed upon guardians or one charged with the control of a minor. *Kellogg v. Burdick*, 96 N. Y. Supp. 965, 967, 110 App. Div. 472.

## TUNING

"Tuning," in wireless transmission, is a term taken from the musical art, and implies the equalization of frequencies of vibration

of wave lengths. *National Electric Signaling Co. v. United Wireless Telegraph Co.*, 189 Fed. 727, 739.

## TUNNELS

As place of work, see *Place*.

As real property, see *Real Property*.

"Tunnels" are practically horizontal wells, differing from ordinary wells only in that the waters from the former find their way to the surface by gravity, while in the latter pumping must be resorted to to bring the water to the surface; both disturbing the natural flow of the subterranean waters, and both being artificial means of reaching and controlling the natural subterranean flow to develop water power. *Garvey Water Co. v. Huntington Land & Improvement Co.*, 97 Pac. 428, 432, 154 Cal. 232.

## TURF EXCHANGE

"Turf exchange," as used in a statute prohibiting the operation of a turf exchange, means a pool room or place for betting on horse races. *State v. Rabb*, 39 South. 971, 115 La. 733; *Same v. Nease*, 80 Pac. 897, 46 Or. 433; *Same v. Maloney*, 39 South. 539, 544, 115 La. 498.

## TURKEY

As poultry, see *Poultry*.

An allegation that the property raffled was a "turkey" is supported by proof that it was a dead turkey. *Commonwealth v. Coleman*, 68 N. E. 220, 222, 184 Mass. 193.

## TURN

See *Half Turn*; *Seasonably Turn*; *Whole Turn*.

## TURN IN LOADING

See *Loading*.

## TURN OVER

The words "turn over," in a will directing executors to "turn over and pay" the residuary estate to a trustee, are applicable to the securities comprising part of the residue. *Macy v. Mercantile Trust Co.*, 59 Atl. 586, 590, 68 N. J. Eq. 235.

## TURN STOCK

Under the statute which requires railroad companies to maintain fences sufficient to "resist horses, cattle and live stock," an instruction that a company was required to maintain one sufficient to "turn stock" was not improper; the quoted terms being synonymous. *Deal v. St. Louis, I. M. & S. Ry. Co.*, 129 S. W. 50, 52, 144 Mo. App. 684.

## TURNOUT

As *side track*

The words "turnouts" and "switches," in Acts Tenn. 1903, c. 216, providing that any

railroad company may build turnouts and switches without altering its charter, relate to tracks in the nature of side tracks adjacent to and used in connection with another line of track, and do not refer to a track which branches off entirely from the existing line to a distant objective point. *City of Memphis v. St. Louis & S. F. R. Co.*, 183 Fed. 529, 539, 106 C. C. A. 75.

A "turnout," as applied to a railway, is a short line of track having connection by means of switches with the main track. By means of it a single-track road may be used by cars moving in opposite directions, the "turnout" affording accommodations at the side of the track for one train while the other is passing over the main track at that point. It does not include an additional track, which, taken in connection with the original track and with a double-track railway with which the two tracks connected at the limits of a borough, constituted an unbroken double-track line. *Borough of Bridgewater v. Beaver Valley Traction Co.*, 63 Atl. 796, 798, 214 Pa. 343.

## TURNPIKE

"A 'turnpike' is a highway, differing neither in the responsibility for its proper maintenance nor in any other particular from an ordinary highway, save in the mode of constructing and maintaining it. An ordinary public road is maintained and repaired by taxes. A turnpike is supported and maintained by the tolls exacted. A turnpike is regarded in law as a public easement, and not as private property. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other highway." *State ex rel. Hines v. Scott County Macadamized Road Co.*, 105 S. W. 752, 758, 207 Mo. 54, 13 Ann. Cas. 656 (quoting *State ex rel. Allison v. Hannibal & R. C. Gravel Road Co.*, 39 S. W. 910, 138 Mo. 332, 36 L. R. A. 457).

As *highway*

See *Highway*.

As *public place*

See *Public Place*.

As *public road*

See *Public Road*.

As *real property*

See *Real Property*.

## TURNTABLE

The "turntable doctrine" is based upon the idea that a dangerous instrumentality has been constructed where children were in the habit of congregating, or at a place inviting to children, to the owner's knowledge, so that he ought to have anticipated that they would be attracted to it. *Meyer v. Union Light, Heat & Power Co.*, 151 S. W. 941, 942, 151 Ky. 332, 43 L. R. A. (N. S.) 136;

**Hight v. American Bakery Co.**, 151 S. W. 776, 168 Mo. App. 431; **Brown v. Chesapeake & O. R. Co.**, 123 S. W. 298, 300, 135 Ky. 798, 25 L. R. A. (N. S.) 717 (citing Thompson on Negligence, p. 952). See, also, **Brown v. Rockwell City Canning Co.**, 110 N. W. 12, 13, 132 Iowa, 631. But some courts do not accept this doctrine. **Conrad v. Baltimore & O. R. Co.**, 61 S. E. 44, 45, 64 W. Va. 176, 16 L. R. A. (N. S.) 1129.

## TURPENTINE

See Crude Turpentine.

As cultivation of the trees, see Cultivation.

As fructus industriales, see Fructus Industriales.

As personal property, see Personal Property.

## TURPITUDE

See Moral Turpitude.

## TURTLE

As animal, see Animal.

## TUYERES

"Tuyeres" of a Bessemer converter are the channels which connect the outer walls of the furnace with the interior. **Farrel v. United Verde Copper Co.**, 121 Fed. 551, 553.

## TWELVE

An instruction permitting the jury to assess defendant's punishment for manslaughter in the first degree at "twelve months" does not amount to an instruction to fix the punishment at a "year and a day." **Untrein v. State**, 41 South. 285, 288, 146 Ala. 26.

In an action on a fire policy, it was not error to refuse an amendment to the petition to the effect that a stipulation in the policy that any suit thereon must be commenced within "twelve months next after the fire" meant twelve months after plaintiff was entitled to commence suit. **McDaniel v. German-American Ins. Co.**, 67 S. E. 668, 134 Ga. 189.

Rev. St. 1899, § 6547 (Ann. St. 1906, p. 3274), now Rev. St. 1909, § 7342, requiring the court in cities having more than 100,000 population to excuse from jury service a person who has served on any jury within "twelve months next preceding" his challenge, means within twelve months from the date the juror began service on the regular panel, and not twelve months next preceding the trial, so that a juror summoned for one week beginning with Monday of the week of the trial, and who had sat on juries during that week, but not within a year prior to such Monday, was not disqualified. **Kaiser v. United Rys. Co. of St. Louis**, 135 S. W. 90, 91, 155 Mo. App. 428.

## TWELVE O'CLOCK

See Noon.

## TWENTY

The words "twenty days' notice," as used in a statute providing for the giving of "twenty days' notice" by publication in some newspaper, but which does not specify any number of issues of the paper in which the notice shall be published, are satisfied by a publication in one issue of the paper occurring twenty days prior to the date of the meeting or other action of which the publication purports to give notice. **McGilveray v. City of Lewiston**, 90 Pac. 348, 352, 13 Idaho, 338.

## TWENTY-ONE

The rule of the common law by which an estate devised must at all events vest within a life or life in being and twenty-one years afterward has reference to time, and not to persons; the term "life or lives in being" referring not to the persons who are to take, as testator may select as the measure of time the lives of any persons in existence, and "twenty-one years afterward" are twenty-one years in gross, without regard to the life or coming of age of any person. **Hayes v. Martz**, 89 N. E. 303, 305, 173 Ind. 279.

The law notes no fraction of a day. In law a man is "twenty-one years old" on the day preceding his twenty-first birthday. Hence one born on June 9, 1883, is eligible to vote on June 8, 1904. **Erwin v. Benton**, 87 S. W. 291, 295, 120 Ky. 536, 9 Ann. Cas. 264.

## TWENTY-FOUR HOURS

As day, see Day.

## TWICE IN JEOPARDY

See Jeopardy (In Criminal Law).

## TWO

Any two corporations, see Any.

The word "two," as used in Rev. St. 1881, § 3971, providing that any railroad company theretofore organized shall have the power to unite its road with any other railroad constructed or in progress of construction in this state, or in any adjoining state, and merge and consolidate the stock of the respective companies, making one joint-stock company of the "two" railroads thus connected, does not limit the roads that may consolidate to two, since, as a consolidated company may re-consolidate, it would make no substantial difference whether the consolidation was accomplished by successive acts or by one concurrent agreement. **Smith v. Cleveland, C., C. & St. L. R. Co.**, 81 N. E. 501-506, 170 Ind. 382.

Code 1896, § 2921, makes it the duty of a mine owner to have and maintain at least "two available openings" to the surface strata.

tum of coal worked. Held, that one opening, divided into two parts by a partition, does not comply with the statute, which meant that there should be two separate and distinct openings, two holes in the ground. *Howells Mining Co. v. Gray*, 42 South. 448, 449, 148 Ala. 535.

The expression "two years," as colloquially used, is always understood as an approximate statement, and a declaration by an applicant for an insurance policy that he has not received medical attendance within "two years" before the date of the application will be considered as used in this sense, and attendance by a physician on the applicant, beginning one year and nine months and ending one year and seven months before the application, is not necessarily a breach of warranty. *Owen v. Metropolitan Life Ins. Co.*, 67 Atl. 25, 26, 74 N. J. Law, 770, 122 Am. St. Rep. 413.

### TWO-STORY DWELLING HOUSE

The words "two-story dwelling house," in a deed conveying a lot and providing that nothing less than a "two-story dwelling house" shall be erected thereon, mean one two-story dwelling house designed and used for a single dwelling, and the construction of a flat dwelling house intended for the use of more than one family is prohibited. *Bagnall v. Young*, 114 N. W. 674, 675, 151 Mich. 69.

### TWO-THIRDS VOTE

Where a "two-thirds vote" or other proportion of a legislative body is described as necessary for any purpose, two-thirds of those who are present and constitute a quorum is understood, unless special terms are employed clearly indicating a different intention. *Misouri, K. & T. Ry. Co. v. Simons*, 88 Pac. 551, 554, 75 Kan. 130 (citing *Cooley*, Const. Lim. [7th Ed.] 201, note 2).

Const. 1901, § 76, requires a "vote of two-thirds of each house" for the passage of a bill at a special session of the Legislature upon a subject other than one designated in the Governor's proclamation calling the session. The final vote on an act at a special session not relating to any subject designated by the Governor was, yeas, 65, nays, 0; the membership of the House being 105. Held, that, in view of Const. § 52, which provides that "a majority of each house, shall constitute a quorum to do business," and in view of the explicit language used in instances in which an intent of the Constitution to require a stated proportion of the entire membership of each house or of the Legislature to authorize action in certain matters, as in Const. §§ 125, 284, 286, that the requirement was complied with by a favorable vote on the act of two-thirds of a quorum of each house, and hence that the act was constitutionally passed. *Farmers' Union-Warehouse Co. v. McIntosh*, 56 South. 102, 104, 1 Ala. App. 407.

As used in Const. art. 4, § 23, providing that "two-thirds of that house" shall be required to pass a bill or joint resolution that has been unapproved and unsigned by the Governor, the expression quoted means two-thirds of the members present in a lawfully constituted session, and not two-thirds of the total membership. *Smith v. Jennings*, 45 S. E. 821, 822, 67 S. C. 324.

### TYPE

The provision for "types, old," in the free list paragraph of the Tariff Act of 1897, does not include an alloy, containing approximately 85 per cent. of lead, 12 per cent. of antimony, and 3 per cent. of tin and copper, made from the dross of type metal refined and melted with 15 to 20 per cent. of old movable types, and cast in the form of stereotype plates, which were never used as such, but broken into pieces and packed in barrels for importation. Such material is dutiable as "type metal." *Sapery v. United States*, 135 Fed. 332, 68 C. C. A. 140.

### TYPEWRITING

As printing, see *Print—Printing*.

As subscribe, see *Subscribe—Subscription*.

The word "typewriting" is defined as the process of printing letter by letter by the use of a typewriter. *State ex rel. Coleman v. City of Oakland*, 77 Pac. 694, 696, 69 Kan. 784.

### TYPICAL CROSS-SECTION

A contract for the excavation of a bulkhead, the inner line of which was about 9 feet inshore from an established bulkhead line, and the base of which was to be 15 feet below mean low-water mark with allowance to the contractor for whatever he might excavate within an extra foot in each direction, specified that no payment should be made for excavation beyond those limits, "except where known loose rock is shown in the cross-sections above the top grade of the indicated rock, at a line ten feet westerly of and parallel to the bulkhead line, allowance will be made and paid for to a positive line which is forty-five degrees to the horizontal," and specified, as to "typical sections," that they were given as a guide only and to show approximately what the contractor might expect to encounter in the prosecution of the "work," and represented the "typical sections" as information upon (1) "the existing rock bottom which was the top of the loose rock; (2) the corresponding theoretical sections to be obtained, meaning the so-called nine-foot and fifteen-foot lines; and (3) the corresponding limiting lines to which payment will be made when it is impossible to produce the theoretical sections; and that all material was to be measured by comparison of 'accurate cross-sections.'" The points



at which the 45-degrees lines should commence could not be ascertained before the work commenced. Held, that the "corresponding theoretical sections" meant the 10-foot and 16-foot lines; that the "typical cross-sections" could not be regarded as the "accurate cross-sections"; that "work" had a double meaning, and, for the purpose of fixing the beginning points of the 45-degree lines, did not begin until the blasting began, when the junctions between the loose rock and the ledge rock became "known," so as to be "indicated" upon the cross-sections made by the city after the work was completed; and that work to such junctions was neces-

sitated and contemplated by the contract. *R. G. Packard Co. v. City of New York*, 137 N. Y. Supp. 9, 13, 151 App. Div. 941.

### TYPICAL IMBECILE

Where a finding was to the effect that a certain person was a "typical imbecile," the qualifying word "typical" was probably intended to mean that it was a characteristic or common example of imbecility, not abnormal or unusual, and not belonging to other types of mental incapacity, such as idiocy or insanity. *Caple v. Drew*, 78 Pac. 427, 429, 70 Kan. 136.

## U

**UBERRIMA FIDES**

"*Uberrima fides*" is the rule which applies to agents, partners, and trustees." Hence one owed his partner the strictest good faith, and as an agent of the firm was under obligation to keep an accurate account of the moneys which passed through his hands. *Wiggins v. Markham*, 108 N. W. 113, 115, 131 Iowa, 102 (citing *Levi v. Karrick*, 13 Iowa, 344; *Keyes v. Bradley*, 35 N. W. 656, 73 Iowa, 589).

**UBI EST SPECIALIS, ET RATIO GENERALIS GENERALITER ACCIPIENDA EST**

The maxim "*ubi est specialis, et ratio generalis generaliter accipienda est*," means that, when the reason for a particular legislative act and acts of the same general character is the same, they should have the same effect. *Guile v. La Crosse Gas & Electric Co.*, 130 N. W. 234, 241, 145 Wis. 157.

**UBI JUS, IBI REMEDIUM**

"*Ubi jus, ibi remedium*," does not mean that compensation is given for every loss. It simply means that there is a remedy to enforce and protect every legal right. *Carroll v. Rye Tp.*, 101 N. W. 894, 897, 13 N. D. 458.

The maxim "*ubi jus, ibi remedium*," finds expression in Civ. Code, Ga. 1895, § 4929, where it is declared that "for every right there shall be a remedy, and every court having jurisdiction of the one may, if necessary, frame the other." *Henry v. Cherry & Webb*, 73 Atl. 97, 101, 30 R. I. 13, 24 L. R. A. 991, 136 Am. St. Rep. 928, 18 Ann. Cas. 1006.

**ULTIMATE****ULTIMATE FACT**

The distinction between "ultimate facts" to be found by the jury and mere "conclusions" is an interesting one, as is evidenced by the following extract: "It sometimes happens that facts are so close to the line dividing inferential facts from evidentiary facts that the only safe plan is to put them in the special verdict, where they can do no harm if they should turn out, in the opinion of the court, to be evidentiary facts, and where their absence might be fatal if they should turn out to be inferential facts." *Republic Iron & Steel Co. v. Jones*, 69 N. E. 191, 192, 32 Ind. 189 (quoting *Louisville, N. A. & C. Ry. Co. v. Miller*, 37 N. E. 348, 141 Ind. 550).

**ULTIMATE OBJECT**

Intent distinguished, see *Intent*.

**ULTIMATELY**

Testator declared that the income of the residue should be divided annually between

his son and daughter, share and share alike, "subject to the provisions hereinafter contained," and in case of death of either of them his or her share should go to his or her children, and in case of death of either, and of all of the children of the deceased one, then the surviving son or daughter or surviving grandchildren should receive all of the residue; that all of his estate should "ultimately" be divided equally between all of the children of his son and daughter who should attain the age of 21 if a female, and 25 if a male, and that, when either such grandson or granddaughter should attain the required age, he or she should receive in kind the legal title to his or her proportion of the estate; provided that in case of the death of any of the grandchildren before attaining such ages, but after any such conveyance, then such grandchild receiving the conveyance should be entitled to a further share, so as in the end to divide the estate among the grandchildren attaining such ages equally. Held, that testator's two children each took one-half the income for life, and on termination of one of such life estates the children of the life tenant took their parent's share of the income during the life of the other life tenant, and on the termination thereof all of the grandchildren, whether born before or after testator's death, should "ultimately" share equally in the corpus of the estate provided they arrived at the required age. *Pitzel v. Schneider*, 74 N. E. 779, 782, 216 Ill. 87.

**ULTRA VIRES**

The term "*ultra vires*," in its literal sense, means beyond the power or capacity of a corporation, company, or person, and this must be understood to mean lawful authority. *Chicago, I. & L. Ry. Co. v. Southern Ind. Ry. Co. (Ind.)* 70 N. E. 843, 852.

"The term '*ultra vires*' is the modern legal nomenclature for acts of a corporation through any of its instrumentalities which are beyond the powers conferred by law upon the legal entity." *Fifth Avenue Coach Co. v. New York*, 111 N. Y. Supp. 759, 770, 58 Misc. Rep. 401.

An "*ultra vires*" act is one beyond the express or implied powers of the corporation. *Bradbury v. Waukegan & W. Mining & Smelting Co.*, 113 Ill. App. 600, 609.

Undertakings of a corporation are "*ultra vires*" when they involve adventures beyond the scope of, or the power given, by the charter. *Kavanaugh v. Commonwealth Trust Co. of New York*, 118 N. Y. Supp. 758, 772, 64 Misc. Rep. 303.

The doctrine of "*ultra vires*" has no application to a corporation's torts, but is applicable only to its contractual relations.

Burke v. State, 119 N. Y. Supp. 1089, 1099, 1100, 64 Misc. Rep. 558.

"Ultra vires," when used with reference to tortuous acts of the agents of a municipal corporation, denotes an act or acts done on behalf of the corporation, not within the scope of the powers conferred on it. *Healdsburg Electric Light & Power Co. v. City of Healdsburg*, 90 Pac. 955, 956, 5 Cal. App. 558.

"Ultra vires" contracts are contracts which are beyond the statutory powers of the corporation, and not contracts expressly prohibited by statute and contrary to the public policy of the Legislature. *Strickland v. National Salt Co.* (N. J.) 81 Atl. 828.

An "ultra vires" act is one beyond the power of a corporation, and therefore without legal sanction or vitality; but, though a note given by a corporation for stock in another corporation is ultra vires and uncollectible, such note, when issued by a corporation having authority to issue negotiable paper, is not void in the hands of a bona fide purchaser. *Jefferson Bank of St. Louis v. Chapman-White-Lyons Co.*, 123 S. W. 641, 645, 122 Tenn. 415 (citing 1 Daniel Neg. Paper [3d Ed.] p. 352, § 377).

When acts of corporations are spoken of as "ultra vires," it is not intended that they are unlawful, or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created. *First Nat. Bank of Kansas City v. Guardian Trust Co.*, 86 S. W. 109, 117, 187 Mo. 494, 70 L. R. A. 79 (quoting and adopting the definition in *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, 20 Am. Rep. 504).

Without formulating a definition, it may be properly said that the doctrine of "ultra vires" is that at the instance of the state where public policy requires it, or at the instance of stockholders or creditors whose rights would otherwise be injuriously affected, corporations will be held powerless to do anything not clearly within the terms of their charter or statutory provisions. Our courts, however, hold that the plea of ultra vires will not avail a corporation with respect to an act for which it has received consideration in any case where the status quo ante cannot be restored. In such cases the corporation is estopped to set up the plea of ultra vires. Accommodation notes given by a business corporation are not valid as against corporate creditors or dissenting stockholders, but a corporation cannot be heard to plead that such notes, given by it with the consent of all the stockholders, were ultra vires. *Perkins v. Trinity Realty Co.*, 61 Atl. 167, 170, 69 N. J. Eq. 723 (citing *C. & A. R. R. Co.*

*v. Mays Landing, etc., R. Co.*, 7 Atl. 523, 48 N. J. Law, 530; *Breslin v. Frieze-Breslin Co.*, 58 Atl. 313, 70 N. J. Law, 274).

"We must look to the cases, rather than to the lexicographers, for a definition of the term 'ultra vires.' Without attempting to cover the whole ground, it may be said that if a contract is of such character that, had the corporation at once proceeded to execute it, its acts would have been contrary to public policy, or expressly or impliedly prohibited by statute, or would in any degree disable the corporation from the performance of its statutory duties, the undertaking cannot be enforced by either party. To this extent the cases, English, federal, and state, are in reasonable harmony." Under Act March 14, 1867 (*Burns' Rev. St.* 1901, § 3623), providing that the common council shall have exclusive power over the streets, highways, alleys, and bridges within such city, the common council of a city, in permitting a gas company to use the streets for distributing gas to the inhabitants, may protect the latter from extortion by providing that the company shall not charge in excess of certain prices for its service. *Muncie Natural Gas Co. v. City of Muncie*, 66 N. E. 436, 439, 160 Ind. 97, 60 L. R. A. 822.

"The doctrine of 'ultra vires' is a most powerful weapon to keep private corporations within their legitimate spheres, and to punish them for violations of their corporate charters, and it probably is not invoked too often; but to place that power in the hands of the corporation itself, or a private individual, to be used by it or him as a means of obtaining or restraining something of value which belongs to another, would turn an instrument, intended to effect justice between the state and corporations into one of fraud as between the latter and innocent parties. Such is the modern doctrine, evolved and settled in the progress of events, reaching from the time when private corporations were few, and the doctrine of ultra vires invoked quite as freely as to them as to public corporations, to a time when substantially all restrictions to the formation of such private bodies were removed, and they were authorized and commenced to exist, great and small, everywhere, for the purpose of conducting almost every kind of legitimate business. If such a body transcend its powers, it commits a wrong against the state, and ordinarily it is for the state only to call it to account for such violation." *Harris v. Independence Gas Co.*, 92 Pac. 1123, 1126, 76 Kan. 750, 13 L. R. A. (N. S.) 1171 (quoting and adopting definition in *Zinc Carbonate Co. v. First Nat. Bank*, 79 N. W. 229, 103 Wis. 125, 74 Am. St. Rep. 845).

"Perhaps the most general statement which can be made of the doctrine of 'ultra vires,' is to say that the contract of a corporation which is unauthorized by, or in violation of, its charter or other governing statute, or

entirely outside the scope of the purposes of its creation, is void, in the sense of being no contract at all, because of a total want of power to enter into it. The transaction may be beyond the powers of the corporation, simply because it is foreign to the purposes expressed or implied in the charter; it may invoke the exercise of a power, not forbidden, but simply ungranted, as, for example, where, a railroad company undertakes to guaranty the expenses of a public festival. In the better usage, the term 'ultra vires' is limited to acts of the latter class, and many of the courts make a distinction between transactions which are illegal, because forbidden, and those which are simply in excess of the granted powers." Where the charter of a railroad company conferred power to operate a railroad, to erect warehouses and other works necessary to the road, to erect all buildings, stations, other works, and accommodations necessary or convenient for the operation of the road, to aid any other company "in the construction of its road," to consolidate with any other corporation owning a railroad, or a railroad and any other property, and to guarantee the obligations of other railroad companies, a contract by which it contracted to pay out of certain of its earnings such "commissions" on its receipts as would make good to a hotel company a deficit in the hotel company's earnings sufficient to enable the hotel company to pay dividends on its stock and interest on its bonds was ultra vires and void. *Western Maryland R. Co. v. Blue Ridge Hotel Co.*, 62 Atl. 351, 352, 354, 102 Md. 307, 2 L. R. A. (N. S.) 887, 111 Am. St. Rep. 362 (quoting and adopting definition in 10 Cyc. 1146; *France's Elements of Corp. Law*, § 72).

It is not "ultra vires" for a canal company to contract to construct a basin on land conveyed to it for a canal, to be connected with the canal, as a part of the consideration of the conveyance; a basin being necessary and useful for loading and unloading boats. *Dawson v. Western Maryland R. Co.*, 68 Atl. 301, 303, 107 Md. 70, 14 L. R. A. (N. S.) 809, 126 Am. St. Rep. 337, 15 Ann. Cas. 678.

"Ultra vires" contracts are only those which are defective solely because they are beyond the power of the corporation, because involving some undertaking not within the scope of the corporation's charter. Ultra vires and illegality represent totally different ideas. *Maryland Trust Co. v. National Mechanics' Bank*, 63 Atl. 70, 72, 102 Md. 608.

"A corporation is not liable on an accommodation indorsement in the hands of one who takes with knowledge of that fact. Such an indorsement is 'ultra vires.' That means that the corporation would not be liable on it, even if it had been authorized by all the directors and a majority of the stockholders." *Cook v. American Tubing & Webbing Co.*, 65 Atl. 641, 646, 28 R. I. 41,

9 L. R. A. (N. S.) 193 (citing *Usher v. Raymond Skate Co.*, 39 N. E. 416, 163 Mass. 1, and *J. G. Brill Co. v. Norton & T. St. Ry. Co.*, 75 N. E. 1093, 189 Mass. 431, 2 L. R. A. [N. S.] 525).

"A contract of a corporation which is 'ultra vires' in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature—is not voidable only, but wholly void and of no legal effect." A contract with a street railway company to pave a street for a consideration inuring to the benefit of abutting owners is ultra vires, since a street railway company organized under the Illinois law has no power to engage in the business of paving streets. *Harding v. Harding*, 68 N. E. 754, 760, 205 Ill. 105 (quoting and adopting definition in *National Home Building & Loan Ass'n v. Home Savings Bank*, 181 Ill. 35, 54 N. E. 619, 64 L. R. A. 399, 72 Am. St. Rep. 245).

"Ultra vires contracts" of a municipal corporation are such as the corporation has no power to make under any circumstances or for any purpose; but where a municipal corporation enters into a contract which, under the existing law, it has authority to make, but fails to follow the procedure laid down by the statute, it is not "ultra vires," but irregular, and the contractor or his assignee may recover a balance due thereon. *Rogers v. City of Omaha*, 114 N. W. 833, 80 Neb. 591.

A contract of a corporation is "ultra vires" when it is outside the objects of its creation as defined in the law of its organization and therefore beyond the powers conferred on it by the Legislature. Where a corporation, formed, according to its articles, for buying and selling merchandise, guaranteed, merely as an accommodation to a customer indebted to it, payment for any merchandise a party might sell to such customer, the contract was "ultra vires," under Rev. St. 1889, § 2508, providing that no corporation shall engage in business other than expressly authorized in its charter, or the laws under which it was organized. *Ellett-Kendall Shoe Co. v. Western Stores Co.*, 112 S. W. 4, 5, 132 Mo. App. 513.

A contract of a corporation which is unauthorized by or in violation of its charter or other governing statute, or entirely outside the scope of the purposes of its creation, is "ultra vires," in the sense of being no contract at all, because of total want of power to enter into it. "The transaction may be beyond the powers of the corporation simply because it is foreign to the purposes expressed or implied in the charter. It may invoke the exercise of a power not forbidden, but simply ungranted, as, for example, where a railroad undertakes to guarantee the expenses of a public festival. In the bet-

ter usage, the term 'ultra vires' is limited to acts of the latter class, and many of the courts make a distinction between transactions which are illegal because forbidden and those which are simply in excess of granted powers." *Fifth Avenue Coach Co. v. City of New York*, 111 N. Y. Supp. 759, 770, 58 Misc. Rep. 401.

A corporate contract is "ultra vires," in the proper sense of that term, when it is outside the object of the corporation's creation as defined in the law of its organization and therefore beyond the powers conferred upon it by the Legislature. Such a contract is not merely voidable, but wholly void and of no legal effect. The objection to it is not merely that the corporation ought not to have made it, but that it could not make it. The purchase by a corporation, organized under Rev. St. Mo. 1899, § 2839, subd. 9, providing for the organization of trust companies to buy and sell all kinds of government, state, municipal, and other bonds, and all kinds of negotiable and nonnegotiable paper, stocks, and other investment securities, of all the stock of another corporation, for the purpose of controlling its affairs or exercising its powers through the use of its name, is "ultra vires" and void; such section merely authorizing the purchase of stock as investment securities. *Anglo-American Land Mortgage & Agency Co. v. Lombard*, 132 Fed. 721, 737, 68 C. C. A. 89 (quoting and adopting definition given in *Central Transp. Co. v. Pullman's Palace Car Co.*, 11 Sup. Ct. 478, 139 U. S. 24, 59, 35 L. Ed. 55).

"The term 'ultra vires' has been used without accurate discrimination. Certain contracts on the part of corporations may be prohibited by positive law, either statutory or common. Where such contracts are made by corporations, they are, of course, unlawful. They are *mala prohibita* and void, and for the same reason that the prohibited contract of an individual would be void. Yet courts have termed them 'ultra vires,' and have then proceeded to say that ultra vires contracts were void, and might be disregarded at pleasure. More properly speaking, ultra vires contracts of a corporation are such as do not in any manner serve the accomplishment of the purposes for which the corporation is chartered. They are contracts not positively forbidden, but impliedly forbidden, because not expressly or impliedly authorized." *State v. Corning State Sav. Bank*, 113 N. W. 500, 503, 136 Iowa, 79 (quoting and adopting definition in *Tourtelot v. Whithed*, 84 N. W. 8, 9 N. D. 407).

"Ultra vires" acts of a corporation are such acts as are not within the charter of the corporation, which is the contract under which it is organized and does business, and which includes the privileges and franchises extended to the corporation by the law under which it is acting. Every act done by the di-

rectors or by a majority of the stockholders outside of the charter is unauthorized, though it might have been proper, had the stockholders by their contract seen fit to bring it within the scope of the business they agreed to do. It may be such an act as the law would permit the corporation to do, if the corporation contract had been made broad enough to include it, but is ultra vires, nevertheless, because it is outside of the contract made by the stockholders. *Germer v. Triple-State Natural Gas & Oil Co.*, 54 S. E. 509, 517, 60 W. Va. 143.

In its primary sense, an act is "ultra vires" the powers of a corporation when it is wholly outside the scope of the purposes for which the corporation was formed or has its being, and which it has no authority to perform under any circumstances or in any mode. In a secondary sense, however, an act is ultra vires as it affects the rights of persons without whose consent it may not be done, or when a corporation is not authorized to perform it for the specific purpose, or in the particular manner involved, notwithstanding it may be within the scope of its general powers. If the act is ultra vires in the first sense, the defense is always available; but, when the doctrine is to be applied in the second sense, its availability depends on the circumstances of the particular case. *Wykes v. City Water Co. of Santa Cruz*, 184 Fed. 752, 755.

The term "ultra vires" is used in many different senses. First, it describes a contract which is not within the scope of the powers of a corporation to make under any circumstances or for any purposes. The second meaning refers to contracts of a class which the corporation had a right to execute, but with respect to which there has been some irregularity or defect in the actual exercise of the power "in some particular or through some undisclosed circumstance" affecting the individual contract in issue. The former class is ultra vires in the primary, and really only proper, sense of the term, while in the second it is merely secondary; that is to say, an ultra vires municipal contract in its true sense is a contract relating to matters wholly outside the charter powers of a corporation. When an act is ultra vires in the first sense mentioned, it is generally, if not always, void in toto, and the corporation may avail itself of the plea; but when it is ultra vires in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case. *Beil v. Kirkland*, 113 N. W. 271, 273, 102 Minn. 213, 13 L. R. A. (N. S.) 793, 120 Am. St. Rep. 621 (citing 8 Words and Phrases, pp. 7165, 7166).

#### ULTRA VIRES ABSOLUTE

The acts of a bank which are "ultra vires absolute" are such as are beyond the

powers of the bank for any purpose and under all circumstances. *Fidelity & Deposit Co. of Maryland v. National Bank of Commerce of Dallas*, 106 S. W. 782, 785, 48 Tex. Civ. App. 301.

## UMPIRE

An "umpire" is one called into an arbitration to act only after a disagreement between the arbitrators, and his opinion and judgment as to the points of disagreement must control and determine the award; but he has no right, in the absence of one of the parties and one of the arbitrators, to act on information from the other party and arbitrator. *Cravens v. Estes*, 139 S. W. 761, 764, 144 Ky. 511.

Where an insurance policy provided that, in the event of a disagreement as to the amount of loss, the same should be ascertained by two disinterested appraisers; one to be selected by each party and the two selecting an umpire, to whom differences should be submitted, the award of any two being final the person chosen as umpire by the two appraisers was thereby invested with the power and authority only of an "umpire," in the strict sense of that term, and was authorized to act upon and decide only the matters on which appraisers failed to agree. He was not authorized to act with them as a third appraiser, or to form one of a majority of the three to render an award of the entire loss. *Home Ins. Co. of New York v. M. Schiff's Sons*, 64 Atl. 63, 66, 103 Md. 648.

## UN

"Un" is a preposition, used indiscriminately, and may mean simply not. As used before another word, it may not necessarily mean "contrary to," but may mean "not authorized by," as in the word "unlawful." *State v. Savant*, 38 South. 974, 975, 115 La. 226.

## UNABLE

### Unable to attend to his duties

Where a statute authorizes the court to appoint an assistant prosecuting attorney, where the regular attorney is "unable to attend to his duties," the words mean some mental or physical incapacity to perform his duties, and not a lack of experience or incapacity to conduct the prosecution properly. *Taylor v. State*, 38 South. 380, 385, 49 Fla. 69 (citing *Mahaffey v. Territory*, 66 Pac. 342, 11 Okl. 213).

### Unable to offer tax list

Under Rev. St. c. 9, § 74, barring the right to abatement of taxes unless the applicant was "unable" to offer the list to the assessors at the time appointed, an applicant for abatement of taxes does not show that he

was "unable" to offer such list by proof that he in good faith supposed that he was a non-resident, and had been so regarded by the assessors for a series of years, including the year of the assessment complained of, if in fact he was a resident, and liable to taxation as such. *Edwards Mfg. Co. v. Farrington*, 66 Atl. 309, 311, 102 Me. 140.

### Unable to travel

A witness who has returned home by medical advice, because it would have been dangerous for him to remain at the trial, is "unable to travel," within the meaning of a statute allowing his deposition to be read in such case. *State v. Wheat*, 35 South. 955, 959, 111 La. 860.

### Unable to work

See Sick and Unable to Work.

## UNANIMOUS—UNANIMOUSLY

In a statute requiring the "unanimous vote of all the members" of the council to pass an ordinance, those words mean the votes of all the members constituting the council, and not the unanimous vote of a quorum or of all the members present. *Crickenberger v. Town of Westfield*, 58 Atl. 1097, 71 N. J. Law, 467.

Under Act April 3, 1902, providing that, in case the owners of property along a street object to the construction of a sewer, it shall be constructed notwithstanding the objections, provided the board of health shall certify that a resolution has been "unanimously adopted" by the board that in its opinion the construction of the sewer is necessary to preserve the public health, held, that a unanimous vote of all the members of the board of health was not required, but that the resolution was "unanimously adopted" where the board of health passing the same was legally constituted and the resolution was adopted without any dissenting vote of all the members present, and all voting. *Coxon v. Inhabitants of City of Trenton*, 73 Atl. 253, 254, 78 N. J. Law, 26.

## UNAPPROPRIATED

The term "unappropriated" refers to land that is not in the possession of one who claims the right of possession by virtue of a compliance with the law. *Conn v. Oberto*, 76 Pac. 369, 370, 32 Colo. 313.

## UNAUTHORIZED

### UNAUTHORIZED PURPOSE

A tax levied under an ordinance passed on an unconstitutional statute whereby territory is annexed to a city is one levied for an "unauthorized purpose," within the meaning of Scavenger Act, § 15, and may be adjudged void in a proceeding brought under such act. *State v. Several Parcels of Land*, 111 N. W. 601, 602, 78 Neb. 703.

**UNAVOIDABLE****UNAVOIDABLE ACCIDENT**

"Unavoidable accident," as used in a statute relieving railroad companies from penalty for a default caused by unavoidable accident, means an accident unavoidable by the railroad sought to be penalized. *Hardwick Farmers' Elevator Co. v. Chicago, R. I. & P. R. Co.*, 124 N. W. 819, 821, 110 Minn. 25, 19 Ann. Cas. 1088 (citing *Patterson v. Missouri Pac. R. Co.*, 94 Pac. 138, 77 Kan. 236, 15 L. R. A. [N. S.] 733).

A railroad is not liable for injuries to a passenger resulting from unavoidable accident; but the "buckling" of rails due to their expansion by heat in warm weather, in consequence of the road's failure to leave sufficient space between the ends of the rails, is not an "unavoidable accident," which will relieve it of liability. *Chesapeake & O. Ry. Co. v. Burke*, 145 S. W. 370, 371, 147 Ky. 694, Ann. Cas. 1913D, 208.

Where the findings exonerate defendant from all acts of negligence alleged, and the jury also find that plaintiff was not guilty of contributory negligence, the injuries were caused by what the law designates as an "unavoidable accident." *Tawney v. Atchison, T. & S. F. Ry. Co.*, 114 Pac. 223, 224, 84 Kan. 354 (citing 8 Words and Phrases, p. 7149).

Where, in an action for injuries in a street car accident, the court instructed that the burden was on plaintiff to prove defendant's negligence, and, if he failed, he could not recover, an instruction that there was no liability for an unavoidable accident was properly refused; an "unavoidable accident" being necessarily one occurring not because of negligence, which was eliminated by the requirement of proof of negligence. *Flanagan v. Chicago City Ry. Co.*, 145 Ill. App. 56; *Id.*, 90 N. E. 688, 690, 243 Ill. 456.

The writ in an action begun within the period of limitations was issued April 16th, and the next day plaintiff's attorney in another county sent the writ by mail to the clerk of the county court, with a letter requesting him to approve the bail bond, and forward the writ to plaintiff's local attorney by United States mail. The clerk complied with the request, and on April 18th forwarded the letter to the latter attorney, who was then away from home, but returned in about a week, when a period of some 12 days still remained for service. He did not find the writ, and knew nothing about it until the following August, when it was discovered in a pigeonhole with mail relating to an official position held by the attorney, which had come in envelopes of the same sort. The attorney had assumed that his associates in the other county would attend to the service of the writ, and he acted in good faith. The writ failed in service by "unavoidable accident," within the mean-

ing of V. S. 1214, providing that if, in an action commenced within the time limited by statute, the writ fails of sufficient service by unavoidable accident, the plaintiff may have a year from the determination of the original suit to commence a new action. *Tracy v. Grand Trunk Ry. Co.*, 57 Atl. 104, 107, 76 Vt. 313.

An "unavoidable accident" is defined to be "an event from an unknown cause or an unusual or unexpected event from a known cause, chance or casualty; as if a railroad bed be in good order, and the engine and cars be in good order, and the engineer and other attendants be skillful and careful, and yet a rail breaks and the train is crushed, and employes and passengers are killed, that is an unusual and unexpected event from an unknown cause, and an accident." Hence, in an action against a street railway for injuries received by a passenger from a derailment of defendant's car, an instruction that, if such derailment was the result of a mere accident, then the railroad company is not guilty, is not objectionable because charging the railroad company with the burden of showing that the derailment was accidental. *Overcash v. Charlotte Electric R., Light & Power Co.*, 57 S. E. 377, 379, 144 N. C. 572, 12 Ann. Cas. 1040 (quoting and adopting definition in *Crutchfield v. Richmond & D. R. Co.*, 76 N. C. 320).

In agreements to sell tomatoes, binding the seller, a canning company, to deliver 75 per cent. of the stipulated quantity in case of a total or partial failure of the crop, and containing an exception as to the remaining 25 per cent. if the failure was due to the destruction of the crop by hail, drought, or any "unavoidable" accident or casualty, the use of the word "unavoidable" suggests that the crop failure which was to excuse performance was one the seller could not avoid, thereby implying there might be a failure of the crops for which it would be to blame and which would not excuse performance. But this could not be true unless the failure was confined to territory over which it might have some control; that is, the vicinity of its canner, or at most the territory planted by persons with whom it made contracts and with whom it might have stipulated against inefficient cultivation of the crop. *Ryley-Wilson Grocer Co. v. Seymour Canning Co.*, 106 S. W. 628, 632, 129 Mo. App. 325.

In *Central of Georgia Ry. Co. v. Hall*, 52 S. E. 679, 683, 684, 124 Ga. 322, 4 L. R. A. (N. S.) 898, 110 Am. St. Rep. 170, 4 Ann. Cas. 128, the court discusses at great length the definition of "act of God" and the distinction between an "act of God" and an "unavoidable accident," but without arriving at any conclusion of its own, except that, to relieve a carrier from liability on the ground that the injury was caused by an act of God, the carrier must itself be free from any fault

contributing to the injury. In the course of the discussion the court makes the following citations: *Hays v. Kennedy*, 41 Pa. 378, 80 Am. Dec. 627; *Stroud's Jud. Dict.*; *Bouv. Law Dict.*; *Black's Law Dict.*; *Anderson's Law Dict.*, words "acts of God," "common carrier," and citations; 3 *Wood's Ry. Law*, 1574; 2 *Kent's Com.* 598; 5 *Thomp. Neg.* 6456; *Story, Ballm.* (9th Ed.) § 25; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Story on Ballm.* §§ 25, 511; 2 *Kent's Com.* 597; *Backhouse v. Sneed*, 5 N. C. 173; *Ewart v. Street* (S. C.) 2 *Bailey*, 157, 23 Am. Dec. 131; *Smyrl v. Niolon* (S. C.) 2 *Bailey*, 421, 23 Am. Dec. 146; *Central Line of Roats v. Lowe*, 50 Ga. 509; *Doster v. Brown*, 25 Ga. 24-26, 71 Am. Dec. 153; *Cannon v. Hunt*, 38 S. E. 983, 113 Ga. 501-509; *Young v. Waldrup*, 18 S. E. 23, 91 Ga. 765; *Richmond R. Co. v. White*, 15 S. E. 802, 88 Ga. 805; *Carr v. Houston Guano & Warehouse Co.*, 31 S. E. 178, 105 Ga. 268; *McArthur v. Sears* (N. Y.) 21 *Wend.* 190; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292; *New Brunswick Steamboat & Canal Transp. Co. v. Tiers*, 24 N. J. Law, 697, 64 Am. Dec. 394; *Broom's Legal Maxims* (8th Ed.) 229, 230.

#### Inevitable accident synonyms

An "unavoidable accident," within Act March 4, 1907, c. 2939, § 3, 34 Stat. 1415, exempting railway companies from penalties for working employes overtime in case of "unavoidable accident," is an inevitable accident which could not have been foreseen and prevented by using ordinary diligence, and resulting without the company's fault. *United States v. Kansas City Southern Ry. Co.*, 189 Fed. 471, 477.

#### UNAVOIDABLE CASUALTY

Sickness of defendant's counsel preventing him from attending court is ground for vacation of a default judgment, under *Kirby's Dig.* § 4431, subd. 7, authorizing it in case parties are prevented by "unavoidable casualty or misfortune" from appearing or defending. *Capital Fire Ins. Co. v. J. H. Davis & Son*, 108 S. W. 202, 203, 85 Ark. 385.

If, when an action was begun and continuously until after judgment against defendant, she, though she had a good defense, was disabled by sickness from appearing in court or from preparing or making her defense, she was entitled to a vacation of the judgment for "unavoidable casualty or misfortune," under Civ. Code Prac. § 518, subd. 7. *Baker v. Owensboro Savings Bank & Trust Co.'s Receiver*, 130 S. W. 969, 970, 140 Ky. 121.

The casualty or misfortune that authorizes a new trial must be "unavoidable"; that is, such as could not be by the exercise of reasonable skill and diligence have been avoided, and does not include the failure to discover that an order had not been entered, due only to the laxity in searching the records in the office of the clerk of the court. *Louis-*

*ville & N. R. Co. v. Paynter's Adm'x*, 101 S. W. 935, 938, 125 Ky. 520.

Unavoidable casualty or misfortune, within Civ. Code Prac. § 518, subsec. 7, which authorized the granting of a new trial for "unavoidable casualty or misfortune" preventing the party from appearing or defending, includes a case where plaintiff was ill, and neither she nor her counsel appeared, and the case was dismissed, of which action plaintiff was ignorant until long afterwards, supposing the attorney to be looking after her interests in the case. *Ray v. Arnett* (Ky.) 106 S. W. 828, 829.

Whether a misunderstanding between defendant and his counsel as to which of them should look up evidence of facts on which the defense rested, whereby the evidence was not obtained, amounts to "unavoidable casualty," within Code, § 4091, so as to authorize the setting aside of a default judgment, depends much on the honesty of it, of which a disclosure of a meritorious defense is some evidence. Such a casualty may be easily fabricated, and it is important that it be scrutinized closely. *Farmers' Exchange Bank v. Trestler*, 124 N. W. 793, 795, 145 Iowa, 665.

A foreign insurance company which had consented to service of process upon the Commissioner of Insurance ceased to do business in the state, and notified the commissioner that it had withdrawn therefrom, and that thereafter no service should be had upon him in suits brought against it. Thereafter suit was brought on an agency contract, and process served upon the commissioner, who failed or neglected to forward the summons to the company, and a default judgment was rendered before it knew of the pendency of the action. Held that, under Civ. Code Prac. § 518, subsec. 7, the company was entitled to have the judgment set aside for "unavoidable casualty or misfortune." *Chicago Life Ins. Co. v. Robertson*, 143 S. W. 740, 743, 147 Ky. 61.

The petitioner's counsel, on the 13th day of May, 1907, the day on which the term of court convened at which the action stood for trial, having written to the clerk of the court at Hobart, Okl., from Wichita, Kan., requesting to be advised by return mail on what day such case had been assigned for trial, no reply being received, on the 15th or 16th of the same month petitioner received a letter from a party at Hobart advising him that the case would be reached the latter part of the next week. Petitioner immediately wrote such party to advise him by wire on what day the case was set for trial. On the 18th he received a telegram as follows: "Your case is set for the 1st." Petitioner immediately took the letter to his attorney in Wichita, and they construed it to mean the case was set for the 1st of June, and set about to get ready for the trial of the cause. About the 23d of May petitioner received a letter



from the same party at Hobart that judgment had been rendered on default on the 21st. On investigation, it was revealed that the telegram had been filed with the company at Hobart reading, "Your case is set for the 21st," but that by mistake in transmission, when delivered, it was made to read as above stated. If the telegram had been correctly transmitted, petitioner and his counsel would have been present on the 21st and defended the action. Held, that the construction of the telegram as delivered was reasonable, and, the petitioner and his counsel having exercised ordinary diligence, that this amounted to an "unavoidable casualty or misfortune," within the statute respecting vacation of judgments. *McLaughlin v. Nettleton*, 105 Pac. 662, 25 Okl. 319 (citing *Corning & Horner v. Tripp* [N. Y.] 1 How. Prac. 14; *Trustees of the Northern Dispensary of New York v. Merriam* [N. Y.] 59 How. Prac. 226; *Boyd v. Williams*, 56 Atl. 135, 70 N. J. Law, 185; *Wynn v. Frost*, 50 Pac. 184, 6 Okl. 89; *Williams v. Richmond & D. R. Co.*, 15 S. E. 97, 110 N. C. 466; *Syfers v. Kelsner*, 66 N. E. 1021, 31 Ind. App. 6; *Schnitzler v. Wichita Fourth Nat. Bank*, 1 Kan. App. 674, 42 Pac. 496).

#### UNAVOIDABLE CAUSE

"Unavoidable causes," as the term is used in a contract relieving from a specified penalty for delay brought about through unavoidable causes, literally defined, are inevitable causes, such that no human power could prevent. *City of Mankato v. Barber Asphalt Paving Co.*, 142 Fed. 329, 345, 73 C. C. A. 439.

Where several months elapse between the date of the death of counsel for the plaintiff in certiorari and the expiration of the time within which notice of the sanction of the petition could regularly have been given, such death will not be considered as "unavoidable cause," within a statute providing that in default of such notice, unless prevented by "unavoidable cause," the certiorari shall be dismissed. *Johnson v. State*, 58 S. E. 415, 2 Ga. App. 181.

An "unavoidable cause," which cannot be anticipated or avoided by the exercise of due diligence and foresight," and which will legally excuse an interstate carrier of live stock for confining such stock in cars for a period longer than 28 consecutive hours without unloading for rest, water, and feeding, under Act June 29, 1906, c. 3594, § 1, 34 Stat. 607, is one which cannot be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under the circumstances of the particular case, and as would have been exercised by a man of ordinary prudence under such circumstances. An accident occurring to a train through the negligence of the transportation company is not such a cause; nor is mere press of business, or the side-tracking of the

train to allow for the passing of other trains, the meeting or passing of which could have been anticipated when the transportation was begun, or the lack of facilities for unloading or feeding. *United States v. Southern Pac. Co.*, 157 Fed. 459, 461.

The measure of "due diligence and foresight" is that diligence and foresight which persons of ordinary prudence and care commonly exercise under similar circumstances. And the due diligence and foresight which condition the anticipation and avoidance of the other incidental or unavoidable causes specified in the 28-hour law is that degree of diligence and foresight which reasonably prudent and careful men ordinarily exercise under like circumstances. An "accidental or unavoidable cause" which cannot be avoided by the exercise of due diligence and foresight in the meaning of this law is a cause which reasonably prudent and careful men, under like circumstances, do not and would not ordinarily anticipate, and whose effects under similar circumstances they do not and would not ordinarily avoid. "Willfully" means "purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements." *Chicago, B. & Q. R. Co. v. United States*, 194 Fed. 342, 344, 114 C. C. A. 334.

#### UNAVOIDABLE CONTINGENCY

Failure to deliver goods ordered is not due to "unavoidable contingencies," subject to which the order is taken, where they could have been furnished in a time satisfactory to the purchaser, if it would have accepted them in small shipments from time to time, instead of insisting on its right to have them in a single shipment. *Union Trust Co. v. Weber-Seely Hardware Co.*, 84 S. W. 784, 786, 73 Ark. 584.

#### UNAVOIDABLE DANGER

The running of a steamer and the barge which she was towing onto a towhead and into a growth of three-inch willows and cottonwoods on the Mississippi river, as a matter of good seamanship during a very dark and foggy night when the river was in high flood, the barge not being on the bottom, was an unusual and unavoidable danger of the river, within a policy insuring the barge against "unavoidable dangers of rivers." *Paddock-Hawley Iron Co. v. Providence-Washington Ins. Co. of Providence*, R. I., 93 S. W. 358, 361, 118 Mo. App. 85.

#### UNAVOIDABLE DELAY

A delay caused by negligence is not "unavoidable." An allegation in a bill to obtain the issuance of a patent under Rev. St. § 4915, filed more than a year after the application was refused by the decision of the Court of Appeals of the District of Columbia in interference proceedings that complain-

ants brought suit within the year against the successful applicant, to whom the patent was granted, and learned for the first time after such suit had been pending for several months that the defendant had assigned the patent, whereupon that suit was dismissed and the present one was brought against the assignee, does not show that the delay was "unavoidable," within the meaning of Rev. St. U. S. § 4894; there being no allegation that the assignment was not recorded, nor that complainants had no means of ascertaining the fact of the assignment. *Westinghouse Electric & Mfg. Co. v. Ohio Brass Co.*, 186 Fed. 518, 520.

Where plaintiff had knowledge that its furnace was working badly, and that normal results could not be relied on, at the time it contracted to supply defendant's requirements of steel castings for the remainder of the year, the subsequent necessity to shut down its plant for repairs was not an "accident" or an "unavoidable cause of delay," within a custom or usage among manufacturers of steel castings that all contracts are subject to the contingency of accidents and "unavoidable delays." *Lima Locomotive & Machine Co. v. National Steel Castings Co.*, 155 Fed. 77, 80, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713.

Under a statute prohibiting the running of freight trains on the Sabbath day, excepting trains starting on Saturday night, where the time of arrival at destination according to schedule is not later than 8 o'clock Sunday morning, railway officials should in good faith endeavor to avoid a necessity that a freight train, duly started on Saturday night, should have to run after 8 o'clock Sunday morning to reach destination; and in determining what is unavoidable, the movement of this train should not be considered as an isolated train running over the road and leaving out of consideration other trains, but this train should be considered in relation to other trains, and as one unit in a complex whole. *Brand v. State*, 60 S. E. 339, 342, 3 Ga. App. 628.

#### UNAVOIDABLE HINDRANCE

Where a vessel commenced discharging cargo in Rio de Janeiro on the day that the revolution began there in 1893, in which the insurgents captured government warships in the harbor, and there was thereafter more or less firing between such ships and forts and batteries on shore, and such a condition of affairs was produced by the hostilities as to render it practically impossible to receive the cargo with the dispatch contemplated by the charter, either because of the intrinsic danger incident to unloading or the inability to procure the necessary men to do the work, such condition constituted an "unavoidable hindrance," and, to the extent that it prevented compliance with the contract, excused performance, and relieved the char-

terers from liability under the provision requiring them to pay demurrage for detention by the default of themselves or their agent. *Burrill v. Crossman*, 130 Fed. 763, 765, 65 C. C. A. 189.

#### UNAVOIDABLY PREVENTED

A statute providing that a motion for a new trial shall be filed within 10 days after the verdict or decision, unless the party is "unavoidably prevented," cannot excuse negligence of the applicant or his attorney, as it usually refers to circumstances beyond the control of the moving party. *Todd v. Peterson*, 81 Pac. 878, 881, 13 Wyo. 513.

In view of Civ. Code Prac. § 342, which provides that an application for a new trial must be made at the term at which the verdict or decision is rendered, and within three days after its rendition, unless unavoidably prevented, such an application on the ground that plaintiffs and their attorneys were prevented by accident and surprise, which ordinary prudence could not have guarded against, from attending the term of court at which the judgment against them was rendered, made at the following term of court, came too late, the words "unavoidably prevented" extending the time for making the application beyond the three days, but not beyond the term, after which other provisions of the Code must be looked to for relief. *Wobble v. Finch (Ky.)* 110 S. W. 808.

Bankr. Act July 1, 1898, c. 541, § 14a, 30 Stat. 550, provides that any person, after the expiration of a month and within the next 12 months subsequent to the adjudication, may file an application for discharge, and, if it shall be made to appear to the judge that the bankrupt was "unavoidably prevented" from filing it within such time, it may be filed within, but not after, the expiration of the next 6 months. Section 14b requires a denial of the application in case the bankrupt has been granted a discharge in voluntary proceedings within 6 years. Held, that the fact that, if a bankrupt applied for a discharge within 12 months, it would necessarily be denied because of his discharge in voluntary proceedings within 6 years such fact did not "unavoidably prevent" him from filing his application for discharge within such time, so as to authorize an extension of time to file until after the 6-year period had expired. *In re Vaine*, 186 Fed. 535.

#### UNBALANCED BID

An "unbalanced bid" for public work is a bid based on nominal prices for some work and enhanced prices for other work. Such a bid is not per se fraudulent nor unlawful, and where there is shown to have been no material enhancement of the gross price and the items are fairly identified, the contract is not reasonably assailable. *Walter v. McClellan*, 96 N. Y. Supp. 479, 481, 48 Misc. Rep.

215 (citing *Reilly v. Mayor, etc., of New York*, 18 N. E. 623, 111 N. Y. 478; *Matter of Anderson*, 17 N. E. 206, 109 N. Y. 554).

## UNBECOMING CONDUCT

A provision of the Constitution of a Brotherhood of Locomotive Engineers authorizing the expulsion of members for "unbecoming conduct" cannot lawfully be so construed as to sanction the expulsion of a member on the ground that he had testified as an expert against a railroad to the injury of other brothers and causing the brotherhood to lose prestige with the railroad. *Thompson v. Grand International Brotherhood of Locomotive Engineers*, 91 S. W. 834, 838, 41 Tex. Civ. App. 176.

## UNBORN CHILD

As existing person, see Existing Person.

## UNBROKEN PACKAGE

An "unbroken package," within Local Option Law, § 18, which provides that the act shall not apply to certain deliveries of unbroken packages by wholesalers, is a package in the original form in which it was made by the shipper for shipment and delivery into a dry unit, if the receptacle is one ordinarily used by honest dealers in the same business, and is recognized commercially as such receptacle; the term not being restricted to the original package as put up by the manufacturer, and as received by the wholesaler; and hence a demijohn, filled by a wholesale dealer in a wet unit from a larger receptacle then in his store, and delivered in the same condition in a dry unit, is an "unbroken package," within the act. *State v. Maire*, 120 Pac. 87, 66 Wash. 591, 39 L. R. A. (N. S.) 1051.

## UNCERTAIN

### UNCERTAIN DAMAGES

The rule against the recovery of damages where they are "uncertain" relates to uncertainty as to the cause rather than uncertainty as to the measure or extent. *Thayer-Moore Brokerage Co. v. Campbell*, 147 S. W. 545, 550, 164 Mo. App. 8.

### UNCERTAIN PROFITS

In an action for breach of contract, profits are considered "uncertain" which are purely speculative in their nature, and dependent on so many incalculable contingencies as to make it impracticable to determine them by any trustworthy mode of computation. *Dickerson v. Finley*, 48 South. 548, 552, 158 Ala. 149.

## UNCHASTE—UNCHASTITY

"Chastity" is that virtue which prevents the unlawful commerce of the sexes, and "un-

chastity" is the reverse of this. *Lysacker v. Bemidji Pioneer Pub. Co.*, 130 N. W. 850, 851, 114 Minn. 179.

Unchaste character may exist without actual "unchastity." It consists of impurity of mind with reference to the sexual relations. *State v. Hummer*, 104 N. W. 722, 724, 128 Iowa, 505.

### Lewdness synonymous

"Lewdness" is synonymous with "impurity," "unchastity," "licentiousness," and "sensuality." *Jamison v. State*, 94 S. W. 675, 678, 117 Tenn. 58 (citing Cent. Dict.).

## UNCIVILIZED COUNTRY

See Wild and Uncivilized Country.

## UNCLASSIFIED SERVICE

As the services rendered by appointees in the office of the city clerk and clerk of the board of aldermen of the city of New York are in the main legislative, such appointees are in the "unclassified service," within Civil Service Law (Laws 1899, p. 798, c. 370), § 8, though they are not directly appointed by the board of aldermen, but by the city clerk, himself elected by the board. *O'Grady v. Polk*, 116 N. Y. Supp. 290, 291, 132 App. Div. 47.

## UNCLE

"Uncle" includes an uncle of the half blood. *State v. Guiton*, 24 South. 784, 785, 51 La. Ann. 155.

## UNCLEAN HANDS

"Unclean hands," within the meaning of a maxim of equity, is a figurative description of a class of suitors to whom a court of equity as a court of conscience will not even listen, because the conduct of such suitors is itself unconscionable—i. e., morally reprehensible as to known facts." The fraud of an agent, that is by mere imputation chargeable upon a complainant, will not render the hands of the latter unclean within the meaning of this maxim. *Vulcan Detinning Co. v. American Can Co.*, 67 Atl. 339, 341, 72 N. J. Eq. 387, 12 L. R. A. (N. S.) 102 (citing and adopting *American Association v. Innis*, 60 S. W. 388, 109 Ky. 595).

## UNCOLLECTED COSTS

Under Cr. Code, § 13, subd. 14, authorizing judgment for costs against one convicted of crime, and Municipal Court Act July 1, 1905, §§ 57, 58, as amended, imposing costs and providing that moneys collected on judgments in the municipal court shall be first applied to the payment of "uncollected costs," costs may not be imposed against the public incurred in unsuccessfully prosecuting one charged with crime, and the phrase "uncollected costs" includes only costs collectible

by means of legal process, and there is no authority for the application of moneys collected to the payment of costs incurred in unsuccessfully prosecuting one for crime. *Galpin v. City of Chicago*, 94 N. E. 961, 966, 249 Ill. 554.

## UNCONDITIONAL

### UNCONDITIONAL AND SOLE OWNERSHIP

See, also, Entire, Unconditional, and Sole Ownership; Sole and Unconditional Ownership; Sole Ownership.

A person may be the "unconditional and sole owner" of premises on which an insured building is erected, though the property is encumbered by a mortgage. *Vankirk v. Citizens' Ins. Co.*, 48 N. W. 798, 799, 79 Wis. 627.

A fire policy stipulating that it shall be void if the interest of insured be other than "unconditional and sole ownership" is not rendered void merely because of the issuance of a tax certificate creating, at most, a lien for taxes in existence in substance before the tax sale. *Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co.*, 116 Pac. 154, 159, 50 Colo. 424, Ann. Cas. 1912C, 597.

A purchaser in possession under a contract of purchase is the "unconditional and sole owner" within a fire policy though the purchase money has not been paid in full; the purchaser not being in default. *Connecticut Fire Ins. Co. v. Colorado Leasing, Min. & Mill. Co.*, 116 Pac. 154, 159, 50 Colo. 424, Ann. Cas. 1912C, 597.

Conditions in insurance policies that the assured shall have "unconditional and sole ownership" of the property insured, or that he shall have the title in fee simple, are complied with by showing that he has the equitable title. *Arkansas Ins. Co. v. McManus*, 110 S. W. 797, 798, 86 Ark. 115.

A vendee in possession under a contract not signed by him, but referring to an application to purchase signed by him, was within the rule that the holder of an equitable title is the "unconditional and sole owner" within the meaning of that condition in a policy of insurance. *McCullough v. Home Ins. Co. of New York*, 102 Pac. 814, 815, 155 Cal. 659, 18 Ann. Cas. 862 (citing and adopting 2 Cooley, Ins. 1369; *Pennsylvania F. I. Co. v. Hughes*, 108 Fed. 497, 47 C. C. A. 459; *Phenix Ins. Co. v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; *Loventhal v. Home Ins. Co.*, 20 South. 419, 112 Ala. 108, 33 L. R. A. 258, 57 Am. St. Rep. 17; *Dupreau v. Hibernia Ins. Co.*, 43 N. W. 585, 76 Mich. 615, 5 L. R. A. 671; *Pelton v. Westchester Fire Ins. Co.* [N. Y.] 13 Hun, 23, affirmed 77 N. Y. 605; *Imperial Fire Ins. Co. v. Dunham*, 12 Atl. 668, 117 Pa. 460, 2 Am. St. Rep. 686; *Franklin Fire Ins. Co. v. Crockett* [Tenn.] 7 Lea, 725; *Johannes v. Standard Fire Office*, 35 N. W. 298, 70 Wis. 196, 5 Am. St. Rep. 159).

A vendee of land occupying it under an executory contract, on which he has paid a portion of the price, and on which he has erected a building, is an "unconditional and sole owner" in fee simple, within the condition of a fire policy providing that it shall be void if the interest of insured is other than unconditional and sole ownership of the fee-simple title. *Jordan v. Hanover Fire Ins. Co.*, 66 S. E. 206, 207, 151 N. C. 341.

A vendee of land occupying the same under an executory contract of purchase is the "unconditional and sole owner" of the same and of the fee-simple title thereto, though the entire purchase price has not been paid, within the condition of a fire policy avoiding the same, if the interest of insured be other than the sole and unconditional ownership, or if the subject of insurance be located on ground not owned by insured in fee simple. *Arkansas Ins. Co. v. Cox*, 98 Pac. 552, 555, 21 Okl. 873, 20 L. R. A. (N. S.) 775, 129 Am. St. Rep. 808.

A condition in a fire insurance policy that insured must be the "unconditional and sole owner" does not refer to the legal title, but to insured's interest, and is not broken by incumbrances placed on the property by him; and hence insured would be the unconditional and sole owner, though he had given an option or made a conditional sale which he could not specifically enforce, and where the risk of loss by fire continues to be his. *Rochester German Ins. Co. v. Monumental Sav. Ass'n*, 60 S. E. 93, 94, 107 Va. 701.

An insurer of goods obtained possession of them from their owner under an agreement to replace them, if he sold them, or pay the owner for them at a time specified, and obtained insurance thereon. The previous owner had no control over the goods and no right to repossess himself of them. Held, that insured had an "unconditional sole ownership" within the meaning of such words, as used in the policy of insurance. *Bush v. Hartford Fire Ins. Co.*, 71 Atl. 916, 923, 222 Pa. 419.

A person holding a conveyance of land in fee simple is the sole and unconditional owner, within a provision of a fire policy that it should be void if the interest of the insured were other than "unconditional and sole ownership," though there are payments still due for the property, for which the vendor has a lien. *President, etc., of Insurance Co. of North America v. Pitts*, 41 South. 5, 6, 88 Miss. 587, 7 L. R. A. (N. S.) 627, 117 Am. St. Rep. 756, 9 Ann. Cas. 54 (citing *Union Assur. Soc. of London, England, v. Nalls*, 44 S. E. 896, 101 Va. 613, 99 Am. St. Rep. 923; *Milwaukee Mechanics' Ins. Co. v. B. S. Rhea & Son*, 123 Fed. 9, 60 C. C. A. 103; *Ellis v. Insurance Co.*, 32 Fed. 646; 19 Cyc. 693; *Morotock Ins. Co. v. Rodefer*, 24 S. E. 393, 92 Va. 747, 53 Am. St. Rep. 846; *Liverpool & L. & G. Ins. Co. v. Cochran*, 26 South.

932, 77 Miss. 348, 78 Am. St. Rep. 524; *Rosenstock v. Mississippi Home Ins. Co.*, 35 South. 309, 82 Miss. 674).

Where, prior to the writing of a policy on a tug, plaintiff, the insured, contracted in writing to sell the tug to C., in consideration of \$500 paid and a note for \$2,300 given by C., payable on or before May 1, 1910, agreeing to give C. immediate possession of the tug, and a clear bill of sale covering the purchase on payment of the note, which was thereafter extended, C. being in possession at the time the insurance was effected, and at the time of the loss, the contract was in part executed; and hence plaintiff had not "unconditional and sole ownership" of the property, as required by the policy. *Point Gratiot Sand & Gravel Co. v. Hartford Fire Ins. Co.*, 136 N. Y. Supp. 877, 878, 77 Misc. Rep. 221.

One built an ice plant with his own money on a part of a block of ground the title to which was in his deceased wife and of which he was the owner by inheritance of a one-third interest. He was an ignorant man, who had originally bought the property and honestly supposed it was his own, and had always so considered and treated it. On his verbal application to an agent, insurance policies were issued to him covering the building and its contents. No written applications were made or required, nor any representations as to the nature or extent of his interest. Under the law of the state a cotenant who made improvements in the belief that he was the sole owner was entitled to have allotted to him the improved part, without taking into consideration the value of his improvements, or in case of sale was entitled to the increased value due to his improvements. Held, that the policies were not avoided by reason of a condition therein that they should be void "if the interest of the assured be other than 'unconditional and sole ownership,' or if the subject of the insurance be a building on ground not owned by the assured in fee simple. *Rochester German Ins. Co., of Rochester, N. Y., v. Schmidt*, 151 Fed. 681, 683.

An insured's ownership is "sole" when no one other than insured has any interest in the property as owner, and is "unconditional" when the quality of the estate is not limited or affected by any condition, within the meaning of a policy providing that it shall be void if the interest of the insured be other than "unconditional and sole ownership." *Rochester German Ins. Co., of Rochester, N. Y., v. Schmidt*, 162 Fed. 447, 451, 80 C. C. A. 333.

The interest of a purchaser of property, which he has unqualifiedly agreed to purchase, and which the former owner has absolutely contracted to sell to him upon definite terms, is the sole and unconditional ownership within the meaning of such clause in

insurance policies, since the vendor may compel the purchaser to pay for the property, and to suffer any loss that occurs. *Phenix Ins. Co. v. Hilliard*, 52 South. 799, 801, 59 Fla. 590, 138 Am. St. Rep. 171.

The just and reasonable purpose of insurance policies in requiring insured to have the sole and unconditional ownership of the insured property is to give protection only to those upon whom the loss insured against would inevitably fall but for the insurance, and to avoid taking risks for those whose lack of interest or whose contingent interest in the property might tend to encourage carelessness or wrongdoing in its use or preservation. *Id.*

To be "unconditional and sole," within the meaning of such phrase as used in an insurance policy, the interest or ownership of insured must be completely vested; not contingent or conditional, nor in common or jointly with others, but of such nature that insured must alone sustain the entire loss if the property be destroyed, whether the title be legal or equitable. *Id.*

The "unconditional and sole ownership" of property, within the meaning of such phrase in an insurance policy, is in those on whom the loss insured against would certainly fall, not as a matter of mere contract obligation, but as the result of real bona fide rights in the insured property. *Id.*

#### UNCONDITIONAL CONTRACT

An order for money drawn by a municipal corporation upon its treasurer, payable upon demand and without condition, is in effect a promissory note, and is an "unconditional contract in writing," within the meaning of a statute providing that, whenever defendant in justice court on an unconditional contract in writing makes defense, he shall make such defense at the first term. *Morgan v. City of Cohutta*, 47 S. E. 971, 972, 120 Ga. 423.

#### UNCONDITIONAL PROMISE TO PAY

Under Negotiable Instruments Law, Laws 1897, p. 722, c. 612, § 20, providing that an instrument, to be negotiable must contain an unconditional promise or order to pay a sum certain in money, and must be payable on demand or at a fixed or determinable future time, and section 22, defining an "unconditional promise" as therein used as follows: "An unqualified promise or order to pay is unconditional within the meaning of this act, though coupled with: (1) An indication of a particular fund out of which reimbursement is to be made, in a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay out of a particular fund is not unconditional"—bonds issued by a joint-stock association, secured by trust deed and payable to bearer, are negotiable, although by

the express terms thereof the stockholders of the association are exonerated from individual liability for payment of the bonds and interest; liability being confined to the security and to the assets of the association, and such limitation not restricting the liability to a particular fund. *Hibbs v. Brown*, 98 N. Y. Supp. 353, 357, 112 App. Div. 214.

Civ. Code 1895, § 3991, provides that a "negotiable instrument" is a written promise or request for the payment of a certain sum of money to order or bearer. Section 3992 provides that a negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment. Section 3996, as amended by Laws 1899, p. 124, provides that a negotiable instrument may contain a pledge of collateral security, with the authority to dispose thereof, also a provision for reasonable attorney fee, or both. Section 3997 provides that a negotiable instrument must not contain any other contract than such as is specified in this article. Laws 1903, p. 238, § 3, subd. 2, provides that an unqualified order or promise to pay is "unconditional" within the meaning of this act, though coupled with a statement of the transaction which gives rise to the instrument. Held, that a paper containing an order or contract for goods, and a note promising to pay for them, is not a negotiable instrument, where, if the note be detached, the order for goods would be destroyed. *State v. Mitton*, 96 Pac. 926, 929, 37 Mont. 366, 127 Am. St. Rep. 732.

Under Negotiable Instruments Law (Laws 1897, c. 612, § 20), which provides that an instrument, to be negotiable, must be in writing and signed by the maker or drawer, must contain an "unconditional promise" or order to pay a sum certain in money, must be payable on demand at a fixed or determinable future time, and must be payable to order or to bearer, and section 22, which declares that "an unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with \* \* \* a statement of the transaction which gives rise to the instruments," an instrument in the form of a letter, addressed to the general agent of an insurance company, dated April 19, 1905, which, after acknowledging receipt of a life insurance policy requested him "to place the said policy in force from this date, and I promise to pay you or your order the first annual premium, amounting to \$53.10, as follows:

Cash paid W. E. Watts.....	\$21.24
On July 10th, 1905.....	10.00
On Sept. 10th, 1905.....	10.00
On Nov. 10th, 1905.....	11.86

\$53.10

"Arthur N. Taylor"

—is a "negotiable instrument"; the mere fact that its language shows that the consideration for the promise was an indebtedness for

an unpaid balance of a premium upon a policy of insurance upon defendant's life which had been delivered to him not operating to make it nonnegotiable, under the statute or the customs and usages of merchants. *Equitable Trust Co. of New York v. Taylor*, 131 N. Y. Supp. 475, 477, 146 App. Div. 424.

## UNCONSCIONABLE

Equity will not enforce an unconscionable contract, but the fact that one provision of a legal contract, or even the entire contract, is more favorable to one party than to the other, does not ordinarily render it "unconscionable." *Chanute Brick & Tile Co. v. Gas Belt Fuel Co.*, 109 Pac. 398, 399, 82 Kan. 752.

The word "unconscionable," as applied to attorney's contracts for contingent fees, means nothing more than that the amount of the fee contracted for, standing alone and unexplained, would be sufficient to show that an unfair advantage was taken of the client, or that a legal fraud was perpetrated on him. *McCoy v. Gas Engine & Power Co.*, 119 N. Y. Supp. 864, 865, 135 App. Div. 771.

An "unconscionable" contract is one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other. *Wenninger v. Mitchell*, 122 S. W. 1130, 1132, 139 Mo. App. 420.

An "unconscionable contract" for attorneys' fees is a fraud, and may be made so to appear by showing that it is such as no man in his senses, and not under a delusion, would make on the one hand, and as no honest and fair man would accept on the other. Defendant, having resided on land abutting a street for a number of years, sued to enjoin the city from lowering the street grade, having expressed himself as determined to prevent it if it cost him "a thousand dollars." Held, that a contract employing an attorney to represent defendant in such action, and agreeing to pay \$500 for his services, was not unconscionable, nor was the charge disproportionate to the service. *Ball v. Reyburn*, 118 S. W. 524, 136 Mo. App. 546.

## UNCONSTITUTIONAL

An "unconstitutional act" is not a law, and confers no rights, imposes no duties, affords no protection, and creates no offices. It is in legal contemplation as inoperative as though never passed. *People ex rel. Stidger v. Horan*, 86 Pac. 252, 262, 34 Colo. 304 (citing *Norton v. Shelby County*, 118 U. S. 425, 6 Sup. Ct. 1121, 30 L. Ed. 178); *People ex rel. Farrington v. Mensching*, 79 N. E. 884, 888, 187 N. Y. 8, 10 L. R. A. (N. S.) 625, 10 Ann. Cas. 101 (citing *Norton v. Shelby County*, 6 Sup. Ct. 1121, 118 U. S. 425, 442, 30 L. Ed. 178).

An "unconstitutional statute" is simply a statute in form, and is not a law, and under every circumstance or condition lacks the force of law, and is of no more saving effect to justify action taken under it than as though it had never been enacted. *Minnesota Sugar Co. v. Iverson*, 97 N. W. 454, 457, 91 Minn. 30.

## UNCONTROLLABLE

The word "uncontrollable," in describing the event which excuses a carrier from liability for loss or damage of goods, qualifies the event as one which cannot be restrained or prevented. *Lehman, Stern & Co. v. Morgan's Louisiana & T. R. & S. S. Co.*, 38 South. 873, 875, 115 La. 1, 70 L. R. A. 562, 112 Am. St. Rep. 259, 5 Ann. Cas. 818.

## UNCONTROLLED

See Momentarily Uncontrolled.

## UNDECORATED CHINA

Construing the provision for china decorated and china not decorated, in Tariff Act July 24, 1897, c. 11, § 1, Schedule B., pars. 95, 96, held, that merely adding a color to white china for utilitarian purposes does not make decorated china, and that china and cooking serving dishes of which the sloping undersides are irregularly colored brown in order to conceal smoke and finger marks, and without decorative effect, are dutiable as "undecorated china" under the latter paragraph. *G. W. Thurnauer & Bro. v. United States*, 159 Fed. 122, 86 C. C. A. 86.

## UNDEFINED

"The term 'undefined' is probably defined the best as 'beauty unadorned is adorned the most.'" *Wells, Fargo & Co. v. McCarthy*, 90 Pac. 203, 210, 5 Cal. App. 301.

## UNDER

See By, Through, or Under.

Sixteen years of age or under, see Years of Age.

Under Rev. St. 1899, § 6116, providing that before granting any franchise for constructing and operating an elevated, underground, or other street railroad, "on," "over," or under any street or alley, etc., the word "over" means "over," and can only apply to elevated roads, and "under" means beneath," and can refer only to underground roads, and "on" means "on," and can only refer to a surface road on the street. *Ruckert v. Grand Ave. Ry. Co.*, 63 S. W. 814, 818, 163 Mo. 260.

The word "under," as used in a mining lease giving the right to remove coal under

coterminous and neighboring lands, together with the right to enter on and under said land, and to mine, excavate, and remove all of said coal, and remove on and "under" said land the coal from "under" adjacent coterminous and neighboring lands, cannot be said not clearly to mean that the rights granted may be exercised "under" the land, and that the right of removal relates to the coal conveyed under the land. *Griffin v. Fairmont Coal Co.*, 53 S. E. 24, 38, 59 W. Va. 480, 2 L. R. A. (N. S.) 1115.

A quitclaim deed by a husband and others, in which the wife did not join, by the habendum clause declared that the grantee was to have and hold the premises to himself, his heirs and assigns forever, so that neither the grantors nor their heirs, nor any person or persons claiming under them, should at any time thereafter have or claim any right or title to the premises. Thereafter the wife obtained judgment for the recovery of title and possession of her homestead in the premises. Held, that the wife was not a person claiming "under" her husband, and that by the terms of the deed the grantors were not liable to the grantee by reason of the recovery had against him. *McCracken v. Taylor (Tex.)* 146 S. W. 693, 695.

### As subject to

The words "under" and "subject" in a deed import that the grantee takes subject to an incumbrance, the amount of which has been deducted from the price, and a covenant is inferred that the grantee will protect the grantor therefrom. *Faulkner v. McHenry*, 83 Atl. 827, 828, 235 Pa. 298, Ann. Cas. 1913D, 1151.

## UNDER AND SUBJECT TO

Where land is sold "under and subject to" a mortgage, it constitutes a covenant of indemnity for the protection of the grantor, and the vendee's liability is coextensive with the original obligation of the vendor. In *re May's Estate*, 67 Atl. 120, 122, 218 Pa. 64 (citing and explaining *Blood v. Crew Levick Co.*, 33 Atl. 344, 171 Pa. 328).

Where a purchaser takes land "under and subject to" a mortgage, he takes the land incumbered at an agreed consideration, which includes the incumbrance, and he agrees to indemnify the vendor to the extent of that consideration in the same manner as if it had been paid in cash and so applied at the time; but there is no personal liability on the part of the purchaser to pay the mortgage if the premises prove insufficient. Where premises covered by a mortgage to a trustee are conveyed to a purchaser "under and subject to" the mortgage, the purchaser is under no obligation to insure the property for the benefit of the mortgagee. *Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 22 Sup. Ct. 842, 849, 186 U. S. 434, 46 L. Ed. 1234.

**UNDER THE CARE OF A PHYSICIAN**

"Consulting" a physician, and being "under the care of" a physician, not only in the technical use of the terms, but to the common mind, may mean very different things. A man may consult a physician without being under his care at all." *Hewey v. Metropolitan Life Ins. Co.*, 62 Atl. 600, 602, 100 Me. 523.

Though a prescription given by a physician in response to a casual inquiry would not amount to being under the physician's care within the meaning of a statement in an application for life insurance that the applicant had not been "under the care of a physician" within two years, and though a prescription given after more careful examination as to an exceptional or isolated occurrence might not constitute the contemplated relationship, it is not necessary that the applicant should be bedridden to constitute being under a physician's care; but if the applicant, being apprehensive as to his condition, though "up and around," consulted a physician, and entrusted his case to him for regular or continuous treatment within the two years, the representation would be false, and would relieve the insurance company from obligations under the policy issued thereon. *Bryant v. Metropolitan Life Ins. Co.*, 60 S. E. 983, 984, 147 N. C. 181.

**UNDER CHARGES**

Charges were filed against a member of a medical society for misconduct, but a copy of them was not served on him at the time, because he was then under suspension for another offense. Later his suspension was remitted, and he was restored to good standing, whereupon he immediately tendered his resignation. Three days thereafter a copy of the charges was served on him, with a notice of hearing. Held, that he was "under charges" when he attempted to resign, within a by-law of the society prohibiting acceptance of the resignation of any member under charges. *Ewald v. Medical Society of New York County*, 128 N. Y. Supp. 886, 889, 144 App. Div. 82.

**UNDER THE CIVIL SERVICE RULES**

By such acceptance of St. 1911, c. 468, and St. 1907, c. 272, § 1, thus included therein by reference, the tenure of the incumbent of the office of city marshal was changed, so as to last during good behavior, though he was holding the office under a prior appointment not received in accordance with civil service rules; the phrase "under the civil service rules," as used in the 1907 statute, having reference merely to the holding of the office, and not to the method of appointment. *Barnes v. Rivers*, 99 N. E. 464, 465, 213 Mass. 1.

**UNDER COLOR OF**

See By Virtue of.

**UNDER CONSIDERATION**

A case is "under consideration" before the grand jury, within the meaning of Rev. Laws 1906, section 5338, when witnesses are being examined. *State v. Slocum*, 126 N. W. 1096, 1097, 111 Minn. 328.

**UNDER THE CONSTITUTION AND LAWS**

Arising under the Constitution or laws, see Arise—Arising.

**UNDER CONTROL**

"Free medical treatment," guaranteed by contract to members of the relief department of a railroad company, means without cost to the disabled member; and the place of treatment, "one of the hospitals under its control," as between the member and the company, means the hospital to which the member is taken by the medical examiner of the company. *Gainesville & Alachua County Hospital Ass'n v. Hobbs*, 69 S. E. 79, 81, 153 N. C. 188.

Where a railroad rule required extra freight trains to run through yards under control, looking out for yard engines and other extras, the words "under control" required the engineer to run at such a speed as would enable him to bring his train to a stop within vision, and this without reference to whether the weather was clear or foggy. *Central R. Co. of New Jersey v. Young*, 200 Fed. 359, 365, 118 C. C. A. 465.

The rules of a railroad company, requiring an engineer approaching stations to have his train "under control" until the track is plainly clear, and after providing that the train might occupy the main track between outside switches at a designated station, declared that the responsibility for a collision within those limits would rest on the approaching train. Held to plainly require an engineer, in approaching those limits in the nighttime, to adjust his control to the distance he could see along the track as he advanced, so that, if the track was already occupied, he could avoid a collision after that point came in view. *Great Northern Ry. Co. v. Hooker*, 170 Fed. 154, 157, 95 C. C. A. 410.

**UNDER THE CONTROL, MANAGEMENT, OR OPERATION**

The words "under the control, management or operation," as used in the proviso of Acts 1907, c. 41, providing that the act shall not apply to any railroad under 50 miles in length under the control, management, or operation of any other road, mean the same as the words "a part of." *Coal & Coke R. Co. v. Conley*, 67 S. E. 613, 634, 67 W. Va. 129.

**UNDER CONVICTION**

A citizen who has been convicted of bribery in an election and has undergone the pun-



ishment fixed by the judgment is not "under conviction" of bribery, within Const. art. 4, § 1 (Code 1906, p. 111), disqualifying such person. *Osborne v. Kanawha County Court*, 69 S. E. 470, 471, 68 W. Va. 189, 32 L. R. A. (N. S.) 418.

#### UNDER DEVELOPMENT

See Improved and Under Development.

#### UNDER THE DIRECTION OF

As used in Bankr. Act July 1, 1898, c. 541, § 47, requiring trustees to collect and reduce to money the property of the estate "under direction of the court," the quoted words do not necessarily mean by order previously made. *Rathbone v. Ayer*, 82 N. Y. Supp. 235, 237, 84 App. Div. 186.

One of the accepted meanings of the word "direction" is the act of governing, ordering, or ruling. *Hurd's Rev. St. 1903*, p. 1260, c. 93, § 18b, provides that no one shall be allowed to enter a mine, except under the direction of the mine manager, until all conditions shall have been made safe. Held that, when the mine manager directs a servant to enter a room to remove dangerous conditions, the servant in so doing is "under the direction of the manager" within the statute, though he is not present. *Kellyville Coal Co. v. Bruzas*, 79 N. E. 309, 311, 223 Ill. 595.

Bankr. Act July 1, 1898, c. 541, § 2, subd. 7, 30 Stat. 546, gives courts of bankruptcy powers to cause the estate of a bankrupt to be collected, reduced to money, and distributed. Subdivision 15 authorizes the making of orders necessary for the enforcement of the provisions of the act, and section 47, subd. 2, 30 Stat. 557, declares that trustees, in collecting and reducing the money and property of bankrupts, shall act "under the direction of the court." Held, that such sections authorize the appointment of an auctioneer by the court to sell property of a bankrupt's estate in advance of any particular occasion therefor. *In re Benjamin*, 136 Fed. 175, 176, 69 C. C. A. 191.

#### UNDER THE DIRECTION AND CONTROL OF

A former resident of Ireland, after living here for more than 35 years, died, leaving one who was apparently his widow, and some relatives. There was nothing to suggest to any one that he had a lawful wife and child in Ireland who were not aware of his death in time to assert their claims. A question arose as to who was entitled to the remainder of his estate after his supposed widow's portion was set apart, and the administrator adopted the method prescribed by Code Pub. Gen. Laws, art. 93, § 142, to have the rights of the parties judicially determined. All requirements of the statute were complied with. All persons who apparently had claims on the estate appeared in response to the statutory notice. There was

no question as to who the collateral relations were, and the only doubt was as to whether two who claimed to be children of deceased were such as the law would recognize. Pending the proceeding, the claimants agreed in court on a settlement of the controversy between themselves. The administrator gave his consent subject to the approval of the court, which appeared to have been verbally expressed. A claim by an attorney for services in effecting such settlement was allowed, and accounts of the administrator and his successor referring to the agreement and the distribution pursuant thereto were allowed, and expressly approved by the court. Held, that the distribution was made "under the direction and control" of the court as the law requires, and the administrators were not liable to account to the lawful wife and child because the court did not pass a more formal order, as it was requested to do. *Garrett v. Kerney*, 68 Atl. 1051, 1052, 107 Md. 501.

#### UNDER FULL CONTROL

"Under full control," used in a railroad company's rules requiring trains to approach and pass through yards "under full control," as understood by railroad men, means ready to stop at any moment. *Neary v. Northern Pac. Ry. Co.*, 97 Pac. 944, 947, 37 Mont. 461, 19 L. R. A. (N. S.) 446.

#### UNDER THE GENERAL ELECTION LAWS

Act No. 131 of 1898, as amended, provides that elections for authorizing special taxes, under Const. art. 232, shall be held "under the general election laws" of the state, and where there were no voting booths provided, and the voting was carried on in the open, without any protection, and the ballots were prepared by other persons for the voters and were signed for them, the voter making his mark, and every elector was assisted and his ballot written for him by another who was not a commissioner of election, the result of the election will not be allowed to stand. *F. B. Williams Cypress Co. v. Police Jury of St. Martin Parish*, 55 South. 878, 879, 129 La. 267.

#### UNDER THE IMMEDIATE INFLUENCE OF SUDDEN PASSION

The phrase "under the immediate influence of sudden passion," as used in a definition of manslaughter, as a voluntary homicide committed under the immediate influence of sudden passion, arising from an adequate cause, but neither justified nor excused by law, means: (1) That the provocation must arise at the same time of the commission of the offense, and that the passion is not the result of a former provocation. (2) That the act must be directly caused by the passion arising out of the provocation: it is not enough that the mind is merely agitated by passion arising from some other

provocation. (3) The passion intended is either of the emotions of the mind known as anger, rage, sudden resentment, or terror, rendering it incapable of cool reflection. *Sue v. State*, 105 S. W. 804, 809, 52 Tex. Cr. R. 122.

#### UNDER THE INFLUENCE OF LIQUOR

The words "under the influence of any intoxicant" in a casualty policy, providing that only a certain amount should be paid in case an "accidental injury is sustained while the assured is insane, delirious or under the influence of any intoxicant or narcotic," meant such degree of influence as would materially impair insured's ability to care for himself and guard against casualties; such degree of influence being equivalent to intoxication in the ordinary meaning of the word. *Bakalars v. Continental Casualty Co.*, 122 N. W. 721, 722, 141 Wis. 43, 25 L. R. A. (N. S.) 1241, 18 Ann. Cas. 1123.

Under an insurance contract limiting the company's liability to one-fifth of the amount otherwise payable if the accident occurred while "under the influence" of any intoxicant, a finding that insured, when injured, was not under the influence of intoxicants "so as to prevent him from being 'fairly' able to take care of himself," showed him to have been under the influence of intoxicants within the contract, so as to entitle him to recover only one-fifth of the amount otherwise payable. *Furry's Adm'r v. General Acc. Ins. Co.*, 68 Atl. 655, 656, 80 Vt. 526, 15 L. R. A. (N. S.) 206, 130 Am. St. Rep. 1012, 13 Ann. Cas. 515.

#### UNDER THE INSPECTION OF PROPER OFFICERS

Rev. St. § 2979, provides that, if an importer gives satisfactory security that the merchandise is to be exported, the collector and naval officers shall permit the merchandise under the inspection of the proper officers to be shipped without payment of duty. Held, that since by Treasury Department articles 834, 838, 841, and 842, providing a system of licensed truckmen to whom a limited custody of the goods is intrusted for the purpose only of transfer from warehouse to hold, the Treasury Department has construed the words "under the inspection of proper officers" to mean that the goods are to be under the constant surveillance of such officers from the time they leave the warehouse until they reach the ship, such construction should be regarded of weight by a federal court. *United States v. Ehr Gott*, 182 Fed. 267, 272.

#### UNDER THE LAWS

The phrase, "corporation 'under the laws' of the state of Virginia" is equivalent in legal intendment to the phrase "corporation existing under the laws of Virginia." *Mathieson Alkali Works v. Mathieson*, 150 Fed. 241, 243, 80 C. C. A. 129.

An affidavit filed under Burns' Ann. St. 1908, § 8351, making any person, not being licensed under the laws of the state, who shall sell spirituous liquors, guilty of a misdemeanor, alleging that accused unlawfully sold beer, not then having a license to sell liquors "according to" the laws of the state, was not defective for using the words quoted, instead of the word "under," as used in the statute; the affidavit being sufficient to inform accused of the offense charged. The phrases "according to" the laws, and "under" the laws, may not in every sense be synonymous; but their meaning, as used in this connection, is so far identical as fully to meet the requirements of good criminal pleading. *Skelton v. State*, 89 N. E. 860, 861, 173 Ind. 462.

#### UNDER LIKE CIRCUMSTANCES

See Like Circumstances.

#### UNDER THE ORDER OR DIRECTION OF

A railway postal clerk is not "an officer, clerk, or employé" traveling "under the order or direction of the Postmaster General," within the intent of the Post Office Regulation, § 11. That regulation refers only to officers detailed for special duty. *Hartman v. United States*, 40 Ct. Cl. 133, 137.

#### UNDER THE ORDERS AND EMPLOYMENT OF

The San Antonio city charter places the police department under the control of the fire commission, and provides that the power of appointment given to the mayor and the city council shall not apply to persons serving in such department. A city ordinance made appropriations for the police department, and special police and special sanitation "under the orders and employment of the mayor." The words "under the orders and employment of the mayor" apply only to special police and special sanitation, and not to the police department, under the control of the police and fire commission, and the appropriation was made for the legal police department pursuant to the duty imposed by the charter. *City of San Antonio v. Beck (Tex.)* 101 S. W. 263, 264.

#### UNDER A PATENT

Operating under a patent, see Operate.

#### UNDER PROTEST

See Protest.

#### UNDER REASONABLE LAWS AND REGULATIONS

A gas company, whose charter requires it to furnish gas to private consumers "under reasonable laws and regulations" at a price not to exceed a certain rate per thousand cubic feet, is not authorized by the quoted words to charge a meter rate in addition where less than a certain quantity of

gas is used. *Louisville Gas Co. v. Dulaney*, 38 S. W. 703, 704, 100 Ky. 405, 36 L. R. A. 125.

#### UNDER THIS ACT

The first proviso of Hurd's Rev. St. 1905, c. 3, § 18, providing that only such persons as are entitled to administer an estate "under" the act shall have the right to nominate an administrator, related to the whole act, and not only to that part of the section that precedes it. In *re McWhirter's Estate*, 85 N. E. 918, 920, 235 Ill. 607.

#### UNDER THE UNITED STATES

Senators of the United States do not hold their places "under the government of the United States," within the meaning of the declaration in Rev. St. U. S. § 1782, that any one convicted under its provisions shall be incapable of holding any office of honor, trust, or profit under that government. *Burton v. United States*, 26 Sup. Ct. 688, 694, 202 U. S. 344, 50 L. Ed. 1057, 6 Ann. Cas. 392.

#### UNDER WAY

A vessel, although her headway is killed in the water, is considered "under way," and subject to the navigation rules, unless she is at anchor, or tied to the shore, or aground. *The Nimrod*, 173 Fed. 520, 525.

The act of Congress prescribing navigation rules provides that a vessel is "under way," within the meaning of the rules, when she is not at anchor, or made fast to the shore, or aground. So a steamship not anchored or disabled must be held to the responsibility of a steam vessel under way in case of a collision. *The Kaga Maru*, 123 Fed. 139, 144.

A vessel is "under way," within steering and sailing rule 28, providing that, when vessels are in sight of one another, a steam vessel under way, whose engines are going with full speed astern, shall indicate the fact with three short blasts of the whistle, when she is not at anchor, or made fast to the shore, or aground. *The Aurelia*, 183 Fed. 341, 343.

A steam vessel lying with her nose against the bank of a stream, and holding her position against the current by the movement of her wheel, is a vessel "under way" within the navigation rules, and not entitled to the rights of an anchored vessel. *The Ruth*, 178 Fed. 749; *Id.*, 186 Fed. 87, 89, 108 C. C. A. 199.

#### UNDERFLOW

"The 'underflow' is the subterranean flow of water which slowly finds its way through the sand and gravel constituting the bed of the stream, and to which rights by appropriation may attach." *Howcroft v. Union & Jordan Irr. Co.*, 71 Pac. 487, 489, 25 Utah, 311.

#### UNDERGROUND PIPING

As personal property, see *Personal Property*.

#### UNDERGROUND RAILROAD

As street railroad, see *Street Railroad*.  
As surface railroad, see *Surface Railroad*.

#### UNDERGROUND STREAM

A "stream of water" has a defined channel. It has banks, and is very distinct from the percolations of subsurface water, which oozes in veins or filters through the earth's strata. An "underground stream" of water differs from a "surface stream" only with respect to its location above or below the surface. *Stoner v. Patten*, 63 S. E. 897, 898, 132 Ga. 178.

#### UNDERLETTING

See *Involuntary Underletting*.

#### UNDERPINNING

A count in an action for damages charged that defendant undertook while excavating to support by underpinning a wall on the margin of plaintiff's land, and that such underpinning was done so negligently that as a proximate cause thereof a part of plaintiff's wall fell. Held, that the word "underpinning" meant placing something under the wall, and that the count rested upon the fact that the defendant undertook to place underpinning under the wall, and in so doing negligently caused it to fall, and that as to another count which rested upon defendant's failure to place props, etc., it and its allegations were distinguishable as separate counts on the same cause of action. *H. H. Parker & Bro. v. Hodgson*, 55 South. 818, 819, 172 Ala. 632.

#### UNDERSHERIFF

As sheriff, see *Sheriff*.

#### UNDERSTAND

"'Understand' is to supply mentally as in explanation of an ellipsis." An assertion, although made in each transaction, by the customers of an office where futures are bought and sold, that actual delivery is "contemplated" and "understood" in all cases, will not prevent the keeper of the office from being guilty of maintaining a gaming house, if as a matter of fact the customers, throughout a continued course of dealings, do not make, tender, or accept actual delivery, but through the proprietor of the office settle their winnings and losses in money. The actual facts of the case must override the contradictory alleged contemplation of the parties.

Anderson v. State, 58 S. E. 401, 411, 412, 2 Ga. App. 1.

Under Code Civ. Proc. § 1884, authorizing the appointment of a resident of the county as an interpreter when a witness does not "understand the English language," where an Indian understood some of the language addressed to him in English, though he could not understand it all, and he had through association with Spanish companions acquired a slight knowledge of that language, and which was used in his conversation with defendant on the occasion of the commission of a crime, the court did not abuse its discretion in appointing an Indian interpreter, a resident of the county, for the Indian in question, when testifying as a witness on defendant's trial. *People v. Salas*, 84 Pac. 295, 296, 2 Cal. App. 537.

### UNDERSTANDING

See Entirely Without Understanding;  
On Any Understanding or Agreement.

#### As an agreement

The use of the ambiguous word "understanding" in a husband's testimony describing a transaction between him and his wife, on which he based claim to cotton produced on her land, does not sufficiently show a meeting of the minds in a contract or agreement intended to be obligatory on both, so as to make the judgment, in an action by the husband for damages to the cotton, pleadable as an adjudication against her. *Williams v. Yazoo & M. V. R. Co.*, 35 South. 169, 82 Miss. 659.

### UNDERSTOOD

See Being Understood; It Was So Understood.

#### As agreed

The word "understood," as used in a clause inserted in a deed for the grantor's benefit, providing that it is "understood" that railroad companies shall have a right of way over the land, is synonymous with the word "agreed," and by accepting the deed the agreement becomes as binding on the grantee as if he had signed the instrument. In re *Barkhausen*, 124 N. W. 649, 651, 142 Wis. 292 (citing *Higginson v. Weld* [Mass.] 14 Gray, 165, 170).

In detinue for a mule claimed by plaintiff under a mortgage, plaintiff testified that he sold the mule to the mortgagor, who had had possession prior to the sale and execution of the mortgage, and that the mule was his up to the time that the mortgage was executed, and that it was "so understood." Held, that it was not error to refuse to exclude the expression "it was so understood," since, as used, it should be taken as synonymous with "agreement" and the statement of a fact, and not a condition. *Holman v. Clark*, 41 South. 765, 767, 148 Ala. 286.

The words "understood" and "agreed" may be used synonymously. Where, in an action to recover a reward for convicting certain voters of election bribery, the court found that one of the bribers signed and swore to the affidavits on which plaintiff instituted the prosecutions, and that it was "understood" between plaintiff and such briber that the latter should receive compensation therefor out of the amount recovered for the reward, the word "understood" was used in the sense of "agreed." *Mount v. Board of Com'rs of Montgomery County*, 80 N. E. 629, 630, 168 Ind. 661, 14 L. R. A. (N. S.) 483 (citing *Higginson v. Weld* [Mass.] 14 Gray, 170; *Barkow v. Sanger*, 3 N. W. 16, 47 Wis. 501; *Bullock v. Johnson*, 35 S. E. 703, 110 Ga. 486; *Saltmarsh v. Bower*, 34 Ala. 613; *Griffin v. Isbell*, 17 Ala. 184; *Winslow v. Dakota Lumber Co.*, 20 N. W. 145, 32 Minn. 238; 8 Words and Phrases, p. 7161).

### UNDERTAKE

A count alleging that defendants were employed to set plaintiff's broken leg and that in consideration thereof "undertook to reduce said fracture and set the broken bone in a proper and skillful manner, and undertook the care and charge of said leg and the cure thereof," but conducted themselves carelessly and unskillfully, is in case and not in assumption; the word "undertook," as used, not importing a promise. *Lawson v. Crane & Hall*, 74 Atl. 641, 642, 83 Vt. 115.

In an action for the wrongful seizure by defendant of plaintiff's goods the testimony of an officer who assisted defendant in the seizure and who testified in his behalf that he did not undertake to compel plaintiff to give defendant the goods was properly excluded as a conclusion of the witness; the word "undertake" not being used in the sense of purpose or intent, but in the sense that he did no act calculated to effect such purpose. *Souther v. Hunt* (Tex.) 141 S. W. 359, 363.

### UNDERTAKER

As profession, see Profession.

A person who engages in the care of dead human bodies and the burial or other disposition of them, together with the conduct of the funeral and burial services, is an "undertaker." *People v. Ringe*, 110 N. Y. Supp. 74, 125 App. Div. 592; *Id.*, 90 N. E. 451, 452, 197 N. Y. 143, 27 L. R. A. (N. S.) 528, 18 Ann. Cas. 474.

### UNDERTAKING

See Original Undertaking; Statutory Undertaking; Void Undertaking.

A simplified bond, without a seal, is known as an "undertaking." *Wollenberg v. Sykes*, 89 Pac. 148, 149, 49 Or. 163.

#### Promise distinguished

Where, in a suit to enforce a resulting trust, the complaint alleged that the property

in controversy was conveyed to defendant on her promise and undertaking to redeliver the deed to plaintiff in the event of his recovery from an illness, etc., that plaintiff delivered the deed to defendant in trust only, defendant promising plaintiff at the time of such delivery, etc., such language did not necessarily mean an oral promise, since the term "promise" may be a contract, a pact, or an agreement, while the word "undertaking" is a stronger term and implies entering into a stipulation. *Dennison v. Barney*, 113 Pac. 519, 521, 49 Colo. 442.

## UNDERWRITTEN

Bonds are "underwritten" by a person when that person buys the bonds and guarantees their sale. *Bone v. Hayes*, 99 Pac. 172, 174, 154 Cal. 759.

## UNDEVELOPED GRANITE QUARRY

The phrase "undeveloped granite quarry" signifies a place from which granite may be taken. There is no inconsistency in a bill to rescind a sale of land for the purchaser's misrepresentations as to its value because it alleges that an "undeveloped granite quarry" under the land is of great value. *Crompton v. Beedle*, 75 Atl. 331, 335, 83 Vt. 287, 30 L. R. A. (N. S.) 748, Ann. Cas. 1912A, 399.

## UNDISPUTED

### UNDISPUTED TITLE

Under Greater New York Charter, § 978, as amended, requiring the commissioners of estimate and assessment in a street opening proceeding to give notice to the persons interested to present their claims, and requiring the commissioners to refer the taking of proof of title to property taken, where the same is undisputed, and proof as to any lien or incumbrance thereon, to their clerk or to the assistant corporation counsel in charge of the proceeding, an "undisputed title" is one which is not disputed before the commissioners by the presentment of adverse claims, and to create conflicting claims two or more persons must claim the same interest or right, and the interposition of a claim of lien or incumbrance does not raise a dispute as to the title; and the taking of proof as to any lien or incumbrance must be referred by the commissioners to their clerk or to the assistant corporation counsel, and where there is a dispute as to the ownership of a parcel of land the commissioners need only ascertain and report the value thereof and make an award to unknown owners, and the taking of proof of title is unnecessary. In *re Mt. Olivet Ave. in City of New York*, 127 N. Y. Supp. 218, 219, 70 Misc. Rep. 276.

## UNDISTRIBUTED

"Undistributed," within Rev. Laws, c. 137, § 4, qualifying section 3, providing that

administration shall not be originally granted more than 20 years after death of deceased, by providing that if administration has not been taken on the estate of a decedent within such 20 years, and any property remains undistributed, or thereafter accrues to such estate and remains to be administered, original administration may be granted, but such administration shall affect no other property, does not mean only "undistributed by an administrator"; but the section applies to all cases where property of an intestate has not been actually divided among and put in the control of the persons entitled as next of kin. *Dallinger v. Morse*, 94 N. E. 701, 702, 208 Mass. 501, Ann. Cas. 1912A, 982.

## UNDIVIDED

### UNDIVIDED PROFITS

The aggregate of all the excessive collection of life insurance premiums in a particular year constitutes that year's accumulation of surplus, which fund is sometimes called, or miscalled, "undivided profits," or "surplus earnings," or the like. *United States Life Ins. Co. v. Spinks (Ky.)* 96 S. W. 859, 893, 13 L. R. A. (N. S.) 1053.

## UNDUE

### UNDUE AND UNREASONABLE DISCRIMINATION

A contract entered into by a railroad company, granting to a steamboat company the exclusive right to receive and discharge freight and passengers at a dock or wharf which is a part of and connected with its depot and station grounds, and which affords the only means and facility for approaching the station grounds by means of the water highway, and excluding all the competitors of such steamboat company from like or similar privileges at any time or at all, is "undue and unreasonable discrimination" in favor of the one company and against its competitors, which is in violation of the provisions of Const. § 6, art. 11. *Cœur d'Alene & St. Joe Transp. Co. v. Ferrell*, 128 Pac. 565, 567, 22 Idaho, 752, 43 L. R. A. (N. S.) 965.

### UNDUE INFLUENCE

See, also, Unduly Influenced.

The word "undue," when used to qualify "influence," has the legal meaning of wrongful. *Sears v. Vaughan*, 82 N. E. 881, 887, 230 Ill. 572.

Insistence upon one's legal rights is not "undue influence." *Van Valkenburgh v. Oldham*, 108 Pac. 42, 44, 12 Cal. App. 572.

The word "undue," as used in connection with "undue influence" as affecting the validity of a will, is not used in the sense lexicographers give to it as one of the popular meanings, disproportionate, inordinate, un-

worthy, as in the phrases "undue excitement," "undue partiality," "undue attachment," or the like; but as a legal phrase it is used in a stricter sense, as denoting something wrong according to the standard morals which the law enforces in the relations of men, and therefore something legally wrong, something violative of a legal duty; in a word, something illegal. *Caughey v. Bridenbaugh*, 57 Atl. 821, 823, 208 Pa. 414.

Under Civ. Code 1910, § 3834, "undue influence," which operates to invalidate a will, is such an influence as amounts to deception. *De Nieff v. Howell*, 75 S. E. 2.2, 204, 138 Ga. 248.

Plaintiffs purchased real estate, borrowing a balance of \$670 of the price from defendant, and having the property conveyed to him as security. Plaintiffs being in financial difficulties, and having mortgaged their personal property to defendant for other indebtedness, found a purchaser for the real estate and contracted to procure a conveyance to him within 15 days. Defendant refused to execute a deed to the purchaser, unless plaintiffs consented to pay him \$289.71, consisting of usurious interest and bonuses on account of the moneys advanced by him to plaintiffs, out of the purchase price of such real estate, and in order not to lose the sale, and because of plaintiffs' necessities, they agreed that he should receive such additional sum as demanded. Held, that plaintiffs were entitled to recover the amount so paid, as money paid under duress, under Civ. Code, §§ 1196, 1204, providing that an apparent consent is not real or free when obtained through undue influence, and defining "undue influence" to consist of the taking of a grossly oppressive and unfair advantage of another's necessities or distress. *Redford v. Weller*, 131 N. W. 296, 297, 27 S. D. 334.

#### As deprivation of free agency

For influence to amount to "undue influence," it must destroy, or at least impair or prevent, free agency. *Drinkwine v. Gruelle*, 98 N. W. 534, 536, 120 Wis. 628.

"To constitute 'undue influence,' within the meaning of the law, there must be mental constraint, moral coercion, the substitution of external for internal agency." *Franklin v. Belt*, 60 S. E. 146, 148, 130 Ga. 37 (citing *Thompson v. Davitte*, 59 Ga. 472, 476).

"Undue influence," to justify the setting aside of a will, must be such as will deprive the testator of his or her free agency. *Yorty v. Webster*, 68 N. E. 1068, 1069, 205 Ill. 630 (citing *Taylor v. Pegram*, 37 N. E. 837, 151 Ill. 106; *Francis v. Wilkinson*, 35 N. E. 150, 147 Ill. 370; *Thompson v. Bennett*, 62 N. E. 321, 194 Ill. 57).

"Undue influence," in order to avoid a will, must be directly connected with the execution of the will, and be exerted for the purpose of procuring a will in favor of par-

ticular parties, to such an extent as to destroy testator's freedom of will and to practically render it that of another. *Snell v. Weldon*, 87 N. E. 1022, 1026, 239 Ill. 279.

"Undue influence," justifying the setting aside of the probate of a will, must be such as to deprive the testator of his free agency, rendering his act the result of the will of another, instead of his own. *Johnson v. Farrell*, 74 N. E. 760, 761, 215 Ill. 542.

"Undue influence," which would avoid a will, must be such as would destroy the liberty and free agency of the testator in the disposition of his property. *Allday v. Cage* (Tex.) 148 S. W. 838, 841.

To defeat a will, "undue influence" must overcome testator's will power and substitute that of another, must amount to coercion or fraud, and be tantamount to force or fear, and thus destroy testator's free agency. *Council v. Mayhew*, 55 South. 311, 318, 172 Ala. 295; *Mullen v. Johnson*, 47 South. 584, 587, 157 Ala. 262.

The "undue influence" which will vitiate a will must be such as amounts to coercion in destroying free agency, or such influence as deprives testator of his free agency, and prevents him from doing as he pleases with his property, but neither advice nor persuasion will vitiate a will made freely from conviction, though such will might not have been made but for such persuasion. *Berst v. Moxom*, 138 S. W. 74, 77, 157 Mo. App. 342.

There is no "undue influence," sufficient to set aside a deed, unless the influence took away the free agency of the grantor; for not every influence is undue, and undue influence cannot be predicated of any act, unless free agency is destroyed. Influence exerted by means of advice, arguments, persuasions, solicitation, suggestion, or entreaty is not undue, unless it is so importunate and persistent, or otherwise so operates, as to subdue and subordinate the will and to take away free agency. *Burnett v. Smith*, 47 South. 117, 118, 93 Miss. 566 (citing 8 Words and Phrases p. 7166).

"Undue influence" must destroy the free agency of testator, and amount to coercion, and it must be shown that testator had no free will. *Wood's Ex'r v. Wood*, 63 S. E. 994, 995, 109 Va. 470.

"'Undue influence' is such influence that the instrument is not properly an expression of the will of the testator in regard to the disposition of his property, but rather an expression of the will of another person." *Gavitt v. Moulton*, 96 N. W. 395, 399, 119 Wis. 35 (citing *In re Jackman's Will*, 26 Wis. 104).

"Undue influence," which will invalidate a gift, must be something which destroys the free agency of the donor, and substitutes therefor the will of another. What constitutes such undue influence cannot be precise-

ly defined, and each case must be determined upon the consideration of its special facts. The means employed and extent of the influence are immaterial, if their effect be to destroy the free agency of the donor. The ultimate facts of undue influence may, and in many cases can only, be established by circumstantial evidence. *Prescott v. Johnson*, 97 N. W. 891, 892, 91 Minn. 273.

To constitute "undue influence," it is essential that the testator's or grantor's mind has been overcome, and it is not sufficient merely that there shall not have been an absolute freedom from influence. *Schneider v. Vosburgh*, 106 N. W. 1129, 1130, 143 Mich. 476.

To constitute "undue influence," the testator must be so influenced by persuasion, pressure, or fraudulent contrivance that he does not act intelligently or voluntarily and is subject to the will and purpose of another. It may be exerted through threats, fraud, importunity, or the silent, resistless power which the strong often exercise over the weak or infirm. It must be sufficient to destroy his free agency and substitute the will of another for that of the testator. Entreaty, importunity, or persuasion may be employed, as may appeal to the memory of past kindnesses and the calls of the distressed. Mere suggestions or advice addressed to the understanding or judgment of the testator never constitute undue influence; neither does solicitation, unless the testator is so worn out with importunities that his will gives way. In *re Tyner*, 106 N. W. 898, 899, 97 Minn. 181 (citing *Robinson v. Robinson*, 53 Atl. 253, 203 Pa. 401; *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. 885).

Influence of the husband of a testator, to be "undue," must have been such as to destroy her free agency, and make her the implement of her husband's craft, and make the instrument executed by her the will of her husband rather than her own. It must operate to destroy her free agency, not at some time in the past, but at the very time and in the very act of executing the instrument. Solicitations, however importunate, cannot of themselves constitute "undue influence"; for though these may have a restraining effect, in that they persuade or induce the mind of the testatrix to consent to the thing asked for, they do not destroy her power to freely dispose of her estate. The mere fact that the testatrix changed her mind, and at the request of her husband made a will which she would not have made, but for his influence, is perfectly consistent with, and may be regarded as an exercise of, her free agency. To come within the ban of the law, the request and importunity of the husband must have gone to the point where argument and persuasion end and coercion, either physical or moral, begins, and the act of the testatrix must not have

been a voluntary yielding to the request or demand of her husband, but a submission of her mind and will to his. In short, to be the product of undue influence, the will made must be in essence and effect the will of the party exercising it, rather than the will of the person executing it. Where testatrix, who executed her will four years after the death of her husband, felt herself bound by the promise she had made her husband when on his deathbed to give her property to his heirs and relatives, and believed that she would suffer the displeasure of her husband in the future if she failed to carry out his wishes, there was not such undue influence as to invalidate her will, though by reason thereof she willed her property to his relatives and heirs, to the exclusion of her own, a disposition she otherwise would not have made. *Henderson v. Jackson*, 111 N. W. 821, 823, 138 Iowa, 326, 26 L. R. A. (N. S.) 479 (citing *Englert v. Englert*, 47 Atl. 940, 198 Pa. 326, 82 Am. St. Rep. 808; *Kaufman's Will*, 49 Pac. 192, 117 Cal. 288, 59 Am. St. Rep. 179; *Schmidt v. Schmidt*, 50 N. W. 598, 47 Minn. 451; *Gilbert v. Gilbert*, 22 Ala. 529, 58 Am. Dec. 268; *Thompson v. Kyner*, 65 Pa. 368; *Shell's Estate*, 63 Pac. 413, 28 Colo. 167, 53 L. R. A. 387, 89 Am. St. Rep. 181; *Eastis v. Montgomery*, 9 South. 311, 93 Ala. 293; *McIntire v. McConn*, 28 Iowa, 480; *Perkins v. Perkins*, 90 N. W. 55, 116 Iowa, 253).

To constitute "undue influence," the mind must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by the insidious influences of persons in close confidential relations with him, that he is not left to act intelligently, understandingly, and voluntarily, but subject to the will or purposes of another. *Howard v. Farr*, 131 N. W. 1071, 1073, 115 Minn. 86.

"Undue influence," in relation to the making of a will, is influence such as to amount to overpersuasion, coercion, of force, destroying the free agency and will power of the testator. *Jackson v. Hardin*, 83 Mo. 175, 185; *Myers v. Hauger*, 11 S. W. 974, 975, 98 Mo. 433; *Thompson v. Ish*, 12 S. W. 510, 511, 99 Mo. 160, 17 Am. St. Rep. 552; *Tilbe v. Kamp*, 54 S. W. 879, 55 S. W. 440, 154 Mo. 545. Where, in a will contest, the court charged that a will in favor of persons standing in confidential relations to testatrix was presumed in law to have been made under undue influence exercised by such beneficiaries, and that the will having been made in favor of testatrix's physician and nurse, to the partial exclusion of lawful heirs, the burden was on them to show want of undue influence, an instruction defining such term as influence amounting to overpersuasion, coercion, or force, destroying the free agency and will power of testatrix, was unobjectionable. Where the validity of a will was attacked because of alleged undue influence of S., evidence of declarations made by testatrix as to

why she left the house of one of her relatives and built a house at P., and as to misunderstandings and disputes which occurred between her and her relatives prior to such removal, was admissible to show that testatrix's change of feeling towards her relatives was not brought about by S. Such evidence was also competent to rebut contestant's proof, concerning occurrences showing that testatrix was under control of S., and that she stated to various witnesses that S. would not allow testatrix's relatives to visit her, etc. Influence gained over testatrix by her physician and nurse through kindness and affection, which induced her to execute a will in their favor, without any imposition or fraud, was not undue influence sufficient to invalidate the will. *Selbert v. Hatcher*, 102 S. W. 962, 967, 205 Mo. 83.

Fraud or "undue influence" exercised over testator, to avoid a will, must be directly connected with its execution, the influence which law condemns being not the legitimate influence springing from natural affection, but the malign influence which springs from fear, coercion, or any other cause depriving testator of free agency in disposing of his property, and the influence must be specially exerted to procure a will in favor of particular persons. *Sanger v. McDonald*, 112 S. W. 365, 368, 87 Ark. 148.

By "undue influence" is meant the substitution of the will of another person for that of the testator, so that the testator is not able to dispose of his estate as if left to his own guidance or free agency. *Hayes v. Hayes*, 145 S. W. 1155, 1158, 242 Mo. 155.

An influence, sufficient to invalidate a will, must be such as to destroy the testator's free agency and induce him to do, against his will, that which he would otherwise not have done, and must operate on or influence the testamentary acts. *Raison v. Raison*, 146 S. W. 400, 402, 148 Ky. 116.

The word "influence," in the term "undue influence," as affecting the validity of a will, does not refer to any and every line of conduct capable of disposing in one's favor a free and self-directing mind, but to a control acquired over another which virtually destroys his free agency. *Caughy v. Bridenbaugh*, 57 Atl. 821, 823, 208 Pa. 414.

Neither advice, suggestions, reasons, or arguments addressed to the judgment of the person who is contemplating making a will, and which are intelligently considered by such person, nor even importunity or persuasion, if the testator has sufficient mental capacity and strength of will to properly weigh and consider them, and resist them unless adopted by him in the free exercise of his judgment and volition, will constitute "undue influence"; but whatever may be the nature and extent of the influence, if, because of the physical and mental weakness of the

testator and the nature and persistency of the influence exerted, it is such that he is unable to resist it, and it deprives him of his power to act as a free agent in the manner that he otherwise would, it is "undue influence," and will avoid the will. *Appeal of O'Brien*, 60 Atl. 880, 881, 100 Me. 156.

The influence which is "undue" and will vitiate a will must amount to moral or physical coercion, which destroys free agency and constrains its subject to do that which, but for it, he would not have done. *In re Buckman's Will*, 85 Atl. 246, 250, 80 N. J. Eq. 556.

The "undue influence" which vitiates a will is such influence, whether slight or powerful, as is sufficient to destroy free agency, so that the act is the result of the domination of the mind of another rather than the expression of the will and mind of testator. *In re Johnson's Will*, 85 Atl. 254, 259, 80 N. J. Eq. 525.

"Undue influence," to invalidate a will, must amount to coercion, compulsion, or constraint, destroying testator's free agency, and obliging him to adopt the will of another, instead of exercising his own. *Ginter v. Ginter*, 101 Pac. 634, 640, 79 Kan. 721, 22 L. R. A. (N. S.) 1024 (citing *Terry v. Buffington*, 11 Ga. 337, 56 Am. Dec. 423; *In re Shell's Estate*, 63 Pac. 413, 28 Colo. 167, 53 L. R. A. 387, 89 Am. St. Rep. 181).

"Undue influence," that will destroy a will, must be such as in effect destroyed testator's free agency and substituted for his own another person's will, and directly affected the testamentary acts. *In re Weber's Estate*, 114 Pac. 597, 603, 15 Cal. App. 224.

"Undue influence," invalidating a will, must be an influence exerted prior to or at the time of the making of the will, and such as destroys free agency, constraining testator at the time the will is made to make a disposition of his estate contrary to and different from what he would have made had he been left to the free exercise of his own inclination or judgment. *In re Ricks' Estate*, 117 Pac. 532, 536, 160 Cal. 450.

"Undue influence," which will avoid a will, is not mere persuasion of testator, but such an influence as deprived him of the free exercise of his intellectual powers, exercised by coercion, imposition, or fraud, and impelling him to act in fear, a desire for peace, or some feeling which he is unable to restrain. *In re Tresidder's Estate*, 125 Pac. 1034, 1035, 70 Wash. 15 (citing 8 Words and Phrases, 7166-7172).

"Undue influence," such as invalidates a will, is any improper or wrongful constraint, machination, urgency, or persuasion, whereby the will of the person is overborne, and he is induced to do, or forbear to do, an act which he would not do, or would do, if left to act freely. *In re Olson's Estate*, 126 Pac. 171, 174, 19 Cal. App. 379.



Where there is merely such a dominating and controlling influence exerted over testator by excessive importunity, or of the mastery which one mind sometimes gains over another, the object which is consciously sought and gained is to lead testator to make a will which is different from the one he otherwise would have made and constitutes "undue influence." *Whitcomb v. Whitcomb*, 91 N. E. 210, 211, 205 Mass. 310, 18 Ann. Cas. 410.

To avoid a deed on the ground of undue influence, the evidence must show such an influence exerted on the grantor as to override his will and to make the act of executing the deed a mere mechanical performance by him of the design of the person exerting the influence, and "undue influence" may consist in any influence which is so far operative as to destroy free agency. *Du Bose v. Kell*, 71 S. E. 371, 378, 90 S. C. 196.

To set aside a deed for "undue influence," it must appear that the influence destroyed the free agency of the grantor and substituted the will of another for his, and, unless such fact appears, the showing of a motive and an opportunity to exert undue influence, together with the falling mental powers of the grantor, are insufficient to overthrow the deed. *Woodville v. Woodville*, 60 S. E. 140, 144, 63 W. Va. 286.

"Before 'undue influence' can be made the ground for setting aside a deed, it must be sufficient to destroy free agency on the part of the grantor. It must amount to coercion—practically duress. Suggestion and advice, addressed to the understanding and judgment, do not constitute 'undue influence'; nor does solicitation, unless the party be so worn by the importunities that his will gives way. Earnest entreaty, importunity, and persuasion may be employed; but if the influence is not irresistible, it is not undue, and its existence is immaterial, even though it is yielded to." *Jenkins v. Rhodes*, 56 S. E. 332, 334, 106 Va. 564 (citing *Greer v. Greer* [Va.] 9 Grat. 330, 333; *Orr v. Pennington*, 24 S. E. 928, 93 Va. 268; *Hammond v. Welton*, 64 N. W. 25, 106 Mich. 244; *Hamilton v. Smith*, 10 N. W. 276, 57 Iowa, 15, 42 Am. Rep. 39; *Conley v. Nailor*, 6 Sup. Ct. 1001, 118 U. S. 127, 30 L. Ed. 112).

To constitute "undue influence," it is unnecessary that moral turpitude or improper motive should exist, and if one, from the best of motives, having obtained a dominant influence over a grantor's mind, induces him to execute a deed or other instrument materially affecting his rights, which he would not have otherwise executed, so exercising the influence obtained that the grantor's will is effaced or supplanted, the instrument is fraudulent. *Myatt v. Myatt*, 62 S. E. 887, 888, 149 N. C. 137.

"Undue influence" of a husband in procuring his wife to adopt his child by a for-

mer wife means that he so far dominated her will as to substitute his will for hers, with the result that the action brought about by the undue influence is not in reality her act. *Phillips v. Chase*, 89 N. E. 1049, 1050, 203 Mass. 556, 30 L. R. A. (N. S.) 159, 17 Ann. Cas. 544.

#### As fraud

"Undue influence" is a species of fraud. *Gallagher v. Neilon*, 121 S. W. 564, 568. See, also, *Pickler v. Wise*, 132 N. W. 815, 817, 152 Iowa, 644.

"Undue influence" is either a species of fraud or a kind of duress. In either case it comes in for the same consideration as fraud in general. *Heath v. Capital Sav. Bank & Trust Co.*, 64 Atl. 1127, 79 Vt. 301.

"Undue influence" is recognized by all authorities as a species of fraud, and fraud, inducing a transfer of personal property or a chose in action, renders such transfer voidable, and one of the remedies of the party defrauded, or his executors, is a rescission of the transfer." *Borchert v. Borchert*, 113 N. W. 35, 37, 132 Wis. 593 (quoting and adopting definition in *Coon v. Dennis*, 69 N. W. 666, 111 Mich. 450).

The procuring of the execution of a will by "undue influence" partakes of the nature of a fraud, or imports at least a constructive fraud on testator. *Whitcomb v. Whitcomb*, 91 N. E. 210, 211, 205 Mass. 310, 18 Ann. Cas. 410.

"Undue influence" is a species of fraud, and in probate law is an unlawful coercion which destroys the free agency of a testator, and substitutes for his free and disposing mind some will other than his own. In *re Campbell's Will*, 136 N. Y. Supp. 1086, 1104; *Scott v. Barker*, 113 N. Y. Supp. 695, 698, 699, 129 App. Div. 241 (quoting and adopting definition in *Matter of Snelling*, 32 N. E. 1006, 136 N. Y. 515; *Marx v. McGlynn*, 88 N. Y. 357).

In an action to avoid a deed for undue influence in its procurement, an instruction that "undue influence" is a fraudulent influence, controlling the mind of him operated upon, by which the will is perverted from its free exercise, and submitting as issues whether defendant possessed undue influence over grantor, and, if so, whether he fraudulently used it to procure the deed, and whether he exerted a fraudulent influence over grantor sufficient to destroy free agency, etc., was not objectionable as laying too much stress on the element of fraud as part of the definition of undue influence. *Myatt v. Myatt*, 62 S. E. 887, 888, 149 N. C. 137.

"Undue influence" in the execution of a will is not the same as fraud. One may exist without the other, though undue influence may be exerted by means of fraud; "fraud" being a distinct head of objection from im-

portunity and undue influence. That is undue influence which amounts to constraint which substitutes the will of another for that of testator, whether through a threat or fraud, but, however exercised, it must, to avoid the will, destroy testator's free agency when the instrument is made. In *re Snowball's Estate*, 107 Pac. 598, 600, 157 Cal. 301.

"Undue influence" may be exerted to prevent the detection of fraud with reference to testatrix. It may amount to fraud if sufficiently strong to secure the provisions of the will desired. *Cooper v. Harlow*, 128 N. W. 259, 261, 163 Mich. 210.

"Undue influence," sufficient to destroy a will, must be such as to constitute a fraudulent influence controlling testator's mind, so as to induce him to make a will which he would not otherwise have made. In *re Abbe's Will*, 59 S. E. 700, 701, 146 N. C. 273.

#### How exercised

"Undue influence" is that which compels the testator to do that which is against his will, from fear, the desire of peace, or some feeling which he is unable to resist. *Sheppey v. Stevens*, 185 Fed. 147, 156; *Struth v. Decker*, 59 Atl. 727, 730, 100 Md. 368 (quoting *Schouler, Wills* [2d Ed.] § 228); *Robinson v. Robinson*, 53 Atl. 253, 265, 203 Pa. 400.

"Undue influence" may well be defined as moral duress or coercion, whereby one is led to make a contract which he would not have made if left to act of his own free will. *Foot v. De Poy*, 102 N. W. 112, 114, 126 Iowa, 366, 68 L. R. A. 302, 106 Am. St. Rep. 365.

"Undue influence," violating a contract, must amount to force or coercion, so as to destroy free agency. *Fjone v. Fjone*, 112 N. W. 70, 71, 16 N. D. 100 (citing *Davis v. Culver* [N. Y.] 13 How. Prac. 62; *Wallace v. Harris*, 32 Mich. 380; *Andrews, Am. Law*).

"Undue influence" may be exerted on testator, so as to render his will invalid, either by fraudulent means or by physical or moral coercion practiced on him, without any actual deception. *Whitcomb v. Whitcomb*, 91 N. E. 210, 211, 205 Mass. 310, 18 Ann. Cas. 410.

"Undue influence," which will vitiate a will, must amount to force and coercion, destroying free agency. It must not be the mere desire of gratifying the wishes of another. That would be a very strong ground in favor of the testamentary act. Further, there must be proof that the act was obtained by coercion or importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear. *Wallen v. Wallen*, 57 S. E. 596, 599, 107 Va. 131.

"To establish 'undue influence,' sufficient to invalidate a will, it must be shown that the will of the testator was coerced into

doing that which he did not desire to do." *Gavitt v. Moulton*, 96 N. W. 395, 399, 119 Wis. 35.

The "undue influence" that will suffice to set aside a will must be such as to overcome the free volition or conscious judgment of the testator and to substitute the wicked purposes of another instead, and must be the efficient cause without which the obnoxious disposition would not have been made. This may be accomplished, not alone by physical coercion or threats of personal harm or abuse, but also by the insidious operation of a stronger mind upon one weakened and impaired by disease or otherwise, whereby the latter is subject to the former and induced to do its bidding, instead of acting in the exercise of unconstrained volition or judgment. It is not all influence brought to bear upon the mind of the testator that may be denominated undue. In *re Pickett's Will*, 89 Pac. 377, 386, 49 Or. 127 (citing *In re Holman's Will*, 70 Pac. 913, 42 Or. 358).

To establish "undue influence" sufficient to invalidate a deed, there must be proof of threats or misrepresentation, undue flattery, or fraud practiced, or physical or moral coercion sufficient to overpower volition, destroy free agency, and impel the party on whom it is practiced to act against his inclination and will; motive, opportunity, or even ability to control in the absence of affirmative proof that it was exercised not being sufficient. *Nelson v. Wiggins*, 137 N. W. 623, 627, 172 Mich. 191.

"Whatever destroys free agency and constrains the person whose act is brought in judgment to do what is against his will and what he would not have done if left to himself is 'undue influence,' whether the control be exercised by physical force, threats, importunities, or any other species of mental or physical coercion." A grantor, who was deprived of her free will and agency in the execution of a deed of trust by the action and conduct of the grantee and his representatives in respect to the arrest and prosecution of the grantor's husband, executed the deed under duress in contemplation of law, so as to enable her to avoid the deed. *Turner v. Overall*, 72 S. W. 644, 648, 172 Mo. 271 (quoting and adopting definition in *Earle v. Norfolk & N. B. Hosiery Co.*, 36 N. E. 188; *Bell v. Campbell*, 25 S. W. 359, 123 Mo. 1, 45 Am. St. Rep. 505).

"Undue influence" is such influence as compels the testator to do that which is against his will from fear, desire of peace, or some feeling which he is unable to resist. Such influence must in some measure destroy the free agency of the testator and must be sufficient to prevent the exercise of that discretion which the law requires in the exercise of the will. Mere arguments, persuasions, solicitations, or entreaties by a beneficiary in a will is not that character of

"undue influence" which is contemplated by law when speaking of "undue influence." *Franklin v. Boone*, 88 S. W. 262, 263, 39 Tex. Civ. App. 597 (citing *Patterson v. Lamb*, 52 S. W. 99, 21 Tex. Civ. App. 512; *Barry v. Gracette* [Tex.] 71 S. W. 309; *Morrison v. Thoman* [Tex.] 86 S. W. 1069).

Actual "undue influence," inducing the execution of a will, may consist of threats of personal harm or duress, under the force of which a person makes a testamentary disposition of his property which is really against his will. In the same category is the undue influence exerted by a strong mind over a weak one by domination, by deceit, or by constant importunity and persuasion, which the weaker mind is unable to resist. Undue influence of this type can never be presumed, but must be affirmatively established; but where the beneficiary under a will maintains some confidential relation to testator, and where the will excludes the natural objects of testator's bounty, the burden of establishing freedom from undue influence is on the proponent. In *re Marlor's Estate*, 103 N. Y. Supp. 161, 162, 52 Misc. Rep. 263.

"Undue influence" is that which compels the testator to do that which is against his will from fear, the desire of peace, or some feeling which he is unable to resist. We say that the influence must be undue in order to vitiate the instrument, because influences of one kind and another surround every rational being, and operate necessarily in determining his course of conduct under every relation of life. *Morrison v. Thoman* (Tex.) 86 S. W. 1069, 1071 (quoting and adopting the definition in *Schouler, Wills*, § 227, and citing *Vance v. Upson*, 1 S. W. 179, 66 Tex. 479; *Brown v. Mitchell*, 12 S. W. 606, 75 Tex. 9; *Trezevant v. Rains* [Tex.] 19 S. W. 567; *McIntosh v. Moore*, 53 S. W. 611, 22 Tex. Civ. App. 22; *Patterson v. Lamb*, 52 S. W. 98, 21 Tex. Civ. App. 512).

"Undue influence" is "that which compels the testator to do that which is against his will from fear, the desire of peace, or some feeling which he is unable to resist. Undue influence may be exercised secretly as well as openly, and this is especially possible where a confidential relation exists between the principal devisee and the testator, and they dwell in the same house together. Such influence may be exerted in many ways, by violence, by force, by threats, by deceit or fraud, by excessive importunity, or by the silent, resistless, power which the strong often exercise over the weak or infirm." *Goodloe v. Goodloe*, 105 S. W. 533, 535, 47 Tex. Civ. App. 493.

Defendant, prior to his marriage to plaintiff, obtained a conveyance of her land to them as tenants by the entirety by threatening to sue her for \$2,500, to cause others to sue her for slander and other causes of action, and by threats that she would never

live to see the inside of her completed opera house, that she would be found dead, that he would stop work on her opera house, in which her money was largely invested, that he would smash everything and ruin the whole business, that she would lose all her property in the threatened litigations, and would be working at the washtub, without a rag to her back. Held, that the threats constituted a wrongful and "undue influence" exerted over plaintiff, controlling her action, and warranted the cancellation of the conveyance. *Ring v. Ring*, 105 N. Y. Supp. 498, 55 Misc. Rep. 420.

"It is a rule governing in ascertaining whether undue influence was exerted over the mind of a testator that the influence was such that it induced the testator to act contrary to his own wishes, and to make a different will from what he would have made if he had been left free to exercise his own wishes and desires according to his own judgment and discretion. No matter how great the fraud may have been, nor how vigorous and active the influence produced upon and exercised over the testator, they would not avail to set aside the will unless they were sufficient to overcome the volition and desire of the testator. Not every influence brought to bear upon the mind of the testator by a beneficiary will be classed as undue influence. Persuasion, entreaty, cajolery, importunity, argument, intercession, and solicitation are permissible, and cannot be held to be undue influence unless they subverted and overthrew the will of the testator, and caused him to do a thing that he did not desire to do. No more could a will made from mere persuasion, entreaty, or argument, which has been weighed and considered by the testator, and his own mind made up and voluntarily formed, be classed as undue influence, than could the arguments of counsel to a court, which are weighed and considered in arriving at a just conclusion as to the law of the case, be designated 'undue influence.'" *Weitz v. Schneider*, 78 S. W. 394, 396, 34 Tex. Civ. App. 201.

#### **Gratitude, affection, etc.**

"Undue influence," which will vitiate a will, must be wrongful, and influence secured through affection is not of that character. *Fitzgerald v. Allen*, 88 N. E. 240, 244, 240 Ill. 80 (citing *Dowie v. Sutton*, 81 N. E. 395, 227 Ill. 183, 118 Am. St. Rep. 266; *Dickie v. Carter*, 42 Ill. 376).

The word "undue," when used to qualify "influence," has the legal meaning of "wrongful," and hence "undue influence" means a wrongful influence; but influence secured through affection is not wrongful, and when a will is made in favor of a child at his solicitation and because of partiality influenced by affection for him, it will not be "undue influence." *Sears v. Vaughan*, 82 N. E. 881, 887, 230 Ill. 572.

The "undue influence" which will avoid a will must amount to coercion or fraud, and must involve such force or fear as destroys the free agency of testator and constrains him to do that which is against his will; mere persuasion, addressed to his judgment and affections, not constituting undue influence. *Mullen v. Johnson*, 47 South. 584, 587, 157 Ala. 262.

"Undue influence" over a testator is influence amounting to force, coercion, or overpersuasion which destroys his free agency and will power. It must not be merely the influence of affection or attachment nor the desire of gratifying the wishes of one beloved, respected, and trusted by testator. *Lindsey v. Stephens*, 129 S. W. 641, 646, 229 Mo. 600; *Hughes v. Rader*, 82 S. W. 32, 53, 183 Mo. 630; *Teckembrock v. McLaughlin*, 108 S. W. 46, 51, 209 Mo. 533; *Winn v. Grier*, 117 S. W. 48, 59, 217 Mo. 420; *Dausman v. Rankin*, 88 S. W. 696, 704, 189 Mo. 677, 107 Am. St. Rep. 391.

"Undue influence," inducing the execution of a will, is such as amounts to force, coercion, or overpersuasion, which destroys the testator's free agency and will power, and not merely the influence of affection or desire to gratify the wishes of one who is near and dear to him. *Weston v. Hanson*, 111 S. W. 44, 50, 212 Mo. 248.

Influence which is gained over testator alone through kindness, and springs from fondness or affection, is not "undue influence" sufficient to avoid the will; such influence being that which is exercised through persuasion, coercion, force or fraud to the extent of overcoming the testator's free agency or will power, so as to substitute the will or wish of the person exerting such influence for that of the testator. *Luebbert v. Brockmeyer*, 138 S. W. 92, 93, 96, 158 Mo. App. 196.

Influence over another, acquired by kindness and attention, will not constitute "undue influence" within the meaning of the law, whether in case of a friend who has been made the beneficiary in a will, or in the case of a wife or child. *Weber v. Strobel*, 139 S. W. 188, 191, 236 Mo. 649.

"Motives of natural affection and gratitude on the part of the testator, even when accompanied by solicitations or arguments which appeal to such motives, do not constitute 'undue influence.'" *Gavitt v. Moulton*, 96 N. W. 395, 399, 119 Wis. 35 (citing *In re Jackman's Will*, 26 Wis. 104; *Deck v. Deck*, 62 N. W. 293, 106 Wis. 472, 473).

"Undue influence," defeating a will, is any influence over the mind of testator to an extent that destroys his free agency and to constrain him to do against his will what he would otherwise refuse to do, whether exerted at one time or another, directly or indirectly, if it so operated on his mind at the

time he executed the paper, but any reasonable influence obtained by acts of kindness or by appeals to the feelings or understanding, and not destroying free agency, is not undue influence. *Watson's Ex'r v. Watson*, 121 S. W. 626, 629, 137 Ky. 25; *Murphy's Ex'r v. Hoagland (Ky.)* 107 S. W. 303, 306; *Bannon v. Patrick Bannon Sewer Pipe Co.*, 119 S. W. 1171, 1175, 136 Ky. 556 (quoting with approval *Murphy's Ex'r v. Hoagland (Ky.)* 107 S. W. 303).

"The fact that a man bequeaths his estate to his wife, excluding his children, his father, or other relations, is absolutely immaterial upon the question of 'undue influence.' The silent influence of affection and respect, augmented by the tender and kindly attentions of a faithful spouse, cannot be regarded as in any sense undue. Nor will the fact that the wife by solicitation, or even by urgent importunity, procures for herself all her husband's property, or a larger share than he devises to others, raise a presumption of law that the husband's will was procured by undue influence exerted by her, or that his mind did not act freely in preparing it. \* \* \* It will not be presumed, because a wife has ample opportunity to exert an influence which may be undue, that she has in fact done so. Nor will any presumption of undue influence arise from the fact that the wife advised her husband in his business affairs and guided him through many difficulties, and at one time advised or requested him to make a will in her favor." *Fulton v. Freeland*, 118 S. W. 12, 19, 219 Mo. 494, 131 Am. St. Rep. 576 (quoting and adopting definition in 1 Underhill, Wills, § 94, p. 126; *Rankin v. Rankin*, 61 Mo. 295; *McFadin v. Catron*, 38 S. W. 932, 39 S. W. 771, 138 Mo. loc. cit. 219; *Myers v. Hauger*, 11 S. W. 974, 98 Mo. loc. cit. 439; *Jackson v. Hardin*, 83 Mo. loc. cit. 185; *Mays v. Mays*, 21 S. W. 921, 114 Mo. loc. cit. 540).

"Undue influence" over a testator has been defined as that which compels him to do that which is against his will, from fear, a desire of peace, or some feeling which he is unable to resist. Influence which exists from attachment, affection, or a desire to gratify, or which results from argument and appeals to the reason and judgment of the testator, is not undue, nor sufficient to invalidate a will. Undue influence consists in exerting upon the testator such an improper influence, whether fraudulent, threatening, or otherwise coercive, as to effect a change in the testator's testamentary disposition, so that the will made is not the will he would have made if uninfluenced. Where testator by his will gave his wife the use of the estate, consisting of a house and lot, for life, with remainder to a son by a former wife, he being a middle-aged man and able to provide for himself, and on the same day, as the result of persuasion of his wife, who was in poor health, he made a new will, giving

his estate to her absolutely, it was held insufficient to show undue influence. *In re Hall's Estate*, 125 N. Y. Supp. 253, 255, 68 Misc. Rep. 581 (citing *Schouler, Wills* [2d Ed.] par. 22; *Matter of Martin*, 98 N. Y. 193; *Matter of Vedder*, 14 N. Y. St. Rep. 470; *Matter of Polles*, 75 N. Y. Supp. 1062, 37 Misc. R&P. 562, 568).

The influence which will avoid a will must be such as amounts to force or coercion destroying free agency; and it must not be the influence of affection, nor the mere desire to gratify the wishes of another. *Dudderar v. Dudderar*, 82 Atl. 453, 457, 116 Md. 605.

Influence gained by kindness and affection will not be deemed "undue influence," as ground for cancellation of a deed of gift, in the absence of any proof of imposition or fraud practiced by the grantee. *Turner v. Gumbert*, 114 Pac. 33, 37, 19 Idaho, 339.

It is not sufficient, to constitute "undue influence," that the testator's reason is convinced by persuasion or argument, if it is by his own will and intention that he carries that decision into effect. *Mueller v. Pew*, 106 N. W. 840, 841, 127 Wis. 288 (citing *In re Jackman's Will*, 26 Wis. 104; *Deck v. Deck*, 82 N. W. 293, 106 Wis. 470).

Persuasion, entreaty, cajolery, importunity, argument, intercession, and solicitation do not constitute "undue influence" sufficient to set aside a will, unless shown to have subverted and overthrown her will, and caused her to do that which she did not desire to do. *Salinas v. Garcia* (Tex.) 135 S. W. 588, 591.

Moderate solicitation to procure a deed does not constitute "undue influence." *Teter v. Teter*, 53 S. E. 779, 783, 59 W. Va. 449 (quoting and adopting *Doran v. McConlogue*, 24 Atl. 357, 150 Pa. 98).

"Honest and moderate intercession or persuasion, unaccompanied with fraud or deceit, and where the testator has not been threatened or put to fear by the flatterer or persuader, will not constitute 'undue influence.' That degree of importunity or undue influence which deprives a testator of his free agency, which is such as he is too weak to resist, and will render the instrument not his free and unconstrained act, is sufficient to invalidate it." The allegation of undue influence concedes testamentary capacity, but the degree of influence exerted involves necessarily to some extent the mental condition of the testator, and what degree of undue influence will vitiate a will depends somewhat on the bodily health and mental vigor of the testator. *Kennedy v. Dickey*, 59 Atl. 661, 662, 100 Md. 152, 68 L. R. A. 317 (quoting from *Davis v. Calvert* [Md.] 5 Gill & J. 302, 25 Am. Dec. 282, and citing *Griffith v. Diffenderffer*, 50 Md. 480; *Stirling v. Stirling*, 21 Atl. 275, 64 Md. 151; *Woerner, Admr*, § 31).

Mere advice, argument, or persuasion, if the grantor's mind acts freely thereunder, does not constitute "undue influence," which will invalidate a deed, though it may have led to its execution when it would not otherwise have been made. *Bishop v. Hilliard*, 81 N. E. 403, 407, 227 Ill. 382 (citing *Sturtevant v. Sturtevant*, 6 N. E. 428, 116 Ill. 340; *Wilcoxon v. Wilcoxon*, 46 N. E. 369, 165 Ill. 454; *Kimball v. Cuddy*, 7 N. E. 589, 117 Ill. 213; *Burt v. Quisenberry*, 24 N. E. 622, 132 Ill. 385; *Francis v. Wilkinson*, 35 N. E. 150, 147 Ill. 370; *Biggerstaff v. Biggerstaff*, 54 N. E. 333, 180 Ill. 407).

The "undue influence" which will avoid a deed is an unlawful or fraudulent influence which controls the will of the grantor, and the affection, confidence, and gratitude of a parent to a child inspiring a gift will not render a deed voidable for undue influence, unless such influence has been so used as to confuse the judgment and control the will of the donor. *Hacker v. Hoover*, 131 N. W. 734, 736, 89 Neb. 317.

#### Relation to and capacity of person influenced

"Undue influence" has been defined to be the use, by one in whom a confidence is reposed by another, who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage of his weakness of mind, or of his necessities or distress. *In re Welch's Will*, 91 Pac. 336, 337, 6 Cal. App. 52 (quoting and adopting definition in *Dolliver v. Dolliver*, 30 Pac. 4, 94 Cal. 646).

Though a person of impaired mental strength is a more favorable subject of undue influence than a person not so impaired, yet the "undue influence" that will avoid a testamentary act of a person of impaired mental strength must destroy his free agency, and constrain him to do what is against his will. *Smith v. Smith*, 56 South. 949, 951, 174 Ala. 205.

Weakness of a person's mind does not, ipso facto, prove he was unduly influenced, but circumstances must be proved pointing to the successful employment of "undue influence" or positive testimony to that effect. *Borchers v. Borchers*, 122 S. W. 357, 361, 143 Mo. App. 72.

"Undue influence" in the execution of a will is not established merely by showing that the sole beneficiary was deceased's physician and stood in confidential relationship to him. *In re Small's Will*, 93 N. Y. Supp. 1065, 1066, 105 App. Div. 140.

A mere confidential relation existing between the testator and a beneficiary under his will, or the opportunity of such beneficiary to exercise "undue influence" over the testator, is not enough to avoid a will; but fraud or "undue influence," to set aside a will, must be such as to overcome the tes-

tator's free volition or conscious judgment, and to substitute the wicked purposes of another instead, and must be the efficient cause, without which the obnoxious disposition would not have been made. Influence arising from gratitude, affection, or esteem is not undue, nor can it become such unless it destroys the free agency of the testator at the time the instrument is executed, and shows that the disposition which he attempted to make of his property therein results from the fraud, imposition, and restraint of the person whose superior will prompts the execution of the testament in the particular manner which the testator adopts. In *re Turner's Will*, 93 Pac. 461, 464, 51 Or. 1 (citing *In re Holman's Will*, 70 Pac. 908, 42 Or. 345; *In re Darst's Will*, 54 Pac. 947, 34 Or. 58).

The amount of "undue influence" in validating a law varies with the strength of the mind of the testator, and the influence which would subdue and control a mind naturally weak or impaired might have no effect to overcome or mislead a strong mind. "Undue influence" is not often the subject of direct proof, but can be shown by all the facts surrounding the testator, the nature of the will, his family relations, condition of his health and mind, his dependency upon or subjection to control of the person supposed to have wielded the influence, the opportunity and disposition of the person to wield it, and his acts and declarations. In *re Ellwanger's Will*, 114 N. Y. Supp. 727, 740.

The burden is upon one alleging "undue influence" in the procurement of a will to prove it, and to that end the evidence must tend to show that the will was the product of an influence exerted upon testator to such a degree as to amount to force or coercion, or by importunities which he could not resist, so that the motive was tantamount to force or fear. While an illicit relation existing between a testator and a beneficiary, and an unjust and unnatural disposition of his property, are circumstances properly to be considered in connection with evidence of undue influence, they are not of themselves evidence either of fraud or of undue influence. *Saxton v. Krumm*, 68 Atl. 1056, 1057, 107 Md. 393, 17 L. R. A. (N. S.) 477, 126 Am. St. Rep. 393.

Where testatrix, a firm believer in Spiritualism, consulted a medium the night before the will was executed, and the following morning stated that her deceased husband had told her that contestants (her orphan grandchildren) would cause trouble, and that she would thereupon make a will and give them \$1 each, whereupon proponent advised testatrix to "give them a dollar," and the two then went to the office of a lawyer, who drew the will by which testatrix bequeathed to each of the grandchildren such sum,

whether such alleged Spiritualistic revelations constituted "undue influence" to invalidate the will was for the jury. *Steinkuehler v. Wempner*, 81 N. E. 482, 486, 169 Ind. 154, 15 L. R. A. (N. S.) 673.

#### Time of exerting influence

"Undue influence" may be exercised either through threats or fraud; but in order to avoid a will it must destroy the free agency of the testator at the time and in the very act of making the testament. In *re Allison's Estate*, 59 Atl. 318, 321, 210 Pa. 22.

"Undue influence," to avoid a will, must be of a kind that subjugates the mind of the testator to that of the person seeking to control it, so as to destroy the free agency of testator when the will is made. In *re McNitt's Estate*, 78 Atl. 32-34, 229 Pa. 71.

"Undue influence," to invalidate a will, must have been in operation upon the mind of the testator at the time of the execution of the will, and his free agency, liberty to act, and independent volition must have been overcome by the influence exercised upon him. *Hart v. Hart* (Tex.) 110 S. W. 91, 92.

"Undue influence," which vitiates a will, must be such influence as dominates testator when the will is made; exercise and not mere existence of undue influence being required. *Gibony v. Foster*, 130 S. W. 314, 324, 230 Mo. 106.

"Undue influence," which will avoid a will or deed, must go to the extent of depriving a party of his free agency, and must operate at the time of the transaction sought to be impeached. *Sears v. Vaughan*, 82 N. E. 881, 887, 230 Ill. 572.

"Undue influence," which will avoid a deed, must deprive the grantor of free agency, and must operate at the time of the execution of the deed. *Riordan v. Murray*, 94 N. E. 947, 950, 249 Ill. 517.

"Undue influence," to avoid a will, must be directly connected with its execution and be operating when the will is made. It must be influence specially directed toward procuring the will in favor of particular parties, and be such as to destroy the freedom of testator's will and render the instrument obviously more the offspring of the will of others. *Bowles v. Bryan*, 98 N. E. 230, 233, 254 Ill. 148.

"Undue influence," however used, must, in order to avoid a will, destroy the free agency of the testator at the time and in the very act of the making of the testament. It must bear directly upon the testamentary act." Where, in a contest of a will because of undue influence, it appears that the testator was of sound mind, in the active management of his affairs, that he was a lawyer, and drew the will himself, that the will remained in his possession for three years, from the date of its execution to the date of

his death, and there was no evidence that the will was executed at a time other than its date, or that his wife was present when it was made, or that she requested the testator to make a will, or that she made a suggestion with reference to it, or that she knew of its existence until after her husband's death, there was no evidence sufficient to show that the wife unduly influenced the testator. In *re Donovan's Estate*, 73 Pac. 1081, 1082, 140 Cal. 390 (citing *Goodwin v. Goodwin*, 59 Cal. 560; *Englert v. Englert*, 47 Atl. 940, 193 Pa. 327, 82 Am. St. Rep. 808; *Page on Wills* [Ed. 1901] §§ 127, 130; *Chaplin on Wills*, p. 95).

"Undue influence," in order to avoid a will, must be such as to destroy the free agency of the testator at the time the instrument is made. It must be a present restraint, operating on the mind of the testator at the time of the making of the testament. In *re Miller's Estate*, 88 Pac. 338, 342, 349, 31 Utah, 415.

"Undue influence," however used, must, in order to avoid a will, destroy the free agency of the testator at the time, and in the very act of the making of the testament. It must bear directly upon the testamentary act." In *re Higgins' Estate*, 104 Pac. 6, 9, 156 Cal. 257 (citing *Estate of Donovan*, 73 Pac. 1081, 140 Cal. 390; *Estate of McDevitt*, 30 Pac. 101, 95 Cal. 17; *Estate of Calkins*, 44 Pac. 577, 112 Cal. 296; In *re Wilson's Estate*, 49 Pac. 172, 711, 117 Cal. 262).

In order to establish "undue influence," there must be proof of a pressure which overpowered the mind and bore down the volition of testator at the very time the will was made. In *re Carithers' Estate*, 105 Pac. 127, 130, 156 Cal. 422.

The "undue influence" which invalidates a will is an influence which destroys the free agency of testator, and places him in a position where he is dominated by another, and acts directly on his mind at the very time when he executes the will. *Simon v. Middleton*, 112 S. W. 441, 442, 51 Tex. Civ. App. 531.

Though a will may be made at the request and solicitation of the beneficiary, and but for such request it would not have been made, this is not enough to render it void, as made under "undue influence," since to be undue the influence must be of such a character as to subject the will of testator to that of the person exercising it. The influence must have been the controlling force inducing the will at the very time it was executed, though the person charged with exercising such influence need not have been personally present coercing the act, if the influence was actually operative in inducing it. *Brackey v. Brackey*, 130 N. W. 370, 371, 151 Iowa, 99.

"Undue influence," as a ground for setting aside a deed, must destroy free agency,

and mere improper influences are not sufficient where they do not amount to fraud, and it must appear that the influence was exercised at the time of the execution of the deed. *Kline v. Kline*, 128 Pac. 805, 808, 14 Ariz. 369.

To be undue within the meaning of the law, influence must be such as subjects the will of the testator to that of the person exercising such influence, and makes the will express the purpose of the person exercising the influence, rather than that of the testator. It must be equivalent to moral coercion. Such "undue influence" must be directly connected with the execution of the will, operating at the time it was made. *Parker v. Lambertz*, 104 N. W. 452, 453, 128 Iowa, 496 (quoting *Perkins v. Perkins*, 90 N. W. 55, 116 Iowa, 253).

### UNDUE PREFERENCE

A lease to a shipper of one of the piers and improvements thereon belonging to a terminal company, which relieves him from the payment of all wharfage and storage charges other than as the same may be included in the yearly rental, and has enabled him to acquire practically a monopoly of the export of cotton-seed products, constitutes an unlawful or "undue preference" under the act to regulate commerce, where other shippers are not and cannot be afforded the same facilities on the same conditions. *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 31 Sup. Ct. 279, 284, 219 U. S. 498, 55 L. Ed. 310.

A rule of a railroad company under which any coal mine operator on its line using its terminal tracks at the seacoast and there unloading its cars within five days on an average during any month is given as a premium a 50 per cent. larger allotment of cars during the next month is an attempted evasion of the provisions of the interstate commerce act requiring a fair and impartial distribution of cars between shippers, and gives an "undue preference" or advantage to shippers so favored, in violation of such act. *United States v. Baltimore & O. R. Co.*, 165 Fed. 113, 122, 91 C. C. A. 147.

The construction of the phrase "undue or unreasonable preference or advantage," as used in the interstate commerce act, when applied to any particular description of traffic, must be the same as when applied to any particular person, company, firm, corporation or locality. All of said terms being contained in *Interstate Commerce Act* Feb. 4, 1887, c. 104, § 3, 24 Stat. 380, in a single sentence, the same construction must be given to each and every part of the sentence. *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 141 Fed. 1003, 1014 (quoting and adopting definition in *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 43 Fed. 37).



**UNDUE PREJUDICE**

Plaintiff, a corporation, was engaged in the general produce business with offices in different places in two states. Defendant had stations at the towns in those states and in adjoining states. It was defendant's custom for the terminal carrier to advance charges of connecting lines upon freight consigned to parties at those stations, and to deliver the freight to consignees, and to receive freight and deliver it to consignees, and to hold the bills until the correctness of the charges had been adjusted. From a bad motive defendant, after notice, refused to advance charges to connecting lines and transport freight consigned to plaintiff unless the charges were prepaid, while it gave credit to other consignees similarly situated. Held not to subject plaintiff to "undue or unreasonable prejudice or disadvantage," within the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379. *Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co.*, 168 Fed. 161, 164, 94 C. C. A. 217, 21 L. R. A. (N. S.) 982, 16 Ann. Cas. 613.

**UNDUE RETURN**

Under V. S. 1075, 1076, requiring officers to execute and return writs and precepts agreeably to the direction thereof, and subjecting them to a penalty for making a false and undue return, an officer who arrests defendant in a civil action on mesne process, which commands him to "make service and return according to law," must return the writ with a statement of substantially all his doings in executing the same; and a return, merely stating that he served the writ on defendant and read the same in his hearing, is not sufficient to enable the officer to justify under the writ for making the arrest, since the return is "undue." *Gibson v. Holmes*, 62 Atl. 11, 14, 78 Vt. 110, 4 L. R. A. (N. S.) 451.

**UNDULY**

In instructing upon a city's liability for damage to property by the overflow of a stream by changing the grade of a street, it is usual to instruct that the volume of water must have been "materially and unduly" increased; "unduly" meaning disproportionately, and not being synonymous with "materially." *Walters v. City of Marshalltown*, 120 N. W. 1046, 1048, 145 Iowa, 457, 26 L. R. A. (N. S.) 199.

**UNDULY INFLUENCED**

In a suit by two children of a decedent to set aside decedent's deed of real estate to a third child, to the exclusion of one of the plaintiffs, the master found that the defendant and one of the plaintiffs "connived together to induce their mother to make a will in their favor to the exclusion of Thomas [her son] and her grandson, and that she

was unduly influenced by them, and that, although she of her own volition and with the idea of preventing trouble, which might be occasioned if she left another will, suggested a deed instead, was nevertheless affected at said time by said undue influence." Held, in view of the fact that decedent made no will, at that time or later, that the finding that the mother was "unduly influenced" had no meaning except by reference to the deed, that the words "at said time" meant when the deed was executed, and that the word "affected" signified acted upon, moved, or changed. *Lyons v. Elston*, 98 N. E. 93, 94, 211 Mass. 478.

In an action by an employé for personal injuries, a replication to an answer relying on a release of the claim, which alleges that by reason of her injuries, bodily pain, and mental anguish consequent thereupon, and by reason of medicines taken to alleviate the pain, the employé had become so weak in body and enfeebled in mind that she did not understand the meaning of the writing, and while in that condition, of which the employer knew, he wrongfully procured and unduly influenced her to sign the writing, etc., is insufficient to show that the release was obtained by the employer's fraud; the words "unduly influenced" being no more than the equivalent of "falsely and fraudulently." *Harris v. Bottum*, 70 Atl. 560, 561, 81 Vt. 346.

**UNENDURABLE**

Under a statute requiring that cruelties shall be "insupportable" in order to constitute ground for divorce, an allegation that defendant's acts of cruelty were "unendurable" was sufficient; both words being expressive of intolerable conduct and having practically the same meaning. *Gamblin v. Gamblin*, 114 S. W. 408, 409, 52 Tex. Civ. App. 479.

**UNENUMERATED MANUFACTURED ARTICLE**

See Manufactures—Manufactured Article.

**UNEQUAL**

The tax imposed by Laws 1905, p. 432, c. 40, imposing a tax on the value of property passing by will or by intestate laws, except when passing to designated relatives of the testator or the intestate, or when passing to charitable, educational, or religious institutions, is not "unequal," in that the tax is not assessed on all the property passing by will or inheritance; for, whether the tax is considered as an impairment of the right of property, by incumbering the right to dispose of it at death, or as a tax on the privilege of succeeding to property at the death of the owner, it affects all citizens



alike. *Thompson v. Kidder*, 65 Atl. 392, 396, 74 N. H. 89, 12 Ann. Cas. 948.

## UNEQUIVOCAL EVIDENCE

The expression "unequivocal evidence," in the syllabus and opinion in *Re McCoy's Will*, 89 N. W. 665, 64 Neb. 150, was the equivalent of "evidence of an equivocal act or conduct." A simple preponderance of the evidence is all that is required to maintain an issue of fact in a civil action. *Davidson's Estate v. Davidson*, 97 N. W. 797, 70 Neb. 584.

## UNEXPIRED TERM

Balance of, see Balance.

The phrase "unexpired term" is not synonymous with "vacancy." The former is the remainder of a period prescribed by law after a portion of such time has passed. A vacancy exists where there is no person lawfully authorized to assume and exercise at present the duties of the office. *State ex rel. Hoyt v. Metcalfe*, 88 N. E. 738, 743, 80 Ohio St. 244.

## UNFAIR

The word "unfair" in a publication may sometimes mean dishonest, and when, by a colloquium or innuendo, shown to have this meaning, might give rise to a cause of action; but it does not necessarily involve so serious a charge. It may convey the idea of discrimination. It may mean that one is prejudiced or partial. It may mean illiberal, hard, ungenerous, or exacting. A publication stating the facts and reasons why defendants placed plaintiffs on an unfair list, taken as a whole, casts no imputation upon plaintiffs' character as individuals or upon their solvency or standing as merchants, and is not libelous. *Watters v. Retail Clerks' Union No. 479*, 47 S. E. 911, 912, 120 Ga. 424.

The word "unfair," as used in a rule of a labor union to indicate the attitude of employers towards members of the union, does not mean that the employer is guilty of fraud, or dishonest conduct, but only that the employer has refused to comply with the conditions upon which union men will consent to remain in his employ or handle materials produced by him. *J. F. Parkinson Co. v. Building Trades Council of Santa Clara County*, 98 Pac. 1027, 1029, 154 Cal. 581, 21 L. R. A. (N. S.) 550, 16 Ann. Cas. 1165.

The use of the term "unfair" has a distinct meaning in labor organizations, and it is in the nature of a direction to the members of these organizations not to use the article to which it is applied, and it is also an intimidation to those who are dealing in it. It gives them to understand that the article will be boycotted, and that would deter parties

from using or dealing in it. *Seattle Brewing & Malting Co. v. Hansen*, 144 Fed. 1011, 1014.

The word "unfair," when coupled with the word "list," is an idiom of the language of organized labor, and means a list of persons unfriendly to or rebellious against its rules and authority, and a notice, in a newspaper devoted to the interests of organized labor, that plaintiff, a contractor, had been placed on the "unfair list" by a certain labor union, and that the paper had instructions to publish the list "until the parties named have decided to set themselves square with organized labor," did not impute to plaintiff dishonesty, faithlessness to contract, unreliability, nor that he was undeserving of confidence. *Labor Review Pub. Co. v. Galliher*, 45 South. 188, 191, 153 Ala. 364, 15 Ann. Cas. 674.

## UNFAIR COMPETITION

"Unfair competition" is distinguishable from the infringement of a trade-mark, in that it does not involve necessarily the question of the exclusive right of another to the use of the name, symbol, or device. A word may be purely generic or descriptive, and so not capable of becoming an arbitrary trade-mark, and yet there may be an unfair use of such word or symbol, which will constitute unfair competition. *G. W. Cole Co. v. American Cement & Oil Co.*, 130 Fed. 703, 705, 65 C. C. A. 105. See, also, *American Brewing Co. v. Bienville Brewery*, 153 Fed. 615, 616.

"Unfair competition" does not necessarily involve the violation of any exclusive right to the use of a word, mark, or symbol as it may arise from the use of words, etc., which everybody may use; the test being whether what has been done tends to pass off the goods of one for those of another, or to deprive such other of his rights. *Bates Mfg. Co. v. Bates Numbering Mach. Co.*, 172 Fed. 892, 895. See, also, *Scriven v. North*, 134 Fed. 366, 375, 67 C. C. A. 348.

The basis of an action for "unfair competition" is fraud or deceit, inducing the public to believe that defendant's goods are those of complainant; and where the likeness is in the goods themselves, because of the copying of the design of complainant's article, which is unpatented, and there is no attempt to deceive purchasers with respect to the manufacturer, there is no ground on which a court of equity can grant an injunction. *Keystone Type Foundry v. Portland Pub. Co.*, 186 Fed. 690, 692, 108 C. C. A. 508.

The essence of the wrong in "unfair competition" consists in the sale of the goods of one manufacturer or vendor for those of another, and the copying by one manufacturer of stoves of an unpatented design of a stove made by another, only a few of which had been sold so that it was not known to the buying public, and no purchaser was deceived, the characteristic marks of the original

designer being removed and those of the maker substituted, did not constitute unfair competition which would sustain a suit for an injunction. *Rathbone, Sard & Co. v. Champion Steel Range Co.*, 189 Fed. 26, 31, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258.

In determining whether a representation as to goods constitutes "unfair competition," the test is whether it is calculated to deceive intending purchasers of such goods—that they are the goods of the first comer. It is not necessary that it should be calculated to so deceive first or intelligent purchasers. It is sufficient that it is calculated to deceive ultimate or ordinary purchasers, and ordinary purchasers include incautious, unwary, and ignorant purchasers. *Bissell Chilled Plow Works v. T. M. Bissell Plow Co.*, 121 Fed. 357, 364, 366.

To make out a case of "unfair or fraudulent competition"—an effort, in other words, to steal the trade built up by another—there must be an actual wrongful intent to deceive the public into the belief that the goods of the one party are the goods of the other, accompanied by such acts and devices as are likely to do so, or such duplication in form and dress of the one by the other as will produce a confusion calculated to bring this about, of which the party complained against is convicted of being willing to have the benefit. *Lamont, Corliss & Co. v. Hershey*, 140 Fed. 763, 764.

"Unfair competition" is not established by proof of similarity in form, dimension, or general appearance alone. When such similarity consists in constructions common to, or characteristic of, the articles in question, and especially when it appears to result from an effort to comply with the physical requirements essential to commercial success, and not to be designed to misrepresent the origin of such articles, the doctrine of 'unfair competition' cannot be successfully invoked to abridge the freedom of trade competition." *J. A. Scriven Co. v. Morris*, 154 Fed. 914, 918 (quoting and adopting the definition in *Marvel Co. v. Pearl*, 133 Fed. 160, 162, 66 C. C. A. 226, 227).

In suits to restrain the use of a trade-name, on the ground of "unfair competition," care must be taken not to extend the meaning of the word "unfair" to cover that which may be unethical, but is not illegal; and while it may be unethical for one trader to take advantage of another's advertising, it would in many cases be legal; the principle in such cases being that nobody has a right to represent his goods as the goods of some one else, the whole doctrine resting upon the prevention of fraud. Where the owner of a shoe store marked all the shoes he sold "E-Shoes," though they were procured from various sources, so that the name did not indicate any particular make of shoes, he may not enjoin the use of the name by another on the

ground of unfair competition. *Perlbery v. Smith*, 62 Atl. 442, 444, 70 N. J. Eq. 638.

"Unfair competition" cannot be predicated upon the use by defendant of a plain brown cigar band with white lettering thereon, because it is similar in color and shape to one previously in use by complainant, where there is no evidence of an intention to imitate, and the only characteristic thing about either band is the name thereon, in which the two are dissimilar, both in name and style of lettering. *E. Regensburg & Sons v. Juan F. Portuondo Cigar Mfg. Co.*, 142 Fed. 160, 164, 73 C. C. A. 378.

While a similarity may be traced in the principles on which actions for infringement of copyright and for unfair competition are founded, copyright is based on statute, while "unfair competition," except as affected by legislative enactment in connection with patents, trade-marks, etc., is dependent on abstract principles of law. Copyright relates to the printed material of a publication, while unfair competition may be concerned with any article of trade, whether having words or letters in its composition and appearance or not. *West Pub. Co. v. Edward Thompson Co.*, 169 Fed. 833, 834, 853.

The doctrine of "unfair competition" is based on the principle of common business integrity, and equity only affords relief when this principle has been violated, and the mischief which equity will guard against is a confusion in trade-names, or in the identity of parties, or in the goods sold, so as to deceive the public and work a fraud on the party having a right to a trade-name. *Eastern Outfitting Co. v. Mannheim*, 110 Pac. 23, 24, 59 Wash. 428, 35 L. R. A. (N. S.) 251.

"Unfair competition" consists in "one person imitating, by some device or designation, the wares made and sold by another, for the purpose of palming off or substituting his wares for those of the other, and in that way misleading the purchaser by inducing him to buy the wares made and sold by the first, instead of those made by the second. This, in law, constitutes misrepresentation and deception, and therefore becomes and is a fraud, not only against the person whose wares are thus imitated, but against the public as well." But the adoption by a telephone company of the same number as a call for its trouble department as that used by a rival company previously established for its trouble department, enabling the newer company to learn, through mistakes of subscribers of the older company, of cases of trouble in the use of its telephones, was not unfair competition against which an injunction would issue. *Rocky Mountain Bell Telephone Co. v. Utah Independent Telephone Co.*, 88 Pac. 26, 28, 31 Utah, 377.

The law of trade-marks is but a special feature of the general law of unfair competi-

tion in trade, which rests upon the elementary principle that no person has the right to sell his goods for those of another. But there are important distinctions to be observed between them. In the first place, "unfair competition," unlike the infringement of technical trade-marks, does not necessarily involve the violation of any exclusive right in the plaintiff to the use of the names of symbols employed by the defendant. There may be unfair competition resulting from an unauthorized and improper use of such names and symbols, although the plaintiff has no property right in them as a trade-mark. Any conduct designed and having a natural tendency to deceive the public, and enable one man to dispose of his goods for those of another, may be unfair competition, and be enjoined, although it is not expressly shown that any particular person was thereby actually deceived. Again, it is frequently stated that in cases of technical trade-mark the fraudulent intent to deceive is presumed, while in cases of unfair competition the plaintiff must prove this intent or show facts and circumstances from which it may be reasonably inferred. *W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co.*, 62 Atl. 499, 505, 100 Me. 461, 4 L. R. A. (N. S.) 960.

"Unfair competition" in trade is not confined to the imitation of a trade-mark, but takes as many forms as the ingenuity of man can devise. It may consist of the imitation of a sign, a trade-name, a label, a wrapper, a package, or almost any other imitation, by a business rival of some distinguishing earmark of an established business, which the court can see is calculated to mislead the public, and lead purchasers into the belief that they are buying the goods of the first manufacturer. The first question is whether there is an imitation in fact, and this must be determined by inspection of the rival symbols or devices. It is not to be expected, of course, that there will ever be an exact copy. The imitator will always seek to introduce enough difference to justify a claim that there has been no imitation, while incorporating enough similarities to carry the general effect of the original design to the mind of the unwary purchaser. *Cornelius v. Ferguson*, 97 N. W. 388, 390, 17 S. D. 481.

"Unfair competition" is distinguished from trade-mark cases in this: That it does not involve necessarily the question of the exclusive right of another to use the name, symbol, or device. A word may not be capable of becoming an arbitrary trade-mark, and yet there may be an unfair use of the word, which will constitute unfair trade. The whole doctrine is based upon the theory of protection to the public, whose rights are infringed or jeopardized by confusion of goods produced by unfair methods of trade, as well as upon the right of complainant to enjoy the good will of a trade built up through his efforts, and sought to be taken from him by

unfair methods. *Sartor v. Schaden*, 101 N. W. 511, 513, 125 Iowa, 696.

"The issue of 'unfair trade' arises only on a showing of fraud or deception in the use of a trade-name, trade-mark, or sign, by one in competition in the same line of trade." As to business where one party is engaged exclusively in the wholesale trade, and the other party exclusively in the retail trade, such issue does not arise. *Regent Shoe Mfg. Co. v. Haaker*, 106 N. W. 595, 597, 75 Neb. 426, 4 L. R. A. (N. S.) 447 (citing *Sartor v. Schaden*, 101 N. W. 511, 125 Iowa, 696; *Kann v. Diamond Steel Co.*, 89 Fed. 706, 32 C. C. A. 324).

"Unfair competition" does not necessarily involve the question of the exclusive right of another to use a name, symbol, or device, and a word may not be capable of becoming an arbitrary trade-mark, and yet there may be an unfair use of the word amounting to unfair trade. The whole doctrine is based on the theory of protection to the public, whose rights are infringed or jeopardized by confusion of goods produced by unfair methods of trade, as well as on the right of the complainant to enjoy the good will of the trade built up by his own efforts. *Dyment v. Lewis*, 123 N. W. 244, 245, 246, 144 Iowa, 509, 26 L. R. A. (N. S.) 73 (citing *Sartor v. Schaden*, 101 N. W. 511, 125 Iowa, 696).

## UNFAVORABLE

See Very Unfavorable.

"Unfavorable" is a synonym of "adverse." *Prunty v. Consolidated Fuel & Light Co.*, 108 Pac. 802, 803, 82 Kan. 541 (citing *Webst. Dict.*).

## UNFINISHED

In a statute making a place where articles in a raw, unfinished, or incomplete state are converted into a new, improved, or different form a manufacturing establishment, the words "unfinished" and "incomplete" refer to a state or condition not yet attained, and mean not fully fashioned to meet some design. *Factory Act (Laws 1903, c. 356) § 7*, provides that an establishment wherein any natural products or other articles, in a raw, incomplete, or unfinished condition, are converted into a new improved or different form, is a manufacturing establishment, within the act. Held, that an establishment wherein railroad iron, old stoves, waste and scrap iron of every description, is cut into lengths, known as grade No. 1, grade No. 2 and busheling scrap, by machines, known as alligator shears, operated by power, to meet standing specifications of mills which purchase the product, is a manufacturing establishment within the act. *Caspar v. Lewin*, 109 Pac. 657, 659, 82 Kan. 604.

## UNFIT FOR DUTY

Laws 1901, p. 154, c. 466, § 355, authorizing the compulsory retirement of police of-

ficers of the city of New York "unfit for duty," does not require the retirement of a policeman unable to perform full police duty or every conceivable duty, but only such as are unable to discharge with average efficiency the duties of their respective grades. *People ex rel. Metcalf v. McAdoo*, 77 N. E. 17, 18, 184 N. Y. 268.

Under a city charter authorizing the police commissioner to remove an officer upon a showing that he is permanently disabled so as to be "unfit for duty," the officer, in order to be retired, must be substantially unfit for the duty required of one of his rank or place in the force, and a certificate stating that an officer is "unfit for the performance of full police duty" is insufficient to authorize his retirement. *Metcalf v. McAdoo*, 95 N. Y. Supp. 511, 513, 48 Misc. Rep. 420.

### UNFORESEEN CAUSE

A street railway construction contract provided that any claim for extra work due to change of location or grade, or to any "unforeseen cause," would not be allowed, unless agreed on in writing in the form of a supplemental contract, signed by the contractor and the engineers, specifying the price. Held, that the word "unforeseen" limited the word "cause" and meant that the cause was not foreknown, and hence extras claimed for, consisting of work done in setting additional and larger poles and in furnishing certain gains and cross-arms, because, owing to the grades and curves of the road, their use would create better railway construction, was not "unforeseen"; and hence plaintiff was not required to comply with such extra work provision in order to recover therefor. *McCaffrey v. Groton & S. St. Ry. Co.*, 84 Atl. 284, 286, 85 Conn. 584.

Where a creditor, who attached the interest in land descending to the debtor on the ancestor dying intestate, knew of proceedings to probate the ancestor's will, which disinherited the debtor, but took no steps to become a party thereto, and the will was admitted to probate, the creditor's failure to contest the probate was not the result of "accident, mistake, or 'unforeseen cause,'" within the statute authorizing the granting of a new trial where, by reason of accident, mistake, or unforeseen cause, judgment was rendered against the applicant for a new trial. *Seward v. Johnson*, 62 Atl. 569, 570, 27 R. I. 396.

### UNFORESEEN CASUALTY

A sale of standing timber, to be removed within a given time, is a sale of only so much of the timber as is removed within that time, or in a reasonable time thereafter, if the purchaser is prevented from removing it by act of God or of the seller, or by some unforeseen casualty or misfortune; and where standing timber was sold in May, 1910, to be removed

in a year, and cutting was delayed until August and hauling until November, though the roads were in good condition in the fall, and it could easily have been removed, and though the buyer knew that the roads in winter would be bad, the buyer was not prevented from removing it by "unforeseen casualty or misfortune," and had no right to enter to remove it after the expiration of the year. *Z. Harrell & Co. v. Danks*, 151 S. W. 13, 14, 151 Ky. 71.

### UNFORTUNATE

The word "unfortunate," as used in a devise of a fund in a will to be used in organizing and maintaining a home for bettering the condition and comforting the unfortunate widows and orphans of a certain city, is used in the sense of poor or indigent, and a devise for the indigent widows and orphans of a city is good, and not void on the theory that the class named is too indefinite. *Gidley v. Loverberg*, 79 S. W. 831, 835, 35 Tex. Civ. App. 203.

### UNGROUND

The residuum in the process of decortiating pepper berries, consisting of the inner cuticle in the form of a powder, which, without further grinding, is mixed with ground pepper as an adulterant, is not within the provision in the Tariff Act of 1897 for pepper "unground." It is sufficient if the pepper reaches its ground condition by decortication, or some other process equivalent to grinding, to be excluded from this provision. *Frame & Co. v. United States*, 143 Fed. 692.

### UNIFORM

To make a patent license fee "uniform" it is not necessary that it be uniform for all time, or that each and every person taking a license shall pay that exact sum under all circumstances and conditions. If it is uniform for a considerable period of time, and accepted and paid by those who take licenses during that time, it answers the rules of law, even if, during that period, for some peculiar reason or special circumstances, a lesser fee is accepted from a few persons. Where two different uniform license fees under a patent prevailed at different periods of time, the fee having been reduced on a certain date, an infringer, whose infringement commenced during the first period and extended into the second, may properly be charged with damages at the higher rate until he ceased to infringe; but where he subsequently again commenced infringement, his liability should be measured by the rate then prevailing. *Fox v. Knickerbocker Engraving Co.*, 158 Fed. 422, 427.

### UNIFORM ASSESSMENT

An assessment is "uniform," within the meaning of the law, if the average ratio of

assessed to actual market value is applied in determining the valuation of each separate tract. *Mineral R. R. & Mining Co. v. Northumberland County Com'rs*, 78 Atl. 991, 998, 229 Pa. 436.

### UNIFORM OPERATION OF LAWS

See, also, General Law.

"'Uniform operation throughout the state' means universal operation as to territory. It takes in the whole state, and as to persons and things it means universal operation as to all persons and things in the same condition or category. When a law is available in every part of the state as to all persons and things in the same condition or category, it is of 'uniform operation throughout the state.'" *Gentsch v. State*, 72 N. E. 900, 901, 71 Ohio St. 151 (quoting and adopting definition in *State v. Spellmire*, 65 N. E. 619, 622, 67 Ohio St. 77, 86).

Laws are general and "uniform," not because they operate on all alike, for they do not, but because every one who is brought within the circumstances and conditions provided by the law is affected thereby. *Indianapolis Traction & Terminal Co. v. Kinney*, 85 N. E. 954, 956, 171 Ind. 612, 23 L. R. A. (N. S.) 711.

The word "uniform," in the constitutional provision requiring laws of a general nature to have a uniform, operation "does not mean universal." The provision intends simply that the effect of the general laws shall be the same to and upon all persons who stand in the same relation to the law—that is, all the facts of whose cases are substantially the same." *Ex parte Sohneke*, 82 Pac. 956, 959, 148 Cal. 262, 2 L. R. A. (N. S.) 813, 113 Am. St. Rep. 236, 7 Ann. Cas. 475 (quoting and approving definition in *Hellman v. Shoulters*, 44 Pac. 915, 45 Pac. 1057, 114 Cal. 159); *Ex parte Zhizhuzza*, 81 Pac. 955, 957, 147 Cal. 328 (quoting and adopting the definition in *Hellman v. Shoulters*, 44 Pac. 915, 45 Pac. 1057, 114 Cal. 159); *Ex parte Murphy*, 97 Pac. 199, 202, 8 Cal. App. 440.

If a statute operates uniformly on all members of the class to which application of the statute is limited, as it properly may be, it has the "uniform application" required by Const. art. 1, § 11. *Ex parte King*, 106 Pac. 578, 579, 157 Cal. 161.

A law of general nature, passed for the whole state, and not applied to any particular locality therein, and having no words prohibiting its application to any particular locality, has "uniform operation," within Const. art. 5, § 59 (*Bunn's Ed.*, § 132), though practically it may not operate in every part of the state. *Anderson v. Ritterbusch*, 98 Pac. 1002, 1004, 22 Okl. 761.

That Rev. St. § 5198 (U. S. Comp. St. 1901, p. 3493), authorizes recovery from a national bank only, and not from a state bank,

of a penalty for taking usury does not render it obnoxious to the provision of the state Constitution that all laws of a general nature shall have uniform operation; laws being of "uniform operation" if they apply to all persons in like situation. *Ingraham v. Merchants' Nat. Bank of Greene*, 132 N. W. 869, 870, 153 Iowa, 408.

The operation of a statute is "uniform" if its terms are applicable to all of a certain class in the state, though in certain localities there be none of that class; but, whenever they come into existence, the general law applies to them. *State ex rel. Covington v. Thompson*, 38 South. 679, 683, 142 Ala. 98 (citing *State v. Nelson*, 39 N. E. 22, 52 Ohio St. 88, 26 L. R. A. 317, 319).

*Anderson's Law Dictionary* states: "The operation of a law means its practical working and effect." Also: "'All laws of a general nature shall be uniform in their operation' means that such laws shall bear equally, in their burdens and benefits, upon persons standing in the same category." Again: "Every law of a general nature must operate equally upon all persons brought within the relations and circumstances provided for." Again: "A law is uniform when all persons brought within the relation and circumstances provided for are affected alike, when it has a 'uniform operation' upon all within the class upon which it purports to operate." *Commonwealth ex rel. Carson v. Mathues*, 59 Atl. 961, 976, 210 Pa. 372.

### UNIFORM RULE OF TAXATION

See, also, Uniform Taxation.

"Taxation by a 'uniform rule' will require that the rate of taxation shall be uniform, and such uniformity coextensive with the territory to which it applies, whether the tax is a state, county, township, or city tax, and that every species of property not exempt from taxation, whether lands, goods, money, or choses in action, and however used or employed, shall go upon the tax duplicate at its rule value in money. The true value in money is adopted as a standard for taxation, as the basis upon which a uniform rate of taxation is to be fixed. But taxation by a uniform rule does not necessarily demand that there should be the same mode of assessment for every species of property, without regard to any classification. An assessment, in the sense of a valuation of the property of the taxpayer for the purpose of determining the proportion of tax to be paid, should, it is true, be uniform in its mode, to the extent that the property is assessed according to its true value in money. But it would not follow that different classes of property may not be valued for taxation by different officers and boards, and by different modes and agencies. The same rigid and inflexible method of assessment for all classes of property might result in a marked in-

equality in the burden of taxation." *Missouri, K. & T. Ry. Co. of Texas v. Shannon*, 100 S. W. 138, 143, 100 Tex. 379, 10 L. R. A. (N. S.) 681 (quoting and adopting definition in *State v. Jones*, 37 N. E. 945, 51 Ohio St. 492).

The phrase "uniform rules" in the Constitution does not refer to those regulations that pertain to the agencies and methods employed in the assessment and collection of taxes, but only to the basic rules for taxation, which settle how the public burden is to be distributed, including the designation of the property that is to contribute and the rate or rates by which the taxes are to be laid and apportioned. The constitutional requirement of uniform rules for taxation is satisfied by a uniformity that obtains without discrimination throughout a class of property set apart on reasonable grounds for separate treatment. *Central R. Co. of New Jersey v. State Board of Assessors*, 67 Atl. 672, 682, 75 N. J. Law, 120 (citing *State Board of Assessors v. Central R. Co.*, 4 Atl. 578, 48 N. J. Law, 146).

The Perkins act of 1906 (P. L. p. 571, c. 280), requiring what is known as second-class railroad and canal property to be assessed and taxed in the same manner and at the same rate as other property located in the district, the tax thereon to be paid to the proper officers of the several taxing districts, prescribes a "uniform rule of taxation" in respect to the subjects mentioned in the act. *United New Jersey R. & Canal Co. v. Parker* (N. J.) 67 Atl. 686, 687.

#### UNIFORM SERIES

The words "uniform series," as used in section 4, c. 179, Laws of 1897 (Gen. Stat. 1909, § 7813), which authorizes the school text-book commission to select and adopt a uniform series of school text-books for use in the public schools of the state, have reference to the whole series of text-books adopted for use in the public schools. The use must be uniform in all schools of the same grade. The text-books adopted upon any subject may be made up of books prepared by different authors, provided the same text-book is adopted for use in the same grade in all the public schools. It is for the text-book commission, in its discretion and judgment, to determine whether or not text-books by different authors upon the same subject are so arranged as to permit them to be used connectedly. *State ex rel. Simon v. Fairchild*, 125 Pac. 40, 42, 87 Kan. 781.

#### UNIFORM TAXATION

See Equal and Uniform Taxation.

See, also, Uniform Rule of Taxation.

A tax is "uniform" if it is equal upon all persons belonging to the described class upon which it is imposed. While the constitutional provision that laws shall be passed taxing by a uniform rule certain kinds of property according to its true value in money is man-

datory so far as ad valorem and uniform taxation is concerned, it does not limit the power of the General Assembly to provide the machinery for determining the value; and Revisal 1905, § 5290, providing for the assessment of railroad property by a commission, is not unconstitutional, although the property of individuals is valued at their places of residence by local assessors. *Atlantic & N. C. R. Co., v. City of Newbern*, 60 S. E. 925, 926, 147 N. C. 165 (citing *Gatlin v. Town of Tarboro*, 78 N. C. 119; *Burroughs, Tax'n*, § 77).

A tax is "uniform" when it operates alike in all places where the subject of it may be found, and is not wanting in such uniformity because the thing is not equally distributed in all parts of the country. When one township requires the bridging of a stream which passes through it, and another township has no such stream, and therefore no such requirement is necessary, the law which permits the one requiring such bridge to incur a debt sufficient to build it is not void because of the fact that it has provided the manner in which the people of the township may be taxed greater than it is necessary for those in the other township to be. *McMillan v. Board of Com'rs of Payne County*, 79 Pac. 898, 900, 14 Okl. 659.

In levying excise taxes upon privileges, there may be proper classification and different rates applied to different classes; the term "uniformity in taxation" meaning simply taxation which acts alike on all persons similarly situated. *Beals v. State*, 121 N. W. 347, 348, 139 Wis. 544.

Under the requirement for "uniformity of taxation," it is not necessary that all assessments be made through the same officials or by the uniform method of procedure; but an assessment may be made by duly authorized officials, or the state may make it directly by appropriate legislative action. *State v. City of Baltimore*, 65 Atl. 369, 371, 105 Md. 1.

In the constitutional guaranty that a "uniform and equal" rate of assessment and taxation shall be provided for and that all taxation shall be "equal and uniform," the word "rate" is used in a somewhat different sense when applied to the assessment from that when applied to taxation. Equality in the rate of assessment means proportional valuation—relative, not absolute, equality. Equality in the rate of taxation means that the percentage shall be the same, or absolutely equal. No meaning can be attached to the word "uniform" which is not conveyed by the word "equal." The law providing that all live stock pastured in more than one county during the year shall be subject to taxation in each of the counties in proportion to the time that it ranges therein; that live stock and the owner thereof shall be liable to the home county "for taxes thereon at the

rate of levy for state, county, and other purposes as other property is liable"; that the owner shall, unless he has sufficient real estate liable therefor, pay to the assessor at the time of the levy "the whole amount of said tax for the full year at the rate of the last preceding levy"; that whenever live stock is pastured in another county, it and its owner shall be liable to such county for the portion of taxes due thereon for the length of time that the stock remains within such county during the year "according to the last preceding rate of levy in said county"—and which fails to provide for a subsequent adjustment or equalization of the taxes collected from an owner of migratory stock in accordance with the rate of levy for the preceding year, in case such rate differs from the rate for the current year in which the taxes are collected, is repugnant to the Constitution. *Lake County v. Schroder*, 81 Pac. 942, 944, 47 Or. 136 (citing *Crawford v. Linn County*, 5 Pac. 738, 11 Or. 482).

Under Const. § 181, authorizing the imposition of license taxes, and section 171, requiring all ad valorem taxes to be uniform, the Legislature had no power to pass an act imposing an occupation tax on real estate agents varying in amount according to the class of the city in which such real estate agents resided, and exempting all who did not live or do business in such cities and towns. *Hager v. Walker*, 107 S. W. 254, 257, 128 Ky. 1, 15 L. R. A. (N. S.) 195, 129 Am. St. Rep. 238.

While it is conceded that absolute equality and uniformity of legislation on the subject of taxation is beyond human attainments, the constitutional provision requiring that all taxes be "uniform" should be given effect as far as possible, and, conceding that the words "equal" and "uniform" are used in the same sense, an occupation tax law, in order to meet the requirement of the Constitution, must require every taxpayer embraced in the legislative classification to pay the same amount, or, if the amount of taxation is fixed by a per centum on the income of the taxpayer, the basis of the tax must be limited to the income derived from the occupation that is taxed, and cannot be based on such income and another income, variable in amount and derived from different occupations. *Galveston, H. & S. A. R. Co. v. Davidson* (Tex.) 93 S. W. 436, 457 (concurring opinion of Key, J.).

P. L. 1888, p. 269 (Gen. St. p. 3324), as amended by Laws 1906, cc. 82, 122, 280 (P. L. 1906, pp. 121, 220, 571), imposes a "uniform state tax," applicable to all railroad and canal corporations of the state, within the meaning of Act March 4, 1869 (P. L. 1869, p. 226), relative to transit duties, providing that all companies paying transit duties shall hereafter pay a certain prescribed tax until the Legislature shall by general law impose "a uniform state tax, equally applicable to

all railroad and canal corporations." The court said: "We do not construe the words 'a uniform state tax,' in the act of 1869, to mean a tax uniform in amount throughout all the taxing districts of the state, within the entire territory of the state, but as fixing a rule of taxation which shall be uniform in its application to all railroad and canal property within the several taxing districts. The rate of taxation in the several taxing districts must, of necessity, owing to their different needs, vary; but the variance is uniform in its application upon all railroads and canal companies owning property within the several taxing districts; and hence the rate of taxation in the several districts falls with equal burden upon the property of each railroad and canal company within each of the taxing districts of the state." *United New Jersey Ry. & Canal Co. v. State Board of Assessors*, 67 Atl. 438, 443, 75 N. J. Law, 35.

Chapter 91 of the Laws of 1905, being a supplement to the act for the taxation of railroad and canal property, and known as the "Duffield Act" (P. L. 1905, p. 189), is not in conflict with article 4, § 7, par. 12, of the Constitution of this state, which provides that "property shall be assessed for taxes under general laws, and by uniform rules, according to its true value." *Bergen & D. R. Co. v. State Board of Assessors*, 67 Atl. 668, 672, 74 N. J. Law, 742.

## UNILATERAL CONTRACT

The term "unilateral contract," as expressing the idea of a contract lacking in mutuality, is a legal solecism; there is no such thing as a one-sided contract. *High Wheel Auto Parts Co. v. Journal Co. of Troy*, 98 N. E. 442, 443, 50 Ind. App. 396.

To make a contract "unilateral," and thereby void, there must be no mutuality of obligation, and only one party thereto must be bound thereby. *Cal Hirsch & Sons Iron & Rail Co. v. Paragould & M. R. Co.*, 127 S. W. 623, 624, 148 Mo. App. 173. See, also, *Friendly v. Elwert*, 105 Pac. 404, 406, 57 Or. 509, Ann. Cas. 1913A, 357.

## UNIMPEACHABLE EVIDENCE

The evidence is unimpeachable, within Kirby's Dig. § 8012, subd. 5, providing for the probate of a will written in the handwriting of testator on the "unimpeachable evidence" of disinterested witnesses to the handwriting and signature of testator, where there is no evidence reflecting on the character or testimony of the witnesses testifying to the handwriting and signature of testator. *Smith v. Boswell*, 124 S. W. 264, 267, 93 Ark. 66. See, also, *Arendt v. Arendt*, 96 S. W. 982, 80 Ark. 204.

## UNIMPROVED

The word "wild" is used interchangeably with the words "unimproved and uninclosed,"

relative to lands claimed under Kirby's Dig. § 5057, relating to adverse possession, and a finding that lands were wild is sufficient to show that they were uninclosed and unimproved. *Rachels v. Stecher Cooperae Works*, 128 S. W. 348, 352, 95 Ark. 6; *Fenton v. Collum*, 150 S. W. 140, 141, 104 Ark. 624.

## UNINCLOSED LAND

A finding that lands were "wild" is a finding that the lands were "unimproved and uninclosed" within Kirby's Dig. § 5057, relating to title by limitation to uninclosed and unimproved lands. *Rachels v. Stecher Cooperae Works*, 128 S. W. 348, 95 Ark. 6; *Fenton v. Collum*, 150 S. W. 140, 141, 104 Ark. 624.

A horse which travels down a road, and from thence into a lane, and from thence onto a railroad's right of way, without encountering a fence, goes upon the right of way where the same passes through "uninclosed lands," within the meaning of Rev. St. 1899, § 1105, requiring a railroad to fence its tracks where the same pass through uninclosed lands. *Reed v. Chicago & A. Ry. Co.*, 87 S. W. 65, 67, 112 Mo. App. 575.

## UNINCORPORATED ASSOCIATION

See Association.

## UNINHABITED HOUSE

An "uninhabited house" is a house that is fitted for habitation, but is unoccupied at the time. *State v. Rowland Lumber Co.*, 69 S. E. 58, 59, 153 N. C. 610.

## UNINTENTIONAL

An instruction that if defendant, on his express malice aforethought, with intent to kill M., shot at him with a gun, and by mistake killed deceased, he would be guilty of murder in the second degree, was objectionable in the use of the words "by mistake" for "unintentionally"; they not being synonymous. *Deneaner v. State*, 127 S. W. 201, 204, 58 Tex. Cr. R. 624.

Among the items included in a materialman's lien account were window frames and blinds, alleged to have been delivered to the contractor pursuant to the plans, and the material was actually set into the walls, but afterwards taken out by the direction of the owners, and the materialman's testimony tended to show that it did not know that it, as well as some doors delivered, were not used when the lien account was filed; defendant's testimony being to the contrary. In a suit to establish a lien for material, the materialman requested an instruction that an inadvertent or unintentional misstatement of some of the items in the lien account as having been used in the building would not vitiate

the whole account, so as to prevent him from obtaining a lien for the items correctly stated. Rev. St. 1909, § 8223, entitled a materialman to a lien, though he may have "unintentionally failed to enter in his account filed the full amount of credits to which the debtor may be entitled." Held, that it was error to refuse the requested instruction; the statutory word "unintentional" meaning without fraudulent purpose to withhold a credit to which a debtor was entitled, and not an omission of a credit when, in law, the right thereto may be doubtful. *E. R. Darlington Lumber Co. v. Pottinger*, 147 S. W. 179, 181, 165 Mo. App. 442.

## UNINTERRUPTED

The word "uninterrupted," as used in an instruction making uninterrupted adverse enjoyment an element of prescription, means unbroken, and is synonymous with the word "continuous." *Evans v. Scott*, 83 S. W. 874, 876, 37 Tex. Civ. App. 373.

The word "continuously," in a bill of lading providing that the cargo shall be "received by the consignee immediately the vessel is ready to discharge and 'continuously' at all such hours," etc., is not synonymous with "incessantly" or "uninterruptedly," but the clause means no more than that the discharge should be reasonably continued, considering the time, place, and circumstances, the nature and character of the cargo, the situation of the vessel, and prevailing conditions generally. *United States Shipping Co. v. United States*, 146 Fed. 914, 920.

## UNINTERRUPTED USE

The "uninterrupted and continuous enjoyment" of a right of way for twenty years, which is necessary before it ripens into an easement, does not mean that the one using such right of way must pass or repass every day for twenty years, but simply that he must exercise the right more or less frequently, according to the nature of the way, and without objection on the part of the owner of the land. *Dummer v. United States Gypsum Co.*, 117 N. W. 317, 323, 153 Mich. 622 (citing and adopting the definition in *Cox v. Forrest*, 60 Md. 74).

## UNION

See Labor Union; Reunion; This Union; Trade Union.

A "union" is a coupling nut, provided at one end with an internal shoulder, adapted to engage a pipe, called a spud, sleeved through the nut and adapted to engage such internal, by its external, shoulder; the other end of the nut being internally threaded and adapted, as it is screwed up, to draw in and seat the beveled end of the spud. *Rainear v. Western Tube Co.*, 159 Fed. 431, 432, 86 C. C. A. 411.



**UNIT****UNIT OF FORCE**

The "unit of force," in scientific work, is that force which, when acting on a body weighing one gram, will give it an acceleration of one centimeter in one second. *Peoria Waterworks Co. v. Peoria Ry. Co.*, 181 Fed. 990, 1001.

**UNIT OF POWER**

The "unit of power," called the "watt," equals 10,000,000 units of power in the C. G. S. system, or one ampere times one volt. One horse power is 746 Watts or three-fourths of a kilowatt. *Peoria Waterworks Co. v. Peoria Ry. Co.*, 181 Fed. 990, 1001.

**UNIT OF PRESSURE**

The "unit of pressure," called the "volt," is that electrical force which, when steadily applied to a wire or other conductor having a resistance of 1,000,000,000 units of the C. G. S. system, will produce a current of one-tenth of a unit per second of that system. *Peoria Waterworks Co. v. Peoria Ry. Co.*, 181 Fed. 990, 1001.

**UNIT OF REPRESENTATION**

Under Primary Election Law (Laws 1898, pp. 332, 341, c. 179) § 4, subd. 4, requiring the chairman of the general committee of each political party to deliver a statement of the conventions, committees, and offices for which delegates, candidates, etc., are to be elected at a primary, and the number of delegates and members of committees to be elected in each "unit of representation," and section 2, providing that "unit of representation" shall apply to an assembly district, etc., a rule of the general committee of a political party, which provides that the unit of representation shall be the assembly district, is valid, and a statement specifying the number of delegates, etc., to be elected in each "unit of representation" is sufficient, though it permits the participation in the nomination of candidates for offices on a smaller unit by those who cannot vote for the candidates at the general election, notwithstanding Election Law (Laws 1896, pp. 913, 922, c. 909) §§ 34, 53, defining a qualified elector; the election law not affecting the primary election law subsequently enacted. In re Sheridan, 107 N. Y. Supp. 244, 246, 57 Misc. Rep. 42.

**UNIT OF RESISTANCE**

The "unit of resistance," called the "ohm," is 1,000,000,000 units of the C. G. S. system. *Peoria Waterworks Co. v. Peoria Ry. Co.*, 181 Fed. 990, 1001.

**UNIT OF VOLUME**

The unit of volume, called the "ampere," is one-tenth unit of the C. G. S. system. *Peoria Waterworks Co. v. Peoria Ry. Co.*, 181 Fed. 990, 1001.

**UNITE****UNITED IN BUSINESS**

Under Rev. Code, § 4380, subd. 3, disqualifying a person from acting as a juror where he is "united in business with either party" to the action, where a person has an agreement with a party to the action, whereby one is sinking an artesian well and the other is contingently liable for a part payment of the expenses on failure to procure water, and has executed a contract to that effect, such person as a juror and the party litigant are "united in business" within the statute. *Hall v. Chattin*, 106 Pac. 1132, 1133, 17 Idaho, 664.

The relation of landlord and tenant between a juror and a party authorizes the sustaining of a challenge to a juror under Comp. Laws, § 3259, subsec. 3, making it ground for challenge for cause to a juror that he is "united in business" with either party. *Sherman v. Southern Pac. Co.*, 111 Pac. 416, 418, 33 Nev. 385, Ann. Cas. 1914A, 287.

**UNITED IN INTEREST**

Otherwise united in interest, see Otherwise.

**UNITED STATES**

See Courts of the United States; Dwelling in the United States; From Port of the United States; Law of the United States; Money of the United States; Offense against United States; Property of United States; Suit in Which United States are Plaintiffs; Under the United States; Vessels of the United States.

Current money of the United States, see Current Money.

The "United States" are for many important purposes a single nation, and in all commercial regulations we are one and the same people. *Northern Securities Co. v. United States*, 24 Sup. Ct. 436, 456, 193 U. S. 197, 48 L. Ed. 679 (citing *Cohens v. Virginia*, 6 Wheat. [19 U. S.] 264, 413, 5 L. Ed. 257, 293).

**As person**

See Person.

**UNITED STATES COMMISSIONER**

As officer of court, see Court Officer.

**UNITED STATES CONSTITUTION**

State Constitution distinguished, see State Constitution.

**UNITED STATES OBLIGATION**

See Obligation of United States.

**UNITED STATES OFFICER**

Under Const. art. 2, § 2, providing for the appointment of officers of the United States, an "officer of the United States," within Pen.

Code, § 117 (Act March 4, 1909, c. 321, 35 Stat. 1109), punishing the acceptance of bribes by any officer of the United States, is one who is either appointed by the President by and with the advice and consent of the Senate, or by the President alone, the courts of law, or heads of some executive department of the government, and a special officer appointed by the Commissioner of Indian Affairs for the suppression of the liquor traffic among the Indians, is not an "officer of the United States." *United States v. Van Wert*, 195 Fed. 974, 976.

Under Const. art. 2, § 2, providing that all officers shall be appointed by the President, by and with the advice of the Senate, or Congress may vest the appointment of such inferior officers as they think proper in the President alone, in the courts, or in the heads of departments, a special agent of the Land Department of the United States, appointed under an appropriation act to meet the expenses of protecting timber on public lands, but providing no fixed salary, tenure of office, or person with power to appoint, was not an "officer of the United States," within Rev. St. § 5481, providing that every officer of the United States, guilty of extortion under color of his office, shall be punished, etc. *United States v. Schlierholz*, 137 Fed. 616, 618, 621.

The provisions in Rev. St. §§ 753, 761, that the writ of habeas corpus shall in no case extend to a prisoner in jail, unless he is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof, in which case the court or judge shall proceed in a summary way to determine the facts of the case, and dispose of the party as law and justice require, confer jurisdiction on federal courts to release on habeas corpus an officer of the United States held in custody for an act done or omitted under authority vested in him by the laws of the United States, though there was no act of Congress covering the particular case. Assistant district attorneys, appointed by a United States district judge, as authorized by Act Cong. May 28, 1896, c. 252, § 8, 29 Stat. 181, are "officers of the United States courts" for their respective districts. *In re Leaken*, 137 Fed. 680, 682.

The second clause of section 2 of the Tucker Act, as amended in 1898, which withholds from the jurisdiction conferred on the Circuit and District Courts by said section suits brought against the United States to recover fees, salary, or compensation for official services of "officers of the United States," does not apply to a suit to recover disbursements made by a marshal in paying for the services of court bailiffs. Bailiffs are never sworn in accordance with the statute, and are not "officers of the United States," but come within the expression "officers of the

court." *United States v. Swift*, 139 Fed. 225, 227, 71 C. C. A. 351 (citing *United States v. McCabe*, 129 Fed. 708, 64 C. C. A. 236).

#### UNITED STATES WATERS

See Waters of the United States.

### UNITY

#### UNITY OF INTEREST

An estate in joint tenancy does not exist unless there is unity of interest, title, time, and possession; "unity of interest" meaning that the interests must accrue by one and the same conveyance, "unity of time," that they must commence at one and the same time, and it must also appear that the interests of the joint holders remain the same until the death of one of them, when the survivor takes it all. *Staples v. Berry*, 85 Atl. 303, 305, 110 Me. 32.

#### UNITY OF TIME

An estate in joint tenancy does not exist unless there is unity of interest, title, time, and possession; "unity of interest" meaning that the interests must accrue by one and the same conveyance, and "unity of time" that they must commence at one and the same time, and it must also appear that the interests of the joint holders remain the same until the death of one of them, when the survivor takes it all. *Staples v. Berry*, 85 Atl. 303, 305, 110 Me. 32.

### UNIVERSAL

#### UNIVERSAL MALICE

By "universal malice" we do not mean a malicious purpose to take the life of all persons, but is that depravity of the human heart which determines to take life upon slight or insufficient provocation, without knowing or caring who may be the victim. *Mitchell v. State*, 60 Ala. 26, 30.

#### UNIVERSAL SUCCESSION

"Universal succession" is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to the rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying "mobilia sequuntur personam"; but, being a fiction, it is not allowed to obscure the facts when the facts become important. *Blackstone v. Miller*, 23 Sup. Ct. 277, 278, 188 U. S. 189, 47 L. Ed. 439.

### UNIVERSITY

As public corporation, see Public Corporation.

As public school, see Public School.

A testatrix in one item of her will devised to trustees "my house and grounds," with all the buildings standing within such

grounds, to be used for public purposes, and in a subsequent item gave the remainder of her estate to the trustees of a university; to be devoted to the construction "upon the grounds of the said university" of a building to be used for certain purposes. Held, that the term "university" was not used to designate any building or group of buildings, but the corporation, the preposition "of" denoting proprietorship and not location, and the word "grounds" evidently used in the latter item to express the rhetorical antithesis between "my house and grounds," used in the previous item, upon which a public hall and garden were to be established; and the establishment of the building upon the grounds "of the said university" will not be deemed to bear a limited or special meaning confining it to such lands as lie immediately adjacent to and are used in connection with the existing buildings of the university, but to embrace any land owned by the university so located as to make the building to be erected available for the purposes intended; and a tract not contiguous to the original and central campus upon which the existing university buildings are situated, but separated therefrom in part by a railroad, in part by a public street, and in part by land of other owners, the only communications between the tract and the central campus being by means of streets or lanes, would be "grounds of the said university," within the meaning of the will, where owned by the university. Trustees of Princeton University v. Wilson, 78 Atl. 393, 397, 78 N. J. Eq. 1.

Act Cong. July 2, 1862, granting certain public lands or land scrip to the several states, and providing that the proceeds thereof shall be invested to constitute a perpetual fund for the endowment of one "college" where the leading object shall be instruction in mechanic arts and agriculture, and appropriating money arising from the sales of the public lands to the states for the benefit of such schools, does not require that the "leading object" of the aided institution in its entirety, or as a complete institution, be the teaching of the branches of learning related to agriculture and mechanic arts. A university may, and usually does, embrace several colleges. The Wyoming statutes expressly declare that the State University "shall embrace colleges or departments of letters, of science, and the arts"; that the "college or department of the arts shall embrace courses of instruction in the practical and fine arts, especially in the application of science to the arts of \* \* \* mechanics, engineering, architecture, agriculture and commerce, together with instruction in military tactics." It is sufficient if the aided institution maintains a college or department whose leading object is instruction in the prescribed branches, and applies the funds to the support of such college or department; and the institution will not be rendered incapable of appropriating

the donations from the fact that a majority of its students are enrolled in other departments. State ex rel. Wyoming Agricultural College v. Irvine, 84 Pac. 90, 99, 14 Wyo. 318.

#### UNIVERSITY PURPOSES

Under Act Cong. Feb. 18, 1881, 21 Stat. 326, and the amendment thereof, granting to the territory of Idaho and other territories 72 sections of land for "university purposes," and under the provisions of the Idaho admission act (Act Cong. July 3, 1890, 26 Stat. 216), providing for the disposal of the land granted for educational purposes, and section 8, providing that the proceeds of such land shall constitute a permanent fund to be invested and held and the income thereof used exclusively for university purposes, the interest of proceeds on such land cannot be used for the erection or equipment of university buildings or buildings connected therewith; the purpose of the university not being in any sense the erection or equipment of buildings therefor. Roach v. Gooding, 81 Pac. 642, 645, 11 Idaho, 244.

#### UNJUST

##### UNJUST DISCRIMINATION

While the owner of goods shipped generally can designate the route, and the receiving carrier must observe the owner's directions in delivering to a connecting carrier, the duty is one growing out of the particular contract of carriage or imposed as a common-law obligation, and a breach thereof by requiring of a connecting carrier, as a condition upon which it should receive goods, that they should be transported over a different route from that selected by the owner, requiring a violation by the connecting carrier of Rev. St. 1895, art. 4535, under which a connecting carrier, receiving goods from another carrier destined to a point on its line, must carry them on its line to destination, unless the person having a right to do so had routed them otherwise, is not an "unjust discrimination" within art. 4574, making it unjust discrimination to fail or refuse under regulations of the Railroad Commission to receive and transport without delay or discrimination tonnage, etc., destined to a point on or over a connecting line. Missouri, K. & T. Ry. Co. of Texas v. Thompson (Tex.) 118 S. W. 618, 621, 623.

To constitute "unjust discrimination" within Sayles' Ann. Civ. St. 1897, art. 4574, defined as unreasonable preference to any particular shipper, a preference must be given to one shipper over shippers of similar freight under similar circumstances, and a contract binding a carrier to receive cars of another carrier and deliver them to a shipper for the reception of his freight is not invalid as creating an unjust discrimination, in the absence of evidence that the contract gave the shipper a preference over shippers of oth-

er similar freight, who could secure cars from other carriers. *Texas & P. Ry. Co. v. Shawnee Cotton Oil Co.*, 118 S. W. 776, 779, 55 Tex. Civ. App. 183.

Under Rev. St. Tex. 1895, art. 4574, subd. 1, making it unlawful to give any undue preference or advantage to any locality, an order of the railroad commissioners, giving an undue and unreasonable preference to one of two cities, as to rates, is unlawful, though the city discriminated against, possesses superior natural advantages which offset the discrimination. *Railroad Commission of Texas v. Galveston Chamber of Commerce*, 115 S. W. 94, 99, 51 Tex. Civ. App. 476 (citing *Interstate Commerce Commission v. Baltimore & O. R. R. Co.*, 12 Sup. Ct. 844, 145 U. S. 263, 36 L. Ed. 706).

As to issuing through bills of lading, or furnishing its cars to connecting carriers in order that shipments may be carried to ultimate destination without reloading at terminal points, the carrier may discriminate against cotton seed, provided all shippers are treated alike. The carrier's refusal to place cars of cotton seed on a warehouse sidetrack, it being the common practice of the carrier to deliver cars of cotton seed upon the side track of other parties, is a denial of "equal facilities in the transportation and delivery of freight," and "an unjust discrimination" in violation of the rule of the Railroad Commission. *Augusta Brokerage Co. v. Central of Georgia Ry. Co.*, 62 S. E. 996, 998, 5 Ga. App. 187 (following *Central of Georgia Ry. Co. v. Augusta Brokerage Co.*, 50 S. E. 476, 122 Ga. 652, 69 L. R. A. 119).

## UNJUSTLY

### Surreptitiously distinguished

In Rev. St. § 4920, providing that in an action for infringement the defendant may plead the general issue, and may prove on trial that plaintiff had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same, the word "surreptitiously" has no relation to a case where each party to an interference has really and truly proceeded independently and honestly, although the word "unjustly" may be strained to cover even a case like that. *Automatic Weighing Mach. Co. v. Pneumatic Scale Corporation*, 158 Fed. 415, 420.

## UNKNOWN

A bet by parties, not aware of the fact, involving the question whether a third person has a lease on designated real estate, refers to an event unknown to the bettors, and constitutes "gambling" within Const. art. 1, § 9, forbidding pool selling, book making, or any other kind of gambling, and within Betting and Gaming Law, 1 Rev. St. (1st Ed.) p. 662, pt. 1, c. 20, tit. 8, §§ 8, 9, declaring

that bets depending on any chance, "or unknown or contingent event," shall be unlawful, etc.; the word "unknown" referring to that which was unknown to the parties to a wager, the word "contingent" showing that the event referred to applies equally to existing or nonexisting events, the word "event" meaning that in which an action, operation, or series of operations terminates and having reference to something that has taken place, the words "unknown event" meaning a past circumstance unknown to the parties, and the words "contingent event" referring to one that hereafter may or may not occur. *Thomson v. Hayes*, 111 N. Y. Supp. 495, 496, 59 Misc. Rep. 425.

Where plaintiff knew that defendants' residence, at the time of the contract sued on, was in S., that one of the defendants was attending school outside the state, and that the other defendants were traveling in Europe, and there was nothing known to him to lead him to believe that their absence from home was other than temporary, their residence was not "unknown" to him, within the meaning of Rev. St. 1895, art. 1194, subd. 3, authorizing suit in a county other than that of the defendant's residence, when such residence is unknown. *Brooks v. Bonner* (Tex.) 149 S. W. 564, 566.

The words "unknown claimants," in the statute as to proceedings against lands as state lands, mean such as are not known and cannot be ascertained by reasonable diligence. A claimant of land that is proceeded against as the state land, who is known or whose claim can be ascertained by the use of reasonable diligence, should be made a party to the bill eo nomine, and, if a resident of the state, should be served with process. It is error to proceed against such claimant under the general designation in the bill of "unknown claimants," and any decree that may be pronounced against him without his appearance in the cause will be void as to him for want of jurisdiction, and may be collaterally assailed. *Preston v. Bennett*, 68 S. E. 45, 47, 67 W. Va. 392.

## UNKNOWN HEIRS

In Code Civ. Proc. §§ 79, 80 (Gen. St. 1909, §§ 5672, 5673), providing for services by publication in cases relating to real property, the term "unknown heirs," where the relief demanded is to exclude defendants from any interest in real property, means all kinds of heirs, including heirs of heirs of such defendants as well as the legatees of heirs. *Howell v. Garton*, 108 Pac. 844, 845, 82 Kan. 495.

## UNKNOWN OWNER

Laws 1897, c. 103, § 6, makes it the duty of the county collector, county clerk, and county assessor, in proceedings to collect delinquent taxes, to furnish the county attorney such evidence as may be in their posses-

sion. Held, in a suit to quiet title, where plaintiff's deed was on record, and gave his residence as in a certain county of the state, a judgment for taxes against the "unknown owner" did not include plaintiff's title, since he was entitled to service of citation if within the jurisdiction of the court, and, not being an unknown owner, he was not a party to the proceedings. *Scales v. Wren*, 127 S. W. 164, 103 Tex. 304.

## UNLAWFUL

See Willful and Unlawful.

An indictment using the words "unlawful, feloniously, of his malice aforethought, with deliberation and premeditation" to characterize the act charged means that it was "willful." *Harding v. State*, 126 S. W. 90, 91, 94 Ark. 65.

A complaint, in an action for injuries to a passenger while alighting from a train, which alleges that plaintiff, urged by the "willful," "unlawful," and "reckless" injunctions of the conductor, and in obedience to his directions, proceeded to alight from the train while in motion, and in so doing was injured, does not charge negligence, but charges willfulness; the word "unlawful" assigning no specific legal character to the acts alleged, and the word "reckless" being equivalent to "willful." *Crosby v. Seaboard Air Line Ry.*, 61 S. E. 1064, 1067, 81 S. C. 24.

Within the rule that, where the owner of a patent has given to another the right to use one of the machines made under the patent in a particular way only, or with supplies necessary to its use of a particular character or make only, the use of it in any other way, or with any other supplies or materials necessary to its operation is unlawful, the word "unlawful" does not imply a criminal use of the machine or device, but a violation of the contract or agreement under which the same is held and used. *Cortelyou v. Charles Eneu Johnson & Co.*, 138 Fed. 110, 118.

The words "wanton," "willful," and "unlawful" do not necessarily mean, in statutes on malicious mischief, the same as "malicious." The word "malicious," as used in the statute on malicious wounding of domestic animals, means actual malice toward the owner, and any evidence which fairly shows that the act was necessary to prevent injury to the accused or to his property is admissible on the issue of malice. *People v. Jones*, 89 N. E. 752, 756, 241 Ill. 482, 16 Ann. Cas. 332 (citing 25 Cyc. 1677: 5 Words and Phrases, p. 4307; *Glover v. People*, 68 N. E. 464, 204 Ill. 170).

### As in violation of law

"Unlawful," as applied to threatened injury to property, means contrary to law; that is, an injury threatened must be unlawful, irrespective of the purpose with which

the threat is used. *People v. Schmitz*, 94 Pac. 407, 419, 7 Cal. App. 330.

The word "unlawful," in the act of August 1, 1906 (Acts 1906, p. 114), to provide for local option elections in counties where the sale of liquor is unlawful except in dispensaries, must be interpreted in the light of the legislation of this state, where the word or its equivalent is used, and the legislative intent was evidently to embrace those counties in which, under the operation of some valid law of this state, the sale of liquor was declared to be unlawful, without reference to whether, under any of such laws, there might be an exception inuring to the benefit of a certain class enumerated by the General Assembly in an excepting clause. *City of Barnesville v. Means*, 57 S. E. 422, 425, 426, 128 Ga. 197.

An affidavit averring that accused was found "unlawfully" in possession of intoxicating liquors in a building described in his control for the purpose of keeping, running, and operating a place where intoxicating liquors are sold, in violation of the law, does not charge that accused was found in possession of liquor for the purpose of illegal sales, in violation of Acts 1907, p. 27, c. 16, § 1 (*Burns' Ann. St.* 1908, § 8337); the word "unlawful" not showing that the possession was in violation of law. *Barnhardt v. State*, 86 N. E. 481, 482, 171 Ind. 428.

### As unauthorized by law

"Unlawful" does not necessarily mean contrary to law. "Un" is a preposition used indiscriminately, and may mean simply not, and "unlawful" means not authorized by law. *State v. Savant*, 38 South. 974, 975, 115 La. 226.

The word "unlawful" as applied to the purpose and acts of corporations is not used exclusively in the sense of *malum in se* or *malum prohibitum*, but it is often employed to designate powers which corporations are not authorized to exercise or contracts which they are not authorized to make, and includes acts and contracts which are *ultra vires*. *Dunbar v. American Telephone & Telegraph Co.*, 87 N. E. 521, 533, 238 Ill. 456.

## UNLAWFUL ACT

Engaged in unlawful act, see Engaged.

An act is not "unlawful," within the purview of the statute of this state defining involuntary manslaughter, unless it is prohibited by some valid law of this state. *Hayes v. State*, 75 S. E. 523, 525, 11 Ga. App. 371.

An "unlawful act," such as constitutes an element of involuntary manslaughter, is a thing which one has no right to do. *State v. Woods* (Del.) 77 Atl. 490, 491, 7 Pennewill, 499.

Under Code, § 2340, imposing liability for damages caused by dogs, except when

the party injured is doing an "unlawful act," the unlawful act that will defeat liability must be one that directly contributes to the injury. Permitting an animal to run at large in a public highway is not such an "unlawful act." *Beckler v. Merringer*, 109 N. W. 185, 131 Iowa, 614.

### UNLAWFUL ASSEMBLY

At common law and under Pen. Code 1895, arts. 299-311, 313, 315, defining an "unlawful assembly" as the meeting of three or more persons with intent to aid each other, by violence or in any other manner, either to commit an offense or illegally to deprive any person of any right, etc., prohibiting unlawful assemblies for certain purposes, there is no unlawful assembly, except when it contemplates a disturbance of the peace or injury to the rights of individuals, and it cannot be composed of persons assembled to carry on their ordinary business, though on a day and in a manner not authorized by law, unless their actions will in some way disturb the rights of others or the public rights; and an actress, travelling about the country and entertaining the people, meeting with others on Sunday in a theater to entertain the people, is not guilty thereof. *Ex parte Jacobson*, 115 S. W. 1193, 1195, 55 Tex. Cr. R. 237.

"Unlawful assembly" is a distinct offense at common law, and if persons assemble for a purpose which, if executed, would constitute a riot, but separate without carrying out their purpose, their acts constitute an unlawful assembly. *B. & C. Comp. §§ 1913, 1914*, defining a "riot" as any use of, or threat to use, force, by three or more persons acting together, if accompanied by immediate power of execution, and making such assembly an unlawful assembly, where there is no actual commission of the unlawful act, or where the assembly is adapted to disturb the peace, etc., and providing a punishment for the former offense, but not for the latter, does not make an unlawful assembly a crime. *State v. Stephanus*, 99 Pac. 428, 53 Or. 135, 17 Ann. Cas. 1146.

### UNLAWFUL COMBINATION

Where an "unlawful combination" exists, it is none the less unlawful because it exists under a self-imposed constitution and is governed by by-laws, and because it conducts its operations in a public or semi public way, asserting the right, in pursuit of its purposes, to interfere with individual liberty and with public interests; and, in a proceeding for damages for wrongdoing by such a combination to the special injury of an individual, the constitution and by-laws of the association constitute no protection as against compensatory damages. *Lohse Patent Door Co. v. Fuelle*, 114 S. W. 997, 1012, 215 Mo. 421, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492.

The test of an "unlawful combination" in restraint of trade, under Act July 2, 1890, c. 647, § 1, 26 Stat. 209, is its necessary effect upon free competition in commerce, and a combination, the effect of which is to stifle and substantially restrict such competition, is unlawful; but if the effect is only indirectly to restrict competition, while its chief result is to foster the trade to those who make it, it is not within the law. The union of two or more persons and the conscious participation of two or more minds is necessary to an unlawful combination. *Union Pacific Coal Co. v. United States*, 173 Fed. 737, 745, 97 C. C. A. 578.

### UNLAWFUL CONSPIRACY

The word "unlawful," as used in the definition of conspiracy as a confederacy to do something "unlawful," includes the breach of civil as well as of criminal law. *State v. Bacon*, 61 Atl. 653, 654, 27 R. I. 252 (citing 2 Bish. Cr. Law, § 178); *State v. Dalton & Fay*, 114 S. W. 1132, 1138, 134 Mo. App. 517 (quoting and adopting definition in 2 Bish. New Cr. Law [8th Ed.] § 178); *State v. Bleunstock*, 73 Atl. 530, 534-538, 78 N. J. Law, 256; *Randall v. Lonstorf*, 105 N. W. 663, 664, 126 Wis. 147, 3 L. R. A. (N. S.) 470, 5 Ann. Cas. 371; *White v. White*, 111 N. W. 1116-1119, 132 Wis. 121 (quoting and adopting definition in *Martens v. Reilly*, 109 Wis. 464-473, 84 N. W. 840, 843).

The term "unlawful," used with reference to acts of conspirators, does not include every act which violates the rights of a private individual, and for which the law affords a civil remedy, but is held to include those acts which, by reason of the combination, have a harmful effect upon society and the public; and a combination may amount to a conspiracy although its unaccomplished object be to do that which, if actually done by an individual, would not amount to an indictable offense, and in that sense a conspiracy may consist of a combination to do what is merely "unlawful." *Chicago, W. & V. Coal Co. v. People*, 73 N. E. 770, 775, 214 Ill. 421.

### UNLAWFUL CONTRACT

The word "unlawful," though properly used in designating contracts contrary to law, is inapplicable to contracts void on the ground of immorality, or on the ground that they are contrary to public policy. *McCarter v. Firemen's Ins. Co.*, 61 Atl. 705, 70 N. J. Eq. 291.

*Wilson's Rev. & Ann. St. 1903, § 813*, provides: "That is not lawful which is, first, contrary to an expressed provision of law; second, contrary to the policy of expressed law, though not expressly prohibited; or third, otherwise contrary to good morals." Under such statute a sale and transfer of a city license to sell intoxicating liquors in

direct violation and disregard of section 387 of such statute is "unlawful," and where such sale of a license entered into and makes a part of the consideration for a promissory note, such note is wholly void. *Arnett v. Wright*, 89 Pac. 1116, 1117, 18 Okl. 337.

### UNLAWFUL DETAINER

"Unlawful detainer" is a statutory remedy for the benefit of landlords against tenants who hold over after the expiration of their term. It is founded on a breach of contract implied by law, if not expressed, and it may be maintained either by the lessor or his heir or assignee to whom the land passes." It can be maintained only where the relation of landlord and tenant exists. *Thompson v. Morgan*, 69 S. W. 920, 924, 4 Ind. T. 412 (quoting and adopting definition in *Johnson v. West*, 41 Ark. 535, and citing *Mason v. Delancy*, 44 Ark. 444, *Necklace v. West*, 33 Ark. 682, and *Dortch v. Robinson*, 31 Ark. 296); *Showalter v. Ryles*, 97 Pac. 569-571, 22 Okl. 329 (quoting *Johnson v. West*, 41 Ark. 535). See, also, *Sass v. Thomas*, 69 S. W. 893, 4 Ind. T. 331.

Under Shannon's Code, § 5093, defining "unlawful detainer" as where the defendant enters by contract, either as tenant or claiming through or under a tenant, the action of unlawful detainer lies only where the defendant entered by contract and as lessee, or under a lessee, and hence that form of action will not lie against one who entered under a conveyance from a tenant by curtesy. *Shepperson v. Burnette*, 92 S. W. 762, 116 Tenn. 117.

An action of "unlawful detainer" is purely possessory, with the incident of damages attached for the detention of the property. In such actions plaintiff must recover upon the strength of his right to possession, and not rely on the weakness of the adversary right. *Fisk v. Arnold*, 104 S. W. 824, 825, 7 Ind. T. 526.

"Unlawful detainer" is an action not to determine title but to recover immediate possession, and is based on a contract, express or implied, whereby the relation of landlord and tenant arises and exists between the parties, and in it, by provision of Kirby's Dig. § 3648, evidence of title is admissible only on the question of right of possession. *Pringle v. Williams*, 149 S. W. 101, 104 Ark. 322.

Under Kirby's Dig. § 3630, which provides that every person willfully and without right holding over lands or tenements after the term, or who shall peaceably and lawfully obtain possession thereof and hold the same willfully and unlawfully after demand in writing, shall be guilty of "unlawful detainer," the action of unlawful detainer can only be maintained where the relation of landlord and tenant subsists, or, at least, where the possession has been ob-

tained by the defendant permissibly; the action being founded on the breach of contract, that the tenant shall restore possession to the one from whom it was received. *Miller v. Plummer*, 152 S. W. 288, 290, 105 Ark. 630.

A tenant does not become primarily an "unlawful detainer" upon breach of the covenant in the lease to pay rent, but rather upon failure to pay after demand by a legal notice in the statutory time. This constitutes him an unlawful detainer of the premises. *Hunter v. Porter*, 77 Pac. 434, 438, 10 Idaho, 86.

A lessee is not guilty of an "unlawful detainer" simply because he remains in possession after breach of a covenant of which the lessor may or may not take advantage. The lessor must give the statutory notice demanding possession. *Schnittger v. Rose*, 73 Pac. 449, 451, 139 Cal. 656.

After one has served the statutory notice on another to remove from certain premises and the latter fails to comply therewith, the latter is guilty of "unlawful detainer," provided the former proves title and that the latter entered into possession without permission and without color of title. *Columbia & Puget Sound R. Co. v. Moss*, 87 Pac. 951, 952, 44 Wash. 589.

Code Civ. Proc. § 1161, declares that a tenant of real property for a term less than life is guilty of an "unlawful detainer" when he continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him without the permission of the landlord, or the successor in estate of the landlord, if any there be. *Vatuone v. Canobio*, 88 Pac. 374, 375, 4 Cal. App. 422.

The action of "unlawful detainer" is not a common-law action, but is purely statutory. *MacKenzie v. Porter*, 91 Pac. 917, 40 Colo. 340.

The fact that a tenant each month tendered one month's rent, which was refused, there being no pretense that the tenant deposited the rent in any bank for the landlord, as provided by Civ. Code, § 1500, did not entitle him to refuse payment and to retain possession of the premises after the landlord served him with the notice authorized by Code Civ. Proc. § 1161, subd. 2, providing that a tenant is guilty of "unlawful detainer" where he continues in possession, after default in payment of rent, and three days' notice requiring its payment or possession of the property shall have been served on him. *Occidental Real Estate Co. v. Gantner & Mattern*, 95 Pac. 1042, 1044, 7 Cal. App. 727.

An action in "unlawful detainer" will lie for a breach of collateral covenants, as well as for a breach of those which run with

the land. *Knight v. Black*, 126 Pac. 512, 513, 19 Cal. App. 518.

"An 'unlawful detainer' is where one has lawfully entered into possession of lands or tenements, and after the termination of his possessory interest refuses, on demand in writing to deliver the possession thereof to any one lawfully entitled thereto, his agent or attorney." Code 1896, § 2127. In other words, before the suit can be maintained, there must have been a termination of the tenant's possessory interest. *Barnewell v. Stephens*, 88 South. 662, 663, 142 Ala. 609.

#### UNLAWFUL DISCRIMINATION

The fact that a railroad permitted the location of an elevator, maintained by a private corporation, on the industrial track on the right of way, does not render its refusal to construct, at its own expense, a side track to a competing elevator, located off the right of way, an "unlawful discrimination," within Const. art. 9, § 18 (*Bunn's Ed.* § 222). *Chicago, R. I. & P. Ry. Co. v. State*, 99 Pac. 901, 903, 23 Okl. 94.

A gas company with the right under its charter to operate in several towns and cities in the state is not guilty of an "unlawful discrimination" as to one of such cities by abandoning its franchise and withdrawing its property and business therefrom. *East Ohio Gas Co. v. City of Akron*, 90 N. E. 40, 43, 81 Ohio St. 33, 26 L. R. A. (N. S.) 92, 18 Ann. Cas. 332.

#### UNLAWFUL DISPOSITION

Other unlawful disposition, see *Other*.

#### UNLAWFUL DISPOSITION OF MORTGAGED GOODS

To constitute an "unlawful disposition of mortgaged goods," they need not be taken beyond the state, nor with intent to defeat the lien, disposal with notice of the lien without the lienor's written consent and without payment or deposit as required by statute being sufficient. *State v. Boyer*, 68 S. E. 573, 575, 86 S. C. 260.

#### UNLAWFUL ENTRY

In one sense the term "unlawfully entered" is broad enough to include a forcible entry; but, assuming that a complaint in an action of forcible entry and detainer, which alleges an "unlawful entry," is defective, it may be properly amended so as to aver an unlawful and forcible entry. *Wilson v. Campbell*, 88 Pac. 548, 75 Kan. 159, 8 L. R. A. (N. S.) 426, 121 Am. St. Rep. 366, 12 Ann. Cas. 766.

"Unlawful entry," within Kirby's Dig. §§ 1603-1605, defining burglary as the unlawful entering a building in the nighttime with intent to commit a felony, and declaring that the manner of breaking or entering is not material, etc., is going into the building with

the intention, formed at the time the entry is made, to commit a felony. *Pinson v. State*, 121 S. W. 751, 753, 91 Ark. 434.

#### UNLAWFUL IMPRISONMENT

In order to constitute "unlawful imprisonment," where no force or violence was actually used, the circumstances attending the arrest must be such as to warrant an apprehension that force will be used, if there was no submission to the restraint under it. *Gunderson v. Struebing*, 104 N. W. 149, 151, 125 Wis. 173.

To constitute an "unlawful imprisonment," where no force is actually employed, the submission must be to a reasonably apprehended force; and the fact that one considers himself restrained in person is not sufficient, unless there is in fact a reasonable ground to apprehend a resort to force on an attempt to assert one's liberty, and a mere asserted purpose to forcibly detain one is not sufficient. *Powell v. Champion Fibre Co.*, 63 S. E. 159, 161, 150 N. C. 12.

Unlawful deprivation of an alien's right to enter the country constitutes "unlawful imprisonment," to obtain freedom from which habeas corpus lies. *United States ex rel. D'Amato v. Williams*, 193 Fed. 228, 231.

#### UNLAWFUL INCLOSURE

Under Act Feb. 25, 1885, which makes unlawful "all inclosures of public lands not claimed in good faith by the person inclosing the same, a fence built upon one's own land, which in fact incloses public lands of the United States, is 'unlawful,' regardless of the intent with which such fence is built or maintained. *Homer v. United States*, 185 Fed. 741, 745, 108 C. C. A. 79.

A settler in advance of surveys who incloses no greater area than the land laws permit him to enter is not a trespasser nor is his inclosure "unlawful"; Act Feb. 25, 1885, c. 149, 23 Stat. 321, p. 1524, to prevent unlawful occupancy of the public domain, not being intended to prevent actual bona fide settlers from occupying an entryman's proportion of the public lands. *McAllister v. Okanogan County*, 100 Pac. 146, 147, 51 Wash. 647, 24 L. R. A. (N. S.) 764.

Defendant owned a tract of 5,000 acres of grazing land with a mountain range to the east and north of it. He built a fence from the range on the east, westward to the south of his land, and then northwestward to the north range, inclosing between such fence and the mountains his own land and also public lands, which he used for a pasture. There were two breaks in the fence through which, as well as over the mountains, trails led into the pasture, but for practical purposes the fence and mountains prevented defendant's stock from straying out and other stock from coming in. Held, that such fence



did not constitute an "unlawful inclosure" of public lands, within Act Feb. 25, 1885, 23 Stat. 321. *United States v. Johnston*, 172 Fed. 635, 637.

### UNLAWFUL INJURY

An "unlawful injury," within Pen. Code, § 519, providing that extortion may be accomplished by a threat to do unlawful injury to property, can include no injury that is not of such character that, if it had been committed as threatened, it would have constituted an actionable wrong, an injury for which suit for the resultant damages could be brought against the defendant, or which if merely threatened, could be enjoined in equity, if the remedy at law were deemed inadequate. *People v. Schmitz*, 94 Pac. 419, 420, 153 Cal. xviii, 15 L. R. A. (N. S.) 717.

### UNLAWFUL INTERCOURSE

In Act No. 134, p. 175, of 1890, making it a crime to abduct a woman of previous chaste character for the purpose of prostitution or for any unlawful sexual intercourse, etc., the term "unlawful sexual intercourse" means sexual intercourse out of wedlock, and is not restricted to such sexual intercourse as is made unlawful by some express statute. *State v. Savant*, 38 South. 974, 975, 115 La. 226.

### UNLAWFUL INTEREST

Rev. St. 1895, art. 3104, provides for forfeiture of all interest where usurious, and Rev. St. 1895, art. 3106, as amended by Acts 1907, p. 277, c. 143, declares that the person paying the usurious interest may recover double the amount thereof. Held, that under Const. art. 16, § 11, as amended in 1891, declaring that all contracts for a greater rate of interest than 10 per cent. shall be deemed usurious, the term "usurious interest," means "unlawful interest," and hence was not limited to the excess over the lawful rate, but included all the interest received and collected. *Baum v. Daniels*, 118 S. W. 754, 755, 55 Tex. Civ. App. 273.

### UNLAWFUL KILLING

"An 'unlawful killing' means any killing of a human being which is not justifiable or excusable by the law." *State v. Wetter*, 83 Pac. 341, 346, 11 Idaho, 433.

The violation of a penal ordinance of a municipality regulating the driving of horses in public streets, as a result of which death ensues, is not an "unlawful killing," within Rev. St. § 6S11, defining the crime of manslaughter. *State v. Collingsworth*, 92 N. E. 22, 23, 82 Ohio St. 154, 28 L. R. A. (N. S.) 770, 137 Am. St. Rep. 775.

### UNLAWFUL MONOPOLY

A corporation engaged in selling tobacco products at retail is not rendered unlawful

by the fact that a majority of its stock is owned by another corporation, which is itself an unlawful combination in restraint of interstate commerce, and which sells to the retailing corporation the larger part of its goods, where the latter conducts its business independently in a lawful manner, and sells also goods of other manufacturers. Nor does it constitute an "unlawful monopoly," in violation of Sherman Act July 2, 1890, c. 647, § 2, 26 Stat. 209, because it operates in the several states 400 retail stores out of 600,000 places where tobacco is sold. *United States v. American Tobacco Co.*, 164 Fed. 700, 703, 704.

### UNLAWFUL PREFERENCE

To establish an "unlawful preference" under the Bankruptcy Act, it must be alleged and proved that at time of the transfer transferor was insolvent, that the property transferred was such as his creditors had a right to subject to their claims, that he intended a preference, and that transferee had reasonable cause to believe the transferor so intended. In re *Leech*, 171 Fed. 622, 96 C. C. A. 424, 625.

It is not every intent to hinder creditors in collecting, or to prevent them from collecting, but an intent to do so unlawfully, that constitutes an "unlawful preference" under the Bankruptcy Act. *Sargent v. Blake*, 160 Fed. 57, 61, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58.

An agreement, on the sale of a saloon business, that money paid by the purchaser to a third person pending settlement of a dispute, representing the value of the unexpired license, was to be returned to the brewing company as a part of the amount it had advanced to the seller to obtain the license, did not create an "unlawful" preference within the Bankruptcy Act. *Sharp v. Simonsch*, 119 N. W. 790, 791, 107 Minn. 133.

A chattel mortgage, in so far as given to secure a present advancement and an indorsement on a note for a present obligation created, is a valid lien as against other creditors, and is not an "unlawful preference" under Revisal 1905, § 968, as amended by Revisal Supp. 1911, § 968, which provides that a preference, invalid as to other creditors, shall be deemed to have been given where property has been transferred or conveyed in consideration of a pre-existing debt, when the grantee or transferee knew or had reasonable ground for believing that the grantor or assignor was insolvent at the time. *Wooten v. Taylor*, 76 S. E. 11, 13, 159 N. C. 604.

### UNLAWFUL PURPOSE

As used in an instruction that a common design and unlawful purpose is the essence of conspiracy, the phrases "common design" and "unlawful purpose" are synony-

mous. *Imboden v. People*, 90 Pac. 608, 622, 40 Colo. 142.

### UNLAWFUL RATE

The purpose of the Interstate Commerce Act, prohibiting a carrier from giving any special rate or rebate, etc., is to require railroads to have one uniform published tariff rate for all interstate shipments, and any other rate is an "unlawful rate." *Atchison, T. & S. F. Ry. Co. v. Holmes*, 90 Pac. 22, 24, 18 Okl. 92.

### UNLAWFUL VIOLENCE

Where the members of a charivari party forcibly place a bride and groom in a wagon against their will and draw them up and down the streets, they are engaged in an act of "unlawful violence," within Gen. St. 1901, § 2501, making municipalities liable for their acts. *City of Cherryvale v. Hawman*, 101 Pac. 994, 995, 80 Kan. 170, 23 L. R. A. (N. S.) 645, 133 Am. St. Rep. 195, 18 Ann. Cas. 119.

### UNLAWFULLY

The term "unlawfully," as used in the federal statute defining manslaughter, means without legal excuse. *O'Barr v. United States*, 105 Pac. 988, 990, 3 Okl. Cr. 319, 139 Am. St. Rep. 959 (quoting *Roberts v. United States*, 126 Fed. 897, 61 C. C. A. 427).

The word "unlawfully," in an indictment, conveys the same meaning as the words "without authority of law." *Schley v. State*, 37 South. 518, 519, 48 Fla. 53; *State v. Holland*, 45 South. 380, 381, 120 La. 429, 14 Ann. Cas. 692; *Fooshee v. State*, 108 Pac. 554, 559, 3 Okl. Cr. 666.

In the statute punishing unlawful intercourse with a female under 18 years of age, the word "unlawfully" is used in the sense of "without authority of law," "not permitted by law." *State v. Tinkler*, 83 Pac. 830, 831, 72 Kan. 262.

In the statute providing that whoever shall "unlawfully" carnally know a female under 16 years of age shall be punished, etc., the word "unlawfully" is used to exempt carnal knowledge of a woman under 16 where the parties are husband and wife; and, though an indictment under the statute must charge that the intercourse was unlawful, it is not necessary that the word "unlawful" should be used in the accusatory part thereof. *Moss v. Commonwealth*, 128 S. W. 296, 297, 138 Ky. 404. See, also, *Plunkett v. State*, 82 S. W. 845, 72 Ark. 409.

Pen. Code, § 7, subd. 6, defines the word "bribe" as anything of value or advantage, etc., given with a corrupt intent to influence "unlawfully" the person to whom it is given in his action, vote, etc., in any public or official capacity. Section 165 punishes one giving a bribe to any member of any board

of supervisors with intent to "corruptly" influence such member in his action on any matters, etc. Held, that the use of the word "unlawfully" as qualifying "to influence" in section 7, adds nothing to the meaning of section 165, and hence an indictment for bribery charging an intent to "corruptly" influence, etc., by giving money, etc., was sufficient, though the word "unlawfully" was not used. *People v. Glass*, 112 Pac. 281, 286, 158 Cal. 650.

It has been held that the use of the word "unlawfully," in an indictment charging the commission of an act causing miscarriage or abortion, "negatives or precludes any inference or possibility that the act was done by a surgeon for the purpose of saving the woman's life." *Johnson v. People*, 80 Pac. 133, 137, 33 Colo. 224, 108 Am. St. Rep. 85 (quoting *Commonwealth v. Sholes* [Mass.] 13 Allen, 554).

The use of the word "unlawfully," in an affidavit in the language of the statute denouncing as unlawful the sale of milk containing dirt, precludes all legal excuse for the offense, and negatives a sale for any other purpose than food, thus rendering the affidavit sufficient, if that is the construction to be given the statute. *State v. Closser* (Ind.) 99 N. E. 1057, 1060.

Where the sufficiency of an indictment for causing nonmailable matter to be deposited in the post office is not questioned until after verdict, the words "willfully, 'unlawfully,' wrongfully, and knowingly," as used therein, were to be taken in their broadest sense, as applying to all that was expressed in respect of the act, and therefore as imputing to defendants knowledge of the contents of the circular alleged to have been mailed, and of the book of which it was an advertisement. *Burton v. United States*, 142 Fed. 57, 59, 73 C. C. A. 243.

The Rhode Island statute provides that no person shall operate a motor vehicle on the public highways recklessly, or so as to endanger the life or limb of any person, and prescribes precautions to be taken by the operator while using a public highway. A complaint thereunder charged as to the offense that defendant did "unlawfully" operate a certain motor vehicle in a certain public highway named "recklessly," and in operating it "recklessly" ran and drove into a team being driven by complainant on such highway, so as to endanger his life and limb, etc. Held, that disregard of or inattention to the duty prescribed by the law constituted unlawfulness and recklessness; that the words "unlawfully" and "recklessly," in the complaint, described the manner in which defendant drove, so as to negative an inference that the collision was an innocent accident; and that the facts stated constituted an offense under the statute. *State v. Welford*, 72 Atl. 396, 397, 29 R. I. 450.

In their ordinary acceptation, the words "unlawfully," willfully, and knowingly," when applied to an act or thing done, import knowledge of the act or thing so done, as well as an evil intent or bad purpose in doing such thing. *United States v. Mitchell*, 141 Fed. 666, 671 (citing *Price v. United States*, 17 Sup. Ct. 366, 165 U. S. 311, 41 L. Ed. 727); *Clement v. United States*, 149 Fed. 305, 314, 79 C. C. A. 243 (citing *Rosen v. United States*, 16 Sup. Ct. 434, 161 U. S. 30, 33, 40 L. Ed. 606).

The words "unlawfully," feloniously," as used in an indictment charging accused with "unlawfully, feloniously" receiving property theretofore feloniously stolen, mean that the act which they characterize proceeded from a criminal intent and evil purpose, and thus exclude all color of right and excuse for the act. *Bise v. United States*, 144 Fed. 374, 375, 74 C. C. A. 1, 7 Ann. Cas. 165.

"An information charging that the accused "unlawfully" and feloniously" did steal, take, and carry away certain property, with the intent then and there to steal and carry away the said personal property, includes therein the element of felonious intent upon the part of the taker to deprive the owner permanently of such property and convert the same to his own use." *Martin v. State*, 93 N. W. 161, 162, 67 Neb. 36.

The words "willfully," "unlawfully," "feloniously," and "maliciously" import only that criminal intent which is the necessary part of every felony or other crime, but they do not necessarily include the specific "purpose" to do the act which is an element of the crime charged. Whether the indictment is on a statute or at the common law, it is a rule universal and without exception that every intent, like everything else, which the law makes an element of the offense, must be alleged, for otherwise no prima facie case appears. *Newby v. State*, 105 N. W. 1099, 1100, 75 Neb. 33.

The word "unlawfully," in an allegation that defendant did "unlawfully" assault prosecutor, implied that the assault was delivered with a criminal intent, and sufficiently advised defendant of the offense he was charged with having committed. *State v. Koonse*, 101 S. W. 139, 142, 123 Mo. App. 655.

The complaint in an action for the death of a person struck by a train, which alleges that defendant "unlawfully and grossly, negligently and wantonly omitted to give any signal," and ran the train at a "speed grossly, negligently and wantonly high," and "unlawfully, wantonly and grossly, carelessly and negligently" ran the train over decedent, and which charges a violation of a municipal ordinance regulating the speed of trains, and which states the facts showing the relative situation of the parties at the time and before the accident, charges negligence, for the word "unlawfully" refers to the alleged viola-

tion of the ordinance, and the words "willfully" and "wantonly" merely meaning "recklessly" or "heedlessly." *Neary v. Northern Pac. Ry. Co.*, 110 Pac. 226, 230, 41 Mont. 480.

#### **Feloniously distinguished**

The charge that an act was done "feloniously" includes the charge of "unlawfulness." *State v. Miller*, 89 S. W. 377, 380, 190 Mo. 449.

The word "feloniously" includes "unlawfully" in its meaning, for an act cannot be said to be "feloniously" done and not be "unlawfully" done. *People v. St. Clair*, 91 N. E. 573, 574, 244 Ill. 444 (citing *Carroll v. State*, 75 S. W. 471, 71 Ark. 403).

#### **Rudely distinguished**

An information charging that accused "willfully" and "unlawfully" displayed an alleged deadly weapon in a manner calculated to disturb, etc., is insufficient to charge an offense under Pen. Code 1895, art. 334, providing punishment for those who "rudely" display any pistol or other deadly weapon in a manner calculated to disturb, for "willfully" is not synonymous with "rudely," nor does it convey the same meaning. The instrument could be displayed "willfully" or "unlawfully" without coming within the terms of the statute. *Fuller v. State*, 87 S. W. 832, 48 Tex. Cr. R. 300.

#### **Willfully compared**

The words "unlawfully, feloniously, and of his malice aforethought, and after deliberation and premeditation," used in charging murder, include all the meaning conveyed by the word "willfully." *Daniels v. State*, 88 S. W. 844, 845, 76 Ark. 84.

#### **Without lawful purpose compared**

An averment in an indictment that the defendant "unlawfully, willfully, and wantonly sent" an indecent letter to a female is not sufficient to show an offense under a statute which makes it a misdemeanor "willfully and wantonly" to send such a letter to a female, "without lawful purpose in sending the same." *State v. Smith*, 46 N. J. Law, 491.

#### **Wrongfully compared**

The words "unlawfully," "willfully," "fraudulently," and "feloniously," in an indictment, include the word "wrongfully." *State v. Pellerin*, 43 South. 159, 161, 162, 118 La. 547 (citing *State v. Brown*, 6 South. 541, 41 La. Ann. 345; *Marr's Cr. Jur. of Louisiana, verbo, "Indictment,"* subd. "The Words of the Statute").

### **UNLAWFULLY CARRYING**

To constitute the offense of "unlawfully carrying" a pistol, the pistol must be carried on or about defendant's person. *Davis v. State*, 82 S. W. 512, 47 Tex. Cr. R. 148.

Carrying a pistol to a shop to have it repaired, and returning home with it, is not

an "unlawful carrying," within the meaning of Pen. Code, art. 338. *Mangum v. State* (Tex.) 90 S. W. 31.

### UNLAWFULLY HOLD OVER

A complaint in justice's court, which showed that plaintiff was the owner of real estate described, that a room in the building thereon was occupied by defendant, that plaintiff was entitled to immediate possession, that defendant held possession without right, and for 15 days last past unlawfully kept plaintiff out of possession thereof, showed the relation of landlord and tenant, and was sufficient to give the justice jurisdiction within Burns' Ann. St. 1908, § 8071, giving justices jurisdiction of actions by landlords for the possession of land; the words "unlawfully kept" meaning unlawfully detained, synonymous with the statutory words "unlawfully hold over." *Everett v. Irwin*, 94 N. E. 352, 353, 47 Ind. App. 263.

### UNLAWFULLY IN THE UNITED STATES

Found unlawfully in the United States, see Find—Found.

### UNLEAVENED

There is no common, uniform, or general trade understanding including the words "leavened" or "unleavened." There is however, a substantial agreement among dictionary definitions that "leavened" means any substance that sets up fermentation in, or raises or makes light, and the evidence showed that this broad definition corresponded with ordinary understanding and speech. The term "unleavened," as applied to wafers, is restricted to wafers such as are used as a vehicle for taking medicine, or as seals, or for religious purposes. Edible wafers, raised in the making by the use of baking powder or bicarbonate of soda, are "leavened" although these agents do not produce fermentation, and are dutiable under Tariff Act July 24, 1897, § 6, as nonenumerated manufactured articles, and are not entitled to free entry under paragraph 696 in the free list as "wafers unleavened or not edible." *F. H. Leggett & Co. v. United States*, 131 Fed. 817, 818 (citing Stand. Dict.; Cent. Dict.; Webst. Dict.).

### UNLESS

"Laws 1854-55, p. 264, c. 228, § 20, providing that, in the absence of any contract in relation to lands through which a railroad may pass, it shall be presumed that the land has been granted by the owner to the company, 'unless' the owner shall apply for an assessment of the value of the lands within two years next after the location of the road, has no application where a deed is executed by the owner of the land to the railroad within two years after the building of

the road, and a claim under the deed is inconsistent with a claim under the statute." "The word 'unless,' used in the act, is thus defined by Webster: 'Unless. Upon any less condition than the fact or thing stated in the sentence or clause which follows; if not; supposing that not; if it be not; were it not that.' The Century Dictionary defines the same word as follows, omitting some secondary meanings: 'If it be not that; if it be not the case that,' etc. These definitions clearly indicate a negative condition precedent, as much so as the condition in a mortgage that, 'unless' the money is paid, or 'if it be not' paid, by a certain day, the land may be sold. If the money is paid on or before the day limited, the mortgagor is in no default whatever, and the power of sale never arises." *City of Hickory v. Southern Ry. Co.*, 49 S. E. 202, 205, 137 N. C. 189.

The word "unless," in Domestic Relations Law (Laws 1896) c. 272, § 3, declaring a marriage void if contracted by a person whose husband or wife by a former marriage is living, "unless" either the former marriage was annulled or dissolved for a cause other than the adultery of such person, or the former spouse has been sentenced to imprisonment for life or has absented himself or herself for five successive years without being known to be alive, partakes more of the character of a proviso than of an exception, but, whether considered as an exception or a proviso, it is not necessary to negative the matter in the pleading, and where, in a suit for breach of marriage promise, the validity of plaintiff's marriage to a third person on account of his having a living spouse by former marriage at the time became material, it was not necessary for her to specifically negative the exceptions to the law in a reply setting up the prior existing marriage of her alleged husband. *Stein v. Dunne*, 103 N. Y. Supp. 894, 896, 119 App. Div. 1.

In an action against a railroad company for wrongful death, where plaintiff relied on the humanitarian doctrine, a charge that, unless the jury believe from the evidence that the engineer did not discover the peril of plaintiff's intestate in time to avoid the injury, they must find for defendant is erroneous, because "unless" is equivalent to "if not," and the use of the double negative predicates plaintiff's right of recovery upon the absence of negligence. *Central of Georgia Ry. Co. v. Finch* (Ala.) 59 South. 619, 620.

The word "unless," as used in an insurance policy providing that no action could be sustainable unless the proofs had been furnished in the specified time, and the words "until after," as used in a policy providing that no action could be sustainable until after proofs were furnished, etc., mean the same thing—that the proof having not been furnished within the specified time, the accus-

ed's right of action in either case is cut off. *Teutonia Ins. Co. v. Johnson*, 82 S. W. 840, 842, 72 Ark. 484.

#### UNLESS OTHERWISE DIRECTED

The use of the words "unless otherwise directed by the court or judge granting the writ," in Laws 1899, p. 1502, c. 712, § 45, authorizing certiorari to review an assessment of a special franchise and directing that the writ run to the state board of tax commissioners, and to no other board or officer, "unless otherwise directed by the court or judge granting the writ," does not entitle the local assessors to intervene, as such words apply only to parties legally interested in the proceedings, and not to the local assessors desiring to be made parties to repel any reflection cast upon their actions in making the assessment. *People ex rel. Rochester Tel. Co. v. Priest*, 73 N. E. 1100, 1102, 181 N. Y. 300.

#### UNLESS THE SUIT CAN BE MAINTAINED

Within the rule that attachment is but an incident to a suit, and, "unless the suit can be maintained," the attachment must fall, the term means "unless the court has jurisdiction over the person of the defendant." *Laborde v. Ubarri*, 29 Sup. Ct. 552, 214 U. S. 173, 53 L. Ed. 955 (quoting *Ex parte Des Moines & M. R. Co.*, 103 U. S. 794, 796, 26 L. Ed. 461, 462).

#### UNLIMITED

##### UNLIMITED CONVEYANCE OF AN EASEMENT

An "unlimited conveyance of an easement" is in law a grant of unlimited reasonable use, and deeds of flowage rights, though absolute in form, convey as against the servient estate right to reasonably necessary use only. *Chapman v. Newmarket Mfg. Co.*, 68 Atl. 868, 74 N. H. 424, 15 L. R. A. (N. S.) 292.

##### UNLIMITED GUARANTY

An "unlimited guaranty" may be defined as one that is unlimited both as to time and amount. *Merchants' Nat. Bank v. Cole*, 93 N. E. 465, 466, 83 Ohio St. 50, Ann. Cas. 1912A, 773.

##### UNLIMITED POLICY

An "unlimited insurance policy" on lumber, etc., means that the policy covers lumber within the mill and adjoining buildings, as well as lumber in the yards. *Ferguson v. Lumbermen's Ins. Co.*, 88 Pac. 128, 129, 45 Wash. 209.

#### UNLIQUIDATED

##### UNLIQUIDATED CLAIM

Though by express provision of Rev. St. 1895, art. 3089, a demand on a fire policy, in case of total loss of the property insured, is a liquidated demand, a claim for breach of a

contract to renew or procure insurance is an "unliquidated demand" within article 754, providing that unliquidated damages cannot be set off in an action on a certain demand. *Wise v. Ferguson (Tex.)* 138 S. W. 816, 818.

*Bankr. Act July 1, 1898, c. 541, 30 Stat. 544*, provides that if one or more, but not all of the members of a firm are adjudged bankrupt, the firm property shall not be administered in bankruptcy, unless on consent of the nonbankrupt partners, but that such partners shall settle the partnership business as soon as possible, and account for the interest of the bankrupt partners. By section 63 debts of the bankrupts may be proved and allowed against their estate which are (1) a fixed liability as evidenced by a judgment or an instrument in writing, owing at the filing of the petition, whether then payable or not; (4) founded upon an open account or upon contract; (5) founded upon provable debts reduced to judgments after the petition is filed and before discharge. Section 63, subd. "b," permits unliquidated claims against the bankrupt to be liquidated as the court may direct, and may thereafter be proved. Plaintiffs were partners with defendants in buying and selling tobacco, and plaintiffs knew, when defendants filed a petition in bankruptcy, that the venture would result in loss, leaving defendants indebted to plaintiffs, though the exact amount was not then known, and could not be known until the rest of the tobacco was sold. Held, that plaintiffs had an "unliquidated claim" against defendants within section 63, subd. "b" which was provable when plaintiffs filed their petition. *Dycus v. Brown*, 121 S. W. 1010, 1013, 135 Ky. 140, 28 L. R. A. (N. S.) 190.

##### UNLIQUIDATED DAMAGES

While an attachment will not issue in an action for "unliquidated damages," this merely means that the amount plaintiff is entitled to recover shall be ascertained or ascertainable by reference to the contract and proof of what was done under it, and that the standard by which defendant's liability is to be measured shall be furnished by the contract, and not left open to mere speculation or vague conjecture. *Hale Bros. v. Milliken*, 75 Pac. 653, 655, 142 Cal. 134 (citing *Wade*, *Attachm.* § 23).

#### UNLOAD

##### UNLOADING WITHOUT PERMIT

Where a person arriving in the United States took with him from the vessel articles which he had willfully omitted to declare to the customs officers, he was guilty of "unloading merchandise without a permit," in violation of section 2872, Rev. St. *United States v. 218½ Carats Loose Emeralds*, 153 Fed. 643, 646; *Two Hundred and Eighteen and One-Half Carats Loose Emeralds v. United States*, 154 Fed. 839, 83 C. C. A. 475

(citing *United States v. One Pearl Necklace*, 111 Fed. 165, 49 C. C. A. 287, 56 L. R. A. 130; *One Pearl Chain v. United States*, 123 Fed. 374, 59 C. C. A. 499; *United States v. One Pearl Chain*, 139 Fed. 517, 71 C. C. A. 500; *United States v. Five Packages of Tapestry*, 114 Fed. 496).

## UNMANUFACTURED

Powdered opium prepared by a series of processes from gum opium, which result in a more valuable article, having a new use and a new commercial signification, held not to be opium "crude or unmanufactured," within the meaning of a tariff act. *Merck v. United States*, 151 Fed. 14, 15, 80 C. C. A. 510.

Congress, in using the words "unmanufactured tobacco," in *Tariff Act 1897*, par. 215, must be deemed to have adopted the construction given by the federal Supreme Court to those words as used in an earlier tariff act. *Latimer v. United States*, 32 Sup. Ct. 242, 223 U. S. 501, 56 L. Ed. 526.

Dyers' sticks of hard wood, which have been trimmed and peeled, and had the rough edges removed, and the ends rounded, are not dutiable as manufactures of wood, under *Tariff Act July 24, 1897*, c. 11, § 1, Schedule D, par. 208, 30 Stat. 168, but as wood "unmanufactured" under paragraph 198, 30 Stat. 167. *United States v. Knipscher & Maas Silk Dyeing Co.* 152 Fed. 590, 591.

Wheat injured by frost to such an extent as to reduce it to a low grade, or to "no grade," but which can still be used for seed and for making flour, is dutiable as wheat, under the tariff act of 1897 (30 Stat. 170) and not as a nonenumerated "unmanufactured" article (30 Stat. 205). *United States v. W. P. Devereux Co.*, 135 Fed. 428.

## UNMANUFACTURED TIMBER

See *Logs and Round Unmanufactured Timber*.

## UNMARKETABLE TITLE

See *Marketable Title*.

## UNMARRIED

See *If She Remains Unmarried*.

In an action for wrongful death under *Rev. St. 1909*, § 5425, authorizing an action by an administrator where his intestate left no husband, wife, or minor child, natural born or adopted, the allegation that deceased was single and unmarried, without an allegation that he left no children surviving him, natural born or adopted, is insufficient to show that the action is properly brought by an administrator, since although under the rule that pleadings shall be liberally construed, especially after verdict, the word "unmarried" might properly be held to mean that deceased had never been married, and that

he left no natural children, it cannot be held to constitute an allegation that he left no adopted children. *Hegberg v. St. Louis & S. F. R. Co.*, 147 S. W. 192, 210, 164 Mo. App. 514 (citing 7 Words & Phrases, p. 6520).

Testatrix, on making her will, had five unmarried daughters, one married daughter, and an incompetent son. In her will she expressed a wish that her unmarried daughters, or such of them as desired to live together, with her son, should live in one household, and directed that the house wherein they had been living be kept in repair, etc., so long as any of her daughters remaining single might choose to make it their home. She further directed that a share of the estate held in trust for her son's benefit should on his death go to her "unmarried daughters." Before the execution of the will the word "unmarried" was substituted by testatrix in the draft for "surviving." Held, that only those daughters unmarried at the date of the son's death were included. *Robinson v. Martin*, 93 N. E. 488, 489, 200 N. Y. 159.

### As never having married

Primarily the word "unmarried" means never having been married. *Cheek v. Walker*, 50 S. E. 863, 864, 138 N. C. 446.

The word "unmarried," as used in a testamentary provision directing that in case of the death of his daughter without issue that portion of the estate bequeathed to her should go to such person or persons as would "receive the same were I to die in and an inhabitant of the state of New York, unmarried and intestate," means not married at the time of testator's death, not as never having been married; and in such event the property bequeathed passes to the descendants, and not to the collateral relatives of the testator. In *re Union Trust Co.*, 72 N. E. 107, 108, 179 N. Y. 261.

A daughter of the intestate, who had been married, and had left her husband and returned and kept house for intestate, but was not divorced, was not "unmarried," within *Rev. St. 1895*, arts. 2046, 2049, providing for the setting aside of the homestead and exempt property of an intestate to his widow, minor children, and unmarried daughters remaining with the family. *Wilkins v. Briggs*, 107 S. W. 135, 138, 48 Tex. Civ. App. 596.

### Divorced persons

A divorced woman is not an "unmarried female," within the meaning of *Va. Code 1904*, § 3677, making it a felony to seduce and have illicit connection with any unmarried female of previous chaste character under promise of marriage. *Jennings v. Commonwealth*, 63 S. E. 1080, 109 Va. 821, 21 L. R. A. (N. S.) 265, 132 Am. St. Rep. 946, 17 Ann. Cas. 64 (citing 8 Words and Phrases, p. 7196).

*Rev. St. 1895*, art. 1869, provides that whenever a person dies intestate, all his es-

tate shall vest in his heirs, subject to the payment of debts. Article 2060 declares that the homestead shall not be liable for any debts of the estate except for the purchase money thereof, taxes due, or for work and materials used for improvements thereon, and article 2046 provides that the court shall set apart for the use of the widow, minor children, and unmarried daughters remaining with the family of the deceased all such property as may be exempt from execution. Article 2055 declares that, should the estate prove insolvent, the title of the widow and children to all property paid to them under the statute shall be absolute and free from any debts of the estate. Held, that where an ancestor and his widow both died leaving an insolvent estate, and a homestead, and at the time of the widow's death a divorced daughter was residing on the homestead with the widow as a member of the family, together with certain grandchildren, such divorced daughter was an "unmarried daughter" within the statute, so that the homestead was not subject to the debts of the widow's general creditors. *Anderson v. McGee* (Tex.) 130 S. W. 1040, 1043.

Rev. St. Ohio 1906, § 5441, authorizes an allowance in lieu of a homestead to a widow, or to an unmarried female, having in good faith the care, maintenance, and custody of any minor child or children of a deceased relative, resident of Ohio, and not the owner of a homestead. Held that, since under the decisions of Ohio, the words "having in good faith the care, maintenance and custody of any minor child or children of a deceased relative" qualified the word "widow" as well as the words "unmarried female," where a bankrupt was a divorced woman, who supported her two minor children, she was entitled to an exemption in lieu of homestead, as an "unmarried female" having the custody, etc., though she might not be regarded as a widow. In re *Giles*, 158 Fed. 596, 597, 85 C. C. A. 418.

#### Widows

A devise to testator's spinster or "unmarried" nieces includes those nieces who, at testator's decease, were widows, as well as those who had never married. In re *Conway's Estate*, 37 Atl. 204, 181 Pa. 156.

Where at the time of a devise to three unmarried daughters so long as they remain unmarried, one of the daughters is a widow, the term "unmarried" will include the widow, by giving the word a secondary, and perhaps a less accustomed, meaning, which is "not being married at the time in question." *Trenton Trust & Safe Deposit Co. v. Armstrong*, 62 Atl. 456, 457, 70 N. J. Eq. 572.

Act March 4, 1889 (St. 1889, p. 56), as amended by Act March 31, 1891 (St. 1891, p. 287), provides that whenever any member of the police department of a city after 10

years' service shall die from natural causes, his widow or children, or if there are no widow or children then his mother or "unmarried sisters," shall be entitled to \$1,000 from a fund created by the act. Held, that the words "unmarried sisters" as so used did not mean never having been married, but included sisters of the officer who were widowed at the time of his death. *Mott v. Scanlan*, 125 Pac. 762, 763, 19 Cal. App. 250.

#### UNNATURAL WILL

A will is "unnatural" in a legal sense only when it is contrary to what the testator, from his known views, feelings, and intentions, would have been expected to make. When it is in accordance with such views it is not "unnatural," however much it may differ from the ordinary actions of man in similar circumstances. Where a testator had a prejudice against his son-in-law, and for this reason left his property to his daughter's children, instead of to the daughter, for the purpose of avoiding the probability of the estate coming into the hands or management of the daughter's husband, although the prejudice was without just foundation, the will was not "unnatural." In re *Morgan's Estate*, 68 Atl. 953, 954, 219 Pa. 355.

#### UNNECESSARILY

The word "unnecessarily" means heedlessly; without necessity; outside of the usual course of business pertaining to the subject. *St. Louis & S. F. R. Co. v. Franklin* (Tex.) 123 S. W. 1150, 1155.

Under an allegation in a petition against a railroad company for negligent treatment of plaintiff employé at the company's hospital, stating that the surgeon furnished "carelessly and negligently and unnecessarily" performed a specified operation, the words "carelessly and negligently" are not synonymous with "unnecessarily"; the latter term negating necessity for the operation, while the other terms refer to the manner of performing the operation. *Williams v. Union Pac. R. Co.* (Wyo.) 124 Pac. 505, 508.

The terms "voluntarily" and "unnecessarily," in the rule that a passenger who voluntarily and unnecessarily undertakes to ride on the platform of a moving train cannot recover for damages sustained from such perilous exposure, impose a limitation on the rule, and where it appears that, owing to the overcrowded condition of the car, there is neither sitting nor standing room on the inside, it may not be negligence to occupy the platform. But so long as there is standing room inside the car the passenger cannot occupy the platform. A declaration for injuries to a passenger, alleging that he took passage on the rear coach of defendant's train, and not being able to secure a seat in

that coach, because of its overcrowded condition, stood on the rear platform thereof and was thrown from the train while it was passing around a curve at a rapid speed, but failing to allege that the defendant attempted to gain a seat in any other coach of the train, or requested any of the trainmen to secure a seat for him, or that there was no standing room inside the rear coach, was demurrable; it not appearing that plaintiff was not voluntarily and unnecessarily riding on the platform. *Meyere v. Nashville, C. & St. L. Ry.*, 72 S. W. 114, 116, 110 Tenn. 166.

## UNNECESSARY

Acts of an officer, in serving a warrant, in taking plaintiff out of bed at 1 o'clock at night, carrying him to a lockup in a patrol wagon with intoxicated people, and placing him in a cell not sufficiently warm, were within his authority under the process, and if there were no other acts to which the words "unnecessary" and "unwarrantable," as used in a recital in the bill of exceptions that the arrest was made in an unusual manner and with acts of unnecessary and unwarrantable cruelty and indignity are applicable, the words do not imply an act beyond the authority of the process. *Laing v. Mitten*, 70 N. E. 128, 129, 185 Mass. 233.

A delay may be "necessary," and yet "unreasonable." If it is made necessary by the negligence of the party chargeable therewith, such delay is in legal contemplation "unreasonable" however imperatively necessary it may have been. In an action for delay in the shipment of cattle, an instruction holding the carrier liable only in case the delay was both unreasonable and unnecessary was erroneous, since it would be liable if the delay was unreasonable, though rendered necessary by its negligence. *Rogers v. Texas & P. Ry. Co. (Tex.)* 94 S. W. 158, 162.

## UNNECESSARY DANGER

See, also, Exposure to Unnecessary Danger.

In a proviso in a contract of insurance exempting the insurer from liability for an accident resulting from voluntary exposure to unnecessary danger, "the words 'unnecessary danger' signify that the danger meant is one not incident to the duty or avocation of the insured; and this view consists with another term of the policy, in which the occupation of deceased was referred to and he was insured as a train porter, a hazardous calling. The words 'voluntary exposure' signify that the insured must be exposed to danger with the consent of his will, which carries the idea that the danger incurred must be realized, instead of unexpected." *Bateman v. Travelers' Ins. Co.*, 85 S. W. 128, 129, 110 Mo. App. 443.

## UNNECESSARY EXPOSURE TO DANGER

See, also, Exposure to Unnecessary Danger.

The expression "unnecessary exposure to danger," in an accident policy providing that it should not cover injuries from such exposure, includes exposure attributable to negligence of insured; the provision being intended to hold insured to the exercise of ordinary care and to exempt insurer from liability from injury occurring through a failure to exercise such care. *Pacific Mut. Life Ins. Co. v. Adams*, 112 Pac. 1026, 1030, 27 Okl. 496.

Where an accident insurance policy cut down the liability of an insurance company if injuries shall result from an unnecessary exposure to obvious danger, and it appears that the insured was described as a "clerk in a store, not doing porter's work," and it also appears that the store was a general store in a mining region, and that one of the clerk's duties was to go to a powder house about 1¼ miles away from the store, and deliver the powder to customers, the insurance company has no standing to claim a reduction in liability because the insured was killed by an explosion at the powder house while in the ordinary performance of his duties. In such a case the mere handling of explosives either in the store or in the powder house was not an "unnecessary exposure to obvious danger" within the meaning of the policy. *Alloway v. General Acc. Ins. Co.*, 35 Pa. Super. Ct. 371, 377.

## UNOCCUPIED

See Personally Unoccupied.

Vacant and unoccupied, see Vacancy—Vacant—Vacate.

The terms "unoccupied" and "unappropriated" refer to land that is not in the possession of one who claims the right of possession by virtue of a compliance with the law. *Conn. v. Oberto*, 76 Pac. 369, 370, 32 Colo. 313.

"Vacant" and "unoccupied" are not synonymous terms. If an insurance policy is conditioned to be void in case the premises become "vacant or unoccupied," the existence of either condition will avoid the policy; but if a policy contains the condition that in case the premises are left "vacant and unoccupied," etc., then they must be both vacant and unoccupied in order to defeat it. *Ohio Farmers' Ins. Co. v. Vogel (Ind.)* 73 N. E. 612, 614.

A new building in process of construction was not within a provision in a list of prohibited risks by which insurer's agents were prohibited from insuring "unoccupied buildings." *Harris v. North American Ins.*



Co., 77 N. E. 493, 494, 190 Mass. 361, 4 L. R. A. (N. S.) 1137.

As commonly used and understood, the word "occupation" is synonymous with "possession," but as used in a fire policy, providing that it shall become void if the house insured becomes "unoccupied," means that no one lives therein. It is not synonymous with vacant, but is that condition where no one has the actual use or possession of the thing or property in question. In such constructions the word is to be construed with reference to the nature and character of the building, the purpose for which it is designed, and the uses contemplated by the parties as expressed in the contract. *Yost v. Anchor Fire Ins. Co.*, 38 Pa. Super. Ct. 594, 599.

#### House

"The word 'occupation,' as applied to a dwelling house, means living in it; and hence, to become vacated or unoccupied, it must be without an occupant—without any person living in it." *Baggerly v. Lee*, 73 N. E. 921, 923, 37 Ind. App. 139 (citing *Home Ins. Co. of New York v. Boyd*, 49 N. E. 285, 19 Ind. App. 173; *Paine v. Agricultural Ins. Co. (N. Y.)* 5 Thomp. & C. 619; *American Ins. Co. v. Padfield*, 78 Ill. 169).

Where the husband of a tenant of a building and his hired man slept in the building after the tenant had removed the greater part of the furniture, but leaving a part, and the husband left on the premises his horses and chickens, etc., the house was not vacant or "unoccupied" within a fire policy stipulating that it should be void if the building became vacant or unoccupied, and so remained for ten days. *Seubert v. Fidelity-Phoenix Ins. Co. of New York*, 136 N. W. 103, 104, 29 S. D. 261, 40 L. R. A. (N. S.) 58.

In a policy exempting the insured from liability, in case the property he insures should become vacant or unoccupied, the words "vacant" and "unoccupied" have a definite and fixed meaning, and that is "that, if the house insured should cease to be used as a place of human habitation, or for living purposes, it would then become vacant and unoccupied." The extent of the time of vacancy is not the essence of the contract. Vacancy of insured property is universally recognized in insurance circles as an increased risk, and in contemplation of law there is as much violation of such a provision in a contract by a vacancy for a brief period as there would be for a more extended period. *Ohio Farmers' Ins. Co. v. Vogel (Ind.)* 75 N. E. 849.

"For a dwelling house to be 'occupied,' it must be used by human beings as their customary place of abode." The mere presence of goods in the house and a supervision over it is not occupancy. That requires living in it. *Knowlton v. Patrons' Androskog-*

*gin Mut. Life Ins. Co.*, 62 Atl. 289, 292, 100 Me. 481, 2 L. R. A. (N. S.) 517 (citing *Moore v. Phoenix Fire Ins. Co.*, 6 Atl. 27, 64 N. H. 140, 10 Am. St. Rep. 384; *Sonneborn v. Manufacturers' Ins. Co.*, 44 N. J. Law, 220, 43 Am. Rep. 365; *Herrman v. Ins. Co.*, 85 N. Y. 162, 39 Am. Rep. 644).

The occupancy of a dwelling house within a fire policy, stipulating that it shall be void if the building becomes vacant or unoccupied and remains so for 10 days, means that some person is living in it, and, if for ten days no person is living in it, the house is "unoccupied," and the policy is forfeited, but one may occupy premises which are not places of abode, and a house occupied by a caretaker or watchman not making the house his domicile is occupied. *Walton v. Phoenix Ins. Co.*, 141 S. W. 1138, 1141, 162 Mo. App. 316.

#### UNOCCUPIED FOR SCHOOL PURPOSES

*Burns' Ann. St. 1901*, §§ 5920a-5981, relate to the duration of school terms in school townships; and section 5999 grants the right to use a public school building for other than school purposes when "unoccupied for common school purposes." Held, that the term "unoccupied for common school purposes" had reference only to the time intervening between terms of school, and did not authorize a religious organization to use a schoolhouse on Sundays and evenings during a school term, when the school was not actually in session. *Baggerly v. Lee*, 73 N. E. 921, 923, 37 Ind. App. 139.

#### UNOPENED

Neither the failure of county authorities formally to open up streets in a platted addition outside of corporate limits, nor the fact that they have not been used by the public, will make them in law closed or unopened streets, within Gen. St. 1901, § 6058, where everything was done at the time the plat was filed necessary to open them for public use. Where open lands, lying wholly outside corporate limits, have been regularly platted, and the streets dedicated to the public, such streets cannot be regarded as "unopened," within Gen. St. 1901, § 6058, making county roads vacant which have remained unopened for public use for seven years. *Kiehl v. Jamison*, 101 Pac. 632, 79 Kan. 788.

#### UNPAID

##### UNPAID BALANCE

The "unpaid balance," as used in the statutes giving a lien to materialmen and subcontractors on any unpaid balance after notice of claim for a lien, means any sum of money which is due when the notice is given, or that may subsequently become due under the contract to the contractor. *McDonald*

Stone Co. v. Stern & Marx, 38 South. 643, 645, 142 Ala. 506 (citing Alabama & Ga. Lumber Co. v. Tisdale, 36 South. 618, 139 Ala. 250).

### UNPAID TAX

Gen. St. 1894, § 1602, subd. 3, providing that, if lands sought to be redeemed from tax sale shall have been sold to a purchaser, the party redeeming shall pay all "unpaid delinquent taxes" accruing subsequent to the sale, means taxes that are overdue and unpaid in fact. *Jenswold v. Minnesota Canal Co.*, 101 N. W. 603, 93 Minn. 382.

An assessment of real estate was declared illegal by the court, and stricken from the roll, because the name of a nonresident owner had been placed among the names of resident owners. Held not an "unpaid tax," within Laws 1874, c. 610, § 3, as amended by Laws 1887, c. 193, allowing the town board to examine the list of unpaid taxes returned by the collector, and, after adding certain percentages, to reject all taxes on land so imperfectly described or so erroneously assessed that the taxes cannot be collected, and authorizing a reassessment, as there was no unpaid tax to be returned by the collector, so that a reassessment would be a new and original assessment, requiring notice to a landowner. *Douglas v. Board of Sup'rs of Westchester County*, 65 N. E. 162, 163, 172 N. Y. 309.

### UNPLATTED LANDS

Prior to 1890 a 40-acre tract of land lying wholly outside a city was platted as an addition to the city. In 1891 the plat was vacated by the board of county commissioners. The land has ever since been used as one tract for farming purposes. All conveyances affecting it have referred to it by its legal description. Held, that since the vacation of the plat it has been "unplatted lands" within the meaning of section 1220 of the Gen. Stat. of 1909, which authorizes a city by ordinance to extend its limits so as to annex adjoining territory. *State ex rel. Dawson v. City of Wichita*, 128 Pac. 369, 88 Kan. 375.

### UNPRECEDENTED

Within the rule that a municipality is not liable for injuries from insufficiency of its sewage system to carry off the surface water in case of an extraordinary storm, the word "extraordinary" is not used as synonymous with "unprecedented," but with "unusual," that which is rare or uncommon, happens sometimes, but not so often as to be regarded as a common occurrence. *Geuder Paeschke & Frey Co. v. City of Milwaukee*, 33 N. W. 835, 839, 147 Wis. 491.

### INPRODUCTIVE

Where property held under a testamentary trust for a beneficiary for life with gift

over of the corpus produces an income grossly disproportionate to its value, with no probable prospect of an increase of income, the property is unproductive within Real Property Law (Laws 1896, p. 573, c. 547) § 85, as amended by Laws 1897, p. 40, c. 136, § 1, authorizing a sale of trust property because it has become "unproductive," and the court has jurisdiction, with the consent of the remaindermen, to order a sale of the property. *Webster Realty Co. v. Delano*, 120 N. Y. Supp. 440, 443, 135 App. Div. 488.

### UNPROFESSIONAL

#### UNPROFESSIONAL CONDUCT

Other unprofessional conduct, see Other.

Procuring or aiding and abetting in procuring a criminal abortion is "unprofessional and dishonorable conduct," within Comp. St. 1907, § 4327, providing for the revocation of a physician's license for such conduct. *Munk v. Frink*, 116 N. W. 525, 527, 81 Neb. 631, 17 L. R. A. (N. S.) 439.

An attorney was declared to be guilty of "unprofessional conduct" who represented to an ignorant man, who had employed him to obtain for him a divorce, that he filed a bill and obtained a decree of divorce, and misled and deceived him by delivering to him a copy of the fictitious decree, and represented to the mother of the woman whom he was about to make his second wife that her prospective son-in-law was divorced, when he had not filed a bill nor taken any steps toward obtaining for his client a divorce, and when he had not been divorced. *People v. Belinski*, 69 N. E. 5, 6, 205 Ill. 564.

B. & C. Comp. § 1066, providing that an attorney shall be disbarred by this court upon proper proceedings for that purpose whenever it shall be made to appear to the court that if he were then applying for admission to the bar his application should be denied because of "unprofessional conduct," means that an attorney shall be disbarred when it appears that his general moral character or unfitness is such that, if he were applying for admission, his application would be denied. *State ex rel. Grievance Committee of State Bar Ass'n v. Tanner*, 88 Pac. 301, 302, 49 Or. 31.

The provision of St. 1901, p. 56, c. 51, authorizing revocation of physician's certificate for "unprofessional conduct," and declaring that it shall be deemed unprofessional conduct to issue medical advertising in which grossly improbable statements are made, but not defining what would constitute such statement, is too indefinite for enforcement. *Hewitt v. Board of Medical Examiners of the State*, 84 Pac. 39, 148 Cal. 590, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750.

The fact that the term "professional conduct" is not defined by Laws 1903, No. 59, § 7,

authorizing the revocation of a physician's license for "grossly immoral or unprofessional conduct rendering him unfit to practice," does not render the statute void for uncertainty, as the term must be construed to mean that which is by general opinion considered to be grossly unprofessional because immoral or dishonorable. *Aiton v. Board of Medical Examiners of Arizona*, 114 Pac. 962, 13 Ariz. 354.

## UNREASONABLE DELAY

The terms "negligent delay" and "unreasonable delay" are used interchangeably and are of the same meaning. *Chicago, R. I. & P. Ry. Co. v. Gillett (Tex.)* 99 S. W. 712, 713.

Where a motion is filed in a cause pending in the Supreme Court to strike the bill of exceptions from the record, and sustained because of defects therein, a delay of the plaintiff in error for over two years thereafter in moving to withdraw the record for the purpose of applying to the trial court to have the bill of exceptions amended is "unreasonable," and the relief will be denied. *Freeburgh v. Lamoureux*, 81 Pac. 97, 13 Wyo. 454.

Where a board of park commissioners commenced proceedings for the condemnation of land on May 18th, and abandoned them on August 14th, after an appeal to the district court, but before any hearing therein, the delay was not so long as to be unreasonable within the rule that in the absence of a showing of "unreasonable delay," and, in the absence of statute, no action lies for the abandonment of ad quod damnum proceedings. *Ford v. Board of Park Com'rs of City of Des Moines*, 126 N. W. 1030, 1032, 148 Iowa, 1, Ann. Cas. 1912B, 940.

Where a principal in a bond, securing the completion of certain buildings conveyed to him on which the obligee held certain mortgages, bound himself to complete the buildings without delay, and it appeared that the deed to the property was not made to him until November 13, 1901, when he entered into possession, and, he having done nothing to complete the work, notice of breach of covenant was given to him on December 14, 1901, and the surety in the bond was notified of the default on the 20th, the obligee's delay in announcing his election to claim a default could not be deemed unreasonably long as a matter of law. *Burr v. Union Surety & Guaranty Co.*, 95 N. Y. Supp. 114, 117, 107 App. Div. 315.

A delay may be "necessary," and yet "unreasonable," if it is made necessary by the negligence of the party chargeable therewith, such delay is in legal contemplation "unreasonable," however imperatively necessary it may have been. In an action for delay in the shipment of cattle, an instruction holding the carrier liable only in case the delay was both unreasonable and unneces-

sary was erroneous, since it would be liable if the delay was unreasonable, though rendered necessary by its negligence. *Rogers v. Texas & P. Ry. Co. (Tex.)* 94 S. W. 158, 162.

A telegram was delivered to defendant company in May, 1906, for transmission to plaintiff, which the company did not deliver to plaintiff at all, and no claim for damages was made to defendant until January, 1907. Code, § 2164, provides that no action against a telegraph company for damages caused by erroneous transmission or unreasonable delay in delivery of a message shall be maintained, unless the claim has been presented to the company within 60 days from the accrual of the cause of action. Held, in plaintiff's action against the company for damages, that defendant's entire omission to deliver the message was neither "erroneous transmission" nor "unreasonable delay in delivery," and that plaintiff was not required to present his claim to the company as a condition precedent to his right of action. *Larsen v. Postal Telegraph Cable Co.*, 130 N. W. 813, 814, 150 Iowa, 748.

"The defendant contends that the shipment was not seasonable, and we think his contention must be sustained. \* \* \* It was understood that the defendant ordered a portion of the goods for use on Memorial Day. They were not shipped until May 18th, 18 days after the receipt of the order, and did not reach Waterville until after Memorial Day. It is the opinion of the court that the delay was 'unreasonable' and that the action cannot be maintained." *Rhoades v. Cotton*, 38 Atl. 367, 368, 90 Me. 453 (citing and adopting *Fisher v. Boynton*, 32 Atl. 995, 87 Me. 395).

Under a statute providing that a divorce must be denied where there is an "unreasonable lapse of time" before the commencement of the action, and providing that unreasonable lapse of time is such delay in commencing the action as establishes the presumption that there has been connivance, collusion, or condonation of the offense, or full acquiescence in the same with intent to continue the marriage relation, the delay of a wife for more than ten years to seek a divorce, and then only in response to plaintiff's complaint, establishes the presumption of her "acquiescence with intent to continue the marriage relation." *Kenniston v. Kenniston*, 92 Pac. 1037, 1039, 6 Cal. App. 657.

## UNREASONABLE DISCRIMINATION

See Undue and Unreasonable Discrimination.

## UNREASONABLE DISTRESS

A substantially excessive distress being necessarily an unreasonable one, within Civ. Code 1902, § 2434, providing that a distress for rent shall be reasonable and not

too great, and that a landlord who makes "unreasonable and excessive distress" shall be liable for damages sustained by the tenant by reason of such excessive distress, a charge submitting to the jury the question whether the distress was unreasonable—that is, whether the amount of property seized to pay \$80 was excessive—was not erroneous in not submitting the question whether it was unreasonable and excessive; the word "excessive" being undoubtedly used in the charge in the sense of substantially excessive. A distress of goods which, at the sale thereunder, sold for \$255, to pay a rent claim of \$80 and \$10 expenses, would warrant a charge as matter of law that it was unreasonable and excessive, within Civ. Code 1902, § 2484, making the landlord liable to the tenant for damages from such a distress; the property subject to seizure consisting, not of a single article, but of numerous articles. *Alexander v. Able*, 70 S. E. 1009, 1010, 88 S. C. 368.

## UNREASONABLE TIME

The phrase "unreasonable time," as used in the statement of the rule that, as the ground of attachment must exist at the time the warrant of attachment was issued, an "unreasonable time" should not be allowed to elapse between the making of the affidavit and the issuance of the writ, means such delay as would under the circumstances cast suspicion on the verity of the affidavit, or lead to the supposition that the ground stated for the attachment had ceased to exist. *Martinovich v. Marsicano*, 89 Pac. 333, 334, 150 Cal. 597 (citing *Kesler v. Lapham*, 33 S. E. 289, 46 W. Va. 293).

## UNREASONABLY RESISTED

Where, in an action against executors on a note indorsed by testator, the only question litigated was whether testator had waived protest, and such fact was established by a son of testator, who was also the father of the executor and brother of the executrix, whose testimony was not disputed, and whose whereabouts were at all times known to defendants, a finding that payment was "unreasonably resisted," within Code Civ. Proc. § 1836, allowing plaintiff costs where his claim has been unreasonably resisted, was warranted. *Pauley v. Millsbaugh*, 88 N. Y. Supp. 565, 567, 95 App. Div. 208.

Where an administrator of the indorser of a note had no defense on the merits, and the only issue presented by him was whether the claim based thereon had been presented and rejected, and its collection barred by the short statute of limitations, which was determined against him, he was properly held to have "unreasonably resisted and neglected payment of the claim," within Code Civ. Proc. § 1836, authorizing taxation of costs

in such event against the administrator, payable out of the estate. *Gardner v. Pitcher*, 95 N. Y. Supp. 678, 682, 109 App. Div. 106.

## UNREGISTERED DEED

Laws 1885, p. 233, c. 147, § 1, now Revisal 1905, § 980, provides that no "conveyance of land or contract to convey or lease of land" for more than three years shall be valid as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, but from the registration thereof, provided no purchase from any such donor, bargainor, or lessor shall avail to pass title as against any unregistered deed executed prior to December 1, 1885, when the person holding or claiming under such unregistered deed shall be in actual possession and enjoyment of the land. Held, that the words "unregistered deed," as used in the proviso, is used in its broad generic sense, and has the same scope as the quoted words, "conveyance of land," etc., used in the first part of the section. *McNeill v. Allen*, 59 S. E. 689, 690, 146 N. C. 283.

## UNSAFE

See Become Unsafe.

A method of work, to be "unsafe," must be such that a reasonably prudent man would not, under the circumstances, adopt it. *Lewis v. Barton Salt Co.*, 107 Pac. 783, 784, 82 Kan. 163.

### As insolvent

The words "unsafe or insolvent" in St. 1898, § 45-11, making a bank officer criminally responsible who shall receive a deposit, knowing the bank to be unsafe or insolvent, are used as legal equivalents. The term "unsafe or insolvent" does not mean insolvent in the limited sense of inability to pay indebtedness in the ordinary course of business, but means insolvent in the broad sense of a deficiency of assets realizable in cash within a reasonable time to pay liabilities. A bank is "unsafe or insolvent" when the cash value of its assets realizable in a reasonable time in case of liquidation, as ordinarily prudent persons would close up their business, is not equal to its liabilities, exclusive of stock liabilities. *Ellis v. State*, 119 N. W. 1110, 1117, 138 Wis. 513, 20 L. R. A. (N. S.) 444, 131 Am. St. Rep. 1022.

It is true that the phrase "unsafe to continue to transact business," as used in Act March 26, 1895 (St. 1895, p. 172) c. 147, providing that upon the failure of a bank to conform to the bank commissioners' order requiring the discontinuance of unsafe practices, or if the commissioners decide it to be unsafe for the bank to continue to transact business, they shall take control of the bank, etc., is broader than the term "insolvent"; and a finding that it is unsafe for a banking corporation to continue business does not

necessarily mean that it is insolvent. But the converse of this is not true. The act clearly contemplates that it is unsafe for an insolvent banking corporation to continue business and that a determination by the commissioners that such corporation is insolvent is equivalent to a finding that it is unsafe for it to continue business. *People v. Bank of San Luis Obispo*, 97 Pac. 306, 309, 154 Cal. 194.

### UNSAFE AND DANGEROUS

The term "unsafe and dangerous," in an instruction imposing liability on a city for injuries from a defective condition of a sidewalk rendering the same "unsafe and dangerous," is the equivalent of not being reasonably safe; the language importing more than a mere defective condition. *Squiers v. Kansas City*, 75 S. W. 194, 195, 100 Mo. App. 628.

### UNSEAWORTHY

See Seaworthy—Seaworthiness.

A vessel is not "unseaworthy," within the meaning of a marine policy, because there may have been a deficiency in kinds of fodder supplied for animals, a portion of its cargo. *Tweedie Trading Co. v. Western Assurance Co. of Toronto*, 168 Fed. 962, 964.

Where, during the unloading of a barge in the usual manner, which caused an uneven keel for a few hours, she sprang a leak, and the remaining cargo was damaged by water, such damage was not caused by "fault or error in the management of the vessel," within section 3 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445), but from "unseaworthiness," or from "negligence, fault, or failure in proper loading," within section 1, for which the vessel is liable. *Donaldson v. J. W. Perry Co.*, 138 Fed. 643, 645, 71 C. C. A. 93 (citing *The Carib Prince*, 18 Sup. Ct. 753, 170 U. S. 655, 42 L. Ed. 1181; *The Germanic*, 25 Sup. Ct. 317, 196 U. S. 589, 49 L. Ed. 610).

### UNSECURED DEBT

"Unsecured debt," as used in Civ. Code 1895, § 2716, authorizing a receiver for an insolvent trader at the instance of creditors representing one-third of the unsecured debt of the trader, means a debt for which no security is held; not one secured by collateral security or pledge, though such security may be less than the debt. *Farmers' Union Warehouse Co. v. Coweta Fertilizer Co.*, 65 S. E. 291, 133 Ga. 132.

Shares of stock in national and state banks are "unsecured solvent debts" due from others to the taxpayer, from which he is entitled to deduct his unsecured debts due to bona fide residents of the state as authorized by Rev. Codes, §§ 1682, 1683, 1685. *First Nat. Bank of Weiser*

*v. Washington County*, 105 Pac. 1053, 1056, 17 Idaho, 306.

### UNSERVICEABLE

County property becomes "unserviceable," within Pol. Code 1895, § 278, so as to authorize its sale by the commissioners of roads and revenues, where it cannot be beneficially or advantageously used under all the circumstances. *Dyer v. Martin*, 64 S. E. 475, 477, 132 Ga. 445.

### UNSETTLED

The affairs of a partnership are "unsettled," so as to subject it to bankruptcy adjudication, as authorized by Bankr. Act July 1, 1898, c. 541, § 5, subd. "a," 30 Stat. 548, so long as the partnership debts are unpaid. *In re Pinson & Co.*, 180 Fed. 787, 790.

### UNSKILLFULNESS

Where plaintiff sought to recover for decedent's death in a street railroad accident under the humanitarian rule, and charged that decedent's death was caused by the negligent unskillfulness, etc., of defendant's servant, and there was evidence that the motorman had been in charge of the car in question only about a week, having been in actual service about half of that time, plaintiff's counsel was justified in arguing that defendant was negligent in placing the car in charge of an inexperienced servant; the term "unskillfulness" being sufficient enough to include inexperience. *Ellis v. Metropolitan St. Ry. Co.*, 138 S. W. 23, 33, 234 Mo. 657.

In an action against a surgeon for performing an operation unskillfully and without plaintiff's consent, the court charged that defendant was not required to possess or exercise the highest degree of skill, but was bound to possess and exercise that degree of skill usually possessed by surgeons generally in that section of the country. If, "however, in performing the operation, defendant failed to do so with that skill which is usually possessed by the profession of surgeons in that section of the country, the skill used by defendant in performing the operation was not the degree of skill required by law." Held, that the clause quoted was improper, and that the court, in place thereof, should have charged that, if the operation was performed by defendant with such skill, then it was not "unskillfully" performed, within the meaning of the instructions. *Van Meter v. Crews*, 148 S. W. 40, 43, 149 Ky. 335.

### UNSOLD

See Remain Unsold.

### UNSOUND

A stipulation in a contract of fraternal insurance with a married woman that the

policy should not take effect unless delivered to her "while in sound health" is not violated by reason of the applicant being pregnant at the time of delivery of the policy. Confinement in childbirth is not a "personal ailment" within the meaning of such a provision in a contract of insurance. Pregnancy is not per se a condition of "unsound health," nor a disease, within the meaning of such terms used in an application for a policy of insurance. *Rascot v. Royal Neighbors of America*, 108 Pac. 1048, 1053, 18 Idaho, 85, 29 L. R. A. (N. S.) 433, 138 Am. St. Rep. 180.

### UNSOUND MIND

See Mental Unsoundness.

The mind may in a sense be said to be "unsound" where its possessor is suffering from delusions, hallucinations, and illusions, and yet he may be held responsible for a criminal act, where the intent is an essential ingredient of the offense, if these things are not the products of a diseased mind. *Porter v. State*, 37 South. 81, 83, 140 Ala. 87.

*Burns' Ann. St. 1908*, § 3938, provides that persons of unsound mind and infants may not alien land or any interest therein. *Burns' Ann. St. 1894*, § 240, declares that technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import. Held, that the words "unsound mind," as used in *Burns' Ann. St. 1908*, § 3112, providing what persons may make a will, having been construed to mean a person of such unsoundness of mind as incapacitates him from making a will according to the standard fixed by the adjudicated cases, its use in section 3938 would be given the same technical meaning; and hence an allegation in a guardian's complaint to set aside a conveyance of real property by his ward that the ward was of unsound mind when the conveyance was executed was not fatally defective as alleging a mere conclusion. *Humphrey v. Harris*, 96 N. E. 38, 39, 48 Ind. App. 469.

A request to charge that if B. on September 2, 1902, did not have mental capacity sufficient to understand his property rights and the character, object, and nature of the transfer of the corporate stock in question and to transfer the same according to a definite purpose and desires of his own, then he was of "unsound mind," but if he had mental capacity sufficient to understand his property rights and character, object, and nature of the transfer of the stock by means of the powers executed and to transfer the same according to a definite purpose and desire of his own, he was not of unsound mind, sufficiently presented the question of lack of capacity to the jury. *Bannon v. Patrick Bannon Sewer Pipe Co.*, 119 S. W. 1170, 1175, 136 Ky. 556.

Under a statute which provides that persons of "unsound mind" at the time of their

production cannot be witnesses, a person who can apprehend the obligation of an oath and is capable of giving a fairly correct account of the things he has seen or heard is competent as a witness, although he may be afflicted with some form of insanity. *State v. Simes*, 85 Pac. 914, 12 Idaho, 310, 9 Ann. Cas. 1216.

Under *Rev. St. 1899*, § 3702 (*Ann. St. 1906*, p. 2071), providing that, for the purposes of the chapter relating to insane persons, the words "insane person" or the words "person of unsound mind" shall be construed to mean either an idiot, or a lunatic, or a person of unsound mind and incapable of managing his own affairs, there is no distinction in law between irresponsible persons, persons of unsound mind, or idiots and raving maniacs. In *re Crouse*, 120 S. W. 666, 670, 140 Mo. App. 545.

The fact that a woman 73 years old deeded her farm to her eldest son in consideration of his promise to maintain her during her lifetime, and sold him stock thereon at a price less than its actual value, will not warrant the appointment of a guardian, under Code, § 3219, providing for the appointment of a guardian of the property of a "person of unsound mind." *Arment v. Arment*, 111 N. W. 812, 813, 134 Iowa, 199.

The expression "unsound mentally" indicates nothing as to the extent or degree of the mental defect, and does not denote an exemption from legal responsibility from criminal acts. *Commonwealth v. Hallowell*, 72 Atl. 845, 846, 223 Pa. 507.

### As every grade of mental incapacity

The words "lunacy" and "unsound mind" have been bent out of their technical sense in some instances; a legislative construction being given thereto in harmony with the broad views of courts that they include every phase of unsound mind rendering one incapable of caring for himself or his property. In *re Streiff*, 97 N. W. 189, 191, 119 Wis. 566, 100 Am. St. Rep. 903.

Under a statute authorizing all persons to dispose of their property by will, except infants and "persons of unsound mind," the latter exception includes idiots, persons non compos, lunatics, monomaniacs, or distracted persons. The term includes every species of unsoundness of mind, although, if the unsoundness of mind does not in any way influence or affect the provisions of the will, it may be a valid one. *Swygart v. Willard*, 76 N. E. 755, 757, 166 Ind. 25.

### As incapable of transacting business in hand

Every mind in the legal sense is sound that can reason and will intelligently in the particular transaction being considered, and every mind is "unsound" or insane that cannot so reason and will. In *re American*

Board of Com'rs for Foreign Missions, 66 Atl. 215, 221, 102 Me. 72.

#### Inability to conduct ordinary affairs

Where mental incapacity renders one unable to conduct the ordinary affairs of life and leaves him in a condition to be the victim of his misfortune, he is of "unsound mind," within Kirby's Dig. § 7812, providing that a person of unsound mind includes one who is a lunatic, idiot, or deranged. *Pulaski County v. Hill*, 134 S. W. 973, 975, 97 Ark. 450.

"Unsound mind" means inability to transact ordinary affairs of life, to understand their nature and effect, and exercise the will in relation thereto. *Kaack v. Stanton*, 112 S. W. 702, 705, 51 Tex. Civ. App. 495.

### UNSUITABLE PERSON

See Suitable Person.

### UNTENANTABLE

Under a lease of a store building for the retail clothing business which provided that, while the demised premises are untenable by fire, rent shall cease, a fire which so damaged the building that it could not be used for the retail business, although the goods were left on the shelves pending insurance adjustment, rendered the building "untenantable," and released the lessee from rent for that period, though he did not surrender possession. *Acme Ground Rent Co. v. Werner*, 139 N. W. 314, 151 Wis. 417.

The continued occupation by a tenant of a building after its damage by fire is some evidence of its fitness for occupation, but is not conclusive evidence on the point within the lease providing that on the building becoming untenable in consequence of a fire the rent shall cease until everything is put in complete repair; the word "untenantable" meaning not fit to be rented or occupied by a tenant. *Reischmann v. L. N. Hartog Candy Co.*, 132 N. Y. Supp. 435, 437.

Where premises are rented for a store, and the lease provides that if they are rendered untenable by fire the rent is to cease, the premises became "untenantable" when from fire the building is damaged so that it is unfit for carrying on a shoe store, and cannot be restored by ordinary repairs such as can be made without unreasonable interruption to the business. *Wolff v. Turner*, 65 S. E. 41, 6 Ga. App. 366.

### UNTIL

An order extending the time for filing a bill of exceptions "until" the following term limited the time to the first day of the following term. *Akins v. City of Humansville*, 113 S. W. 687, 688, 133 Mo. App. 502.

The word "until," as used in the expression, "until otherwise provided by law," means "up to that time," "till the point or degree that," and as so used means until the law provides some other disposition of the matter in question. *Holcomb v. Chicago, R. I. & P. Ry. Co.*, 112 Pac. 1023, 1024, 27 Okl. 667.

Testator directed that a trust created by his will should continue until the expiration of 20 years after his death and the death of his wife. Held, that the language could not be read as if the words had been "until the expiration of 20 years after my death and until the death of my wife," and the intention of the testator to have the trust continued 20 years after the death of the widow, as well as 20 years after his own death, was disclosed. *Robinson v. Bonaparte*, 61 Atl. 212, 216, 102 Md. 63.

Under the Code the persons selected as grand jurors in January of each year are to act for one year and "until" other persons are selected the next year. This means that they shall act only until the happening of the event mentioned and not afterwards. The word "until," as used in section 210, is a word of limitation, and designates the end of the thing referred to. The meaning of this word when used as in the Code is aptly stated by the Court of Appeals of Missouri as follows: "The word 'until' is a word of limitation, used ordinarily to restrict what immediately precedes it to what immediately follows it. Its office is to point out some point of time, or the happening of some event, when what precedes it shall cease to exist, or have any further force or effect." *Halsey v. Superior Court of City and County of San Francisco*, 91 Pac. 987, 992, 152 Cal. 71 (citing *Maginn v. Lancaster*, 73 S. W. 372, 100 Mo. App. 116).

The proper words to be used in creating a limitation upon the term granted by a lease are "while," "as long as," "until," and "during." *Vanatta v. Brewer*, 32 N. J. Eq. 268, 270.

The word "at," in a will giving a certain sum of money to the children of the testator's daughter that she then had and might or should have "at" the time of her death, should be construed in the sense of "until." *Haggerty v. Hockenberry*, 30 Atl. 88, 89, 52 N. J. Eq. 354.

#### As excluding last day

Act Aug. 31, 1909 (Laws 1909, p. 305), provided that respondent's term as jury commissioner under appointment made by the Governor ran "till the first Monday after the second Tuesday in January, 1911," and that on the expiration of each term the Governor should appoint successors who should hold office for three years from the expiration of the term of their respective predecessors. Held, that the word "till" meant "up or down to; as far as; until," the words "to," "till,"

and "until" being synonymous, and, "until" being primarily a word of exclusion, respondent's term did not include any part of the first Monday after the second Tuesday in January, and hence, since the term of the existing Governor did include that day, there was a vacancy in the office of jury commissioner, which the Governor had power to fill by appointment. *Oberhaus v. State ex rel. McNamara*, 55 South. 898, 902, 173 Ala. 483.

*Bouvier's Law Dictionary* defines the word "to" as a term of exclusion, unless by necessary implication it is manifestly used in a different sense. Webster recognizes the words "to," "till," and "until" as synonymous in the sense here used. The *Century Dictionary* gives like recognition as to the use of these words. Where on the 25th day of February plaintiff in error was allowed to the 15th day of March to make and serve a case for the Supreme Court, the time granted expired at 12 o'clock midnight March 14th. *Maynes v. Gray*, 76 Pac. 443, 69 Kan. 49, 105 Am. St. Rep. 146, 2 Ann. Cas. 518.

While in the interpretation of instruments by which powers are created or estates granted, the word "until" is generally used to delimit the extent of that which is within the grant, and hence excludes the day up to which the grant runs, where the term of a judge was to continue until a certain date, the term of the incumbent of the office included such date; the function of the preposition being not to limit, but to extend. *Fulton v. Woodward*, 24 Atl. 402, 54 N. J. Law, 481.

When a period of time is to continue "until" a certain day, such day is excluded; and where, in a lease, both "from" and "until" are used, then, unless the two dates named are both outside of the term granted, the general rule excluding both these dates cannot be applied. Where the words "from" and "until" are used in a lease in connection with the phrase a "term of two years," either one or both of the dates named may be either included within the term or excluded therefrom, and the whole instrument must be considered to get the true intent. *I. X. L. Furniture & Carpet Installment House v. Berets*, 91 Pac. 279, 280, 32 Utah, 454.

The word "until," in Acts 1900-01, p. 1291, declaring that one of the terms of the city court of Gadsden shall continue "until" the third Saturday in December, is exclusive of that day. *Johnson v. State*, 37 South. 421, 141 Ala. 7, 109 Am. St. Rep. 17.

When time to do an act is given until a day named, the word "until" will be deemed exclusive, unless it is shown by the context or otherwise that the contrary was intended. *Carver v. Seever & Bryan*, 102 N. W. 518, 519, 126 Iowa, 669 (citing *Century Dict.*; *People v. Walker*, 17 N. Y. 502; *Kendall v. Kingsley*, 120 Mass. 94).

While the word "until" is perhaps most frequently used in a restrictive sense, and excludes the day mentioned, it depends on the intent to which it is used which is to be inferred from the nature and circumstances of the case. *Harvey v. Provident Inv. Co. (Tex.)* 150 S. W. 284 (citing 8 Words and Phrases, p. 7218).

Where defendant was granted "until January 5th" to have his bill of exceptions signed by the presiding judge, the time for signing expired on the night of January 4th, and the court did not, on January 5th, which was in vacation, have power to extend the time until January 6th, as the term "until January 5th" excluded that day. *Richardson v. State*, 39 South. 12, 142 Ala. 12.

#### As including last day

The word "until," in New York City Charter, § 1401 (Laws 1901, p. 599, c. 466), providing that judges of the Court of Special Sessions shall hold office until December 31st in the years mentioned, was inclusive. *People v. Fitzgerald*, 89 N. Y. Supp. 268, 269, 96 App. Div. 242.

The word "until," when applied to the extension of time for the filing of the bill of exceptions "until" a certain date, includes such date. *Bloch Queensware Co. v. Smith, Saxton & Co.*, 80 S. W. 592, 593, 107 Mo. App. 13 (citing *St. Louis & S. F. Ry. Co. v. Gracy*, 29 S. W. 579, 126 Mo. 472).

Under Act Feb. 28, 1907, continuing one of the terms of the city court of Montgomery "until" the Saturday before the second Monday in July, the Saturday named should be included within the term, the rule to be applied being that in statutes limiting the continuance of terms of court until a certain day, which is the last day of the week or month, the interpretation to be placed upon the word "until" is that the last day named is to be included. *Montgomery Traction Co. v. Knabe*, 48 South. 501, 503, 158 Ala. 458.

If, by an order in a criminal case, a defendant be required to enter into a recognizance for his appearance in court on June 25, 1904, and he be given until that time in which to present a bill of exceptions, the strict legal and lexicographic meaning of the word "until" is controlled by the context, and the bill may be presented on the day named. *State v. Horine*, 78 Pac. 411, 412, 70 Kan. 256.

#### Until after

The word "unless," as used in an insurance policy providing that no action could be sustainable unless the proofs had been furnished in the specified time, and the words "until after," as used in a policy providing that no action could be sustainable until after proofs were furnished, etc., mean the same thing—that, the proof having not been furnished within the specified time, the accused's right of action in either case is cut



off. *Teutonia Ins. Co. v. Johnson*, 82 S. W. 840, 842, 72 Ark. 484.

#### Until further order of court

Where a temporary injunction was granted "until further order of the court," the words quoted import an order that until such time, for good cause appearing, the same should be modified or dissolved, not an arbitrary right of dissolution at the court's discretion. The broadest powers given to courts in the control of their records and judgments do not comprehend arbitrary power of rescinding orders once entered, but do comprehend that such orders of modification or rescission should be based upon good reasons presented to the court. *Humphry v. Buena Vista Water Co.*, 84 Pac. 296-297, 2 Cal. App. 540.

The words "until the further orders of the court," contained in a restraining order, together with the day set for hearing on which parties are required to show cause, if any, why a temporary injunction should not issue against them, mean only "in the meantime." *Ex parte Grimes*, 94 Pac. 668, 671, 20 Okl. 446.

#### Until his successor is elected and qualified

The words "until his successor is elected and qualified," as used in the Constitution and statutes relative to the terms of officers, are not intended to prolong the term of office beyond such reasonable time after the election as will enable the newly elected officer to qualify, and after the expiration of such reasonable time, if the newly elected officer fails to qualify, the office becomes vacant. *Prowell v. State*, 39 South. 164, 166, 142 Ala. 80 (citing *City Council of Montgomery v. Hughes*, 65 Atl. 201, 206, 207; *Chelmsford Co. v. Demarest* [Mass.] 7 Gray, 1).

Under *Pierce's Code*, § 4224 (*Ballinger's Ann. Codes & St.* § 425), fixing the term of the county treasurer's office at two years and "until his successor is elected or qualified," the word "elected," meaning elected by the same electoral body that elected the incumbent whose term of office is thus fixed, does not permit the qualification as such successor by a person appointed by the county board because of the failure to qualify of the person elected as such. *State ex rel. Vanderveer v. Gormley*, 102 Pac. 435, 438, 53 Wash. 543.

Act Feb. 26, 1907 (*Laws 1907*, p. 189), creating the law and equity court of Madison county, provided that the judge should be appointed by the Governor to hold "until the general election in 1910, and until his successor is elected and qualified," the term to be six years, and until the incumbent successor is elected or appointed and qualified, and that the judge should be elected at the general election in 1910, and every six years thereafter the judge to take and file the oath

of office required of certain judges. Held, that Code 1907, § 1463, providing that judges of inferior courts, when not otherwise provided for by law, shall hold their respective offices for six years from the first Monday after the second Tuesday in January next after their election and until their successors are elected and qualified, did not apply to a judge of such court, nor prolong the term of office of an appointee as judge of a superior court, or delay the right of a judge elected to fill a succeeding term of the same office, when the terms of both were fixed by the act creating the court, so that on the election and qualification of a successor to the appointee as judge of the court so elected, the appointee's term of office *ipso facto* expired. *Betts v. Ballentine*, 55 South. 814, 815, 172 Ala. 325.

A clause in an official bond guaranteeing faithful discharge of the officer's duties for a specified term, and "until his successor is appointed," will not hold the surety for defaults occurring beyond a reasonable time after the expiration of his term; but what is a reasonable time is a question of fact for the jury, and cannot be determined upon a demurrer. *Camden v. Greenwald*, 47 Atl. 458, 459, 65 N. J. Law, 458.

The words "until his successor shall qualify," used in relation to a term of office, were not intended to prolong the term beyond a reasonable time after the election to enable the newly elected officer to qualify. Act Feb. 7, 1899 (*Acts 1898-99*, p. 676), provided that the superintendent of education of Montgomery county should be elected at the general election to be held on the first Monday in August, 1900, and at the general election every four years thereafter, that his term of office should begin on October 1st following the election, and that he should hold office until his successor should be duly qualified. Acts 1903, p. 438, in relation to general elections, provided that county superintendents should be elected in November, 1904, and every four years thereafter. It was held that the provision as to the superintendent holding office until his successor should be duly qualified did not prolong the term of office of the incumbent at the time of the election in November, 1904, beyond a reasonable time to enable the newly elected officer to qualify. *State ex rel. Covington v. Thompson*, 38 South. 679, 683, 142 Ala. 98 (citing *Prowell v. State ex rel. Hasty*, 39 South. 164, 142 Ala. 80).

#### Until the hearing

Where, in proceedings to procure a new trial, movant is allowed "until the hearing" to prepare and present for approval a brief of the evidence, the term "until the hearing" includes only the time between the date of the order granting time and the time when the court enters upon the actual hearing; and an attempt to file a brief of evidence,

which has not been approved by the trial judge, after the court has orally announced judgment dismissing the motion though the judgment has not been reduced to writing or signed, is nugatory. *Davis v. State*, 70 S. E. 148, 149, 8 Ga. App. 711.

## UNTO

"Unto a jail or building" is not a common form of expression, and in no popular sense has it ever been used to mean to convey within a building. Probably no case can be cited where that word has ever been construed to be synonymous with or to mean "into." *People v. Klammer*, 100 N. W. 600, 137 Mich. 399.

## UNUSUAL

An instruction assuming that the operation of a train around a curve "at an unusually high rate of speed" was negligence is erroneous, such a speed may be "unusual," but safe. *Flucks v. St. Louis, I. M. & S. R. Co.*, 122 S. W. 348, 349, 143 Mo. App. 17.

## UNUSUAL CARE

By "unusual care" is meant a greater degree of care than is necessary where danger is not apparent. *Walsh v. Central New York Telephone & Telegraph Co.*, 68 N. E. 146, 148, 176 N. Y. 163.

## UNUSUAL FRESHET OR STORM

"Unusual," as applied to a freshet, does not necessarily mean "extraordinary," though the word "unusual" is sometimes used in that sense. Thus to charge that a builder of a bridge over a stream is required to leave openings for the passage of the water reasonably to be expected to flow therein, but that no liability can attach for the results of an "unusual rain" or extraordinary freshet, was an improper statement of the duty. *Broadway Mfg. Co. v. Leavenworth Terminal Ry. & Bridge Co.*, 106 Pac. 1034, 1035, 81 Kan. 616, 28 L. R. A. (N. S.) 156 (citing 3 Words and Phrases, 2628; *Avery v. Vermont Electric Co.*, 75 Vt. 235, 54 Atl. 179, 59 L. R. A. 877, 98 Am. St. Rep. 818; *American Locomotive Co. v. Hoffman*, 105 Va. 343, 54 S. E. 25, 6 L. R. A. [N. S.] 252, 8 Ann. Cas. 773).

Within the rule that a municipality is not liable for injuries from insufficiency of its sewage system to carry off the surface water in case of an extraordinary storm, the word "extraordinary" is not used as synonymous with "unprecedented," but with "unusual," that which is rare or uncommon, happens sometimes, but not so often as to be regarded as a common occurrence. *Gender Paeschke & Frey Co. v. City of Milwaukee*, 133 N. W. 835, 839, 147 Wis. 491.

## UNUSUAL MANNER

See Cruel and Unusual Manner.

## UNUSUAL PUNISHMENT

Since, under Laws 1908, c. 168, a county convict cannot be confined for more than two years for nonpayment of a fine and costs, section 2 of chapter 109, providing for confinement until payment of fines and costs, is not unconstitutional, as providing for "unusual punishment," in violation of Const. 1890, § 28, and Const. U. S. Amend. 8. *Ex parte McInnis*, 54 South. 260, 98 Miss. 773.

## UNVALUED POLICY

An "unvalued policy" is one in which the value of the interest at risk is not fixed in the policy, but is estimated by a certain standard, and in case of loss is made out by proof. *Peninsular & O. S. S. Co. v. Atlantic Mut. Ins. Co.*, 185 Fed. 172, 173, 174.

## UNWARRANTABLE

Acts of an officer, in serving a warrant, in taking plaintiff out of bed at 1 o'clock at night, carrying him to a lockup in a patrol wagon with intoxicated people, and placing him in a cell not sufficiently warm, were within his authority under the process; and if there were no other acts to which the words "unnecessary" and "unwarrantable," as used in a recital in the bill of exceptions that the arrest was made in an unusual manner and with acts of unnecessary and unwarrantable cruelty and indignity, are applicable, the words do not imply an act beyond the authority of the process. *Laing v. Mitten*, 70 N. E. 128, 129, 185 Mass. 233.

When defendant drove its automobile at a speed of 20 miles an hour towards plaintiff on a narrow approach to a bridge, from whence plaintiff could not escape without proceeding forward to a cross-street, and though observing the frightened condition of plaintiff's horse, and his signals to them to stop and allow him to escape, refused to slacken its speed, causing plaintiff's horse to run away and injure him, such conduct was an "unwarrantable use of the highway," rendering defendant liable for plaintiff's injuries. *Indiana Springs Co. v. Brown*, 74 N. E. 615, 617, 165 Ind. 465, 1 L. R. A. (N. S.) 238, 6 Ann. Cas. 656.

## UNWEANED LAMB

As sheep, see Sheep.

## UNWROUGHT METAL

Iron sand, a completed article manufactured from cast iron and steel scrap, is not dutiable as "unwrought metals," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 183, 30 Stat. 166. *Harrison Supply Co. v. United States*, 164 Fed. 155, 156.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 183, 30 Stat. 166,

for "unwrought metals," does not include ferro-alloys which, though capable of being wrought into different forms and shapes, are not to any extent shown to be imported to be themselves wrought into useful articles, but are generally used for imparting certain qualities to steel in the process of its manufacture. *E. J. Lavino & Co. v. United States*, 171 Fed. 245; *United States v. E. J. Lavino & Co.*, 175 Fed. 964, 965, 99 C. C. A. 637.

In construing the provision in paragraph 183, Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 166, for "metals unwrought," held, that "unwrought" implies a metal which is capable of being wrought, and not a substance fit only to be used with other ingredients to produce an entirely different and distinct product, and that ferro-chrome, ferromolybdenum, ferro-tungsten, and ferro-vanadium, used only in imparting certain qualities to steel, and incapable of being themselves wrought into any useful article, are not within said provision. *United States v. Roesseler & Hasslacher Chemical Co.*, 131 Fed. 576; *Id.*, 137 Fed. 770, 772, 70 C. C. A. 346.

## UP

See *Bucking Up*; *Fixed Up*; *On—Upon*; *Paid Up*; *Wound Up*.

## UP TO AND INCLUDING

Under Transfer Tax Law (Consol. Laws 1909, c. 60, as amended by Laws 1910, c. 706) § 221, establishing increasing rates of taxation in proportion to the amount of property transferred, the words "up to and including the sum of" relate to the excess over the amount subject to the previous rate of taxation, and should be construed to read "up to and including an excess equal to the sum of," and they do not relate to the entire amount of the transfer. In *re Jourdan's Estate*, 128 N. Y. Supp. 728, 729, 70 Misc. Rep. 159.

## UPLAND OWNER

Laws 1897, c. 89, § 45 (Rem. & Bal. Code, § 6750), provides that the owner of lands abutting or fronting on tide or shore lands of the first class shall have the right for 60 days following the filing of the final appraisal of the tide and shore lands to apply for and purchase all or any part of the tide or shore lands in front of the lands so owned. Const. art. 17, § 2, declares that the state disclaims all title in and claim to all tide, swamp, and overflowed lands patented by the United States and not impeached for fraud. Held, that where overflowed lands bounded by a meander line, and located below high-water mark, were patented prior to the adoption of the Constitution, section 6750 did not invariably confer on the owner of the upland above high-water mark the exclusive right to purchase shore lands to the exclusion of the owner of such overflowed lands, and hence

the owner of upland which fronted but did not abut on platted tide or shore lands was not entitled to a preference right to purchase such shore lands as against the owner of private lands located below high-water line fronting on the inner line of tide and shore land platted and offered for sale by the state; he being regarded as the "upland owner" for such purpose. *Bleakley v. Lake Washington Mill Co.*, 118 Pac. 5, 7, 65 Wash. 215.

## UPPER STORIES

In a statute providing that owners of buildings more than two stories high shall provide convenient exits from the different upper stories, the term "upper stories" means all stories above the ground floor. *Rose v. King*, 49 Ohio St. 213, 221, 30 N. E. 267, 15 L. R. A. 160.

## URBAN EASEMENTS

The "urban easements" belonging to property abutting on streets are the rights that one's windows should not be darkened, that the free enjoyment of pure air should not be substantially interfered with, and that the free and usual access thereto should not be impaired. The value of property is affected as these rights are taken away or substantially impaired. As between lessor and lessee, the injury from this technical trespass is not the same, and the former has his remedy for any injury sustained to his reversionary right, while the tenant has his remedy for any injury occasioned to him according to the circumstances of the hiring. Where the city of New York leased land under an agreement which was practically perpetual, with periods for renewal and readjustment of rentals, consented to the construction of an elevated road in front of the premises after a building had been erected by the lessee, and the building and lease were sold after the commencement of the operation of the road, and the lease was thereafter renewed, there was an impairment of the leasehold interest for which damages were recoverable, though when the renewal was made the road was built and in operation. *Storms v. Manhattan Ry. Co.*, 71 N. E. 3, 5, 178 N. Y. 493, 66 L. R. A. 625.

## URBAN HOMESTEAD

In order to constitute land an "urban homestead," it is not necessary that it should have been originally surveyed or platted by the city. It is sufficient that the land is recognized as a part of the plat or plan. It is unimportant that the lots of which it is composed do not conform to the dimensions or shape of lots generally in the platted parts of the city, where its use, controlled by the city and surroundings, impress the property with the character of an urban homestead. A contention, in a suit by the owner to en-

join the sale of such property on execution, that such lot constituted a part of a rural homestead, is untenable. *Harris v. Matthews*, 81 S. W. 1198, 1204, 36 Tex. Civ. App. 424.

Under Const. art. 16, § 51, providing that to constitute an "urban homestead" the land claimed as such must be used as a home, etc., a mere intent to make unoccupied property a homestead is insufficient to constitute it a homestead; it being required that the intent concur with acts of preparation to seasonably and actually use and occupy the property as a home. *Cobb v. Collins*, 111 S. W. 760, 761, 51 Tex. Civ. App. 63.

In determining whether a homestead is "urban" or rural, the corporate line does not control, but should be considered as a material fact when the property has been acquired after the city limits have been established. Const. art. 16, § 51, provides that a rural homestead shall consist of not more than 200 acres, and that an "urban homestead" shall consist of a "lot or lots" not to exceed in value \$5,000. Land, designated as a lot in a particular block in the city plan, and within the limits of a city, was purchased and used for a residence in connection with the owner's business as a merchant, and afterwards the owner purchased land adjoining his residence property, but separated from it by the city's limits as generally recognized, which he used for pasturing the family horses or cattle, and for raising products for home consumption; both lots being valued at less than the constitutional limit for urban homesteads. The city exercised no jurisdiction over such tract and levied no taxes thereon, nor was it rendered for city taxation. Held, that the term "lot or lots" must be taken in its popular sense, and did not embrace land within the limits of the corporation not connected with the plan of the city; that the original homestead was urban in character, and the later acquisition was rural; and that, as there could be no blending of urban and rural homesteads, the tract last purchased was not a part of the owner's homestead, and hence was subject to foreclosure under a deed of trust. *First Nat. Bank v. Litchfield* (Tex.) 144 S. W. 350, 352.

## URBAN REAL ESTATE

"'Urban real estate' is that situated in a city, or a town resembling a city." *Stees v. Bergmeier*, 98 N. W. 648, 650, 91 Minn. 513.

Acts 1888, p. 127, c. 98, § 19, relating to the annexation of a certain tract to Baltimore, provided that until 1900 the tax rate upon all "landed property" and taxable personal property in the tract should not exceed the rate of Baltimore county for 1887, and that after 1900 the rate should be the same as for the rest of the city of Baltimore,

provided that the increased rate should not take effect until avenues, streets, or alleys should be opened through the property, and at least six dwellings or storehouses be ready for occupation upon each block of ground so to be formed. Acts 1902, p. 199, c. 130, provided that the term "landed property" in the act of 1888 should mean real estate, whether in fee simple or leasehold, that, the provision as to the opening of avenues, etc., should mean opened graded, kerbed and otherwise improved from kerb to kerb by pavement or other substantial material, and that the term "block of ground" should mean an area not exceeding 200,000 superficial square feet, bounded on all sides by intersecting avenues, streets, or alleys, graded, kerbed, and otherwise improved from kerb to kerb, by pavement or other substantial material. A triangular block, being part of the tract annexed by the act of 1888, contained 1,000,000 superficial square feet, bounded on one side by 3,034 feet of a road, part of which was kerbed and macadamized, the rest covered with an inch of stone, but unkerbed. On another side was a common road, not graded, kerbed, or paved, and on the third side was a private toll road, kerbed and paved in the middle. There were about 47 dwellings and storehouses on the block. Held, that a leasehold interest in the block was taxable under the county, and not the city, tax rate. *Mayor and City Council of Baltimore v. Schafer*, 68 Atl. 138, 140, 107 Md. 38.

## URBAN SERVITUDES

Use of streets for the laying of sewers and gas and water pipes constitutes "urban servitudes." *Sweet v. Perkins*, 101 N. Y. S. 163, 165, 115 App. Div. 784.

## URETHRA

The "urethra" of a female is a duct starting from the vagina, which is a canal leading to the womb, and leading to the bladder for the purpose of emptying it. The same lips are around the vagina and urethra, and from the outer edge of such lips to the bladder the distance is about two inches. *Clark v. People*, 79 N. E. 941, 943, 224 Ill. 554.

## US

A warrant of attorney contained in a joint and several note signed by eight makers authorizing the holder to have judgment confessed against "us, or any or either of us," is not exhausted by the entry of judgment against one or more but not all of the makers, but is the equivalent of eight separate warrants each signed by one of the makers, and the holder may enter a several judgment against each maker. *George D. Harter Bank v. Straus*, 170 Fed. 489, 491.

## USABLE VALUE

"Usable value" means the value of the use of the premises to the occupant, as distinct from the rental of the premises in a lease by the owner to a tenant. *Bates v. Holbrook*, 85 N. Y. Supp. 673, 677, 89 App. Div. 548; *Bly v. Edison Electric Illuminating Co.*, 97 N. Y. Supp. 592, 593, 111 App. Div. 170 (citing *Bates v. Holbrook*, 70 N. E. 1094, 178 N. Y. 568).

The "usable value" of premises is not synonymous with "rental value," but has, as a term, an equivalent sense, which should be allowed to be shown in condemnation proceedings. *Reisert v. City of New York*, 68 N. E. 731, 736, 174 N. Y. 196.

## USAGE

See Common Usage; Trade Usage.

Usage, in its most extensive meaning, includes custom; but in its narrower significance it refers to a general habit, mode or course of procedure. *Wilmington City Ry. Co. v. White* (Del.) 66 Atl. 1009, 1012, 6 Pennewill, 363.

A custom or "usage" is the result of a long-continued and substantially uniform practice. *Baltimore & O. R. Co. v. Doty*, 133 Fed. 866, 872, 67 C. C. A. 38.

"Usage" is a reasonable and lawful public custom concerning transactions of the same nature as those which are to be affected thereby, existing at the place where the obligation is to be performed and either known to the parties or so well established, general and uniform, that they are presumed to have acted with reference thereto, and usage in a particular locality is something which exists in general repute in the trade affected thereby in the community, and which all residents are supposed to know of, and are presumed to have contracted with reference to. *Miller v. Wiggins*, 76 Atl. 711, 712, 227 Pa. 564. But one not shown to have knowledge of a trade usage confined to a particular business, which is not shown to be of such a general and notorious character that he must be presumed to have contracted with reference to it, is not bound by such usage. *Bixby v. Bruce*, 95 N. W. 34, 35, 69 Neb. 78 (citing 2 Greenl. Ev. § 251).

"'Usage' is a matter of fact, not of opinion. Usage of trade is a course of dealing; a mode of conducting transactions of a particular kind. It is proved by witnesses testifying to its existence and uniformity, from their knowledge, obtained by observation of what is practiced by themselves and others in the trade to which it relates." *Ames Mercantile Co. v. Kimball S. S. Co.*, 125 Fed. 332, 336 (quoting *Haskins v. Warren*, 115 Mass. 574).

Negotiable Instruments Law (Consol. Laws 1909, c. 38) § 322, provides that a check

must be presented for payment within a reasonable time after its issue. Section 4 provides that, in determining what is a reasonable time, regard is to be had to the nature of the instrument, any usage of trade or business with respect to such instruments, and the facts of the particular case. Held that, in view of the custom of the New York Clearing House Association, the deposit of a check received after banking hours, on the morning of the day after its receipt, and its presentment for payment in the usual course of business by the bank of deposit on the day following, showed due diligence in presentment; "reasonable" being a relative term to be determined according to the circumstances of the case, "reasonable time" meaning "so much time as is necessary under the circumstances conveniently to do what the contract requires," and "usage of trade" meaning a known, uniform, and reasonable usage, not contrary to law or public policy. *Zaloom v. Ganim*, 129 N. Y. Supp. 85, 87, 72 Misc. Rep. 36.

### Custom distinguished

"Usage" is a repetition of acts, and differs from "custom" in that the latter is the law or general rule which arises from such repetition; and while there may be usage without custom there cannot be a custom without a usage accompanying or preceding it. *American Lead Pencil Co. v. Nashville, C. & St. L. Ry.*, 134 S. W. 613, 615, 124 Tenn. 57, 32 L. R. A. (N. S.) 323.

The term "custom" refers to those usages which have existed and been universally recognized for so long a period as to acquire the force of law and be binding without the assent of the individual, while "usage" refers to an established method of dealing adopted in a particular place, or by those engaged in a particular vocation or trade, which acquires legal force because people make contracts in reference thereto. *Byrd v. Beall*, 43 South. 749, 751, 150 Ala. 122, 124 Am. St. Rep. 60 (citing 12 Cyc. 1033).

"The word 'custom' is sometimes used synonymously with 'usage,' meaning a course of dealing which derives its legal force from assent, express or implied; again, as something which by long usage or judicial sanction has acquired the force of law, and is binding without regard to the question of assent." "Usage" in its most extensive meaning includes "custom." "Customs" are of two kinds, general and particular. *Wilmington City Ry. Co. v. White* (Del.) 66 Atl. 1009, 1012, 6 Pennewill, 363.

## USE

See Life Use; Superstitious Use.

A "use," a trust, and a "confidence" is one and the same thing, and if an estate is conveyed to one person for the use of another or upon a trust for another, and nothing

more is said, the statute immediately transfers the legal estate to the use, and no trust is created, although express words of trust are used. *Jones v. Jones*, 123 S. W. 29, 34, 223 Mo. 424, 25 L. R. A. (N. S.) 424 (quoting and adopting the definition in *Perry, Trusts* [5th Ed.] § 298).

#### USE—USED

See Actually Used; As Now Used; Attempt to Use; Available Use; Beneficial Use; Business and Factory Use; Common Use; Continuous Adverse Use; Domestic Use; Exclusive Use; Exclusively Used; Experimental Use; Fitted for Use; For Her Own Use; For the Use; Full and Entire Use; Held for the Use; Highest and Best Use; Intemperate Use; In Use; Lawful Use; May Use; Open to Use; Ordinary Use; Permissive Use; Personal Use; Prior Public Use; Private Use; Public Use; Reasonable Use; Religious Uses; Separate Use; Sole Use; Street Use; To Be Used; Travel and Use; Uninterrupted Use; Vehicle Used for Pay.

Charitable use, see *Charity*.

His own use and benefit, see *His*.

Other public use, see *Other*.

Similar use, see *Similar*.

One of the most common meanings of the word "use," as defined by Webster, is "usefulness, utility, advantage, productive of benefit"; and "public use" may well mean public usefulness, utility, or advantage, or what is productive of general benefit. *State ex rel. Edwards v. Millar*, 98 Pac. 747, 753, 21 Okl. 448.

Where a will provides for a gift in trust, the residue to be "used, paid out, and expended" for the care of her husband, the trust contemplates the consumption of the principal of the residue as far as necessary for the care of the beneficiary. *In re Lehre's Will*, 131 N. Y. Supp. 992, 72 Misc. Rep. 565.

#### As benefit or profit

In general, the "use" or usufruct of a thing does not mean the thing itself, but the right to use, enjoy, hold, or occupy, and have the fruits thereof. If the thing is in the form of real estate, the use includes its occupancy or cultivation, or the rent which can be obtained for the same, and if it is money or its equivalent, the use, generally speaking, consists of the interest which it will earn. *Linton v. Howard*, 128 N. W. 793, 795, 163 Mich. 556.

Webster defines the word "use," as a noun, primarily as follows: "The act of employing anything, or of applying it to one's service; application; employment; conversion to some purpose; as, the use of a pen in writing; his machines are in general use." The ordinary meaning of the use of a thing is not the thing itself, or any part thereof, but

is that which the thing will produce. If it is a house or other building, it is the rent which can be obtained for it; if it is money, it is the interest it will earn. *In re Moor's Estate*, 128 N. W. 198, 199, 163 Mich. 353.

A depositor in a savings bank formed a fixed purpose of giving the deposit to her brother, and that the deposit should at once become his property. She had lost her bank book, and delivered to her brother an order on the bank, directing it to pay the entire deposit to him. At the time of the delivery of the order to him, she stated that she gave him the deposit "subject to her use of the same" for life. Held to show an intention to make an absolute gift; the word "use" as applied to the use of money being the profit derived therefrom. *Candee v. Connecticut Sav. Bank*, 71 Atl. 551, 552, 81 Conn. 372, 22 L. R. A. (N. S.) 568.

The word "use," in a testamentary disposition of property to be held "in trust for the use of the preacher, or preachers, who shall hereafter serve Zoar Church, \* \* \* and for no other purpose," is not to be given such a limited meaning as will require an occupancy of the land as a parsonage but will be given a general significance so as to permit the enjoyment of the property irrespective of actual occupancy. *White v. Britton*, 56 S. E. 232, 234, 75 S. C. 428.

The requirement of the California Codes that an applicant for the purchase of school lands must state that it is for his own "use and benefit" does not mean that the applicant must go into possession and occupy the land personally and devote it to the use of which it is capable, but simply means that, when one makes application to purchase, he does so with the intention and purpose of deriving whatever profit and advantage may accrue through the purchase for himself alone, as contradistinguished from a purchase for the benefit or advantage of some other person, and, as an element of the benefit, he may properly have in contemplation the sale of land at a profit some time after he has obtained his certificate of purchase. *Henshall v. Marsh*, 90 Pac. 693, 697, 151 Cal. 289.

Where a will created a trust fund giving the dividends, rents, and profits of trust property to testator's widow for life, and on her death the corpus to certain remaindermen, in ascertaining the rights of the wife under the trust, the phrase "dividends, rents, and profits" will be treated as synonymous with "use and income." *Boardman v. Boardman*, 62 Atl. 339, 342, 78 Conn. 451, 12 L. R. A. (N. S.) 779.

#### As destruction

In a statute relating to prize money, where the "use of the vessel has been appropriated to the United States," the term "use of the vessel" does not mean the destruction of the vessel to prevent its recapture, and, where captors of a vessel destroy it to pre-

vent recapture, they are not entitled to prize money. *The Santo Domingo*, 119 Fed. 386, 390.

#### As employ

One contracting to pay a reasonable compensation for the use of another's drilling tools to repair a gas well is liable to pay a reasonable compensation for the time he has possession and use of the tools, and his liability is not limited to days of actual service; the word "use" applying to one's service, employment, or conversion to some purpose. *Independent Torpedo Co. v. J. E. Clark Oil Co.*, 95 N. E. 592, 593, 48 Ind. App. 124 (quoting 8 Words and Phrases, pp. 7226, 7227).

In the *Standard Dictionary* the word "use" is defined as: "The act of using; employment, as of means or material for a purpose; application to an end, particularly a good or useful end; as, the use of steam in navigation." Webster defines it as: "The act of employing anything or applying it to one's service; application, employment, conversion to some purpose; as, the use of a pen in writing." Thus the mere possession by one whose business it was to fill siphons with aerated water for dealers, of a box of siphons found near the filling machine, but not shown to have been filled by him, was not a "use" of such siphons, within *Laws 1896*, p. 998, c. 933, § 3, providing that the "use" of a bottle, siphon, etc., by any person, other than the one whose name or mark shall be thereon, without the latter's consent, shall be presumptive evidence of unlawful "use." *People v. Sommer*, 106 N. Y. Supp. 190, 191, 55 Misc. Rep. 55.

Under a statute providing that the bill of exceptions "used" on the hearing of a motion for a new trial shall constitute a part of the record on appeal, a bill of exceptions settled and employed as the record of the proceedings upon which the motion was grounded may be considered. *Boin v. Spreckels Sugar Co.*, 102 Pac. 937, 939, 155 Cal. 612 (quoting and adopting definition in *State v. Central Pac. Ry. Co.*, 30 Pac. 887, 17 Nev. 259). See, also, *Kelly v. Ning Yung Ben. Ass'n*, 72 Pac. 148, 149, 138 Cal. 602.

#### As intentional use

*Snyder's Comp. Laws 1909*, § 2370 (*Wilson's Rev. & Ann. St. 1903*, § 2268), makes it a felony to use any instrument with intent to procure the miscarriage of a pregnant woman. *Snyder's Comp. Laws 1909*, § 2045 (*Wilson's Rev. & Ann. St. 1903*, § 1948), makes all persons concerned in a crime, whether a felony or misdemeanor, and whether they directly commit the act or aid therein, though not present, principals. Held, that to "advise" and "procure" a pregnant woman to use an instrument, with intent by accused to cause her miscarriage, constitutes a "use" of the instrument in violation of section 2370. *Greenwood v. State*, 105 Pac. 371, 372, 3 Okl. Cr. 247.

Where the owners of a dumping scow placed a man in sole charge with power to dump her load, and he, becoming unnecessarily alarmed at the roughness of the sea while being towed to the dumping grounds, dumped a part of her load into the waters of a harbor, in violation of act March 3, 1899, c. 425, § 13, 30 Stat. 1152, the scow is subject to the penalty imposed by section 16 of the act, although the action of the scowman was contrary to the orders of the owner; but the towing tug, although the property of the same owner, where the master had no reason to anticipate the violation of the statute, cannot be said to have been "used or employed" in such violation, and is not subject to the penalty therefor. *The Scow No. 9*, 152 Fed. 548, 551 (citing *The Emperor*, 49 Fed. 751).

Where the person placed in charge of a scow by the owner, for the purpose of dumping her load, in the business in which she was "used," and in which the owner was engaged, discharged such load into the waters of a harbor, in violation of Act March 3, 1899, c. 425, § 13, 30 Stat. 1152, such act was in a sense within the scope of his employment, although contrary to the owner's general instructions, and the scow was "used" for the unlawful purpose, within the meaning of section 16 of the act, and subject to the penalty thereby imposed. *The Scow No. 36*, 144 Fed. 932, 935, 75 C. C. A. 572.

#### Condemn use in fee simple

Under Code Pub. Gen. Laws 1904, art. 23, § 366, as amended by Acts 1908, c. 240, empowering certain corporations to acquire by condemnation any property right whatsoever necessary for its purpose in its discretion, "either in fee simple or the use thereof in fee simple or for a less estate," etc., a corporation organized for the transmission of electrical power may take both a fee simple in property desired and also an easement to cut and trim trees which may interfere with its use of the land. *Webster v. Susquehanna Pole Line Co. of Harford County*, 76 Atl. 254, 260, 112 Md. 416, 21 Ann. Cas. 357.

#### As keep

The "using" of a building for a certain purpose, and the "keeping" of a building for such purpose, are almost synonymous terms. While it may not necessarily follow that, because a building is kept for an unlawful purpose, it is actually being used for such purpose, yet a building which is being used for an unlawful purpose is being kept for such purpose. *Laws 1903*, p. 153, c. 12, § 7, punishing every person who lets any building, knowing that it is intended to be used for an unlawful purpose, means that, when a person lets any building to be used for an unlawful purpose, he lets it to be kept for such purpose. *Oligschlager v. Territory*, 79 Pac. 913, 914, 15 Okl. 141.

**As occupied**

Rev. Laws, c. 104, § 1, authorizing certain cities, for the prevention of fire, to regulate the inspection, materials, construction, alteration, and use of buildings, does not authorize an ordinance prohibiting reshingling of a roof; the word "use" indicating the purpose for which the building may be occupied. *Commonwealth v. Hayden*, 97 N. E. 783, 784, 211 Mass. 296.

**Title conveyed**

Testator directed his executors to hold his real estate until a designated date and then divide it into shares, and he gave a share to his son. By a codicil he declared that the devise to the son should be for his sole "use" independent of his wife, and that, on his death without issue living at the time of his death, the devise should go to others. Held, that the son acquired only a life estate; the word "use" meaning the transfer of an interest in land for life. *Love v. Walker*, 115 Pac. 296, 301, 59 Or. 95 (citing 8 Words and Phrases, p. 7228).

A will whereby testator gave to his wife all his personal property, with a restriction that so much thereof as consisted of "monies, notes, mortgages, bonds, and similar valuables" she should have the use of for life, and after her death the same should go to others, and whereby he devised all his real estate to the wife under the same restrictions, with the right to dispose thereof and invest the proceeds, etc., vested a life estate in the wife in the restricted portion of the personalty and in the realty; the word "use" not imparting the power to destroy or consume, but only the right to enjoy. *In re Moor's Estate*, 128 N. W. 198, 199, 163 Mich. 353.

A gift of testator's real and personal property to his wife "to her own private use forever" and after her death the "balance" to his and her relatives, in equal shares, is a gift to the wife in fee simple; the word "use" implying more than a mere usufruct, and the word "balance" meaning what remains or is left over. *Brohm v. Berner* (N. J.) 77 Atl. 517.

The word "use," according to its ancient definition, included every form of beneficial or equitable estate; there being no more all-embracing term for any estate less than legal. When used, however, in a will bequeathing the residue of testator's estate to the "maintenance and use" of testator's two sons, it was not restricted in meaning either in itself or by its association with the word "maintenance," but should be construed to evidence testator's intention to give to the sons the entire income of the property. *In re Scharmann*, 118 N. Y. Supp. 687, 688, 63 Misc. Rep. 640.

A devise of the "use" of land for life creates a life estate. *Little v. Colman*, 66 Atl. 483, 484, 74 N. H. 215.

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Webster defines "to use" among other definitions as "to make use of; to convert to one's service; to avail oneself of; to put to a purpose." Where testator gave his wife all his property to be used by her according to her desire, any remaining property on her death to be divided among brothers and sisters, the wife took a life estate with a power of sale of any or all property and the right "to use" the proceeds as she might desire. *McGuire v. Gallagher*, 59 Atl. 445, 99 Me. 334.

A deed described the land by metes and bounds and referred to it as "being the triangular piece \* \* \* lying between the lines of the old street and the proposed improvement as laid down on said map together with the use of such portion of land in front of said triangle as was lately included in T. avenue, as formerly laid." At the time of the execution of the deed the grantee owned as a homestead land on T. street, and the grantor owned land directly opposite. A proposed change in the street would leave a triangle on the side owned by the grantor between the line of the new street and the line of the old street. At the time of the execution of the deed, the old street was in use. Held, that the grantor conveyed the fee of the triangle and the land in front of it between the triangle and the land of the grantee; the word "use" meaning entire, exclusive, complete, or any other comprehensive word expressing all of the purposes to which land can be put. *Blauvelt v. Passaic Water Co.*, 72 Atl. 1091, 1093, 75 N. J. Eq. 351.

The power given by law to a devisee to "use" the principal means the "power to consume," and the power to consume real estate necessarily includes the power to convey. *Kennedy v. Pittsburg & L. E. R. Co.*, 65 Atl. 1102, 1103, 216 Pa. 575.

The words "use and benefit" are words of wide application, and mean the entire beneficial interest in the property in question. *Roberts v. Lynn Ice Co.*, 73 N. E. 523, 524, 187 Mass. 402 (citing *Smith v. Harrington* [Mass.] 4 Allen, 566; *Paine v. Forsaith*, 30 Atl. 11, 86 Me. 357; *Lawe v. Hyde*, 39 Wis. 345; *Heaston v. Board of Com'rs of Randolph County*, 20 Ind. 898, 403).

As used in a will by which testatrix bequeathed to her husband the "use and benefit" of all her property, with full power to use and transfer the same as if it belonged to him in fee, the succeeding paragraph declaring that on the death of her husband she gave the remainder to her daughter and two children, the words "use and benefit" had reference to a qualified estate, rather than an absolute estate in fee, and the husband acquired a life estate under the will only, with an added power of disposition, and the property remaining after his death passed to testatrix's daughter and her children, as pro-



vided. *Pool v. Napier*, 124 N. W. 755, 756, 145 Iowa, 699.

The phrase "use and benefit," as used in a devise for one's use and benefit, is appropriate in creating a life estate, but not in the creation of an absolute estate. *Fuller v. Wilbur*, 49 N. E. 916, 917, 170 Mass. 506.

Where testator's will devised to his wife all his real and personal property for life to use and dispose of according to her best judgment, and the third paragraph provided that, after her death, all of the described property should be equally divided among the testator's children or their heirs forever, the wife took only a life estate subject to remainder in fee in the children; the expression "use and dispose of" not adding anything to her estate, and at most merely authorizing her to dispose of her life estate. *Hovely v. Herrick*, 139 N. W. 384, 385, 152 Wis. 11.

#### Use of check

Where defendant sent plaintiff a check for less than the amount claimed in satisfaction, directing plaintiff not to use the check unless he accepted it in full settlement, and plaintiff, while refusing to accept the check in settlement, had it certified and retained possession, such certification amounted to "use" of the check, since by certification the drawer was relieved from liability, and the bank became the debtor of the holder. *Scheffenacker v. Hoopes*, 77 Atl. 130, 133, 113 Md. 111, 29 L. R. A. (N. S.) 205.

#### Use of church

Gift to use of church, see *Gift to Church*.

#### Use as a dwelling house

We may "use" a building, or the building may be "used" by us. So we may "use" no buildings other than dwelling houses, or no buildings other than dwelling houses may be used by us. No rule of grammar is violated by either form of expression. A restriction in a deed that "no buildings other than dwelling houses," with the usual outbuildings appertaining thereto, "shall be erected, placed, and used upon the said land" is not violated where the house is occupied by defendants as their home, and they sleep, eat, and live there, and have no other home or place of residence, though one room in the house has been fitted up as an operating room, and the house is also used as a hospital, for surgical and medical cases, and as a lying-in hospital, for which defendants have been duly licensed. *Carr v. Riley*, 84 N. E. 426, 427, 198 Mass. 70.

#### Use of engine

An engine which was employed in filling a silo for several days was being "used," within the meaning of a policy forbidding the use of an engine near the barn, since its use was as permanent as the character of the work required. *Wilson v. Union Mut. Fire Ins. Co.*, 55 Atl. 662, 664, 75 Vt. 320.

#### Use as evidence

See *For Use as Evidence*.

#### Use of franchise

Where a corporation was authorized to acquire property, appropriate and distribute water, construct canals, and establish, collect, and receive rates, water rents, and tolls, and was authorized to exercise the right of eminent domain, the actual exercise of such powers by the construction of canals in a county other than that in which the corporation's principal place of business was located, constituted the "use" of a franchise by the corporation in such county which was there subject to taxation. *San Joaquin & K. R. Canal & Irrigation Co. v. Merced County*, 84 Pac. 285, 288, 2 Cal. App. 593.

#### Use of land

See *Value of Use of Land*.

#### Use liquor

The word "used," in a question in an application for life insurance, "Have you ever used spirits, wine, or malt liquors to excess?" does not imply an occasional indulgence in strong drink; it means to be accustomed; to make a practice of. It is a word which is synonymous with custom or habit or habitual indulgence. A negative answer to the question does not constitute a misrepresentation or false statement which will avoid the policy issued thereon merely because it is shown that the insured had sometimes, but not habitually, drank to excess. *Provident Sav. Life Assur. Soc. v. Exchange Bank of Macon*, 126 Fed. 360, 361, 61 C. C. A. 310.

The word "use" in a question to an applicant for life insurance, "Do you use liquors?" means habit, practice, or custom, and a negative answer was not false because the applicant had drunk liquor, however slight the use. *Pacific Mut. Life Ins. Co. of California v. Terry*, 84 S. W. 656, 657, 37 Tex. Civ. App. 486 (citing Cent. Dict.; *Equitable Life Assur. Soc. v. Liddell*, 74 S. W. 87, 32 Tex. Civ. App. 252; *Mutual Life Ins. Co. of New York v. Simpson (Tex.)* 28 S. W. 837; *Knickerbocker Life Ins. Co. v. Trefz*, 104 U. S. 203, 26 L. Ed. 708; *Connecticut Mut. Life Ins. Co. v. Union Trust Co.*, 5 Sup. Ct. 119, 112 U. S. 257, 28 L. Ed. 708; *Northwestern Mut. Life Ins. Co. v. Muskegon Nat. Bank*, 7 Sup. Ct. 1221, 122 U. S. 501, 30 L. Ed. 1100; *Van Valkenburgh v. American Popular Life Ins. Co.*, 70 N. Y. 605; *Brockway v. Mutual Benefit Life Ins. Co.*, 9 Fed. 252; *Grand Lodge A. O. U. W. v. Belcham*, 33 N. E. 886, 145 Ill. 308; *Brignac v. Pacific Mut. Life Ins. Co. of California*, 36 South. 595, 112 La. 574, 66 L. R. A. 322; *May*, Ins. pp. 379, 637, and 638; *Stand. Dict.*; *Union Mut. Life Ins. Co. v. Relf*, 36 Ohio St. 596, 38 Am. Rep. 613; *Chambers v. Northwestern Mut. Life Ins. Co.*, 67 N. W. 367, 64 Minn. 495, 58 Am. St. Rep. 549); *Brignac v. Pacific Mut. Life*

Ins. Co. of California, 36 South. 595, 596, 112 La. 574, 66 L. R. A. 322.

Where a by-law of a mutual benefit society provided that it should be relieved from liability in case the member became intemperate in the use of intoxicating liquors, or his death should result from his intemperate use thereof, the words "intemperate use" should be construed as equivalent to habitual intemperance in such use, but the word "use" employed in the sentence relieving the company from liability in case of death resulting from the intemperate use of such liquors was not employed with reference to a fixed habit, but should be construed to mean the means only by which death was caused, so that where insured died as the result of a fall, which was directly caused by his intoxicated condition, the society was not liable without regard to whether insured had acquired a fixed habit of intoxication. *Ury v. Modern Woodmen of America*, 127 N. W. 665, 666, 149 Iowa, 706.

#### Use of the mails

See *Fraudulent Use of the Mails*.

#### Use of public funds

That the Legislature, in providing a fund and authorizing its "use" for declared purposes and constituting the incumbent of the office of State Superintendent of Public Instruction the paymaster authorized to disburse from the fund for certain duties for which he was allowed to employ clerical assistants, did not thereby constitute the officer the owner of the fund. The right of use conferred was the right to disburse in payment for such service germane to the duties of the office. *State v. Stockwell*, 134 N. W. 767, 769, 23 N. D. 701.

#### Use as public highway

"Use as a highway," within *Burns' Ann. St.* 1908, § 7663, creating a highway by 20 years' user, contemplates a continuous use of the way as a public road which every citizen has a right to use for travel; and though the way need not be kept in repair, or accepted by the public authorities, the use by the public must be under a claim of right, either with the landowner's consent or over his objection. *Pister v. McCreery*, 88 N. E. 303, 304, 307, 172 Ind. 613, transferred from Appellate Court, 86 N. E. 980 (citing *Board of Com'rs of Shelby County v. Castetter*, 33 N. E. 986, 34 N. E. 687, 7 Ind. App. 309; *Wild v. Deig*, 43 Ind. 455, 458, 13 Am. Rep. 309; *Morse v. Sweeney*, 15 Ill. App. 486, 492; *Starr v. Camden A. R. Co.*, 24 N. J. Law, 592, 597; *Arkansas River Packet Co. v. Sorrels*, 8 S. W. 683, 50 Ark. 466; *Morgan v. Reading* [Miss.] 3 Smedes & M. 366, 406; *Heyward v. Chisholm* [S. C.] 11 Rich. Law, 253; *Elliott Roads* [2d Ed.] 7; *Louisville, N. A. & C. Ry. Co. v. Etzler*, 30 N. E. 32, 3 Ind. App. 562; *Village of Grandville v. Jenison*, 47 N. W. 600, 34 Mich. 54; *Speir v. Town of Utrecht*, 24 N. E. 692,

121 N. Y. 420; *Shellhouse v. State*, 11 N. E. 484, 110 Ind. 509; *Township of Madison v. Gallagher*, 42 N. E. 316, 159 Ill. 105; *Toof v. City of Decatur*, 19 Ill. App. 204; *Hart v. Town of Red Cedar*, 24 N. W. 410, 63 Wis. 634; *Jones v. Davis*, 35 Wis. 376; *Bartlett v. Beardmore*, 46 N. W. 494, 77 Wis. 356; *Kelsey v. Furman*, 36 Iowa, 614; *Webster v. Lowell*, 8 N. E. 54, 142 Mass. 324).

The moving of a building along a highway, when permission is obtained from the proper authorities, is a "use of the highway," within *Pub. St.* 1882, c. 109, § 17, providing for the necessary cutting, disconnecting, or removing of electric wires in the necessary use of streets. *Richards Building Moving Co. v. Boston Electric Light Co.*, 74 N. E. 350, 351, 188 Mass. 265.

#### Use of railroad

A "bona fide claimant," within section 3376 of the Revised Statutes, prescribing a penalty for demanding and receiving on sale of a ticket a greater sum for the transportation of the passenger than that allowed by law, is one claiming in good faith. "Using" the road of such company implies an intention to use it. It does not imply a contract personally to use it. *Pennsylvania Co. v. O'Connell*, 95 N. E. 773, 774, 84 Ohio St. 218, Ann. Cas. 1912C, 540.

Code, § 2071, makes every railroad company liable for damages to employés by the mismanagement of the engineers or other employés, when such wrongs are in any manner connected with the use and operation of any railway about which they shall be employed. Plaintiff was a machinist's helper in the machine shop of defendant railroad company where engines were brought for repairs, his duty being to block the wheels of an engine when placed over the draw pit in the shop and to remove such blocks when the engine was to be moved. After one set of wheels had been put on an engine and it was about to be moved by another engine, in order to put on the second pair of drivers, plaintiff attempted to brush a chock from under the wheel of the dead engine, when the other engine started without warning and crushed his hand. The operating department of the railroad had no control over the machine shops, which were used only for repairing disabled equipment which had been withdrawn from service, and not merely for temporary repairs and cleaning, as were the roundhouses. Held, that the statute referred to the physical "use and operation" of the railroad in transportation, and the rails on the shop floor did not constitute a "railway," nor was the movement of the repaired engine by the other engine done in the "use and operation" of the railway, within the meaning of the statute, so that the company was not liable for the negligence of the engineer in starting the live engine. *Slaats v. Chicago, M. & St. P. Ry. Co.*, 129 N. W. 63,

64, 149 Iowa, 735, 47 L. R. A. (N. S.) 129, Ann. Cas. 1912D, 642.

#### Use of street

See Customary Use of Street.

The term "use" in an ordinance, regulating the use of the streets of a city by persons who use vehicles thereon, and requiring the payment of certain license fees therefor, has reference to a continued or repeated practice; and the ordinance applies to all who, in such sense, use the vehicles described, and includes nonresidents as well as residents of the municipality. *Linton v. City of Columbus*, 29 Ohio Cir. Ct. R. 390.

Laws 1880, p. 255, c. 221, authorized the formation of corporations for the building and operating by animal power of railways in villages and towns, but not in cities, and by various acts the powers of rural railways were enlarged, all the acts requiring the consent of the local governing body before tracks could be laid in streets. Laws 1897, p. 290, c. 175 (St. 1898, § 1863a), prohibits the condemnation of streets or alleys in cities. Laws 1899, p. 537, c. 306, amending the former laws, extended the right to villages, and Laws 1901, p. 686, c. 465, amending St. 1898, § 1863, now embodied in Sanb. St. Supp. 1906, § 1863a, provided that all the statutes relating to the exercise of eminent domain by railways should apply to street railroads, but nothing therein should apply to any street, alley, etc., in any city or village, unless the use of the street, etc., should first be granted to the street railway by a franchise duly passed by the board of trustees or council of such village or city. Petitioner sought to condemn the streets of a city for the purpose of operating an interurban street railway therein, but had never secured the consent of the city to use the streets for interurban purposes. Held, upon consideration of the statutes and the history of the legislation, which always required the consent of a city to the use of the streets for the purpose for which they were used, that "the use of the street," required by section 1863a, was the use of the streets for interurban purposes only, and the fact that the use of the streets had been granted petitioner for local street railway purposes was not sufficient within the statute, and since petitioner had never secured the use of the streets for interurban purposes, the condemnation proceedings were properly dismissed. *Beloit, D. L. & J. Ry. Co. v. Macloon*, 110 N. W. 897, 900, 136 Wis. 218.

#### Use tracks

General Railroad Law N. Y. (Laws 1892, c. 676) § 98, requiring a street railroad company, "so long as it shall continue to 'use' any of its tracks in any street," to pave between such tracks, etc., applies to tracks maintained by a company under claim of right, although not actually used by it, or used only to a small extent. *Pennsylvania Steel Co. v. New York City Ry. Co.*, 191 Fed. 216, 224.

#### Use weights

Revisal 1905, §§ 3063, 3067, 3073, relating to weights and measures, requiring every person "using" weights and measures to permit the standard keeper to adjust the same, and providing that every person "using, buying, or selling by weights and measures," who shall neglect to comply with the act, shall forfeit a specified sum, do not, when considered in the light of the history of legislation on the subject, impose a penalty for the refusal to permit the standard keeper to adjust scales used by a railroad company in weighing freight for shipment; the words "buying and selling" limiting the word "using." *Nance v. Southern Ry. Co.*, 63 S. E. 116, 118, 119, 120, 121, 149 N. C. 366.

#### Use of wharf

"Use of a wharf," as used in Stat. Me. c. 93, § 7 (Laws 1889, p. 255, c. 287), providing that all domestic vessels shall be subject to a lien for use of a wharf, means "wharfage," which has been regarded as among the usual and necessary port charges of the vessel. Wharfage is the use of a wharf furnished in the ordinary course of navigation, and a contract relating to wharfage, as understood in the laws and usages of maritime affairs, is a maritime contract. It does not, however, include a claim for rent of a wharf under a lease which continues to accrue during the absence of the vessel. *The James T. Furber*, 129 Fed. 808, 810.

#### Used for charitable purposes

Under P. S. 496, exempting from taxation property "used" for charitable uses, the Masonic Temple of the Grand Lodge of Masons authorized, by Acts 1896, No. 259, to take and hold property for a site for a temple, and to erect a building thereon for the benefit of the masonic fraternity, is not exempt from taxation where the entire building is let to tenants who pay rent to the Grand Lodge which has no intention to ever use the building itself or any part of it directly and immediately for charitable uses, but which merely intends to use the net income from the rent for such use at some uncertain future time, since the word "used" means the direct and immediate use of the property itself, and not the remote and consequential benefit derived from its use. *Grand Lodge of Masons v. City of Burlington*, 78 Atl. 973, 975, 84 Vt. 202.

#### Used for railroad purposes

Pub. Laws 1888, p. 269, exempts all "property used for railroad purposes" from local taxation. Held that, ordinarily where a company has not completed its road and is engaged in the work of construction, the exempted words of the statute must be extended to property within the right of way not actually used for other purposes during such work of construction. In re *New York Bay R. Co.*, 66 Atl. 916, 917, 75 N. J. Law, 111.

The expression "property used for railroad and canal purposes" is, upon the question of its valuation under subdivision 2, § 3, Act March 27, 1888, for the taxation of railroad and canal property, the precise equivalent of "property to which a value is imparted by its use under a railroad or canal franchise." *Long Dock Co. v. State Board of Assessors*, 73 Atl. 53, 55, 78 N. J. Law, 44.

Property taxed under P. L. 1888, p. 269 (Gen. St. p. 3324, § 239), was a ferry house, being part of a railroad terminal at tide water, in connection with which the companies had established a ferry under the authority of Revision P. L. 1903, p. 646, Gen. St. p. 2647, § 40. Held, that so far as the lands and buildings were necessary for the purposes of the terminal, and not actually used for other purposes, they were property "used for railroad purposes," and only taxable by the state board. In re United New Jersey R. & Canal Co., 68 Atl. 167, 168, 75 N. J. Law, 334.

On an issue as to whether certain pieces of property in Jersey City belonging to the Central Railroad Company of New Jersey were "used for railroad purposes," so as to render them assessable by the state board of assessors under the act of March 27, 1888 (Gen. St. p. 3324), the following property was held to be used for railroad purposes: A plot of land which was occupied exclusively by the Pullman Parlor Car Company for storing ice and other articles used by that company in connection with its cars which were hauled over the lines of the railroad for the transportation of the passengers of the railroad who chose to ride in parlor cars, though the railroad derived no profit from the use of the property other than the accommodation afforded to its passengers; a trestle used exclusively by the railroad for the delivery of coal to a coal company, the coal being dumped directly from the cars into holds of vessels lying at the wharf, the coal company having an office on the wharf for the transaction of its business at that point; land partly occupied by railroad tracks and which it was intended should be entirely so occupied in the near future; a plot of ground lying in the terminal yard of the company, running through which were certain tracks used for cars transporting structural iron for a construction company, the open ground adjoining the tracks being used by such construction company for unloading the iron brought in and assorting it for reshipment on the cars of the railroad. In re Central Railroad of New Jersey, 59 Atl. 1062, 1064, 72 N. J. Law, 86.

#### Used for sale of intoxicating liquor

Under the statute declaring it a misdemeanor for any person owning, using or controlling a house of any kind to sell or give away liquor by such device as is known as "the blind tiger," or by any other name or

device, the "use" or control of the house need not be habitual or permanent in order to constitute the offense defined by the statute; but it is sufficient if it be used or controlled by defendant at the time of the illegal sale of liquor therein. *Henry v. State*, 92 S. W. 405, 77 Ark. 453.

#### Used in construction

Explosives employed in blasting rock in grading and tunneling for a railroad are "used" in or about its construction, within the meaning of the Mechanic's Lien Law (Acts 1883, p. 296, c. 220), as amended by Acts 1891, p. 215, c. 98. *Hercules Powder Co. v. Knoxville, L. & J. R. Co.*, 83 S. W. 354, 357, 113 Tenn. 382, 67 L. R. A. 487, 106 Am. St. Rep. 836 (citing *Basshor v. Baltimore & O. R. Co.*, 3 Atl. 285, 65 Md. 99).

Under Mechanic's Lien Law (Hurd's Rev. St. 1911, c. 82) §§ 1, 7, 21, giving a contractor a lien for the amount due him for material, fixtures, apparatus, machinery, services, or labor, providing that no lien for material shall be defeated for want of proof that the material after the delivery actually entered into the construction of the building, though it be not shown that such material was actually "used in the construction of such building or improvement," and giving subcontractors liens for materials, a subcontractor of the original contractor to construct a brick and reinforced concrete building is not entitled to a lien for lumber furnished for false work, and subsequently removed; the quoted words referring to material used as a part of the construction, so as to become a part of the completed structure. *Rittenhouse & Embree Co. v. F. E. Brown & Co.*, 98 N. E. 971, 972, 254 Ill. 549.

While food furnished a railroad contractor for his workmen may be said to be "used" in the construction of the road on which they work, it is only so in a remote and consequential way or sense, and will not give the furnisher a mechanics' lien thereon. Groceries and food furnished for workmen, while in a sense used in the construction of the road, are not materials which so enter into its construction that a lien can be based on them. *S. B. Luttrell & Co. v. Knoxville, L. & J. R. Co.*, 105 S. W. 565, 572, 119 Tenn. 492 (citing *Giant Powder Co. v. Oregon Pacific Ry. Co.*, 42 Fed. 474, 8 L. R. A. 700; *Elliott, R. R.* § 1068).

#### Used in interstate commerce

Under the safety appliance act of March 2, 1893, c. 196, § 2, 27 Stat. 531, which makes it unlawful for any railroad company engaged in interstate commerce to haul or permit to be hauled or used on its lines, any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, as amended by Act March 2, 1903, c. 976, § 1, 32 Stat. 943, which provides that the provisions of the original and amendatory acts relating to couplers, etc., shall be held to

apply to all cars used on any railroad engaged in interstate commerce, a car with a defective coupler, billed for the repair shop, but which was not sent there but was left on a track in ordinary use in a switchyard, to be repaired by the switchmen and then coupled to other cars, was being "used," within the meaning of the statute. *Erie R. Co. v. Russell*, 183 Fed. 722, 724, 106 C. C. A. 160.

The word "used," in Safety Appliance Act March 2, 1893, requiring common carriers to equip any car used in moving interstate traffic with automatic couplers, applies to all cars and trains operated by a railroad carrier of interstate commerce over an interstate highway, irrespective of whether they are operated between points situated in the same state, or whether they are empty, or whether the traffic carried is interstate traffic. *Wabash R. Co. v. United States*, 168 Fed. 1, 3, 93 C. C. A. 393.

A freight car loaded with interstate freight, and placed on a side track in the railway yard at destination, to await simple repairs to the automatic coupler, is "used in moving interstate commerce," within the meaning of Safety Appliance Act March 2, 1893, 27 Stat. 531, when a coupling with another car is thereafter attempted by the carrier's order, during the course of switching operations. *Delk v. St. Louis & S. F. R. Co.*, 31 Sup. Ct. 617, 620, 220 U. S. 580, 55 L. Ed. 590.

A car loaded with coal, to be delivered to a consignee in another state, is "used in moving interstate traffic," within the meaning of Safety Appliance Act March 2, 1893, c. 196, § 2, 27 Stat. 531, by the railroad company which takes it from the place of loading, although such company only undertakes to deliver it to a connecting carrier within the same state. *United States v. Southern Ry. Co.*, 135 Fed. 122, 126.

The phrase "used in moving interstate traffic" does not mean that a car must be actually loaded and on its journey from one state to another in order to be within the provisions of the act, but only that it has been, and is intended to be, so used whenever required, and it is a violation of the act to move such a car not equipped with automatic couplers from one state to another as a part of a train, although it is empty at the time; nor is the mere fact that it is destined to a repair shop a defense. *United States v. St. Louis, I. M. & S. R. Co.*, 154 Fed. 516, 518.

A car used in intrastate commerce only, though moved in a train containing a car bearing interstate traffic, was not "used in connection therewith," where they were in different parts of the train and not in position to be coupled or uncoupled. *United States v. Illinois Cent. R. Co.*, 166 Fed. 997, 999.

The federal safety appliance act applies to a defective car or engine used in moving a

box car from one switch track to another in defendant's yards, when the purpose of moving such car is to load it with merchandise for shipment into another state. The act does not apply to cars which, though standing on the tracks of railroads engaged in interstate commerce, were not being used in such commerce; and where, after an interstate carriage a car is unloaded, it ordinarily ceases to be used in interstate commerce, as where it is used in intrastate traffic, or remains idle, awaiting repairs or such future use as may afterwards be determined; but where, after an interstate carriage, it is to return empty to the state from which it came, it is within the act throughout the trip, including the time between the unloading and the beginning of the return trip. A defective car, which is being hauled in a train that contains cars that are being used in moving interstate commerce, is within the act, though the defective car is not itself being "used in interstate commerce." *Bresky v. Minneapolis & St. L. Ry. Co.*, 132 N. W. 337, 338, 115 Minn. 386.

#### USE AND OCCUPATION

See Action for Use and Occupation.

#### USEFUL

The utility intended by Rev. St. § 4929, authorizing the granting of a patent for any new, "useful," and original shape or configuration of any article of manufacture, is artistic, and not practical. What is meant is that the design shall constitute something which is artistically worth the while, and is not frivolous or hurtful. *Williams Calk Co. v. Neverslip Mfg. Co.*, 136 Fed. 210, 215.

#### Proper synonymous

As used in the rule of the Circuit Court of Appeals, providing that, whenever it shall be necessary or "proper," in the opinion of the presiding judge, that original papers should be inspected in the court upon writ of error or appeal, the presiding judge may make such order for the safe-keeping and return of such original papers, as to him may seem "proper," etc., the word "proper" is equivalent to the word "useful" or the word "aidful." The rule fixes the limit within which the presiding judge may act in such matter, and he is not authorized to make an order for incorporating original papers introduced in evidence in the record, instead of copies, merely for the purpose of saving expense, nor unless in his opinion an inspection of the originals, as distinguished from authenticated copies, is either necessary or would be useful or aidful in the determination of the appeal. *Dowagiac Mfg. Co. v. Brennan & Co.*, 156 Fed. 213, 215.

#### USEFUL DESIGN

The term "useful," in relation to designs means adaptation to producing pleas-

ant emotions. There must be originality and beauty. Mere mechanical skill is not sufficient. *Roberts v. Bennett*, 136 Fed. 193, 195, 69 C. C. A. 533 (citing *Rowe v. Blodgett & Clapp Co.*, 103 Fed. 873; *Bevin Bros. Mfg. Co. v. Starr Bros. Bell Co.*, 114 Fed. 362; *Eaton v. Lewis*, 115 Fed. 635; *Id.*, 127 Fed. 1018, 61 C. C. A. 562). See, also, *H. S. Earle Mfg. Co. v. Clark & Parsons Co.*, 154 Fed. 851, 852 (citing *Gorham Mfg. Co. v. White*, 14 Wall. 511, 20 L. Ed. 731; *Westinghouse Electric & Mfg. Co. v. Triumph Electric Co.*, 97 Fed. 101, 38 C. C. A. 65; *Rowe v. Blodgett & Clapp Co.*, 112 Fed. 61, 50 C. C. A. 120; and *Walker, Pat.* [4th Ed.] § 375).

### USEFUL ENTERPRISE

The business of conducting public billiard halls and poolrooms is not a "useful enterprise" within the rule that a municipality cannot say who shall exercise the right of engaging in a lawful business having no injurious tendency; and an ordinance authorizing the licensing of poolrooms is valid. *Goytino v. McAleer*, 103 Pac. 174, 10 Cal. App. 683.

### USEFULNESS

See Reasonable State of Usefulness.

### USELESS

Highway Law, Laws 1890, p. 1193, c. 568, § 84, authorizing the discontinuance of a highway as "useless," means "practically useless," and not "absolutely useless," since the term "useless" is seldom employed in its absolute sense. In *re Trask*, 92 N. Y. Supp. 156, 157, 45 Misc. Rep. 244.

Under the statute providing that a highway may be discontinued when a majority of the commissioners shall determine that it is "useless," a highway should be discontinued as useless where it is substantially abandoned by the general public, or where some other highway will better accommodate the public. In *re Howland*, 108 N. Y. Supp. 1122, 1123.

### USER

See Nonuser.

Dedication presumed from user, see Dedication.

### USING FOR HIRE

As used in an ordinance providing for the payment of a license by owners of vehicles used or let for hire, the term "using for hire" was intended to apply to cases where persons, the hirers, did not take temporary possession, but where the owners handled the wagon and team for pay. *Sweetman v. City of Covington (Ky.)* 82 S. W. 386.

### USING MAILS TO DEFRAUD

See Defraud; Fraudulent Use of the Mails; Scheme.

## USUAL

See Unusual.

In prosecutions for homicide, in charging as to the presumption that persons intend the ordinary results of their acts, the words "necessary," "probable," "usual," and "ordinary" are substantially synonymous. *Beauregard v. State*, 131 N. W. 347, 351, 146 Wis. 280.

Reining or driving a runaway horse is not driving in the "usual and customary" manner. *Williams v. San Francisco & N. W. R. Co.*, 93 Pac. 122, 129, 6 Cal. App. 715.

### USUAL ABODE

See House of Usual Abode.

### USUAL AND ORDINARY CARE

The words "usual and ordinary care," in connection with an extrahazardous business, such as conducting an electric light company, mean nothing more or less than that, if there be great danger and hazard, there should be a corresponding degree of skill and attention required by law. *Bourke v. Butte Electric & Power Co.*, 83 Pac. 470, 474, 33 Mont. 267.

### USUAL BUSINESS OFFICE

Under Rev. St. 1899, § 8092 (Ann. St. 1906, p. 3843), providing that in suits against mutual companies process shall be served on the president, secretary, or chief officer in charge of the "principal office" of such company, a return of service, reciting that it was served on the secretary of the company, he being in said defendant's "usual business office" and in charge thereof, is insufficient to confer jurisdiction, since it does not show that such office was the company's principal office. *Thomasson v. Mercantile Town Mut. Ins. Co.*, 116 S. W. 1092, 1094, 217 Mo. 485; *Wiccarver v. Mercantile Town Mut. Ins. Co.*, 117 S. W. 698, 700, 137 Mo. App. 247.

### USUAL CHARGE

Insurance is a "usual charge," within the terms of a joint adventure contract providing that, in ascertaining net profits, "taxes on the capital employed and other charges as usual" were to be made. *Stone v. Wright Wire Co.*, 85 N. E. 471, 473, 199 Mass. 306.

### USUAL COURSE OF BUSINESS

Commercial paper may be said to be received in the "usual course of business" when it is indorsed and delivered for value under such circumstances that a business man of ordinary intelligence and capacity would give his money, goods, or credit for it, when offered for the purpose for which it is transferred; and it would not be in due course, if he should at once suspect the integrity of the paper itself, or the credit and standing of the party offering it. *Matlock v. Scheuer-*

man, 93 Pac. 823, 826, 51 Or. 49, 17 L. R. A. (N. S.) 747.

The expression "usual course of business," as one of limitation upon the powers of a corporation, is generally referable to the activities of a going concern and has little, if any, application to one which is upon the threshold of liquidation because of insolvency. In the latter condition, the managing officers, with the approval of the shareholders, may make any fair and equitable disposition of the assets which, not being in violation of any provision of law, will insure the payment of all debts and is reasonably calculated to preserve the largest equity for the shareholders. *George v. Wallace*, 135 Fed. 286, 295, 101 C. C. A. 662.

The transferring of goods into the name of an insolvent's broker, falsely stating that they are his, and selling them as his, when they are not, is not a "sale in the usual course of business" of the true owner. *Jaquith v. Davenport*, 84 N. E. 125, 127, 197 Mass. 397.

#### USUAL DOMESTIC REMEDIES

According to the New York Pharmacy Act, the term "usual domestic remedies" means medicines, a knowledge of the properties of which and dose has been acquired from common use, and includes only such remedies as may be safely employed without the advice of a physician. An unlicensed person, charged and proved to have received money for recommending a certain substance as a cure for disease, cannot exculpate himself by showing that the substance he recommended was a domestic medicine, in the sense that it was a well-known remedy, the effect of which was a matter of common knowledge. *State v. Huff*, 90 Pac. 279, 283, 75 Kan. 585, 12 L. R. A. (N. S.) 1094.

#### USUAL FORM

The term "short form," as used in Acts 1898, p. 92, in referring to the "short form" of bills of exceptions in that act, as contrasted with bringing up the case "in the usual form," refers to excepting to the judgment, decree, or verdict, segregating a certain ruling, assigning error on it, and bringing it up as a necessarily controlling ruling in the brief mode set out in the statute. The "usual form" referred to means some form or methods for bringing cases to the reviewing court, which were usual before the enactment of the statute. *Lyndon v. Georgia R. & Electric Co.*, 58 S. E. 1047-1050, 129 Ga. 353.

#### USUAL OUTBUILDINGS

A deed of property intended for an improved residence district contained a restriction, for the benefit of the grantor and his grantees, that "no buildings, other than dwelling houses \* \* \* with the usual outbuildings appurtenant thereto," should be erected or used upon said land. Held that,

construing the restriction with reference to the meaning of the language at the date of the deed, a garage or storehouse for automobiles was not of the kind described as the "usual outbuildings appurtenant thereto," and that its erection was a violation of the restriction. *Riverbank Improvement Co. v. Bancroft*, 95 N. E. 216, 218, 209 Mass. 217, 34 L. R. A. (N. S.) 730, Ann. Cas. 1912B, 450.

#### USUAL PLACE OF ABODE

See House of Usual Abode.

The term "usual place of abode," as used in statutes authorizing substituted service of summons on a defendant, means the place of residence of the defendant at the time of service. *Minnesota Thresher Mfg. Co. v. L'Heureux*, 118 N. W. 565, 82 Neb. 692 (citing *Blodgett v. Utley*, 4 Neb. 25; *Seymour v. Street*, 5 Neb. 85; *Earle v. McVeigh*, 91 U. S. 593, 23 L. Ed. 398; *Capehart v. Cunningham*, 12 W. Va. 750; *Ruby v. Pierce*, 104 N. W. 1142, 74 Neb. 754); *Berryhill v. Sepp*, 119 N. W. 404, 405, 106 Minn. 458, 21 L. R. A. (N. S.) 344 (citing and adopting *State v. Toland*, 15 S. E. 599, 600, 36 S. C. 515; *Du Val v. Johnson*, 39 Ark. 182, 192; *Walker v. Stevens*, 72 N. W. 1038, 52 Neb. 653; *Mygatt v. Coe*, 44 Atl. 198, 199, 63 N. J. Law, 510; *Ser v. Bobst*, 8 Mo. 506, 507; *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398; *Madison County Bank v. Suman's Adm'r*, 79 Mo. 527, 530; *Missouri, K. & T. Trust Co. v. Norris*, 63 N. W. 634, 61 Minn. 256).

One who had a plural wife went to England with her and resided and worked there for three years. During his absence in England, his other wife A. built a house in Salt Lake City with money furnished by him, and during his absence she lived therein. He never saw the house nor lived in it until after his return from England, during which time summons was attempted to be served on him by leaving a copy at such house with his wife A., on which judgment was rendered by default, concerning which he had no knowledge until he returned from England. Held, that such house was not plaintiff's "usual place of abode" within Comp. Laws 1907, § 2948, subd. 8, authorizing substituted service by leaving a copy of the process at the defendant's usual place of abode with a suitable person at least fourteen years of age; the term "place of abode" as so used being the place where defendant lives or abides, his "then present residence," and is not synonymous with "domicile." *Grant v. Lawrence*, 108 Pac. 931, 933, 37 Utah, 450, Ann. Cas. 1912C, 280.

The term "usual place of abode," as used in Gen. St. 1865, c. 164, § 13, providing that "In suits in \* \* \* divorce \* \* \* if the plaintiff or other person for him shall allege in his petition that part or all of the defendants are nonresidents of the state, or have absconded or absented themselves from

their 'usual place of abode' in this state, etc., the clerk shall make an order or publication," etc., means and is used in the same sense as the word "residence" is used. In an action for divorce, a petition alleged "that defendant is a nonresident of this state, or that he has absconded or absented himself from his usual place of abode in this state so the ordinary process of law cannot be served upon him." Held, that the allegations were sufficient to authorize an order for service of notice by publication. *Hinkle v. Lovelace*, 102 S. W. 1015, 1017, 204 Mo. 208, 11 L. R. A. (N. S.) 730, 120 Am. St. Rep. 698, 11 Ann. Cas. 794.

As used in B. & C. Comp. §§ 55, 396, 400, subd. 2, providing that "the summons shall be served by delivery of a copy thereof \* \* \* to the defendant personally or if he be not found, to some person of the family above the age of fourteen years at the dwelling house or usual place of abode of defendant," the terms "dwelling house" and "usual place of abode" are synonymous and evidently mean a domicile. *McFarlane v. Cornelius*, 73 Pac. 325, 328, 43 Or. 513.

#### USUAL PLACE OF RESIDENCE

The term "usual place of residence," as used in statutes authorizing substituted service of summons on a defendant, means the place of residence of the defendant at the time of service. *Minnesota Thresher Mfg. Co. v. L'Heureux*, 118 N. W. 565, 82 Neb. 692 (citing *Blodgett v. Utley*, 4 Neb. 25; *Seymour v. Street*, 5 Neb. 85; *Earle v. McVeigh*, 91 U. S. 503, 23 L. Ed. 398; *Cauehart v. Cunningham*, 12 W. Va. 750; *Ruby v. Pierce*, 104 N. W. 1142, 74 Neb. 754).

#### USUAL RESIDENCE

"'Usual residence' means customary; common." *State v. Snyder*, 82 S. W. 12, 27, 182 Mo. 462 (quoting *State v. Washburn*, 48 Mo. 240).

#### USUAL RISK

An insurance policy insuring a brig against "risks contained in all regular policies" of insurance, being an insurance against the "usual risks" was insurance against loss by capture. *Levy v. Merrill*, 4 Me. (4 Greenl.) 180, 186.

#### USUAL SHORT RATE

A fire insurance policy provided that the assured might cancel the policy when the premium or note or obligation given for such premium has been actually and fully paid in cash, in which case the company might retain the usual short rate from the date of the policy to the time of cancellation. A policy was issued for a term of five years; the premium being payable in five annual installments of \$19 each, and the first installment being paid on the issuance of the policy. The usual rate for insurance for the term of one year was \$28.50. Held, that insured was not

entitled to cancel the policy at the termination of the first year without paying either the remaining installments or the rate for a one-year policy. The "usual short rate" referred to in the policy is the customary rate charged for insuring like property in a like amount for original short-term insurance. *Home Ins. Co. v. Hamilton*, 128 S. W. 273, 274, 143 Mo. App. 237.

#### USUAL STOPPING PLACE

As used in St. 1898, § 1818, declaring that, if any passenger shall refuse to pay his fare, he may be ejected at any "usual stopping place," the words "usual stopping place" do not mean "station or passenger station," but rather a place reasonably safe for the discharge of passengers, and where they will not be exposed to unreasonable hazard. Hence the statute was satisfied by ejecting the passenger at a point where a large number of employes engaged in mills were received and discharged by defendant in going to and coming from a city; accessible dwelling houses being not more than 500 or 600 feet away, and a hotel within 60 rods, though there was no depot or ticket office at that point. *Habeck v. Chicago & N. W. Ry. Co.*, 132 N. W. 618, 619, 146 Wis. 645, Ann. Cas. 1912C, 485.

#### USUALLY

In an action for injuries to a passenger, an instruction that plaintiff assumed the risks "ordinarily" incident to the coupling of the cars, instead of such risks as were "usually" incident thereto, was not objectionable; such words being regarded as synonymous. *St. Louis Southwestern Ry. Co. of Texas v. Morrow (Tex.)* 93 S. W. 162, 163.

#### USUALLY CULTIVATED OR IMPROVED

Code Civ. Proc. § 325, providing that adverse possession, not based on a written instrument, judgment, or decree, may be established by showing that the land was "usually cultivated or improved," means that the land should be cultivated or improved in the manner and to the extent usual in the case of similar property. *Gray v. Walker*, 108 Pac. 278, 279, 157 Cal. 381.

#### USUALLY LIABLE

Within the rule that the limit of municipal responsibility to dispose of surface waters and sewage is to provide for such storms as are usually liable to occur, the term "usually liable" excludes storms which are liable to occur, and so are within reasonable anticipation that they may or will occur, but only at long intervals. *Geuder Paeschke & Frey Co. v. City of Milwaukee*, 133 N. W. 835, 839, 147 Wis. 491.

#### USUALLY RESIDENT WITHIN

Inhabitant of, synonymous, see *Inhabitantcy*—Inhabitant.



## USUCAPTION

"Usucaption," a term concerning the acquisition of title to land, relates purely to a question of law. *Cooper v. Falk*, 33 South. 567, 570, 109 La. 474.

## USUFRUCT

The term "usufruct" signifies the right of enjoying a thing, the property of which is vested in another, and to draw from the same all the profit, utility, and advantage which it may produce, provided it be without altering the substance of the thing. *Schwartz v. Gerhardt*, 75 Pac. 698, 699, 44 Or. 425 (citing *Bouv. Law Dict.*).

As used in Rev. Civ. Code, art. 2480, providing that, in all cases where the thing sold remains in the possession of the seller because he has reserved to himself the usufruct or retains possession by a precarious title, there is reason to presume that the sale is simulated, and, with respect to third persons, the parties must produce proof that they are acting in good faith and establish the reality of the sale, the word "usufruct" embraces the right of habitation or occupancy reserved by the vendor, and under which he retains possession of the thing sold. This retention of possession by reservation in the deed or by agreement with the vendee creates a prima facie presumption of fraud, since such possession is inconsistent with the nature of the contract of sale, transferring as it does the ownership and possession of the property. *Radovich v. Jenkins*, 48 South. 988, 989, 123 La. 355.

Civ. Code La. art. 533, defines a "usufruct" as the right of enjoying a thing the property of which is vested in another, and to draw from the same all the profits, utilities, and advantages which it may produce, provided it be without altering the substance of the thing. It also declares that the obligation of not altering the substance of the thing takes place only in the case of a perfect usufruct. Article 534 declares money to be an imperfect usufruct, and by article 536 the ownership of such a usufruct is in the "usufructuary," who is entitled under article 556 to the possession and use of the usufruct, and to proceed by action against all persons who obtain possession and enjoyment thereof. Held, that the position of a "usufructuary" of money was unlike that of an executor or administrator, but like that of a legal owner. *Benedict v. Clarke*, 123 N. Y. Supp. 964, 965, 139 App. Div. 242.

## USUFRUCTUARY

A person to whom, out of the revenues or an estate, a certain amount is to be paid monthly is not a "usufructuary." *Succession of Ward*, 34 South. 135, 136, 110 La. 75.

Civ. Code La. art. 533, defines a "usufruct" as the right of enjoying a thing the

property of which is vested in another, and to draw from the same all the profits, utilities, and advantages which it may produce, provided it be without altering the substance of the thing. It also declares that the obligation of not altering the substance of the thing takes place only in the case of a perfect usufruct. Article 534 declares money to be an imperfect usufruct, and by article 536 the ownership of such a usufruct is in the usufructuary, who is entitled under article 556 to the possession and use of the usufruct, and to proceed by action against all persons who obtain possession and enjoyment thereof. Held, that the position of a "usufructuary" of money was unlike that of an executor or administrator, but like that of a legal owner. *Benedict v. Clarke*, 123 N. Y. Supp. 964, 965, 139 App. Div. 242.

## USURIOUS

See, also, Usury.

Place where usurious interest is taken as disorderly house, see *Disorderly House*.

To make a contract of loan "usurious" it must appear that, at the time the contract was entered into, the parties agreed that an unlawful rate of interest should be paid and received. In the absence of such understanding any subsequent conduct of the parties, however fraudulent, will not make the contract "usurious." *Ardmore Loan & Trust Co. v. Dillard*, 104 S. W. 814, 816, 7 Ind. T. 501.

Under Laws 1891, c. 4022, p. 51, § 2, defining usurious contracts and prescribing penalties and forfeitures, and which by section 2 makes unlawful and usurious any contract, contrivance, or device whatever, whereby the debtor is required or obligated to pay a greater sum than the actual principal sum received, together with interest at the rate of 10 per cent. per annum, a contract by a corporation, not operating under the building and loan association laws of Florida, with a shareholder, whereby the corporation agrees to advance to the shareholder \$7,300 at 7 per cent. interest per annum, and that the interest should be calculated and added to the principal, and the sum thus obtained should be divided into 120 equal monthly payments of \$82.13, due on the 11th day of each succeeding month, and that 10 per cent. of the whole sum, or \$730, should be deducted as a bonus for making the advance and that therefore the real transaction was an advance or loan of \$6,570 at 10 per cent. per annum, and that under the terms of the contract a penalty of 10 per cent. was to be imposed on the shareholder if he made default in paying any one of these monthly installments, and that the installment should then also bear interest at 7 per cent. per annum, and that, if the borrower made default in the payment of three consecutive monthly

installments, the whole debt should ipso facto become due, payable, and collectible, with no provision in the contract for eliminating any part of the unearned interest contained in the installments thus precipitated to maturity, is unlawful and "usurious." *Maxwell v. Jacksonville Loan & Improvement Co.*, 34 South. 255, 268, 45 Fla. 425.

Rev. St. 1895, art. 3104, provides for forfeiture of all interest where usurious, and Rev. St. 1895, art. 3106, as amended by Acts 1907, p. 277, c. 143, declares that the person paying the usurious interest may recover double the amount thereof. Held, that under Const. art. 16, § 11, as amended in 1891, declaring that all contracts for a greater rate of interest than 10 per cent. shall be deemed usurious, the term "usurious interest," means "unlawful interest," and hence was not limited to the excess over the lawful rate, but included all the interest received and collected. *Baum v. Daniels*, 118 S. W. 754, 755, 55 Tex. Civ. App. 273.

The "usurious interest," which, under Rev. St. 1895, art. 3106, as amended by Acts 1907, c. 143, is recoverable by the person paying it from the person receiving or collecting it, to twice the amount so received or collected, means the whole amount of the interest received, and not the excess above what might lawfully have been received. *Taylor v. Shelton* (Tex.) 134 S. W. 302, 304.

Rev. St. 1899, § 3709 (Ann. St. 1906, p. 2077), provides that a party exacting "usurious interest" shall not recover more than the amount due on the principal debt, with legal interest, after deducting therefrom all payments of usurious interest, whether paid as commissions or as interest. An agent of a lender furnished money to a borrower at the highest legal rate of interest, and without the knowledge of the lender charged the borrower commissions for making the loan. Held, that the note was "usurious." *Little v. Hooker Steam Pump Co.*, 100 S. W. 561, 563, 122 Mo. App. 620.

The "usurious transaction," from the date of which the two years' limitation prescribed by U. S. Rev. Stat. § 5198, for actions to recover back twice the amount of interest paid a national bank, begins to run, occurs on the date of the payment of the usurious interest, and not on the date when the debt was paid. *McCarthy v. First Nat. Bank*, 32 Sup. Ct. 240, 241, 223 U. S. 493, 56 L. Ed. 523.

## USURP—USURPATION

A person holding an office to which he is ineligible under the Constitution is guilty of "usurpation of office," and may be punished by fine, as provided by Ky. St. 1903, § 1364. *Hill v. Anderson*, 90 S. W. 1071, 1072, 122 Ky.

87 (quoting *Commonwealth v. Adams* [Ky.] 3 Metc. 6).

Webster defines "usurp" as "to commit seizure of place, power, function, or the like without right; to seize and hold it in possession by force or without right; as, to 'usurp' a throne," etc. Bouvier defines "usurper" as "one who intrudes himself into an office which is vacant and ousts the incumbent without any color of title whatever; his acts are void in every respect." Anderson gives the same definition, and derives it from "usurpare"—"to seize to one's own use." To "usurp" an office is to seize it by force, actual or constructive, without any color of right or title. "Usurpation" is entirely different from holding an office originally rightfully possessed, but to which the incumbent becomes ineligible. Thus one holding the office of notary public, who continues to exercise the functions of that office after his appointment and qualification as post master, is not guilty of "usurpation" of office, within the statute making usurpation of office a misdemeanor. *Palmer v. Commonwealth*, 92 S. W. 588, 122 Ky. 693. And so, according to these definitions, the defendant was not guilty of "usurpation" of office, within the statute, making it an offense for any person to hold any office after his election thereto shall have been declared illegal by a court of competent jurisdiction, or to usurp any office established by law, where, though his election to the office of road supervisor was not legal, he was put into it by the fiscal court, and, though he retained possession and exercised the duties of the office after the fiscal court had declared the office vacant, there had never been a judicial determination that the election was illegal by a court of competent jurisdiction. *Eubank v. Commonwealth*, 103 S. W. 368, 369, 126 Ky. 348 (quoting and adopting the definition in *Palmer v. Commonwealth*, 92 S. W. 588, 122 Ky. 693).

Where a sheriff collected taxes after his term had expired, giving a receipt therefor as an ex-sheriff, it was not a "usurpation" of office, within Ky. St. 1903, § 1364, as he did not profess in so doing to hold the office of sheriff, or to be entitled to discharge its duties. *Commonwealth v. Bush*, 115 S. W. 249, 252, 131 Ky. 384.

A "usurpation" is nothing more nor less than the assumption of power not authorized. *Clark v. Brown* (Tex.) 108 S. W. 421, 451.

## USURPER

A "usurper" is one who intrudes himself into an office which is vacant, or ousts the incumbent without any color of title. *Palmer v. Commonwealth*, 92 S. W. 588, 122 Ky. 693; *Eubank v. Commonwealth*, 103 S. W. 368, 369, 126 Ky. 348; *Commonwealth v. Bush*, 115 S. W. 249, 252, 131 Ky. 384.

## USURY

See, also, Usurious.

By the canon law, "interest" and "usury" were synonymous terms, and it was unlawful to take any money for the use of money, and this law was rigidly enforced by the temporal authorities of England until the reign of Henry VIII, when the legal right to take interest was first created by act of Parliament (St. 37 Hen. VIII, c. 9), and ever since, in England and in this country, this right has existed in legal contemplation as the creature of statutory enactment. *Ex parte Berger*, 90 S. W. 759, 761, 193 Mo. 16, 3 L. R. A. (N. S.) 530, 112 Am. St. Rep. 472, 5 Ann. Cas. 383.

"Usury" is an illegal profit required and received from the borrower by a lender of money, and to constitute it there must be a loan or forbearance, the loan must be of money or something circulating as money, it must be repayable absolutely and at all events, and something must be exacted for the use of the money in excess of and in addition to the interest allowed by law. *Clemens v. Crane*, 84 N. E. 884, 889, 234 Ill. 215.

Any profit made or loss imposed on the necessities of the borrower, whatever form, shape, or disguise it may assume, where the treaty is for a loan, and the capital is to be returned at all events, is so much profit taken on a loan and amounts to "usury" if it exceeds the legal rate of interest. *Hall v. Eagle Ins. Co. of London, Eng.*, 136 N. Y. Supp. 774, 783, 151 App. Div. 815.

A profit greater than the lawful rate of interest, intentionally exacted as a bonus for the loan of money, imposing on the necessities of the borrower in a transaction where the treaty is for a loan and the money is to be returned at all events, is "usury." *Doster v. English*, 67 S. E. 754, 755, 152 N. C. 339.

"Usury" is exacting or receiving more than the lawful rate of interest. But, if the debt on which it is complained usury is exacted may be wholly discharged according to its terms without reaching the usury, there is no usury, since the debtor has the privilege of paying the lawful sum only. *Taylor v. Buzard*, 90 S. W. 126, 114 Mo. App. 622 (citing *Clark*, Cont. 401).

Where a loan contract allows the lender to demand repayment of the principal sum, with legal interest in any event, and there is a further stipulation for a contingent benefit beyond the legal rate of interest, the contract is usurious. "Usury" arises where a borrower gives the lender a note, and at the same time, by separate agreement, gives him the option to either demand payment of the note or to cancel it and take stock deposited as collateral security and dividends thereon in lieu of the note at any time before

or after maturity. *U. T. Hungerford Brass & Copper Co. v. Brigham*, 95 N. Y. Supp. 867, 868, 47 Misc. Rep. 240.

#### As interest greater than allowed by law

The offense of "usury" consists in taking unlawful interest. *Sanford v. Kunz*, 71 Pac. 612, 613, 9 Idaho, 29.

Under Code 1896, § 2626, fixing the legal rate of interest, and section 2630, providing that all contracts at a higher rate are usurious, "usury," generally speaking, is the taking of more for the use of money than the law permits. *Darden v. Schuessler*, 45 South. 130, 154 Ala. 372.

#### Agreement necessary

To constitute "usury," there must be an agreement on the part of a lender to receive and on the borrower to give for the use of money a greater rate of interest than 10 per cent. *Citizens' Bank of Junction City v. Murphy*, 102 S. W. 697, 699, 83 Ark. 31.

To constitute "usury," there must either be an agreement whereby the borrower promises to pay and the lender knowingly receives a higher rate of interest than that allowed, or such higher rate must be knowingly "reserved, taken, or secured." *Briggs v. Steel*, 121 S. W. 754, 755, 91 Ark. 458.

#### Intent

Erroneously claiming more than is due is not "usury." *Fidelity Loan Ass'n v. Connolly*, 95 N. Y. Supp. 576, 577.

#### Interest in advance

"Usury" is the reserving and taking, or contracting to reserve and take, either directly or by indirection, a greater sum for the use of money than the lawful interest." To take interest at the highest legal rate in advance on a long loan is palpable usury, though the authorities are almost unanimous that in short-time loans it is not usury to reserve the interest in advance. The taking of interest for a portion of a year, computed on the principle that a year consists of 360 days, or 12 months of 30 days each, is not usurious, provided this principle is resorted to in good faith as furnishing an easy and practical mode of computation, and not as a cover for usury. *Patton v. Bank of La Fayette*, 53 S. E. 664, 666, 5 L. R. A. (N. S.) 592, 4 Ann. Cas. 639 (quoting *Civ. Code 1895*, § 2877).

#### Loan or forbearance

It is an essential requisite to a "usurious" transaction that there be a loan, expressed or implied. *Lusk v. Smith*, 81 Pac. 173, 175, 71 Kan. 550.

"To constitute 'usury,' there must be a loan or forbearance of money and an agreement, express or implied, by the borrower to repay the same with interest in excess of the rate allowed by law." All money due or

to become due under municipal contracts were assigned in consideration of money paid therefor; the amount paid being the face value, less a discount of about 10 per cent. Held, not usurious, though the discount might in amount exceed the legal rate of interest. *Dickson v. City of St. Paul*, 117 N. W. 426, 427, 428, 105 Minn. 165 (citing *Webb*, *Usury*, §§ 19-24; *Struthers v. Drexel*, 7 Sup. Ct. 1293, 122 U. S. 487, 30 L. Ed. 1216; *Footte v. Emerson*, 10 Vt. 388, 33 Am. Dec. 205; *Reger v. O'Neal*, 10 S. E. 375, 33 W. Va. 159, 6 L. R. A. 427; *Balfour v. Davis*, 12 Pac. 89, 14 Or. 47; *Raynolds v. Carter* [Va.] 12 Leigh, 186, 37 Am. Dec. 642).

#### Penalty distinguished

See *Penalty*.

#### Sharing in profits

Intervener loaned \$12,000 to a firm to purchase timber lands, the firm to repay such loan, and for the use of the money to pay intervener 50 cents per thousand feet of lumber cut, the amount to be cut to be not less than 20,000,000 feet, the principal to be repaid at the rate of \$2 per thousand feet of lumber as it was cut, such payments on the principal to amount to not less than \$500 per month. Within about two years from the date of the loan intervener had received back the \$12,000 of the principal, and, in addition thereto, \$2,627.20, and claimed a balance due of \$7,442.33, and in settlement thereof received notes aggregating \$6,000, \$1,200 in cash, and \$243 in open account. Held, that the notes so given were based entirely on a usurious consideration; "usury" being the taking, receiving, reserving or charging either directly or indirectly a greater sum for the use of money than the lawful rate of interest, and a contention that the transaction was only a profit-sharing agreement could not be sustained, as the stipulated payments were to be made whether the adventure succeeded or failed. *Chas. A. Riley & Co. v. W. T. Sears & Co.*, 70 S. E. 997, 1000, 154 N. C. 509.

### UTENSILS

See *Farming Tools and Utensils*.

A steam thresher for harvesting a rice crop is a "farming utensil," as used in Civ. Code, art. 3259, making the vendor's privilege superior to the privilege of the lessor for rent. The word "utensils" more especially means an implement or vessel for domestic or farming use. See *Standard Dictionary* verbo. As used in Civ. Code, art. 3259, "utensils" is a translation of "ustensiles," used in article 2102 of the Code Napoléon. This word, in France, has been held to include a "machine a battre," or threshing machine. *Fuzier Herman*, *Code Civil*, vol. 4, p. 873. In French jurisprudence the word is used as synonymous with "agricultural instruments,"

whatever may be their nature. *Laporte v. Libby*, 38 South. 457, 458, 114 La. 570.

### UTERO-GESTATION

In *Crim. Code*, § 6, providing that "any physician or other person who shall administer, or advise to be administered, to any pregnant woman with a vitalized embryo, or fetus, at any stage of utero-gestation, any medicine, etc., the word "utero-gestation" means pregnancy. One of the definitions of such word given by the *Standard Dictionary*, by the *Century Dictionary*, and by *Webster* is "pregnancy," and this is the sense in which it is used in this connection. *Edwards v. State*, 112 N. W. 611, 612, 79 Neb. 251.

### UTILITY

See *Public Utility*.

Articles of, see *Articles within Tariff Act*.

### UTMOST CARE

It is usual to use the word "highest" in instructions upon the degree of care required toward passengers, instead of "utmost," and the former should be used, though there may be but slight difference in their meaning. *Quinn v. Metropolitan St. Ry. Co.*, 118 S. W. 46, 48, 218 Mo. 545.

In an instruction that every protection reasonably accessible must be used in the first place in protecting electric wires, and the utmost care should be used to keep them so, the words "reasonably" and "utmost care" meant the same thing. *Winkelman v. Kansas City Electric Light Co.*, 85 S. W. 99, 100, 110 Mo. App. 184.

An instruction that a carrier owed to a passenger the "utmost care" for his safety was not objectionable; such care being no more than the highest degree of care which a carrier is bound to exercise. *Houston & T. C. Ry. Co. v. Keeling*, 120 S. W. 847, 848, 102 Tex. 521.

The term "utmost," as applied to care, is synonymous with the expression "such precaution as human skill and foresight could suggest." *Gregory v. Elmira Water, Light & R. Co.*, 83 N. E. 32, 34, 190 N. Y. 363, 18 L. R. A. (N. S.) 160.

A charge, defining "utmost care" to be such a degree of care as would be exercised by a very careful, prudent, and competent person under the same or similar circumstances, was proper. *Weatherford, M. W. & N. W. Ry. Co. v. White*, 118 S. W. 799, 803, 55 Tex. Civ. App. 32.

The terms "ordinary care," "utmost care," and "highest degree of care" are relative, and are applicable solely to the particular circumstances. *Anderson v. Great*

Northern Ry. Co., 99 Pac. 91, 95, 15 Idaho, 513.

A telegraph company, failing to deliver within a reasonable time messages intrusted to its care, does not exercise, in the delivery thereof, the "utmost diligence," within Wilson's Rev. & Ann. St. 1903, § 699, declaring that a carrier of messages must use the utmost diligence in the transmission and delivery thereof. *Blackwell Milling & Elevator Co. v. Western Union Tel. Co.*, 89 P. 235, 236, 17 Okl. 376, 10 Ann. Cas. 855.

#### UTMOST CARE AND SKILL

The words "utmost care and skill" do not mean the utmost care and diligence which men are capable of exercising, but mean the utmost care consistent with the carrier's undertaking, and with due regard for all the other matters which should be considered in conducting the business. *Ilges v. St. Louis Transit Co.*, 77 S. W. 93, 94, 102 Mo. App. 529 (citing *Dodge v. Boston & B. S. S. Co.*, 19 N. E. 373, 148 Mass. 207, 2 L. R. A. 83, 12 Am. St. Rep. 541).

By "utmost care and skill" is meant the highest degree of care and skill known which may be used under the same or similar circumstances. *Mangan's Adm'r v. Louisville Electric Light Co.*, 91 S. W. 703, 706, 122 Ky. 476, 6 L. R. A. (N. S.) 459 (citing *Thomp. Neg.* §§ 797, 4036; *Haynes v. Raleigh Gas Co.*, 19 S. E. 344, 114 N. C. 203, 26 L. R. A. 810, 41 Am. St. Rep. 786; *Alexander v. Nanticoke Light Co.*, 58 Atl. 1068, 209 Pa. 571, 67 L. R. A. 475, and cases cited in notes; *City Electric Street Ry. Co. v. Connery*, 33 S. W. 426, 61 Ark. 381, 31 L. R. A. 570, 54 Am. St. Rep. 262; *Ugla v. West End St. Ry.*, 35 N. E. 1126, 160 Mass. 351, 39 Am. St. Rep. 481).

In an action against a street railroad company for personal injuries, the court instructed that the defendant was bound to exercise toward plaintiff "the utmost care, skill, and vigilance" to carry her safely, and also, on her arrival at destination, to stop the car at the usual stopping place, or some other place where it was suitable for plaintiff to alight; and if defendant's servants in charge of the car failed to exercise the utmost care, skill, and vigilance, and by reason thereof did not stop at the usual place, but beyond it at a place unsafe and unsuitable for alighting, and plaintiff was consequently injured while alighting, and while she herself was exercising ordinary care, defendant was liable. Defendant insisted that the phrase, "utmost care, skill, and vigilance," overstated the care defendant was bound to observe, and called for the highest conceivable care, and that the court should have defined the expression "utmost care and skill" as the care and skill which very cautious men exhibit in similar circumstances. The appellate court, in passing on defendant's objections, said that that objec-

tion had often been raised to instructing juries by the words used in the present case, and that it was not the best or most approved form of charge, and that it was well to advise the jury that the law means by "utmost care and skill" the degree of those qualities used by very cautious men in the same vocation. *Fillingham v. St. Louis Transit Co.*, 77 S. W. 314, 317, 102 Mo. App. 573.

An instruction, in an action against a carrier for injuries to a passenger by the derailment of the coach, that the burden was on the carrier to prove that the coach, the engine, roadbed, tracks, and ties were reasonably safe "so far as human skill, diligence, and foresight could provide, \* \* \* and that by the utmost human skill, diligence, and foresight is meant such skill, diligence, and foresight as is exercised by a very cautious person under like circumstances," is not erroneous, though no standard by which to measure the carrier's duty is furnished by requiring it to exercise care so far as human skill, diligence, and foresight can provide. *Skiles v. St. Louis, I. M. & S. Ry. Co.*, 108 S. W. 1082, 1083, 130 Mo. App. 162.

#### UTTER

To "publish and utter" a check bearing a forged indorsement is to offer it to another with direct or indirect assertions that it is good. *State v. Anderson* (Del.) 74 Atl. 1097, 1099, 1 Boyce, 135.

To "utter" a forged instrument is to put it in circulation, or to offer to do so, with fraudulent intent to injure another. *Holloway v. State*, 118 S. W. 256, 258, 90 Ark. 123.

The crime of "uttering a forged writing" consists in offering to another a forged instrument with a knowledge of the falsity of the writing and with the intent to defraud. To constitute the offense it is not necessary that the writing should have been actually received as genuine by the party to whom the same is offered, or that the attempt to defraud be successful; the uttering is complete if the forged instrument is offered as genuine, or declared or asserted, either directly or indirectly, by words or by actions as good. *Maloney v. State*, 121 S. W. 728, 730, 91 Ark. 485, 134 Am. St. Rep. 83, 18 Ann. Cas. 480 (citing *Wharton's Cr. Law* [10th Ed.] 708; 5 *Ency. of Evid.* 865; *Elsev v. State*, 2 S. W. 337, 47 Ark. 572; *People v. Caton*, 25 Mich. 390; *State v. Horner*, 48 Mo. 520; *Smith v. State*, 29 N. W. 923, 20 Neb. 285, 57 Am. Rep. 832; 19 *Cyc.* 1388; *Holloway v. State*, 118 S. W. 256, 90 Ark. 123).

The word "utter" means to put out, to pass off, and, in case of forged paper or counterfeit, there may be an uttering without an actual passing of the paper or money. In a

prosecution for uttering obscene pictures, where defendant took a person into a room in which there was a book containing pictures and pointed the book out to him, whereupon the person opened the book and inspected the pictures, the pictures were not uttered, within the statute making it a crime to utter obscene pictures. *McGuinness v. McGuinness* (N. J.) 62 Atl. 937.

One authorized by a creditor to collect a debt has no authority, on receiving from the debtor in payment a check payable to the creditor, to indorse the creditor's name, and a person taking the check with knowledge of such indorsement, with intent to obtain money thereon based on the indorsement, and who does obtain money thereon, is guilty of "uttering a forged check." *People v. Minge*, 103 N. Y. Supp. 627, 629, 118 App. Div. 652.

**Intent and knowledge**

To constitute the offense of "uttering a forged check," there must be an intent to cheat and a knowledge of the falsity of the instrument. Under a statute defining the offense of uttering forged instruments, knowing them to be forged, it is error to charge that the jury should find defendant had knowledge if he had notice of any suspicious circumstances sufficient to put a reasonably prudent man on inquiry which, if followed up, would have led to knowledge of the forgery. *Wells v. Territory*, 98 Pac. 483, 487, 1 Okl. Cr. 469.

**Delivery and receipt**

"To 'utter and publish' a document is to offer directly or indirectly, by word or action, such document as good." "Uttering" means substantially to offer. If a person offers another a thing (as, for instance, a forged instrument, or a piece of counterfeit coin which he intends to pass as good), the act constitutes an "uttering" whether the thing offered be accepted or not, and the offer need not go so far as to be in law a tender. But it must be a complete attempt to do the particular thing which the law forbids, though there may be a complete conditional uttering as well as any other, which will be criminal. Allegation that defendant did "utter and publish" a certain forged check is supported by evidence that he offered to pass said check as a genuine instrument, though the offer was not accepted, and

defendant did not exhibit it to the witness; there being other evidence from which the jury might find that such check was forged by defendant and was in his possession when such offer was made. *Walker v. State*, 56 S. E. 113, 127 Ga. 48, 8 L. R. A. (N. S.) 1175, 119 Am. St. Rep. 314 (quoting and adopting definition in *Whart. Cr. Law* [10th Ed.] vol. 1, § 703, and citing *State v. Horner*, 48 Mo. 520; 1 *Bish. Cr. Law* [1st Ed.] § 185).

Under Code, § 4854, defining the offense of "uttering" a false instrument as the uttering and publishing as true any instrument such as is described in section 4853 as an instrument, the false making of which constitutes forgery, which section includes deeds, bonds, etc., it is not essential that the instrument be actually transferred to or accepted by another as genuine; it sufficing that such instrument be offered as genuine with intent to defraud, and hence an indictment for uttering a forged mortgage need not allege an actual transfer nor the name of the transferee, if such transfer was made. *State v. Weaver*, 128 N. W. 559, 560, 149 Iowa, 403, 31 L. R. A. (N. S.) 1046, Ann. Cas. 1912C, 1137.

**Forgery distinguished**

Forgery distinguished, see Forgery.

**Probating will**

Tender of a will for probate, knowing it to be forged, is an "uttering" thereof, though the surrogate may not have jurisdiction to admit it to probate. *State v. Ready*, 72 Atl. 445, 447, 77 N. J. Law, 329.

**Publish synonymous**

An indictment alleging that accused did "utter and publish" as true a forged instrument states an offense under Rev. St. § 833, making it an offense to "alter or publish" as true a forged instrument, since the word "utter" is mere surplusage, and does not show that accused did not commit the offense of publishing, the words "utter" and "publish" conveying the meaning of disposing of the forged instrument, and having about the same meaning. *State v. Barrett*, 46 South. 1016, 1017, 121 La. 1058 (citing 8 *Words and Phrases*, p. 7251).

**UXOR**

See Et Uxor.

## V

**VACANCY—VACANT—VACATE**

See Casual Vacancy.

The Standard Dictionary defines the word "vacant" as devoid of occupants, empty, unfilled, unoccupied, having no incumbent, and states that that is vacant which is without that which has filled or might be expected to fill it, that it has extensive reference to rights or possibilities of occupancy. *Knight v. Trigg*, 100 Pac. 1060, 1064, 16 Idaho, 256.

The word "vacating," as used in Gen. St. 1894, § 4665, subd. 9, providing for appeal from an order vacating or refusing to vacate a previous order, judgment, or decree, means the vacating or setting aside of any part of a previous order. In *re Phelps' Estate*, 101 N. W. 496, 497, 93 Minn. 350.

The word "vacate," in a statute relating to "vacation" of streets, could be applicable only to a highway already existing. *Erie R. Co. v. City of Passaic*, 74 Atl. 338, 79 N. J. Law, 19.

A street is "vacated," within St. Okl. 1893, § 584, relating to the vacating of streets, when its character as such is destroyed, and it is thereafter held in private ownership, the same as the adjacent lots to which it has accreted. *Atchison, T. & S. F. Ry. Co. v. City of Shawnee*, 183 F. 85, 87, 105 C. C. A. 377.

To "vacate" premises in the ordinary signification of the word means only a surrender of actual possession—of *possessio pedis*. A requirement in a certificate of purchase issued to a purchaser of state land, that he shall vacate the premises on his failure to pay the purchase money is complied with by a surrender of the actual possession of the premises, without a surrender to the state of the certificate. *People v. Clough*, 63 Pac. 1066, 1069, 16 Colo. App. 120.

**VACANCY — VACANT — VACATE (Of Building)**

"Vacant" means unfilled; unoccupied, without a claimant, tenant, or occupier. A house was called "vacant" which was inhabited by no one. *Burrill's Law Dict.* 1019. A "vacant" house is an untenanted house. *Anderson, Law Dict.* 1078. "Vacant" is unoccupied (*Standard Dict.*); not occupied or filled with incumbent or tenant. *Century Dict.* *Bedell v. Edgett*, 104 N. Y. Supp. 1013, 1014, 120 App. Div. 451.

A policy of insurance provided that, if the premises were unoccupied for 10 days, the policy should be void. Held, that the fact that the premises were reoccupied after such time did not avoid the forfeiture. *Hardiman v. Fire Ass'n of Philadelphia*, 61 Atl. 990, 991, 212 Pa. 383.

In an action on an insurance policy providing that it was to become void if the buildings became vacant or unoccupied, the answer alleged that the possession and occupancy of the buildings described and of the insured premises was changed, and said premises ceased to be occupied as provided in the policy. Held, that the answer was sufficient to raise the question of a vacancy, for the terms "vacancy" and "nonoccupancy" are used interchangeably and are equivalent in meaning. *Cone v. Century Fire Ins. Co.*, 117 N. W. 307, 308, 139 Iowa, 205.

The principal idea in the condition in an insurance policy avoiding it if the premises shall become "vacant and unoccupied" is increase of risk, and that idea must have been intended as part of the definition of the words "vacant and unoccupied." It was intended by the words in the connection in which they were used to refer to such a desertion of the premises and removal from them, as would materially increase the risk. Where a policy against loss by fire, lightning, tornado, and windstorm covered a dwelling house and double corncrib, with a stable addition and hay and corn, places separate valuations on the separate subjects, and more than 30 days after the removal of the tenant from the house, which stood some 200 or 300 feet from the corncrib, the corncrib was destroyed by a windstorm, the provision that the policy should be void if the above-mentioned premises became vacant prevented recovery for the corncrib, though the farm was worked by the owner from his adjoining farm, and the crib was used for the storage of farm machinery. *Republic County Mut. Fire Ins. Co. v. Johnson*, 76 Pac. 419, 421, 69 Kan. 146, 105 Am. St. Rep. 156, 2 Ann. Cas. 20.

**Dwelling house**

Where a policy on a dwelling house in process of construction was conditioned against vacancy, and permission was given for mechanics to work in and about the premises 30 days after date, the building never having been occupied as a dwelling house, was not "vacant and unoccupied" after the expiration of such permits; those words referring to a permanent removal and entire abandonment of the house. *Harris v. North American Ins. Co.*, 77 N. E. 493-495, 190 Mass. 361, 4 L. R. A. (N. S.) 1137 (following *Johnson v. Norwalk Fire Ins. Co.*, 56 N. E. 569, 175 Mass. 529).

In a policy exempting the insured from liability, in case the property he insures should become vacant or unoccupied, the words "vacant" and "unoccupied" have a definite and fixed meaning, and that is "that if the house insured should cease to be used as a place of human habitation, or for living

purposes, it would then become vacant and unoccupied." The extent of the time of vacancy is not the essence of the contract. Vacancy of insured property is universally recognized in insurance circles as an increased risk, and in contemplation of law there is as much violation of such a provision in a contract by a vacancy for a brief period as there would be for a more extended period. *Ohio Farmers' Ins. Co. v. Vogel (Ind.)* 75 N. E. 849.

"A dwelling house is chiefly designed for the abode of mankind. For the comfort of the dwellers in it, many kinds of chattel property are gathered in it, so that, in the use of it, it is a place of deposit of things inanimate, and a place of resort, and a place of resort and tarrying of beings animate. With those animate far away from it, but with those inanimate still in it, it would not be 'vacant,' for it would not be empty and void. And \* \* \* with all inanimate things taken out, but with those animate still remaining in it, it would not be unoccupied, for it would still be used for shelter and repose. And it is because, in our experience of the purpose and use of a dwelling house, we have come to associate our notion of the occupation of it with the habitual presence and continued abode of human beings within it that that word applied to a dwelling always raises that conception in the mind. Sometimes the use of the word 'vacant,' as applied to a dwelling, carries the notion that there is no dweller therein; and we should not be sure always to get or convey the idea of an empty house by the words 'vacant dwelling.'" *Knowlton v. Patrons' Andros-coggin Mut. Fire Ins. Co.*, 62 Atl. 289, 291, 100 Me. 481, 2 L. R. A. (N. S.) 517.

#### Same—Change of tenants

Where plaintiff's husband, who lived in another house on the same lot, placed a bed in the insured house after the tenant vacated, and slept there five nights each week, carrying on his business on the premises during the day, the house was not "vacant and unoccupied for ten days" within the forfeiture clause of the insurance policy. *Thieme v. Niagara Fire Ins. Co.*, 91 N. Y. Supp. 499, 500, 100 App. Div. 278.

Where the husband of a tenant of a building and his hired man slept in the building after the tenant had removed the greater part of the furniture, but leaving a part, and the husband left on the premises his horses and chickens, etc., the house was not "vacant" or unoccupied within a fire policy stipulating that it should be void if the building became vacant or unoccupied, and so remained for 10 days. *Seubert v. Fidelity-Phenix Ins. Co. of New York*, 136 N. W. 103, 104, 29 S. D. 261, 40 L. R. A. (N. S.) 58.

Under a policy of fire insurance, providing that the entire policy, unless otherwise

provided by agreement indorsed thereon, shall be void if the building described, whether intended for occupancy by the owner or tenant, shall become vacant or unoccupied and so remain for ten days, a "vacancy" for 30 days during a change of tenants does not of itself void the three years' policy, which has yet a long time to run, where the insurance company declares no forfeiture. *Athens Mut. Ins. Co. v. Toney*, 57 S. E. 1013, 1016, 1 Ga. App. 498 (citing *Cooley, Briefs, Ins.*).

Where a tenant moved out of a dwelling the last week in February, and another person moved in about the first of May following, but in the meantime no one occupied the dwelling, and the doors thereof were unfastened the greater part of the time and even stood open, and children about town made a playground of the premises, and occasionally domestic animals wandered into the building, the building was "vacant or unoccupied," within a fire policy providing that it would be void if the building should be or become vacant or unoccupied and so remain, unless by agreement indorsed on or added to the policy, and the policy was voided, though the dwelling remained occupied until a fire. *Hoover v. Mercantile Town Mut. Ins. Co.*, 69 S. W. 42, 43, 93 Mo. App. 111.

#### Same—As empty

Where, after the tenant of an insured house moved out, another person moved in at the request of the owner, so as to preserve the insurance, had all his effects in the house, with control of the premises, and was corporally present and in actual possession of the premises every night during most of the time between departure of the tenant and the destruction of the house by fire, which was about a month, and was not absent from the place during that time for more than four days, the house was occupied, within a provision of the policy that the insurance should only continue while the premises were occupied by a tenant as a private dwelling house, and that the entire policy, unless otherwise provided, should be void if the building, whether intended for occupancy by the owner or tenant, should remain vacant or unoccupied for 10 days, and the fact that only one of the rooms in the house had been used by the occupant, and that the other rooms were not furnished, did not render the house vacant within the policy; the word "vacant" meaning "empty" in its ordinary sense. *Agricultural Ins. Co. of Watertown, N. Y., v. Owens (Tex.)* 132 S. W. 828, 830.

#### Same—Temporary absence

A mere temporary absence of the occupants of a dwelling house, with the intention to return, when the premises are left in their usual condition, does not make the house "vacant," with a fire policy providing that it should be void if the premises should become and remain vacant for more than 10 days.



Kampen v. Farmers' Mut. Fire Ins. Co., 133 N. W. 163, 164, 116 Minn. 68.

**Same—As unoccupied**

"The word 'occupation,' as applied to a dwelling house, means living in it; and hence, to become vacated or unoccupied, it must be without an occupant—without any person living in it." *Baggerly v. Lee*, 73 N. E. 921, 923, 37 Ind. App. 139 (citing *Home Ins. Co. of New York v. Boyd*, 49 N. E. 285, 19 Ind. App. 173; *Paine v. Agricultural Ins. Co.* [N. Y.] 5 Thomp. & C. 619; *American Ins. Co. v. Padfield*, 78 Ill. 169).

Within a by-law of a mutual insurance policy, providing that vacation of the property for longer than 10 days shall suspend the policy, but reoccupation, with notice thereof, shall revive it, "vacant" has the same meaning as "unoccupied"; and when no one lives in the house it is vacant, though the last occupant has left some furniture in it. *Brashears v. Perry County Farmers' Protective Ins. Co.* (Ind.) 98 N. E. 889, 890.

"Vacant" and "unoccupied" are not synonymous terms. If an insurance policy is conditioned to be void in case the premises become "vacant or unoccupied," the existence of either condition will avoid the policy. But if a policy contains the condition that it shall be void in case the premises are left "vacant and unoccupied," then they must be both vacant and unoccupied, in order to defeat it. *Ohio Farmers' Ins. Co. v. Vogel* (Ind.) 73 N. E. 612, 614.

**Factory or mill**

Delays and interruptions incident to the business, such as low water, diminished custom, or derangement of machinery, causing a temporary discontinuance of the use of a mill operated by water power, does not render it "vacant and unoccupied," within the meaning of an insurance policy. *Waukau Milling Co. v. Citizens' Mut. Fire Ins. Co.*, 109 N. W. 937, 939, 130 Wis. 47, 118 Am. St. Rep. 998, 10 Ann. Cas. 795 (citing *Whitney v. Black River Ins. Co.*, 72 N. Y. 117, 28 Am. Rep. 116).

**Store**

Plaintiff occupied defendant's storeroom under a lease expiring September 1, 1910, and agreed not to claim an extension of the lease, but to vacate on that date; but on August 23d plaintiff executed a bill of sale of his business to his wife, and agreed with another to deliver possession of the store on or before September 26th, and assigned the good will of the business, and on September 1st the store was in the actual possession of plaintiff's wife, he being employed as her clerk. Held, that the store was not vacated by plaintiff on September 1st pursuant to his agreement; it being necessary that premises be unoccupied, without a claimant, tenant, or occupier, in order to be "vacated." *Rothbart v. Rothman*, 127 N. Y. Supp. 1095, 143 App. Div. 156.

**VACANCY—VACANT—VACATE (Of Office)**

Vacancy created by death, resignation, or otherwise, see Otherwise.

An office is "vacant" whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein until the happening of some future event. *Mays v. Bassett*, 125 Pac. 609, 610, 17 N. M. 193.

A "vacancy in office," within the meaning of the law, can never exist when an incumbent of the office is lawfully there and in the discharge of his official duty. *Holtan v. Beck*, 125 N. W. 1048, 1052, 20 N. D. 5.

Absence of a member of a jury commission is not equivalent to a "vacancy" in the board sufficient to prevent action. *State v. Bouvy*, 50 South. 849, 851, 124 La. 1054.

The word "vacancy," as applied to an office, has no technical meaning. An existing office without an incumbent is vacant. There is no basis for the distinction that it applies only to an office vacated by death, resignation, or otherwise. *Commonwealth v. McAfee*, 81 Atl. 85, 88, 232 Pa. 36 (citing 8 Words and Phrases, p. 7529).

"The term 'vacancy' means an empty space, a place unfilled, and, when applied to an office, it means the state of being destitute of an incumbent, or a want of the proper officer to officiate in such office. But in neither case has it any reference whatever to any former time or to any former condition of the place or office. If a place or office is empty now, there is a vacancy, regardless of whether it has once been filled or has always been empty. And so of an office." *Richardson v. Young*, 125 S. W. 664, 686, 122 Tenn. 471.

The term "vacancy," as used in a constitutional provision that the filling of all vacancies not otherwise directed or provided by the Constitution shall be made in such manner as the Legislature shall direct, cannot be made to cover the case of an office of which there is an incumbent in possession, and in the discharge of his duties, merely by the device of extending his term. *State ex rel. Cummings v. Trehwitt*, 82 S. W. 480, 482, 113 Tenn. 561.

The office of township tax collector becomes "vacant," under Act July 2, 1895, where a borough is created out of part of its territory, where the incumbent of such office is a resident at the time of that portion of the township which becomes the borough. *Commonwealth ex rel. Boland v. Topper*, 68 Atl. 666, 667, 219 Pa. 221.

"A 'vacancy in office' is defined by section 1521. Ky. St. 1903, as follows: 'The term "vacancy in office," or any equivalent phrase, as used in this article, means such as exists when there is any unexpired part of a term of office without a lawful incumbent

therein, or when the person elected or appointed to an office fails to qualify according to law, or when there has been no election to fill the office at the time appointed by law. It applies whether the vacancy is occasioned by death, resignation, removal from the state, county, or district, or otherwise." *Combs v. Eversole*, 86 S. W. 560, 561, 120 Ky. 346.

Const. art. 7, § 5, providing that the Governor may fill "vacancies" in offices not otherwise provided for by the Constitution or by law, until the same shall be filled by the General Assembly or by the people, applies to vacancies in offices to which incumbents are elected by the people or General Assembly, and does not authorize the filling of vacancies in office filled by appointment of the Governor, with the advice and consent of the Senate, which occur while the Senate is in session. *In re Railroad Commission*, 67 Atl. 802, 803, 28 R. I. 602.

Under Ky. St. §§ 1521, 1522, defining a vacancy in office as existing when there is an unexpired term of office without a lawful incumbent, and providing for appointments to fill vacancies, and sections 3588, 3589, providing for the election of a school board in a city in the odd years, and empowering the board to fill vacancies until the next general election, appointees to fill vacancies in the board holding under appointments made on April and August of an even-numbered year hold office until the next general election in the odd-numbered year. *Hollar v. Cornett*, 138 S. W. 298, 299, 144 Ky. 420.

The word "vacancy" has no technical meaning, but must be understood with reference to the context in which it is found. The provision in the Missouri Constitution declaring that, when any office becomes vacant, the Governor, unless otherwise provided by law, shall appoint a person to fill such vacancy, who shall continue in office until a successor has been elected or appointed and qualified, means that the appointee shall hold the office until the end of the term in which the vacancy occurs, and thereafter until everything required by law to give title to the office to another person has been done. *State ex inf. Hadley ex rel. Wayland v. Herring*, 106 S. W. 984, 988, 208 Mo. 708.

The word "vacancy," as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied, in the manner provided by the Constitution or law, with an incumbent who is legally qualified to exercise the powers and perform the duties which pertain to it; and, conversely, it is vacant, in the eye of the law, whenever it is unoccupied by a legally qualified incumbent, who has a lawful right to continue therein. *State ex rel. Chenoweth v. Acton*, 77 Pac. 299, 300, 31 Mont. 37; *Territory v. Mann*, 120 Pac. 313, 315, 16 N. M. 744.

Acts 1909, c. 103, § 3, amending Acts 1907, c. 435, provides that all vacancies in

the State Board of Elections shall be filled by joint vote of the General Assembly, except vacancies occurring when it is not in session, when, if the office of only one member is vacant, the remaining members of the board shall fill the vacancy, and if they fail to do so it shall be filled by the Secretary of State, Comptroller, and Treasurer, and that if there be more than one vacancy it shall be filled by appointment by such officers. Held, in view of the meaning of "vacant," which meant "without an incumbent," regardless of when or how it became vacant, and of the words "occur" and "happen," which were synonymous and meant "existing" or "to be found," that the Comptroller, Secretary of State, and Treasurer were authorized to fill two or more vacancies in the board of elections during recess of the Legislature, whether such vacancies occurred during recess or while the Legislature was in session. *Richardson v. Young*, 125 S. W. 664, 683, 122 Tenn. 471.

Code, § 1272, providing that vacancies in county offices shall be filled by the supervisors, and that the district court may appoint a suitable person to act as clerk of such court until the vacancy is filled in the manner provided by law, construed as authorizing the supervisors alone to fill a vacancy in the office of clerk of the district court, and as empowering the court to appoint a person to act as clerk until the vacancy is filled by the board, so that the office remains vacant until the board fills it or until an election intervenes, is not in conflict with Const. art. 11, § 6, providing that a person appointed to fill a vacancy in an office shall hold until the next general election, a "vacancy" existing in an office when it has no lawful incumbent, and a vacancy being filled by the lawful appointment or election thereto of some qualified person. *State ex rel. Heffelfinger v. Brown*, 123 N. W. 779, 780, 144 Iowa, 739.

The word "vacancy," as applied to an office, has no technical meaning. An office is not vacant so long as it is supplied in the manner provided by the statute or law with an incumbent legally qualified to exercise the powers and perform the duties pertaining to it, and conversely it is vacant whenever it is unoccupied by a legally qualified incumbent. Under Code 1906, §§ 3435, 3436, providing for general municipal elections on the second Tuesday in December, 1906, and every two years thereafter, for all elective municipal officers, and that the officers-elect shall qualify and enter on the discharge of their duties on the first Monday of January after their election and shall hold office for two years and until their successors are elected and qualified, and providing that in case of vacancy, the unexpired term of which shall not exceed six months, the vacancies shall be filled by appointment, and, if the unexpired term exceeds six months, a general election shall be held to fill such vacancy, the election of one not qualified to hold office

has the same effect as if there had been no election, and caused the old incumbent to hold over until the next general election, and there was no vacancy to be filled. *State v. Hays*, 45 South. 728, 729, 91 Miss. 755 (quoting and adopting definition in *State v. Harrison*, 16 N. E. 384, 113 Ind. 434, 3 Am. St. Rep. 666).

Laws 1903, c. 363, redistricted Maury county, and extinguished a number of civil districts by merging them with other original districts, reducing the number from 25 to 9. The justices of the peace for four districts were left unaffected. The places of the justices for the other five districts could be filled by an election held after 10 days' notice given by the proper authorities; for, notwithstanding these five are new districts, yet the places to be filled in them are "vacancies," within the statute. *State v. Akin*, 79 S. W. 805, 806, 112 Tenn. 603 (citing *Condon v. Maloney*, 65 S. W. 871, 108 Tenn. 82).

#### Conviction of felony

Under the provisions of the charter of San Francisco that an office becomes "vacant" when the occupant is convicted of a felony, there is a vacancy in the office of mayor when a verdict of guilty has been entered on trial of the mayor for a felony, and the board of supervisors has, on the judgment thereon being certified to them, declared the office vacant, though an appeal from the judgment is perfected and a certificate of probable cause granted. *McKannay v. Horton*, 91 Pac. 598, 600, 151 Cal. 711, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146.

#### Creation of office

An office newly created becomes ipso facto vacant in its creation. The word "vacant" as applied to an office means without an incumbent, and an existing office without an incumbent is vacant, whether the office is a new or an old one. *State ex rel. Buckner v. City of Butte*, 109 Pac. 710, 712, 41 Mont. 377.

Where a new judicial district is created out of a part of the counties comprising an old judicial district, and the judge of the old district resides in a county not within the new district, there is a "vacancy" in the office of judge of the new district within Rev. Codes, § 317, subd. 5, declaring that an office shall be deemed vacant when the incumbent ceases to reside in the district in which the duties of his office are to be exercised. *Knight v. Trigg*, 100 Pac. 1060, 1065, 16 Idaho, 256.

Gen. St. 1902, § 3366, provides that every corporation organized thereunder shall have three or more directors, who shall hold office for a year, and who may fill any vacancy in the board for the unexpired portion of the term. Held, that the provision does not apply to newly created directorships, but merely gives the directors authority to appoint

for the remainder of a term which has been partly filled, since while the word "vacancy" may sometimes fitly describe the condition of an office which has never been filled, yet, when read with the other words of the sentence, such meaning cannot properly be given to that word as here used. *Gold Bluff Mining & Lumber Corp. v. Whitlock*, 55 Atl. 175, 177, 75 Conn. 669.

An office is "vacant" when there is no legal incumbent to discharge its duties. It is vacant when it is not filled, as a house would be vacant when it is empty. A new house which has never been occupied is no less vacant than an old one which had been occupied, but whose tenant has removed from it. So a new office, which has never been filled, is vacant when there is no incumbent, as much so as if it had had an incumbent and he had resigned or died. Const. § 129, designating the term of office of circuit judges, provides that the General Assembly shall, at the same time the judicial districts are laid off, direct elections to be held in each district to elect a judge therein. Section 152 declares that, unless provided in the Constitution, vacancies in all elective offices shall be filled by election or appointment; that if the unexpired term will end at the next succeeding annual election, at which city, town, district, or state officers are to be elected, the office shall be filled by appointment for the remainder of the term; if the unexpired term will not end at the next succeeding annual election at which city, town, county, or state officers are to be elected, and if three months intervene before such annual election at which either of such officers are to be elected, the office shall be filled by appointment until such election, and then the vacancy shall be filled for the remainder of the term. By Act March 2, 1906, an additional judge of the circuit court for the Sixteenth circuit was provided for, to be appointed by the Governor, and to hold office until January, 1907, and that at the November, 1906, election there should be a circuit judge elected for that office, who should hold his office after January, 1907, and until his successor was elected and qualified. Held that, on the creation of a new judgeship in such district, a "vacancy" occurred, within Const. § 152, and that the Legislature therefore had no power to provide for an election to fill the office of such judge in November, 1906, at which time there would be no election in such county to elect other state, district, or county officers. *Yates v. McDonald*, 96 S. W. 865, 866, 123 Ky. 596.

Act March 31, 1901, redistricted the state into judicial circuits, and section 1716a created the Thirty-First Circuit. Section 1717 provided that the Governor should appoint a judge therefor, to hold office until the next general election, when his successor should be elected to hold office until the first Monday in January, 1905, after which his succes-

sor elected at the general election, 1904, is to hold office in the same manner as other circuit judges, who by section 1749 are given a tenure of six years. Const. art. 6, § 25, declares that circuit judges shall hold office for six years, but section 32 provides that in case of vacancy it shall be filled as provided by law, and article 5, § 11, provides that, when any office shall become vacant, the Governor, unless otherwise provided by law, shall fill the office by appointment. Held, that the period elapsing between the creation of the new judicial district and the regular election for 1904, at which all the judges in the state were to be elected, was a "vacancy," within the meaning of Const. art. 6, § 32, so that under that section, as well as article 5, § 11, the Legislature had power to provide as it did by Act March 31, 1901, § 1717 (Laws 1901, p. 110), for the filling of such vacancy by election for a term of less than six years, and that act was not in conflict with the constitutional provision that circuit judges shall hold office for six years. *State ex inf. Hadley v. Burkhead*, 85 S. W. 901, 905, 187 Mo. 14.

#### Death of nominee

Primary Election Law (Laws 1903, c. 451) § 25, provides that the statutes in force in relation to the holding of elections, solicitation of voters at the polls, challenging of votes, the manner of conducting elections, and all other kindred subjects shall apply to all primaries in so far as they are consistent with the act. Held, that such section did not incorporate into the primary election law St. 1898, § 34, providing that, if a nominee die after the ballots are printed and before election, the proper chairman of the committee of the political organization of which such candidate was the nominee may make a nomination to fill the vacancy, and that, if the nominee die after the ballots are printed and no nomination shall be made as therein provided, the votes cast for him shall be counted, and, if he receive a plurality, the vacancy shall be filled as in case of vacancies occurring by death after election, such section relating in terms only to a person already nominated by a party, the word "nominee" having such meaning, and the word "vacancy" meaning a place once filled, but not so any longer, especially in view of the fact that section 13 of the primary election law makes provision for the filling of vacancies by providing that vacancies occurring after a primary shall be filled by the party committee of the city, county, or state, as the case may be. *State ex rel. Bancroft v. Frear*, 128 N. W. 1068, 1075, 144 Wis. 79, 140 Am. St. Rep. 992.

#### Death of officer

Under a statute providing for the appointment of a trustee by the Supreme Court in case of a "vacancy in the office," such a vacancy exists on the death of a trustee un-

der a voluntary assignment for the benefit of creditors. *Petition of Ballou*, 11 R. I. 359, 360.

#### Death of officer-elect

The death of a person elected to an office before he qualifies does not create a "vacancy," where the Constitution provides that an incumbent in an office shall hold for his term, and until the election and qualification of a successor. *State ex rel. Hoyt v. Metcalfe*, 88 N. E. 738, 743, 80 Ohio St. 244.

#### Expiration of term

Where the term of a justice of the peace appointed by the Governor in 1910 expired on the first Monday in May, 1912, and the Senate in 1912 failed to confirm an appointment made by the Governor in February of that year, there was, after the first Monday in May, 1912, a "vacancy" within Const. art. 4, § 43, providing that, in the event of a vacancy in the office of a justice, the Governor shall appoint a person to serve as justice for the residue of the term, and the Governor could appoint one as justice for the residue of the next term of two years. *Claude v. Wayson*, 84 Atl. 562, 566, 118 Md. 477.

"Vacancy," as applied to an office, has no technical meaning, and an office may be regarded as vacant or not according to whether it is occupied by one who has a legal right to hold it, and to exercise the powers and perform the duties pertaining to it. "A 'vacant office' is one without an incumbent. Vacancy in office is one thing and 'term' another. An office may be vacant and filled many times during a term of four years, but it cannot become vacant at the end of a term where the incumbent is authorized to hold over, for the instant the successor is duly appointed and has qualified he becomes entitled to the office, and there has been no hiatus at all. So long, therefore, as an office is supplied with an incumbent in the manner provided by the Constitution or law who is legally qualified to exercise the powers and perform the duties which appertain to it, the office is not vacant." Acts 1902-04, p. 745, c. 482, § 106 (Va. Code 1904, p. 62), which provides that, when a vacancy occurs in any county office, the same shall be filled by the court or judge thereof, has reference alone to vacancies occurring during a term of an office by death, resignation, removal, and the like, and does not contemplate the filling of an office for the ensuing term on the expiration of a preceding term, where the incumbent holds the office for a fixed term and until his successor has qualified. *Chaddock v. Burke*, 49 S. E. 976, 977, 103 Va. 694.

#### Failure to elect

Under Primary Election Law (Laws 1910, c. 741) § 160k, providing that any vacancy in respect to any office shall be filled as the rules and regulations of the governing bodies for the respective parties shall provide, if two candidates for a county office have an

equal number of votes at a primary election, a "vacancy" exists which should be filled by the state central committee of the party for that county. *Usilton v. Bramble*, 82 Atl. 661, 662, 117 Md. 10, Ann. Cas. 1913E, 743.

Const. Tex. art. 16, § 17, provides that all officers within the state shall continue to perform the duties of their offices until their successors shall be duly qualified, and Rev. St. Tex. 1895, art. 387, after providing for the election of municipal officers, including mayor, aldermen, and secretary, declares that they shall be elected as provided and hold office for two years, "and until the election and qualification of their successors." Held that a municipal corporation, having failed to elect municipal officers, did not create "vacancies" within Acts 25th Leg. Tex. c. 114, providing for dissolution of municipal corporations for nonuser of corporate powers, where the offices had been vacant for a period of 10 years or more. *Ringling v. City of Hempstead*, 193 Fed. 596, 602, 113 C. C. A. 464.

Under Ky. St. § 1521 (Russell's St. § 4116), declaring a "vacancy in office" to exist when there has been no election, and when it is occasioned by death, resignation, removal from the county or district, or otherwise, and section 4436 (section 5712), authorizing the county superintendent to appoint a school trustee to fill a vacancy which is caused from failure of a trustee-elect to qualify according to law, or from any other cause, there is a vacancy, authorizing appointment of a trustee, where, an election being called and held as required by law, the result is not ascertained by reason of an untoward interference. *Dixon v. Caudill*, 136 S. W. 1043, 1045, 143 Ky. 623.

Act Feb. 8, 1901, created the county court of Coffee county, and section 1 provided that the judge should be elected by the Senate for a term of six years and until his successor was elected and qualified, which should be done in the same manner at the end of six years. Section 28 authorized the Governor to appoint a successor in case of vacancy. The act was amended by Act Sept. 29, 1903, section 18 of which provides that the judge should be elected by the Senate for six years, and that the then incumbent's term should not expire until 1907 and until his successor is elected, and authorized the Governor to fill any vacancy by appointment, his appointee to hold until the election of his successor as herein provided by the voters of the county. The first judge elected by the Senate resigned October 3, 1903, and the next judge elected resigned April 6, 1905, when relator was elected to succeed him, and, there being no other election by the Senate or by the electors as provided, on January 4, 1909, the Governor appointed defendant to the office. Held that, relator's term having expired, and the Senate having failed to elect a judge as provided, there was a "vacancy" which

the Governor was authorized to fill by appointment. *Ham v. State ex rel. Blackmon*, 49 South. 1032, 1033, 162 Ala. 117.

Under Pol. Code, § 996, providing that "an office becomes 'vacant' on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent \* \* \*"—one who has been elected to an office, but who fails to qualify by filing the bond, is in the sense of the statute the incumbent, though he never was in possession of nor performed any duty in connection with the office. Under Pol. Code, § 996, providing that "an office becomes vacant on the happening of either of the following events before the expiration of the term: (1) The death of the incumbent. \* \* \* (10) The decision by a competent tribunal declaring void his election or appointment"—an office became "vacant" on the decision of the court declaring void an election on the ground that the person elected, but who had not taken possession of the office, and who failed to qualify and take his official oath, was ineligible to take the office at the time of the election, in proceedings to contest the election under Code Civ. Proc. § 1111, providing that the right of any person declared elected may be contested when he was not at the time of the election eligible to the office, and section 1122 providing that, after hearing the proofs and allegations of the parties, the court must pronounce judgment either confirming or annulling and setting aside such election. *Campbell v. Board of Supervisors of Santa Clara County*, 93 Pac. 1061, 1063, 7 Cal. App. 155.

The general law concerning cities, enacted in 1867, by section 12 provides that, if two or more persons have an equal and highest number of votes for the same office, the common council shall call an election to fill the office, and by section 16 provides that all "vacancies" in the office of councilman, etc., shall be filled by special election; but such provision was changed by Act Feb. 26, 1891, § 1, providing that "vacancies" in the office of councilmen shall be filled by appointment by the common council. The general act concerning elections, approved April 21, 1881, provides that a special election shall be held whenever two or more persons receive the highest and an equal number of votes at any election. Two days before the latter statute was approved, an act concerning elections became a law, providing that, if two or more persons have the highest and an equal number of votes for a city office, the city board shall declare that no person is elected, and shall certify such fact to the city clerk, who shall certify it to the tribunal whose duty it is to "supply vacancies in office or to issue a writ of election." Section 43 of the act concerning cities and towns provides that all city elections shall be held in conformity with the general election laws. Const. art. 15, § 3, declares that, whenever it

is provided in any law that any officer shall hold his office for any given term, it shall be construed to mean that he shall hold his office until his successor is elected or qualified. Act March 6, 1905, provides that, in case of a vacancy in the office of councilman through death, resignation, or other cause, the council shall fill such vacancy by a special meeting. Held, that the latter statute, in making provision for the filling of vacancies, did not show an intent to treat a failure to elect owing to a tie vote as a "vacancy," but in such case a special election should be held. *State ex rel. Jett v. Ives*, 78 N. E. 225, 226, 167 Ind. 13.

#### Failure to qualify

T. was elected sheriff in November, 1906, for the term of two years, commencing with the second Tuesday of January, 1907, and was re-elected for a two-year term beginning on the second Tuesday of January, 1909, but died November 23, 1908, before qualifying for the second term, and on December 29, 1908, the board of county commissioners appointed respondent sheriff to fill the vacancy "until the next general election," and he duly qualified and entered into the office on January 2, 1909; but on January 12, 1909, before the commencement of the second term, the board declared the office vacant and appointed relator to fill such vacancy "until the next general election." Const. art. 12, § 1, provides that an officer shall hold until his successor is duly qualified. Article 14, § 9, provides that, in case of vacancy in a county office, the county commissioners shall fill it by appointment, and the appointee shall hold such office until the next general election, or until the vacancy be filled according to law. Article 12, § 10, provides that an office is vacant if the person elected or appointed refuse or neglect to qualify within the time prescribed by law, and by section 11 the term of any officer elected to fill a vacancy terminates at the expiration of the term during which the vacancy occurred. Mills' Ann. St. § 848, requires a sheriff to be elected for a term of two years, and to give bond before entering upon his official duties. Section 808 empowers the county commissioners, in case of vacancy, where the unexpired term exceeds one year, to fill such vacancy by appointment until an election can be held as provided by law. Section 924 makes every county office vacant upon the death of the incumbent, or his refusal or neglect to qualify. Section 1586 permits officers appointed to fill vacancies to immediately qualify, but provides that, if appointed, they shall hold only until their successors are elected or qualified. Section 1589 requires vacancies in county offices to be filled by appointment by the county commissioners until the next general election, when they shall be filled by election, subject to the provisions of Const. art. 6, § 29. Held, that the term "vacancy" applied to the term, and not to the incumbent, and,

under Const. art. 12, § 10, T.'s neglect to qualify made a vacancy in the office, and relator was entitled to the office under his appointment of January 12th; respondent being entitled, under his appointment, to serve until the second term began. *People ex rel. Callaway v. De Guelle*, 105 Pac. 1110, 1111, 47 Colo. 13.

#### As applied to term

A "vacancy" at common law means a vacancy in office, and not in the term. *State ex inf. Hadley v. Corcoran*, 103 S. W. 1044, 1049, 206 Mo. 1, 12 Ann. Cas. 565.

A "vacancy" in a public office "means *ex vi termini*—an unexpired term." *Rodwell v. Rowland*, 50 S. E. 319, 329, 137 N. C. 617 (dissenting opinion of Brown, J.).

The phrase "unexpired term" is not synonymous with "vacancy." The former is the remainder of a period prescribed by law after a portion of such time has passed. A vacancy exists where there is no person lawfully authorized to assume and exercise at present the duties of the office. *State ex rel. Hoyt v. Metcalfe*, 88 N. E. 738, 743, 80 Ohio St. 244.

" \* \* \* The word 'vacancy,' when used in written Constitutions with reference to a public officer, sometimes signifies an 'unexpired term'; but that is not necessarily so. It often relates merely to the office without reference to the term. \* \* \* Under Sess. Acts 1879, p. 28, embodied in Rev. St. 1899, §§ 6539, 6541 (Ann. St. 1906, p. 3272), providing for the appointment of a jury commissioner in cities having a certain population, and declaring that the appointee shall hold office for four years after the 1st day of May in the year of his appointment, and in case of any vacancy during the term "in like manner as hereinbefore provided," when considered in connection with Act March 3, 1857 (Laws 1856-57 p. 661), as amended by Act Nov. 14, 1857 (Laws 1857, p. 486), relating to jury commissioners and the general course of legislation on the subject of appointment to fill vacancies in offices, an appointee to fill a vacancy in the office of jury commissioner caused by the death of the incumbent holds office for four years from May 1st of the year of his appointment, though the appointment purports to be for a less term. *State ex inf. Hadley v. Corcoran*, 103 S. W. 1044, 1048, 206 Mo. 1, 12 Ann. Cas. 565.

#### VACANT AND UNOCCUPIED

See Vacancy—Vacant—Vacate.

#### VACANT LAND

The granting of the certificate to be located upon "vacant public land" contemplated vacant public land subject to location; the phrase being generally used interchangeably with others to indicate lands subject to location or settlement. *Roberts v. Terrell*, 110 S. W. 733, 735, 101 Tex. 577.

Where the owners of certain vacant land constructed buildings thereon without first obtaining approval of the plans, in disregard of Building Code of the City of New York, § 4, and, pending an application, after the completion of the buildings, for a permit to erect the same, under resolution of the board of estimate and apportionment under Greater New York Charter, § 990, the land was condemned, the land was vacant within section 990 of the charter, and title vested immediately in the city. *Coady v. Thatcher*, 131 N. Y. Supp. 178, 179, 146 App. Div. 585.

The 80 acres of land in suit and an adjoining 40 acres were owned by the same person and possessed as one tract. The small clearing and farm buildings were on the 40 acres, but the entire 120 acres were surveyed, stakes set at the corners, and the boundaries blazed on the trees. The owner went over the land occasionally to guard against trespass and fires, sold and gave away some timber, and permitted persons to enter for the purpose of removing the same. He occupied the house while engaged in growing and harvesting crops and removing timber, leaving furniture in the house and hay in the barn when away. Held, that the land in suit was not "vacant and unoccupied" within St. 1898, § 1187, providing a limitation of three years for recovery of such land, as against a tax deed. *Flanders v. Washburn Land Co.*, 121 N. W. 250, 251, 139 Wis. 390.

## VACATION

### Of court

Judge in vacation as court, see Court (Of Justice).

"The very meaning of the term 'vacation,' as applied to a court, imports an absence of power to render judgment or grant interlocutory judicial orders. It means 'a vacating, a making void; intermission of a stated employment.'" *Accoult v. G. A. Stowers Furniture Co.* (Tex.) 83 S. W. 1104, 1105.

Rev. St. 1879, c. 59, art. 4, § 3494, provides that in certain actions, if plaintiff shall allege in his petition or file affidavit that any of defendants are nonresidents the court, or in vacation the clerk, shall make an order for publication. Held, that the term "vacation" was not used in its common-law sense as the time elapsing between end of one term and beginning of another, but included an adjournment from March 20, 1884, to June 16th following, both under Act March 15, 1883, p. 111, declaring that the words "in vacation" shall include any adjournment for more than one day, and independent thereof. *Himmelberger-Harrison Lumber Co. v. Keener*, 117 S. W. 42, 45, 217 Mo. 522.

Sayles' Ann. Civ. St. 1897, art. 2989, provides that judges of the district courts may either in term time or vacation grant writs of injunction returnable to their courts in specified cases, and article 3007 provides that

motions to dissolve injunctions without determining the merits may be heard after answer filed in vacation as well as in term time on at least 10 days' notice to the opposite party, or his attorney. Held, that the word "vacation," as so used, meant the vacation of the district court of the county wherein the case was pending, in which an injunction was awarded, and hence, there being no statute fixing the place for hearing motions to dissolve, a judge granting an injunction in vacation may hear a motion to dissolve it in a county other than that in which the suit is pending. *Wier v. Hill* (Tex.) 125 S. W. 366, 368.

Rev. St. 1899, § 809, provides that the court may, on granting an appeal, fix the amount of the appeal bond and allow appellant time in vacation not exceeding 10 days to file the same, subject to the approval of the clerk, and such appeal bond approved by the court and filed within the time specified shall stay the execution thereafter. Section 4160 provides that, whenever any act is authorized to be done by a clerk of any court in vacation, the words "in vacation" shall be held to include an adjournment of court for more than one day. Held that, where the 10 days which may be allowed after the term at which an appeal is allowed carries over into the next regular term, it is in the power of the court, during the subsequent term, to approve the appeal bond. *State ex rel. Bamberge v. Graves*, 126 S. W. 749, 751, 147 Mo. App. 324.

Rev. St. 1899, § 4160, provides that, whenever any act is authorized to be done in vacation, the words "in vacation" shall be construed to include any adjournment of the court for more than one day. This section did not limit the power of the judge in admitting a person to bail and taking bond under section 2543, providing that, when a defendant is in custody or under arrest for a bailable offense, the judge of the court in which the indictment or information is pending may admit him to bail and take his recognizance, so that a judge of the court in which an indictment was pending had power to admit defendant to bail and take his recognizance in chambers after the court had adjourned on that day until the day following. *State v. Woodson*, 78 S. W. 603, 605, 179 Mo. 408.

### Of officer or employé

Under Laws 1897, pp. 252-254, c. 378, §§ 724-728, the fire commissioner of the city of New York has the general management of the fire department, with power to remove the officers and employes on charges mentioned. Held, that he had no power to relieve the chief of the fire department from his duties or remove him from his position because he refused to continue a vacation granted to him on his own request, since a "vacation" is a personal privilege that can be

waived. *In re Croker*, 67 N. E. 307, 309, 175 N. Y. 158.

#### Of street

The word "vacate," in a statute relating to vacation of streets, could be applicable only to a highway already existing. *Erie R. Co. v. City of Passaic*, 74 Atl. 338, 79 N. J. Law, 19.

A street is "vacated," within St. Okl. 1893, § 584, relating to the vacating of streets, when its character as such is destroyed, and it is thereafter held in private ownership, the same as the adjacent lots to which it has accreted. *Atchison, T. & S. F. Ry. Co. v. City of Shawnee*, 183 Fed. 85, 87, 105 C. C. A. 377.

An ordinance of a first-class city, authorizing a railway company to exclusively use one-half of a street with its tracks by depressing them by making a cut, is not a "vacation" ordinance within Rem. & Bal. Code, § 7507, authorizing such cities to vacate streets; it being necessary that such power be exercised pursuant to sections 7840-7843. *State ex rel. B. Schade Brewing Co. v. Superior Court of Spokane County*, 113 Pac. 576, 581, 62 Wash. 96.

## VACCINATION

See Successful Vaccination.

The term "vaccination," in the act of June 18, 1895 (P. L. 207, § 12), prohibiting the attendance of a child at school without a certificate of successful vaccination, or of its having had the smallpox, means inoculation with the virus of cowpox for the purpose of communicating that disease as a prophylactic against smallpox, and it indicates an operation, by inserting the virus under the skin, and the test of its success is the appearance of the symptoms of the disease, including those manifesting themselves on the skin, and administering the virus through the mouth, though producing on the body practically the same symptoms, except exterior and local inflammation, is insufficient. *Lee v. Marsh*, 79 Atl. 564, 566, 230 Pa. 351.

At present the preponderance of opinion is that "vaccination" is a highly useful ameliorative, if not always a preventive of smallpox. A statute providing for the exclusion of unvaccinated children from the public schools does not involve, in its application, trespass on the reserved rights of the individual beyond the reach of the police power from the fact that vaccination is the infliction of a disease on the subject. *Stull v. Reber*, 64 Atl. 419, 421, 215 Pa. 156, 7 Ann. Cas. 415.

## VADIUM

### VADIUM VIVUM

A "vivum vadium" is a living pledge resembling the estate held by statute merchant

or statute staple. *Bradburn v. Roberts*, 61 S. E. 617, 619, 148 N. C. 214 (citing 2 Blk. 157-160).

## VAGINA

The "vagina" of a female is a canal leading to the womb, and is located back of the urethra, which is a duct leading to and emptying the bladder. The same lips are around the vagina and urethra, and the distance from the edge of such lips to the neck of the womb is from three to four inches. *Clark v. People*, 79 N. E. 941, 943, 224 Ill. 554.

## VAGRANCY—VAGRANT

See Power to Define Vagrancy.

As misdemeanor, see Misdemeanor.

See, also, Loiter.

A "vagrant" has been defined as "one who strolls from place to place; one who has no settled habitation; an idle wanderer; a sturdy beggar; an incorrigible rogue; a vagabond." *Ex parte Branch*, 137 S. W. 886, 887, 234 Mo. 466.

Gen. Laws 31st Leg. c. 59, § 1, par. "d," defines "vagrants" as all able-bodied persons who habitually loaf, loiter, or idle for the "larger portion of their time." Held, that the term "larger portion of their time," when construed with the remainder of the provision, was not so vague as to render the law invalid. *Ex parte Strittmatter*, 124 S. W. 906, 907, 58 Tex. Cr. R. 156, 137 Am. St. Rep. 937, 21 Ann. Cas. 477.

Rem. & Bal. Code, § 2688, which defines one who practices "fortune telling" to be a "vagrant," is constitutional, and extends to the vocation of professing to tell future events in one's life by casting horoscopes, etc., though the principles of astrology be followed. *State v. Neitzel*, 125 Pac. 939, 69 Wash. 567, 43 L. R. A. (N. S.) 203, Ann. Cas. 1914A, 890.

Pen. Code, § 647, subd. 4, defining "vagrants" to include confidence operators having no visible means of support when found loitering around certain public places, was not unconstitutional as abridging the privileges or immunities of citizens. *Ex parte Hayden*, 106 Pac. 893, 894, 12 Cal. App. 145.

A complaint under an ordinance denouncing as "vagrant" all persons living by gambling, which charges that defendant is a vagrant, being without visible means of support, who gambles at the game of draw poker for a living, is sufficient. *City of Shreveport v. Bowen*, 40 South. 859, 116 La. 522.

An indictment alleging that defendant, being able to work and having no property, wandered about in idleness sufficiently charges vagrancy, within a statute providing that any person wandering about in idleness, who is able to work and has no property to sup-



port him, is a "vagrant." *Vandiver v. State*, 40 South. 88, 145 Ala. 682.

Where, upon the trial of one for the offense of "vagrancy," it was charged in one count of the accusation that the defendant is a "professional gambler living in idleness," the court did not err in refusing a request to charge the following: "Under the law of vagrancy, the gist of the offense is the failure or the refusal of the offender to work, when work is necessary to support himself." *Simmons v. State*, 55 S. E. 479, 126 Ga. 632.

The fact that one may work one or two days in a week, and then remain idle the remainder of the week, does not constitute him a "vagrant," though he might be able to work and have no property to support himself, if his earnings for the proportion of time he might labor were sufficient to furnish him an honest livelihood. *Harris v. State*, 60 S. E. 207, 3 Ga. App. 447.

One who wanders and strolls about in idleness, with no lawful purpose or object whatever, an habitual loafer, idler, and vagabond, who is able to work, has no property, no reasonably continuous employment, and no regular income, is a "vagrant," within the meaning of Pen. Code 1895, § 453, par. 3; and this is true, notwithstanding such person may have a fixed place of abode, where he usually lodges. Especially would such person be a vagrant when his loafing and loitering was about pool rooms, bar rooms, dives, lewd houses, and other places of like character. *Carter v. State*, 55 S. E. 477, 126 Ga. 570, 571.

Evidence which establishes that one is an habitual loafer and loiterer, both morning and evening, "in the tenderloin district" of a city, who is able to work, and has no property, no reasonably continuous employment, and no regular income, is sufficient to support a conviction for the offense of "vagrancy," under the provisions of Pen. Code 1895, § 453, par. 3. *Darby v. State*, 56 S. E. 91, 127 Ga. 46 (citing *Carter v. State*, 126 Ga. 570, 55 S. E. 477).

A man clothed as a woman and having on a wig and slippers, who stands in the lobby of a theater with his face painted, representing the "White Slave," is not a "vagrant" within Code Cr. Proc. § 887, subd. 7, providing that a person is a vagrant who, having his face painted, discolored, covered, or concealed, or being otherwise disguised, appears in a road or public highway, or in a field, lot, wood, or inclosure. *People v. Luechini*, 136 N. Y. Supp. 319, 75 Misc. Rep. 614.

The words "visible or lawful business" in Pen. Code, § 647, subd. 6, defining as a vagrant "Every person who wanders about the streets at late or unusual hours of the night without any visible or lawful business," are used in the sense of good and sufficient reason, and refer to the reason why he is

roaming the street rather than to any business or avocation in life from which support is derived. *Ex parte McLaughlin*, 116 Pac. 684, 685, 16 Cal. App. 270.

Act March 17, 1909 (Acts 31st Leg. c. 59), punishing vagrants and declaring that certain persons, including prostitutes, shall be deemed vagrants, applies only to those persons who meet the description at the time that a charge is made under it, and one who has abandoned her vocation as a prostitute and has entered a place set apart for her reformation is not a "vagrant." *City of San Antonio v. Salvation Army (Tex.)* 127 S. W. 860, 863.

Code 1907, § 7843, defines a "vagrant" to consist of "any able-bodied person who shall abandon his wife and child, or either of them, without just cause, leaving them without sufficient means of subsistence or in danger of becoming a public charge." Held, that such act does not make it a crime to abandon a wife and child on all occasions, nor where accused married his wife after the institution of bastardy proceedings against him, and he was fraudulently induced to believe that he was the father of the child, which he subsequently discovered was not so. *Carnley v. State*, 50 South. 362, 363, 162 Ala. 94.

Defendant, for the purpose of rebutting the evidence of his vagrancy, which was claimed to have existed to the knowledge of the officer arresting him, so as to justify the arrest without a warrant, having testified that he had a lease, covering several months prior and up to the time of the arrest, of a certain tenement, which he had sublet to prostitutes, and that he had in the meantime purchased a mining location, on which he intended to go as soon as the lease expired, may, for the purpose of showing that he had no lawful business, which fact, in connection with his wandering about the streets at late and unusual hours of the night, would constitute him a "vagrant" under Pen. Code, § 647, subd. 6, be required on cross-examination to testify that during the running of his lease he had no other business except gambling. *People v. Craig*, 91 Pac. 997-999, 152 Cal. 42.

Laws 1905, p. 109, classifying as "vagrants" all persons able to work, having no property to support them, and who have no visible or known means of a fair, honest, and reputable livelihood, enlarges somewhat the meaning of the term "vagrant." Any work or labor which is sufficient to furnish the means of livelihood to the laborer if he has no family and to prevent him from wandering about in idleness would be "reasonably continuous employment" to constitute visible or known means of a fair, honest, and reputable livelihood. The public is not concerned in the length of labor or the proceeds thereof. Its only object is to

protect itself from the idler and the results of idleness. *Lewis v. State*, 59 S. E. 933, 934, 3 Ga. App. 322.

Gen. Acts 1903, p. 244, making a man, who quits his house and leaves his wife and children without means of subsistence, guilty of "vagrancy," does not apply where the accused left his wife and children before the passage of the act, though he remained away from them after that time. To constitute the offense there must be an actual desertion, followed by a failure or refusal to provide means of subsistence for the wife and children. Both of these elements must concur, and, after the act of desertion is completed by the quitting of the house and leaving the wife and children without subsistence, there cannot be a subsequent act of quitting, so as to render the quitting of the house and the failure to provide concurrent acts. *Crawley v. State*, 41 South. 175, 176, 146 Ala. 145 (citing *Gay v. State*, 31 S. E. 569, 105 Ga. 599, 70 Am. St. Rep. 68).

A "vagrant" was originally understood to be an idle person, without visible means of support, who, though able to work for his maintenance, refused to do so, but the idea later included one whose business status or course of conduct was vicious or habitually unlawful; so the offense of being a vagrant, where it depends upon an habitual course of misconduct, is a separate offense from each specific act of misconduct, and hence Vagrancy Act (Acts 31st Leg. c. 59) § 1, subd. "k," declaring the keeper of a house of gambling and gaming to be a vagrant, defines a different offense from that defined by Pen. Code 1895, art. 388b, making it a felony for any person to keep any premises, building, room, or place for the purpose of being used as a place to gamble with cards; and hence the vagrancy act does not repeal the provision of the Penal Code. *Parshall v. State*, 138 S. W. 759, 766, 62 Tex. Cr. R. 177.

Rev. St. 1899, § 2228, declares that every able-bodied married man, who shall neglect or refuse to support his family, shall be deemed a "vagrant," and section 2921 declares that when the husband shall be guilty of such conduct as to constitute him a vagrant, within the meaning of the law respecting vagrants, the wife may be divorced. Held that, where a physician of good habits endeavored to establish a practice, maintained an office where he waited for patients and attended to such calls as he had, contributing his entire income from his practice to the support of his wife and himself, he was not a "vagrant," within the law entitling her to a divorce, though he did not succeed in earning enough to support both of them, and she was compelled to contribute to their support from her separate means. *Gallimore v. Gallimore*, 91 S. W. 406, 408, 115 Mo. App. 179.

## VALID

See Invalid.

## VALID CONSIDERATION

The abandonment of an unlawful enterprise, though it would have been profitable, is not a "valid consideration." *Phelps v. Manecke*, 96 S. W. 221, 222, 119 Mo. App. 139.

## VALID DEFENSE

The term "valid defense" in Code Civ. Proc. § 636, authorizing the court to direct that a foreclosure begun by advertisement shall be had in the circuit court on the mortgagor showing a valid defense, includes any defense which may reduce or extinguish the indebtedness secured, but does not include a defense unavailable to the mortgagor at the time of the order transferring the foreclosure to the circuit court, and a mortgagor may not plead limitations in defense to a foreclosure begun by advertisement and subsequently transferred to the circuit court. *Kaumann v. Barton*, 128 N. W. 329, 330, 26 S. D. 371.

## VALID DELIVERY

A "valid delivery" of a deed is accomplished when the conduct and acts of a grantor manifest a present intent to dispose of the title conveyed by the deed. There is no particular form necessary, but any act or thing which manifests such an intent is sufficient to establish it. It is always a question of fact, and must be determined by the circumstances surrounding each particular transaction. In an action to establish a lost deed, evidence that the grantor obtained plaintiff's daughter to read it to her, and then took the deed from the daughter's hand, and requested plaintiff to hold out her hand, when the grantor placed the deed in plaintiff's hand, and said: "This house and lot is yours, and everything there is on the place. Now go and put it in the bureau drawer"—which plaintiff did, was sufficient to show a valid delivery. *Kenniff v. Caulfield*, 73 Pac. 803, 804, 140 Cal. 34.

## VALID JUDGMENT

The use of the expression "valid judgment," when it is given the effect of an estoppel, does not merely mean a judgment valid in form, but a legal and valid judgment lawfully obtained under pleadings and evidence that would justify its rendition. *Sawyer v. First Nat. Bank of Ilco*, 93 S. W. 151, 157, 41 Tex. Civ. App. 486.

## VALID LIEN

Under Ky. St. §§ 2316, 2317, giving the landlord a lien for rent on the personal property of the tenant superior to all but "valid liens" created before the property was carried on the premises, his lien is superior to the mere claim for the purchase money of the one who sold the articles to the tenant;

valid liens meaning such as are valid under section 496, providing no chattel mortgage shall be valid against creditors till acknowledged and lodged for record. *Kloak Bros. & Co. v. Joseph*, 150 S. W. 651, 150 Ky. 508.

### VALID TENDER

In order to constitute a "valid tender," it must be an unconditional offer of the amount tendered. An offer to pay a certain amount of money in satisfaction of the whole debt is not sufficient. A tender, in order to be available, must be without qualification or condition and must not be coupled with any condition which, if accepted, would qualify the right of the party to whom the amount is tendered in litigation of his claim for a larger sum, so a tender "in full settlement and discharge of all demands" which plaintiff had against the person making the tender was insufficient. *Mann v. Roberts*, 105 N. W. 785, 786, 126 Wis. 142.

### VALID VOTING MARK

Election Law, § 368, rule 9, providing that a "void ballot" is a ballot upon which there shall be found any mark other than a single X mark made for the purpose of voting, and section 358, rule 7, providing that one straight line crossing another straight line at any angle within a party circle or within the voting spaces shall be deemed a "valid voting mark," should be liberally construed, so that a tremulous line drawn by an infirm elector, or an irregular or curved line drawn by an elector with poor eyesight, or with muscles untrained to the use of a pencil, or any single line but once crossing another single line in such a way as to substantially comply with the statute, though the line has been retraced and the pencil has not been kept exactly on the line at parts removed from the point where the lines cross, should not be held void. *Fallon v. Dwyer*, 90 N. E. 942, 943, 197 N. Y. 336.

### VALIDITY

See Obtain Validity.

### VALLEY

The common understanding of the word "valley," as applied to a mountainous country, is as meaning lowlands in contradistinction to mountain slopes and ridges. *Whaley v. Northern Pac. Ry. Co.*, 167 Fed. 664, 669.

### VALUABLE

Where plaintiff agreed to give defendant certain information with reference to the existence of a certain vein or lead of ore within the boundaries of a certain claim, and defendant agreed to pay plaintiff 10 per cent. of the selling price of said claim when a sale should be made, if, on investigation by defendant, in his judgment the information should be "satisfactory," proof that the vein

carried "value," and hence that the information was "valuable," would not establish that it was "satisfactory" to defendant, within the meaning of the contract as alleged. There is a distinction in the meaning of the terms "valuable" and "satisfactory"; "valuable" means capable of being valued or estimated; "satisfactory" means affording satisfaction, satisfying; that fully satisfies or contents; and a thing may possess value and be unsatisfactory, or be satisfactory and yet have no value. *McCrimmon v. Murray*, 117 Pac. 73, 75, 43 Mont. 457.

### VALUABLE CONSIDERATION

See Purchaser for a Valuable Consideration; Valid Consideration; Value.

Other good and valuable consideration, see Other.

"A 'valuable consideration' is some legal right acquired by the promisor in consideration of his promise, or forborne by the promisee in consideration of such promise." *Darcey v. Darcey*, 71 Atl. 595, 597, 29 R. I. 384, 23 L. R. A. (N. S.) 886.

A "valuable consideration" is a class of consideration upon which a promise may be founded, and entitles the promisee to enforce his claim against an unwilling promisor. *Fischer v. Union Trust Co.*, 101 N. W. 852, 853, 138 Mich. 612, 68 L. R. A. 987, 110 Am. St. Rep. 329.

"Valuable consideration," necessary to give a recorded deed priority over a prior unrecorded deed, means an approximately adequate consideration. *Riley v. Robinson*, 112 N. Y. Supp. 753, 754, 128 App. Div. 178.

A "valuable consideration" is the relinquishment by the promisee of some right which he may rightfully exercise or enforce, or the incurring of some risk or trouble at the instance of the promisor. *John v. Elkins*, 59 S. E. 961, 964, 63 W. Va. 158 (quoting and adopting definition in *County Court of Barbour County v. Hall*, 41 S. E. 119, 51 W. Va. 269).

One dollar is not such "valuable consideration" for a deed as gives a subsequent purchaser priority over a senior deed through priority of record. *Dunn v. Dunn*, 136 N. Y. Supp. 282, 284, 151 App. Div. 800.

A "valuable consideration" is money or its equivalent—anything capable of being measured by a money standard. An inadequate "valuable consideration" in itself is not sufficient grounds to warrant the court in decreeing a reconveyance. *Dickey v. Norris*, 65 Atl. 541, 216 Pa. 184.

A "valuable consideration" is defined to be money or something that is worth money. 2 Washb. Real Prop. (4th Ed.) p. 394; 1 Chitty, Con. (11th Am. Ed.) 27. It is not necessary that the consideration should be adequate in point of value in order to constitute the grantee a bona fide purchaser.

Although small, or even nominal, in the absence of fraud, it is enough to support a contract entered into upon the faith of it. *Strong v. Whybark*, 102 S. W. 968, 969, 204 Mo. 341, 12 L. R. A. (N. S.) 240, 120 Am. St. Rep. 710 (citing *Forbs v. St. Louis*, 1 M. & S. R. Co., 82 S. W. 562, 107 Mo. App. 674; *Marks v. Bank of Missouri*, 8 Mo. 316; *Ridenbaugh v. Young*, 46 S. W. 959, 145 Mo. 280; *Blaine v. Publishers, George Knapp & Co.*, 41 S. W. 787, 140 Mo. 251; *Anderson v. Gaines*, 57 S. W. 726, 156 Mo. 664; *Green v. Higham*, 61 S. W. 798, 161 Mo. 333).

A "valuable consideration" is such as money or the like, and the adequacy or inadequacy of the amount, or its disproportion to the actual value of the property, does not affect the question of the kind of consideration. The adequacy of the consideration is an element of the good faith of the transaction, and has no bearing upon whether the consideration is a valuable or a good one. *Lindley v. Blumberg*, 93 Pac. 894, 897, 7 Cal. App. 140 (citing *Frey v. Clifford*, 44 Cal. 342; *Clark v. Troy*, 20 Cal. 224).

A "valuable consideration" may consist of anything of any value, and it may be the assumption of an obligation—the mere altering of the condition of the party to be affected. *Roush v. Vanceburg*, S. L. T. & M. Turnpike Co., 85 S. W. 735, 736, 120 Ky. 165.

"A consideration emanating from some injury or inconvenience to the one party, or from some benefit to the other, is a 'valuable consideration.'" *Ward, Murray & Co. v. Young*, 89 S. W. 456, 457, 40 Tex. Civ. App. 294 (quoting and adopting the definition in *Conover v. Stillwell*, 34 N. J. Law, 54).

"A 'valuable consideration,' in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *Kirby-Carpenter Co. v. Burnett*, 144 Fed. 635, 636, 75 C. C. A. 437.

A "valuable consideration" is something more than mere love and affection or gratitude. "A 'valuable consideration' is necessary to support any contract, and the rule makes no exception as to the character of the consideration respecting negotiable notes when the consideration is open to inquiry." *Sullivan v. Sullivan*, 92 S. W. 966, 967, 122 Ky. 707, 7 L. R. A. (N. S.) 156, 13 Ann. Cas. 163 (quoting and adopting definition in 1 Daniel, Neg. Inst. § 179).

A "valuable consideration" may consist in some right, interest, or benefit to one party, or some loss, detriment, or responsibility resulting actually or potentially to the other, and if there is any advantage to one of the parties the law will not weigh the adequacy of consideration. *Melroy v. Kemmerer*, 67 Atl. 699, 700, 218 Pa. 381, 11 L. R. A. (N. S.) 1018, 120 Am. St. Rep. 885 (citing *Bouv. Law*

*Dict.; Fowler v. Smith*, 25 Atl. 744, 153 Pa. 639).

"As applied to chattels, 'valuable consideration' means something more than the discharge of a debt that revives when the consideration for its discharge fails. It means the parting with some value that cannot be actually restored by operation of law, leaving the purchaser in a changed condition, so that he may lose something beside his bargain." *Albert v. Hoffman*, 117 N. Y. Supp. 1043, 1044, 64 Misc. Rep. 87 (quoting and adopting the definition in *Hurd v. Bickford*, 27 Atl. 107, 85 Me. 217, 220, 35 Am. St. Rep. 353).

"A 'valuable consideration' is some legal right acquired by the promisor in consideration of his promise or forbore by the promisee in consideration of such promise. A common form of stating the same principle is that a 'valuable consideration' for a promise may consist of a benefit to the promisor or a detriment to the promisee. A promise on the part of an owner to pay the amount of a subcontractor's claim is supported by an agreement by the subcontractor not to file a lien." *Harness v. McKee-Brown Lumber Co.*, 89 Pac. 1020, 1022, 17 Okl. 624 (quoting 1 Page, Contracts, par. 274).

"A 'valuable consideration' is one that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. Any damage or suspension or forbearance of a right will be sufficient to sustain the promise." *First Nat. Bank of Plattsmouth v. Lehnhoff's Estate*, 109 N. W. 164, 165, 77 Neb. 303 (quoting and adopting definition in *Armann v. Buel*, 59 N. W. 515, 40 Neb. 803).

"A 'valuable consideration' is one that is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made." Where a creditor of a partnership releases the joint indebtedness and accepts a note of one of the partners in payment, he receives a sufficient consideration. *Waydell v. Luer* (N. Y.) 3 Denio, 410, 418 (quoting and adopting 2 Kent's Com. [2d Ed.] 265).

"A 'valuable consideration' is one that is either a benefit to the party promising or some trouble or prejudice to the party to whom the promise is made. Where one of several makers of a note arranges with the other members to pay the note, and the means are put in his hands for that purpose, and he takes up the note, paying part in cash and giving his own note for the balance, which the holder accepts and gives up the original note, the consideration is sufficient, and the makers of the original note are discharged. *Livingston v. Radcliff*, 6 Barb. (N. Y.) 201, 207 (quoting and adopting 2 Kent's Com. 464).

A "valuable consideration," in the sense of the law, may consist either in some right,

interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. It is sufficient consideration for an agreement by a husband to pay his divorced wife \$45 a month for her support "for so long a time as she does not marry again," that she released him from all obligation under a prior contract for her separate maintenance, which was recognized as binding by the parties both before and after a decree of divorce. *Jones v. Jones*, 27 Pac. 85, 86, 1 Colo. App. 28.

If the promisee, at the instance of the promisor and moved by his promise, do any act which occasions him even the slightest trouble or inconvenience, or in doing which he incurs a risk, the act so performed constitutes a "valuable consideration" for the promise. Indeed, there is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, whether there is any actual loss or detriment to him or actual benefit to the promisor or not. *Buhler v. Trombly*, 108 N. W. 343, 344, 139 Mich. 557 (citing 9 Cyc. pp. 312, 313).

"Consideration" means something which is of some value in the eye of the law, moving from the plaintiff. It may be some benefit to the defendant [promisor], or some detriment to the plaintiff [promisee]. Stated with greater elaboration, a 'valuable consideration,' in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *Frye v. Hubbell*, 68 Atl. 325, 332, 74 N. H. 358, 7 L. R. A. (N. S.) 1197 (quoting and adopting the definition in *Kidder v. Blake*, 45 N. H. 530, 532).

"Consideration" is a benefit to the party making a promise, or to a third person at his request, or an inconvenience, loss, or injury to the promisor. The amount of the consideration, so it be appreciable, is immaterial. A "valuable consideration" is either some right, interest, profit, or benefit accruing to the party making the promise, or some forbearance, detriment, loss, responsibility, act, labor, or service given, suffered, or undertaken by the party to whom the promise is made. If the promisee do any act to his injury, however slight, at the request of the promisor, either express or implied, the detriment so sustained operates as a consideration. *Strode v. St. Louis Transit Co.*, 95 S. W. 851, 853, 197 Mo. 616, 7 Ann. Cas. 1084 (citing *Green v. Higham*, 61 S. W. 798, 161 Mo. 337, *Gantt, J.*; 1 Pars. Cont. [2d Ed.] p. 357).

A "valuable consideration" consists ordinarily of money, or its equivalent, or marriage; but some advantage or benefit to the promisor, or some injury or damage to the promisee, is sufficient to support a contract,

and a vendor's promise, without pecuniary consideration, to refund a balance of purchase money paid by the purchaser if it should appear that lands sold to other purchasers were liable for the payment of the balance, which, if binding, was an injury to the promisor and a benefit to the promisee, was without consideration. *Sturm v. Parish*, 1 W. Va. 125, 144 (citing 1 Pars. Cont. 353, 360).

A legal or "valuable consideration" necessary to support a contract consists either in some right, interest, profit, or benefit accruing to one party, or a detriment or forbearance given, suffered, or undertaken by the other, but a mere consent or withdrawal of an objection by one party to the doing of that which the other had a legal right to do is not sufficient consideration to support a promise, for the promisor gets nothing in return for his promise, and hence a street railway which was legally entitled to cross the tracks of a steam road, which road could be required by the municipality to keep a crossing watchman regardless of whether the street railway crossed its tracks or not, received no consideration for the steam road's consent to the crossing of its tracks, and so its promise to compensate the watchman if one should be required was unenforceable. *Baltimore & O. S. W. R. Co. v. Cincinnati, L. & A. Electric St. R. Co. (Ind.)* 99 N. E. 1018, 1020.

A "valuable consideration" in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. Where testator subscribed for the purpose of aiding in the payment of the indebtedness of a university, and verbally authorized its president to announce such subscription at a public convention in his presence, where others subscribed, and where on the faith of his subscription the university employed others to solicit subscriptions and incurred liability for their services, testator's subscription was based on a "valid consideration," so as to be a valid claim against his estate. *Baptist Female University of North Carolina v. Borden*, 44 S. E. 47, 53, 132 N. C. 476.

There is a "promise of valuable consideration" within Purity of Election Law (St. 1893, p. 22, c. 16) § 19, subd. 1, making it an offense, for which the right of a person declared elected to an office may be contested, to promise a valuable consideration to a voter to induce him to vote for any particular person, where the successful candidate promised, in effect, that the duties of the office should not be performed, and there would be no expense in connection with it, and this, though his failure to qualify, which he promised, would not result in the office being left without an incumbent, thus making a saving to taxpayers, but would create a vacancy which

could and would be filled by appointment. *Bush v. Head*, 97 Pac. 512, 515, 154 Cal. 277.

A daughter, to whom her father conveys a farm worth \$20,000 in consideration of \$10, which is paid, and of her undertaking to pay the net proceeds of the place to him during his life, and after his death a certain portion thereof to his wife and other daughter, is not a purchaser for a "valuable consideration." *Ten Eyck v. Witbeck*, 31 N. E. 994, 135 N. Y. 40, 31 Am. St. Rep. 809.

#### Agreement to forbear

A "valuable consideration" is some legal right acquired by the promisor in consideration of his promise, or forborne by the promisee in consideration of such promise. A husband's agreement to convey land to his wife, in consideration of her agreement to discontinue a divorce suit, which she thereafter discontinued, was based on a valuable consideration. *Darcey v. Darcey*, 71 Atl. 593, 597, 29 R. I. 384, 23 L. R. A. (N. S.) 886.

#### Antecedent debt

An antecedent debt is not a "valuable consideration." *Sparks v. Taylor* (Tex.) 87 S. W. 740, 743.

A conveyance or transfer of property in consideration of a pre-existing indebtedness is a conveyance for a "valuable consideration." *Virginia Timber & Lumber Co. v. Glenwood Lumber Co.*, 90 Pac. 48, 50, 5 Cal. App. 256.

Where the payee of a note, on receiving it, paid a specified sum to banks which the maker owed, there was a "valuable consideration" for the note within Negotiable Instruments Law (Acts 1904, p. 220, c. 102) § 25, providing that an antecedent debt constitutes value. *Hermann's Ex'r v. Gregory*, 115 S. W. 809, 811, 131 Ky. 819.

Where an assignment of credits by a corporation was made, for the most part, in consideration of a pre-existing indebtedness, such indebtedness was not a "valuable consideration" sufficient to sustain the assignment, under P. L. 1896, p. 298, § 64, providing that a bona fide purchase for a valuable consideration before a corporation shall have actually suspended its ordinary business by a person without notice of the corporation's insolvency, etc., should not be invalidated. *Russell & Erwin Mfg. Co. v. E. C. Faltoute Hardware Co.* (N. J.) 62 Atl. 421, 423, 424.

#### Good consideration distinguished

As good consideration, see Good Consideration.

A "valuable consideration," as distinguished from a good consideration, is one founded on money, or something convertible into money, or having a value in money, except marriage, which is regarded as a valuable consideration. A plea alleging that a note was without any valuable consideration,

either moral or legal, has no reference to any consideration except a valuable one. *Dicks v. Andrews*, 59 S. E. 782, 783, 129 Ga. 718 (citing Civ. Code 1895, § 3658).

A "valuable consideration" must be money or the like, in contradistinction from a good consideration, though it may be greatly disproportionate to the value of the land conveyed therefor. It may be the surrender, suspension, or forbearance of a legal right to process for the enforcement of a debt, as the right to process of attachment. A mortgagee in a mortgage to secure a pre-existing debt is a purchaser for a "valuable consideration." *Frey v. Clifford*, 44 Cal. 335, 341 (citing and adopting *Clark v. Troy*, 20 Cal. 219; *Payne v. Bensley*, 8 Cal. 260, 68 Am. Dec. 318; *Naglee v. Lyman*, 14 Cal. 450; *Robinson v. Smith*, 14 Cal. 94).

#### Marriage

"Marriage" is a valuable consideration, and a married woman is regarded as a purchaser for a valuable consideration of all property which accrues to her by virtue of her marriage. *Staser v. Gaar, Scott & Co.*, 79 N. E. 404, 405, 168 Ind. 131 (citing *Derry v. Derry*, 74 Ind. 560; *Richardson v. Schultz*, 98 Ind. 429).

Where a conveyance by a man was made prior to his agreement to marry, and without reference to any anticipated rights of a prospective wife, the failure to record it until after his marriage did not render it invalid as in fraud of the wife's marital rights, for the statute for the registration of conveyances was intended to protect purchasers for valuable consideration, mortgagees, and judgment creditors without notice, and cannot be construed to include persons entering into a marriage contract, though marriage is a "valuable consideration," but in a way which must be differentiated from that valuable consideration which will support a contract, in that ordinarily the word "valuable" signifies that the consideration is pecuniary or convertible into money. *Nelson v. Brown*, 51 South. 360, 363, 164 Ala. 397, 137 Am. St. Rep. 61.

#### Value received

An allegation that a written instrument was executed and delivered "for a valuable consideration" is an allegation of fact, and not a conclusion of law, since the terms "for a valuable consideration" and "for value received" are practically identical in meaning, in law as well as general business intercourse, and, if there be any distinction, "valuable consideration" has a more definite and comprehensive meaning than "value received." *St. Lawrence County Nat. Bank of Canton v. Watkins*, 138 N. Y. Supp. 116, 117, 153 App. Div. 551.

#### VALUABLE FOR MINERALS

See Land Valuable for Minerals.

**VALUABLE IMPROVEMENTS**

An office building constructed by one man in two or three days and an open shed capable of holding about one-half ton of coke were insufficient to give a preference right to purchase shore lands from the state under Rem. & Bal. Code, §§ 6750, 6754, giving such right to owners of "valuable improvements." *Pacific Iron Works v. Bryant Lumber & Shingle Mill Co.*, 111 Pac. 578, 579, 60 Wash. 502.

A frame house, firmly constructed on school land by a settler thereon, is a "valuable improvement," within Rev. St. 1901, pars. 4035-4037, giving the preferred right to lease school land to the settler thereon making permanent improvements thereon, etc., and the building may be used by the settler for a warehouse in which to store supplies for use on adjacent property, or to sell to proprietors of adjacent property, or for a saloon to invite the patronage of employes on adjacent property; but a house placed on blocks or pillars is not an appurtenant to the realty and is not an improvement. *Schley v. Vail*, 95 Pac. 113, 114, 11 Ariz. 226.

**VALUABLE MINERALS**

Other valuable minerals or deposits, see Other.

The words "valuable mineral deposits," as used in a statute providing that mining claims upon veins or lodes of rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, etc., should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including non-metallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, reslin, marble, mica, slate, amber, petroleum, limestone, building stone, and coal. *Northern Pac. R. Co. v. Soderberg*, 23 Sup. Ct. 365, 368, 188 U. S. 526, 47 L. Ed. 575.

**VALUABLE PAPERS**

Under Revisal 1905, § 3127, providing that a holographic will shall be given effect, if found among the valuable papers of decedent, the term "valuable papers" means such papers as are kept and are considered by the decedent worthy of being taken care of. In *re Jenkin's Will*, 72 S. E. 1072, 1075, 157 N. C. 429, 37 L. R. A. (N. S.) 842.

"Valuable papers" are such papers as are kept and considered worthy of being taken care of by the particular person, having regard to his condition, business, and habits of preserving papers. They do not necessarily mean the most valuable papers of the decedent even, and are not confined to papers having a money value, or to deeds for lands, obligations for the payment of money, or

certificates of stock. The requirement is only intended as an indication on the part of the writer that it is his intention to preserve and perpetuate the paper as a disposition of his property, and that he regards it as valuable; consequently the sufficiency of the place of deposit to meet the requirement of the statute will depend largely upon the condition and arrangements of the testator. "No better definition of 'valuable papers,' perhaps, can be given than that they consist of such as are regarded by the testator as worthy of preservation, and therefore, in his estimation, of some value. It is not confined to deeds for land or slaves, obligations for money, or certificates of stock. Any others which are kept and considered worthy of being taken care of by the particular person must be regarded as embraced in that description. This requirement is only intended as an indication on the part of the writer that it is his intention to preserve and perpetuate the paper in question as a disposition of his property; that he regards it as valuable." *Brogan v. Barnard*, 90 S. W. 858, 859, 115 Tenn. 260, 112 Am. St. Rep. 822, 5 Ann. Cas. 634 (quoting and adopting definitions in *Marr v. Marr* [Tenn.] 2 Head, 306 and in *Pritchard, Wills & Administration*).

The words "valuable papers," in Code 1858, § 2163, providing that a writing appearing to be the will of a decedent, written by him and found after his death "among his valuable papers," etc., contemplate documentary papers deemed valuable and worthy of preservation by the owner; and a holographic will of a decedent, found in a box in which he kept stamps and stationery for sale and use as postmaster, was not found among his "valuable papers," essential to sustain it as a will. *Brogan v. Barnard*, 90 S. W. 858, 859, 115 Tenn. 260, 112 Am. St. Rep. 822, 5 Ann. Cas. 634.

Election tickets, prepared by the election commissioners and authorizing the election officers of voting precincts to be used in the election, are "valuable papers," and the property of the election commissioners of the county, within Code 1858, § 4652, subsec. 14 (*Shannon's Code*, § 6496), making it a misdemeanor to maliciously destroy any goods or valuable papers of another. *State v. Click*, 90 S. W. 855, 115 Tenn. 283.

**VALUABLE RIGHT**

Securing the signature of a person to a note, whereby he was subsequently required to pay it, is securing from him a "valuable right," within Pen. Code 1895, art. 943, as to swindling. *Johnson v. State*, 123 S. W. 143, 145, 57 Tex. Cr. R. 347.

**VALUABLE THING**

Chickens and all kinds of poultry are "valuable things," within Rev. St. 1899, § 1886, making an entry of any house in the nighttime, in which goods, wares, and mer-

chandise and "other valuable things" are kept or deposited, burglary. *State v. McGuire*, 91 S. W. 939, 942, 193 Mo. 215.

## VALUATION

See Last Adjusted Valuation; Overvaluation.

### As assessment

See Assessment (In Taxation).

### As an estimation

While the words "assessment" and "valuation" may be properly used to designate certain acts of the assessor, they are as properly and more frequently used to designate the official estimate of the value of property subject to taxation. While the assessor makes such official estimate, it is not conclusive, but is subject to revision by the board of equalization, which body frequently substitutes its own estimate of the value of a particular portion of the property for that of the assessor. *State ex rel. Mellor v. Grow*, 105 N. W. 898, 899, 74 Neb. 850.

### As rate

See Rate.

## VALUE

See Actual Value; Anything of Value;

Assessed Value; At Their Value; Book Value; Cash Market Value; Cash Surrender Value; Cash Value; Clear Value; Current Market Value; Disproportionate to the Value; Face Value; Fair Cash Value; Fair Market Value; Franchise Value; Full and Fair Cash Value; Full and True Value; Full Cash Value; Full Value; Going Value; Highest Market Value; Holden for Value; Innocent Holder for Value; Insurable Value; Intrinsic Value; Market Value; Money Value; Nuisance Value; Par Value; Prospective Value; Purchase for Value; Real Value; Reasonable Selling Value; Reasonable Value; Relative Value; Rental Value; Salable Value; Selling Value; Sole Judge of Value; Sound Value; Stumpage Value; Sufficient Value; Taxable Value; Thing of Value; True Value; Usable Value.

Article of value, see Article.

Element of robbery, see Robbery.

Increase in value as profit, see Profit.

Other representative of value, see Other.

Other value, see Other.

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time." *Hover v. Magley*, 96 N. Y. Supp. 925, 48 Misc. 430 (quoting *Neg. Inst. Law*); *Wilkins v. Usher*,

97 S. W. 37, 38, 123 Ky. 696 (quoting *Neg. Inst. Law*).

Under Acts 1899, p. 146, c. 94, § 25, providing that "value" is any consideration sufficient to support a simple contract, a bank discounting a note and obtaining credit in favor of the indorser in a solvent bank for the amount of the discounted paper is a holder for value. *Elgin City Banking Co. v. Hall*, 108 S. W. 1068, 1071, 119 Tenn. 548.

According to Pol. Code, § 3617, the terms "value" and "full cash value" mean the amount at which property would be taken in payment of a just debt due from a solvent debtor. *Crocker v. Scott*, 87 Pac. 102, 106, 149 Cal. 575.

Under Ky. St. 1903, § 978, authorizing appeals to the circuit court from judgments of the county court where "the amount in controversy" is over \$50, orders of the county court removing and appointing sheriffs are not appealable, the word "amount" in the quoted phrase applying only to a judgment for money, though the word "value" may apply to judgments for a number of things other than money. *Renshaw v. Cook*, 111 S. W. 377, 384, 129 Ky. 347.

To promise to pay an already existing debt or the actual payment therefor is not "value" within the meaning of Negotiable Instruments Act (P. L. 1902, p. 589) § 29. *Morris County Brick Co. v. Austin*, 75 Atl. 550, 551, 79 N. J. Law, 273.

The rule that, as against accommodation indorsers of a note fraudulently diverted from the purpose for which it was given, one receiving it as collateral security for an antecedent debt cannot enforce it, is not changed by Negotiable Instruments Law, § 51, providing that "value" is any consideration sufficient to support a simple contract, and that an antecedent debt constitutes value. The antecedent debt must be paid and discharged by receipt of note to devest the accommodation indorsers of the burden. *Sutherland v. Mead*, 80 N. Y. Supp. 504, 507, 80 App. Div. 103.

Though Code Supp. § 3060a25, in defining what constitutes consideration under the Negotiable Instruments Act, declares that "value" is any consideration sufficient to support a simple contract, and that an antecedent or pre-existing debt constitutes value, etc., it makes no provision for a conditional credit, a credit that may or may not become absolute, and so plaintiff bank is not a bona fide purchaser in the due course of business of a certificate of deposit issued by the C. Bank to defendant, and indorsed by defendant in blank and delivered to the B. Bank for collection, and then sent by the B. Bank to plaintiff, to which the B. Bank was indebted, notwithstanding that, on receipt of it, plaintiff credited on its books the amount thereof to the B. Bank; the credit not be-



ing absolute, but conditional, to the effect that, if the certificate was paid by the C. Bank, the credit became absolute thereafter, but, if it was not paid it was to be charged back to the B. Bank. *Commercial Nat. Bank of Council Bluffs v. Citizens' State Bank of Armour*, S. D., 109 N. W. 198, 199, 132 Iowa, 706.

Though, strictly, "price" tokens agreement on a value by parties in interest, while "value" is, as a rule, the general estimate of the pecuniary equivalent of the subject of inquiry, the terms "worth," "price," and "value" may be treated as synonymous in determining the damages for breach by the buyer of a contract of sale. *Scruggs & Echols v. Riddle*, 54 South. 641, 645, 171 Ala. 350.

The term "property," as used in Const. 1906, art. 3, § 17, providing that an individual's property shall not be taken or damaged for public use, except on due compensation first made, includes every species of value, right, or interest. The term "value," as applied to property, is the price deemed or accepted as equivalent to the utility of anything—compensation regarded as an equivalent. The law infers value from the term "property," and, if none is shown, the inference will be that the value is nominal. *Illinois Cent. R. Co. v. State*, 48 South. 561, 562, 94 Miss. 759.

Intoxicating liquor, though not lawfully the subject of sale in this state, is not so lacking in the element of "value" that it cannot be the subject of larceny. "Value," as the word is used in prosecutions for larceny, does not necessarily mean money value or market value. *Mance v. State*, 62 S. E. 1053, 1054, 5 Ga. App. 229.

"The 'value' of a thing is what it will produce, and admits of no precise standard. It must be in its nature fluctuating, and will depend upon \* \* \* different circumstances. One man, in the disposal of his property, may sell it for less than another would; he may sell it under a pressure of circumstances which may induce him to sell it at a particular time." Because of the various considerations which go to make up the value of property, courts of equity will not ordinarily refuse specific performance because of inadequacy of price, unless it shocks the conscience. *Heyward v. Bradley*, 179 Fed. 325, 331, 102 C. C. A. 509.

The word "value," in the rule that the right of the public to use a turnpike on payment of such tolls as, in view of the nature and "value" of the services rendered by the company, are reasonable, means value to the person to whom the service is rendered. *Salt River Valley Canal Co. v. Nelssen*, 88 Pac. 117, 119, 10 Ariz. 9, 12 L. R. A. (N. S.) 711, 16 Ann. Cas. 796.

Where a power of attorney to recover certain land contained a grant of an undivided

half interest to the attorney for his expenses and services, expenses incurred by him after notice of a deed cutting off all interest of the donor in the land were not "value" paid by the attorney for the land without notice of an adverse claim under such deed. *Davis v. Bell* (Tex.) 128 S. W. 658, 661.

"A machine of this character [dredge] can hardly be said to have a fixed market value, and as to such property the rule is, in fixing its value that recourse may be had to its cost, utility, and use, and also to the opinion of witnesses who may possess such information as may give their opinions weight." *California Development Co. v. Yuma Valley Union Land & Water Co.*, 84 Pac. 88-90, 9 Ariz. 366.

Const. Cal. art. 13, § 1, provides that all property in the state not exempt under the laws of the United States shall be taxed in proportion to its value to be ascertained as provided by law. Carrying out the command to provide for the ascertainment of the value of property to be taxed, it was enacted by Pol. Code, § 3627, that all taxable property shall be assessed at its "full cash value," and by section 3617, that the terms "value" and "full cash value" mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor. *San Francisco Nat. Bank v. Dodge*, 25 Sup. Ct. 384, 385, 197 U. S. 70, 49 L. Ed. 669.

Customs Administrative Act June 10, 1890, c. 407, § 19, 26 Stat. 139, provides that the words "value" or "actual market value," whenever used in the act, or in any law relating to the appraisement of imported merchandise, shall be construed to mean the actual market value, or wholesale price of such merchandise as bought and sold in usual wholesale quantities at the time of exportation to the United States in the principal markets of the country from whence imported, and in the condition in which such merchandise is there bought and sold for exportation to the United States, or consigned to the United States for sale, etc. *United States v. Park & Tilford*, 152 Fed. 142, 143, 81 C. C. A. 360.

Under Rev. Laws, c. 73, § 41, providing that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration, and every person whose signature appears thereon is deemed a party thereto for value, and section 42, providing that "value" is any consideration sufficient to support a simple contract, and that an antecedent or pre-existing debt constitutes value, and section 43, providing that, where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time, where defendant signed the note in suit and gave it to O. to enable him to take up a forged note indorsed

to plaintiff by O., plaintiff could recover against defendant, for O. was liable as indorser of the forged note, whether he knew it was forged or not, and plaintiff had a right to accept defendant's note in settlement of O.'s liability. *Jennings v. Law*, 85 N. E. 157, 158, 199 Mass. 124.

#### As actual value

The words "value of the taxable property," as used in Const. art. 11, § 3, prohibiting municipal corporations from becoming indebted in an amount exceeding 5 per centum on the value of the taxable property located therein, when construed in the light of the purpose which actuated its enactment, which was to prevent the improper expenditure by municipalities of public money, and of subsequent legislation (Acts 28th Gen. Assem. p. 23, c. 41, § 2, as amended) providing that no municipal corporation shall become indebted to an amount exceeding  $1\frac{1}{4}$  per centum on the "actual value" of the property located therein, except that cities of the second class may become indebted to an amount aggregating, with all other indebtedness, a sum not exceeding  $2\frac{1}{2}$  per centum of such "actual value," mean the actual value of property in the city, and not the taxable value prescribed by Code, § 1305, providing that property subject to taxation shall be valued at its actual value and assessed at 25 per centum of such value, which assessed value shall be taken as the taxable value of the property. *N. W. Halsey & Co. v. City of Belle Plaine*, 104 N. W. 494, 495, 128 Iowa, 467.

Acts 1902-04, p. 163, c. 148, § 17 (Code 1904, p. 2199), relative to taxation of bank stock provides that from the total market value of its shares of stock there shall be deducted the assessed value of its real estate otherwise taxed in the state and the value of each share of stock shall be its proportion of the remainder, provided that the market value of said stock shall be estimated at a sum not less than the aggregate of the capital, surplus, and undivided profits of the bank, as shown by its last published statement, after deducting from such aggregate the value of its real estate otherwise taxed in the state. Acts 1908, p. 325, c. 213, § 1, amending the previous act, provides that from the total value of the shares of stock of the bank, to be ascertained by adding its capital, surplus, and undivided profits, there shall be deducted "the value" of its real estate otherwise taxed in the state, and the actual value of such share of stock shall be its proportion of the remainder. Held, that the value of real estate to be deducted is its assessed value, and not its actual value, the words "otherwise taxed" not referring merely to real estate, but referring to and modifying the entire phrase, "the value of its real estate otherwise taxed in this state." *Commonwealth v. Virginia Bank & Trust Co.*, 66 S. E. 853, 854, 110 Va. 552.

#### Amount synonymous

The word "value," as used with reference to money, is synonymous with amount. *People v. Hines*, 89 Pac. 858, 859, 5 Cal. App. 122; *Richburger v. State*, 44 South. 772, 774, 90 Miss. 806.

The word "value," as used in the Code of 1873, as amended by Laws 1899, c. 104, providing that if any person by false pretense shall obtain from another person any money, goods, etc., with intent to cheat, and if the value of the property or promissory note or written instrument or security fraudulently obtained shall be \$30 or upwards, such person so offending shall be imprisoned in the penitentiary, etc., means the amount of the liability expressed, assumed, or incurred by means of the written instrument to which the signature was fraudulently obtained. *Moline v. State*, 100 N. W. 810, 812, 72 Neb. 361.

#### Antecedent debt

Transferees of a note taken before maturity from payees in part payment of antecedent indebtedness were holders for value: such a debt constituting "value" under the express provisions of Laws 1897, p. 727, c. 612, § 51. *Mindlin v. Appelbaum*, 114 N. Y. Supp. 908, 909, 62 Misc. Rep. 300.

Negotiable Instruments Act (Pub. Acts 1905, p. 94, No. 265) § 27, provides that "value" is any consideration sufficient to support a simple contract, and that an antecedent or pre-existing debt constitutes value. Section 29 (page 395) provides that, where the holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien. Held, that a person holding a note as collateral security for a pre-existing debt is a holder for value to the extent of the amount due him. *Graham v. Smith*, 118 N. W. 726, 727, 155 Mich. 65.

Where the indorser of a dishonored note delivered to the holder bank as collateral a demand note by himself and wife, in consideration of the bank's promise to forbear suing the indorser on the note, taking the demand note as collateral for the pre-existing debt made the bank a "holder for value" of the note as against the wife, an accommodation maker, under Rev. Laws 1902, c. 73, § 42, providing that a pre-existing debt constitutes "value," whether the instrument is payable on demand or at a future time, notwithstanding the demand note was payable to the bank. *Lowell v. Bickford*, 88 N. E. 1, 2, 201 Mass. 543.

Under section 51 of the Negotiable Instruments Law of New York (Laws 1897, p. 727, c. 612), which provides that "value" is any consideration sufficient to support a simple contract, and that "an antecedent or pre-existing debt constitutes value," an indorsee of an accommodation note, which took the

same from another indorsee before maturity, in good faith, and without notice of any defense, as collateral security for an antecedent debt of the immediate indorser, is a "holder for value," or occupies the position of a holder for value, and may enforce the note against the maker, although it surrendered no right in respect to the original debt, and although the note was invalid and illegal in its inception. In re Hopper-Morgan Co., 154 Fed. 249, 253.

In an action by the holder against the maker of an accommodation check, fraudulently diverted by the payee from the purpose for which it was given, it appeared that the payee delivered the check to plaintiff on account of a pre-existing debt, and that plaintiff who also owed the payee a less sum, and gave him a check therefor on his representation that the other check would not otherwise be good. It did not appear that plaintiff took the accommodation check in extinguishment of the debt due from the payee or that an extension of time of payment thereof for any determinate period was given. Held, that such pre-existing debt, not extinguished or extended, was not "value," within Negotiable Instruments Law (Laws 1897, p. 727, c. 612) § 51, providing that a pre-existing debt constitutes value. *Harris v. Fowler*, 110 N. Y. Supp. 987, 988, 59 Misc. Rep. 523.

#### As cash value

The word "value," as applied to the value of property destroyed by fire, covered by a fire policy, means cash value, and testimony of insured as to what he considered the value of the property covered by the policy, and destroyed, is sufficient proof of cash value, he having a better knowledge than any one else of the quality and value thereof, should no other evidence be available. *Sisk v. American Central Fire Ins. Co.*, 69 S. W. 687, 692, 95 Mo. App. 695.

#### As market value

"By 'value,' in common parlance, is meant 'market value,' which is no other than the fair value of property as between one who wants to purchase and another who desires to sell." *Hetland v. Bilstad*, 118 N. W. 422, 423, 140 Iowa, 411.

The term "value," when applied to property, with no qualification expressed or implied means the price which the property could command in the market. *Missouri, K. & T. Ry. Co. of Texas v. Crews*, 120 S. W. 1110, 1111, 54 Tex. Civ. App. 548 (citing 8 Words and Phrases, pp. 7278, 7279).

"The word 'value,' as used with reference to the value of property stolen, signifies the sum for which the like goods are at the time commonly bought and sold in the market." *Stephens v. State*, 55 South. 940, 942, 1 Ala. App. 159 (quoting 8 Words and Phrases, p. 7276).

"By 'value' is meant, not what the thing is worth to the owner, but the price that it would bring in open market"; and hence evidence of the special value of the property stolen is not admissible in a larceny case. *People v. Gilbert*, 128 N. W. 756, 757, 163 Mich. 511, Ann. Cas. 1912A, 894 (citing *State v. Doepke*, 68 Mo. 208, 30 Am. Rep. 785).

"Market value" is synonymous with the terms "value" and "full cash value," defined by Pol. Code, § 3617, as the amount at which the property would be taken in payment of a just debt from a solvent debtor, and the market value of stock, fairly represents its full cash value in absence of exceptional circumstances giving it an abnormal value, so that any inference of fraud by the placing of an excessive valuation on stock, taken as a basis for assessing a corporate franchise, is rebutted by a showing that the value of the franchise was ascertained by the approved method of deducting from the aggregate market value of its stock, the value of its tangible property, and taking the difference as the franchise value. *City of Los Angeles v. Western Union Oil Co.*, 118 Pac. 720, 721, 161 Cal. 204.

When applied to property, and no qualification is expressed or implied, "value" means the price which the property could command in the market. By the term "value of stock" is usually meant market value. Text-writers use the terms "value" and "market value" as interchangeable, and both as being equivalents of actual value, salable value, and, in proper cases, rental value. In an action against a railroad company for killing horses, plaintiff alleged that at the time they were killed "they were then and there each respectively of the reasonable value as follows, viz.: One \* \* \* was of the value of \$375, and the other \* \* \* was of the value of \$175." Held that, in the absence of an exception thereto, proof either of the market value of the horses or of the intrinsic value was admissible, but that, in the absence of any showing that they had no market value, nor real value, and that they cannot be reproduced or replaced, it was error to admit evidence as to the value of the horses to plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Crews*, 120 S. W. 1110, 1111, 54 Tex. Civ. App. 548 (quoting and adopting definitions in 8 Words and Phrases, pp. 7278, 7279).

The word "value," when applied to the value of land appropriated under the writ of eminent domain, means market value, and the measure of damages is the market value, except where it is shown there is no market value. The owner of the land condemned is entitled to compensation, based on the actual pecuniary damage sustained, and in proving market values the same must be estimated from such standpoint as will afford

compensation. *City of Dallas v. Taylor* (Tex.) 69 S. W. 1005.

#### As valuable consideration

The negotiable instruments act (Laws 1902, p. 86, c. 130, § 52; Code Supp. 1907, § 3060a52) provides that a holder in due course must be a holder for value. Section 191, p. 98 (section 3060a191), provides that the term "value" means valuable consideration. Section 25, p. 84 (section 3060a25), provides that an antecedent or pre-existing debt constitutes value. Held that, where one having possession of notes indorsed by the payees pledged them by way of substitution for other collateral held by the pledgee for antecedent indebtedness, the pledgee became a holder for value. *Voss v. Chamberlain*, 117 N. W. 269, 271, 139 Iowa, 569, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331.

#### VALUE IN CONTROVERSY OR DISPUTE

In a suit by the several owners of water rights in a stream, joining as complainants for convenience only, to enjoin the obstruction of the stream or the diversion of water therefrom by defendants, the matter in dispute must exceed \$2,000, exclusive of interest and costs, as to each complainant, to give a federal court jurisdiction. *Eaton v. Hoge*, 141 Fed. 64, 66, 72 C. C. A. 74, 5 Ann. Cas. 487.

The amount of damages claimed in a complaint for libel fixed the "value of the property in dispute," for the purposes of Laws 1907, c. 57, § 34, requiring the record to be printed where the amount in dispute exceeds \$1,000. A claim for damages arising out of tort is "property in dispute." *Woodling v. Romero*, 113 Pac. 622, 16 N. M. 55.

Where plaintiff claimed land occupied by defendant, who claimed under an alleged condemnation and by adverse possession, a judgment for plaintiff for \$132 under a special finding of tenancy settled rights relative to the land, and appeal would lie under Ky. St. 1903, § 950, requiring that, in order to appeal to the Court of Appeals, the "value in controversy" be not less than \$200. *Illinois Cent. R. Co. v. Ross* (Ky.) 83 S. W. 635, 636.

#### VALUE OF CAPITAL STOCK

The "value" of a corporation's capital stock, for the purpose of assessing a franchise tax, is ascertained by determining every element contributing to value of the corporation's assets, whether tangible or intangible. *Coulter v. Weir*, 127 Fed. 897, 908, 62 C. C. A. 429.

The actual "value of the capital stock" of a railroad corporation must always exceed the actual value of the tangible property by some amount, according to the value of the franchise; but its assessed value need not necessarily exceed the actual value of the tangible property. *Chicago, B. & Q. R. Co. v. Siders*, 88 Ill. 320, 325.

#### VALUE OF LAND TAKEN

The "value" of land sought to be condemned, which the petitioner is required to pay, is not what any one person would give for the land for his own particular use, but what could probably be obtained for it if a sale was desirable and a purchaser sought, applying the ordinary business methods to find him and to dispose of the property. *Weiser Valley Land & Water Co. v. Ryan*, 190 Fed. 417, 423, 111 C. C. A. 221.

#### VALUE OF PART OF WORK DONE

In a contract providing that defendant's engineer should estimate the value of the part of the work done as a basis for partial payments during the progress of the work, the "value of the part of the work done" was not necessarily the contract price of the cubic yards of excavation or of concrete constructed, but its value in relation to all the surrounding conditions, or the value which would result to defendant if the contractor stopped work at that particular point, which would not necessarily depend on the volume of materials removed or constructed. *O'Hehir v. Central New England Ry. Co.*, 137 N. Y. Supp. 627, 633, 152 App. Div. 677.

#### VALUE OF RAILROAD

On an issue as to the "value" of a railroad for purposes of taxation, taxes actually paid by the railroad should be added to its operating expenses and deducted from its gross income. *State v. Nevada Cent. R. Co.*, 81 Pac. 99, 106, 107, 28 Nev. 186, 113 Am. St. Rep. 834.

#### VALUE OF RENTS

As used in a stipulation, in an action between a mortgagor and mortgagee, that in stating the accounts the register would credit the mortgagor with the "value of rents" of certain of the property while in the mortgagee's possession, the words "value of the rents" meant the aggregate of the sum of the rents collected by the mortgagee within the period defined. The stipulation, so construed, was but expressive of the law that a mortgagee, not himself using the property, but who rents it, must account only for the rents collected, unless there is a contrary stipulation. This construction is aided by the fact that the stipulation was drawn by a skilled draftsman, who, had he intended otherwise, would have used words so indicating such "reasonable value." *Crittenden v. Chancey*, 49 South. 811, 812, 161 Ala. 519.

#### VALUE OF USE OF LAND

In an action for damages to plaintiff's land through the pollution by defendant of a stream through the land, defendant was not prejudiced by an instruction that plaintiff was entitled to recover the "value of the use of the land"; there being practically no difference between such value and the rental

value. *Williams v. Haile Gold Mining Co.*, 66 S. E. 117, 118, 85 S. C. 1.

### VALUE OR CLASSIFICATION

Tariff Act Aug. 5, 1909, c. 6, subsec. 13, 36 Stat. 99, provides that an appraiser's appraisal of goods to be imported shall be final and conclusive against all parties, and shall not be subject to review, but authorizes a reappraisal. Subsection 14 declares that the collector's decision as to the rate and the amount of duties shall also be final and conclusive against all persons interested, but Act Cong. June 22, 1874, c. 391, 18 Stat. 190, unrepealed, provides that, after the duties have been liquidated, the settlement shall after the expiration of a year from the time of entry, in the absence of fraud, be final and conclusive. Section 28, subsec. 15, provides that the general appraiser and collectors shall examine the importer under oath in any matter or thing which they may deem material respecting any imported merchandise in ascertaining the dutiable "value or classification" thereof. Held that, since the words "value or classification" include both an appraisal and liquidation, it may also include a reliquidation by the collector by proceedings instituted by him within the year, and hence the collector is entitled within that period to institute reliquidation proceedings, in which the importer may be cited for examination, though there can be no reappraisal by him. *United States v. Calhoun*, 184 Fed. 499, 505.

### VALUE RECEIVED

The words "for value received" are prima facie evidence of consideration to support a guaranty. *White v. Western State Bank*, 119 Ill. App. 354, 359.

The execution of a note "for value received" implies an obligation to pay. *Bick v. Yates*, 117 S. W. 650, 137 Mo. App. 268.

As used in a note the words "for value received" import that the note was based on a consideration. *Tyler v. Jaeger*, 93 N. Y. Supp. 558, 560, 47 Misc. Rep. 84.

A bond reciting that it is for "value received" sufficiently expresses the consideration under the statute of frauds. *White Sewing Mach. Co. v. Fowler*, 78 Pac. 1034, 28 Nev. 94.

Proof of the maker's signature to a note which bears the words "value received" imports the payment of a consideration to the maker by the payee. *Harris v. Firth* (N. J.) 68 Atl. 1064, 1065.

The term "for value received" is not alone sufficient to constitute a note a negotiable instrument. It must further appear that the instrument was payable to the payee named, or order, or to bearer. *Pinnell v. Meaks*, 72 S. W. 461, 99 Mo. App. 20.

The phrase "for value received" constitutes a good averment of consideration, but

in an action on a note against a surety, where the defense is an agreement extending the time, so as to discharge the surety, the consideration of such agreement must be pleaded and proved. *National Citizens' Bank v. Toplitz*, 71 N. E. 1, 2, 178 N. Y. 464.

While the words "value received" in a note import in law a consideration, yet they do not change the rule that the burden of proof is on the plaintiff, suing on the note, to show by a preponderance of the evidence his right to recover. *Best v. Rocky Mountain Nat. Bank of Central City*, 85 Pac. 1124, 1128, 37 Colo. 149, 7 L. R. A. (N. S.) 1035.

St. 1898, § 2307, requires a special promise to answer for the debt of another to be in writing, expressing the consideration, and subscribed by the party to be charged therewith. A note reciting that it was "for value received" was signed by the defendant under the name of the maker. Held, that the recital "for value received" was a sufficient compliance with the statute as to expressing consideration, and that defendant by his signature adopted the terms of the note and was bound thereby. *Kuenzie v. Jansen*, 130 N. W. 450, 451, 145 Wis. 473, Ann. Cas. 1912A, 1241.

An allegation that a written instrument was executed and delivered "for a valuable consideration" is an allegation of fact, and not a conclusion of law, since the terms "for a valuable consideration" and "for value received" are practically identical in meaning, in law as well as general business intercourse, and, if there be any distinction, "valuable consideration" has a more definite and comprehensive meaning than "value received." *St. Lawrence County Nat. Bank of Canton v. Watkins*, 138 N. Y. Supp. 116, 117, 153 App. Div. 551.

### VALUE THEREFOR

Under Negotiable Instruments Act (P. L. 1902, p. 589) § 29, providing that an accommodation party is one who signed the instrument as maker, drawer, acceptor, or indorser, without receiving "value therefor," and to lend his name to some other person. Held, that the words "value therefor" meant value for the negotiable instrument, not value for the loan of the money. *Morris County Brick Co. v. Austin*, 75 Atl. 550, 551, 79 N. J. Law, 273.

### VALUED POLICY

Where a policy did not indicate an intention on the part of the insurer to value the risk and loss, it was not a "valued policy." *Delaware Ins. Co. of Philadelphia v. Hill* (Tex.) 127 S. W. 283, 292.

A marine insurance policy is a "valued policy" if, by agreement, the value is to be fixed by reference to some other instrument; but the agreement must be based on some standard, certain or capable of being made certain, and known to and accepted by both

parties; and it is not a valued policy if one of the parties may insert any value he chooses in the instrument referred to. *Insurance Co. of North America v. Willey*, 98 N. E. 677, 212 Mass. 75.

A "valued policy" of fire insurance is one in which the sum to be paid as an indemnity in case of loss is fixed by the terms of the contract, and by law, to be paid at all events, without reference to the real value of the property. *Georgia Co-operative Fire Ass'n v. Lanier*, 57 S. E. 910, 1 Ga. App. 186 (citing *Rosser v. Georgia Home Ins. Co.*, 29 S. E. 286, 101 Ga. 720; *May, Ins.* [4th Ed.] § 30).

A rent insurance policy, stipulating that insurer should be liable for the actual loss of rent by a fire rendering the building untenable, based on the rentals in force from the rented portions at the time of the fire, and computed from the date of the fire for the time required to put the premises in tenable condition, and requiring insured to carry insurance on the rent in an amount equal to the annual rent, under penalty of being a co-insurer to the extent of the deficiency, makes the insurer liable for such amount of the rent, at the rate paid for the portions rented at the time of a fire, as would become payable to insured during the time required to restore the premises to a tenable condition, without deduction for any expenses connected with the renting; the policy being analogous to a "valued policy" defined by Civ. Code, § 2596, as a policy expressing on its face an agreement that the thing insured shall be valued at a special sum, in so far as it prescribes a method of determining the amount of loss. *Whitney Estate Co. v. Northern Assur. Co. of London*, 101 Pac. 911, 913, 155 Cal. 521, 23 L. R. A. (N. S.) 123, 18 Ann. Cas. 512.

Civ. Code, § 1793, defines insurance as a contract whereby one undertakes to indemnify another against loss. Section 1845 provides that a policy is either open or valued. Section 1846 defines an open policy as one in which the value of the thing insured is not agreed upon, but left to be ascertained in case of loss. Section 1847 defines a "valued policy" as one which provides that the thing insured shall be valued at a specified sum. Section 1877 provides that double insurance exists where the same person is insured by several insurers in respect to the same subject. Section 1878 provides that in case of double insurance each insurer shall contribute ratably toward the loss. *Sess. Laws 1905, c. 126*, prescribes a standard form of fire policy which provides that the amount of insurance written therein on real property shall be taken conclusively to be the true value. Held, that under the standard policy, the value of real property on total loss is conclusively fixed by the total of all the insurance written therein which is the amount of the policy and concurrent insurance, and

the total amount of loss is the sum total of insurance, and, the value of the property being conclusively fixed at a sum equal to the loss, the several policies cannot be prorated. *Lawyer v. Globe Mut. Ins. Co.*, 127 N. W. 615, 619, 25 S. D. 549.

#### Open policy distinguished

A "valued policy" of marine insurance is one which, for the purposes of the risk, fixes a definite value on the insured property, foreclosing dispute, no matter how high the valuation, except in a case of fraud or wager. An "open policy" is one where the value is not settled in the policy, and, in case of loss, must be agreed upon or proved. *Insurance Co. of North America v. Willey*, 98 N. E. 677, 212 Mass. 75.

### VALVE

See Bleed or Drain Valve; Quick Action Triple Valve.

### VARIANCE

See Material Variance.

"Variance" means "difference," and it is no variance that the proof does not establish all the allegations of the petition. *Red Ball Transfer & Storage Co. v. Deloe*, 120 Pac. 575, 576, 30 Okl. 522.

A "variance" is a disagreement between the allegations in the information and the proof as to some matter which is legally essential to the charge. *State v. Crean*, 11; *Pac. 603, 605, 43 Mont. 47, Ann. Cas. 1912C, 424.*

A "variance" exists when the evidence does not sustain the pleadings on which a recovery is sought or a defense rested. *Illinois Cent. R. Co. v. Curry*, 106 S. W. 294, 296, 127 Ky. 643.

In an action on the case a failure to prove all that is charged in the declaration is not a "variance," provided enough of the charge is established to make a cause of action. *City of Ottawa v. Hayne*, 114 Ill. App. 21, 23; *Id.*, 73 N. E. 385, 214 Ill. 45.

A "variance," to be available to the defendant, should consist of a failure of plaintiff's proof in its entire scope between the issues made by the pleadings and the evidence offered in their support; and it cannot consist of mere discrepancies nor defects in an imperfect statement of a cause of action. *Biggam v. Tinsley*, 130 S. W. 506, 510, 149 Mo. App. 467.

"A 'variance' is a disagreement between the allegation and the proof in some matter which, in point of law, is essential to the charge or claim, \* \* \* or to have become so by being inseparably connected by the mode of statement with that which is essential." *Prestwood v. McGowin*, 41 South. 779, 780, 148 Ala. 475 (quoting and adopting

the definition in 1 Greenl. Evid. [15th Ed.] § 51).

The fact that a complaint in a suit on a contract alleges a joint contract with all the defendants and the evidence discloses a separate contract with one of them is not a "variance" amounting to a failure of proof within the meaning of Rev. Codes, § 6587, defining it. *Logan v. Billings & N. R. Co.*, 107 Pac. 415, 416, 40 Mont. 467.

Property charged to have been stolen must be set out in the indictment or information, and the law by no means recognizes it as simply a variance where the charge designates one article and the proof shows an entirely separate and distinct article, since a "variance" applies only where the proof does not strictly conform to the description of the article. *State v. Plant*, 107 S. W. 1076, 1077, 209 Mo. 307.

#### Failure of proof distinguished

"Speaking technically, there is a well-defined distinction between variance and 'failure of proof'; but in a sense in which the term 'failure of proof' is constantly used—that is, as the equivalent of insufficiency of evidence—there may not be, and frequently is not, any distinction whatever. Text-books and reports speak of variance amounting to a failure of proof, when referring to a case in which the evidence, though it may tend to prove a cause of action, wholly fails to prove the cause of the action alleged." Where the evidence tends to establish a cause of action utterly different from that alleged in the complaint, there is such a variance as amounts to a failure of proof, and the question of such variance may be presented on a motion for new trial, under a specification of insufficiency of the evidence to justify the verdict." *Forsell v. Pittsburgh & Montana Copper Co.*, 100 Pac. 221, 222, 38 Mont. 403 (citing 1 Elliott, Ev. § 204).

Where a petition predicated upon an express contract for the exchange of horses, under which plaintiff in a certain event might have back his horse upon returning defendant's, and upon the breach involved in defendant's refusal to give back the horse he had received, avers the happening of the event, the return of defendant's horse, and the refusal of defendant to give back the horse he had received, and that in making the trade plaintiff's horse had been valued by the parties at a certain amount, and there is proof of all the allegations, except that as to the valuation of the horse, there is no "failure of proof," but only a "variance," within the meaning of Rev. St. 1909, § 2021, defining a failure of proof as failure to prove a cause of action alleged in its entire scope and meaning, since the allegation as to valuation is not one pertaining to the cause of action at all, so that an instruction as to reasonable damages, instead of agreed damages, is properly given. *Mekos v. Fricke*, 139 S. W. 1181, 1183, 159 Mo. App. 631.

## VARIETY

Though a contract for the sale of orange trees provided that the buyer should give the seller notice one month before the trees were budded as to the variety he would select, the buyer could select a reasonable number of the varieties of those trees which could be obtained by the seller with reasonable diligence; the singular word "variety" including as well the plural. *Pearson v. McKinney*, 117 Pac. 919, 923, 160 Cal. 649.

## VARIOUS

Ky. St. 1903, § 2554, provides that an order directing the holding of a local option election in a magisterial district may be granted by the judge of the county court, upon a written petition, signed by a number of legal voters in each precinct of the territory to be affected equal to 25 per cent. of the votes cast in each of said precincts at the last preceding general election. An order filing a petition for an election recited that the petitioners constituted a number equal to 25 per cent. of the legal voters of the various voting precincts in a certain magisterial district. The order directing the holding of the election recited that it appeared to the satisfaction of the court that the petition was signed by more than 25 per cent. of the legal voters living and residing within the magisterial district. Other orders showed that the election was held as directed, and that there was a majority of votes against the sale of liquor, and, taken together, established all the jurisdictional facts necessary to a valid election. Held, that the mere failure of the order directing the holding of the election to specifically state that the signers of the petition constituted 25 per cent. of the legal voters "in each precinct" of the territory to be affected did not invalidate the election. According to Webster, the word "various" means "different," and "several" means "separate," "distinct." Therefore to say of persons whose names appear to the petition in question that they equal in number 25 per cent. of the legal voters of the several voting places in the magisterial district is equivalent to saying that they equal 25 per cent. of the legal voters in each precinct, and, if equal to 25 per cent. of the legal voters in each precinct, equal also to the same per cent. of the legal votes cast in each precinct at the last preceding general election. *Commonwealth v. Jones* (Ky.) 84 S. W. 305, 307.

## VARY

The word "vary," as used in Code Civ. Proc. § 1771, authorizing the court, after final judgment in divorce, to annul or vary directions as to the maintenance of any of the children of the parties, means "to change to something else." *White v. White*, 138 N. Y. Supp. 1082, 1085, 154 App. Div. 250.

Where a will creating a testamentary trust gave the trustees full power to invest and reinvest the residue and to vary the securities and property, the words "to vary" would be construed to mean "to change to something else," authorizing the trustees to change the investments in which they found the residue at the time of testator's death. *Merchants' Loan & Trust Co. v. Northern Trust Co.*, 95 N. E. 59, 61, 250 Ill. 86, 45 L. R. A. (N. S.) 411.

## VASECTOMY

As cruel and unusual punishment, see Cruel and Unusual Punishment.

## VAT

As place of work, see Place.

A machine known as a "liner," a heavy, hollow, revolving iron roller, filled with steam of high temperature, with a smaller roller above, between which papers were passed by the operator, was not the character of machinery required to be guarded, by *Burns' Ann. St. 1908, § 8029*, requiring employers to guard "all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery"; the liner being neither a "vat" nor a "gearing." *Jenkins v. Lafayette Box Board & Paper Co.*, 87 N. E. 992, 993, 43 Ind. App. 463.

Section 9 of the Indiana factory act (*Burns' Ann. St. Ind. 1901, § 7087i*), which provides that "all vats, pans, saws, planers, cogs, gearing, belting, shafting, set screws and machinery of every description therein shall be properly guarded," applies to any kind of machinery which is alleged and proved to be of the same kind as a vat, pan, saw, etc., with respect to danger of operation and practicability of erecting guards. *Inland Steel Co. v. Kachwinski*, 151 Fed. 219, 221, 80 C. C. A. 571.

## VAULT

A brick structure entirely open on one side cannot be a "vault" or safe, within the meaning of an ordinance regulating the storage of dangerous explosives. *Smith v. Mine & Smelter Supply Co.*, 88 Pac. 683, 687, 32 Utah, 21.

## VEGETABLE

See Necessary Vegetables.

"The word 'vegetables' is found in paragraph 286 [of schedule G of the Tariff Act of March 3, 1883], under the heading 'Provisions,' and in common parlance applies to articles of food." *Sonn v. Magone*, 16 Sup. Ct. 67, 68, 159 U. S. 417, 40 L. Ed. 203.

### Walnuts

The provision for "pickles" in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241,

30 Stat. 179, covers only "vegetables." Pickled walnuts are therefore excluded therefrom. *United States v. Acker, Merrill & Condit Co.*, 171 Fed. 77, 78, 96 C. C. A. 181.

### Truffles

In Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170, the term "vegetables" is used in accordance with the ordinary understanding, vegetables usually served at dinner, which does not include truffles, which are used only as a condiment in cooking. A Circuit Court held that truffles were "vegetables," though the Supreme Court had previously given that term a meaning that excluded truffles. Held that, in the subsequent re-enactment of the provision for "vegetables" in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170, the term must be presumed to have been used in accordance with the Supreme Court definition. *Von Bremen, MacMonnies & Co. v. United States*, 168 Fed. 889, 891, 94 C. C. A. 301.

### Wai san

"Wai san," an edible root used by the Chinese as a vegetable, is, because edible, removed from the provision for "drugs," in Tariff Act July 24, 1897, c. 11, § 1, Schedule A, par. 20, 30 Stat. 151, and is dutiable as "vegetables," under Schedule G, par. 257, 30 Stat. 171. *Wing On Wo v. United States*, 175 Fed. 891.

### Watermelon

A watermelon is a species of fruit, and is also generically a "vegetable." *Massey v. City of Columbus*, 70 S. E. 263, 264, 9 Ga. App. 9.

## VEGETABLE IN NATURAL STATE

Cauliflowers that have been trimmed, washed, and packed in brine for preservation during transportation, and to keep them in their natural state, and that when taken out of it and washed are still in their natural state, are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 257, 30 Stat. 171, as "vegetables in their natural state," rather than under paragraph 241, 30 Stat. 170, as "vegetables prepared or preserved." *United States v. Strohmeier & Arpe Co.*, 167 Fed. 533, 534, 93 C. C. A. 65.

The slicing of vegetables solely to facilitate the natural drying operation is not sufficient to remove them from their natural state; and mushrooms cleaned, sliced, and dried in the sun are dutiable as "vegetables in their natural state," under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 257, 30 Stat. 171, rather than as "vegetables prepared or preserved," under paragraph 241, 30 Stat. 170. *A. Zaumati & Co. v. United States*, 153 Fed. 880, 82 C. C. A. 626.

The provision in paragraph 241, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat.



170, for mushrooms "prepared or preserved," does not include mushrooms dried merely by evaporation, which are dutiable under paragraph 257 of said act, c. 11, § 1, Schedule G, 30 Stat. 171, as "vegetables in their natural state." *Kraut v. United States*, 139 Fed. 94, 95.

Mushrooms dried in order to preserve them and placed in hermetically sealed tins holding from 30 to 45 pounds, are, within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 241, 30 Stat. 170, relating to "mushrooms prepared or preserved, in tins, jars, bottles or similar packages," rather than paragraph 257, 30 Stat. 171, relating to "vegetables in their natural state." *Choy Chong Woh & Co. v. United States*, 153 Fed. 879, 82 C. C. A. 608.

#### VEGETABLE SUBSTANCE

See Fibrous Vegetable Substance.

### VEHICLE

See Draught or Driving Vehicle; Motor Vehicle; Originating within Vehicle.

Other vehicles, see Other.

See, also, Wagon.

#### Bicycle or motor carriage

A bicycle is a "vehicle." *Fielder v. Tipton*, 42 South. 985, 149 Ala. 608, 8 L. R. A. (N. S.) 1268, 123 Am. St. Rep. 69, 13 Ann. Cas. 1012 (citing Elliott, Roads & S. [2d Ed.] § 852, p. 927; Clementson, Road Rights & Liabilities of Wheelmen, §§ 90, 103, pp. 90, 94; *Davis v. Petrinovich*, 21 South. 344, 112 Ala. 654, 36 L. R. A. 615).

A bicycle is a "vehicle" of such nature that it may be properly used upon highways and its use regulated by the Legislature, and, being a vehicle, its proper place is upon the highway or street, and not upon the sidewalk, unless otherwise provided by statute. *Molway v. City of Chicago*, 88 N. E. 485, 486, 239 Ill. 486, 23 L. R. A. (N. S.) 543, 16 Ann. Cas. 424.

The law of the road, defined by Rev. Laws, c. 54, requiring the driver of a vehicle traveling in the same direction to pass a carriage ahead by driving to the left of the middle of the traveled part of the way, while inapplicable to pedestrians, applies to automobiles, as they are "vehicles," within the statute. *Brown v. Thayer*, 99 N. E. 237, 238, 212 Mass. 392; *Foster v. Curtis*, 99 N. E. 961, 213 Mass. 79, 42 L. R. A. (N. S.) 1188, Ann. Cas. 1913E, 1116.

"A bicycle is a 'vehicle.' It may be lawfully ridden upon a street or highway, and has the same rights upon the highway as other vehicles, and it is the duty of a street railway company to give to a bicyclist who is riding upon or attempting to cross its tracks in front of its car the usual and sufficient warning and to exercise the same degree of care as is required in favor of other vehicles."

*Ashley v. Kanawha Valley Traction Co.*, 55 S. E. 1016, 1019, 60 W. Va. 306, 9 Ann. Cas. 836.

The Greater New York charter (Laws 1901, p. 1, c. 466), provides that the word "vehicle" shall include wagons, cabs, carriages, omnibuses, motors, etc. An ordinance prohibits advertising wagons in the streets except business notices on ordinary business wagons. Held, that vehicles on four wheels, propelled by motors, designed primarily for the carriage of passengers, operated by a corporation maintaining a stage route, are "wagons" within the ordinance, a "wagon" being a wheeled carriage; a vehicle on four wheels. *Fifth Ave. Coach Co. v. City of New York*, 86 N. E. 824, 826, 194 N. Y. 19, 21 L. R. A. (N. S.) 744, 16 Ann. Cas. 695; *Id.*, 110 N. Y. S. 1037, 126 App. Div. 657, 111 N. Y. S. 759, 58 Misc. Rep. 401.

#### Elevator car

Rev. St. 1895, art. 3017, subd. 1, authorizes an action for damages on account of injuries causing death "by the negligence \* \* \* of the proprietor, owner, charterer, hirer of any railroad," etc., "or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence or carelessness of their servants or agents," etc. Held, that an elevator car in an office building, habitually used to transport passengers, came within the meaning of the clause "other vehicle for the conveyance of goods or passengers." *Farmers' & Mechanics' Nat. Bank v. Hanks* (Tex.) 128 S. W. 147, 150.

#### As included in premises

See Premises.

#### As included in team

See Team.

#### Locomotives or cars

A road locomotive or traction engine, used to draw cars, is a "vehicle," within a statute requiring the licensing of operators of automobiles and motorcycles, and defining them as all vehicles propelled by other than muscular power, except railroad and railway cars, motor vehicles running only upon rails or tracks, and road rollers. *Emerson Troy Granite Co. v. Pearson*, 64 Atl. 582, 74 N. H. 22.

#### As place of business

See Place of Business.

### VEHICLE FOR HEAVY TRANSPORTATION

A city in its charter was granted the power to improve streets and to regulate the use thereof, and in another paragraph of the same section it was empowered to regulate by ordinance "the width of the tires of all vehicles for heavy transportation." Held, that the latter grant of power was express, and must be strictly construed; that the express grant was not merely a corollary of the general power to improve the streets and regu-

late the use thereof; that under Rev. St. 1899, § 4160 (Ann. St. 1906, p. 2252), providing that "words and phrases shall be taken in their plain or ordinary and usual sense," the term "vehicles for heavy transportation" means vehicles constructed for carrying heavy loads; and that an ordinance regulating the width of tires of all vehicles to be used on the streets in accordance with the size of the axles exceeds the power of the city, as it makes no discrimination between vehicles for light and heavy transportation. *State ex rel. St. Louis Transfer Co. v. Clifford*, 128 S. W. 755, 759, 228 Mo. 194, 21 Ann. Cas. 1218.

### VEHICLE USED FOR PAY

The owner of wagons kept to rent to various firms under monthly contracts and under their control, and who does not hold himself out ready to serve any person who may have goods to transfer, is not the owner of "vehicles used for pay," nor is his compensation subject to control by the city council, under a provision giving it power to levy a tax on vehicles used for pay within the city, and to prescribe compensation therefor. *McCauley v. State*, 119 N. W. 675, 83 Neb. 431.

### VEHICLES AND OTHER MECHANICAL CONTRIVANCES

Wheeled or rolling chairs are not specifically named, but they are clearly within the description of "vehicles and other mechanical contrivances," as used in an ordinance regulating travel on the public highways of a city, and classing together all persons riding or driving, whether in vehicles or other mechanical contrivances, as occupants of the cartway. *Stevenson v. United States Exp. Co.*, 70 Atl. 275, 221 Pa. 59, 128 Am. St. Rep. 725.

### VEIN

See *Fissure Vein*; *Known Vein* or *Lode*.  
Coal vein, see *Coal Bed*.

Recovery of vein, see *Recover—Recovery*.

"Vein of coal," "coal bed," and "coal seam" are used as equivalent terms. *Chapman v. Mill Creek Coal & Coke Co.*, 46 S. E. 262, 263, 54 W. Va. 193.

As a geological term "bed" is synonymous with "vein" or "stratum," but the term "coal bed" may be used to mean "quarry." *Hoysmdt v. Delaware, L. & W. R. Co.*, 151 Fed. 321, 326, 331.

"A 'vein' or 'lode' is mineral-bearing rock or other earthy matter in place in a fissure in rock, so that its boundaries are sharply defined by rocky walls in place." *Webb v. American Asphaltum Mining Co.*, 157 Fed. 203, 204, 84 C. C. A. 651.

A "vein," to the miner, is a body of ore, quartz, or mineral-bearing substance lying within the crust of the earth, bounded on

each side by the country rock, generally varying in width and extending in length across and through the country for greater and less distances. *State v. Praul*, 106 Pac. 763, 764, 57 Wash. 198.

The rule that extralateral rights cannot exist through a mineralized hanging or foot-wall formation which is sufficiently mineralized to sustain a mining location does not apply where a vein containing valuable ore has well-defined walls, which are of themselves but a part of the mineralized zone which contains ore and veins of quartz sufficiently valuable to support a mining location; such veins being regarded as separate and distinct from the mineralized zone. The essential elements of a "vein" are mineral or mineral-bearing rock and boundaries. *Golden v. Murphy*, 103 Pac. 394, 405, 31 Nev. 395 (citing *Grand Central Mining Co. v. Mammoth Mining Co.*, 83 Pac. 648, 29 Utah, 490).

Under Rev. St. U. S. § 2322, providing that locators of lode locations shall have the right to all veins throughout their entire depth, the apex of which lies inside the surface lines of the location extended downward vertically, a complaint in ejectment to recover a "vein" apexing in plaintiff's location states a cause of action based on extralateral rights, though merely alleging that defendant wrongfully entered on plaintiff's claim on veins apexing within its boundaries, since a vein, though having an extralateral extension, is a part of the location within which it apexes. *Davis v. Shepherd*, 72 Pac. 57, 58, 31 Colo. 141.

Rev. St. U. S. § 2333, provides that, where an application for a patent for a placer claim does not include an application for a known vein or lode within its boundaries, the application shall be construed as a declaration that the claimant of the placer claim has no right of possession of the vein or lode claim, but that, where the existence of a vein or lode claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof. Held, that a "vein or lode" within such section is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain, and that a "known vein or lode" is one clearly ascertained, and of such extent as to render the land more valuable on that account and justify its exploitation and development. *Noyes v. Clifford*, 94 Pac. 842, 847, 37 Mont. 138.

"Veins" or lodes are lines or aggregations of metal imbedded in quartz or other rock in place, consisting of a strip of mineral-bearing rock within defined boundaries in the general mass of the mountain, which must be continuous and without interruption, bounded by country rock mineralized to no greater extent than the general condition

of the vicinity. Rock or matter of any kind, in order to constitute a "vein" or lode within the meaning of the statute, must be metaliferous and contain such mineral value as will distinguish it from the country rock, especially where no well-defined walls appear. Under the acts of Congress the essential elements of a "vein" are mineral or mineral-bearing rock and boundaries, and, in cases of controversy, where one of these elements is well established, very slight evidence may be accepted as to the existence of the other. What values the filling or material of a fissure should contain to constitute it a vein, within the meaning of the act of Congress, must necessarily depend upon the characteristics of the district or county in which the vein or lode, in any particular instance claimed to exist, is located, and upon the character, as to boundaries, of the vein itself. Values, therefore, of the filling of the vein must be considered with special reference to the district where the vein or lode is found. The definition of a vein must be considered with reference to the formations and characteristics of the particular district in which the vein is located. Where the boundaries of what is claimed to be a vein are not well, or not at all, defined, either at the surface or at depth, the value of the material must be so in excess of the country rock as to differentiate it from such rock, else the material cannot be held to constitute a vein. In the absence of defined walls and mineralization appreciably greater than that contained in the general mass of the mountain, broken, stained, and fissured material, or crushed and brecciated matter, characteristic of the district, cannot be held to constitute a vein or lode, under the statute. In such case, the limits of fracturing do not constitute the limits of the vein, and even if there be found an occasional vug or fragment of ore, yet where it is disconnected from any ore body and so intermingled with the surrounding country rock that it cannot be regarded as continuous, it does not mark the line of the vein or lode, within the meaning of the law. Where a vein located in sedimentary beds of rock is formed by replacement, and the mineralization ceases within a short distance of the ore body or ore channel, the limits of the deposition of ore are the limits of the vein; and this is so, whether the vein be considered laterally or with reference to the apex. In determining the location and strike of a vein, the geological features of the adjacent country, so far as in evidence, will be considered by the court. *Grand Central Min. Co. v. Mammoth Min. Co.*, 83 Pac. 648, 676, 679, 29 Utah, 490.

## VELOCIPEDE

A bicycle is defined as a "two-wheeled velocipede," and a "velocipede" is defined as

a "light carriage." A bicycle is a "vehicle," and under Rev. St. 1881, § 3361, making it unlawful to ride or drive upon any sidewalk for the use of passengers, except across the same, it is unlawful to ride a bicycle thereon. *Mercer v. Corbin*, 20 N. E. 132, 134, 117 Ind. 450, 3 L. R. A. 221, 10 Am. St. Rep. 76 (quoting and adopting definitions given in *Webst. Dict.*).

## VELVET

So-called "panne velvet" is dutiable as "plush," and not as "velvets," under *Tariff Act July 24, 1897, c. 11, § 1, Schedule L, par. 386, 30 Stat. 186. United States v. Passavant & Co.*, 164 Fed. 912.

No rule exists in trade or commercial usage declaring that fabrics having a pile of 3.5 millimeters or less in length should be regarded as "velvets," and of over 3.5 millimeters as "plush." *United States v. Silberstein, Castell & Co.*, 153 Fed. 965, 967.

## VEND

The title of the act approved August 10, 1906, "An act fixing the annual license fee for retailing or vending spirituous, intoxicating or malt liquors in Irwin county at twenty thousand dollars, and to provide a penalty for violating the same, and for other purposes," is broad enough to provide for a license fee for the sale of such liquor in any quantity, since "to vend," in its largest sense, means to sell, and it is quite apparent that the legislative scheme was to impose a license fee, not only on the retailer, who sells in quantities less than a quart, but also upon all vendors or sellers of intoxicating liquors, irrespective of the quantity involved in the sale. *Glover v. State*, 55 S. E. 592, 594, 126 Ga. 594.

## VENDEE

As owner, see *Owner*.

A remote vendee is within Code 1896, § 3505, allowing redemption of property sold under a mortgage from the "purchaser or his vendee." *Robbins v. Brown*, 44 South. 63, 151 Ala. 236.

The word "vendee," in the Alabama statute extending the right of redemption from sale to the vendee of the debtor, refers only to a person to whom the debtor may have sold the equity of redemption before the sale, and does not entitle a purchaser from the debtor to foreclosure of the vendor's lien to redeem from such sale. *Wallace v. Markstein*, 40 South. 201, 202, 147 Ala. 262.

## VENDEE'S LIEN

The purchaser of land by an executory contract has an equitable lien thereon for any money paid by him under the contract,

so that, in case he is entitled to recover such money back because of the inability or refusal of the vendor to perform, he may do so by proceeding against the land. This is known as the "vendee's lien," and is universally recognized in equity where the doctrine of equity prevails. The lien cannot be extended so as to cover the costs of examining the title, though it is an item of the vendee's damages. *Occidental Realty Co. v. Palmer*, 102 N. Y. Supp. 648, 649, 117 App. Div. 505.

## VENDING

The word "vending," as used in the title of Act Aug. 10, 1906, fixing the annual license fee for retailing or vending spirituous, intoxicating, or malt liquors in a certain county, is not the equivalent of "retailing," as used in the title, to "vend" in this sense meaning to sell, and a license fee is imposed, not only on the retailer who sells in quantities less than a quart, but also upon all vendors or sellers of intoxicating liquors, irrespective of the quantity involved in the sale. *Glover v. State*, 55 S. E. 592, 594, 126 Ga. 594.

## VENDER—VENDOR

See Itinerant Vendor.

As owner, see Owner.

"A vendor [vender] is one who transfers the exclusive right of possession of property, either his or that of another, for some pecuniary equivalent. A soliciting agent, who takes orders subject to the approval of his principal, is not ordinarily regarded as a 'vendor.'" *State v. Bristow*, 109 N. W. 199, 200, 131 Iowa, 664.

The word "vendor," as used in Civ. Code 1895, § 3618, providing that a recorded deed loses its priority over a subsequent purported deed from the same vendor taken without notice of the existence of the first, has been construed in its literal sense as meaning the party by whom the sale is made, or the person who transfers property by sale; and it has been, in effect, held that, although two deeds to the same land may be from the same grantor, they cannot compete under the statute, unless they are also from the same vendor. This is inconsistent with the idea that the effect of the statute was to broaden the meaning of the terms used in the statutes to describe what deeds should compete thereunder for priority. A deed to described wild land, executed by the general devisees of the deceased former owner, taken by the vendee therein for value and without notice of a deed to the same land executed by the testator, although recorded before the registry of the older deed, does not obtain priority over such senior conveyance. *Henderson v. Armstrong*, 58 S. E. 624, 626, 627, 128 Ga. 804 (citing *Toole v. Toole*, 33 S. E. 686, 107 Ga. 472).

## VENDOR AND PURCHASER

The relation of "vendor and purchaser" is for all practical purposes that of mortgagor and mortgagee, with all the incidents thereto. *Jones v. Jones*, 62 S. E. 417, 418, 148 N. C. 358.

## VENDOR'S LIEN

See, also, Grantor's Lien.

A conveyance for which the consideration is not paid raises a claim in equity on the property conveyed, commonly called a "vendor's lien," which the courts enforce against the grantee and those claiming under him with notice. *Wilson v. Plutus Mining Co.*, 174 Fed. 317, 319, 98 C. C. A. 189.

A "vendor's lien" is simply "the vendor's right to enforce his claim for the purchase money against or out of the vendor's equitable estate," not his legal estate, for he has none. *Managan Estate v. Great Cent. Land Co.*, 77 Pac. 485, 487, 45 Or. 335 (citing *Security Savings & Trust Co. v. Mackenzie*, 33 Or. 209, 52 Pac. 1046).

"It is indispensably necessary to the existence of a 'vendor's lien' that the parties should stand in the relation to each other of vendor and vendee. It arises out of and is incident to the purchase, and is founded upon an implied trust between the vendor and purchaser, and the law does not authorize the vendee to transfer this lien with the note taken for the purchase money, even though he expressly proposes to do so." A loan of money to pay the purchase price of land does not create a vendor's lien in the lender. *Hardin v. Hooks*, 81 S. W. 386, 387, 72 Ark. 433 (quoting *Hecht v. Spears*, 27 Ark. 229, 11 Am. Rep. 784).

## As an equitable right

A "vendor's lien" is not the result of any agreement or intention of the parties, but is an equity raised by a court of chancery for the benefit of vendors of realty and is not created by Civ. Code, § 3046, providing that one who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer. *Royal Consol. Mining Co. v. Royal Consol. Mines Co.*, 110 Pac. 123, 128, 157 Cal. 737, 137 Am. St. Rep. 165.

A "vendor's lien" is that lien which in equity is implied to belong to a vendor for the unpaid price of land sold, where he has not taken any other lien or security beyond the personal obligation of the purchaser. The lien is not the result of any agreement between the vendor and vendee, but is simply an equity raised by the courts for the benefit of the vendor, to be enforced or not as the exigencies of each particular case may require. *Rewis v. Williamson*, 41 South. 449, 450, 51 Fla. 529 (citing *Johnson v. McKinnon*, 34 South. 272, 45 Fla. 388).

A "vendor's lien" is an equitable security arising from the fact that a vendee has received from his vendor an estate for which he has not paid the full consideration, and is not dependent for its existence on the express agreement of the parties. *Eubank v. Finnell*, 94 S. W. 591, 593, 118 Mo. App. 535 (citing *Johnson v. Burks*, 77 S. W. 133, 103 Mo. App. 221).

#### As an estate in land

A "vendor's lien" is not an estate, but is a mere right, existing potentially only, and without any tangible existence, and exists only as an incident to the obligation to pay the price, and, if there is no such obligation, there can be no lien. *Marchand v. Chicago, B. & Q. Ry. Co.*, 127 S. W. 387, 389, 147 Mo. App. 619.

The right of a vendor to subject the land to the payment of the purchase money is not a "right or estate in the lands," within Ann. Code 1892, § 2444, providing that conveyances purporting to convey a greater estate than the grantor has shall convey as much of the right and estate as he could lawfully convey, etc., the vendor's interest passing to the personal representatives of a deceased, and the statute did not make a conveyance to defendants after their grantors had conveyed to another pass the grantors' claim against such prior grantee for purchase money. *Howell v. Hill*, 48 South. 177, 94 Miss. 566.

#### As incumbrance

See Incumbrance.

### VENDITIONI EXPONAS

A writ of "venditioni exponas" is one sometimes issued to cause a sale of lands seized under a former writ. *Howell v. Sherwood*, 147 S. W. 810, 815, 242 Mo. 513.

### VENEERS OF WOOD

Veneers of wood of exceeding thinness, pasted on paper for the purpose of keeping them in shape, the paper being in some instances the component material of chief value, are within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 198, 30 Stat. 167, for "veneers of wood." *American Trading Co. v. United States*, 142 Fed. 214, 215.

### VENIRE

See Special Venire.

Under Code 1907, § 7265, providing that, when the day set for trial is on a subsequent week of the term, the special jurors drawn, together with the jurors drawn for the subsequent week, shall constitute the "venire," that the name of G. C. Ahhatt was drawn and the list of jurors served on defendant contained that name, when no such person was found and G. C. Abbott was the person really

summoned, would not affect the validity of the venire; the name drawn being the same as that in the list served. *Parker v. State*, 51 South. 260, 262, 165 Ala. 1.

### VENIRE FACIAS DE NOVO

A "venire de novo" is a common-law remedy, and by it such defects only as may be apparent on the face of the record are presented. This rule has been somewhat modified in its application to special verdicts. *Douglas v. Indianapolis & N. W. Traction Co.*, 76 N. E. 892, 893, 37 Ind. App. 332 (citing *Dolan v. State*, 23 N. E. 761, 122 Ind. 141; *La Follette v. Higgins*, 28 N. E. 768, 129 Ind. 412, 418; *Maxwell v. Wright*, 67 N. E. 267, 160 Ind. 515; *Elliott's Gen. Prac.* § 985).

At common law, where a case came up on a writ of error, it was the custom to hand back jurisdiction, if at all, by an entry and a mandate called, among other things, a "venire facias de novo." Now the same end is attained by awarding a new trial and reversing and remanding the case, where defendant's judgment is not allowed to stand. *Donnell v. Wright*, 97 S. W. 928, 931, 199 Mo. 304.

### VENOMOUS INCOMPETENT

A letter, referring to the manager of a mail chute company as "the 'venomous incompetent' \* \* \* who has charge of your office here, and who either does not know how to put [a mail chute] in order, or willfully queers it, \* \* \* so as to bedevil us and the job," is actionable per se, tending to charge the manager with moral delinquency, and holding him up to hatred, ridicule, and contempt. *Hlnrichs v. Butts*, 133 N. Y. Supp. 769, 770, 149 App. Div. 236.

### VENUE

See Change of Venue.

Proceedings to secure change of, as with in practice, see Practice (In Law).

Under Acts 1889, p. 73, constituting Buchanan county a judicial circuit, and giving it two circuit judges, and making of it two divisions, a cause should be sent from one division to another on an application for a change of "venue" on account of disqualification of the judge, though the act does not expressly require it, unless the court is satisfied by proof that the other judge is also disqualified. The word "venue" may be construed to mean county, as in strictness it does. *Leslie v. G. W. Chase & Son Mercantile Co.*, 98 S. W. 523, 526, 200 Mo. 363.

#### Jurisdiction distinguished

See Jurisdiction (Of Courts).

### VERANDA

A "veranda" is a part of the dwelling within a covenant in a deed providing that

buildings on the property should be set back at least 25 feet from the street line. *McDonald v. Spang*, 105 N. Y. Supp. 617, 620, 55 Misc. Rep. 332.

## VERBAL

### VERBAL CONTRACT

Where the owner agreed in writing to convey land, and his vendee thereafter agreed verbally to convey a part of the land to complainant, to which agreement the owner verbally assented, the contract to convey to complainant was a "verbal agreement" for the sale of land within the statute of frauds (Code, § 2840), and not merely an agreement by the original owner to release his vendor's lien on a part of the land. *Hoover v. Baugh*, 62 S. E. 968, 969, 108 Va. 695, 128 Am. St. Rep. 985.

### VERBAL GIFT

A "verbal gift" without a delivery transfers no title, and unless the donor divests himself of all dominion over the subject-matter of the gift the title will not pass. Where one owning securities placed them in a package in his private box in the vaults of a safety deposit company, and at that time told defendant that they were hers, and he gave her a key and password, but subsequently he exercised entire control over the property, and a part of the time it was not in the box, and he removed coupons from certain of the bonds and deposited the proceeds to his credit in a bank, and thereafter he made efforts to obtain the key which he had given defendant, the facts did not show a gift. *Millard v. Millard*, 77 N. E. 595-597, 221 Ill. 86.

Under Civ. Code, § 1147, providing that a "verbal gift," which is defined by section 1146 as a transfer of personal property, made voluntarily, and without consideration, "is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery," a transfer by a bank depositor of an account to his credit in the bank to himself and his son, with the right and power to each to draw on the account during their lives, with a direction to the bank to pay the residue remaining upon the death of either to the survivor, cannot operate as a gift *inter vivos*, since the donee is not given full and complete dominion of the thing. *Carr v. Carr*, 115 Pac. 261, 264, 15 Cal. App. 480.

## VERDICT

See Chance Verdict; Compromise Verdict; Cured by Verdict; Directed Verdict; Dissent from Verdict; Estoppel by Verdict; General Verdict; Motion to Direct Verdict; Partial Verdict; Perverse Verdict; Quotient Ver-

dict; Request for Directed Verdict; Separate General Verdict; Special Verdict; Wrongful Verdict.  
Wrong verdict, see Wrong.

A "verdict" is the unanimous decision made by a jury and reported to the court on matters lawfully submitted to them in the course of a trial. *Union Pac. Ry. Co. v. Connolly*, 109 N. W. 368, 370, 77 Neb. 254.

"The word 'verdict' is not an abstract designation of the finding of a jury, but it relates to the issue involved in the pleadings and evidence, and while it may in form be a verdict, it is not a verdict in law, unless it substantially responds to the issues. \* \* \* A verdict in a legal sense generally is the determination of the jury upon the matters of fact in issue in the cause upon the evidence. The general rule is that the verdict must comprehend the whole issue or issues submitted to the jury in a particular case." *Johnson Bros. v. Glaspey*, 113 N. W. 602, 604, 16 N. D. 335.

Code Cr. Proc. 1895, art. 743, defines a "verdict" as a declaration by a jury of their decision of the issue submitted to them in writing and concurred in by each member of the jury. Where an indictment charged ordinary burglary and burglary of a private residence, in separate counts, but the only issue submitted was the burglary of a private residence, a verdict of "guilty as charged" was responsive and sufficient. *Jones v. State*, 117 S. W. 127, 55 Tex. Cr. R. 535.

A special "verdict" is not complete unless it leaves to the decision of the court only questions of law. *Sonnesyn v. Akin*, 104 N. W. 1026, 1031, 14 N. D. 248.

A trial on which the jury has failed to agree will not be considered as one of the "verdicts," within Civ. Code Prac. § 341, where there have been three verdicts on substantially the same evidence. *Louisville & N. R. Co. v. Daniel*, 115 S. W. 804, 1198, 131 Ky. 689; *Id.*, 119 S. W. 229.

### As decision of a jury

Rouvier's definition of a verdict is the unanimous decision of a jury, reported to the court, on matters lawfully submitted to them in the trial, and the term "verdict" is often used in distinction to answers to special questions, but is not necessarily synonymous with "general verdict"; and the word, as so used in law, is not applicable to findings of fact by the court. *Swan v. Bevis Rock Salt Co.*, 119 Pac. 871, 86 Kan. 260.

Under Rev. Code Civ. Proc. § 293, providing that the verdict shall be deemed to have been excepted to, and Rev. Civ. Code, § 2465, defining the word "verdict" to include a judge's findings of fact, it is not necessary to except to findings to determine sufficiency of the evidence on appeal. *Kelly v. Wheeler*, 119 N. W. 994, 996, 22 S. D. 611.

Under B. & C. Comp. § 159, providing that the findings of the court shall be deemed a "verdict," and may be set aside in the same manner and for the same reasons, and section 173, defining a new trial as a re-examination of an issue of fact after a trial and decision, and section 174, specifying the manner in which a verdict or other decision may be set aside and a new trial granted, and providing that a new trial may be granted "on the motion of the party aggrieved," the court cannot on its own motion set aside its filed findings after the filing by a party of a motion for judgment; the court not having been imposed on by fraud or collusion of the parties or otherwise. *Scott v. Ford*, 97 Pac. 99, 101, 52 Or. 288.

A final order, pursuant to a recommendation of commissioners, allowing owners of property taken in condemnation proceedings costs and allowances, was not a "verdict," within Code Civ. Proc. § 1235, providing that, where final judgment is rendered for a sum of money awarded by a verdict, report, or decision, interest on the award from the date when the verdict was rendered to the time of entry of judgment must be computed by the clerk and added to the award. *In re Pine's Stream and East Meadow Stream in Town of Hempstead*, 114 N. Y. Supp. 681, 683, 684, 129 App. Div. 929.

An inquest of insanity held by two justices of the peace upon the alleged insanity of any person or inhabitant of their county and their certificate that said person therein named is insane and a proper subject for treatment in a hospital for the insane, is not a judgment of a court or equivalent thereto; nor is such finding and certificate equivalent to a "verdict" of a jury or a finding of a court that such person is of unsound mind and incapable of managing his own estate, its purpose being to establish the fact that such person is entitled to admission to a hospital for the insane for treatment. *Leinss v. Weiss*, 71 N. E. 254-256, 33 Ind. App. 344.

#### Findings of fact

A "verdict" is a general finding of all facts. *Atchison, T. & S. F. Ry. Co. v. Osburn*, 100 Pac. 473, 474, 79 Kan. 348.

"A 'verdict' is the compound result of the legal instructions given to the jury by the court and of their findings of fact applied to the legal principles laid down for their guidance." *Lewis v. Hinson*, 43 S. E. 15, 18, 64 S. C. 571 (quoting definition in *Bonhan v. Bishop*, 23 S. C. 105); *Cole v. Blue Ridge Ry. Co.*, 55 S. E. 126, 127, 75 S. C. 156.

#### VERDICT CONTRARY TO EVIDENCE

The phrase "verdict contrary to evidence," in a motion for a new trial, is equivalent to the statutory ground for new trial that the verdict is not sustained by sufficient evidence. *Linderman v. Nolan*, 83 Pac. 796, 16 Okl. 352.

#### VERDICT CONTRARY TO LAW

See Against Law.

#### VERIFICATION—VERIFY

*Illinois Central Railroad Charter (Priv. Laws 1851, p. 71) § 18*, requires the railroad company to file certain accounts of gross receipts to the state, and declares that, for the purpose of verifying and ascertaining the accuracy of such accounts, full power is vested in the Governor to examine the books and papers of the corporation, and the officers, agents, and employees of the company under oath, etc. Held, that the word "ascertain" meant "to make certain to the mind," "to free from obscurity, doubt, or chance," "to make sure of," "fix," "determine," and the word "verify" meant "to ascertain to be correct," "to establish the truth of," "to confirm," "substantiate," "to ascertain to be correct," "to be corrected, if found erroneous, as to verify a statement, quotation, reference, account, or reckoning of any kind, to verify the items of a bill, or the total amount, to prove to be true, to confirm, to establish the truth of"; and hence the Governor was not only authorized to fix and determine whether the accounts were correct, but to correct them, if found erroneous, and finally to adjust and settle them. *State v. Illinois Cent. R. Co.*, 92 N. E. 814, 832, 246 Ill. 188.

*Acts 1907, p. 225, c. 123, § 6*, declares that within a year after the passage of the act all medical practitioners practicing under previous laws, and not having received a license from the state medical board, shall present to the board evidence of the existence and validity of their diplomas or valid existing licenses, and shall receive from the board a verification license. Held, that the word "verification," as there used, meant to confirm or to substantiate something already done involving a duty to ascertain the genuineness and valid existence of a license previously granted by lawfully authorized boards, the identity of the person, etc. *Board of Medical Examiners of Texas v. Taylor*, 120 S. W. 574, 575, 56 Tex. Civ. App. 291 (citing 8 Words and Phrases, pp. 7295, 7296).

To "verify" means to prove to be true or correct; to establish the truth of; to confirm. A guaranty company gave a bond to a union to secure the faithful discharge of the duties of its treasurer. It stipulated that the union should notify the company immediately on discovering any dishonesty on the part of the treasurer. The union in its application stated that the treasurer's accounts would be examined and verified every three months by its trustees. The application stipulated that the statements were warranted to be true, and that the business of the union should be maintained as stated. In February it was learned that the treasurer was short in his accounts. A quarterly examination of his books had been made in

December preceding, at which time it was found that he should have on hand \$740. He showed a bank book showing deposits of \$440 and the balance in cash. The amount alleged to be in the bank was not verified. Held, that the union failed to verify the funds in the possession of the treasurer as required by the application, relieving the company of liability. *United States Fidelity & Guaranty Co. v. Downey*, 88 Pac. 451, 452, 38 Colo. 414, 10 L. R. A. (N. S.) 323, 120 Am. St. Rep. 128.

In a building contract requiring the contractor to "verify the dimensions" of the detailed drawings, plans, and specifications prepared by the architect, the quoted expression does not require the contractor to ascertain whether or not the architect proceeded on a radically erroneous theory in drawing the plans. *Beattie Mfg. Co. v. Heinz*, 97 S. W. 188, 190, 120 Mo. App. 465.

#### **As proceeding**

See Proceeding.

#### **As requiring oath**

The primary meaning of "verify" is to affirm under oath, and Acts 1905, p. 182, c. 109, § 5, requiring a firm doing a banking business to make reports to the auditor of state, verified by some member of the firm, calls for reports under oath. *State v. Trook*, 88 N. E. 930, 931, 172 Ind. 558.

The "verification" contemplated by Code W. Va. 1906, c. 130, § 31, relating to the verifying of mechanics' liens, is an oath or affirmation taken and administered by and before an officer having authority by law to administer and certify oaths and affirmations. *Tygart Valley Brewing Co. v. Vilter Mfg. Co.*, 184 Fed. 845, 849, 107 C. C. A. 169.

#### **VERIFIED BY AFFIDAVIT**

In view of the fact that *Burns' Ann. St.* 1908, §§ 6002, 6008, providing for the filing and allowance of claims against counties, contemplate that the claim and the "verification" thereof are separate instruments, and in view of the meaning of "claim," which is the assertion of a liability, to the one making it, to do a service or pay a sum, and of the term "verified," which, as applied to pleadings and statements of claims filed with municipal officers, etc., means an affidavit "attached to" such statement of claim as to the truth of the matter stated therein, the verification of a claim filed against a county for work done is not a part of the statement of claim, but a distinct instrument, and hence need not be alleged in the affidavit, together with the claim, in a prosecution for presenting a fraudulent claim to a county for work done, in order to admit the claim itself in evidence, as matters not forming a part of an instrument need not be set out in the affidavit as a part thereof, in order to prevent a

variance. *Bader v. State*, 94 N. E. 1009, 1011, 176 Ind. 268.

Under a statute providing that every person wishing to avail himself of the benefits of the chapter relating to mechanics' liens must file a just and true account of the amount due, after allowing all credits, and containing a correct description of the property to be charged with such lien, "verified by affidavit," a statement of lien on behalf of a corporation, verified by its president on information and belief, was insufficient. *Western Plumbing Co. v. Fried*, 81 Pac. 394, 33 Mont. 7, 114 Am. St. Rep. 799.

Under Rev. Codes, § 7291, providing that the lien shall be "verified by affidavit," it was sufficient that the entire lien was in form an affidavit, with an itemized statement attached, and this being filed it was not necessary that the lien notice must have attached to it a verification in form similar to that required for pleadings; the word "verified" meaning to confirm by oath, and an "affidavit being a written declaration under oath." *Wertz v. Lamb*, 117 Pac. 89, 92, 43 Mont. 477.

#### **VERIFIED STATEMENT**

The words "verified statement," in *Greater New York Charter* (Laws 1901, c. 466) § 261, providing that a verified statement of claim shall be filed with the comptroller, relate to the statement which a claimant must file, showing in detail the property alleged to have been damaged or destroyed and the manner thereof, and do not refer to a verification of a claim on an examination conducted by the comptroller as authorized by section 149. *Frank v. City of New York*, 133 N. Y. Supp. 434, 436, 75 Misc. Rep. 472.

#### **VERMUTH**

"Vermuth" is not "wine," within either the commercial or the popular meaning of that term, and therefore is not subject to the stamp tax on "sparkling or other wines," provided in War Revenue Act June 13, 1898, c. 448, 30 Stat. 463. *Taylor v. Treat*, 153 Fed. 656, 657 (citing definitions in *Standard and Century Dictionaries*).

"Vermuth" is not a "wine," "cordial," or "liqueur," within the meaning of *Tariff Act* July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174, prohibiting an allowance for the leakage of those three articles. *United States v. Julius Wile, Sons & Co.*, 178 Fed. 269, 270, 101 C. C. A. 574.

#### **VERY**

An instruction, in an action for injuries to a passenger by the derailment of the train, that the carrier must exercise the utmost caution characteristic of very careful and prudent men, is erroneous as imposing on the carrier too high a degree of care; the word



"very" meaning exceedingly, excessively, and the word "excessive" meaning exceeding what is usual or proper. *Parker v. Boston & M. R. R.*, 79 Atl. 865, 872, 84 Vt. 329.

The word "very," in common parlance, has not the same meaning as "extraordinary"; and hence an instruction, in an action for injuries to a passenger, that a carrier owes the duty to exercise the highest degree of diligence known to "very" diligent persons, was not objectionable as requiring a standard of extraordinary care. *Southern Ry. Co. v. Burgess*, 42 South. 35, 37, 143 Ala. 364.

The term "very high degree of care" means that degree of care which a person possessed of the highest degree of care and prudence engaged in the same kind of employment would have exercised under like circumstances, and the word "negligence," as applied to one engaged in the transportation of passengers for hire, is the failure to do anything which a person of the highest degree of care and prudence, engaged in the same kind of employment, would have done under like circumstances, or the doing of anything which a person possessed of the highest degree of care and prudence engaged in the same kind of business, would have refrained from doing under like circumstances. *Central Texas & N. W. R. Co. v. Smith (Tex.)* 73 S. W. 537, 538 (citing *International & G. N. Ry. v. Welch*, 24 S. W. 390, 86 Tex. 204, 40 Am. St. Rep. 829).

#### VERY FAST

While the expressions "very fast" and "mighty fast" are terms of relative meaning, when they are applied to the speed of a street car, they are sufficiently definite to enable the jury to say whether or not the car was travelling in excess of seven miles an hour. In an action against a street railroad for injuries to a passenger, evidence that the car was going "very fast" and "mighty fast" was sufficient to render it error to exclude an ordinance limiting the rate of speed of a street car to seven miles an hour. *Moore v. Northern Texas Traction Co.*, 95 S. W. 652, 653; 41 Tex. Civ. App. 583.

#### VERY HEAVY SHRINK

A shipper of live stock wrote the carrier that he had had "a very heavy shrink," and stated that in one instance all the cattle in one car were knocked down by rough handling, and complaint was made of the delay in transportation, which caused the stock to reach destination too late for a certain market. Held, that the letter, by the term "very heavy shrink," did not amount to a claim for damages merely from loss of weight alone, and did not preclude recovery for loss due to depreciation on account of loss in weight, injury to quality, and decline in the market. *Ratliff v. Quincy, O. & K. C. R. Co.*, 94 S. W. 1005, 1008, 118 Mo. App. 644.

#### VERY RICH

The terms "wealthy" and "very rich" are too indefinite and general to charge any one with the knowledge of the kind and amount of property possessed. In a suit to set aside an antenuptial agreement because of the disproportion between the provision for the wife therein and the husband's means, evidence that the wife had been told by the husband, prior to the making of the agreement, that he was a "banker," a "large landowner," and "wealthy," did not discharge the burden upon those claiming under the husband under the agreement to show that the wife had full knowledge as to the nature, character, and extent of the husband's means at the time. *Warner v. Warner*, 85 N. E. 630, 637, 235 Ill. 443.

#### VERY SEVERE

The unexpected jarring of a passenger car, described as "very severe," as the train was passing over a cross-switch used during the repair of one of the railroad company's bridges, which resulted in a passenger, who was standing near the open door of a car, being thrown from the car and injured, did not constitute negligence on the part of the carrier. *Foley v. Boston & M. R. R.*, 79 N. E. 765, 766, 193 Mass. 332, 7 L. R. A. (N. S.) 1076.

#### VERY UNFAVORABLE

To say that the general character of a person for truth and veracity is "very unfavorable" is in common parlance but another mode of saying that it is bad in that regard. *Martin's Ex'r v. Martin*, 25 Ala. 201, 211.

#### VESSEL

See *Coastwise Steam Vessel*; *Foreign Vessel*; *Steam Vessel*.

Management of, see *Management*.

Owner of vessel, see *Owner*.

#### Appurtenances included

The word "vessel," as used in Chinese Exclusion Act May 6, 1882, c. 126, § 10, 22 Stat. 61, providing that "every vessel whose master shall knowingly violate any provisions of this act shall be liable to seizure and condemnation," etc., is broad enough to include the vessel's tackle, apparel, furniture, and "appurtenances." A chronometer supplied on account of the owners of a schooner as a necessary part of her equipment for a special service, and necessary part of her equipment, is to be regarded as "appurtenant" to the "ship," and as included in the term "vessel." *The Frolic*, 148 Fed. 921, 922 (citing *Abb. Merchant Ships & Seamen* [14th Ed.] p. 33, 34, 280; *Richardson v. Clark*, 15 Me. 421; *The Witch Queen*, 3 Sawy. 201, 30 Fed. Cas. 396).

**Barge**

A barge with a pile driver mounted thereon and moved from place to place by tugs, which at the time of an injury to an employé working thereon was working in a tidewater stream, is a "vessel" subject to the admiralty jurisdiction, and within Rev. St. §§ 4283, 4289 (U. S. Comp. St. 1901, pp. 2943, 2945), giving the right to a limitation of liability without regard to the manner in which it was moored or the fact that at the time of the injury the tide was out and it rested on the bottom. In re P. Sanford Ross, 196 Fed. 921, 924.

**Derrick hoist**

A derrick hoist held a "vessel" subject to admiralty jurisdiction and against which the engineer and general utility man employed thereon were entitled to a seaman's lien for wages. The Sallie, 167 Fed. 880.

**Dredge**

The Pennsylvania act giving a lien for repairs or supplies furnished on "all ships, steamboats or vessels navigating" the rivers in the state, embraces only such "vessels" as are engaged in the business of trade or commerce on such rivers, and does not apply to a dredge boat, without motive power and used only for supporting and moving from place to place dredging apparatus. Fredericks v. James Rees & Sons Co., 135 Fed. 730, 731-734, 68 C. C. A. 368.

Dredges are to be considered in admiralty as "vessels." The owner of a tug, which was verbally hired by the day by the owner of three dredges to "wait upon" such dredges while engaged on certain work, the services rendered being the carrying of coal and water to the dredges, the towing of scows, and the dredges themselves when necessary, is not entitled to a maritime lien on all or any of such dredges for a balance due on a contract which was not one for ordinary towage services to the vessels themselves. The Alligator, 161 Fed. 37, 39, 88 C. C. A. 201.

"It was distinctly held by Judge Dodge \* \* \* that a scow is a 'vessel,' to be dealt with as such by persons concerned with maritime affairs. Dredges have, I think, been uniformly treated as vessels subject to ordinary rules relating to navigation, \* \* \* and it would be anomalous if they could occupy navigable waters in a fog, without giving other vessels, which were justified in navigating there, warning of their presence." The Kennebec, 167 Fed. 847, 855 (citing and adopting In re Eastern Dredge Co., 138 Fed. 942, and The City of Birmingham, 138 Fed. 555, 71 C. C. A. 115).

**Foreign vessel**

A statute giving the right to a lien for supplies furnished "vessels" is applicable only to domestic vessels of the state, and a lien cannot be obtained thereunder on a foreign

vessel. The Golden Rod, 151 Fed. 6, 7, 80 C. C. A. 246.

**As public work**

See Public Work.

**Pump boat**

A "pump boat," which consists of a floating structure equipped with engine, boiler, pumps, pipes, and capstans, used for pumping out coal barges, and which can be moved on the water by means of poles or ropes attached to its capstans or towed, is a "vessel," and subject to the admiralty jurisdiction. Charles Barnes Co. v. One Dredge Boat, 169 Fed. 895, 896.

**Scow**

A navigable structure intended for the transportation of a permanent cargo, as a scow carrying a pile driver and engine, which has to be towed in order to navigate, is a "vessel," and within the admiralty jurisdiction. The Raithmoor, 186 Fed. 849, 850.

A scow 110 feet long, employed in carrying mud in Boston Harbor and adjacent waters, or other waters subject to the jurisdiction of admiralty courts, is a "vessel" for the purposes of admiralty jurisdiction and the maritime law, and her owner may maintain proceedings for limitation of liability on account of collision under Rev. St. §§ 4282, 4289, as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80. In re Eastern Dredging Co., 138 Fed. 942, 943.

**As structure**

See Structure.

**Wrecked or dismantled ship**

A steamer, which had been taken on shore by her owners for the purpose of being dismantled, and from which the masts and engines had been removed, so long as the dismantling process had not proceeded so far as to render her wholly incapable of being navigated as a tow or otherwise, continued to be a "vessel," within the meaning of Rev. St. § 4289, as amended by Act June 19, 1886, c. 421, § 4, 24 Stat. 80; and her owners may maintain proceedings for a limitation of liability for damage done by her, where she floated and went adrift in a storm without their knowledge. The C. H. Northam, 181 Fed. 983, 984.

A vessel, although wrecked, abandoned by her owners and underwriters, and her register closed, but which still retains her hull, though damaged, and her machinery, remains a "vessel" in a maritime sense, and is subject to dry dock charges while undergoing repairs after she has been raised, and to a maritime lien for such charges. The George W. Elder, 196 Fed. 137, 139.

**VESSELS EMPLOYED BY AUTHORITY OF LAW**

The term "vessels employed by authority of law," within the meaning of Rev. St. U. S. § 1571, providing that "no service shall be

regarded as sea service except such as shall be performed at sea, under the orders of a department, and in 'vessels employed by authority of law,' is restricted to vessels owned or chartered by the government, or otherwise engaged in the service of the United States, and does not include a steamer upon which a naval officer takes passage under the orders of a department. *United States v. Thomas*, 25 Sup. Ct. 102, 105, 195 U. S. 418, 49 L. Ed. 259.

### VESSELS OF THE UNITED STATES

A steamer enrolled and licensed in the office of collector of customs in the port of Detroit under the statutes of the United States is a "vessel of the United States," regardless of what use may be made of her; and the recording of a mortgage on a vessel of the United States, under Rev. St. U. S. § 4192, in the office of the collector of customs where such vessel is registered, renders the mortgage valid, regardless of the fact that it is not recorded as required by the state law. *Fleming v. Sloane*, 110 N. W. 933, 934, 147 Mich. 404.

A "vessel of the United States," as used in the Tonnage Duty Act means more than a vessel whose nationality is American. It means such a vessel as is defined in section 4131 of the Revised Statutes, providing that "vessels registered pursuant to law, and no others, except such as shall be duly qualified, according to law, for carrying on the coasting trade and fisheries, or one of them, shall be deemed vessels of the United States, and entitled to the benefits and privileges appertaining to such vessels; but they shall not enjoy the same longer than they shall continue to be wholly owned by citizens and to be commanded by a citizen of the United States. And the officers of vessels of the United States shall in all cases be citizens of the United States." A vessel which is not a "vessel of the United States" may be an "American vessel," because of the nationality of her owner. *The Alta*, 136 Fed. 513, 519, 69 C. C. A. 289 (citing *Wade v. Chicago*, S. & St. L. R. Co., 13 Sup. Ct. 892, 149 U. S. 327, 37 L. Ed. 755).

A vessel not registered in the United States is a vessel "not of the United States," within the meaning of Rev. St. § 4219, although owned by a citizen of the United States, and on her entry from a foreign port is subject to tonnage duty at the rate of 50 cents per ton thereunder. *The Alta*, 148 Fed. 663, 664, 665, 78 C. C. A. 415 (citing *The Merritt*, 17 Wall. [84 U. S.] 562, 21 L. Ed. 682; *The Conqueror*, 17 Sup. Ct. 510, 513, 166 U. S. 110-119, 41 L. Ed. 937).

### VEST

See Technically Vested.

Under a will which directs, after the decease of testator's brother and his wife, that

certain real estate shall "vest" in the children of the deceased brother, the children were to come into possession of the property on the decease of their parents. *Jacobs v. Whitney*, 91 N. E. 1009, 1011, 205 Mass. 477, 18 Ann. Cas. 576.

The general rule for determining whether a bequest is vested or contingent is that, when the time of division is of the substance of the gift, the legacy is contingent, but, when the time is mentioned only as a qualifying clause of payment or division, the legacy is vested. *Crawford v. Engram*, 45 South. 584, 585, 153 Ala. 420.

The entire clear value of a legacy under a will devising the residuary estate in trust to pay over to the testator's niece the net income in quarterly payments for life, and not merely so much of such life estate as she had actually received before July 1, 1902, had "vested" prior to that date, in the sense of the provision of Act June 27, 1902, c. 1160, § 3, 32 Stat. 400, for the refunding of so much of the succession tax as may have been collected on "contingent beneficial interests which shall not have become vested" before the date mentioned. *United States v. Fidelity Trust Co.*, 32 Sup. Ct. 59, 60, 222 U. S. 158, 56 L. Ed. 137.

"Vested," as used in a partnership agreement, providing for the dissolution of the firm, and that all the firm's assets should vest in the liquidating partner, did not give to such liquidator absolute title, but title only for the purpose of liquidating the assets of the partnership, so that on his death such assets did not descend to his administratrix. *Smith v. Proskey*, 81 N. Y. Supp. 424, 425, 82 App. Div. 19.

Under Statutes, § 2830, providing that "a future interest is 'vested' when there is a person in being who would have a right defeasible or indefeasible to the immediate possession of the property upon the ceasing of the immediate or precedent interest," a will giving to the wife a life estate, and the son all property after her death, empowers the son to transfer by written instrument to his mother, and her heirs and assigns, forever, property to become his after the death of the mother. *Coats v. Harris*, 75 Pac. 243, 245, 9 Idaho, 458.

The ordinary, proper, and legal meaning of a provision that personal property shall be "vested in" a certain person is that the title to the property passes to and rests in him; and where an agreement provided for the dissolution of a partnership by consent, appointed one of the partners liquidator, and further provided that all stock, book accounts, and other assets of the firm should vest in such liquidating partner, it gave him an absolute title in the assets, so that on his death, they would descend to his administratrix. *Oshinsky v. Greenberg*, 79 N. Y. Supp. 833, 39 Misc. Rep. 342.

A deed under which the grantees are to enter immediately into possession, and thereafter have the use of the land, unless some condition in the deed is broken, and by which the grantees, in consideration of the conveyance, covenant to furnish the grantor support and proper attendance during his life, and give him a burial and monument, and to pay a mortgage on the premises, and that he shall have the right to re-enter and take possession for a breach of any of such covenants, though providing that the performance of said covenants is made a "condition precedent to the vesting of the title," creates conditions subsequent, and not precedent; the word "vesting" not being used in its technical sense, but the clause, in the light of the surrounding circumstances and in connection with the entire instrument, being clearly intended to mean that the title should vest at once, but that the grantees should not have an absolute indefeasible title till they had performed all the conditions of the deed. *Phillips v. Gannon*, 92 N. E. 616, 619, 246 Ill. 98.

#### VESTED ESTATE

An estate is "vested" where there is an immediate right of present enjoyment or a present fixed right of future enjoyment. *Armstrong v. Barber*, 88 N. E. 246, 248, 230 Ill. 389; *Trippet v. State*, 86 Pac. 1084, 1086, 149 Cal. 521, 8 L. R. A. (N. S.) 1210 (quoting *Kent*, Comm. 202).

Within the rule that, where a residuary estate is completely "vested" before the enactment of the transfer tax statute, it cannot be reached by that form of taxation, the word "vested" is really to be construed as equivalent to the word "accrued," and not as distinguished from merely contingent interests. In that sense a property right which has been fully acquired is protected by the contract, and becomes in law a vested right, the enjoyment of which is not to be deemed as only a privilege, and as such consequently subject to taxation upon the right of enjoyment. In *re Craig's Estate*, 89 N. Y. Supp. 971, 973, 97 App. Div. 289.

To vest an estate is to give a legal or equitable seisin. An estate "vests" in a person who is given a present and immediate interest, as distinguished from an interest the existence of which depends on a contingency. The word applies to estates in personality, as well as estates in land. In *re McClellan's Estate*, 70 Atl. 737, 221 Pa. 261.

Where the form of a deed is actually employed, such phrases as "vest at my death," "take effect at my death," and the like may well be construed as merely designed to postpone possession or enjoyment by the grantee till after the death of the grantor. An instrument attested as a deed and in all respects in the form of a deed should, though it contains the words "this deed to

take effect at my death," be treated, not as a will, but as a conveyance passing title in present, with right of possession postponed till the death of the maker. *Nolan v. Otney*, 89 Pac. 690, 691, 75 Kan. 311, 9 L. R. A. (N. S.) 317 (quoting *West v. Wright*, 41 S. E. 602, 115 Ga. 277).

The phrase "vest in and belong to," as used in Laws 1858, c. 291, providing for condemnation of lands for a bridge over Harlem river, and declaring that, upon the confirmation of the report of the commissioners, the property shall "vest in and belong to" the city of New York, denotes no estate less than a fee. In *re Jerome Avenue in City of New York*, 105 N. Y. Supp. 1009, 1011, 54 Misc. Rep. 345.

If there is a present right to a future possession, though that right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate: an unpossessed estate being vested if it is certain to take effect in possession by enduring longer than the precedent estate. A will gave the residue of testator's estate to a trustee for 20 years, with power to invest and reinvest it, and provided that, when there should be a greater accumulation than the trustee deemed necessary for the purposes of the trust, he should divide it into six equal shares, paying one share to each of testator's five children and dividing one share among the children of testator's deceased son, and provided that, if any of testator's children should die without leaving lineal descendants before expiration of 20 years after testator's death, their shares should go to the other legatees, share and share alike, per stirpes and not per capita, and that at the expiration of 20 years the trustee should sell the property and divide it into six shares to be distributed as provided for distribution of the income. Held, that all legacies under the will were vested subject as to the children to be divested by death within 20 years without leaving lineal descendants. The legacies to the children of testator's deceased son were vested absolutely and unconditionally, so that an administrator of a deceased daughter of testator's deceased son was entitled to share in a distribution of income. In *re Long's Estate*, 77 Atl. 924, 928, 228 Pa. 594.

In determining whether an estate is "vested" or contingent, "the question is always: Is futurity annexed to the substance of the gift? If so, the vesting is postponed. Or is it annexed to the time of payment only? If so, the legacy vests immediately." Another authority says: "The question of 'vested' or contingent is not to be tested by the certainty or uncertainty of obtaining the actual enjoyment, for that would make the character of the estate depend, not upon the terms of its creation, but on the form of the result. Neither does it depend on the defeasibility or the indefeasibility of the right

of possession, for many estates are vested without possession, as well as with, which are yet defeasible. If there is a present right to a future possession, though that right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate." *Rhode Island Hospital Trust Co. v. Noyes*, 58 Atl. 999, 1002, 26 R. I. 323 (quoting *Staples v. De Wolf*, 8 R. I. 118; *Safe Deposit & Trust Co. v. Wood*, 50 Atl. 920, 201 Pa. 427).

"A future estate is either vested or contingent. It is 'vested' when there is a person in being who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is 'contingent' while the person to whom or the event on which it is limited to take effect remains uncertain." *In re Perry*, 96 N. Y. Supp. 879, 884, 48 Misc. Rep. 285.

When an estate is "vested" for life or years, it is fixed for the described term, and its owners are seized for that term. *Brewington v. Brewington*, 109 S. W. 723, 727, 211 Mo. 48 (citing *Black, Law Dict.*, title "Vest").

A future estate is "vested" when there is a person in being who would have an immediate right to the possession of the property or the determination of all intermediate or preceding estates. *In re Ryder*, 89 N. Y. Supp. 460, 462, 43 Misc. Rep. 476 (citing *Laws 1896*, p. 564, c. 547, § 30).

The rule for determining whether an estate bestowed by a will is "vested" or contingent is that, where the time of division or payment is of the substance of the gift, the legacy is contingent; when time is mentioned only as a qualifying clause of the payment or division, then the legacy is vested; or, in other words, legacies payable after the death of the testator are either vested or contingent, and, when the testator annexes time to the payment only, the legacy will be vested, but, if of the gift itself, it will be contingent. *Johnson v. Terry*, 36 South. 775, 776, 139 Ala. 614.

The term "vested estate," as used in Civ. Code Prac. § 489, authorizing the sale of a vested estate of an infant or of a person of unsound mind in real property by order of a court of equity in certain cases, and section 490 providing that a vested estate in real property owned jointly by two or more persons may be sold in certain cases, includes all estates which are not contingent, and the sections do not authorize the sale of an infant's interest in real property which is a contingent remainder and dependent on the event of the infant surviving the life tenants. *Crutcher v. Rodman*, 81 S. W. 252, 253, 118 Ky. 506 (citing *Ward v. Edge*, 39 S. W. 440, 100 Ky. 757).

*Real Property Law (Laws 1896*, p. 564, c. 547), § 27, declares a future estate is

"vested" when there is a person in being who would have an immediate right to the possession of the property on the determination of all the intermediate or precedent estates. *Schell v. Carpenter*, 100 N. Y. Supp. 554, 555, 50 Misc. Rep. 400.

The law favors the vesting of estates, and an estate is "vested" when it is limited to a person in being and is to take effect on the determination of a preceding particular estate. *Pingrey v. Rulon*, 92 N. E. 592, 596, 246 Ill. 109.

A conditional legacy or devise, subject to be divested on the happening of the contingency on which it is given, is "estate vesting sub modo." *Matlock v. Lock*, 73 N. E. 171, 178, 38 Ind. App. 281 (citing 1 *Rop. Leg.* 601).

Where infants jointly own land, subject to the unassigned dower of their mother in a third of it, and all live on it, there is a "vested estate" therein, jointly owned and in possession, within Civ. Code Prac. § 490, subsec. 2, authorizing such an estate to be sold in an action by either owner, though one be an infant, if the property be indivisible, so that the sale is properly allowed if the action is brought by the guardian of the infants, the widow consenting to take the present value of her dower, though she join as plaintiff. *Hatterich v. Bruce*, 151 S. W. 31, 32, 151 Ky. 12.

#### VESTED IN INTEREST OR POSSESSION

The word "vest," as used in a deed, has a double meaning, denoting either "a vesting in interest," or "a vesting in possession." *Burney v. Arnold*, 67 S. E. 712, 715, 134 Ga. 141.

Testator gave his residuary estate for two lives to trustees, with instructions to consider the corpus divided into a certain number of shares, declaring that the income should be distributed among named beneficiaries annually, and that after the lapse of the two lives the corpus should be divided in such a manner that the parties theretofore receiving the income only should be vested with the principal in the same proportion. Held, that the word "vest" was used, not in the sense of vesting in interest, but in possession, and that the beneficiary took a vested interest in the principal on the testator's death, which passed on the beneficiary's death under his will. *Ogden v. Ogden*, 82 N. Y. Supp. 710, 715, 40 Misc. Rep. 473.

#### VESTED INTEREST

A "vested interest" is one in which there is a present fixed right either of present enjoyment or of future enjoyment. A "contingent interest" is one in which there is no present fixed right of either present or future enjoyment, but in which a fixed right will arise in the future under certain speci-

fied contingencies. An estate in remainder is not rendered contingent by uncertainty of time of enjoyment. The right and capacity of the remaindermen to take possession of the estate, if the possession were to become vacant, and the certainty that the event on which the vacancy depends must happen some time, and not the certainty that it will happen in the lifetime of the remaindermen, determine whether or not the estate is vested or contingent. *Nelson v. Nelson* (Ind.) 72 N. E. 482, 483.

The right to inchoate dower given at common law is not a "vested interest." *Griswold v. McGee*, 112 N. W. 1020, 1022, 102 Minn. 114, 12 Ann. Cas. 186.

When the subject of the gift is separated from the rest of the estate, and vested in trustees for the benefit of the legatee, the gift, although in form contingent, will be held "vested." Where testator bequeathed his residuary estate in trust, the income to be paid to his grandson until he attained the age of 25 years, when the trustees were to pay him the principal thereof, and the grandson died before reaching such age, it was held that he took a "vested interest" in the principal. *In re Middleton's Estate*, 61 Atl. 808, 809, 212 Pa. 119.

#### VESTED LEGACY

Where the event is certain, though the time be uncertain, a legacy is vested. *Moore v. Matthews*, 61 Atl. 743, 745, 70 N. J. Eq. 373 (citing *Beatty's Adm'r v. Montgomery's Ex'x*, 21 N. J. Eq. 324).

A testator, who died in March, 1901, devised and bequeathed his residuary estate to trustees, to hold and manage the same during the lives of the two surviving children of the testator who should be the youngest at the time of his death and for so much longer as permissible under the laws of the state. The trustees were directed to set apart a sufficient sum to produce a certain amount of income to be paid to the widow during her life, and to pay the income from the remainder in equal parts to the four children of the testator named, or to their issue or devisees in case of their death, subject as to a part thereof to certain charges to pay off liens on property. At the termination of the trust the corpus of the estate was to be divided equally between the four children or the devisees, legatees, assigns, or legal heirs of any deceased. Held, that each of the four children took at once a vested estate in one-fourth part of the testator's residuary estate, having the immediate right to dispose of the same by deed or will, and to enjoy a part of the income, subject to no contingency, possession of the corpus alone being deferred; that such gifts took effect at once "in possession or enjoyment," and became subject to the legacy tax imposed by War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464, and

that the taxes paid thereon were not recoverable under Act June 27, 1902, c. 1160, § 3, 32 Stat. 406, as having been assessed on contingent interests which had not become vested prior to July 1, 1902. *Title Guarantee & Trust Co. v. Ward*, 164 Fed. 459, 467 (citing 8 Words and Phrases, p. 7304).

#### VESTED REMAINDER

The word "vested," as applied to real estate, implies a present interest therein, and a remainder is therefore vested in one when he or his heirs have the right to the immediate possession, whenever or however the preceding estates may determine. *Storrs v. Burgess*, 67 Atl. 731, 732, 29 R. I. 269 (citing *Hawkins, Wills*, 221 et seq.; *Rule Against Perp.* 76, §§ 100, 101; *Johnson v. Edmond*, 33 Atl. 503, 65 Conn. 492, 499; *Starnes v. Hill*, 16 S. E. 1011, 112 N. C. 1, 9, 22 L. R. A. 598).

A remainder which is subject to a condition subsequent is "vested" subject to divestiture on the happening of the condition. *Walker v. Alverson*, 68 S. E. 966, 968, 87 S. C. 55, 30 L. R. A. (N. S.) 115.

A "vested remainder" is one by which a present interest passes to the party, though to be enjoyed in future, and by which the estate is fixed to remain to a determinate person after the particular estate is spent; he having an immediate fixed right of future enjoyment. *In re Kountz's Estate*, 62 Atl. 1103, 1105, 213 Pa. 390, 3 L. R. A. (N. S.) 639, 5 Ann. Cas. 427 (quoting and adopting definition in *Williamson v. Field's Ex'rs* [N. Y.] 2 Sandf. Ch. 533, 552, and citing *Tiffany, Real Prop.* § 120(b); *Brown v. Lawrence*, 57 Mass. [3 Cush.] 390, 397; 1 Boone, *Real Prop.* [2d Ed.] § 173; and *Fearne, Cont. Remainders*, 216).

A "vested remainder" is one limited to a certain person on a certain event, namely, the termination of the particular estate, in such manner that the remainderman has present capacity to take possession should the possession become immediately vacant. *Nelson v. Nelson* (Ind.) 72 N. E. 482, 484 (quoting and adopting definition in *Gard. Wills*, §§ 128-131).

A remainder is a "vested" one where a present interest, although to be enjoyed in the future, passes under the will to a certain and definite person. *Vogt v. Vogt*, 26 App. D. C. 46, 51.

A "vested remainder" is defined to be "whenever the preceding estate is limited so as to determine on an event which certainly must happen, and the remainder is so limited to a person in esse, and ascertained that the preceding estate may be, by any means, determined before the expiration of the estate limited in remainder." *Taylor v. Stephens* (Ind.) 74 N. E. 12.

A "vested remainder" is one which gives the remainderman or his heirs the right to

immediate possession whenever the preceding estates may terminate. *Brown v. Brown*, 93 N. E. 357, 359, 247 Ill. 528.

A "vested remainder" is one by which a present interest passes under the will to the devisee, though to be enjoyed in the future, and by which the estate is fixed to remain to a determinate person after the particular estate is spent, and one entitled to a vested remainder has an immediate fixed right of future enjoyment. *Richardson v. Richardson*, 68 S. E. 217, 218, 152 N. C. 705.

A "vested remainder" is a present interest which passes to one to be enjoyed in future, so that the estate is invariably fixed in a determinate person after a particular estate terminates; a remainder being vested when a definite interest is created in a certain person and no further condition is imposed than the determination of the precedent estate, it not being sufficient that there is a person in being who has the present capacity to take the remainder if the particular estate be presently determined, but it being necessary that it appear that there are no other contingencies which may intervene to defeat the estate before the falling in of the particular estate. *Golladay v. Knock*, 85 N. E. 649-651, 235 Ill. 412, 126 Am. St. Rep. 224.

When testator gave all his estate to his wife for life, on her death to be divided equally among his children, the children living at the time of testator's death took "vested remainders," under statutes providing that an estate is vested when there is a person in being who would have an immediate right to possession on the determination of the precedent estate. *Vanderpoel v. Burke*, 118 N. Y. Supp. 548, 549, 63 Misc. Rep. 545.

The second clause of a will provided: "I give, devise, and bequeath all the property of which I may die seised and possessed \* \* \* to my beloved wife for her natural life, the remainder thereof to my sons hereinafter named in proportions, for the time and upon the conditions hereinafter expressed." The fourth clause provided that, upon the termination of the wife's life estate, "I give and devise unto my son M. all those certain lots. \* \* \* If my son M. should precede in death his wife and leave him no lawful issue surviving, and should such death of my son M. occur before the property herein devised and bequeathed to him vests in him, then, all the interests herein devised and bequeathed to said M. shall pass to and vest in" his wife absolutely. Other provisions showed that testator clearly understood the legal significance of words of present devise unqualified by other language. Civ. Code, § 694, provides that a future interest is vested when there is a person in being who would have a right to immediate possession upon the ceasing of the precedent interest.

Section 695 provided that a future interest is contingent while the person in whom or the event upon which it is limited to take effect remains uncertain; and section 1341 provides that devises and bequests are presumed to vest at testator's death. Held, that son M. took a "vested remainder" in the estate devised to him immediately upon testator's death. In *re De Vries' Estate*, 119 Pac. 109, 111, 17 Cal. App. 184.

Real Property Law (Laws 1896, p. 564, c. 547) § 30, provides that an estate is "vested" when there is a person in being having an immediate right to possession on the termination of all intermediate or precedent estates; and section 31 declares that the existence of an unexecuted power of appointment does not prevent the vesting of a future estate limited on default of execution of the power. Testator bequeathed a share of his estate in trust for S., one half absolutely and the other half for life, and in case no issue survived her to pay one-half of her share to her appointee by will, and in default of appointment to C., should she survive S. Both C. and S. survived testator. S. died without children, leaving C. surviving and a will by which she executed the power of appointment in favor of C. Held, that on testator's death, S. surviving and having no issue, the remainder in the half share of S. vested at once in C., subject to be divested by the birth of issue to S. or by the execution of the power. In *re Haggerty*, 112 N. Y. Supp. 1017, 1018, 128 App. Div. 479.

"Vested remainders" are those by which a present vested interest passes to the party, though to be enjoyed in future, and by which the estate is invariably fixed to go to a certain person after the particular estate is spent. *Stout v. Clifford*, 73 S. E. 316, 319, 70 W. Va. 178.

"A 'vested remainder' is where a present interest passes to a certain and definite person, but to be enjoyed in futuro. \* \* \* It is a rule of law that an estate shall be held to vest at the earliest possible period, unless there be a clear manifestation of the intention of the testator to the contrary. Where there is a devise to a class of persons to take effect in enjoyment at a future period, the estate vests in the persons as they come in esse, subject to open and let in others as they are born afterwards." Where a testator who died in March, 1902, by his will bequeathed his residuary estate in trust, the income to be paid to his wife for life, and after her death to be divided between his children then living, the children of any deceased child to take in place of their parent, all children and the heirs of any deceased took a vested interest on the testator's death, which became subject to the legacy tax imposed by section 29 of the war revenue act of 1898, Act June 13, 1898, c. 448, 30 Stat. 464. *Land Title & Trust Co. v. McCoach*, 127 Fed.

381, 385 (quoting *Doe v. Considine*, 73 U. S. [6 Wall.] 458, 474, 18 L. Ed. 869).

Civ. Code, § 694, declaring that a future interest is "vested" when there is a person in being who will have a right to the immediate possession of the property on the ceasing of the intermediate interest, does not apply to a future contingent remainder in unborn grandchildren of a grantee for life, with remainder to the heirs of her body. *Hall v. Wright*, 120 Pac. 429, 431, 17 Cal. App. 502.

A "vested remainder" is one which is limited to an ascertained person in being, whose right to the estate is fixed and certain, and does not depend upon the happening of any future event, but whose enjoyment in possession is postponed to some future time. Where a testator devised property to his wife to hold, until his two children became of age, then to be divided "in equal shares between my wife and my two children, share and share alike," the children took vested remainders, and, on their deaths before attaining majority, their interests passed to their heirs at law. *Roberts v. Herron*, 58 S. E. 968, 78 S. C. 115 (quoting and adopting *Faber v. Police*, 10 S. C. 376, 387).

#### Contingent remainder distinguished

A "contingent remainder" is one limited to take effect either to an uncertain person, or on an uncertain event, while a "vested remainder" is a present interest which passes to a party to be enjoyed in the future, so that the estate is immediately fixed in a determinate person after a particular estate terminates. *Pingrey v. Rulon*, 92 N. E. 592, 595, 246 Ill. 109.

A "contingent remainder" is one limited to take effect either to a dubious or uncertain person or upon a dubious and uncertain event. A remainder is "vested" where there is a right of present enjoyment or a fixed right to a future enjoyment in a determinate person after the particular estate terminates. If there is uncertainty either as to the person who is to receive or in the gift itself to the remainderman, the remainder is contingent. Where the postponement of the estate is for reasons not personal to the remaindermen the remainder is "vested." *Northern Trust Co. v. Wheaton*, 94 N. E. 980, 983, 249 Ill. 606, 34 L. R. A. (N. S.) 1150.

Testator directed that M. and testator's daughter should have 200 acres of land, and that the rest should go to testator's wife, and, at her death, should fall back to them (meaning M. and his daughter). The daughter died before her mother without heirs. Held, that, since the remaindermen were certain and had present capacity of taking in possession, if at any time the possession should become vacant, they took a "vested remainder," though through subsequent contingencies the land might pass to persons other than those intended by the testator. *Hackney v. Tucker* (Ky.) 121 S. W. 417.

The test whether a remainder is "vested" or contingent by inquiring whether the owner being *sui juris*, could, by uniting with the owner of the particular estate, convey a fee-simple title, is inapplicable to a vested remainder, which is subject to a divesting contingency, or which is given to a class some of whom are not in esse. *Walker v. Alverton*, 68 S. E. 968, 970, 87 S. C. 55, 30 L. R. A. (N. S.) 115.

The uncertainty of the right to the enjoyment of a remainder, as distinguished from the uncertainty of the enjoyment of the estate, in the future, distinguishes a "vested" from a contingent remainder, so that the fact that the estate is to take effect after the termination of an intervening estate will not prevent both estates from vesting at the same moment. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant, before the estate limited in remainder determines, universally distinguishes a vested remainder from a contingent remainder. Where testator bequeathed to his wife for life the house in which he resided, and at her death to be divided between testator's heirs per stirpes, the heirs took a vested estate in the remainder at testator's death, and their interest was therefore descendible in case of the death of any of them during the continuance of the life estate. *Well v. King* (Ky.) 104 S. W. 380, 382.

The distinction between "vested" and contingent remainders is clearly stated in the case of *Faber v. Police*, 10 S. C. (10 Rich.) 376, as follows: "According to the elementary writers, a vested remainder is one which is limited to an ascertained person in being, whose right to the estate is fixed and certain, and does not depend on the happening of any future event, but whose enjoyment and possession is postponed to some future time. A contingent remainder, on the other hand, is one which is limited to a person not in being or not ascertained, or, if limited to an ascertained person, it is so limited that his right to the estate depends upon some contingency in the future. So that the most marked distinction between the two kinds of remainders is that in one case the right to the estate is fixed and certain, though the right to the possession is deferred to some future period, but is dependent upon the happening of some future contingency. As it has been well expressed, 'It is not the uncertainty of the estate in the future, but the uncertainty of the right to such enjoyment, which marks the difference between a contingent and a vested remainder.'" A trust deed granted a fee to the trustee for the benefit of the grantor for life, and provided that after her death the trustee should convey the property to certain named children and grandchildren, or if any of them died before conveyance, leaving children,



such children should take the share of their parents. The parties named took a vested, and not a contingent, remainder. *Woodley v. Calhoun*, 48 S. E. 272, 273, 69 S. C. 285.

"The true criterion of a 'vested remainder' is the existence in an ascertained person of a present, fixed right of future enjoyment of the estate, limited in remainder, which right will take effect in possession immediately on the determination of the precedent estate, irrespective of any collateral event, provided the estate in remainder does not determine before the precedent estate." 24 Am. & Eng. Enc. of Law (2d Ed.) 389. Mr. Washburn, in his work on Real Property, says: "The broad distinction between vested and contingent remainders is this: In the first, there is some person in esse, known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all. The event may either happen, or it may not happen until after the particular estate upon which it depended shall have determined so that the estate in remainder will never take effect." A vested remainder is one "when there is an immediate right of present enjoyment, or a fixed right of future enjoyment." 4 Kent, Comm. 194. "That a remainder cannot be vested unless there be some certain person or persons in being in whom it can be regarded as vested is a proposition as to which, upon principle, it would seem that there could be little doubt, and that such is the law is recognized by the most authoritative writers and by numerous decisions." 1 Tiffany's Modern Law of Real Prop. 120. Testator devised real estate to his wife for life with remainder to J., adding that, on the latter dying before distribution of the property, his issue, if he left any, otherwise his heirs, should receive his share. Held, that J. took a vested remainder, so that he and the life tenant could give a perfect title. *Callison v. Morris*, 98 N. W. 780, 781, 123 Iowa, 297.

An estate is "vested" when there is an immediate right of present enjoyment or a present fixed right of future enjoyment. It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to this extent every remainder is and must be liable. The present capacity of taking effect in possession, if the possession were to become vacant before the estate limited in remainder determines, distinguishes a vested from a contingent remainder. Where a testator devised land to his wife during her lifetime, and upon her death to his children in equal shares, but with a provision that, if any of the children should die before the wife leaving no children, the share devised to them

was thereby devised to the survivors of the children, the children took vested and not contingent remainders which might be defeated by their death before the death of the wife, or what is generally called a defeasible fee. *Roach v. Dance* (Ky.) 80 S. W. 1097, 1098 (Kent's Com. vol. 4, § 202; Minor's Institutes, vol. 2, p. 388).

"A 'vested remainder' is an estate to take effect after another estate for years, life, or in tail, which is so limited that, if that particular estate were to expire or end in any way at the present time, some certain person who is in esse and answered the description of the remainderman during the continuance of the particular estate would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency." A testator devised real estate to his daughter for life, remainder to her children, if any surviving her, otherwise to testator's brothers and sisters, and, in case any one or more or all of them should be dead at the time of his death, the share of such deceased brother or sister should go to and be equally divided among his or her children, share and share alike. At the time of the suit for the partition, testator's daughter, though married, was 50 years of age, and had never had any children. It was held that the remainder to testator's brothers and sisters was not a vested remainder, but a contingent one, and hence no partition could be had during the daughter's life. *Ruddell v. Wren*, 70 N. E. 751, 753, 208 Ill. 508.

A testator who died in March, 1901, by his will bequeathed his residuary estate in trust, the income to be paid to his wife during her life, with remainder to his children living at the time of her death, and the lawful issue of any deceased child or children; such issue taking the share only their parent would have taken if living. Held, that the remainder so created was not "vested," not being limited to "persons in esse and ascertained," but was contingent, being limited to persons who could not be ascertained until the death of the wife, and that such bequests were not subject to the legacy tax imposed by section 29 of the war revenue act of June 13, 1898, c. 448. 30 Stat. 464; the wife being still living at the time of the taking effect of the amendment of June 27, 1902, c. 1160, § 3, 32 Stat. 406, exempting from the tax "any contingent beneficial interest not absolutely vested in possession or enjoyment" prior to July 1, 1902. *Land Title & Trust Co. v. McCoach*, 129 Fed. 901, 904, 64 C. C. A. 333.

"A 'vested remainder' is an estate to take effect after another estate for years, life, or in tail, which is so limited that, if that particular estate were to expire or end in any way at the present time, some certain person who was in esse and answered the

description of the remainderman during the continuance of the particular estate would thereupon become entitled to the immediate possession, irrespective of the concurrence of any collateral contingency." A remainder limited upon an estate tail is held to be vested, though it must be uncertain whether it will ever take place. Where a testator limits the interest of one son in the latter proportionate part of the realty to an estate for life, remainder to any surviving child of the life tenant, and in default thereof to such tenant's brothers and sisters, and all of them are living at testator's death, but the life tenant is childless, the brothers and sisters take a vested, and not a contingent, remainder, notwithstanding the liability to a defeat of their interests by subsequent issue born to the life tenant. *Boatman v. Boatman*, 65 N. E. 81, 83, 198 Ill. 414 (quoting and adopting 4 Kent, Comm. [13th Ed.] 228).

Not only at common law, but under the laws of Tennessee and Texas, under a will giving property to F., the wife of G., for her use as long as she remained the wife of G., and the children she might have by G., said property to go to the children of G. on the death of F. or her ceasing to be his wife, there was a "contingent remainder" as regard the children of F. by G. till a child was born to them, whereupon it immediately became a "vested remainder" in that child and all other children that might afterwards be born to them; said remainder opening and letting in each successive child as it was born, and the interest of any child dying before F. descending to the child's heirs. *Greenlaw v. Dillon* (Tex.) 108 S. W. 705, 709.

"It is the uncertainty of the right of enjoyment and not the uncertainty of its actual enjoyment which renders a remainder contingent. The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a 'vested' from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues." In *re Kountz's Estate*, 62 Atl. 1103, 1105, 213 Pa. 390, 3 L. R. A. (N. S.) 639, 5 Ann. Cas. 427 (citing and quoting definition from 4 Kent, Comm. § 203, note "a," in *Doe, Lessee v. Poor*, v. *Considine*, 73 U. S. [6 Wall.] 458, 476, 18 L. Ed. 869).

Where the preceding estate created by deed is limited, so as to determine on an event which must happen, and the remainder is so limited to a person in being, and ascertained, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder, the remainder is "vested"; but, where the preceding estate is limited, so as to determine only on an event which is uncertain and may never happen, or where the remainder is limited to a person not in being, or not ascertained, or

when it is limited, so as to require the concurrence of some uncertain event, independent of the determination of the preceding estate and the duration of the estate limited in remainder, to give it a capacity of taking effect, the remainder is contingent. *Hall v. Wright*, 120 Pac. 429, 431, 17 Cal. App. 502.

If the gift is immediate, though its enjoyment be postponed, it is "vested"; but if it is future, and is dependent on some dubious circumstances through which it may be defeated, then it is contingent. And the rule is that the law leans towards the vesting of remainders. The uncertainty which characterizes a contingent, as distinguished from a "vested remainder," is uncertainty as to the person or the event, and not as to the time of enjoyment. If futurity is annexed to the substance of the gift, the vesting is suspended; but, if it appears to relate to time of payment only, the legacy vests instantaneously, and words directing division or distributing between two or more objects at a future time are equivalent to a direction to pay. Where, by the terms of a will, the wife received the "entire property . . . during her natural lifetime after first disposing of sufficient to pay all of" the testator's debts, and the second item provided that, at the death of the wife, "all the property devised or bequeathed to her as aforesaid, or so much thereof as may then be unexpended, I give and bequeath to my four sons [of whom plaintiff was one], to be divided equally among them and to their heirs and assigns forever," it was held that plaintiff took a vested remainder, so that it was subject to sale on execution against plaintiff. *Jonas v. Welres*, 111 N. W. 453, 454, 134 Iowa, 47.

To constitute a "vested remainder," there must be some known person in being who, by the instrument, is to take and enjoy the estate upon the expiration of the particular estate, and whose right to do so cannot be defeated by any contingency, while a "contingent remainder" is contingent if it depends upon the happening of a contingent event, which may not happen until the particular estate has terminated; the existence of a contingency, irrespective of the duration of the remainder, being the criterion. In *re Washburn's Estate*, 106 Pac. 415, 417, 11 Cal. App. 735.

The terms "vested estates" and "contingent estates," used in section 2037, Rev. St. 1898, have far different significations than the common-law terms "vested remainders" and "contingent remainders." A vested remainder at the common law is one where there is "some person in esse, known and ascertained, who by the will or deed creating the estate is to take and enjoy the same upon the expiration of the existing particular estate, and whose right to such remainder no contingency can defeat." A vested estate or remainder in the statutory sense is

one where there is a person in esse, "who, should the particular estate now cease, would eo instanti et ipso facto have an immediate right to the possession," though whether he would ever take in fact might depend upon an uncertain event rendering the interest a contingent remainder, strictly so called, by the common-law rule. While a vested remainder by the rules of the common law is not subject to be divested at all, not so a vested estate in the statutory sense. That may be divested upon condition subsequent in whatever way or manner the creator thereof in creating the same may provide or authorize. While at common law an estate in remainder cannot be at the same time both vested and contingent, there is that seeming contradiction as to remainders under section 2037, Rev. St. 1898. A person may be so conditioned that he would immediately take in remainder should the precedent estate presently cease, yet may not be so entitled at any future time. The element of certainty, by force of the statute, gives to the remainder the character of a vested estate for the purpose of the subject covered by the statutes. The element of uncertainty gives to the remainder, by the same means, the character of a contingent estate for the same purpose. Whether an estate in remainder created by will is or is not vested in the common-law sense is controlled by the character of the estate actually created, as evidenced by the testamentary intention, not by any law, common or statute. When there is a devise to one, remainder over direct to others, nothing appearing in the will to the contrary, the legal presumption is that the testator intended to create vested estates in remainder in a common-law sense; that is, estates indefeasible, descendible, and alienable. When an estate is by will carved out of a fee, and the remainder is directed to be divided between the members of a class of persons after the expiration of such particular estate, the presumption of a testamentary intention that the estates in remainder shall vest upon the death of the testator is displaced by a presumption, nothing appearing in the will to the contrary, that the testator purposed to create contingent remainders in a common-law sense. In *re Moran's Will*, 96 N. W. 367, 369, 370, 118 Wis. 177.

"The distinction between a 'vested' and contingent remainder in a case like the present one is well defined. The former is one that is so limited to a person in being and ascertained that it is capable of taking effect in possession or enjoyment on a certain determination of the particular estate, without requiring the concurrence of any collateral contingency. The uncertainty as to the remainderman ever enjoying the estate which is limited to him by way of remainder will not render such remainder a contingent one, providing he has by such limitation a present, absolute right to have the estate the in-

stant the prior estate shall determine; but the absence of such present absolute right renders the estate a contingent remainder." A will left a life estate in certain property to R., the remainder to her son A., or A.'s surviving lawful issue, if any, but, if A. died without lawful issue, then the remainder was to go to testator's three sons, C., B., and W., in equal shares, or to their lawful issue, respectively. R. survived B., who had survived A., but both A. and B. died without lawful issue. Held, that the remainder to A. did not vest because of the gift over, neither did the remainder to B. vest because of the gift over to his issue, in case R. survived him, and also because of its liability to be defeated by A. surviving R. Hence, B.'s interest being a contingent remainder, his will conveyed no interest in the property in question. *Voorhees v. Singer*, 68 Atl. 217, 218, 73 N. J. Eq. 532.

The chief difference between a "vested remainder" and one that is contingent is that the latter may be destroyed by determination of the particular estate or the happening of the contingency (and even this cannot be where, as here, the life estate is held by trustees), while a vested remainder would simply be accelerated; and, unless the contingency is one which affects the capacity to take, a "contingent remainder" or other contingent interest is transmissible, even though not, in the technical sense, vested, and hence it will pass, in case of death before the happening of the event upon which it is dependent, to the heirs or devisees of the remainderman so dying. In *re Brooke's Estate*, 63 Atl. 411, 412, 214 Pa. 46 (citing *Gray*, Perp. § 118; *Bassett v. Hawk*, 11 Atl. 802, 118 Pa. 94; *Chess's Appeal*, 87 Pa. 362, 30 Am. Rep. 361).

A remainder is "vested" when there is a person in being who would have an immediate right to the possession of the property on the determination of the intermediate or precedent estate, contingent when the person to whom, or the event on which, it is limited to take effect remains uncertain. That there may be a defeasance so far as the person in whom it is vested is concerned does not make the estate on that account a contingent one. A "vested remainder" may be aliened by any form known to the law which does not require a formal livery of seisin or passing of actual possession, with the same restrictions as are applicable to other estates. Real Property Law (Laws 1896, p. 564, c. 547) § 30, declares a future estate to be vested when there is a person in being who would have an immediate right to the possession of the property on the determination of the intermediate or precedent estate, and contingent while the person to whom or the event on which it is limited to take effect remains uncertain. Testator gave to his widow the use of the residue of his estate for life or until her marriage, on the happening

of either of which events he gave such residue to his children equally; the children of any child, who at that time might be deceased, to take the share the parent would have taken. Held, that the will created a vested, and not a contingent, remainder in testator's children. *Genunge v. Murphy*, 112 N. Y. Supp. 310, 311, 59 Misc. Rep. 381 (quoting and adopting the definitions in 2 Washb. Real Prop. p. 553; Real Property Law [Laws 1896, p. 564, c. 547] § 30, and citing *Reaves*, Real Prop. 730, 731; *Lawrence v. Bayard* [N. Y.] 7 Paige, p. 70; *Grout v. Townsend* [N. Y.] 2 Denio, 736).

Vested and contingent remainders are distinguishable, in that in the first there is some person in esse, known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate on expiration of the particular estate, and whose right to such remainder no contingency can defeat; while a contingent remainder depends upon the happening of a contingent event, whether the estate limited as a remainder shall ever take effect at all. A will, after providing for testator's widow during her life, directed that his property be placed in the hands of trustees, and that on the death of the widow the residue of the estate should be disposed of according to several clauses, specifying persons and institutions to whom payment should be made, and the respective amounts thereof. Held, that such clauses created contingent and not "vested" remainders. *Giddings v. Gillingham*, 81 Atl. 951, 953, 108 Me. 512.

A remainder is "vested" where there is a present capacity to convey an absolute title to the remainder, and, where the remainder is limited to a person not ascertained by the terms of the instrument, the remainder is contingent. Under a clause of conveyance in trust providing that, ten years after the youngest of the children had reached majority, the trustee should make a final settlement, with each of said children, paying over to each of them living, and to the heirs at law of such as may have died, their respective shares, whereupon the trust should cease, and the title to the real estate not disposed of should vest in fee simple in the children living and in the heirs of children who have died. The estate taken by the children living and the heirs of those deceased was a contingent remainder, and the legal title was in the trustee until the time for the termination of the trust. *Buxton v. Kroeger*, 117 S. W. 1147, 1151, 219 Mo. 224; *Same v. Lauman*, 117 S. W. 1162, 219 Mo. 276, 277; *Same v. Dunn*, 117 S. W. 1163, 219 Mo. 278.

A "contingent remainder" is one limited to take effect either to an uncertain person or on an uncertain event. It is limited by the instrument creating it either to a person not yet ascertained or not in being, or so as to depend on an event which may never happen. It is an estate which is not ready

to come into possession at any moment when the prior estate may end, but, if the estate is at any time ready to come into possession provided the prior estate ends, then the estate is "vested," so that whenever the person who is to succeed to the estate in remainder is in being and is ascertained, and the event which by express limitation will terminate the precedent estate is certain to happen, the remainder is vested; the uncertainty which distinguishes the contingent from the vested remainder being not the uncertainty whether the remainderman will live to enjoy the estate, but whether he will ever have the right to such enjoyment. *Carter v. Carter*, 85 N. E. 292-294, 234 Ill. 507.

The use of the word "vested" in a finding that a party was the owner of an estate in remainder in a lot that was vested in children of a life tenant by virtue of a certain deed which was to one for life, remainder to the heirs of her body, and "will upon the death of said E. M. (the life tenant) take the interest and estate in fee in said lot 4 that would, under said deed \* \* \* go to those of the above named children of Mrs. E. M. who shall survive her," was not a holding that the interest in remainder of such children was a vested one, so as to be inconsistent with the view that the remainder is contingent, implied from the language of another finding; the context making it apparent that the words "vested in" are not used in the comparative sense as distinguishing a vested from a contingent estate, but rather as the equivalent of "acquired by." *Los Angeles County v. Winans*, 109 Pac. 650, 653, 13 Cal. App. 257.

The second clause of a will provided: "I give, devise, and bequeath all the property of which I may die seized and possessed \* \* \* to my beloved wife for her natural life, the remainder thereof to my sons hereinafter named in proportions, for the time and upon the conditions hereinafter expressed." The fourth clause provided that, upon the termination of the wife's life estate, "I give and devise unto my son M. all those certain lots. \* \* \* If my son M. should predecease in death his wife and leave him no lawful issue surviving, and should such death of my son M. occur before the property herein devised and bequeathed to him vests in him, then all the interests herein devised and bequeathed to said M. shall pass to and vest in" his wife absolutely. Other provisions showed that testator clearly understood the legal significance of words of present devise unqualified by other language. Civ. Code, § 694, provides that a future interest is vested when there is a person in being who would have a right to immediate possession upon the ceasing of the precedent interest. Section 695 provides that a future interest is contingent, while the person in whom or the event upon which it is limited to take effect

remains uncertain; and section 1341 provides that devises and bequests are presumed to vest at testator's death. *Iield*, that son M. took a "vested remainder" in the estate devised to him immediately upon testator's death. *In re De Vries' Estate*, 119 Pac. 109, 111, 17 Cal. App. 184.

### VESTED RIGHT

Rights are "vested" when the right of enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. *Trustees of Presbytery of Jersey City v. Trustees of First Presbyterian Church of Weehawken*, 78 Atl. 207, 210, 80 N. J. Law, 572.

When the phrase "a vested right" or "a vested interest" is used in other relations, it may with reasonable precision be held to mean some right or interest in property that has become fixed or established, and is no longer open to doubt or controversy. *Graham v. Great Falls Water Power & Town-Site Co.*, 76 Pac. 808, 810, 30 Mont. 393 (citing *Evans-Snyder-Buel Co. v. McFadden*, 105 Fed. 293, 44 C. C. A. 494, 58 L. R. A. 900).

A right is not "vested" unless it is something more than such a mere expectation as may be based upon an anticipated continuation of the present general laws. *Brooklyn Union Gas Co. v. City of New York*, 100 N. Y. Supp. 570, 577, 50 Misc. Rep. 450 (citing *Cooley*, Const. Lim. [6th Ed.] 438).

A "vested right" protected by federal and state Constitutions is some right or interest in property which has become established and is no longer open to doubt or controversy. It does not include a claim to property which is contrary to justice and equity, nor a right to property purchased pending litigation concerning the title bought, so as to free it from the effect of subsequent curative legislation. *Downs v. Blount*, 170 Fed. 15, 20, 95 C. C. A. 289, 31 L. R. A. (N. S.) 1076.

A mortgage lien constitutes a "vested property right," and, after it has attached, the Legislature has no power to create a lien superior to the vested interest or to provide that such vested lien shall be made inferior to the lien subsequently created. *National Bank of Commerce v. Jones*, 91 Pac. 191, 193, 18 Okl. 555, 12 L. R. A. (N. S.) 310, 11 Ann. Cas. 1041.

A member of a police force has no "vested right" in an act of the Legislature creating a police pension fund and granting a pension to those who have served for 20 years, but the Legislature may repeal the same. *Friel v. McAdoo*, 91 N. Y. Supp. 454, 456, 101 App. Div. 155.

A "vested right" may be considered as the power to do certain actions or to possess certain things lawfully. In its latter aspect it is substantially a right of property, and as such is protected by those provisions in

the Constitution which apply to such rights. But a right to property is a perfect and exclusive right, and a right, therefore, to recover the amount of a judgment cannot be called a perfect or a vested right. *Lohrstorfer v. Lohrstorfer*, 104 N. W. 142, 146, 140 Mich. 551, 70 L. R. A. 621 (quoting and adopting definition in *Henderson & N. R. R. Co. v. Dickerson* [Ky.] 17 B. Mon. 173, 66 Am. Dec. 148).

A "vested right" is property, as tangible things are, when they spring from contract or the principles of the common law. There is a "vested right" in an accrued cause of action, in a defense to a cause of action, even in the statute of limitations, when the bar has attached, by which an action for a debt is barred. *Lewis v. Pennsylvania R. Co.*, 69 Atl. 821, 823, 220 Pa. 317, 18 L. R. A. (N. S.) 279, 13 Ann. Cas. 1142 (quoting with approval from *Suth. Stat. Const.* § 480).

"A 'vested right,' which will entitle the holder to the independent judgment of the federal court upon the construction of a constitutional provision or the statute of a state, must be a right acquired under and by virtue of the Constitution or statute." Hence, where complainant's rights in a waterworks company were acquired under a municipal contract and not by virtue of a constitutional or statutory provision, complainant was not entitled to the independent judgment of the federal court on the construction of a constitutional provision relating to the power of the municipality to increase its indebtedness for the construction of waterworks. *City of Sioux Falls v. Farmers' Loan & Trust Co.*, 136 Fed. 721, 731, 69 C. C. A. 373.

"In its application, as a shield of protection, the term 'vested rights' is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should recognize and protect, and of which the individual could not be deprived arbitrarily without injustice." The naked legal title to land is not a vested interest, in the sense of a property right, which the courts will protect from retrospective legislation intended to divest it. *Diamond State Iron Co. v. Husbands*, 68 Atl. 240, 246, 8 Del. Ch. 205 (quoting in part *Cooley*, Const. Lim. pp. 454 and 470).

Acts 1870, p. 124, c. 89, provides that the city of B., and those citizens who have contributed or may contribute to improvements on land for the use of the state agricultural association, shall, in case of dissolution of the association, receive from the net proceeds of sale of its property such sums as the amount of money paid by the city or individual citizens may bear to the aggregate amount contributed by the state; the

city and the individual citizens having "vested rights" in the city and individual contributors, together with the state, in the proceeds of the association's property in case of its dissolution. Held, that Acts 1890, p. 57, c. 73, attempting to postpone the rights under the act of 1870 of contributors, and to give priority in such proceeds to the payment of all debts owing by the association, is unconstitutional, as impairing "vested rights," and taking the property of the contributors and giving it to others. Acts 1886, p. 198, c. 128, appropriating \$3,000 for the state agricultural association, and providing that, in case of dissolution of the association, the state shall be preferred to such amount, and Acts 1904, p. 246, c. 141, providing for such dissolution, and making the same provision for preference of such \$3,000, are unconstitutional, as impairing the vested rights in such proceeds given by Acts 1870, p. 124, c. 89, to contributors for improvements for the association. Maryland Jockey Club of Baltimore City v. State, 67 Atl. 239, 241, 106 Md. 413.

Rights are "vested" when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest (quoting and adopting definition in Pearsall v. Great Northern Ry. Co., 16 Sup. Ct. 705, 161 U. S. 646-673, 40 L. Ed. 838). One who acquires title to tidelands from the state obtains no vested right to possible future accretion thereto which cannot be cut off by subsequent legislation. Western Pac. Ry. Co. v. Southern Pac. Co., 151 Fed. 376, 399, 80 C. C. A. 606.

A "license" to sell intoxicating liquor is a mere permit, and not a "vested" property or contract right, and the state may, in the exercise of its police power, revoke it, though it may be sold or mortgaged, and is subject to execution. Baldacchi v. Goodlet (Tex.) 145 S. W. 325, 327.

## VESTIGE OF WORK

Civ. Code, art. 3502, providing that a man may retain possession of an estate sufficient to prescribe, so long as there remains any "vestige of the work" erected by him, has reference to such vestige as challenges attention, and remnants of pillars, flush with the ground and barely noticeable, are insufficient. John T. Moore Planting Co. v. Morgan's Louisiana & T. R. & S. S. Co., 53 South. 22, 41, 126 La. 840.

## VETERAN

A janitor of a police station, whose employment was not included in the list of positions to be filled by the board of civil service commissioners until after his discharge, and who had not before his discharge been registered in the office of the board as a

veteran or been certified by it for appointment, was not a "veteran holding an employment or office in the public service," within St. 1896, p. 535, c. 517, § 5, embodied in Rev. Laws, c. 19, § 23, providing that no "veteran holding an office or employment in the public service" shall be removed until after a full hearing. Sims v. O'Meara, 79 N. E. 824, 825, 193 Mass. 547.

## VETO

Under Rev. Laws, c. 26, § 9, requiring the mayor of a city, if he disapproves of an order of the city council, to return it with his objections in writing, a "veto" by a mayor, simply stating that he returns the order without his approval, and containing no statement of objections, is of no effect. Casey v. Dadman, 77 N. E. 717, 191 Mass. 370.

## VEX

### VEXATION

The words "vexation" and "delay" in Rev. St. 1909, § 2040, requiring appellant to file an affidavit stating that the appeal is not made for vexation or delay, are not synonymous, but the word "vexation" expresses a peculiar meaning not expressed by any other word in the statute, and an affidavit must contain the word "vexation" as well as the word "delay." Cassidy v. City of St. Joseph, 152 S. W. 306, 308, 247 Mo. 197.

### VEXATIOUS

"Vexatious," within Rev. St. 1909, § 7068, providing a penalty for an insurance company's vexatious refusal to pay a loss, means without reasonable cause. Rogers v. Connecticut Fire Ins. Co. of Hartford, 139 S. W. 265, 268, 157 Mo. App. 671.

## VI ET ARMIS

See Force and Arms.  
Element of larceny, see Larceny.

## VIA TRITA EST TUTISSIMA

"The beaten path is the safest." Donnell v. Wright, 97 S. W. 928, 931, 199 Mo. 304.

## VIADUCT

Approaches of viaduct, see Approaches.  
As railroad, see Railroad—Railway.  
As railroad bridge, see Railroad Bridge.

## VIBRATE

Where the employment of explosives in a stone quarry caused plastering to fall from the ceilings of a contiguous owner's house, bricks to work loose and fall from the cornice, and the mortar to crumble from between the bricks in the walls, the word "vibrate," which means to swing or oscillate with a quick motion, in a decree enjoining

the operation of the quarry so as to jar the owner's buildings, or to cause the same to shake and vibrate, awarded to the owner the measure of relief only to which he was entitled, for, if the quarry could not be operated without causing the house to thus vibrate, then its entire operation should be enjoined. *Blackford v. Heman Const. Co.*, 112 S. W. 287, 291, 132 Mo. App. 157.

## VIBRATION

See Hoop-Like Vibration.

## VICE

See Inherent Vice.

Webster defines "vice" as a defect; a fault; an imperfection. *Guinn v. Pecos & N. T. Ry. Co.* (Tex.) 142 S. W. 63, 64.

Under Civ. Code, art. 2804, declaring that partnerships formed for any purpose forbidden by good morals are void, a partnership formed to conduct gambling, by playing draw and stud poker, is void as contrary to public policy, as evidenced by Const. art. 188, declaring that gambling is a vice, and Civ. Code arts. 1893, 1895, 2983, and Code Prac. art. 19, declaring that an obligation with an unlawful cause can have no effect, etc.; the word "vice" meaning a moral fault or failure, especially immoral conduct or habits. *Martin v. Seabaugh*, 54 South. 935, 936, 128 La. 442.

## VICE PRINCIPAL

See, also, Fellow Servant; Superintendent.

A "vice principal" is the representative of the master, for whose acts and negligence the master is responsible. *Southern Ry. Co. v. Cheaves*, 36 South. 691, 697, 84 Miss. 565.

A "vice principal" is one intrusted by the master with power to superintend, direct, or control workmen. *Burkard v. A. Leschen & Sons Rope Co.*, 117 S. W. 35, 41, 217 Mo. 466.

An employé, whose duty is to direct and control workmen under him, is a "vice principal" as to the work intrusted to him. *Smith v. American Car & Foundry Co.*, 99 S. W. 790, 792, 122 Mo. App. 610.

Where a master clothes an employé with authority to control another servant, the superior servant is a "vice principal" to the servant under his control. *Benak v. Paxton & Vierling Iron Works*, 124 N. W. 461, 462, 85 Neb. 836.

The term "vice principal" is generally used to denote an employé to whom the employer has intrusted the performance of a duty which the law requires the employer himself to assume. *Cleveland, C., C. & St. L. Ry. Co. v. Foland*, 91 N. E. 594, 596, 174 Ind. 411.

At common law, where the master delegates to an employé the performance of any duty devolving upon him, such employé stands in his place and becomes a "vice principal," and the master is liable for his negligence. *Stearns & Culver Lumber Co. v. Fowler*, 50 South. 680, 683, 58 Fla. 362.

The term "vice principal," as used in the fellow-servant law, has been defined as including any servant who represents the master in the discharge of those personal or absolute duties which every master owes to his servants; such duties being often referred to as the nonassignable duties of a master. While the words "superintendent," "foreman," "overseer," and the like do not necessarily import that the employé bearing such title was the vice principal of the master, this fact, in connection with the character of the work and the character of the order given in reference to the operation of dangerous machinery, may be sufficient to raise a question for the jury as to whether such servant was, on the occasion in question, the vice principal of the master, or only a fellow servant of the plaintiff. Mere supervision, and nothing more, by one of a number of servants, over the work in which they are engaged, will not necessarily raise the employé from the position of a fellow servant to that of a vice principal; but supervision, coupled with the discharge of other duties in connection therewith, may have this effect. *Moore v. Dublin Cotton Mills*, 56 S. E. 839, 842, 127 Ga. 609, 10 L. R. A. (N. S.) 772 (citing *Bloyd v. Railway Co.*, 22 S. W. 1089, 58 Ark. 66, 41 Am. St. Rep. 85).

A "vice principal" must have entire charge of the business, or one to whom a master delegates a duty of his own, which is an absolute obligation, from which nothing but performance can relieve him. *Staebler v. Warren-Ehret Co.*, 72 Atl. 554, 555, 223 Pa. 129.

A person is not a "vice principal," unless he has entire charge of the business, or a distinct branch thereof, having authority to superintend the work and exercising control of such business, or unless the employer has delegated to him a duty of his own, which is an absolute obligation, from which nothing but performance can relieve him. *Vant v. Roelofs*, 66 Atl. 749, 750, 217 Pa. 535.

A servant who has authority to direct and supervise the work of those under him and to hire and discharge such subordinate servants is a "vice principal," whose negligence is that of the master. *Hugo, Schmeltzer & Co. v. Palz*, 141 S. W. 518, 521, 104 Tex. 563.

One in charge of his employer's business as general manager is a "vice principal." *Hamann v. Milwaukee Bridge Co.*, 106 N. W. 1081, 1084, 127 Wis. 550, 7 Ann. Cas. 458.

An agent who is employed to exercise the master's duty of exercising care for the safety of servants is a "vice principal." *Burns v. Delaware & A. Telegraph & Telephone Co.*, 59 Atl. 220, 223, 70 N. J. Law, 745, 67 L. R. A. 956.

The boss of a repair train is not a "vice principal." *Peterson v. Philadelphia, B. & W. R. Co.*, 66 Atl. 660, 217 Pa. 401.

A foreman or superintendent is not necessarily a "vice principal." *Schillinger Bros. Co. v. Smith*, 80 N. E. 65, 67, 225 Ill. 74.

A "vice principal" is a servant who represents the master in the discharge of those primary and personal duties which every master owes to his servant, and which the master cannot delegate so as to relieve himself from responsibility for their due and proper performance; such duties include the exercise of reasonable care to furnish reasonably safe machinery and appliances, to furnish and maintain a reasonably safe place to work, and to make reasonable and proper inspection of such machinery and appliances. *Schillinger Bros. Co. v. Smith*, 80 N. E. 65, 67, 225 Ill. 74.

A foreman, under whom workmen are employed, is a "fellow servant" with the workmen, when engaged in accomplishing with them the common task or object, but, when discharging or assuming to discharge the duties toward the workmen which the law imposes on the principal, is a "vice principal." *Christ v. Wichita Gas, Electric Light & Power Co.*, 83 Pac. 199, 201, 72 Kan. 135.

A foreman superintending blasting operations for the master is a "vice principal." *Knight v. Donnelley*, 110 S. W. 687, 690, 131 Mo. App. 152.

A servant designated by a vice principal to perform a particular service which had been delegated to him by his master in turn becomes a "vice principal." *Cleveland, C., C. & St. L. Ry. Co. v. Austin*, 127 Ill. App. 281, 287.

A servant placed in entire charge of a distinct branch of the master's business, not merely to superintend it, but to control it, with no one else to exercise any discretion or oversight, is a "vice principal" of the master. *Groves v. James McNeil & Bro. Co.*, 75 Atl. 600, 601, 226 Pa. 345.

In instructing the jury in an action for negligence, it is improper to refer to an independent contractor as a "vice principal"; this term being applicable only in actions by a servant against a master. *Gordon v. Roberts*, 123 Pac. 288, 290, 162 Cal. 506.

A "vice principal" is one to whom the master delegates a duty of his own which is a direct, personal, and absolute obligation, from which nothing but performance can relieve him. The obligation of a master to furnish to his servant a reasonably safe place

in which to work is a direct, personal, and absolute obligation, and if such a duty is delegated to an agent, such agent is a vice principal. *Clegg v. Seaboard Steel Casting Co.*, 34 Pa. Super. Ct. 63, 69.

In sending an employé out to work under the direction of a foreman, the employer commits to the foreman as "vice principal" the performance of the duty of exercising reasonable care for the protection of the employé. *Mack v. Chicago, R. I. & P. Ry. Co.*, 101 S. W. 142, 144, 123 Mo. App. 531.

An employé who has the right to give orders to other employés and to enforce obedience thereto, and who has the right to report and to procure the discharge of the other employés who understand the relation and their duty to obey, is a "vice principal," and the employer is liable for his negligence in giving orders to the other employés. *Hipp v. Champion Fibre Co.*, 68 S. E. 215, 216, 152 N. C. 745.

One is a "vice principal" who is employed to hire, direct, and discharge employés, or to whom the employer has delegated a duty owing to workmen, though otherwise he may be a fellow servant; it being the authority given in a particular matter, and not the grade of service, which determines the issue of vice principal or fellow servant. *Lantry-Sharpe Contracting Co. v. McCracken (Tex.)* 134 S. W. 363, 364.

An employé intrusted with the performance of the employer's personal duties is, in regard thereto, a vice principal, and the employer is liable for injuries to a coemployé resulting from his negligence. Within this rule, a car dispatcher having not only control of the motormen and conductors of an interurban electric railway, but also control of the cars and their operation, is a "vice principal" and not a fellow servant. *Edge v. Southwest Missouri Electric R. Co.*, 104 S. W. 90, 97, 206 Mo. 471.

A "vice principal," as the term is used in the law of fellow servants, is a servant who represents the master in the discharge of those personal or absolute duties which every master owes his servant, as distinguished from fellow servants, who may be said to be persons engaged in a common employment in the service of the same master. *Hollweg v. Bell Telephone Co.*, 93 S. W. 262, 264, 195 Mo. 149.

Where the giving of a warning is not incidental to the work on which the servant required to give the warning is engaged, he is the representative of the master, and not a fellow servant; but, where the duty of giving the signal is incidental to his general employment, his failure to perform it is not imputable to the master. The duty of blowing the whistle or ringing the bell resting on the engineer or hostler in charge of an engine while being run on the ash pit track in a railroad yard is an incident of the operation of the en-



gine, and a failure to perform the duty does not impose responsibility on the master for injuries received by an employé engaged in the common work. *Koneski v. Delaware, L. & W. R. Co.*, 74 Atl. 516, 77 N. J. Law, 645, 26 L. R. A. (N. S.) 644.

Servants to whom a master delegates the duty to use reasonable care to furnish other servants with a safe place to work, and to see that rules and regulations regarding care and condition of appliances are complied with, are "vice principals," and not "fellow servants." *Girard v. Grosvenordale Co.*, 73 Atl. 747, 750, 82 Conn. 271.

An employé is a "vice principal," whatever his comparative rank, or his authority to command or employ or discharge employés, where he represents the master in the performance of the nondelegable duty to provide suitable appliances for the performance of a coemployé of the work assigned to him. *Frizzell v. Sullivan*, 83 Atl. 651, 652, 117 Md. 388 (quoting 8 Words and Phrases, p. 7314).

The duty of a master to provide a reasonably safe place in which to work is a primary duty, and, when the master delegates it to a servant, the latter represents the master, who is responsible for the manner in which the duty is discharged, and knowledge possessed by such servant is the knowledge of the master, and any negligence of such servant while discharging such duty is the negligence of the master. *Shives v. Eno Cotton Mills*, 66 S. E. 141, 143, 151 N. C. 290.

The common-law doctrine of fellow servant, as construed by the United States Supreme Court, as well as by the Supreme Court of this state, makes an employé, charged with the duty of keeping a safe place to work, a "vice principal" of the master, regardless of the rank of the servant to whom the duty is intrusted, and, under that construction, a servant whose duty it is to keep a repair track reasonably safe for repairers at work thereon is a vice principal of the master, and his negligence is the negligence of the master. *El Paso & S. W. R. Co. v. Smith*, 108 S. W. 988, 989, 995, 50 Tex. Civ. App. 10.

It is not the law in the state of Wyoming that "persons employed in the same general work" of the master are "fellow servants," and on principle, and by the weight of authority, persons engaged in the service of the master, who are intrusted by him with the management or direction of his general work, or with some particular part thereof, are not fellow servants with the subordinate employés, but are "vice principals." *Johnson v. Union Pac. Coal Co.*, 76 Pac. 1089, 1097, 28 Utah, 146, 67 L. R. A. 506.

The order of a foreman to an experienced servant under his control to perform an act merely incidental to the servant's employment, and not known to the foreman to be attended with a hidden danger, though ac-

companied with an assurance of safety, is the direction of a superior servant, and not of a "vice principal." *Reid v. Northwestern Fuel Co.*, 133 N. W. 161, 162, 116 Minn. 96.

Where employés are engaged in assisting one another in a common task, the fact that one takes the lead in directing the work because of age, experience, or common consent does not change the relation of fellow servants and make the one so directing a "vice principal." *Frengen v. Stone & Webster Engineering Corp.*, 119 Pac. 193, 195, 66 Wash. 204.

The mere assumption of the duties of general direction and superintendence by a fellow servant, in the absence of authority express or implied, does not constitute the servant so assuming to act "a vice principal." *Safety Insulated Wire & Cable Co. v. Matthews*, 151 Fed. 761, 764, 81 C. C. A. 385.

"Vice principal" is defined as one who performs personal duties of the master, which cannot be delegated, such as the duty to provide reasonably safe machinery and appliances and a reasonably safe place in which to work, to provide for inspection and repair of premises and appliances, and to inform immature, ignorant, or unskilled servants of the dangers of the situation. *Baler v. Selke*, 71 N. E. 1074, 1076, 211 Ill. 512, 103 Am. St. Rep. 208 (citing *Mobile & O. Ry. Co. v. Godfrey*, 39 N. E. 590, 155 Ill. 78).

A "vice principal" is the representative of the master, and for his acts and negligence the master is responsible. An employé of a corporation may become a vice principal in two ways: First, he may be intrusted with the entire management and supervision of all the business of the corporation, or with the entire management and supervision of a distinct and separate department of its business, in which case he may be termed a general vice principal because in all of his acts relative to the business of the corporation he stands in the place of the master; second, any employé may be a special vice principal, without regard to rank, when performing one of the positive personal duties of the master. An employé, who, in the absence of the manager, is directed to look after the other employés and direct matters generally the same as any foreman would be required to do, is not a vice principal. *Ruemmel-Braun Co. v. Cahill*, 79 Pac. 260, 261, 14 Okl. 422 (quoting and adopting the definition in *City of Minneapolis v. Lundin*, 58 Fed. 525, 7 C. C. A. 344).

"If the employé or servant is clothed with special power and authority in the conduct of the master's business, in and about which is involved the absolute duty of the master to other servants with respect to the obligation to provide them with safe instrumentalities and a safe place in which to work, he is, with respect to such other employés, a 'vice principal,' when engaged in the

performance of the duties so involving the absolute obligations of the master." *Hjelm v. Western Granite Contracting Co.*, 102 N. W. 384, 385, 94 Minn. 169 (quoting and adopting definition in *Perras v. A. Booth & Co.*, 84 N. W. 739, 85 N. W. 179, 82 Minn. 191).

A "vice principal" for whose negligence an employer will be liable to other employes must be one in whom the employer has placed the entire charge of the business, or of a distinct branch of it, giving him not mere authority to superintend certain work of certain workmen, but control of the business, and exercising no discretion or oversight of his own; or one to whom he delegates a duty of his own which is a direct personal and absolute obligation, from which nothing but performance can relieve him. Any person who directs the places where the employes shall work, whether he be called the superintendent, foreman, or agent, will become in that respect and as to the performance of that obligation of the master, a vice principal. *Mapes v. Pittsburg Provision & Packing Co.*, 31 Pa. Super. Ct. 453, 458.

Under the modern rule of the federal courts the theory of "vice principal" as determining the liability of a master to a servant for the negligence of another employe has been largely discarded, and the distinction between negligence which is to be imputed to the master and that which is to be considered as merely and solely the negligence of a fellow servant turns rather on the character of the act than on the relation of the employes to each other. *Peiers et al. v. George*, 154 Fed. 634, 639, 83 C. C. A. 408 (citing *Chicago, M. & St. P. R. Co. v. Ross*, 5 Sup. Ct. 184, 112 U. S. 377, 28 L. Ed. 787; *Baltimore & O. R. R. Co. v. Baugh*, 13 Sup. Ct. 914, 149 U. S. 368, 37 L. Ed. 772).

Where the place where an employe was mining ore was not reasonably safe, and he was ignorant of the fact, and could not by ordinary care have discovered the danger, it was the duty of the employer to inform him of it, and, in the absence of an official of higher grade, this duty devolved on the foreman, under whom he was working, as "vice principal." *Low Moor Iron Co. v. La Blanca's Adm'r*, 55 S. E. 532, 534, 106 Va. 83, 9 Ann. Cas. 1177.

Employes charged with the duty of keeping a place to work and machinery in a safe condition, and of inspecting the same, are "vice principals" of the employer, regardless of their rank. Neither a roundhouse inspector charged with the duty of inspecting the pilot of an engine, nor a section foreman and his men, required to keep the track in safe condition, are "fellow servants" of a brakeman. *Missouri, K. & T. Ry. Co. v. Wise*, 106 S. W. 465, 468; *Id.*, 109 S. W. 112, 101 Tex. 459.

The delegation to a coemploye of the duty to furnish safe and suitable machinery

and to keep the same in repair will not, under the doctrine of coservice, defeat an action for negligence by an employe, where the delinquent was discharging one of the personal duties of the employer. Where the employer is a corporation, the performance of such delegated duty by the subagent or employe is the act of the corporation, and it is responsible for its faithful and prudent performance to the same extent as if the service was performed by the highest officer of the corporation. *Kane v. Babcock & Wilcox Co.*, 67 Atl. 1014, 1016, 75 N. J. Law, 698 (citing *Steamship Co. v. Ingebregsten*, 31 Atl. 619, 57 N. J. Law, 400; *Curley v. Illoff*, 42 Atl. 731, 62 N. J. Law, 758, 763; *Burns v. Delaware & Atl. Telegraph & Telephone Co.*, 59 Atl. 220, 592, 70 N. J. Law, 745, 754, 67 L. R. A. 956).

The foreman of a crew building a trestle for a logging railway is not such a fellow servant of an ordinary workman thereon as to preclude recovery for injuries resulting from the foreman's negligence, since the foreman is a "vice principal" of the master. *Cook v. Chehalis River Lumber Co.*, 94 Pac. 189, 191, 48 Wash. 619.

A distinct and independent employe to whom is delegated the duty to disconnect and make safe electric wires on which others must work is ordinarily a "vice principal," and not a fellow servant with the linemen and other like workmen. *Massy v. Milwaukee Electric Ry. & Light Co.*, 126 N. W. 544, 546, 143 Wis. 220, 40 L. R. A. (N. S.) 814, 139 Am. St. Rep. 1090.

Where a foreman had power to and did direct the progress of the work, and ordered another servant to do a particular thing by which he was hurt, it does not make the foreman a "vice principal." *Pasco v. Minneapolis Steel & Machinery Co.*, 117 N. W. 479, 480, 105 Minn. 132, 18 L. R. A. (N. S.) 153.

Plaintiff's foreman, who had complete control of the digging of a pit in which plaintiff was working when injured by the sides falling in, and of the laborers working therein, acted as a "vice principal" in ordering plaintiff to work in the pit. *Standard Forgings Co. v. Saffel*, 96 N. E. 321, 325, 176 Ind. 417.

Where the foreman of a powder gang in a rock quarry directed plaintiff to strike the drill while it was being held by such foreman in a hole, without removing the blast, with reference to the duty to warn plaintiff of the dangers attending the work he was called to perform, the foreman was a "vice principal," and not plaintiff's fellow servant. *Burrows v. Ozark White Lime Co.*, 101 S. W. 744, 82 Ark. 343.

One having the general control and supervision of railroad repair work and giving general directions respecting the movements of work trains is a "vice principal," and not

a fellow servant, of the laborers employed to do repair work. *Jachetta v. San Pedro, L. A. & S. L. R. Co.*, 105 Pac. 100, 104, 36 Utah, 470.

The duty of an engineer in a sawmill to warn employes by sounding the whistle before starting the machinery in motion was that of a "vice principal" and not that of a fellow servant, and the master is liable for failure to perform the duty. *Comrade v. Atlas Lumber & Shingle Co.*, 87 Pac. 517, 519, 44 Wash. 470 (citing *McDonough v. Great Northern Ry. Co.*, 46 Pac. 334, 15 Wash. 244; *O'Brien v. Page Lumber Co.*, 82 Pac. 114, 39 Wash. 537; *Dossett v. St. Paul & Tacoma Lumber Co.*, 82 Pac. 273, 40 Wash. 276).

Plaintiff's intestate was employed to shovel clay in a pit into cars. The pit was about 20 feet deep, and the clay was taken from the side of the pit and loosened by blasting, so that it could be shoveled into the cars. Held, that the servant, whose duty it was to fire the blast, in giving timely warning of the firing was performing a masterial duty. *Streicher v. Davenport Brick & Tile Co. (Iowa)* 124 N. W. 327, 329.

The master's duty to warn his servant of dangers in the place of employment, of which the master has knowledge, and which are unknown to the servant, is a personal duty, for the discharge of which the servant has a right to look to the master; and if the master delegates another to perform it, the other stands in the master's place, and the master becomes liable for his acts of negligence. A foreman of a crew in which a servant is working is but a "vice principal" in respect to informing the servant of dangers attendant on the place where the foreman directs the servant to work. *Hume v. Ft. Halifax Power Co.*, 75 Atl. 300, 302, 106 Me. 78, 138 Am. St. Rep. 332.

The duty of a head sawyer to properly handle the lever controlling the carriage on which persons acting as setters rode was that of a "vice principal," for the neglect of whom the master is liable. *Eidner v. Three Lakes Lumber Co.*, 88 Pac. 326, 327, 45 Wash. 323 (citing *O'Brien v. Page Lumber Co.*, 82 Pac. 114, 39 Wash. 537; *Dossett v. St. Paul & Tacoma Lumber Co.*, 82 Pac. 273, 40 Wash. 276).

A machinist, employed by the master to repair an elevator cable, was the representative of the master as to his duty to use reasonable care to provide the elevator operator with a reasonably safe place in which to work and reasonably safe appliances. *Haynie v. Hammond Packing Co.*, 103 S. W. 581, 582, 126 Mo. App. 88.

To constitute the foreman of a gang of laborers a "vice principal," for whose negligence the master will be liable for personal injuries to an employe subject to his control, the master must confer on him the absolute

management, exercising no discretion as to the conduct of his business except in providing safe tools, a safe place to work, safe materials to work on, competent fellow servants and, where necessary, proper rules and regulations for conducting the same. *E. Van Winkle Gin & Mach. Co. v. Brooks*, 116 Pac. 908, 909, 29 Okl. 351.

One directing and superintending the stringing of wires for a telegraph company is the representative of the company, and his knowledge is the knowledge of the company. *Postal Telegraph Cable Co. v. Likes*, 80 N. E. 136, 141, 225 Ill. 249.

A common laborer who spliced the horses for a scaffold on which the employes worked was a "vice principal," as he stood in the place of the master in the performance of a personal and absolute duty toward the employes working thereon, for the performance of which the master was responsible regardless of the rank and position of such laborer. *Schillinger Bros. Co. v. Smith*, 80 N. E. 65, 67, 225 Ill. 74.

Where plaintiff, an ironworker, was injured by the negligence of defendant's foreman in allowing "wash plates" to be used in the construction of a boat, to be so negligently on the deck of such boat that they fell into the hull, where plaintiff was working and struck him, the foreman was engaged in a delegable duty, and was a fellow servant of plaintiff, and not a "vice principal," for whose negligence defendant was liable. *Amoe v. Great Lakes Engineering Works*, 114 N. W. 1010, 1011, 151 Mich. 212.

Where the duty of inspecting a mine for gas is delegated to a certain servant while performing it, he is as to his coworkers a "vice principal," irrespective of his ordinary duties. *Western Coal & Mining Co. v. Buchanan*, 102 S. W. 694, 695, 82 Ark. 499.

One who had general supervision of operations in the part of the coal mine where plaintiff worked, and gave personal directions on one shift and had a foreman on the other, and who had hired plaintiff and put him to work in the room, where he was injured, was his "vice principal." *Hill v. Nelson Coal Co.*, 104 Pac. 876, 880, 40 Mont. 1.

A mine boss discharging the duty of the employer in furnishing to an employe, engaged in mining ore as a common laborer, a reasonably safe place in which to work is a "vice principal," and not a fellow servant, of the employe. *Low Moor Iron Co. v. La Blanca's Adm'r*, 55 S. E. 532, 534, 106 Va. 83, 9 Ann. Cas. 1177.

A mining boss, employed to inspect the safety of the mine, as required by Burns' Ann. St. 1901, § 7479, in the performance of his duty to see that the mine is safe, is the "vice principal," and not the fellow servant of a miner injured by the negligence of the

boss. *Antioch Coal Co. v. Rocky*, 82 N. E. 76, 78, 169 Ind. 247.

In an action for injuries while working in defendant's mine by the use of an unsafe fuse furnished by its shift boss, held, that in so furnishing the fuse the shift boss acted as a "vice principal" for defendant, which was liable for his negligence, which was the proximate cause of plaintiff's injury. *Laitinen v. Shenango Furnace Co.*, 114 N. W. 264, 265, 103 Minn. 88.

Under Sand. & H. Dig. § 6248, providing that persons engaged in the operation of a railroad, who are intrusted with the duty and authority of superintendence of other persons in the railroad service, are "vice principals" of the railroad and not "fellow servants" with those superintended by them, a train dispatcher, who governs the movement of trains and originates their running orders, and a conductor, under whose direction a train is actually run, are not "fellow servants" with a fireman on the train. *Choctaw, O. & G. Ry. Co. v. Doughty*, 91 S. W. 768, 769, 77 Ark. 1.

Arkansas St. § 6658, provides that all persons engaged in the service of any railroad corporation, foreign or domestic, doing business in said state, who are intrusted by such corporation with the authority of superintendence, control, or command of other persons in the employ of such corporation, or with authority to direct any other employé in performance of any duty, are "vice principals" of such corporation and not fellow servants of such employé. The members of a train crew who set cars on a spur track are "fellow servants" of the brakeman on another train injured while his car is passing the cars on the spur track because the cars on the spur track are left too close to the main track. *Ham v. St. Louis & S. F. R. Co.*, 117 S. W. 108, 109, 136 Mo. App. 17.

As to what makes a "vice principal," the generally received doctrine is as stated in *Whart. Neg.* § 229: "When the employer leaves everything in the hands of the middleman, reserving to himself no discretion, then a middleman's negligence is the employer's negligence, for which the latter is liable." One who contracts with a mining company to break down rock and ore for a certain distance to disclose the vein, at a stipulated price per foot, the company to furnish steam drill and keep the drift clear of rock, as the contractor broke it down, is to be regarded as a contractor with, and not a servant of, the company. He is not a fellow servant with the superintendent of the company, under whose direction his work is performed. *Mayhew v. Sullivan Mining Co.*, 76 Me. 100, 109.

Where a general manager of a department is appointed in obedience to a statute, making such appointment compulsory and

making such manager expressly responsible and independent of his employer's control, such employer is not liable for anything more than due care in selecting him. He is not a "vice principal," because he is not really the agent of the principal. *Sale Creek Coal & Coke Co. v. Priddy*, 96 S. W. 610, 612, 117 Tenn. 168, 10 Ann. Cas. 745 (quoting from and approving 1 *Shear. & R. Neg.* § 231).

One may become a "vice principal" only either when he is performing or charged with one of the positive duties of a master belonging to that class which the master cannot delegate to a subordinate, so as to relieve himself from liability for the negligent acts of such subordinate, or where he is placed in the absolute control and management of an entire business or of a distinct and separate department of a business. *Mollhoff v. Chicago, R. I. & P. R. Co.*, 82 Pac. 733, 734, 15 Okl. 540.

Where a servant in charge of a straw chopper, superintending the work, puts another servant to work thereon, such superintending servant is not a fellow servant of the other, but a "vice principal" of the master as to the duty of giving instructions. *Wyman v. Berry*, 75 Atl. 123, 125, 106 Me. 43, 20 Ann. Cas. 439.

Where an oil company established a boiler repair shop and intrusted its sole charge to a superintendent, who hired and discharged workmen and gave orders in relation to the work, the superintendent was a "vice principal," not a fellow servant of the workmen in the repair shop. *Green v. Washington Oil Co.*, 64 Atl. 877, 878, 216 Pa. 35.

Where a foreman gave directions for the drilling of certain holes for blasting, but left to a workman the handling of the battery and the firing of the shots, and without giving notice, and in violation of the usages of the business, the workman fired a blast, and another workman was injured, the workman firing the blast was not a "vice principal" within Act June 10, 1907 (P. L. 523), for whose negligence the master would be liable. *Coleman v. Keenan*, 72 Atl. 267, 268, 223 Pa. 29.

A shift boss and powderman, who had charge of blasting and drilling in connection with railroad construction work, and who used dynamite which required skill and great care, were not the "fellow servants" of a common laborer engaged in shoveling earth into cars in the cut which was being constructed, and who had no means of knowing what they were doing, and no means of guarding against their acts, but were "vice principals," and were bound to notify laborers in places made dangerous by their work. *Ongaro v. Twohy*, 94 Pac. 916, 917, 49 Wash. 93.

It being defendant's duty to see that its cars were properly inspected for the safety of its employees, if it delegated this duty to

one of its employes, such employé in making the inspection would be a "vice principal," and not a fellow servant. *Missouri, K. & T. Ry. Co. of Texas v. Blachley*, 109 S. W. 995, 999, 50 Tex. Civ. App. 141.

Where an employer places a foreman in charge of the construction of a building, with authority to control and direct the workmen, who are instructed to obey his orders, and a workman receives injury while obeying the foreman's order, the foreman's negligence is the employer's. *McCracken v. Lantry-Sharpe Contracting Co.*, 101 S. W. 520, 45 Tex. Civ. App. 485.

Where defendant directed its superintendent to obtain and set up a pile driver for use on the succeeding day, the negligence of the superintendent in failing to properly stay the pile driver, which resulted in an injury to a servant while working on the same, was the negligence of a "vice principal," and not of a fellow servant. *Wilder v. Great Western Cereal Co.*, 109 N. W. 789, 791, 134 Iowa, 451.

One through whom the proprietor of a livery stable conducts it, and who is the manager and superintendent thereof, and employs help, is the "vice principal" of the master, for whose negligence in failing to instruct a common laborer how to start an engine, great danger being attendant thereon unless it was started properly, the master is liable. *Tivnan v. Keahon*, 101 N. Y. Supp. 1076, 1077, 117 App. Div. 50.

Where defendant's superintendent in charge of the raising of beams in defendant's mill directed plaintiff to move the end of a beam supported by a defective chain from where the beam had caught, and plaintiff was injured by the fall of the beam, caused by the breaking of the chain, the superintendent was plaintiff's "vice principal," and not his fellow servant, under the rule that, so far as the superintendent represents the employer in the discharge of duties resting on him with reference to the safety of the employé, his negligence is not that of a fellow servant but of the employer. *McGuire v. Waterloo & Cedar Falls Union Mill Co.*, 113 N. W. 850, 851, 137 Iowa, 447.

Plaintiff was assistant engineer in charge of a stationary engine. He worked nights, and reported to the chief engineer for orders, and when the plant was not running acted as night watchman, and had instructions to report the necessity of repairs to the chief engineer, who was to have them made. He occasionally made simple repairs himself. The engine became defective, and plaintiff reported the fact to the chief engineer, who neglected to make the repairs, and plaintiff was injured. Held, that the chief engineer was a "vice principal" and not a fellow servant of plaintiff, and that the latter was entitled to recover for the injuries received. *Peterson v. G. W. Van Dusen & Co.*, 111 N. W. 839, 840, 101 Minn. 50.

Where the general foreman in charge of the excavating for the foundation of a building sent a blasting crew to another part of the foundation and directed a certain workman to clear the ice and snow out of a hole which had been drilled in the rock by other workmen, and this workman was injured by dynamite left there exploding, the foreman was a "vice principal" charged with the duty to exercise proper care to provide a reasonably safe place for the employes to work. *Carlson v. James Forrestal Co.*, 112 N. W. 626, 101 Minn. 446.

Plaintiff, a head stone mason in charge of a stone gang, was injured by the fall of a stone by the breaking of a defective derrick chain. When chains needed repairs, or new ones were required, they were obtained from the blacksmith, frequently under plaintiff's direction, and at other times on motion of members of the crew. Plaintiff, on the day before the accident, in the absence of the general foreman, complained to H., in charge of ordinary supplies, of the defective character of the chain, and was told to go on with the work, and that H. would see that it was fixed. H. had no authority as to tools and appliances used. Both H. and plaintiff had authority to employ men. Held, that H. was not the "vice principal," and that his promise to repair did not excuse plaintiff on assuming the risk of using the chain. *Wolk v. Smith*, 105 Pac. 138, 139, 56 Wash. 33.

Where defendant employer intrusted a paper-cutting machine and its care and repair into the hands of a foreman, who, knowing of the defective condition of the machine, directed plaintiff, who was ignorant of such condition, to operate it, the foreman was the representative and agent of defendant, and not a fellow workman of plaintiff. *Brunger v. Pioneer Roll Paper Co.*, 92 Pac. 1043, 1045, 6 Cal. App. 691.

A master mechanic of a steel works is a "vice principal" and not a fellow servant of other employes of the works, where it appears that he has entire charge of the repairs, employs and discharges the repairmen, and has the authority to determine, without being required to consult any higher officer, when and what repairs are necessary, and to select his own means for executing his plans. *Clegg v. Seaboard Steel Casting Co.*, 34 Pa. Super. Ct. 63, 68.

Though, in a servant's action for injuries in a repair job, it is a question for the jury whether E. was a fellow servant or a "vice principal," proof that defendant's master mechanic ordered plaintiff to work under E., defendant's millwright, and that on all repair jobs within his jurisdiction E. had exercised superintendence and control over the men working with him, is sufficient, in the absence of countervailing evidence, to justify the inference that E. was vested by defendant with the power of superintending control over

plaintiff, so as to constitute him a vice principal. *Gale v. Helmbacher Forge & Rolling Mills Co.*, 140 S. W. 77, 79, 159 Mo. App. 639.

Plaintiff and D. were employed by defendant in dismantling heavy machinery in the World's Fair buildings. D. was foreman under a superintendent who was under a manager there. The day before the accident, a heavy wooden frame, 25 feet high, had been erected and temporarily fastened in place with guy ropes under the direction of D., to be used to lift and move the heavy parts of an engine. On the day of the accident, plaintiff and four other men were working under D. to permanently secure this frame in place. D. directed plaintiff to go upon the frame, and after he had climbed there for the purpose of moving one of the ropes which held this frame in place, so that they could use it at another place as a permanent guy rope, D. untied it below, and the frame fell and injured plaintiff. Held, D. was not a "vice principal," but was a fellow servant" of plaintiff, and defendant was not liable for his negligence. *Westinghouse, Church, Kerr & Co. v. Callaghan*, 155 Fed. 397, 401, 83 C. C. A. 669, 19 L. R. A. (N. S.) 361.

A train dispatcher is a "vice principal," and not a "fellow servant," of an engineer of a train running under his orders. *Santa Fé Pac. R. Co. v. Holmes*, 136 Fed. 66, 69, 68 C. C. A. 634 (citing *Northern Pacific Ry. Co. v. Dixon*, 24 Sup. Ct. 683, 194 U. S. 338, 48 L. Ed. 1006; *Oregon Short Line & U. N. R. Co. v. Frost*, 74 Fed. 965, 21 C. C. A. 186; *Northern Pacific Ry. Co. v. Mix*, 121 Fed. 476, 57 C. C. A. 592).

A servant of a carriage manufacturer placed in charge of a wagon used to haul vehicles from the factory to depots for shipment, and who has authority to employ men to assist him, and who directs them in the work, is a "vice principal," and not a fellow servant, of the men. *McIntyre v. Tebbetts*, 120 S. W. 621, 623, 140 Mo. App. 116.

A locomotive engineer and a switchman whose duty it was to give signals to control movement of a train in the making of a coupling by a conductor were fellow servants of the conductor, and not "vice principals," as having superintending control within Railroad Law (Laws 1890, c. 565, as amended by Laws 1906, c. 657) § 42a. *Eagen v. Buffalo Union Terminal R. Co.*, 93 N. E. 1110, 1111, 200 N. Y. 478.

An engineer in charge of an engine used in the yards of a factory is not a vice principal within the scope of Railroad Law (Consol. Laws, c. 49) § 42a, making engineers in the employ of a railroad corporation "vice principals" of such corporation or the receiver of such corporation, as the company in charge of the factory was not a railroad corporation or a receiver thereof. *Matrusciello*

*v. Milliken Bros.*, 126 N. Y. Supp. 739, 742, 141 App. Div. 769.

A motorman took his car into a barn, and, while he was standing in the rear of it, a second car in charge of another motorman came up and stopped four feet away. The conductor of the second car turned the trolley pole around to the front, and, being unable to place it, the motorman of the second car made the contact, whereupon the car moved suddenly forward, and the motorman of the first car was crushed between the cars. Held, that the motorman of the second car was the "vice principal" to the other motorman, within Railroad Law (Laws 1890, c. 565) § 42a, as added by Laws 1906, c. 657, defining "vice principals," as those intrusted with the authority of superintendence, control, or command of other persons employed or with authority to direct or control any other employé in the duty of such employé, or who have for the time being physical control or direction of the movement of a car, etc. *Gorman v. Brooklyn, Q. C. & S. R. Co.*, 131 N. Y. Supp. 686, 687, 147 App. Div. 21.

A person in control of a train on which live stock was being transported was the "vice principal" of the railroad, and notice to him by the shipper of the danger of switching the car with the stock onto a track running into a district infected with cholera was notice to the corporation. *Council v. St. Louis & S. F. R. Co.*, 100 S. W. 57, 58, 123 Mo. App. 432.

The engineer and conductor of a train are not "vice principals" in their relation to the fireman of said train. *Hayes v. New York, N. H. & H. R. Co.*, 105 N. Y. Supp. 592, 593, 121 App. Div. 198.

Conductors and engineers engaged in running and operating trains are "vice principals" and not "fellow servants" of a brakeman, and their negligence is the negligence of the company. *Southern Indiana Ry. Co. v. Baker*, 77 N. E. 64-66, 37 Ind. App. 405.

Where plaintiff was employed by a railroad company as one of an extra gang of track and bridge repairers under its foreman, and the foreman ordered one of the men, R., to take charge of a car which followed that on which the foreman rode, to stop at curves, and to look out for trains, and R. occupied a position where he had control of the brake, and where it was his duty to look out for the trains, R. was a "vice principal." *Warren v. Chicago, B. & Q. Ry. Co.*, 87 S. W. 585, 586, 113 Mo. App. 498.

Under the law of Virginia, the maintaining of a safe roadbed by a railway company is a duty, in the performance of which a servant is a vice principal for whose neglect, resulting in the injury of another servant, the company is responsible, and not a

"fellow servant." *Louisville & N. R. Co. v. Pointer's Adm'r*, 69 S. W. 1108, 1113, 113 Ky. 952.

A foreman of a railroad construction gang, employed in unloading cinders from cars and preparing the roadbed, had power to hire and discharge the laborers and direct their movements. He had also power to direct the movements of a train crew employed in placing the cars where they were to be unloaded. Held, that the foreman was not a fellow servant of a member of the gang but was the employer's "vice principal." *Chicago & E. I. R. Co. v. Kimmel*, 77 N. E. 936, 937, 221 Ill. 547.

Where workmen, under control of a division engineer, were doing work of a railroad company in undermining supports of a bridge, in absence of a showing to the contrary, they would be presumed to be in the company's employ, and thus being, as to a conductor injured by collapse of the bridge, the alter ego of the company under Rev. St. 1895, art. 4560f, making persons intrusted by a railway corporation with control over others in its employ "vice principals" of the company, they having knowledge of danger created, which was knowable to them in exercise of ordinary care, the company occupied the same position as to knowledge toward the conductor. *Beaumont, S. L. & W. R. Co. v. Olmstead*, 120 S. W. 596, 600, 56 Tex. Civ. App. 96.

*Burns' Ann. St. 1901, § 7083*, provides that every railroad or other corporation operating in the state shall be liable for personal injuries suffered by any employé while in the service, exercising due care, if the injury was caused by the negligence of any person in the service of such corporation having charge of any signal, telegraph office, switchyard, shop, roundhouse, locomotive engine, or train upon a railway, etc. Held, that such act enlarged the class of "vice principals" previously existing, and under it railroad corporations were liable for injuries to a servant caused by the negligence of an employé in charge of any signal, etc. *Pittsburgh, C., C. & St. L. Ry. Co. v. Lightheiser*, 78 N. E. 1033, 1035, 168 Ind. 438.

A conductor in charge of a freight train backed his train into a siding with such force as to throw a heavy casting from a car, which was standing on the siding and which was struck by the freight train, onto the main track, where it was struck by a passenger train, which it wrecked, thereby injuring the fireman of such passenger train. A rule of the railroad required employés in charge of trains to promptly report to the superintendent any incident involving the obstruction of the road, to repair damages and take entire charge of necessary work, and to first protect the train with proper danger signals, and take every precaution to prevent further accident. Held that, under

the laws of Tennessee, the crews of the freight and passenger trains were fellow servants up to the time when the casting was thrown upon the main track, but, from that time until the time when the passenger train was wrecked, the conductor of the freight train was, by virtue of the railroad's rule, a "vice principal," whose duty it was, as a representative of the railroad, to remove the obstruction from the main track and to warn the approaching passenger train for its protection. *Cincinnati, N. O. & T. P. Ry. Co. v. Curd*, 89 S. W. 140, 141, 133 Ky. 138, 134 Am. St. Rep. 444.

Rev. St. 1899, § 2874, provides that persons intrusted by a railroad corporation with the authority of command of other persons in the employ of the corporation, or the authority to direct any other servant in the performance of any duty, or with any duty owing by the master to the servant, are vice principals of the corporation. A rule by a railroad corporation provided that passenger conductors have entire charge of their trains and of all persons employed thereon, and will be held responsible for the prompt and safe movement of their trains and the conduct of the trainmen. Held, that a conductor is not a fellow servant of the master mechanic while the latter is riding on the locomotive for the purpose of discovering and remedying a defect in the locomotive, but is a "vice principal"; and the railroad corporation will be liable for the death of the master mechanic, caused by the negligence of the conductor, under Rev. St. 1899, § 2864 (*Ann. St. 1906, p. 1637*), providing that a railroad corporation shall be responsible for the death of a person resulting from the negligence of any employé while running a train. *Tabor v. St. Louis, I. M. & S. Ry. Co.*, 109 S. W. 764, 768, 210 Mo. 385, 124 Am. St. Rep. 728.

Defendant railroad company was engaged in constructing a railroad on which trains west of C. were operated under bulletin orders issued by defendant's trainmaster. An order was issued that all east-bound work trains should have right of way over west-bound trains between 12 o'clock noon and 12 o'clock midnight, and vice versa between 12 o'clock midnight and 12 o'clock noon. On the day of the accident plaintiff, as engineer, was running an extra east-bound train about 60 miles west of C., and at 1 o'clock p. m. his train, having the right of way under such orders, was run into by a west-bound train in charge of the trainmaster as foreman in charge of a crew of laborers. The latter train was run at a high rate of speed on a crooked track through a rough and mountainous country, and no flagman was put out or any steps taken to protect plaintiff's east-bound train. Held, that the negligence of the trainmaster in permitting his train to be run in violation of the bulletin

was negligence in his capacity as "vice principal," and not as plaintiff's fellow servant, for which the railroad company was responsible. *Morrison v. San Pedro, L. A. & S. L. R. Co.*, 88 Pac. 998, 1001, 32 Utah, 85 (citing *Pittsburgh Bridge Co. v. Walker*, 48 N. E. 915, 170 Ill. 550; *Chicago & Alton R. Co. v. May*, 108 Ill. 288; *Sante Fé P. R. Co. v. Holmes* [decided May 21, 1906] 202 U. S. 438, 26 Sup. Ct. 676, 50 L. Ed. 1094).

A brakeman signaling to the engineer of a freight train was not in the "physical control or direction of the movement of a signal," within Laws 1906, c. 657, § 42a, so as to render him a vice principal of the railroad company, and make the company liable for his negligence to a station agent who independent of the statute would be his fellow servant; that phrase being primarily directed to the operation of mechanical devices or machinery. Laws 1906, c. 657, § 42a, provides that employes of a railroad company intrusted with superintendence or control of other persons in the same employ, or with the authority to control any other employé, or who have as a part of their duty physical control or direction of the movement of a signal, switch, locomotive engine, etc., shall be deemed "vice principals." Held, that the "direction and control" referred to means that which proceeds from superior authority, and the mere fact that an engineer switching freight cars had to rely upon a rear brakeman to give signals would not give the brakeman authority to control the engineer within the meaning of the statute so as to make him a vice principal of the railroad company, so as to render the company liable for injuries to a station agent from the negligence of the brakeman who independently of the statute would be his fellow servant. *Hallock v. New York, O. & W. Ry. Co.*, 90 N. E. 1124, 1126, 197 N. Y. 450.

Laws 1906, p. 1682, c. 657, as amended, providing that in all actions against a railroad corporation for personal injury, or death resulting from personal injury, while in the employment of such corporation, arising from its negligence or that of any of its officers or employes, it shall be held that persons in the service of any such railroad corporation, who are intrusted with the authority to direct or control any other employé in the performance of duty of such employé, or who have as a part of their duty for the time being physical control or direction of the movement of a signal, switch, locomotive engine, car, train, or telegraph office, are "vice principals" of such corporation, and are not fellow servants of such injured or deceased employes, is not unconstitutional, and does not create a new cause of action, but merely declares what may be regarded as prima facie evidence, and as such a rule of evidence is valid. *Schradin v. New York Cent. & H. R. R. Co.*, 103 N. Y. Supp. 73-75.

Under Laws 1902, p. 1748, c. 600, making the master liable for death of an employé caused by the negligence of any person in the service of the employer intrusted with or exercising superintendence, whose sole or principal duty is that of superintendence, etc., as supplemented by Laws 1906, p. 1682, c. 657, declaring that persons having authority of superintendence, control, or command of other persons in the employment of a railroad or with authority to direct or control any other employé in the performance of his duty, etc., are "vice principals," and not fellow servants, the foreman of a railroad section crew in the performance of his duty to warn a member of the crew of the danger from an approaching express train was a "vice principal," and not a fellow servant. *La Placa v. Lake Shore & M. S. Ry. Co.*, 111 N. Y. Supp. 797, 799, 127 App. Div. 843.

Laws 1906, p. 1682, c. 657, known as the "Barnes act," provides that in all actions against a railroad for injuries to an employé from the negligence of such railroad or its officers in addition to the liability now existing by law it shall be held that persons engaged in the service of any railroad, intrusted with the authority of superintendence of other employes, or who have as a part of their duty physical control or direction of the movement of a car, engine, etc., are "vice principals," and not fellow servants of such injured employes. Plaintiff, a brakeman, was directed by his conductor to uncouple a car, and he, not being able to signal directly to the engineer, passed the signal to the conductor, who repeated it to the engineer, but not being able to uncouple the car, was directed by the conductor to pull the pin from another car, which he did, signaling the train to move, and after the cars had separated they were suddenly stopped and pushed back against the other car, catching plaintiff's foot between the bumpers, the backward movement of the cars being in response to a signal by the conductor, of which plaintiff had no intimation. A well-recognized rule in railway service permitted only the trainman who was engaged in uncoupling the cars to give signals for train movements. Held, that plaintiff's injuries were caused by the conductor's negligence in not taking signals from plaintiff, and in himself directing the movement of the car under his general authority, and was the act of a vice principal within the statute, for which defendant was liable. *Brown v. New York Cent. & H. R. R. Co.*, 89 N. E. 1096, 196 N. Y. 542.

Railroad Law (Laws 1890, c. 565) § 42a, as added by Laws 1906, c. 657, provides that in actions against a railroad company for death resulting from personal injury to an employé, arising from the company's negligence or that of its employes, the employé or his legal representative shall have the



same rights and remedies as are now allowed, and, in addition thereto, it shall be held that persons engaged in the company's service or intrusted with the authority of superintendence, control, or command of other employes, or with the authority to direct them in the performance of their duties, or who have for the time being physical control or direction of the movement of a signal, engine, etc., are vice principals, and not fellow servants, of the injured employe. Decedent was a third-rail patrolman in defendant's employment, and it was the custom of such patrolmen to work in pairs, one of them repairing minor defects, while the other kept watch for the approach of trains and warned the working patrolman thereof, alternating in working and watching as they themselves determined. Held that, since the duty of the other patrolman to warn decedent of approaching trains was only incidental to his work, he was not a "vice principal" as to decedent, but a fellow servant; the statute only making an employe a vice principal in such case, where his special or sole duty was to give warning. *Hintze v. New York Cent. & H. R. R. Co.*, 125 N. Y. Supp. 644, 645, 140 App. Div. 852.

A complaint for death of a railroad engineer by running into an open switch, alleging that a section foreman was charged with the duty of keeping the track in repair, did not show that such foreman was the "vice principal" while engaging in operating the switch. *Chicago, I. & L. Ry. Co. v. Barker*, 83 N. E. 369, 374, 169 Ind. 670, 17 L. R. A. (N. S.) 542, 14 Ann. Cas. 375.

Defendant's railroad rules provided that extra trains were not shown on the time tables, and had no rights except those given by the train dispatcher, that they should not be run without orders from the dispatcher, and that all interurban trains must report to the dispatcher at certain sidings. Defendant's general trainmaster, while the general superintendent of transportation was absent and while therefore in full charge of transportation, took out an extra car, and while operating the same himself as motorman caused the car to come into collision with a car operated by plaintiff in the opposite direction, resulting in plaintiff's injuries. The trainmaster took out the car without notifying the dispatcher, and proceeded past one of the notification stations before reaching the point of collision without telephoning the dispatcher as required by rule; being unable to do so because the telephone line was not in working order, due to the inclemency of the weather. Held, that the trainmaster, though operating the car himself, did not for that reason cease to be a "vice principal," and become plaintiff's fellow servant; since his act in taking out the car and operating it over the road without notice to the dispatcher was the act of

a vice principal. *Indiana Union Traction Co. v. Pring*, 96 N. E. 180, 185, 50 Ind. App. 566.

An engineer is a "vice principal" and not a fellow servant of his fireman, within Const. 1895, art. 9, § 15, giving to railroad employes the right to recover for injuries sustained by the negligence of a superior having the right to control or direct the services of the party injured. *Pagan v. Southern Ry. Co.*, 59 S. E. 32, 34, 78 S. C. 413, 13 Ann. Cas. 1105.

A "vice principal" is one who stands in the place of and represents the master; thus a conductor in charge of a railroad train as to the brakemen and flagmen is a vice principal and not a fellow servant. *Atlantic Coast Line R. Co. v. Beazley*, 45 South. 761, 765, 54 Fla. 311.

#### As affected by actual assistance

Where a "vice principal" does the work of an ordinary laborer, and is negligent therein, his employer is not liable for injuries to another employe from such negligence. *Miller v. American Bridge Co.*, 65 Atl. 1109, 216 Pa. 559.

If one who is a "vice principal" in a general sense undertakes the performance of a duty which usually belongs to a fellow servant, he is, as respects that particular act, a fellow servant and not a vice principal. *Roebing Const. Co. v. Thompson*, 82 N. E. 196, 197, 229 Ill. 42 (citing *Chicago & Alton Railroad Co. v. May*, 108 Ill. 288; *Gall v. Beckstein*, 50 N. E. 711, 173 Ill. 187; *Baier v. Selke*, 71 N. E. 1074, 211 Ill. 512, 103 Am. St. Rep. 208).

One may be a vice principal as to certain acts and a fellow servant as to others, and a foreman in giving commands to his men is a "vice principal," but, where he joins the men in doing the common labor which they are doing, he is, as to such work, a fellow servant. *Chenoweth v. Burr*, 89 N. E. 1008, 1010, 242 Ill. 312.

A boss of a crew, loading rails onto a flat car, engaged in the same work as the crew, although he may have direction of it, is not a "vice principal" of the master, but a mere "fellow servant" of the members of the crew. *Whitfield v. Louisville & N. R. Co.*, 66 S. E. 973, 974, 7 Ga. App. 268.

A foreman directing employes engaged in moving things in a railway yard did not lose his status of "vice principal," fixed by *Sayles' Ann. Civ. St.* 1897, art. 4560g, declaring that all persons intrusted by a railway company in controlling other employes are vice principals, and become fellow servants of the employes by assisting them in moving a tool box in the yard pursuant to his orders. *Missouri, K. & T. Ry. Co. of Texas v. Dean* (Tex.) 89 S. W. 797, 798.

Plaintiff was injured while operating a steel drop press by the parting of a belt due

to a defective lacing. The work of adjusting the lacings was not easily accomplished by operators of the presses, and had been placed on a superior servant in charge of some 35 of such presses in defendant's factory. Held, that such servant, whose duty it was to lace the belt, was not plaintiff's fellow servant with reference to such act, but a "vice principal," although when his other duties permitted he operated one of the drop presses. *Gilmore v. American Tube & Stamping Co.*, 66 Atl. 4, 5, 79 Conn. 498.

The term "vice principal" has a well-defined legal meaning and is generally understood by the courts as indicating a particular kind of a representative of the master, one having authority to employ and discharge servants under his control; and, where the negligence of the vice principal injures an employé, the master is liable, though the act he is performing at the time falls within the ordinary duties of a fellow servant. *Suderman & Dolson v. Kriger*, 109 S. W. 373, 376, 50 Tex. Civ. App. 29.

A "vice principal," for whose negligence an employer will be liable to other employés, must have entire charge of the business, or one to whom a master delegates a duty of his own, which is an absolute obligation, from which nothing but performance can relieve him, and hence an employé who had charge of putting on a roof, and who worked with the men under him and did the same kind of work, and at the time of the accident was tacking paper on the roof, is not a "vice principal" as to the men under his control. *Staebler v. Warren-Ehret Co.*, 72 Atl. 554, 555, 223 Pa. 129.

Plaintiff was employed as a miner at a specified price for coal delivered at the mouth of the pit, plaintiff being required to run his cars of coal to the entry, where they were transported to the mouth of the pit by mule power. Plaintiff was promised assistance in running his cars out, in order to facilitate his mining efforts, and, on the derailment of a car in the room, he was assisted by the pit boss to rerail the same, in which operation his fingers were pinched between the bottom of the car and a wooden prop the pit boss had been using, and which he had dropped near the car. Held, that the acts of the pit boss in assisting plaintiff were those of a fellow servant and not of a "vice principal." *Cavanaugh v. Centerville Block & Coal Co.*, 109 N. W. 303, 304, 131 Iowa, 700, 7 L. R. A. (N. S.) 907.

A street railway barn foreman, whose duty it was to give orders with reference to the running of cars, with authority to lay off men for infraction of rules, directed plaintiff to take out a new car, which plaintiff stopped just outside the car shed, at a sandhouse, to get sand for his trip. While plaintiff was getting sand, the foreman got on the standing car and started it forward without signal, crushing plaintiff against the side of the sand

bin. Held, that the foreman was plaintiff's "vice principal," and that his act in momentarily moving the car, instead of ordering another to do so, did not render his negligence in so doing that of plaintiff's "fellow servant." *Blen v. St. Louis Transit Co.*, 83 S. W. 986, 987, 108 Mo. App. 399 (citing *Grattis v. Kansas City, P. & G. R. R.*, 55 S. W. 108, 153 Mo. 380, 48 L. R. A. 399, 77 Am. St. Rep. 721; *Bane v. Irwin*, 72 S. W. 522, 172 Mo. 306; *Miller v. Missouri Pac. R. Co.*, 19 S. W. 58, 109 Mo. 350, 32 Am. St. Rep. 673; *Hawk v. McLeod Lumber Co.*, 65 S. W. 1022, 166 Mo. 121; *Dayharsh v. Hannibal & St. J. R. Co.*, 15 S. W. 554, 103 Mo. 575, 23 Am. St. Rep. 900; *Russ v. Wabash West. Ry. Co.*, 20 S. W. 472, 112 Mo. 45, 18 L. R. A. 823; *Donahoe v. Kansas City*, 38 S. W. 571, 136 Mo. 670; *Foster v. Missouri Pac. R. R.*, 21 S. W. 916, 115 Mo. 165; *Fogarty v. St. Louis Transfer Co.*, 79 S. W. 669, 180 Mo. 490, 1 Ann. Cas. 136; *Hutson v. Missouri Pac. R. Co.*, 50 Mo. App. 300; *Haworth v. Kansas City Southern R. Co.*, 68 S. W. 111, 94 Mo. App. 215; *Donnelly v. Aida Min. Co.*, 77 S. W. 130, 103 Mo. App. 349; *Strode v. Conkey*, 78 S. W. 679, 105 Mo. App. 12).

#### As determined by duty performed

Whether one is a "vice principal" so as to make the master liable for his negligence does not depend upon his rank as an employé, but upon the character of his duties. *Indiana Union Traction Co. v. Long*, 96 N. E. 604, 606, 176 Ind. 532.

In determining whether an employé represents the employer, the duty required to be performed, rather than the title by which the employé is known or called, is to be considered. *Stearns & Culver Lumber Co. v. Fowler*, 50 South. 680, 683, 58 Fla. 362.

It is the act itself that characterized the performer as a "vice principal" or a "fellow servant," and not the title of the actor or the fact that he does superior duties. *Chicago, I. & L. Ry. Co. v. Barker*, 83 N. E. 369, 374, 169 Ind. 670, 17 L. R. A. (N. S.) 542, 14 Ann. Cas. 375.

It is not the grade, or title, or the position in the service, that determines whether a person is a fellow servant or a "vice principal" of the master, but it is the duty which the servant performs towards the other servants. *Moore v. Dublin Cotton Mills*, 56 S. E. 839, 841, 127 Ga. 609, 10 L. R. A. (N. S.) 772 (citing 2 Labatt, Mast. & S. § 508 et seq.; 6 Cur. Law, 555 et seq.; 8 Words and Phrases, p. 7313).

An employé authorized to perform a duty which is clearly the master's is, to that extent, a vice principal, and the controlling inquiry must be whether an act or omission resulting in injury involved a duty owing by the master to the injured servant. *Patterson v. Southern Ry. Co. of Indiana*, 99 N. E. 491, 492, 52 Ind. App. 618.

If an employé has no authority from the master, then in the very nature of things he cannot be a "vice principal." If he has authority, whether express or implied, his vice principalship depends upon whether the scope of such authority includes attention to or performance of any of the nondelegable duties of the master, and, if so, then whether the alleged negligent act is referable to any of those duties. *Beresford v. American Coal Co.*, 98 N. W. 902, 904, 124 Iowa, 34, 70 L. R. A. 256.

In the absence of some statute defining fellow servant, the test to be applied is whether the negligent act, which caused the injury, was a breach of a positive duty owing by the master to his servant, in which case the person performing the act is a "vice principal," and not a fellow servant. *Morrison v. San Pedro, L. A. & S. L. R. Co.*, 88 Pac. 998, 1002, 32 Utah, 85 (quoting and adopting definition in *Merrill v. Oregon Short Line R. Co.*, 81 Pac. 85, 29 Utah, 264, 110 Am. St. Rep. 695).

In the absence of a statute, "unless the negligent servant is the general manager or general superintendent of the business of the master, it is not his rank or authority over other employes, but it is the nature of the duty he is discharging when he is guilty of the negligence that determines whether he is a 'vice principal' or a 'fellow servant,' and when the master is liable or is exempt from liability for the injury caused by his negligence. If he is discharging one of the absolute duties of the master, the latter is liable for his acts and for his negligence, but, if he is discharging one of the primary duties of the service, his employer is exempt from liability." *Southern Pac. Co. v. Schoer*, 114 Fed. 466, 468, 52 C. C. A. 268, 57 L. R. A. 707.

A mere foreman—not the head of a separate department—is a fellow servant of the workmen under him or a "vice principal" dependent on the nature of the duties he is discharging at the time of the negligent act, with which he is charged. If he is discharging one of the absolute or personal duties of the master, he is a "vice principal," and his negligence is imputable to the master. Where a bridge company sent a force of men under a foreman to make repairs on a railroad bridge, consisting in part of replacing certain old parts with heavy steel girders, and in doing this it was necessary to construct on the spot wooden frames or bents to support the weight of the girders, while they were being put in place, which were made by the workmen as an incident to the work, the foreman was not a "vice principal" either with respect to the construction of such frames or their subsequent inspection. *Phoenix Bridge Co. v. Castleberry*, 131 Fed. 175, 179, 180, 65 C. C. A. 481.

Where a servant is injured in performance of work of his master, and the negli-

gence of a coemployé is involved, whether such coemployé is to be deemed a fellow servant or a vice principal is to be determined, not so much by the rank or title, if any, used to describe him, but chiefly by the character of the duties intrusted to him; and an employé performing for the master the duty to provide the place and instrumentalities of work, a coterie of competent servants, or to arrange the general system of work, is deemed the "vice principal" of the master. *Mills v. Bartow Lumber Co.*, 70 S. E. 983, 985, 9 Ga. App. 171.

In the performance of those duties placed upon the master by express law, or implied to him under the contract of employment, and variously designated as the "positive," "absolute," "personal," "nondelegable," or "nonassignable" duties of the master, the servant intrusted with them, even though he be the most menial in point of rank, is to the extent of such duties the alter ego or "vice principal" of the master. Conversely the coemployé, however important be his official title, who is doing mere servant's work, or is engaged merely with the ordinary details of the labor, is to be regarded as a fellow servant in the business at hand. In a suit by a servant against the master, where the injury was occasioned by the negligence of another employé, the defense of a common employment is excluded, or allowed to prevail, according as the delinquency was or was not a breach of one or more of what the law regards as the absolute, personal, or nondelegable duties of the master. *Dennis v. J. S. Schofield's Sons Co.*, 57 S. E. 925, 1 Ga. App. 489 (citing *Moore v. Dublin Cotton Mills*, 56 S. E. 839, 127 Ga. 609, 10 L. R. A. (N. S.) 772).

The mere superiority in dignity, grade, or compensation, in favor of one servant of a common principal over other servants, is not a mark by which to distinguish whether or not the former is a "vice principal." The most general test is that, in order to be a "vice principal," a servant must so far stand in the place of his master as to be charged in the particular matter with the performance of a duty towards the inferior which, under the law, the master owes to such servant, as furnishing tools (*Guthrie v. Louisville & N. R. Co.*, 11 Lea, 372, 47 Am. Rep. 286), or machinery and appliances (*Louisville & N. R. Co. v. Lahr*, 6 S. W. 663, 86 Tenn. 335, 341), or giving orders with respect to work to be done by the subordinate (*Nashville, C. & St. L. R. Co. v. Handman*, 13 Lea, 423, 429). *Louisville & N. R. Co. v. Dillard*, 86 S. W. 313, 314, 114 Tenn. 240, 69 L. R. A. 746, 108 Am. St. Rep. 894, 4 Ann. Cas. 1028 (quoting and adopting the definition in *Ohio River & C. R. Co. v. Edwards*, 76 S. W. 897, 111 Tenn. 31).

The doctrine that a superior servant is on that account a "vice principal" representing his master, rather than a fellow servant with others employed by the same master

and engaged in the same work, does not prevail in this state, and is not supported by the weight of authority. The master's liability to one servant for the negligence of another in no way depends upon the superior rank of the negligent servant. A servant of any grade may be employed in the discharge of the particular and personal duties which the master owes to the servant, as when he is engaged in the duty of providing safe, suitable, and sufficient machinery and appliances. While engaged in such employment, although at other times he may be only a fellow servant with other employes, he becomes a "vice principal," and his master is liable for his negligence, because the performance of these duties cannot be delegated by a master so as to relieve himself from the consequence of negligence in these respects. *Small v. Allington & Curtis Mfg. Co.*, 48 Atl. 177, 178, 94 Me. 551.

Among the duties which the master owes to the servant, and which he cannot delegate to others so as to absolve himself from liability for negligence in their performance, are the duties of the master to warn the servant of latent defects and dangers which are or ought to be known to the master, and of which the servant without fault is ignorant, and to exercise reasonable diligence to furnish the servant a reasonably safe place in which to perform his work. Whoever is set to perform these duties, no matter what be his grade or rank, represents the master in that particular and is not a "fellow servant" of those to whom the duty is due but is a "vice principal." If the servant by whose negligence the injury is caused was at the time, with the knowledge, consent, and procurement of the master, engaged in the performance of a duty which, under the law, the master owed to the servant, the relation of "fellow servant" does not exist between the offending employe and the injured servant. A driver in a coal mine, after putting his mule away for the day, returned through the main entry of the face of the coal to get his coat and bucket. While he was walking through the entry, an explosion of dynamite occurred in the roof above his head, and he was injured as a result. The shot had been placed and ignited by two of defendant's timbermen, whose duty it was to keep the roof in safe condition, and in the performance of such the timbermen were "vice principals" engaged in performing the master's nondelegable duty to keep the mine safe, and the master was responsible for their negligence in failing to warn plaintiff of the impending explosion. Whether servants are fellow servants of the person injured or vice principals does not depend on whether they were engaged in a common employment under the same general contract and paid by the same principal, but whether the negligent servant in the act or omission complained of by the direction or consent of the master was in

discharge of a duty which the master personally owed to the injured servant. *Donk Bros. Coal & Coke Co. v. Thil*, 81 N. E. 857, 859, 228 Ill. 233 (citing *Hess v. Rosenthal*, 43 N. E. 743, 160 Ill. 621; *Chicago & A. R. R. Co. v. Scanlan*, 48 N. E. 826, 170 Ill. 106; *Chicago & Alton R. R. Co. v. Maroney*, 48 N. E. 953, 170 Ill. 520, 62 Am. St. Rep. 396; *Chicago Union Traction Co. v. Sawusch*, 75 N. E. 797, 218 Ill. 130, 1 L. R. A. [N. S.] 670; *Mobile & O. R. R. Co. v. Godfrey*, 39 N. E. 590, 155 Ill. 78; *Pullman Palace Car Co. v. Laack*, 32 N. E. 285, 143 Ill. 242, 18 L. R. A. 215; *Libby, McNeill & Libby v. Scherman*, 34 N. E. 801, 146 Ill. 540, 37 Am. St. Rep. 191; *Hines Lumber Co. v. Ligas*, 50 N. E. 225, 172 Ill. 315, 64 Am. St. Rep. 38; *Leonard v. Kinnare*, 51 N. E. 688, 174 Ill. 532; *Kewanee Boiler Co. v. Erickson*, 54 N. E. 1044, 181 Ill. 549).

The responsibility of the master is not determined by the difference in rank between the servant injured and the one in fault, or by the fact that the negligent servant is foreman or in control of others, but upon the nature of the act complained of, whether it is an act of service or an attempted performance of a nondelegable duty of the master. Plaintiff was injured by an explosion of gas while cleaning a hydraulic main in defendant gas company's plant under the direction of defendant's foreman. Defendant had provided valves for shutting off the gas from its mains while they were being cleaned, and it does not appear that the act of shutting off the gas or airing the mains required any special skill. Held, that the negligence of the foreman in failing to shut off the gas from the main or to air it before it was cleaned was not negligence in the performance by him of a nondelegable duty owed by defendant to plaintiff, but such action was purely an act of service, which defendant could properly delegate, and for the negligent performance of which defendant was not liable. Nor can plaintiff recover on the ground that defendant had failed to provide a safe place for him to work, since defendant provided proper appliances for securing plaintiff's safety, and the place was rendered unsafe only by the neglect of the foreman to properly use these appliances; the operation of the appliances being a duty defendant could delegate to an employe. *Tilley v. Rockingham County Light & Power Co.*, 67 Atl. 946, 947, 74 N. H. 316 (citing *Hilton v. Fitchburg R. Co.*, 59 Atl. 625, 73 N. H. 116, 119, 68 L. R. A. 428; *McLaine v. Head & Dorost Co.*, 52 Atl. 545, 71 N. H. 294, 58 L. R. A. 462, 93 Am. St. Rep. 522; *Galvin v. Pierce*, 54 Atl. 1014, 72 N. H. 79; *Wallace v. Boston & M. R. R.*, 57 Atl. 913, 72 N. H. 504).

A superintendent or foreman is not necessarily a "vice principal" simply because he occupies that position. Title or rank has not of itself any special significance in this connection. When engaged with the other serv-

ants in the common employment of the master, the superintendent or foreman is a fellow servant, and for his personal negligence the master is not responsible; but when clothed with special authority in respect to the management and conduct of the master's business, a general supervision of it, the control and direction of the other servants under his charge, authority to direct them in the performance of their duties, he is, in respect to those absolute duties the master owes such other servant, a vice principal. He stands in the place of the master in the performance of those duties, whether in reference to the selection of safe instrumentalities, a safe place to work, or in giving proper warning of dangers and risks not known to the servant, or which he could not by the exercise of reasonable prudence discover; and his failure and neglect to perform such absolute duties render the master liable. *Dixon v. Union Ironworks*, 97 N. W. 375, 377, 90 Minn. 492.

**As determined by power to hire and discharge**

It is not essential that one have the power to employ and discharge employes, in order to be a "vice principal." *Wichita Cotton Oil Co. v. Hanna* (Tex.) 139 S. W. 1000, 1001.

Authority to employ and discharge makes an employe a "vice principal," regardless of his grade of service. *Lantry-Sharpe Contracting Co. v. McCracken*, 117 S. W. 453, 456, 53 Tex. Civ. App. 627.

Where a foreman had general charge of a mine, including the particular work in which plaintiff, a miner, was engaged when injured, and hired the miners and told them what to do and where to work, he was a "vice principal," and not a fellow servant of plaintiff. *Vasby v. United States Gypsum Co.*, 128 Pac. 606, 607, 46 Mont. 411.

The one in immediate charge of the work of loading lumber on a vessel from a dock, with power to hire and discharge the hands, is not a fellow servant of a laborer placing the lumber in a sling to be hoisted but a "vice principal." *Schroeder v. Brown & McCabe*, 116 Pac. 335, 336, 59 Or. 81.

A yard foreman, who had no authority over a yard engineer except to direct him when and where to move his engine, and who did not have the right of employment or discharge of the engineer, was not a "vice principal" as to the latter but a fellow servant. *Southern Ry. Co. v. Smith*, 59 S. E. 372, 374, 107 Va. 553.

One who is the foreman of a department in an establishment divided into departments, with power to hire and discharge employes in that department, is a "vice principal" in the conduct of that department, and any negligence on his part in the conduct of the business committed to him is negligence of the master. *Hugo, Schmeltzer & Co. v. Paiz* (Tex.) 128 S. W. 912, 916.

A servant who is the medium of communication between the master and his servants, who was the proper person to make repairs when requested and who had the power to dismiss a servant requesting such repairs, is a "vice principal" within the meaning of the law. *Suchomel v. Maxwell*, 88 N. E. 553, 144 Ill. App. 543, 550; *Id.*, 88 N. E. 558, 240 Ill. 231.

An employe directing a gang engaged in loading iron rails on a flat car and controlling the manner of performing the work is a "vice principal" and not a fellow servant, though he has no power to employ or discharge the men. *Chicago, R. I. & P. Ry. Co. v. Rathneau*, 80 N. E. 119, 120, 225 Ill. 278.

A man placed on a barge by the owner, with authority to direct its movements and to hire additional men when needed about the cargo, is a "vice principal" in respect to the performance of the owner's duty as master towards men so hired. *Pennsylvania R. Co. v. Hartell*, 157 Fed. 667, 668, 85 C. C. A. 335.

A master mechanic in the employ of an iron and steel company, whose duty it is to keep the machinery and appliances in repair and safe for employes to work about, who has full power to hire and discharge men, is a "vice principal" of the company. *Republic Iron & Steel Co. v. Lee*, 81 N. E. 411, 412, 414, 227 Ill. 246.

A statement does not show that an employe was other than a fellow servant when it shows no more than that he was foreman of a gang, and does not disclose that he has power either to employ or discharge. *Pipkin v. Hayward Lumber Co.* (Tex.) 96 S. W. 635, 636.

An assistant general manager of a corporation, who has general authority in the conduct of its business and the direction of its work, is a "vice principal," and not a "fellow servant" engaged in the actual operation of the business, although he has no power to employ and discharge such inferior servants. *Abilene Cotton Oil Co. v. Anderson*, 91 S. W. 607, 608, 41 Tex. Civ. App. 342.

The fact that a foreman in charge of a single job of work being done by defendant corporation, who worked with the men under him, had the power to hire and discharge them and to direct their movements in that particular work did not erect that single job into a department of defendant's business so as to make the foreman a "vice principal," but he remained a "fellow servant" with the men under him, and for his negligence, resulting in an injury to one of such men, defendant cannot be held liable. *Vilter Mfg. Co. v. Otte*, 157 Fed. 230, 232, 84 C. C. A. 673.

The conductor or "boss" or "foreman" of a log train used by a sawmill company solely for its own purposes, who has no authority to employ or discharge, and who is subordinate to others engaged in the same business, is not

in law necessarily the "vice principal" of the master discharging a duty peculiarly devolving upon it while signaling the movements of a machine used in loading the log train so as to give a right of action against the company by an employé who was injured because of negligence of the conductor in signaling. *Stearns & Culver Lumber Co. v. Fowler*, 50 South. 680, 684, 58 Fla. 362.

#### School-teachers

One who entered into a contract with the board of education to render such services as teacher as would be required of him for a certain time was not a "vice principal" or "first assistant," within laws 1900, p. 1605, c. 751, and entitled to the compensation provided by that law. *Wood v. Board of Education of City of New York*, 112 N. Y. Supp. 578, 580, 59 Misc. Rep. 605.

On June 30, 1898, the Richmond borough school board appointed plaintiff as "vice principal, subject to the rules and regulations prescribed by the city superintendent of schools." The rules of the city superintendent limited appointment to the position of "assistant principal" to those holding a "first assistant teacher's license or a principal's license for high schools." Plaintiff did not have either one of the licenses mentioned in the city superintendent's rule, but possessed a certificate of the State Superintendent of Public Instruction. Held, that the term "assistant principal," as used in the city superintendent's rules, was equivalent to the term "vice principal," and plaintiff was not entitled to the salary of a "vice principal" or "head of department." *Gormley v. Board of Education*, 129 N. Y. Supp. 153.

## VICINAGE

See Jury of the Vicinage.

## VICINITY

See Immediate Vicinity.

Under a contract releasing a railroad from all liability for loss by fire of any property "situated or hereafter placed in the vicinity of such track, whether such loss result from negligence or other cause," it was error to submit to the jury the question whether the property destroyed by the fire, which started at a point about 40 feet from the track, and consumed lumber situated some 400 feet from that point and near the tracks, the ground being littered with shavings, which it was the duty, under the contract, of the property owner to clear away, was situated in the vicinity of the tracks, but the court should have so declared as a matter of law. *Mann v. Pere Marquette R. Co.*, 97 N. W. 721, 724, 135 Mich. 210.

The term "vicinity," as used in a charter act granting the right to lay gas pipes in the streets of the "town of Millville and its vi-

cinity," Millville being at the time an unincorporated village included in a township by the same name, held to refer to the immediate vicinity of the village, and not to the whole township and its vicinity. *Landis Tp. v. Millville Gas Light Co.*, 65 Atl. 716, 72 N. J. Eq. 347.

A firm engaged in business at L. sold its business and agreed for 10 years not to enter into similar business at L. "or vicinity." Within a few months thereafter they started a similar business at W.,  $6\frac{1}{2}$  miles from L., and shortly thereafter engaged in a similar business at Z., the same distance from L. They advertised their business in the L. newspapers and sold a small quantity of goods to customers at L. About 11 months thereafter, the assignees of the purchaser of the business at L. threatened to sue if they engaged in business at L., but said nothing as to the business at Z. and W. About 4 years thereafter, the assignees wrote another letter, stating their belief that the sellers were proposing to violate their contract by engaging in business at L., but made no claim that they had breached their contract by engaging in business at any other point. Held, that the word "vicinity" does not express any definite idea of distance, but may mean in some connections a trifling space, and in others thousands of miles, and that the construction placed upon the contract by the parties thereto and their successors did not extend the word "vicinity" to include the towns Z. and W. *Burton v. Douglass*, 123 N. W. 631, 633, 141 Wis. 110, 18 Ann. Cas. 734.

#### As neighborhood

To be in the "vicinity" of a certain county or state is not to be in that county or state but to be outside of it, though near it; only in the neighborhood of it. "Etymologically and by common understanding 'in the vicinity' means in the neighborhood, and 'neighborhood,' as applied to place, signifies nearness. 'In the vicinity' does not even mean adjoining to or abutting on, but merely close by, or neighboring country." In this case, the words "in the vicinity" were used in the return on an execution for sale of land describing the land as "in the vicinity of Mississippi," and it was held that there was an utter failure to show their location. *Jones v. Rogers*, 38 South. 742, 745, 85 Misc. 802.

## VICINITY CONTRACT

By the terms of a contract plaintiff was appointed by defendant an agent for the sale of machinery at De Pere, such agent to have the privilege of making sales in the vicinity of De Pere. On the back of the printed form of contract was the following indorsement: "The design of a 'vicinity contract' is to pay an agent the stipulated commission on whatever machinery he may sell under the provisions of the contract, not in the territory of another agent who had the exclusive right to

sell in a defined territory." The agent's territory is not a "defined territory," within the meaning of the indorsement on the contract. The business of these agents is not to sit still at some place and sell machinery to those who come to the agent and want to buy it, but to canvass or work their territory; and these vicinity contracts are made rather than those of a definite territory on purpose to meet cases of this kind, where a locality may be more closely connected in a business way with any one village than one near by, and to avoid conflict between different agents from broader territory. *McGeehan v. Gaar, Scott & Co.*, 100 N. W. 1072, 1074, 122 Wis. 630.

## VICIOUS

### VICIOUS PROPENSITY

A "vicious propensity" of a dog is not confined to a disposition to attack every person but includes as well a natural fierceness or disposition to mischief as might occasionally lead him to attack human beings without provocation. *Merritt v. Matchett*, 115 S. W. 1066, 1069, 135 Mo. App. 176.

## VIDELICET

See, also, That Is To Say.

"The term 'that is to say' has undergone judicial interpretation. In *Stuckeley v. Butler*, *Hobart's Reports*, 168, it was held, as stated in the syllabi, that: 'A scilicet cannot restrict a grant where the former words are express and special. Secus, where the former words are so indifferent that they may receive such a restriction without apparent injury. A scilicet may particularize what before was general, or distribute what was in gross, or explain what was uncertain, but it must not be inconsistent with the premises.' And in the body of the opinion Sir Henry Hobart said: 'Now I come to the use of a "viz." or "sc." or, in the English, "that is to say," and the nature and force of it. It is neither a direct several clause nor a direct entire clause, but it is intermedia. First, it is clear that it is not a substantive clause of itself, and therefore you can neither begin a sentence with it nor make a sentence of it by itself; but it is, as I may say, *clausula ancillaris*—a kind of handmaid to another clause, and to deliver her mind not her own. And therefore it is a kind of interpreter. Her natural and proper use is to particularize that that is before general, or distribute that that is in gross, or explain that that is doubtful or obscure.' *Hobart's Reports*, p. 181b. The term 'that is to say,' as employed in an indictment, underwent judicial interpretation in *King v. Powell*, 2 *Blackstone's Reports*, 787, and was there construed to be intended as explanatory of what preceded it." Under a codicil bequeathing to testator's half-sister a portion equal to the share of his trustee's wife and her children, to be paid to her by testa-

tor's executor on final settlement of the estate ("that is to say," should the trustee's wife take a child's part, then the half-sister should take a child's part), the clause introduced by "that is to say" explained the portion of the estate intended for testator's half-sister and did not fix the time when she should receive the same. *Brooks v. Brooks*, 86 S. W. 158, 161, 162, 187 Mo. 476.

The natural and proper use of either a "scilicet" or "videlicet" is to particularize that which has been before stated generally, and to explain that which is indifferent, doubtful, or obscure. It may sometimes work a restriction of the preceding allegation, but cannot, in general, be used to preface anything contrary or repugnant to the premises, nor to increase or diminish the preceding matter, and, if it attempts to do so, the statement made under it will be rejected as surplusage. *Tullis v. Shaw*, 83 N. E. 376, 378, 169 Ind. 662 (citing 8 Words and Phrases, pp. 7319, 7320).

The office of a "videlicet" is to indicate that the plaintiff does not undertake to prove the precise circumstances as alleged. *Chicago Terminal Transfer R. Co. v. Young*, 118 Ill. App. 226, 229.

## VIEW

See Fully in View; Plain View.

As receiving evidence, see Receiving Evidence.

The purpose of a "view" is not to supply evidence, but to enable the jury to apprehend it. Granting or refusing a view is a matter necessarily largely in the discretion of the trial court; and an appellate tribunal will not undertake to control such discretion, unless it plainly appears that it was erroneously exercised. *Stanley v. Commonwealth*, 63 S. E. 10, 11, 109 Va. 796.

### VIEWED AND LAID OUT

That a highway has been "viewed and laid out" means that the land constituting it has been given the status and subjected to the servitude of a public highway. *Bradley v. Crane*, 94 N. E. 359, 361, 201 N. Y. 14.

## VIEWERS

Since the enactment of Sess. Laws 1901, c. 96, p. 200, giving to the county surveyor all the duties previously required of "viewers" in the laying out of county roads, the word "viewers," wherever it occurs, either in the statute or the road proceedings, must be interpreted as meaning or referring to the county surveyor, so that under Bal. Ann. Codes and St. §§ 3871, 3872, providing for notice to landowners and proceedings by commissioners on the report of "viewers," a service of notice of a hearing on the report of the surveyor was sufficient. *State ex rel. Pagett v. Superior Court, Pierce County*, 91 Pac. 241, 242, 47 Wash. 11.

## VIGILANT WATCH

A "vigilant watch" means, in the common acceptation of the term, an exceedingly careful watch. *Theobald v. St. Louis Transit Co.*, 90 S. W. 354, 366, 191 Mo. 395.

## VILLAGE

See Incorporated Village.

A place which was not incorporated, but at which there was a post office, store, one residence, and a sawmill, and another building in process of construction, was a village within a statute authorizing the removal, of a county seat to any "village," etc. *Court of Com'rs of Washington County v. State ex rel. Bowling*, 44 South. 465, 466, 151 Ala. 561.

Where the owner of farm lands platted it into lots, blocks, and streets, filing the plat with the county clerk, but there was no acceptance of dedication, no incorporation, and no buildings there but a post office, the land did not become a "town" or "village," within *Sand. & H. Dig. § 3712*, limiting the homestead therein to one acre. *Clements v. Crawford County Bank*, 40 S. W. 132, 133, 64 Ark. 7, 62 Am. St. Rep. 149.

The name "village" always carries to the mind the idea of a small urban community. A city is a town, and a village is a town, but the word "city" or "village" indicates the size of the town. *State ex rel. Scott v. Lichte*, 126 S. W. 466, 470, 226 Mo. 273.

The word "villages," as used in *Comp. St. 1903, c. 14, § 40, art. 1*, providing that whenever a majority of the taxable inhabitants of any town or village not heretofore incorporated under any law of this state shall present a petition to the county board of the county in which said petitioners reside, praying that they may be incorporated as a village designating the name they wish to assume and the metes and bounds of the proposed village, and if such county board or a majority of the members thereof shall be satisfied that a majority of the taxable inhabitants of the proposed village have signed such petition, and that inhabitants of 200 or more are actual residents of the territory described in the petition, the said board shall declare the said proposed village incorporated, applies to villages in the ordinary and popular sense of the term and was not intended to clothe large rural districts with extended municipal powers and subject them to special taxation for purposes for which they are in no wise adapted, and that lands adjacent to the town or village might be incorporated therewith, provided they were in such close proximity as to be suburban in character, and have some unity of interest with the platted portion in the maintenance of municipal government, but did not contemplate the incorporation of removed territory having no natural connection with the

village and not adapted to municipal purposes. *Commonwealth Real Estate Co. v. City of South Omaha*, 110 N. W. 1007, 1008, 78 Neb. 368.

### As assemblage of houses

A "village" means an assemblage of houses, less than a town or city, but nevertheless urban or semiurban in its character. *State ex rel. Young v. Village of Gilbert*, 120 N. W. 528, 530, 107 Minn. 364.

### As incorporated village

Where a statute required all railroads to provide, at all villages and boroughs on their respective roads, depots with suitable waiting rooms, the word "villages" means incorporated villages and not every isolated hamlet at which a railroad may have a flag station. *State v. Baltimore & O. R. Co.*, 56 S. E. 518, 519, 61 W. Va. 367 (citing and adopting definition in *State ex rel. Railroad & Warehouse Com'rs v. Minneapolis & St. L. R. Co.*, 79 N. W. 510, 76 Minn. 469).

Under the Minnesota statute, which requires railroad companies to establish stations at towns and villages, the word "villages" means not every sparsely settled hamlet but an incorporated village. *Atchison, T. & S. F. Ry. Co. v. State*, 112 Pac. 1010, 1016, 27 Okl. 565 (quoting and adopting definition in *State ex rel. Railroad & Warehouse Commission v. Minneapolis & St. L. R. Co.*, 79 N. W. 510, 76 Minn. 469).

### As municipality

See Municipality.

### As precinct

See Precinct.

### Town synonyms

At the time of the granting of a franchise to a gas company to lay pipes in streets of the "town of Millville and its vicinity," there was a village of Millville situated within the township of Millville. Held, that the words "town of Millville and its vicinity" referred, not to the entire township of Millville, but to the village of Millville and its vicinity. *McCarter v. Millville Gaslight Co.*, 69 Atl. 248, 73 N. J. Eq. 739.

A complaint, in a prosecution for carrying concealed weapons, was not defective because in the name of the "village of O.," instead of the town of O., though *Rev. St. 1899, § 6004*, declares that the inhabitants of a village shall be a body politic and corporate by the name and style of "the town of"; the entire statute (sections 6004-6066) using the words "town" and "village" interchangeably, and the complaint having also used them in like manner. *Town of Orrick v. Akers*, 83 S. W. 549, 109 Mo. App. 662.

## VILLAGE BRIDGE

Generally speaking, a town bridge is one wholly within a town, and a "village bridge" one wholly within a village, but the Legis-



lature having seen fit to provide that a town road, which is intersected by a village plat and crossed by a navigable stream, requiring to be bridged to make a road usable, shall be deemed to be a town road and the bridge a town bridge to the same extent that it is a village street and "village bridge" as regards the maintenance of the bridge, the meaning of the statute on the subject is perfectly plain. *Village of Bloomer v. Town of Bloomer*, 107 N. W. 974, 979, 128 Wis. 297.

### VILLAGE COUNCIL

The "village council," under the Minnesota statutes, is the governing body of the municipality, charged with the management of its affairs, legislative and administrative, and alone clothed with power and authority to enter into such contracts as are deemed necessary for the public welfare. *Jewell Belting Co. v. Village of Bertha*, 97 N. W. 424, 91 Minn. 9.

### VILLAGE DATUM

A "village datum" is a certain monument or object, of a permanent character, which has been adopted by the municipality as a base or starting point for the grades and levels of the municipality. *Chicago Consol. Traction Co. v. Village of Oak Park*, 80 N. E. 42, 44, 225 Ill. 9.

### VILLAGE ELECTION

As municipal election, see *Municipal Election*.

### VILLAGE LOTS

See *Town and Village Lots*.

### VILLAGE OFFICE

As municipal office, see *Municipal Office*.

### VILLAGE ORDINANCE

As criminal laws, see *Criminal Law*.

### VILLAGE PROPERTY

A pleading relating to the taxing of farm lands within the limits of an incorporated village in referring to the "village property," will be understood as using that phrase to mean the same as the words "physical village," as used in prior opinions of the court. *Atherton v. Village of Essex Junction*, 74 Atl. 1118, 1119, 83 Vt. 218, 27 L. R. A. (N. S.) 695, Ann. Cas. 1912A, 339.

### VILLAGE PURPOSE

Laws 1907, c. 93, authorizing the application of village funds to the care and maintenance of streets which the trustees are unable to accept by dedication, etc., is in conflict with Const. art. 8, § 10, prohibiting a village from incurring any indebtedness except for village purposes, for a "village purpose" must be for a public use and for the benefit and advantage of all of the public and in which all have a right to share, and the statute cannot be sustained on the ground that it

relieves the owners of the property abutting on the streets from the care and maintenance thereof. *Smith v. Smythe*, 90 N. E. 1121, 1123, 197 N. Y. 457, 35 L. R. A. (N. S.) 524.

## VINDICTIVE DAMAGES

See, also, *Exemplary Damages; Punitive Damages; Smart Money*.

The word "vindictive," as used to describe damages, is synonymous with punitive and exemplary. *Doerhoefer v. Shewmaker*, 97 S. W. 7, 10, 123 Ky. 646 (citing *Chiles v. Drake* [Ky.] 2 Metc. 146, 74 Am. Dec. 406).

"Vindictive damages," sometimes called "smart money," are only awarded in actions of tort against a telegraph company for failure to properly transmit a message, where the failure was the result of intention or gross negligence. *Western Union Telegraph Co. v. Reeves*, 126 Pac. 216, 217, 34 Okl. 468 (quoting *Atchison, T. & S. F. Ry. Co. v. Chamberlain*, 46 Pac. 499, 4 Okl. 542).

While the damages to which a plaintiff may become entitled in an action of tort, to the amount of his expenses in litigation, in addition to his actual damages, are in fact and in effect "compensatory damages" and not punitive, they are in practice variously termed "exemplary," "punitive," "vindictive," or "smart money," and in an action for personal injuries, in which plaintiff was entitled to recover such additional damages, it was not error to refer to them as "exemplary." *Hull v. Douglass*, 64 Atl. 351, 353, 79 Conn. 266.

A sum assessed by a jury additional to compensation for damages, by way of punishment for wrongdoing, is termed "smart money," or "exemplary," "vindictive," or "punitive" damages. *Farrow v. Hoffecker* (Del.) 79 Atl. 920, 921, 7 Pennewill, 223.

As damages

See *Damage—Damages*.

## VINOUS

### VINOUS AND SPIRITUOUS LIQUORS

Beer, as commonly prepared, is a malt liquor, as distinguished from "vinous and spirituous liquors," and the charge of selling "vinous and spirituous liquors" was not sustained by proof of a sale of beer. *Smith v. State*, 49 South. 113, 94 Miss. 255.

### VINOUS LIQUOR

As intoxicating liquor, see *Intoxicating Liquor*.

"Vinous liquor" is liquor which has undergone fermentation. *State v. Coverdale* (Del.) 77 Atl. 754, 756, 1 Boyce, 555.

"Vinous liquor" means liquor made from the juice of grapes, and it may also include wines made from fruits or berries by process of fermentation, by addition of sugar and al-

cohol. *Marks v. State*, 48 South. 864, 867, 159 Ala. 71, 133 Am. St. Rep. 20.

Where the production of alcohol by fermentation is preceded by no malting process, as in the case of wine, the product is called "vinous liquor." *Pennell v. State*, 123 N. W. 115, 116, 141 Wis. 35.

## VIOLATE—VIOLATION

See Action for the Violation of a Law;  
Die in Consequence of Violation of Law; Each Violation.

Employed in violation of law, see Employed.

Willful violation, see Willful—Willfully.

The word "violation," as used in Acts 1905 (Burns' Ann. St. 1908, § 8597), giving a right of action for injuries occasioned by any violation or willful failure to comply with the provisions of the act, means not only acts of omission but of commission in failing to do the things which are provided shall be done; that is nonconformity, simple negligence. *Princeton Coal Min. Co. v. Lawrence*, 95 N. E. 423, 426, 96 N. E. 387, 176 Ind. 469.

The phrase "violating the local option law," in a bond in a criminal proceeding, does not describe an offense. *Stephens v. State*, 98 S. W. 859, 50 Tex. Cr. R. 531.

Under Rev. St. § 1563, declaring all places in which intoxicating liquors are sold in "violation of law" to be public nuisances, it was held that a sale of liquor on Sunday by a licensed saloon keeper is not, in the absence of evidence showing that a city ordinance had been passed forbidding the sale of liquor on that day, such a "violation of the law" as to render the place in which it was sold a nuisance, though a general statute (section 4595) prohibits any person from keeping open his shop or from doing any kind of business on Sunday, except works of necessity or charity. Section 1563 was intended only to apply to a violation of the excise law itself, which was the subject-matter before the Legislature, and a sale in "violation of law" must be understood to mean a sale prohibited by the provisions of the excise law itself, either expressly or by implication. *State v. Wacker*, 38 N. W. 189, 71 Wis. 672.

Code Civ. Proc. § 1781, subd. 2, and section 1782, provide that an action may be maintained against the director of a corporation by a creditor thereof to procure a judgment, compelling him to pay to the corporation, or its creditors, the value of any property which he may have acquired, transferred, lost, or wasted by a "violation of his duty." Held, that the statutes referred to the violation of their duties as such corporate officers, and did not authorize the maintenance of an action by a creditor against a director of a dissolved corporation, on de-

fendant's promise to pay all the debts of the corporation in case he should be allowed to acquire its property at a judicial sale for less than its real value and his failure to fulfill that promise, as such action was not predicated on any official act or omission. *Lilienthal v. Betz*, 77 N. E. 1002, 1003, 185 N. Y. 153, 7 Ann. Cas. 41.

## VIOLATION OF PROFESSIONAL DUTIES

See Gross Violation of Professional Duties.

## VIOLENCE

See Force and Violence; Unlawful Violence.

External violence, see External.

### As force

"Force," in the Georgia Penal Code definition of robbery, is the same as the "violence" of the common-law definition. *Johnson v. State*, 57 S. E. 1056, 1 Ga. App. 729.

An indictment, under Gen. St. 1906, § 3500, providing for the punishment of any person resisting an officer in the execution of any legal duty "by offering or doing violence" to the person of such officer, which charges the gripping of the hand of the officer and forcibly preventing him from opening the door of the room in which the person for whose arrest the officer held a capias, was, sufficiently charges the essentials of the offense; the allegation that defendant gripped the hand of the officer alleging unlawful force, which as such is synonymous with "violence." *Johnson v. State*, 50 South. 529, 530, 58 Fla. 68.

Pen. Code 1911, art. 1327, defines robbery as an assault, or violence, or putting in fear of life or bodily injury, by which one fraudulently takes from another any property with intent, etc., and permits capital punishment where a firearm or other deadly weapon is used. Code Cr. Proc. 1911, art. 460, declares that the words "with force and arms" are not necessary to the validity of an indictment, and that an indictment which charges the offense in ordinary and concise language so as to enable a person of common understanding to understand it is sufficient. An indictment under section 1327 alleged that accused, "with force and arms" by unlawfully using a firearm, fraudulently took personal property from the owner without his consent and with intent to appropriate the same to his own use. Held, that "violence" was a general term including all sorts of force, synonymous with physical "force," and used interchangeably in relation to assault; that "violently" meant by or with "force"; that "violent" meant impelled with "force"; and hence that the term "with force and arms" sufficiently alleged that the robbery was affected by "violence" as used in the statute. *Robinson v. State (Tex.)* 149 S. W. 186, 187.

The expression in the act relating to forcible entry and detainer by "violence or circumstances of terror" is the equivalent of the English statutory law expression of an entry "with strong hand and a multitude of people." To constitute such an entry under either law, it is not necessary that it should be accompanied with tumult or riot directed against the person of the party in possession. It will be sufficient if it is attended with such a display of force as manifests an intention to intimidate the party in possession or to deter him from defending his rights or to excite him to repel the invasion of his possession, and thus bring about a condition of things which the law was intended to prevent and punish, namely, acts tending to excite a breach of the peace. Where an entry is made with such a display of force, accompanied by destruction of property upon the land on which the entry is made, it is a forcible entry. For one to enter on land in the actual peaceable possession of another, with a number of men acting under his direction and control, with such acts as tend to intimidate the occupant against resisting the intrusion and maintaining his possession, is sufficient to constitute a forcible entry, within Code Civ. Proc. § 1159, declaring one guilty of a forcible entry who, by "violence or circumstances of terror," enters real property. *Knowles v. Crocker Estate Co.*, 86 Pac. 715, 718, 149 Cal. 278 (quoting and adopting definition from *Ely v. Yore*, 11 Pac. 868, 71 Cal. 130).

## VIOLENT

See Quite Violent.

"Violent" means impelled with "force." *Robinson v. State (Tex.)* 149 S. W. 186, 187.

## VIOLENT AND ACCIDENTAL MEANS

See Accident—Accidental; External, Violent, and Accidental Means.

## VIOLENT ENTRANCE

See Forcible and Violent Entrance

## VIOLENT INJURY

The term "violent injury," as defined by Pen. Code, § 240, to be "an unlawful attempt, coupled with a present ability to commit injury upon the person of another," is not synonymous with "bodily harm," but includes any wrongful act committed by means of physical force against the person of another, even though only the feelings of such person are injured by the act. *People v. Bradbury*, 91 Pac. 497, 151 Cal. 675.

## VIOLENTLY

"Violently" means by or with "force." *Robinson v. State (Tex.)* 149 S. W. 186, 187.

An indictment charging that the accused feloniously and violently assaulted a female, and violently and against her will feloniously

did ravish and carnally know, charges rape, the word "violently," being equivalent to the term "forcibly," or "by force," and the word "ravish" importing the employment of force. *State v. Rohn*, 119 N. W. 88, 90, 140 Iowa, 640.

In an instruction defining defendant's liability if plaintiff, a passenger, was "violently handled" by the conductor, "violently handled" simply indicates the result of the physical assault, which, coupled with the insult, had been inflicted upon plaintiff. *Yazoo & M. V. R. Co. v. Williams*, 39 South. 489, 490, 87 Miss. 344.

## VIRTUAL POSSESSION

Defendants in error being in actual possession of part of the tract by their tenant living in a house built upon the tract, holding under color of title and claiming the land as their own at the time the timber was felled and the logs taken away, their possession extended to the limits or boundaries contained in their title papers, which covered the space where the trees grew. This possession was an "effective possession" or "virtual possession" and was an adverse possession" in the sense in which that term is used in the law. *Lieberman, Loveman & O'Brien v. Clark*, 85 S. W. 258, 264, 114 Tenn. 117, 69 L. R. A. 732.

## VIRTUE

See By Virtue of; In Virtue of His Office.

## VIRTUOUS

The test as to whether a female is "virtuous" is not purity of mind or purity of heart, but actual physical purity of person. "Every virgin is virtuous." If, at the time of the alleged seduction, the female had never had unlawful sexual intercourse with man, she was a virtuous female, within the meaning of the law. *Woodward v. State*, 63 S. E. 573, 574, 5 Ga. App. 447.

A "virtuous female," as applied to an unmarried woman, in reference to the crime of seduction, is one who, prior to the intercourse with defendant, had never had sexual intercourse with another man by her consent. The jury should treat prosecutrix as having been virtuous before the alleged seduction, unless the evidence, direct or circumstantial, satisfied them that she had lost her virtue, by having illicit intercourse. *Washington v. State*, 528 S. E. 910, 912, 124 Ga. 423 (citing *O'Neill v. State*, 11 S. E. 856, 857, 85 Ga. 383, 407, 408; *McTyler v. State*, 18 S. E. 140, 91 Ga. 254).

A "virtuous female" is one who has not had sexual intercourse unlawfully, out of wedlock, knowingly, and voluntarily. *Marshall v. Territory*, 101 Pac. 139, 143, 2 Okl. Cr. 136.

A "virtuous woman," within the meaning of Revisal 1905, § 3354, punishing seduction under promise of marriage, is a woman who has never had illicit sexual intercourse. *State v. Whitley*, 53 S. E. 820, 821, 141 N. C. 823.

"A chaste female is one that has never had sexual intercourse, who yet retains her virginity. A 'virtuous female' is one who has not had sexual intercourse unlawfully, out of wedlock, knowingly and voluntarily." *Marshall v. Territory*, 101 Pac. 139, 143, 2 Okl. Cr. 136. Whatever may be the language which one may choose to define a female of previously chaste character, it certainly cannot be contended that one who, moved by lewd desire and libidinous impulse, submits herself to the carnal embrace of a man from November to July, whenever the time and the place are opportune, is a female of such a character on the 30th day of June. It is argued by the state that, as to the appellant, the prosecutrix is exempt from this requirement of the law; that, being the author of her undoing, he cannot take advantage of his own wrong and hide himself under the cloak of this statutory requirement, as a shield for his protection. Such an argument is purely a sentimental one, and, although it may be abhorrent to the moral sense to permit a man to protect himself with the shield of his own wrong, we are dealing with a legal question, and not one of sentiment nor morals; and, in order to find a man guilty of such an offense as the one named in this information, we must first find a female who can in all its essentials measure up to the requirement of the law charged to be violated. The test of virtue in a woman is a personal and physical test, and when, by reason of her voluntary sin, she has lost her virginal purity, it matters not who contributed to that loss; she is no longer chaste. It is not a sound argument to say that the prosecutrix in this case was immune from rape as to all other men, but not from appellant. The statute makes no such distinction; neither can we. As is said in *Shirwin v. People*, 69 Ill. 55: "The right of the accused to defend must be as broad as that of the prosecution to criminate." *State v. Dacke*, 109 Pac. 1050, 1051, 59 Wash. 238, 30 L. R. A. (N. S.) 173.

## VIS MAJOR

"Vis major" is an irresistible, natural cause, which cannot be guarded against by the ordinary exertions of human skill and prudence. *Evans v. Wabash R. Co.*, 121 S. W. 36, 42, 222 Mo. 435.

Injury caused by the "vis major" is equivalent to injury caused by an act of God. *Southern Pac. Co. v. Schuyler*, 135 Fed. 1015, 1018, 68 C. C. A. 409.

As respects the liability of carriers for loss or damage of goods, the term "vis major" (superior force) is used in the civil law in the

same way that the words "act of God" are used in the common law, meaning inevitable accident or casualty. *Lehman, Stern & Co. v. Morgan's Louisiana & T. R. & S. S. Co.*, 38 South. 873, 874, 115 La. 1, 70 L. R. A. 562, 112 Am. St. Rep. 259, 5 Ann. Cas. 818.

## VISCERA

The word "intestines" is synonymous with the word "viscera," which is defined as being applied to the organs contained in the abdomen. *Hampton v. State*, 39 South. 421, 426, 50 Fla. 55.

## VISIBLE

The explosive character of dust combined with air in an elevator or grinding mill is not a condition "visible" to one who does not know the danger of explosion from such combination, although he may see the dust in the air. *Barney v. Quaker Oats Co.*, 82 Atl. 113, 127, 85 Vt. 372.

The word "evident" means "clear to the vision, especially clear to the understanding, and satisfactory to the judgment." It is a synonym of "visible." *State v. Kauffman*, 108 N. W. 246, 20 S. D. 620 (quoting with approval from *Webst. Dict.*).

Though Acts 1911, p. 605, c. 240, denouncing as unlawful the sale, keeping for sale, etc., of "milk containing visible dirt," fixed no standard by which visible dirt can be determined, it is not thereby rendered indefinite and incapable of enforcement, as the term "visible" has the common and specific meaning of being perceivable to the eye, and "dirt" contemplates any foul or filthy substance, or whatever, adhering to anything, renders it foul, unclean, or offensive. *State v. Closser (Ind.)*, 99 N. E. 1057, 1060.

## VISIBLE BUSINESS

The words "visible or lawful business" in Pen. Code, § 647, subd. 6, defining as a vagrant "Every person who wanders about the streets at late or unusual hours of the night without any visible or lawful business," are used in the sense of good and sufficient reason, and refer to the reason why he is roaming the street, rather than to any business or avocation in life from which support is derived. *Ex parte McLaughlin*, 116 Pac. 684, 685, 16 Cal. App. 270.

## VISIBLE COMMENCEMENT OF WORK

Under the Pennsylvania mechanic's lien law (Act June 4, 1901 [P. L. 437] § 13), which provides that such liens, in case of original construction, relate back and take effect "as of the date of the visible commencement upon the ground of the work of building the structure or other improvement," the mere delivery of materials on the ground or the tearing down of the ruins of a previous building destroyed by fire to clear the ground is not sufficient to fix the date of the lien, but

so much must be done of a permanent character, as by the making of a substantial part of the excavation for foundations, as will apprise observers that a building is in progress. *Pusey & Jones v. Pennsylvania Paper Mills*, 173 Fed. 634, 647.

#### VISIBLE MARK

Shrinkage of the muscles of insured's hip and leg, lameness of the leg and the breaking down of the bones in the hip joint, perceptible to a digital examination, sufficiently fulfilled a clause in an accident policy requiring a "visible mark of the injury" on insured's body. *United States Casualty Co. v. Hanson*, 79 Pac. 176, 177, 20 Colo. App. 393.

#### VISIBLE PERSONAL ESTATE

Raw material necessary for the manufacture of paper, paper in process of manufacture, and manufactured paper, being "visible personal estate," must under the act of March 19, 1891 (Pub. Laws 1891, p. 189), be assessed for taxes in the township, ward, or taxing district where the same is found. *State v. Dalrymple*, 28 Atl. 671, 673, 56 N. J. Law, 449.

#### VISIBLE RISK

See Open Visible Risk.

#### VISIBLE SIGN OF INJURY

"Visible signs of injury," within the meaning of an accident insurance policy, "are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidences of an injury." Complaint of pain or internal soreness is not a visible sign. But if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting and retching, or bloody and unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye, in the struggle of nature, any sign of injury, then those are external and visible signs, provided they are the direct result of the injury. *Dezell v. Fidelity & Casualty Co.*, 75 S. W. 1102, 1105, 176 Mo. 253 (quoting and adopting definition in *Barry v. United States Mut. Acc. Ass'n*, 23 Fed. 712, affirmed *United States Mut. Acc. Ass'n v. Barry*, 9 Sup. Ct. 755, 131 U. S. 100, 33 L. Ed. 60).

#### VISIT

##### VISITATION—VISITORIAL POWER

By "visitation" of a corporation is meant the act of examining into its affairs. The purpose of visitation is to supervise, direct, and control the management of the corporation. An application by a bona fide stockholder of a national bank to examine its books, accounts, and loans, etc., in order to determine the value of his stock, is not a "visitation" of the corporation, within Rev. St. U. S. § 241, providing that no national banking association shall be subject to any

visitorial powers. *Harkness v. Guthrie*, 75 Pac. 624, 625, 27 Utah, 248, 107 Am. St. Rep. 664, 1 Ann. Cas. 129 (quoting *Merrill, Mandamus*, § 175).

"Visitation" is defined by *Bouvier* as "the act of examining into the affairs of a corporation." "The power of 'visitation' is applicable only to ecclesiastical and eleemosynary corporations. 1 Bl. Com. 480. The 'visitation' of civil corporations is by the government itself, through the medium of the courts of justice. See 2 Kent, Com. 240. In the United States, the Legislature is the visitor of all corporations founded by it for public purposes." "'Visitation,' in law, is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and enforce an observance of its laws and regulations. *Burrill* defines the word to mean 'inspection; superintendence; direction; regulation.'" *Guthrie v. Harkness*, 26 Sup. Ct. 4, 7, 199 U. S. 148, 50 L. Ed. 130, 4 Ann. Cas. 433.

The statutes are not an exercise of the "visitorial powers" prohibited by U. S. Rev. St. § 5241, providing that no association shall be subject to any visitorial powers, other than such as are authorized by the title on national banks, or are vested in the courts; the term "visitorial power," as there used, meaning power to control and arrest abuses and enforce due observance of the statutes, under section 5240, providing for the employment of bank examiners, authorized to examine the affairs of every banking association and make a report of the bank's condition to the controller. *State v. First Nat. Bank of Portland*, 123 Pac. 712, 714, 61 Or. 551.

#### VISITOR

A "visitor" is an inspector or judge (*Whart. Law Lex. ad verbum*; *Bouv. Law Dict. ad verbum*; *Ency. of Laws of Eng.* vol. 12, p. 483), and his visitation is a judicial visit or perambulation. When a charity rests upon a private endowment, the founder and his heirs become the legal "visitors," but the founder may delegate his power of visitation either generally or specially. No technical form of words is necessary for the appointment of either a general or special "visitor." *MacKenzie v. Trustees of Presbytery of Jersey City*, 61 Atl. 1027, 1038, 67 N. J. Eq. 652, 3 L. R. A. (N. S.) 227.

#### VIVA VOCE

The term "viva voce," when applied to elections, is used in opposition or contradistinction to the ballot, and simply means that the voter shall declare himself by voice, instead of by ballot. In *re Brearton*, 89 N. Y. Supp. 893, 899, 44 Misc. Rep. 247.

#### VIVUM VADIUM

See Vadium Vivum.

## VOCATION

As occupation, see Occupation (Vocation).

The word "occupation" is a generic term, and is that to which one's time and attention are habitually devoted, vocation, calling, trade, business, and a "vocation" is an employment, occupation, calling, trade, including professions as well as mechanical occupations. *Village of Dodge v. Guidinger*, 127 N. W. 122, 87 Neb. 349, 138 Am. St. Rep. 494.

## VOID

See Invalid; Wholly Void.

A "void" thing is, in legal effect, no thing, and has no effect whatever. *Russell v. First Nat. Bank of Hartselle*, 56 South. 868, 871, 2 Ala. App. 342 (citing 8 Words and Phrases, p. 7332).

The phrase "of no effect," as used in rule 40 of the Supreme Court, providing that all rules, whether granted by the court or by a justice, shall be entered in the minutes within ten days, or in default thereof shall be "of no effect," is synonymous with "void." *Mayor and Aldermen of Jersey City v. Davis*, 76 Atl. 969, 80 N. J. Law, 609.

Where a court renders a judgment in excess of its powers, it is a nullity and void, and in such a case the jurisdiction or lack of it does not depend on any fact to be judicially ascertained by the court in connection with the trial of the case. In the matter of jurisdiction of the person, the fact of service must necessarily be judicially ascertained by the court, and, having adjudged it to have been done, the record is regular and may not be collaterally impeached. The rights acquired by a bona fide purchaser for value under an execution upon a judgment of a justice of the peace fair on its face will not be disturbed, though the judgment is invalid. *Carpenter v. Anderson*, 77 S. W. 291, 293, 33 Tex. Civ. App. 491.

A "void act" is neither a law nor a command. It is a nullity, conferring no authority and affording no protection, and whoever seeks to enforce such unconstitutional statute and justify an act thereunder must fail. *Hopkins v. Clemson Agricultural College of South Carolina*, 31 Sup. Ct. 654, 657, 221 U. S. 636, 644, 55 L. Ed. 890, 35 L. R. A. (N. S.) 243.

As used in an insurance policy, providing that it "shall be void" unless consent in writing is indorsed thereon by the company in certain instances, such as if the assured is not the sole and unconditional owner, the words "shall be void" can only be held to apply to such changes as arise after the policy has been delivered and accepted, and do not apply to an existing state or condition. This follows the construction in a similar case on the words in a policy "shall

become void," and the difference in verbiage is not to be regarded as requiring a different construction. *Brunswick-Balke-Collender Co. v. Northern Assur. Co.*, 105 N. W. 76, 79, 142 Mich. 29.

### Construed as voidable

It is rarely that things are wholly "void" and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are "voidable" which are valid and effectual until they are avoided by some act, while things are often said to be "void" which are without validity until confirmed. *Toy Toy v. Hopkins*, 29 Sup. Ct. 416, 417, 212 U. S. 542, 53 L. Ed. 644 (quoting and adopting the definition in 8 Bac. Abr., and citing *Ewell v. Daggs*, 2 Sup. Ct. 408, 108 U. S. 143, 27 L. Ed. 682; *Weeks v. Bridgman*, 16 Sup. Ct. 72, 74, 159 U. S. 541, 40 L. Ed. 253, 255; *Louisville Trust Co. v. Cominger*, 22 Sup. Ct. 293, 296, 184 U. S. 18, 25, 46 L. Ed. 413, 416).

While there is a distinction between the words "void" and "voidable," which may often be important, yet the word "void" is often used in the sense of "voidable." Whatever may be avoided may in good sense be called "void." In *re Silkman*, 105 N. Y. Supp. 872, 873, 121 App. Div. 202.

The statutes have often used the word "void" where it meant "voidable"; ground or cause for making void. *Woodcock v. Bolster*, 35 Vt. 632, 636.

The term "void" is an indefinite expression, having no fixed meaning, what is "voidable" often being called "void," it being a common practice of Legislatures and courts to use the words interchangeably, where the distinction is not material in the particular case; but strictly the word "void" means "of no legal force or effect whatever, null and incapable of confirmation or ratification," and where it is used to secure a right or confer a benefit on property it will, as a rule, be held to have such meaning, but if used respecting the rights of individuals capable of protecting themselves it will often be held to mean only "voidable." *Southern Nat. Ins. Co. of Austin v. Barr (Tex.)* 148 S. W. 845, 846 (quoting and adopting the definition in 8 Words and Phrases, p. 7334).

Where a contract for the sale of onion seed contained a provision that, if the seller found that identical contracts did not exist between the buyer and certain other growers, the contract should become void, such provision was for the sole benefit of the seller, and a breach thereof only rendered the contract void at the seller's election, and it was incumbent upon them, as soon as they ascertained the facts upon which they could exercise such election, to determine whether they would abide by its terms, or treat it as null, and notify the buyer of their election. *Bernard v. Sloan*, 84 Pac. 232-234, 2 Cal. App. 737.

The words "void" and "invalid," when used in regard to contracts not immoral or against public policy, usually mean voidable at the option of one of the parties or some one legally interested therein. *Doney v. Laughlin*, 94 N. E. 1027, 1028, 50 Ind. App. 38 (citing 8 Words and Phrases, pp. 7334, 7335).

Where a contract is expressly declared void by statute, or where the law declares the making of the contract a misdemeanor, or imposes a penalty upon the parties to the contract for the act of contracting, there is no doubt of the general rule of law that the courts will neither enforce that contract at the suit of one party, nor, if the contract has been executed, aid either party to recover back anything he may have paid thereon.

Where the contract is declared "void" by statute, and the statute is within the power of the Legislature to enact, there is not much room for discussion, although even then the whole purview of the statute may indicate that the word "void" is used in the sense of "voidable." Where the statute does not expressly declare the contract void, but prohibits by penalty the making thereof, the courts infer a legislative intent that the contract shall be void, because to enforce the contract would practically set the statute at naught. But these rules do not obtain where the contract itself is not prohibited by law, but is declared to be void because not made or evidenced in the manner prescribed by law, or where the contract is declared void by law as to one party in order to protect the other against injustice or oppression. *Laun v. Pacific Mut. Life Ins. Co. of California*, 111 N. W. 660, 661, 131 Wis. 555, 9 L. R. A. (N. S.) 1204.

#### **Same—Assignments for benefit of creditors**

The word "void," as used in a statute relating to making general assignments by debtors for the benefit of creditors null and void as against creditors, means nothing more than inoperative or voidable. Though a conveyance was, as between the parties, within the statute providing that all fraudulent conveyances shall be "null and void," the fraudulent grantee having conveyed the property to a third person, who was not made a party to a suit by creditors of the vendor to subject the land to their claims, he was not bound by a decree in favor of complainant. *Tudor v. Tudor*, 67 Atl. 539, 540, 80 Vt. 220, 130 Am. St. Rep. 977 (citing and adopting *Merrill v. Englesby*, 28 Vt. 150).

The term "void" is often employed in statutes and judicial writings to characterize acts which are void as to some persons or for some purposes, and valid as to other persons and purposes, or to acts which are not absolutely void, but only voidable, and which may be ratified or confirmed. Under Rev. St. § 1094, which declares that an assignment for

the benefit of creditors, which is wanting in any of the essential requisites prescribed by statute, shall be void as to the assignor's creditors, an assignment which has been declared void at the suit of one creditor, because the court commissioner failed to indorse on the assignee's bond his approval thereof, does not thereby become invalid as to the assignor's other creditors. *Boynton Furnace Co. v. Sorensen*, 50 N. W. 773, 774, 80 Wis. 594 (citing *State v. Richmond*, 26 N. H. 232).

#### **Same—Attorney's fee in note**

Although the statute declares that obligations in notes to pay attorney's fees are void, the word "void" is to be construed as more nearly the equivalent of "voidable," since the statute allows such promise to be enforced on certain terms. *Browne v. Edwards*, 50 S. E. 110, 122 Ga. 277.

#### **Same—Contract to convey**

The word "void," as used in a contract to convey, in a provision that if a balance of the price be not paid on a specified date the amount paid is to be forfeited and the contract is to be "void," means voidable at the vendor's election. *Stewart v. Griffith*, 30 Sup. Ct. 528, 529, 217 U. S. 323, 54 L. Ed. 782, 19 Ann. Cas. 639; *Jersey City v. Davis*, 76 Atl. 969, 80 N. J. Law, 609.

#### **Same—Conveyances**

Though, with certain exceptions, Const. art. 2, § 33, makes conveyances of land to aliens void, where plaintiff conveyed land to an alien for a valuable consideration, he divested himself of all title to the property, since the word "void" is construed as meaning voidable. *Abrams v. State*, 88 Pac. 327, 332, 45 Wash. 327, 9 L. R. A. (N. S.) 186, 122 Am. St. Rep. 914, 13 Ann. Cas. 527.

#### **Same—Discharge of administrator**

The construction to be placed upon Civ. Code 1895, § 3511 (which declares that a discharge obtained by an administrator "by means of any fraud practiced on the heirs or ordinary is void, and may be set aside on motion and proof of the fraud"), is that while the judgment of the court of ordinary discharging an administrator is open to attack on the ground that it was fraudulently procured, it is to be deemed "void" only when, in a proceeding to set it aside, the proof shows it was secured by practicing a fraud upon the heirs at law or upon the ordinary. Read in connection with the context, the term "void" is to be understood as the equivalent of "voidable." The provisions of this section of the Code do not alter the cardinal rule that a judgment rendered by a court of competent jurisdiction and regular upon its face is to be deemed conclusive until it is duly set aside, either on motion in the court in which it was rendered or in an equitable proceeding instituted in the superior court. *Summerlin v. Floyd*, 53 S. E. 452, 124 Ga. 980.

**Same—Fraudulent conveyance**

The word "void," in St. 1898, § 2320, making conveyances in fraud of creditors void, means voidable. *Hyman v. Landry*, 116 N. W. 236, 237, 135 Wis. 598, 128 Am. St. Rep. 1044.

A deed made with intent to hinder, delay, or defraud creditors, which is declared "void" by Rev. St. 1895, art. 2544, is voidable only, and the land cannot be recovered from the grantee or his successor in title without first procuring a decree setting it aside by action for that purpose. *Rutherford v. Carr* (Tex.) 84 S. W. 659, 660 (citing *Stephens v. Adair*, 18 S. W. 102, 82 Tex. 214; *Robb v. Robb* [Tex.] 41 S. W. 92; *Stockbridge v. Crockett*, 38 S. W. 401, 15 Tex. Civ. App. 69; *Groesbeck v. Crow*, 20 S. W. 49, 85 Tex. 200; *Miller v. Koertge*, 7 S. W. 691, 70 Tex. 185, 8 Am. St. Rep. 587).

Gen. St. 1894, § 4227, declaring "void" transfers for the purpose of hindering and defrauding creditors, must be construed as rendering such conveyances voidable only at the election of creditors. *Lucy v. Freeman*, 101 N. W. 167, 168, 93 Minn. 274.

**Same—Infant's contract**

The courts of this state, and very generally, construe infants' contracts as "voidable," and not "void." What confusion exists on the subject has arisen from a careless use of the words "void" and "voidable." An infant's contract might be void for reasons that would render a contract of an adult void. But the better reasoning supports the rule that no contract of an infant is void because of his nonage, but all such contracts are voidable only, except contracts for necessities, and such contracts as he may make by statutory authority, which are binding. *Shroyer v. Pittenger*, 67 N. E. 475, 476, 31 Ind. App. 158.

**Same—Insurance policy**

The term "void," is often used in the sense of "voidable," so that, although an insurance policy be conditioned to be "void" in certain cases, it may be construed to be only "voidable" at the option of the insured. *German Ins. Co. of Freeport, Ill., v. Shader*, 93 N. W. 972, 975, 68 Neb. 1, 60 L. R. A. 918 (citing *Hanover Fire Ins. Co. v. Dole*, 50 N. E. 772, 20 Ind. App. 333; *Kalmutz v. Northern Mut. Ins. Co.*, 40 Atl. 816, 186 Pa. 571; *Schmurr v. State Ins. Co.*, 46 Pac. 363, 30 Or. 29; *Horton v. Home Ins. Co.*, 29 S. E. 944, 122 N. C. 498, 65 Am. St. Rep. 717; *Stevenson v. Phoenix Ins. Co.*, 83 Ky. 7, 4 Am. St. Rep. 120; *Kingman v. Lancashire Ins. Co.*, 32 S. E. 762, 54 S. C. 599; *Bouton v. American Mut. Life Ins. Co.*, 25 Conn. 542).

The word "void," as used in an application for benefit life insurance, providing that the certificate should be "void" in case of misrepresentation, means voidable at the election of the insurer. *Modern Woodmen of*

*America v. Vincent*, 80 N. E. 427, 428, 82 N. E. 475, 40 Ind. App. 711, 14 Ann. Cas. 89.

A provision of an insurance policy issued by a mutual fire insurance company organized under the laws of this state, and of the by-laws of the company attached to such policy, to the effect that the procuring of additional insurance upon the property covered shall render the policy void, unless the written consent of the company be indorsed on the policy, are waived by the failure of the company either to cancel the policy or to indorse its consent within a reasonable time after notice to it of the additional insurance, and before loss occurs. The term "void," as used in the contract, is to be regarded as meaning that the insurer had, at its exclusive option, the right to treat the policy as a nullity. *Swedish-American Ins. Co. v. Knutson*, 72 Pac. 526, 527, 67 Kan. 71, 100 Am. St. Rep. 382.

Where the words of a policy are that the insurance shall be "void" if the premises insured be and remain vacant longer than ten days without the consent of the insurer, the meaning is simply that if a loss occurs during the prohibited vacancy the policy is void, and it does not mean that the policy shall be "absolutely void," so as to the result in a forfeiture of the insurance in case of a temporary vacancy for a reasonable period beyond the ten days. *Athens Mut. Ins. Co. v. Toney*, 57 S. E. 1013, 1015, 1 Ga. App. 492.

The word "void," as applied to contracts, has been given different meanings. A contract may be void in the sense of being illegal; that is, prohibited by law and incapable of ratification and enforcement. It may also in some connections be construed as merely meaning voidable; that is, in force and effect until repudiated by the affirmative act of the party, but it may also be void in the sense of being merely ineffective, of no force and effect, and this is the meaning attached to the words as used in a contract of insurance providing that if the applicant for insurance had made false statements in his application it was null and void. *Taylor v. Grand Lodge A. O. U. W. of Minnesota*, 105 N. W. 408, 410, 96 Minn. 441, 3 L. R. A. (N. S.) 114.

A provision of a policy of insurance, declaring the same "void" in case the interest of the insured be other than unconditional and sole ownership in fee simple, in effect renders the policy voidable, instead of absolutely "void," in the contingency specified, and requires the insurer, in case the insured's title is not one in fee simple, to act promptly on discovery of that fact and notify the insured of its decision to avoid the policy, and tender or manifest its willingness to restore the unearned premium, or the provision will be deemed to have been waived by it. *Glens Falls Ins. Co. v. Michael*,



74 N. E. 964, 970, 79 N. E. 905, 167 Ind. 659, 8 L. R. A. (N. S.) 708.

#### **Same—Issue of corporate stock**

Under St. 1898, § 1753, providing that stock issued by a corporation, except in consideration of money or its equivalent, to the amount of the par value of the stock, shall be void, the word "void" was not used in the sense that corporate stock, issued in violation of the provisions of the section, cannot be validated by subsequently paying full consideration therefor, in view of sections 1751, 1754, and 1756, providing for collecting the difference between the amount paid and the face value of the stock issued. *Haynes v. Kenosha St. Ry. Co.*, 119 N. W. 568, 572, 139 Wis. 227.

#### **Same—Judgment**

The statement of the court in *Matter of Leggat*, 56 N. E. 1009, 162 N. Y. 437, and *People ex rel. Asmus v. Melody*, 86 N. Y. Supp. 837, 91 App. Div. 570, to the effect that a discharge of a judgment debtor from custody on a writ of habeas corpus, without notice to the judgment debtor's creditors, "was without jurisdiction, and the order made in the premises was 'void' and should have been vacated," must be taken as meaning that there was an irregularity requiring reversal of judgment, and not that the judgment was "void"; and the statement of the court in the *Leggat* Case that, because of the failure to serve the parties in interest, the court had no "jurisdiction of the subject-matter," may have been made to distinguish, instead of to overrule, the case of *Savacool v. Boughton* (N. Y.) 5 Wend. 171, commented on in 21 Am. Dec. 181. A judgment may be "void" as to the parties, and valid for the purpose of protecting the ministerial officers, where the court issuing process on the judgment had "jurisdiction of the subject-matter," and nothing appears on the face of the process to apprise the officer that the court was without jurisdiction of the person. *Levy v. Melody*, 99 N. Y. Supp. 153, 156, 50 Misc. Rep. 509 (citing *Murfree, Sheriffs*, § 101a; *Savacool v. Boughton* [N. Y.] 5 Wend. 170, 21 Am. Dec. 181; *Young v. Stone*, 53 N. Y. Supp. 656, 33 App. Div. 268; *Welles v. Thornton* [N. Y.] 45 Barb. 393; *Porter v. Purdy*, 29 N. Y. 106, 113, 86 Am. Dec. 283; *Kerr v. Mount*, 28 N. Y. 659; *Roderigas v. East River Sav. Inst.*, 76 N. Y. 316, 32 Am. Rep. 309).

#### **Same—Mining location notice**

Rev. St. 1901, par. 3241, describes the manner in which the relocation of a forfeited or abandoned lode claim shall be made, and declares that the location notice shall state if the whole or any part of the new location is located as abandoned property, else it shall be "void." Held, that the word "void" meant voidable, and that a location notice, defective in that it failed to state that the claim was located in whole or in part as an abandoned claim, might be

amended to comply with the statute, in the absence of any intervening rights. The word "void" in its strictest sense means that which has no force or effect, and is defined in the *Century Dictionary* as "without legal efficacy; incapable of being enforced by law; having no legal or binding force." But the courts very generally have refused to accept this narrower, stricter construction, and frequently construed it as used in the sense of voidable. *Kinney v. Lundy*, 89 Pac. 496, 498, 11 Ariz. 75.

#### **Same—Note**

A note given to and accepted by an investment company for the first rate installment on an investment bond stipulating for annual payments for a specified period, delivered to and retained by the maker of the note, is enforceable after maturity at its election, though it stipulates in event of non-payment at maturity the bond shall be void; the word "void" meaning voidable at its election. *Pacific Northwest Inv. Society v. Cunningham*, 103 Pac. 9, 10, 54 Wash. 284.

#### **Same—Organization of corporation**

The words "void," "void and of no effect," and "null and void," are often used in statutes and legal documents in the sense of voidable merely—that is, capable of being avoided—and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. Code 1896, § 1286, provides that no certificate of incorporation shall issue when the corporate name assumed is that of a person or firm, unless there be joined thereto some name designating the business to be carried on, followed by the word "company" or "corporation," and if any corporation shall fail to comply with this qualification its organization is void. Section 1282 provides that, when any corporation fails to comply with the requirements of the statute in its organization, the failure may be remedied by filing with the probate judge who issued the certificate of incorporation a statement setting forth the omission and supplying the same. Failure of a corporation to comply with the qualifications of section 1286, by inserting the word designating the business to be carried on, did not render its incorporation "void," but "voidable" only, such being the evident import of the two sections of Code 1896, which are *pari materia*. *State ex rel. Thompson v. Collas*, 43 South. 190, 191, 192, 150 Ala. 515 (citing *Ewell v. Daggs*, 2 Sup. Ct. 408, 108 U. S. 148, 27 L. Ed. 682; *Inskeep v. Lecony*, 1 N. J. Law, 112; *Matter of New York & L. I. Bridge Co.*, 42 N. E. 1088, 148 N. Y. 540; *Columbia & P. S. R. Co. v. Brailard*, 40 Pac. 382, 12 Wash. 22; *Van Shaack v. Robbins*, 36 Iowa, 201; *Rhein-er v. Union Depot, etc., Co.*, 17 N. W. 623, 31 Minn. 289; *Brown v. Brown*, 50 N. H. 538, 552).

**Same—Preference by insolvent**

"Under the bankrupt act of 1867, a preference to a creditor was declared to be void, while in the act of 1898 it is declared to be voidable. It seems to us that the word 'void' in the act of 1867 must be held to be used in the sense of voidable, and not void. A preference under the act of 1867 was good, not only between the parties, but as to all the world, unless judicial proceedings were brought by the assignee under that act to avoid it. If no suit was brought, the preference in the hands of the party preferred could not be assailed by the creditors of the bankrupt, or by any other person." *Capital Nat. Bank v. Wilkerson*, 75 N. E. 837, 838, 36 Ind. App. 467.

**Same—Sale by administrator**

Though St. 1898, § 3914, provides that a purchase by an administrator at his own sale, directly or indirectly, shall be void, such a sale vests legal title, which can only be divested in a proper action, brought within proper time, by one entitled to challenge the validity of the sale; the word "void," as used in the statute, meaning "voidable." *Keilly v. Severson*, 135 N. W. 875, 876, 149 Wis. 251.

Comp. St. Neb. c. 23, § 85, relating to administrator's sales, provides that the executor or administrator making the sale and the guardian of any minor heir of the deceased shall not directly or indirectly purchase or be interested in the purchase of any part of the real estate so sold, and all sales made contrary to the provisions of this section shall be void. Held that, as construed by the Supreme Court of Nebraska, the word "void" employed therein meant voidable at the suit of any proper party in interest. *Burns v. Cooper*, 140 Fed. 273, 278, 72 C. C. A. 25 (citing *Veeder v. McKinley-Lanning Loan & Trust Co.*, 86 N. W. 982, 61 Neb. 892).

**Same—Sale under deed of trust**

A sale under a power in a deed of trust, made after the death of the grantor or mortgagor, and before the expiration of the four years within which administration might be begun, but where no administration had been begun, was valid, and passed the title to the lands conveyed, subject only to be set aside by an administration for the payment of such preferred claims as might have existed under the law at the time, and is not invalid or void, nor in a state of suspense, except as subject to such administration; the terms "invalid" and "void," sometimes applied to such trust deeds, meaning nothing more than ineffectual to pass title; the term "void" being seldom regarded as implying a complete nullity, but as being, in a legal sense, and under certain circumstances, subject to qualification. *Wiener v. Zweib*, 141 S. W. 771, 777, 105 Tex. 262.

**Contracts**

A "void contract" is in fact no contract, since an instrument of that nature does not alter the relations previously existing between the contracting parties, nor will it serve as the foundation of any right. *Allen v. City of Davenport*, 132 Fed. 209, 216, 65 C. C. A. 641.

"Strictly speaking, 'void' means without legal efficacy; ineffectual to bind parties, or to convey or support a right." A contract which is illegal as contrary to public policy is absolutely void, and may be attacked by any one, and in any proceeding in which it is sought to found rights thereon. A sale by a telephone company of its property and franchises is contrary to public policy and void, in the absence of legislative authority. *Cumberland Telephone & Telegraph Co. v. City of Evansville*, 127 Fed. 187, 197.

The word "void," as used in Rev. St. U. S. § 3739, declaring that all contracts or agreements made in violation of the section shall be void (the section providing that no member of Congress shall directly or indirectly make, hold, or enjoy any contract entered into in behalf of the United States), is obviously used in the sense of null or of no effect from the beginning, and not admitting of ratification. It is not intended to say that contracts or agreements made in violation of the statute shall be only voidable, or that they shall be only capable of being avoided, at the election of some officer of the government. This statute applies to a contract made between the United States and one who was not at the time a member of Congress, and who became such while the contract was still executory in whole or in part, and in such a case, on his becoming a member, the contract was dissolved, and his obligation to further perform it and his right to enjoy further benefit from it were terminated by operation of law. *United States v. Dietrich*, 126 Fed. 671, 674.

A note which is "void" in its inception on account of usury continues void forever, whatever may be its subsequent history. It is void in the hands of an innocent purchaser for value, since no validity can be given to it by sale or exchange. *Schlesinger v. Kelly*, 99 N. Y. Supp. 1083, 1086, 114 App. Div. 546 (citing *Clafin v. Boorum*, 25 N. E. 360, 122 N. Y. 385).

The term "void" can only accurately be applied to those contracts that have no effect whatsoever and which are mere nullities, such as those which are against law, illegal, criminal, or in contravention of law and incapable of confirmation or ratification; hence a married woman's deed defectively acknowledged is not void. *Downs v. Blount*, 170 Fed. 15, 22, 95 C. C. A. 289, 31 L. R. A. (N. S.) 1076.

A contract growing out of the unlicensed practice of medicine denounced by Comp. St. art. 1, c. 55, is not a "void contract," where not specifically declared to be such by the statute. *Citizens' State Bank of Newman Grove v. Nore*, 93 N. W. 160, 161, 67 Neb. 69, 60 L. R. A. 737, 2 Ann. Cas. 604 (citing *Columbia Bank & Bridge Co. v. Haldeman* [Pa.] 7 Watts & S. 233, 42 Am. Dec. 229; *Holt v. Green*, 73 Pa. 198, 13 Am. Rep. 737; *Johnston v. McConnell*, 65 Ga. 129; *Conley v. Sims*, 71 Ga. 161; *Smith v. Columbus State Bank*, 1 N. W. 893, 9 Neb. 31; *Kittle v. De Lamater*, 3 Neb. 325; *Wortendyke v. Meehan*, 2 N. W. 339, 9 Neb. 221).

"A 'void contract' is one destitute of legal effect. It is a mere nullity, and good for no purpose whatever. It is binding upon neither party, and may be attacked as invalid by strangers. It does not require any disaffirmance to avoid it, but may be simply disregarded, and it cannot be ratified and made valid." Conditions printed on the back of a pass, which was void because in violation of Laws 1891, p. 277, c. 320, § 4, forbidding discrimination, have no application in an action by the holder of the pass against the railroad company for injuries received while riding on the pass. *McNeill v. Durham & C. R. Co.*, 47 S. E. 765, 766, 135 N. C. 682, 67 L. R. A. 227 (quoting and adopting the definition in *Lawson*, Cont. § 350).

#### **Married woman's deed**

The term "void" can only accurately be applied to those contracts that have no effect whatsoever and which are mere nullities, such as those which are against law, illegal, criminal, or in contravention of law and incapable of confirmation or ratification; hence a married woman's deed defectively acknowledged is not void. *Downs v. Blount*, 170 Fed. 15, 22, 95 C. C. A. 289, 31 L. R. A. (N. S.) 1076.

#### **Null synonyms**

See Null and Void.

#### **Voidable distinguished**

A void contract is one which offends against public law or policy, or is without the scope of proper authority, and a contract of a municipal corporation authorized by an irregular resolution is not "void," but simply "voidable." *Aspinwall-Delafield Co. v. Borough of Aspinwall*, 77 Atl. 1098, 1100, 229 Pa. 1.

The word "void" is so often used in the sense of "voidable" as to have almost lost its primary meaning. It is often used even by legal writers and jurists, where the purpose is nothing further than to indicate that a contract is invalid and not binding in law. The distinction between "void" and "voidable" in their application to contracts is sometimes one of practical importance. When entire technical accuracy is desired, the term "void" can be properly applied only

to those contracts that are of no effect whatsoever, mere nullities, such, for example, as are against the law, illegal, or criminal, or in contravention of that which the law requires, and therefore incapable of confirmation or ratification. *Haggart v. Wilczinski*, 143 Fed. 22, 27, 74 C. C. A. 176.

It is rarely that things are wholly "void" and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are "voidable" which are valid and effectual until they are avoided by some act; while things are often said to be "void" which are without validity until confirmed. *Toy Toy v. Hopkins*, 29 Sup. Ct. 416, 417, 212 U. S. 542, 53 L. Ed. 644 (citing 8 Bac. Abr.; *Ewell v. Daggs*, 2 Sup. Ct. 408, 108 U. S. 143, 27 L. Ed. 682; *Weeks v. Bridgman*, 16 Sup. Ct. 72, 74, 159 U. S. 541, 40 L. Ed. 253, 255; *Louisville Trust Co. v. Cominger*, 22 Sup. Ct. 293, 296, 184 U. S. 18, 25, 46 L. Ed. 413, 416).

In a strict legal sense, "void" means without force or effect, something that does not bind or conclude anybody, or serve to convey or divest a right; while "voidable" means that which has some force or effect, but which may be set aside or annulled for some error or inherent vice or defect. The word "void" is frequently used in statutes, contracts, and other instruments without regard to its strict legal signification, and is not infrequently used in judicial opinions without a special regard to its strict sense and the distinction between it and "voidable," where the subject-matter does not necessarily demand exactness of definition or limitation. *Briscoe v. Macfarland*, 32 App. D. C. 167, 172.

The words "void" and "voidable" are often loosely used, and much confusion has resulted therefrom. "Void" is so frequently employed in the sense of "voidable" as to have lost its primary significance; and, when it is found in a statute, judicial opinion, or contract, it is generally necessary to resort to the subject-matter or context to determine precisely the meaning given to the word. *Capps v. Hensley*, 100 Pac. 515, 518, 23 Okl. 311.

There is a vast difference between the two words "void" and "voidable," or the two situations they describe. It is true that there are decided cases and instances where text-writers use the two words interchangeably; but, when attention is called to the distinction between them and the difference in the consequences which result from the conditions they stand for, it is believed there can be but one opinion. A voidable contract is valid until avoided. While a defrauded party to an ordinary contract may rescind, and the parties may voluntarily place themselves in their former position, rescission of marriage must be pronounced by a competent court. *Jordan v. Missouri & K. Telephone Co.*, 116 S. W. 432, 433, 136 Mo. App. 192.

A sale to the sheriff of land sold by him to satisfy a judgment enforcing a lien for street improvements is a nullity when attacked, within a reasonable time, by the owner of the land, seeking to redeem it from the sale; the word "void" meaning a nullity, as distinguished from the meaning of the word "voidable," meaning that which may be avoided at the suit of an interested party, subject to ratification by lapse of time or acceptance of benefits. *Miller v. Winslow*, 126 Pac. 906, 907, 70 Wash. 401.

### VOID AB INITIO

A contract "void ab initio" is one that never went into effect. In *re Millers' & Manufacturers' Ins. Co.*, 106 N. W. 485, 493, 97 Minn. 98.

### VOID AND OF NO EFFECT

Under Civ. Code, §§ 1511, 1512, 1514, declaring what acts shall excuse performance, and providing that, where performance is prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if the obligation had been performed by both parties, etc., a provision in a contract for the sale and purchase of a designated quantity of oil, as ordered by the buyer from month to month, that a violation thereof shall render the agreement "void and of no effect," only means that a party, by violating the contract, loses his rights under it, but the contract remains in force to protect the rights of the other party, who may maintain an action for damages for such violation. *Central Oil Co. of Los Angeles v. Southern Refining Co.*, 97 Pac. 177, 154 Cal. 165.

The words "void and of no effect," are "often used in statutes and legal documents \* \* \* in the sense of voidable merely—that is, capable of being avoided—and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances." Code 1896, § 1286, provides that no certificate of incorporation shall issue when the corporate name assumed is that of a person or firm, unless there be joined thereto some name designating the business to be carried on, followed by the word "company" or "corporation," and if any corporation shall fail to comply with this qualification its organization is void. Section 1282 provides that, when any corporation fails to comply with the requirements of the statute in its organization, the failure may be remedied by filing with the probate judge who issued the certificate of incorporation a statement setting forth the omission and supplying the same. Failure of a corporation to comply with the qualifications of section 1286, by inserting the word designating the business to be carried on, did not render its incorporation "void," but "voidable" only; such being the evident import of the two sections of Code

1896, which are *pari materia*. *State ex rel. Thompson v. Colias*, 43 South. 190, 191, 192, 150 Ala. 515 (citing *Ewell v. Daggs*, 2 Sup. Ct. 408, 108 U. S. 148, 27 L. Ed. 682; *Inskeep v. Lacony*, 1 N. J. Law, 112; *Matter of New York & L. I. Bridge Co.*, 42 N. E. 1088, 148 N. Y. 540; *Columbia & P. S. R. Co. v. Brailard*, 40 Pac. 382, 12 Wash. 22; *Van Shaack v. Robbins*, 36 Iowa, 201; *Rheiner v. Union Depot, etc., Co.*, 17 N. W. 623, 31 Minn. 289; *Brown v. Brown*, 50 N. H. 538, 552).

### VOID AS TO CREDITORS

Laws 1909, c. 69, § 1, relating to sales of merchandise in bulk, provides that the sale in bulk of any part or the whole of a stock of merchandise otherwise than in the ordinary and regular course of the seller's business shall be fraudulent and void as against the seller's creditors, unless the purchaser demands a list of the creditors, and notifies each of them five days before taking possession. Held, that the phrase "fraudulent and void as to creditors" relates to attaching creditors seeking to set aside the sale, and that the word "void" means "voidable," and, under the statute as so construed, a creditor cannot charge the purchaser of a stock of goods in violation of the act as trustee of the vendor for the value of the goods. *MacGreenery v. Murphy*, 82 Atl. 720, 721, 76 N. H. 338, 39 L. R. A. (N. S.) 374.

The sales in bulk act declares that a sale in violation thereof shall be "void" as to creditors, provided that no proceedings at law or in equity shall be brought against the purchaser to invalidate such "voidable" sale after 90 days from the consummation thereof. Held, that the word "void" was used in the sense of voidable, and that the sale was a nullity only when attacked by creditors within the prescribed period. *Dickinson v. Harbison*, 72 Atl. 941, 942, 78 N. J. Law, 97.

St. 1903, p. 389, c. 415, provides that the sale in bulk of any part or the whole of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business shall be fraudulent and "void" as against creditors of the seller, unless the seller and purchaser make a full inventory of the goods and the purchaser notifies all the creditors of the seller at least five days before taking possession of the merchandise. Held that the term "void" is not used in its strict technical sense, but the Legislature intended, in view of the subject-matter of the statute, the condition of the law prior to its passage, and the abuse which it aims to correct, to place the kind of sale named in the statute in the class theretofore existing as fraudulent, and for that reason voidable by creditors, unless the conditions prescribed were complied with. *Kelly-Buckley Co. v. Cohen*, 81 N. E. 297-299, 195 Mass. 585 (cit-

ing Squire & Co. v. Tellier, 69 N. E. 312, 185 Mass. 18, 102 Am. St. Rep. 322).

A mortgage of a stock in trade executed by a debtor to his creditor which authorizes the mortgagor to remain in possession, and sell the stock in the usual course of business, without obligating himself to apply the proceeds to the payment of the debt, is constructively fraudulent, and "void" as to other creditors, within Rev. St. Mo. 1909, §§ 2880, 2881, declaring that any conveyance in trust for the use of person making it or with intent to defraud creditors is void as to creditors, but, in the absence of actual fraud, the constructive fraud is purged by the mortgagee taking possession before the other creditors seize the property or take any action to enforce their rights to it. Johansen Bros. Shoe Co. v. Alles, 197 Fed. 274, 277, 116 C. C. A. 636.

### VOID BALLOT

Election Law (Consol. Laws, c. 17) § 368, rule 9, providing that a "void ballot" is a ballot upon which there shall be found any mark other than a single X mark made for the purpose of voting, and section 358, rule 7, providing that one straight line crossing another straight line at any angle within a party circle or within the voting spaces shall be deemed a "valid voting mark," should be liberally construed, so that a tremulous line drawn by an infirm elector, or an irregular or curved line drawn by an elector with poor eyesight, or with muscles untrained to the use of a pencil, or any single line but once crossing another single line in such a way as to substantially comply with the statute, though the line has been retraced and the pencil has not been kept exactly on the line at parts removed from the point where the lines cross, should not be held void. Fallon v. Dwyer, 90 N. E. 942, 943, 197 N. Y. 336.

### VOID IF DETACHED

A condition, "Void if detached," etc., in railway coupon tickets, must be reasonably construed to avoid injustice to either party, and the holder cannot be denied passage merely because the ticket had been inadvertently detached, if both book and ticket are presented, and it can be seen by inspection that they correspond. Fairfield v. Louisville & N. R. Co., 48 South. 513, 514, 94 Miss. 887, 136 Am. St. Rep. 611, 19 Ann. Cas. 456.

### VOID JUDGMENT

"A 'void judgment' is in legal effect no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it, are void. The parties attempting to enforce it may be responsible as trespassers." State ex rel. Reed v. Gormley, 82 Pac. 929, 930, 40 Wash. 601, 3 L. R. A. (N. S.) 256, 5 Ann. Cas.

856; In re Killan's Estate, 65 N. E. 561, 562, 172 N. Y. 547, 63 L. R. A. 95 (quoting and adopting statement in 1 Freem. Judgm. [4th Ed.] § 117); Cook v. Edson Keith & Co., 82 S. W. 918, 919, 5 Ind. T. 595 (quoting Freem. Judgm. [3d Ed.] § 117).

"The first and most material inquiry in relation to a judgment or decree is in reference to its validity, for, if it be null, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any of the elements of power or of validity." A default judgment against an infant who has been personally served is voidable only. Cook v. Edson Keith & Co., 82 S. W. 918, 919, 5 Ind. T. 595 (quoting Freem. Judgm.).

A judgment of a court of general jurisdiction cannot be attacked, except in a direct proceeding, unless it is void; and under the weight of authority, when jurisdiction has been obtained by service of process, all subsequent proceedings are an exercise of jurisdiction, and, however erroneous, they are not "void," but voidable only, and not subject to collateral attack. People v. McKelvey, 74 Pac. 533, 534, 19 Colo. App. 131 (quoting and adopting the definition in Brown v. Tucker, 1 Pac. 221, 7 Colo. 30).

"A 'void judgment' is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, or create rights. As to the person against whom it professes to be rendered it binds him in no degree whatever. It has no effect as a lien upon his property. It does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before. It gives him no new right, but an attempt to enforce it will place him in peril." A proceeding to revive a dormant judgment is not a proceeding to breathe life into that which was dead. It is rather a proceeding to awaken that which is asleep. In the instant case the judgment was void. It never possessed any vitality, and it was impossible to impart any vitality to it by revivor proceedings. Minn. Thresher Mfg. Co. v. L'Heureux, 118 N. W. 565, 566, 82 Neb. 692 (quoting and adopting 1 Black, Judgm. § 170, and citing and adopting Rice v. Allen, 95 N. W. 704, 69 Neb. 349, 355).

"The word 'void' can with no propriety be applied to a thing which appears to be sound, and which, while in existence, can command and enforce respect, and whose infirmity cannot be made manifest. If a judgment rendered without in fact bringing the defendants into court cannot be attacked collaterally on this ground unless the want of authority over them appears in the record,

it is no more void than if it were founded upon a mere misconception of some matter of law or of fact occurring in the exercise of an unquestionable jurisdiction. In either case the judgment can be avoided and made *functus officio* by some appropriate proceeding instituted for that purpose; but, if not so avoided, must be respected and enforced." *Dunn v. Taylor*, 94 S. W. 347, 349, 42 Tex. Civ. App. 241 (quoting and adopting the definition in *Freem. Judgm.* § 116).

The words "void" and "voidable," as applied to judgments, do not denote different degrees of faultiness, but are a classification based upon the source from which the evidence comes to show the fault, and generally dependent on the method of attack; the judgment being void and subject to collateral attack if the record proper discloses that the court was without jurisdiction, but merely voidable and subject only to direct attack where the record shows jurisdictional facts which are untrue, but does not show want of jurisdiction. *Kavanagh v. Hamilton*, 125 Pac. 512, 515, 53 Colo. 157.

#### VOID PROCESS

"Void process" is an absolute nullity from the beginning, and is not amendable. *Roy v. Phelps*, 75 Atl. 13, 14, 83 Vt. 174.

"Void process" is defined to be such as is issued without power in the court to award it, or which the court has not acquired jurisdiction to issue in the particular case, or which falls in some material respect to comply with the requisite form of legal process. "Irregular process" is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case, by reason of the existence or nonexistence of some fact or circumstance rendering it improper in such a case. *Jochem v. Cooley*, 176 Fed. 719, 722, 100 C. C. A. 155.

#### VOID TAX SALE

A "void sale" for taxes is no sale, and the purchaser acquires no rights. *Beggs v. Paine*, 109 N. W. 322, 332, 15 N. D. 436.

#### VOID UNDERTAKING

A "void undertaking" is nothing—a mere nullity; and hence, where a single appeal bond is given to support separate appeals, instead of a separate bond for each appeal, as required by statute, the bond was wholly void, and not merely insufficient, and hence not within a statute providing that no appeal shall be dismissed for insufficiency of the undertaking, if a sufficient undertaking be filed before the hearing on motion to dismiss. *Pirrie v. Moule*, 81 Pac. 390, 391, 33 Mont. 1.

#### VOIDABLE

Things are "voidable" which are valid and effectual until they are avoided by some act. *Toy Toy v. Hopkins*, 29 Sup. Ct. 416,

417, 212 U. S. 542, 53 L. Ed. 644 (quoting and adopting the definition in 8 Bac. Abr.).

The phrase "of no effect," as used in rule 40 of the Supreme Court, providing that all rules, whether granted by the court or by a justice, shall be entered in the minutes within ten days, and in default thereof shall be "of no effect," is not synonymous with "voidable." *Mayor and Aldermen of Jersey City v. Davis*, 76 Atl. 969, 80 N. J. Law, 609.

The words "void" and "voidable," as applied to judgments, do not denote different degrees of faultiness, but are a classification based upon the source from which the evidence comes to show the fault, and generally dependent on the method of attack; the judgment being void and subject to collateral attack if the record proper discloses that the court was without jurisdiction, but merely voidable and subject only to direct attack where the record shows jurisdictional facts which are untrue, but does not show want of jurisdiction. *Kavanagh v. Hamilton*, 125 Pac. 512, 515, 53 Colo. 157; *Miller v. Winslow*, 126 Pac. 906, 907, 70 Wash. 401.

A "voidable act" of an infant is binding on the adult contracting party until disaffirmed by the infant, and is therefore capable of being affirmed when the infant attains his majority. "Whenever the act done may be for the benefit of the infant, it shall not be considered void, but he shall have his election when he comes of age to affirm or avoid it." *Damron v. Ratliff*, 97 S. W. 401, 402, 123 Ky. 758 (quoting *Whitney v. Dutch*, 14 Mass. 462, 7 Am. Dec. 229).

#### Appointment of guardian

Under Gen. Laws 1896, c. 248, § 7, and Court and Practice Act 1905, § 803, declaring that a probate decree shall not be deemed invalid in any collateral proceeding, or quashed for want of proper form, or for want of jurisdiction appearing upon its face, a probate decree appointing a guardian for an inebriate and spendthrift, which only adjudged the incompetent to be a person lacking in discretion in managing his estate, was voidable only, and not "void." *Brown v. Probate Court of Warwick*, 67 Atl. 527, 28 R. I. 370, 125 Am. St. Rep. 747.

#### Marriage contract

A "voidable marriage contract" exists where, though prohibited by law, it may be ratified or confirmed by the subsequent cohabitation and conduct of the parties, and is valid until dissolved by judicial decree. *State v. Yoder*, 130 N. W. 10, 12, 113 Minn. 503.

*Wilson's Rev. & Ann. St.* 1903, c. 51, art. 1, § 3, par. 3484, prohibits any male under the age of 18 years, and any female under the age of 15 years, to marry. Chapter 51, art. 1, § 16, par. 3497, makes it criminal to solemnize or enter into a marriage contrary to foregoing provisions. Held, that while a

marriage of a youth of 16 and a girl of 14 was illegal, it was "voidable" only, and not void. *Hunt v. Hunt*, 100 Pac. 541, 542, 23 Okl. 490, 22 L. R. A. (N. S.) 1202.

#### Preference

It is an essential element of a "voidable preference" in bankruptcy that the preferred creditor had grounds to believe that a preference was intended. In *re Burlage Bros.*, 169 Fed. 1006, 1007.

The assignment by a corporation within four months prior to its bankruptcy of accounts receivable to a bank to secure a prior indebtedness did not constitute a "voidable preference" under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562, although the corporation was known to be insolvent, where such accounts were merely substituted for other valid accounts held by the bank, which had been paid, for the purpose of keeping the security good. In *re Reese-Hammond Fire Brick Co.*, 181 Fed. 641, 643, 104 C. C. A. 371.

A mercantile dealer had sold a bankrupt goods for only a few months prior to his bankruptcy. He was slow in making payments, and, learning that he had placed a mortgage on his stock, the creditor sent an attorney to look after the claim. The bankrupt stated to him that he did not have sufficient capital to meet his bills promptly, but was doing a profitable business and was entirely solvent; that he had an offer for his stock in cash and land amounting in value to a sum largely in excess of his indebtedness, which he could accept at once. The attorney advised its acceptance, and meantime took a chattel mortgage on the stock for the amount of his claim. The debtor was in fact insolvent, and became within four months thereafter bankrupt. Held, that such facts supported a finding of the District Court that the creditor did not have a reasonable cause to believe, when the mortgage was taken, that a "preference" was intended, and that it was not "voidable" under Bankr. Act 1898, § 60b, 30 Stat. 562. *Hussey v. Richardson-Roberts Dry Goods Co.*, 148 Fed. 598, 599, 78 C. C. A. 370.

Evidence considered, and held insufficient to establish the insolvency of a corporation at the time it made an assignment of a debt due it to a bank as security for past and future overdrafts, or that the bank had reasonable cause to believe that a preference was intended, so as to render the transfer a "voidable preference" on the bankruptcy of the corporation. *McDonald v. Clearwater Shortline Ry. Co.*, 164 Fed. 1007, 1016, 1017.

A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a "voidable preference," is not deprived of that character or validated by the fact that it

was executed in the performance of a contract to do so made more than four months before the filing of the petition. In *re Great Western Mfg. Co.*, 152 Fed. 123, 128, 81 C. C. A. 341 (citing *Wilson Bros. v. Nelson*, 22 Sup. Ct. 74, 183 U. S. 191, 198, 46 L. Ed. 147; In *re Sheridan*, 98 Fed. 406; In *re Dismal Swamp Contracting Co.*, 135 Fed. 415, 417, 418; In *re Ronk*, 111 Fed. 154; *Pollock v. Jones*, 124 Fed. 163, 61 C. C. A. 555; *Anniston Iron & Supply Co. v. Anniston Rolling Mill Co.*, 125 Fed. 974; *Johnston v. Huff, Andrews & Moyler Co.*, 133 Fed. 704, 66 C. C. A. 534; In *re Mandel*, 127 Fed. 863).

The essential elements of a "voidable preference," within Bankr. Act 1898, as amended, are that the debtor at the time of the transaction was insolvent, that there was a pre-existing debt paid or secured by the transaction within four months prior to the filing of the petition in bankruptcy, and the creditor must have had reasonable cause to believe that a preference was thereby intended. *Seager v. Lamm*, 104 N. W. 1, 2, 95 Minn. 325.

#### Process

"Voidable process" is valid until attacked, and is amendable. *Roy v. Phelps*, 75 Atl. 13, 14, 83 Vt. 174.

## VOLENTI NON FIT INJURIA

See Assumption of Risk.

The maxim, "Volenti non fit injuria," means that he who consents cannot receive an injury. *Rigsby v. Oil Well Supply Co.*, 91 S. W. 460, 463, 115 Mo. App. 297.

The maxim, "Volenti non fit injuria," means that to which a person assents is not esteemed in law an injury. *Adolf v. Columbia Pretzel & Baking Co.*, 78 S. W. 321, 323, 100 Mo. App. 199.

The maxim, "Volenti non fit injuria," applies between strangers as well as between master and servant. *Drown v. New England Telephone & Telegraph Co.*, 66 A. 801, 804, 80 Vt. 1.

Intercourse between persons engaged to marry, whether the act be innocent or guilty, under the maxim, "Volenti non fit injuria," takes from both consenting parties the right to sue at common law. *Wrynn v. Downey*, 63 Atl. 401, 405, 27 R. I. 454, 4 L. R. A. (N. S.) 615, 114 Am. St. Rep. 63, 8 Ann. Cas. 912.

The principle that a person cannot make his own wrong, or his voluntary act, whether wrongful or not, the ground of recovering damages from another, has found expression in the maxim, "Volenti non fit injuria." Whenever contributory negligence is established as the proximate cause of an injury, it is always a complete defense, and bars a recovery for such injury. In such case the maxim, "Volenti non fit injuria," applies. *Smith v. Centennial Eureka Min. Co.*, 75

Pac. 749, 755, 756, 27 Utah, 307 (citing 1 Thomp. Neg. § 185).

**Assumption of risk**

The maxim, "Volenti non fit injuria," cuts off a recovery, where the injury is caused by one of the risks incident to the business, which the servant assumes when he enters the employment. *Blundell v. William A. Miller Elevator Mfg. Co.*, 88 S. W. 103, 105, 189 Mo. 552.

The defense of assumed risk comes within the principle expressed by the maxim, "Volenti non fit injuria." Such maxim, upon which a rule of assumption of risk is based, is not "Scienti non fit injuria," but "Volenti non fit injuria." *Choctaw, O. & G. R. Co. v. Jones*, 92 S. W. 244, 246, 247, 77 Ark. 367, 4 L. R. A. (N. S.) 837, 7 Ann. Cas. 430.

Where a father hires his minor son to an employer to do a certain work, and the employer, without the father's consent, puts the son to a different and more dangerous employment, and the latter is injured, the maxim, "Volenti non fit injuria," cannot be set up against the father, even though it would bar the minor himself from recovery. *Braswell v. Garfield Cotton Oil Mill Co.*, 66 S. E. 539, 540, 7 Ga. App. 167.

"Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for under the terms of the employment the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume." The defense of assumption of risk is not based on contract, but is based on the doctrine of "Volenti non fit injuria" (one who, knowing and appreciating a danger, voluntarily assumes the risk of it), and is recognized by Rev. Codes, § 6183, declaring, "He who consents to an act is not wronged by it;" and hence the doctrine of assumed risk was not abrogated by Const. art. 15, § 16, and Rev. Codes, §§ 5052, 5053, declaring that a contract releasing an employer from liability for his negligence is void. *Osterholm v. Boston & Montana Consol. Copper & Silver Min. Co.*, 107 Pac. 499, 504, 40 Mont. 508.

The defense of assumed risk comes within the principle expressed by the maxim, "Volenti non fit injuria." This defense does not impliedly admit negligence on the part of defendant, and defeat the right of action therefor, as the defense of contributory neg-

ligence does. *Southern Pac. Co. v. Allen*, 106 S. W. 441, 446, 48 Tex. Civ. App. 66.

**VOLITION**

See Rational Volition.

**VOLONTÉ**

"Volonté" and "dernière volonté" are used as equivalents of "will" and "last will." In *re Billis' Will*, 47 South. 884, 885, 122 La. 539, 129 Am. St. Rep. 355.

**VOLT**

The unit of pressure, called the "volt," is that electrical force which, when steadily applied to a wire or other conductor having a resistance of 1,000,000,000 units of the C. G. S. system, will produce a current of one-tenth of a unit per second of that system. *Peoria Waterworks Co. v. Peoria Ry. Co.*, 181 Fed. 990, 1001.

**VOLUME**

See Unit of Volume.

**VOLUME ENGINE**

See Constant Volume Engine.

**VOLUNTARY**

See Involuntary.

**Willful synonyms**

Willful is not the synonym of "voluntary." In truth, they express no distinct idea which is common to both. The former is a word of much greater strength than the latter. *Roberts v. United States*, 128 Fed. 897, 903, 61 C. C. A. 427 (quoting and adopting definition in *McManus v. State*, 36 Ala. 291).

In a prosecution for conspiracy to murder, an instruction that the words "willful" and "willfully" mean intentional, not accidental or "voluntary," is correct. *Gambrell v. Commonwealth*, 113 S. W. 476, 480, 130 Ky. 513.

The word "willfully," within U. S. Comp. St. 1901, § 5341, making one who unlawfully and willfully, but without malice, injures another, of which injury the other dies, guilty of manslaughter, means not merely "voluntarily," but with a bad purpose, being synonymous with "intentionally," "designedly," "without lawful excuse." *Miller v. State*, 107 Pac. 948, 3 Okl. Cr. 575.

While the word "willful" is sometimes synonymous with "voluntary" or "intentional," yet, when used in penal or quasi penal statutes, it usually implies an evil intent, and it is so used in Code, § 1251, providing that any county officer may be removed for willful misconduct or maladministration in office, so that, in a proceeding thereunder to



remove a county treasurer, evidence of his good faith and innocence of intentional wrong was admissible, so as to take the question of the willfulness of his wrongful act to the jury. *State v. Meek*, 127 N. W. 1023, 1024, 148 Iowa, 871, 31 L. R. A. (N. S.) 566, Ann. Cas. 1912C, 1075.

The word "willfully," in Pen. Code, § 639, subjecting to punishment any person who willfully or maliciously displaces, injures, or destroys any water main, means something more than a "voluntary act," and more, also, than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or lawlessness. *McMorris v. Howell*, 85 N. Y. Supp. 1018, 1021, 89 App. Div. 272 (citing *Wass v. Stephens*, 28 N. E. 21, 128 N. Y. 123).

In Pen. Code, § 639, providing for the punishment of a person who "willfully" removes, injures, or destroys a public highway, the word "willfully" means something more than a "voluntary act," and more than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with design to injure another, or one committed out of mere wantonness or lawlessness. *People v. Gilles*, 109 N. Y. Supp. 945, 946, 57 Misc. Rep. 568.

A "willful injury" involves a deliberate purpose not to discharge some duty necessary to safety, which duty the person owing it has assumed by contract, or which is imposed on him by law. It is differentiated from negligence by the fact that the latter arises from inattention or thoughtlessness. The word "willful" or "willfully," as used in this connection, means the quality of being willful, obstinate, stubborn, perverse, "voluntary." As so used, it implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It implies nothing more than that he knows what he is doing, and intends to do what he is doing, and is a free agent. *Southern Ry. Co. v. McNeeley*, 88 N. E. 710, 711, 44 Ind. App. 126.

In Act June 29, 1906, c. 3594, known as the "Twenty-Eight Hour Law," which prohibits carriers of live stock from keeping the same confined in cars, etc., for more than 28 consecutive hours without unloading for rest, water, and feeding, unless prevented by storm or by other accidental or unavoidable causes, which cannot be anticipated or avoided by the exercise of due diligence and foresight, and imposes a penalty on any carrier, which "knowingly and willfully" fails to comply with its provisions, the word "willfully" is not used as implying a vicious or evil intent, but as meaning intentionally or

"voluntarily." *United States v. Union Pac. R. Co.*, 169 Fed. 65, 67, 68, 94 C. C. A. 433; *United States v. Atchison, T. & S. F. Ry. Co.*, 166 Fed. 160.

### **VOLUNTARY ABSENCE**

"Voluntary" means by the free exercise of the will; done by design; purposely. A voluntary act proceeds from one's own free will; done by choice, or of one's own accord; unconstrained by external interference, force, or influence; not prompted or suggested by another. An unavoidable absence would not be voluntary; an unintentional absence, where under the circumstances his presence could not be reasonably required, would not be voluntary. Even an absence, though in somewhat serious negligence, which was neither purposeful, deliberate, nor under circumstances from which such an intention could be presumed, would not be voluntary. *Derden v. State*, 120 S. W. 485, 488, 56 Tex. Cr. R. 396, 133 Am. St. Rep. 986 (citing *Thompson v. State*, 6 S. W. 296, 24 Tex. App. 386).

### **VOLUNTARY ACCEPTANCE**

The term "voluntary acceptance," in *Wilson's Rev. & Ann. St. 1903*, § 760, providing that a "voluntary acceptance" of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known or ought to be known to the person accepting, does not include payment of money to an agent, unless it is shown that he has authority to accept such payment. *Halsell v. Renfrow*, 73 Pac. 118, 124, 14 Okl. 674, 2 Ann. Cas. 286.

### **VOLUNTARY ACT**

A "voluntary act" is an intentional act. *Dillon v. Continental Casualty Co.*, 109 S. W. 89, 91, 130 Mo. App. 502.

### **VOLUNTARY ALIENATION**

A "voluntary alienation" occurs where an estate is voluntarily resigned by one person and accepted by another person, whether the transfer be effected by will, gift, marriage settlement, devise, or other transmission of the property by mutual consent of the parties. A deed by the United States to an Indian, forbidding alienation, deprives the grantee of the power to dispose of the property by will. *Jackson v. Thompson*, 80 Pac. 454, 456, 38 Wash. 282 (quoting and adopting *And. Law Dict.* p. 48).

### **VOLUNTARY APPEARANCE**

"The 'voluntary appearance' of a defendant is equivalent to service." Hence, where a voluntary appearance has been made by nonresident defendant, the action of the court in making an ex parte order permitting him to withdraw his appearance, and in refusing an application seasonably made by plaintiff to vacate such order, is prejudicial

error. *Insurance Trust & Agency v. Failing*, 71 Pac. 826, 827, 66 Kan. 336.

The signing of the stipulation and the consent to an adjournment to a future day constitute a "voluntary appearance" and joinder of issues by the parties, within the contemplation of Municipal Court Act (Laws 1902, p. 1498, c. 580) § 26. *Berliner v. M. Zimmermann Co.*, 104 N. Y. Supp. 407, 408, 54 Misc. Rep. 246.

### **VOLUNTARY ASSIGNEE**

A "voluntary assignee" is not a bona fide purchaser for value, but is a mere representative of the debtor, enjoying his rights only, and is bound where he would be bound. *Smith v. Equitable Trust Co.*, 64 Atl. 594, 215 Pa. 418.

"A 'voluntary assignee' for the benefit of creditors is a mere representative of the debtor, and is bound where he would be bound; but when the assignee, trustee, or whatever he may be called, derives his authority, not from the mere voluntary act of the assignor, but from the mandate of the law, even when enforced in the language of that case, through a "compulsory assignment" from the debtor in the interest of the creditors, he represents the latter, and is vested with their powers. The same principle applies a fortiori to a receiver deriving his authority, not at all from the debtor, but altogether from the court, acting in the interest and for the enforcement of the rights of creditors. When, therefore, on a creditors' bill, a receiver is appointed for an insolvent corporation, he is not limited, like an assignee for the benefit of creditors, by the rights of the debtor corporation as to property held by it under a conditional sale, but has the rights of a levying creditor, and a sale by him passes a good title against the vendor, irrespective of the purchaser's status as a creditor, either with or without notice. *Duplex Printing Press Co. v. Clipper Pub. Co.*, 62 Atl. 841, 843, 213 Pa. 207 (quoting and adopting definition in *Wright v. Wigton*, 84 Pa. 163).

### **VOLUNTARY ASSOCIATION**

See Club.

### **VOLUNTARY CONFESSION**

See Voluntary Statement.

An accused is not compelled to testify against himself when he makes a "voluntary confession," and a confession is voluntary when it is not induced by a threat of harm or a promise of favor or reward held out by a person in authority. *State v. Potoniec*, 134 N. W. 305, 117, Minn. 80.

That a member of the grand jury stated to accused that, if she desired them to be light on her, she had better tell the truth, and that a justice of the peace stated to her, after her arrest, that she had better tell the truth, does not justify the exclusion of

the confession on the ground that it was not a "voluntary confession." *Grimsinger v. State*, 69 S. W. 583, 585, 586, 44 Tex. Cr. R. 1.

### **VOLUNTARY CONTRACT**

Civ. Code 1895, § 2502, providing that parental power over a child is lost "by voluntary contract releasing the right to a third person," does not relate to a contract of a parent apprenticing his child to a third person, and such "voluntary contract" of a father may be valid and binding on the father, although he does not therein apprentice his child. *Eaves v. Fears*, 64 S. E. 269, 131 Ga. 820.

### **VOLUNTARY CONVEYANCE**

"A 'voluntary conveyance' is a conveyance without any valuable consideration. If there is a valuable consideration, no matter how trivial or inadequate, the conveyance is not voluntary." *Hopkins v. White*, 128 Pac. 780, 785, 20 Cal. App. 234 (quoting and adopting the definition of 8 Words and Phrases, p. 7345).

All conveyances not supported by a valuable consideration are "voluntary," and voidable by creditors or others having legal or equitable rights in the property for a valuable consideration and where defendants' grantor had agreed to devise certain property to complainant in consideration for personal services, but, instead, conveyed to defendants voluntarily, in a suit to reach the proceeds thereof decedent's love and affection for defendants was not a sufficient consideration for the conveyance. *Oswald v. Nehls*, 84 N. E. 619, 622, 233 Ill. 438.

A "voluntary conveyance" by an insolvent is a conveyance without any valuable consideration, and, where there is a valuable consideration, no matter how inadequate, the conveyance is not voluntary, and actual intent to defraud the creditors of the transferor must be found as a fact to defeat the transfer. *Commercial Bank of Boonville v. Kuehner*, 115 S. W. 510, 511, 135 Mo. App. 63.

A "voluntary conveyance" is one without any valuable consideration. At law, if there is a valuable consideration, although inadequate, or even trivial, the conveyance is not deemed voluntary; but in equity, when the consideration is inadequate, the conveyance, at the suit of existing creditors of the grantor, will be regarded as having been made with the design on his part to make a gift to the grantee of the difference between the price paid and the actual value of the property. *Polk County Nat. Bank v. Scott*, 132 Fed. 897, 899, 66 C. C. A. 51.

### **VOLUNTARY DEED**

"A 'voluntary deed' is one founded merely and exclusively on a good, as distinguished from a valuable, consideration, on motives of generosity and affection, rather than on a benefit received by the donor, or detriment,

trouble, or prejudice to the donee. If the donor receives a benefit, or the donee suffers detriment, as the consideration of the conveyance, the consideration is valuable, not good, merely." *Pippin v. Tapla*, 42 South. 545, 547, 148 Ala. 353 (citing *Bibb v. Freeman*, 59 Ala. 615; *Early & Lane v. Owens*, 68 Ala. 174).

A deed may be founded on some consideration, and still be technically a "voluntary instrument," and when a valuable consideration is necessary to support a deed, the bare recital of a nominal pecuniary consideration does not show a valuable consideration; and hence, if the purchaser of land for \$960, who had paid no cash therefor, but had given notes reserving a vendor's lien, subsequently, when insolvent and without having paid the notes, conveyed the land to another on a recited consideration of \$2, for the purpose of hindering and defrauding his creditors and defeating the lien of the notes, his grantee was a mere volunteer, and the deed ineffective, so far as the rights of the original purchaser's prior creditors were concerned. *York v. Leverett*, 48 South. 684, 685, 159 Ala. 529.

#### **VOLUNTARY DRUNKENNESS**

"Voluntary drunkenness" consists in a man simply becoming intoxicated, so that he is for the time being incapable of attending to business, and is not a ground for continuance, yet the illness which results from long-continued alcoholism is regarded as involuntary, and is a ground for continuance. *Harrod v. Hutchinson* (Ky.) 105 S. W. 365, 366.

#### **VOLUNTARY EXPOSURE**

"Voluntary exposure" to unnecessary danger or obvious risks, within the meaning of an accident policy, is a conscious or intentional exposure to a known risk, and not a mere inadvertent or accidental one. *Continental Casualty Co. v. Deeg* (Tex.) 125 S. W. 353, 355; *Whalen v. Peerless Casualty Co.*, 73 Atl. 642, 643, 75 N. H. 297, 139 Am. St. Rep. 695.

To render a person guilty of a "voluntary exposure to danger," within the terms of an accident policy providing that such exposure would release the insured from liability, he must have intentionally done some act which reasonable and ordinary prudence would pronounce dangerous, so that he must not only have been guilty of contributory negligence, but guilty of negligence which proximately contributed to the injury. *Payne v. Fraternal Acc. Ass'n of America*, 93 N. W. 361, 362, 119 Iowa, 342 (quoting and adopting the definition in *Follis v. United States Mut. Acc. Ass'n*, 62 N. W. 807, 94 Iowa, 439, 28 L. R. A. 78, 58 Am. St. Rep. 408, and citing *Jones v. United States Mut. Acc. Ass'n of City of New York*, 61 N. W. 485, 92 Iowa, 654; *Sutherland v. Standard Life & Acc. Ins. Co.*, 54 N. W. 453, 87 Iowa,

505; *Smith v. Aetna Life Ins. Co.*, 88 N. W. 370, 115 Iowa, 217, 56 L. R. A. 271, 91 Am. St. Rep. 153; *Equitable Acc. Ins. Co. v. Osborn*, 9 South. 869, 90 Ala. 201, 13 L. R. A. 267).

"A 'voluntary' performance of an act must require an exercise of the will of the actor; in other words, it is an act done in obedience to, and regulated by, the will of the person who does it. It follows, therefore, that it must be done designedly, and not accidentally, and consequently one cannot be said to be guilty of a 'voluntary' exposure to danger, unless he intentionally and consciously assumes the risk of an obvious danger." *Bateman v. Travelers' Ins. Co.*, 85 S. W. 128, 129, 110 Mo. App. 443 (quoting and adopting definition in *Lehman v. Great Eastern Casualty & Indemnity Co.*, 39 N. Y. Supp. 912, 7 App. Div. 424).

Steeplechase riding is a "voluntary exposure to unnecessary danger," within an insurance policy providing that it shall not cover injuries caused by voluntary exposure to unnecessary danger. *Smith v. Aetna Life Ins. Co.*, 69 N. E. 1059, 185 Mass. 74, 64 L. R. A. 117, 102 Am. St. Rep. 326.

Either reckless or deliberate encountering of known danger or danger so obvious that a reasonably prudent person would have observed and avoided it, if the circumstances were not such as necessitated the encountering thereof, is a voluntary exposure within an accident policy limiting liability in case of an injury resulting from "voluntary exposure to unnecessary danger or obvious risk of injury." *Diddle v. Continental Casualty Co.*, 63 S. E. 962, 964, 65 W. Va. 170, 22 L. R. A. (N. S.) 779.

Under a policy exempting insurer from liability for an accident caused by "voluntary or unnecessary exposure to apparent danger," to constitute such exposure, the danger must either be known, or one which in the exercise of ordinary prudence should be known, to insured. *Correll v. National Acc. Soc.*, 116 N. W. 1046, 1048, 139 Iowa, 36, 130 Am. St. Rep. 294.

The term "voluntary or unnecessary exposure to danger," in an accident policy exempting the insurer from liability for injuries caused by voluntary or unnecessary exposure to danger, means a realization that an accident will in all probability result and an injury follow from an action about to be taken, and the danger of injury must be obvious. *Hunt v. United States Accident Ass'n*, 109 N. W. 1042, 1043, 146 Mich. 521, 7 L. R. A. (N. S.) 938, 117 Am. St. Rep. 655, 10 Ann. Cas. 449.

In a proviso in a contract of insurance exempting the insurer from liability for an accident resulting from voluntary exposure to "unnecessary danger," "the words 'unnecessary danger' signify that the danger meant

is one not incident to the duty or vocation of the insured, and this view consists with another term of policy in which the occupation of deceased was referred to, and he was insured as a train porter, a hazardous calling. The words 'voluntary exposure' signify that the insured must be exposed to danger with the consent of his will, which carries the idea that the danger incurred must be realized, instead of unexpected." *Bateman v. Travelers' Ins. Co.*, 85 S. W. 128, 129, 110 Mo. App. 443.

"Voluntary exposure to danger, or obvious risk of injury," within the meaning of an accident policy, is a conscious or intentional exposure to a known risk, and not a mere inadvertent or accidental one. The act of a railroad employé traveling as a passenger, in alighting from a slowly moving train, was not, as a matter of law, such voluntary exposure. *Continental Casualty Co. v. Deeg* (Tex.) 125 S. W. 353, 355.

A provision exempting an accident insurer from liability, where death or disability results from insured's "voluntary exposure to unnecessary dangers," applies where insured is injured by doing something voluntarily which ordinary prudence forbids. A man 68 years of age, and with an umbrella under his arm, who attempts to board a train running six or eight miles an hour, is guilty of a "voluntary exposure to unnecessary dangers." *Rebman v. General Accident Ins. Co.*, 66 Atl. 859, 860, 217 Pa. 518, 10 L. R. A. (N. S.) 957.

Plaintiff, as was his custom, in going from his place of business to a railroad station in the evening, instead of selecting one of two safe ways over the public streets of the city, passed through certain railroad yards, where trains were momentarily passing in opposite directions. Finding his way blocked, he climbed upon a slowly moving freight train which was going in his direction, and shortly after in alighting therefrom was struck by a semaphore and injured. Held, that he was guilty of "voluntary exposure" to an avoidable danger within the terms of an accident policy, and was therefore only entitled to recover under a limited liability clause therein. "To make him guilty of a 'voluntary exposure' to danger, he must intentionally have done some act which reasonable and ordinary prudence would pronounce dangerous." *Alter v. Union Casualty & Surety Co.*, 83 S. W. 276, 277, 108 Mo. App. 169 (citing *Burkhard v. Travelers' Ins. Co.*, 102 Pa. 262, 48 Am. Rep. 205).

An accident insurance policy for \$1,000 provided for a reduction of the amount to \$100 "where the accidental injury results from voluntary exposure to unnecessary danger, or obvious risk of injury, or the intentional act of the insured." Insured was a car repairer, and while riding through the railroad yards by standing on a step on the

side of a car and holding onto a handhold he was struck by a brake rod on a car standing on a neighboring track, which rod was bent towards the track on which insured was riding, and was knocked from the car and killed. In an action on the policy, the court was asked to instruct that his act, where there were other cars standing on another track so close as not to permit the body of a person so riding to clear said stationary cars, "is a 'voluntary exposure to unnecessary danger' or obvious risk of injury, which prevents a recovery in this case" except as to a reduced amount. The court gave the declaration, with the qualification that deceased had "knowledge of these facts." Held erroneous, as the acts specified in the policy which would reduce the amount of the insurance are affirmative acts, implying knowledge and excluding mere negligence, and the insured will be held to have known that which an ordinarily prudent man of ordinary intelligence in the same situation would have known. *Dillon v. Continental Casualty Co.*, 109 S. W. 89, 91, 130 Mo. App. 502.

#### Negligent cumulative

The use of the word "negligent" in the clause "voluntary or negligent exposure to unnecessary danger," in an accident policy exempting the insurer from liability for injury so caused, is cumulative or redundant, and the clause means no more than voluntary exposure to unnecessary danger. *Beard v. Indemnity Ins. Co.*, 64 S. E. 119, 120, 65 W. Va. 283.

#### VOLUNTARY HOMICIDE

See Voluntary Manslaughter.

One who fires a shot, knowing that he cannot do so without hitting an innocent person, is guilty of a "voluntary homicide," the grade of which is to be determined by the circumstances under which the shot is fired. *Ringer v. State*, 85 S. W. 410, 412, 74 Ark. 262.

#### VOLUNTARY INDEBTEDNESS

Indebtedness incurred by a county for the construction of a bridge on a county road is a "voluntary indebtedness," within the prohibition of Const. art. 11, § 10, fixing the limit for such indebtedness. *Bowers v. Neil*, 128 Pac. 433, 436, 64 Or. 104.

#### VOLUNTARY MANSLAUGHTER

See Voluntary Homicide.

"Voluntary manslaughter" arises where one kills another in the heat of blood, as in a fight or upon provocation. *State v. Morahan*, 77 Atl. 488, 489, 7 Pennewill, 494; *State v. Blackburn* (Del.) 75 Atl. 536, 539, 7 Pennewill, 479.

If the killing by a defendant or his aiding or abetting of the killing by another was done in sudden heat of passion upon provocation reasonably calculated to excite defend-

ant's passion beyond his power of control, it was "voluntary manslaughter." *Watkins v. Commonwealth*, 97 S. W. 740, 742, 123 Ky. 817.

If upon a sudden quarrel the parties fight upon the spot, or presently agree and fetch their weapons and fight, and one of them is killed, such killing is "voluntary manslaughter," no matter who strikes the first blow. *Sapp v. State*, 58 S. E. 667, 669, 2 Ga. App. 449 (quoting and adopting *Gann v. State*, 30 Ga. 87).

"Voluntary manslaughter" arises where, upon a sudden quarrel, two persons fight and one kills the other, or where one greatly provokes the other by personal violence, etc., and the other immediately kills him. *State v. Woods* (Del.) 77 Atl. 490, 491, 7 Penne-will, 499.

The unlawful killing of one who has given the slayer no provocation, other than the use of words, threats, menaces, or contemptuous gestures, cannot in this state be graded to "voluntary manslaughter," under the doctrine of mutual combat. *Pen. Code*, § 65. *Bird v. State*, 57 S. E. 320, 128 Ga. 253 (citing *Cumming v. State*, 27 S. E. 177, 99 Ga. 662).

"Voluntary manslaughter" is where the act causing death is committed in the heat of sudden passion caused by provocation. The provocation must be such as the law deems adequate to excite uncontrollable passion in the mind of a reasonable man. The act must be committed under and because of the passion." *State v. White*, 51 S. E. 44, 50, 138 N. C. 704 (quoting and adopting definition in *Clark*, Cr. Law, p. 197).

A constable, after arresting a prisoner under a warrant for misdemeanor, is not justified in killing him on his attempt to escape, but in so doing is guilty of "voluntary manslaughter." *Commonwealth v. Loughhead*, 67 Atl. 747, 748, 218 Pa. 429, 120 Am. St. Rep. 896.

#### Absence of malice

"Voluntary manslaughter" is the unlawful killing of another, without malice, in the heat of passion. *Tyner v. United States*, 103 Pac. 1057, 1058, 2 Okl. Cr. 689.

An instruction that if defendant in sudden heat and passion, created by such provocation as is ordinarily calculated to excite the passions beyond control, and which did then and there excite defendant's passions beyond control, and without previous malice, willfully shot, etc., he was guilty of "voluntary manslaughter," was not erroneous; the term "without previous malice" being included in the term "in sudden heat and passion." *Metcalfe v. Commonwealth* (Ky.) 86 S. W. 534, 535.

"Voluntary manslaughter" is the intentional, unlawful, and felonious, but not de-

liberate or malicious, taking of human life. *State v. Clifford*, 52 S. E. 981, 985, 59 W. Va. 1.

An instruction that to strike and kill with a deadly weapon in sudden affray, or sudden heat and passion, without malice, and not in necessary self-defense, is "voluntary manslaughter," is not erroneous for failing to state the law of self-defense. *Austin v. Commonwealth*, 98 S. W. 295, 296, 124 Ky. 55.

An instruction, on a trial for homicide, that if the jury should believe that accused, in sudden affray and sudden passion, without previous malice, or not in his necessary or to him apparently necessary self-defense, willfully killed decedent, and from which shooting decedent died within a year and a day thereafter, accused was guilty of "voluntary manslaughter," sufficiently defined "voluntary manslaughter." *Williamson v. Commonwealth* (Ky.) 101 S. W. 370, 371.

Though the evidence for the state authorize a conviction of murder and the evidence for accused clearly justify the killing, yet, if the jury believe the state's witnesses in preference to the evidence of the defense, they are not required to find accused guilty of murder, where it is inferable from the evidence that the killing was due, not to malice, but to a sudden, violent, and irresistible impulse of passion, provoked by the assault of decedent upon accused's brother, who had just been unjustifiably shot down by decedent in accused's presence, but may find him guilty of "voluntary manslaughter." *Mattox v. State*, 70 S. E. 1120, 9 Ga. App. 292.

To reduce an intentional blow resulting in death to voluntary manslaughter, there must be a sufficient cause for provocation, and a state of rage or passion without time to cool. An instruction, on trial for murder, that if the jury believed the deceased had just made an attack on a third person, who was much inferior in strength to the deceased, and this was done in the presence of the accused, who was a friend of the person attacked, and that this attack so excited the passion of accused as to destroy all self-control, and, without sufficient cooling time, he killed the person so attacking, the crime was manslaughter, was properly refused. Though serious injury to a relation will reduce a killing to manslaughter, the rule does not apply to a case of a friend or companion. "Voluntary manslaughter" is never attended by legal malice or depravity of heart, and, being sometimes a willful act, it is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty. *Commonwealth v. Paese*, 69 Atl. 891, 892, 894, 220 Pa. 371, 123 Am. St. Rep. 699, 13 Ann. Cas. 1081.

"Manslaughter" is a killing in a sudden affray, without malice, but in the heat of

such passion, produced under provocation, as to render the person deaf to reason. *State v. Primrose* (Del.) 77 Atl. 717, 719, 2 Boyce, 164.

"Manslaughter" is the unlawful killing of another without malice, express or implied, and may be voluntary or involuntary. *State v. Morahan* (Del.) 77 Atl. 488, 489, 7 Pennewill, 494; *Same v. Woods* (Del.) 77 Atl. 490, 7 Pennewill, 499.

Where one without malice, and not under circumstances excusing the killing, voluntarily kills another under a sudden violent impulse or irresistible passion produced by some actual assault or attempt by the person killed to commit a serious personal injury, or by other circumstances sufficient to justify the passion, the homicide is "voluntary manslaughter." *Wall v. State*, 55 S. E. 484, 485, 126 Ga. 549.

The one essential element of "voluntary manslaughter" is passion—hot blood. When an unlawful killing is shown by the state, the presumption is that it was prompted by malice, and, to reduce the homicide below the grade of fraud, it is necessary for the evidence to show the absence of malice. *Rentfrow v. State*, 51 S. E. 596, 597, 123 Ga. 539.

An unlawful, willful, and felonious killing without malice, or in sudden affray, heat, and passion, and not in self-defense, constitutes "voluntary manslaughter." *Arnett v. Commonwealth*, 125 S. W. 700, 701, 137 Ky. 270.

An instruction on a trial for homicide, authorizing a verdict of "willful murder" if the jury believe that the killing was done with malice aforethought, and a verdict of "voluntary manslaughter" if they believe that the killing was done in sudden heat of passion and without previous malice, is not erroneous, as placing on accused the burden of showing that the killing was without previous malice to reduce the homicide to manslaughter. *Ball v. Commonwealth*, 101 S. W. 956, 959, 125 Ky. 601.

If the killing by defendant, or his aiding or abetting of the killing by another, was done without malice, unlawfully and willfully in a sudden affray, it was "voluntary manslaughter." *Watkins v. Commonwealth*, 97 S. W. 740, 742, 123 Ky. 817.

"Voluntary manslaughter" is the unlawful, willful, and felonious killing of another, without previous malice, in a sudden affray, or in sudden heat and passion, not in the necessary or apparently necessary self-defense of the slayer. *Commonwealth v. Mosser*, 118 S. W. 915, 916, 133 Ky. 609 (citing *Whart. Cr. Law* [10th Ed.] § 303; *Mitchell v. Commonwealth*, 11 S. W. 209, 88 Ky. 351; *Roberson, Cr. Law*, § 189).

If accused undertook to shoot over decedent's head, and had reason to know that to shoot as he did would endanger decedent's

life, and fired his pistol recklessly and without malice he would be guilty of "voluntary manslaughter." *Lewis v. Commonwealth*, 131 S. W. 517, 518, 140 Ky. 652.

#### As requiring intention to kill

"To constitute the crime of 'voluntary manslaughter,' it is essential that the homicide be willfully and intentionally committed, or under such circumstances as to strike one at first blush as so reckless and wanton as to be felonious, though apparently not intended by the perpetrator." *Wheeler v. Commonwealth*, 87 S. W. 1106, 1108, 120 Ky. 697; *Brown v. Commonwealth*, 92 S. W. 542, 544, 122 Ky. 626.

"It is essential to the commission of 'voluntary manslaughter' that the homicide should have been willfully and intentionally committed; that is, in a sudden affray, or in sudden heat or passion, or under such circumstances as to strike one at first blush as so reckless and wanton as to be felonious, though apparently not intended by the perpetrator." *Smith v. Commonwealth*, 118 S. W. 368, 369, 133 Ky. 532 (citing *Montgomery v. Commonwealth* [Ky.] 81 S. W. 264; 1 Bish. New Cr. Law, § 314; *York v. Commonwealth*, 82 Ky. 360; *Smith v. Commonwealth*, 20 S. W. 229, 93 Ky. 318).

The indictment does not charge "involuntary manslaughter," defined as the unintentional killing of another in the performance by the slayer of an unlawful act, or the doing of a lawful act in an unlawful manner. *Commonwealth v. Mosser*, 118 S. W. 915, 133 Ky. 915.

It is not necessary that there should be an intent to kill to constitute "voluntary manslaughter" when one person shoots another with a deadly weapon; but if the shooting is intentionally done, and if the slayer knew or had reason to know that to shoot as he did would endanger the life of another, and acted recklessly of such other's safety, an intent to injure him may be inferred. *Lewis v. Commonwealth*, 131 S. W. 517, 519, 140 Ky. 652.

If defendant struck decedent, not for the purpose of defending his brother from what he honestly believed to be a felonious assault, but from sudden heat and passion aroused by the attack upon his brother, intending to kill decedent, he would be guilty of "voluntary manslaughter." *Warnack v. State*, 60 S. E. 288, 290, 3 Ga. App. 590.

Wherever a homicide is neither justifiable nor malicious, and is intentional, it is "voluntary manslaughter." *Mixon v. State*, 68 S. E. 315, 316, 7 Ga. App. 805.

A homicide committed by the wanton, reckless, or grossly careless use of a firearm, without malice aforethought, is "voluntary manslaughter," although there was no intent to kill; the recklessness of the act supplying

the criminal intent. *Ewing v. Commonwealth*, 111 S. W. 352, 355, 129 Ky. 237.

"Voluntary manslaughter" is homicide intentionally committed under the influence of passion, suddenly arising from adequate cause, but neither justified nor excused by law. *State v. Edmunds*, 104 N. W. 1115, 1116, 20 S. D. 135.

"Voluntary manslaughter" is the intentional, unlawful, and felonious, but not deliberate or malicious, taking of human life. *State v. Clifford*, 52 S. E. 981, 985, 59 W. Va. 1.

#### **Murder distinguished**

"Voluntary manslaughter" is distinguished from "murder" solely by the absence of malice as a constituent element of the crime. *State v. Edmunds*, 104 N. W. 1115, 1116, 20 S. D. 135.

"Manslaughter" is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible. In "voluntary manslaughter" there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for, if there should appear to have been an interval between the assault or provocation given and the killing sufficient for the voice of reason to be heard, the killing shall be attributed to deliberate revenge, and punished as murder. *People v. Bissett*, 92 N. E. 949, 951, 246 Ill. 516.

The offense which would otherwise be murder becomes "voluntary manslaughter," where the jury find that the killing was not done with malice aforethought. *Ewing v. Commonwealth*, 111 S. W. 352, 354, 129 Ky. 237.

"At common law, 'voluntary manslaughter' is the unlawful killing of another, without malice, on a sudden quarrel, or in the heat of passion; and generally, if a man be greatly provoked by any gross indignity, and immediately kills his aggressor, it is voluntary manslaughter, and not excusable homicide." A proposed instruction to the jury, telling them that, where one kills another, though intentional, but in passion, in the heat of blood, upon sudden provocation, by gross indignity or by threat of personal violence, was rightly rejected. By the use of the disjunctive "or," the instruction would have justified the murder if only the deceased threatened the defendant with personal violence. Words alone, however insulting or contemptuous, are never sufficient to reduce murder to manslaughter, at least when a deadly weapon

is used; but, when accompanied by the acts of the deceased, showing a purpose to commit personal violence on the accused, as by raising and pointing at him a gun, as if in the act of shooting, accused is entitled to an instruction based on the theory of manslaughter. *State v. Crawford*, 66 S. E. 110, 116, 66 W. Va. 114.

#### **VOLUNTARY NONSUIT**

A "voluntary nonsuit" is where the suit is terminated by the voluntary action and free will of the plaintiff; and where defendant, at the close of plaintiff's evidence, asks an instruction in the nature of a demurrer to the evidence, and the court announces an intention to give the instruction, plaintiff's nonsuit, taken before the ruling is made and exception saved thereto, is premature and voluntary. *Diamond Rubber Co. v. Wernicke*, 148 S. W. 160, 166 Mo. App. 128.

Where a plaintiff takes a nonsuit after the court has indicated its intention to give an instruction in the nature of a demurrer to the evidence, but before such instruction is actually given, it is a "voluntary nonsuit." *Gray v. Ward*, 136 S. W. 405, 407, 234 Mo. 291.

#### **VOLUNTARY PAYMENT**

Where a person without mistake of fact or fraud, duress, coercion, or extortion pays money on a demand which is not enforceable against him, the payment is a "voluntary payment," and cannot be recovered. *Ritchie v. Bluff City Lumber Co.*, 110 S. W. 501, 592, 86 Ark. 175.

##### **Of execution**

A payment of money made on execution is not a "voluntary payment," though there has been no seizure of the property of the one making the payment. *Chaubloss v. Hass*, 101 N. W. 153, 156, 125 Iowa, 484, 68 L. R. A. 126, 3 Ann. Cas. 16.

##### **Of fine**

A payment of a fine assessed upon conviction of a violation of a municipal ordinance is "voluntary," in the legal sense, when the time for obtaining a supersedeas has expired, and the defendant is required either to pay the fine or be committed. *White v. City of Tifton*, 57 S. E. 1038, 1039, 1 Ga. App. 571.

##### **Of freight rates**

To constitute a "voluntary payment," the person paying must have the freedom of exercising his will, and not act under compulsion, and hence, where a captain of a vessel holding possession of property of a shipper refused to deliver it up unless the shipper paid him a larger amount of freight than was due, and the shipper paid the sum demanded to obtain possession of his property, the payment was under compulsion and could be recovered back. *Clancy v. Dutton*, 113 N. Y. Supp. 124, 126, 129 App. Div. 23.

**Of judgment**

An insurance company, pursuant to a settlement by which it paid 50 per cent. of the loss, stipulated that if at any time in the future it adopted any other plan of settlement under or by reason of which the rate of payment was "voluntarily" raised by the company in the district in which plaintiff's property insured at the time of the fire was situated, or if as to any policy holder of the company having a claim for loss in such district under similar conditions a payment at a higher rate was made, plaintiff should be given the benefit of that rate and the settlement increased to that extent. Held, that the clause "if as to any policy holder \* \* \* a payment at a higher rate is made" should be construed in connection with the provision that if the rate of payment was "voluntarily raised," etc., and hence the fact that defendant was compelled to pay judgments recovered for losses in the district, imposing full liability, did not entitle plaintiff to recover the unpaid portion of his loss; payment of such judgment not being "voluntary" within the terms of the settlement. *Ralph Brown Co. v. Norwich Union Fire Ins. Society*, 180 Fed. 933, 935.

The payment of the judgment in good faith by the surety on an appeal bond, after an affirmance on the appeal to a territorial Supreme Court, and after receiving notice from the Governor that unless the judgment were paid the surety would forfeit its right to do business in the territory, cannot be said to have been made "voluntarily" or negligently, so as to defeat the surety's right to reimbursement from its principals, although execution had not then issued on the judgment, and the governor may not have had the power to carry out his threat. *United States Fidelity & Guaranty Co. v. Sandoval*, 32 Sup. Ct. 298, 300, 223 U. S. 227, 56 L. Ed. 415.

**Of tax**

A payment under protest of taxes before the time payment can be enforced is a "voluntary payment," and the sum paid cannot be recovered by the taxpayer unless a payment under protest prior to that time is authorized by statute. *Williams v. Merritt*, 116 N. W. 386, 387, 152 Mich. 621.

Payment without coercion of a tax or assessment (1) which is void on its face, but not known by the payor to be void, or (2) of a tax or assessment which is void, but not void on its face, with knowledge by the payor of facts dehors which make it void, is technically called "voluntary payment." Where taxes were paid and received under the mutual mistake that the property on which they were levied was taxable in New York City, the payment was not voluntary, since not made with knowledge, either presumed or actual, that the levy was void, and they may be recovered. *Betz v. City of New York*, 103 N. Y. Supp. 886, 887, 119 App. Div. 91.

Where, at the time a payment of taxes sought to be recovered was made, the collector had no warrant authorizing him to proceed with the collection of any taxes against plaintiff on the tax list in question, the pendency of plaintiff's appeal from the assessment having suspended all action in that regard, as provided by Gen. St. 1902, § 2356, and no coercive measures against her estate were resorted to or threatened, her payment of the taxes under protest, in response to a bill merely inviting her so to do, was a "voluntary payment," precluding her from recovering the same, under the doctrine that a party cannot recover money voluntarily paid with a full knowledge of all the facts, although no obligation to make such payment existed. *Morris v. City of New Haven*, 63 Atl. 123, 124, 78 Conn. 673.

Payment of illegal taxes under protest, before the taxes had become delinquent and without any demand or threat to levy, merely to prevent the imposition of a penalty and interest which would accrue on the succeeding day, was "voluntary," so that the taxes paid could not be recovered. *Cincinnati, N. O. & T. P. R. Co. v. Hamilton County*, 113 S. W. 361, 362, 120 Tenn. 1.

**Payment under protest**

A mere declaration by one at the time he pays money that the payment is "made under protest" does not show that the payment is not "voluntary." *Town of Phoebe v. Manhattan Social Club*, 52 S. E. 839, 840, 105 Va. 144.

"A mere protest accompanying a payment does not change its character. It remains, nevertheless, a 'voluntary payment,' and concludes the parties." *Gerry v. Siebrecht*, 38 N. Y. Supp. 1034, 1036 (citing *Flower v. Lance*, 59 N. Y. 603).

**VOLUNTARY PEONAGE**

"Peonage" is a status or condition of compulsory service, based upon the indebtedness of the peon to the master. "Voluntary peonage" exists where the debtor voluntarily contracts to enter the service of his creditor, while "involuntary peonage" is forced upon the debtor by some provision of law. *Ex parte Hollman*, 60 S. E. 19, 24, 79 S. C. 9, 21 L. R. A. (N. S.) 242, 14 Ann. Cas. 1105.

**VOLUNTARY PROCEEDING**

See In Voluntary Proceedings.

**VOLUNTARY RATE REDUCTION**

The reduction of rates made by a railroad company, because forced to do so, as it could not otherwise continue to successfully compete for the business, is not "voluntary," within the meaning of the Interstate Commerce Act. *Interstate Commerce Commission v. Chicago Great Western Ry. Co.*, 141 Fed. 1003, 1017 (citing *East Tennessee, V. &*



*G. Ry. Co. v. Interstate Commerce Commission*, 21 Sup. Ct. 516, 181 U. S. 1, 45 L. Ed. 719.

### **VOLUNTARY RETURN**

To constitute "voluntary return" of property, it must be willingly restored to the owner within a reasonable time, the motive inducing its return being immaterial, but a return after accused is found in possession or taken in the act, or after prosecution is instituted, is not voluntary. *Petty v. State*, 129 S. W. 615, 618, 59 Tex. Cr. R. 586.

### **VOLUNTARY SELF-DESTRUCTION**

"Voluntary self-destruction" obviously can mean nothing more than the taking of one's life purposely and intentionally. 'Involuntary self-destruction' would then include all those cases where a person, without intending to accomplish his own death, carelessly and negligently does acts which may naturally and probably result, and do in fact result, in death." *Courtemanche v. Supreme Court I. O. O. F.*, 98 N. W. 749, 751, 136 Mich. 30, 64 L. R. A. 668, 112 Am. St. Rep. 345.

### **VOLUNTARY SEPARATION**

As used in Rev. St. 1898, § 2356, subd. 7, authorizing a divorce where the parties have voluntarily lived separate for five years, the separation must have been mutually voluntary by the parties; and hence, where a wife was compelled to leave her husband by reason of his cruelty, their subsequent living apart for five years was not "voluntary" on her part, and did not entitle him to a divorce. *Jakubke v. Jakubke*, 104 N. W. 704, 705, 125 Wis. 635.

To constitute a "voluntary separation" of husband and wife for a period of five years next preceding the commencement of the action a ground of divorce, it must appear that the separation was mutually voluntary in its inception, and so continued throughout the statutory period. *Sanders v. Sanders*, 116 N. W. 176, 135 Wis. 613.

### **VOLUNTARY SETTLEMENT**

The delivery by a father of a deed in favor of his son to a third person, with directions to keep the deed until the grantor's death and to then have it recorded, is a transaction in the nature of a "voluntary settlement"; such directions clearly disclosing the intent of the grantor to irrevocably divest himself of all dominion over the deed, and that the grantee should thereby be invested with the title to the land, and become entitled to the deed after it was recorded. *Thompson v. Calhoun*, 74 N. E. 775, 776, 216 Ill. 161.

### **VOLUNTARY STATEMENT**

See Voluntary Confession.

A "voluntary statement," which may be used in evidence against a defendant in a criminal prosecution, is one which is not

made under the influence of a threat or menace which inspires dread or alarm, or induced by artifice, or by promise or inducement of profit, or amelioration of punishment. *Anderson v. State*, 114 N. W. 112, 114, 133 Wis. 601 (citing *Hintz v. State*, 104 N. W. 110, 125 Wis. 405).

The word "voluntary" is not in all instances used in contradistinction to "compulsory." Failure to claim the privilege of not being required to make incriminating statements, or testifying without objection at inquests, seems in some cases to have been regarded sufficient from which to deduce the conclusion that testimony was "voluntary," without considering whether or not extraneous influence was the inducing cause of the statements by the accused. No hard and fast rule can be formulated as a test to determine the voluntary character of statements by an accused, but each case must be determined upon its own circumstances. The mere fact that an oath is or is not administered cannot ordinarily of itself serve as a true test. It is said that, to be voluntary, a statement must proceed from a spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause. Where defendants, being suspected of having committed a homicide, were examined before arrest as witnesses at a coroner's inquest, and without being represented by counsel, or warned, they testified, though knowing that they were suspected of complicity in the offense under investigation, the statements made by them were inadmissible against them in a subsequent prosecution for the homicide. *Tuttle v. People*, 79 Pac. 1035, 1038, 33 Colo. 243, 70 L. R. A. 33, 3 Ann. Cas. 513.

### **VOLUNTARY SURRENDER**

Where tenants were summarily ejected, their retirement, without immediate removal of trade fixtures, could not be regarded as a "voluntary surrender" thereof to the lessor. *Bergh v. Herring-Hall-Marvin Safe Co.*, 136 Fed. 368, 371, 69 C. C. A. 212, 70 L. R. A. 756.

### **VOLUNTARY TAKING OF POISON**

The taking of poison unintentionally is not a "voluntary taking," within an accident policy providing that the insurance did not cover an accident or death resulting wholly or partially from "voluntary or involuntary taking of poison," and hence the taking was accidental, and liability would accrue, unless such an accidental taking is excluded by the term "involuntary." *Kennedy v. Aetna Life Ins. Co.*, 72 S. W. 602, 603, 31 Tex. Civ. App. 509.

### **VOLUNTARY TRANSFER**

Civ. Code, § 1040, defines a "voluntary transfer" to be an executed contract, subject to all the rules of law concerning contracts in general, except that a consideration is not necessary to its validity. *Curtin v. Kowalsky*, 78 Pac. 962, 963, 145 Cal. 431.

**VOLUNTARY TRUST**

Gift distinguished, see Gift.

A "voluntary trust" is a device by which a donor effectuates a gift either of property or of its beneficial use to a designated donee. In re Podhajsky's Estate, 115 N. W. 590, 592, 137 Iowa, 742.

To create a valid "voluntary trust" *inter vivos*, where the donor is not trustee, there must be an intent to make a present transfer of ownership upon trust, and the donor must do everything that, according to the nature of the property, is necessary to execute that intent. *Talbot v. Talbot*, 78 Atl. 535, 540, 32 R. I. 72, Ann. Cas. 1912C, 1221.

"A 'voluntary trust' is an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another. \* \* \* A 'voluntary trust' is created as to the trustor and beneficiary by any words or acts of the trustor indicating, with reasonable certainty: (1) An intention on the part of the trustor to create a trust; and (2) the subject, purpose, and beneficiary of the trust." A will giving to testatrix's children certain property, and to her husband one-tenth of her other property, naming him, with two others, trustees for testatrix's whole estate, to be so protected by them that her children shall receive at the age of 25 one half of all that is due, and at 30 the remaining half, providing that they shall receive a commission for their services, assigning to them the duty of keeping the children in such circumstances as will permit them to have every comfort of dress, etc., and all needed education, and providing that in case of her husband's death a certain other person shall act as trustee with the survivors creates a trust as to the property, except that given her husband; the purpose being sufficiently plain, and a devise, in terms, to the trustees not being necessary. In re Reith's Estate, 77 Pac. 942, 943, 144 Cal. 314 (citing Civ. Code, § 2221).

**VOLUNTARY WASTE**

"Voluntary waste" is active or positive, and consists in some act of destruction or devastation. *Norris v. Laws*, 64 S. E. 499, 501, 150 N. C. 599.

**VOLUNTARILY**

A husband "voluntarily" fails to support his wife and children, when his failure to do so is the result of drunkenness, and not owing to some physical or mental disability, or other cause over which he has no control. *Wheeler v. Wheeler*, 61 Atl. 216, 218, 101 Md. 427.

The terms "voluntarily" and "unnecessarily," in the rule that a passenger who voluntarily and unnecessarily undertakes to ride on the platform of a moving train cannot recover for damages sustained from such perilous exposure, impose a limitation on the rule;

and where it appears that owing to the overcrowded condition of the car, there is neither sitting nor standing room on the inside, it may not be negligence to occupy the platform. But so long as there is standing room inside the car the passenger cannot occupy the platform. A declaration for injuries to a passenger, alleging that he took passage on the rear coach of defendant's train, and not being able to secure a seat in that coach, because of its overcrowded condition, stood on the rear platform thereof and was thrown from the train while it was passing around a curve at a rapid speed, but failing to allege that the defendant attempted to gain a seat in any other coach of the train, or requested any of the trainmen to secure a seat for him, or that there was no standing room inside the rear coach, was demurrable, it not appearing that plaintiff was not "voluntarily" and unnecessarily riding on the platform. *Meyere v. Nashville, C. & St. L. Ry.*, 72 S. W. 114, 116, 110 Tenn. 166.

Where there was evidence that confessions of accused to the officers were induced by threats or promises of assistance, an instruction that unless the statements were made voluntarily, and not induced by threats or promises, the jury could not consider them in the case, was sufficient, under Code Cr. Proc. 1895, arts. 789, 790, requiring that the confessions be made "freely" and without compulsion in order to be admissible as evidence, though it be conceded that "freely" and "voluntarily" are not synonymous. *Cross v. State* (Tex.) 101 S. W. 213, 214.

Acts 1909, No. 291, § 39, provides that, on proper application, township boards shall approve bonds of retail liquor dealers, not to exceed the number doing business in such township in April, 1909, provided that, if thereafter the number of retail liquor dealers in any township shall exceed the ratio of one to each 500 inhabitants, no license shall be issued to take the place of licenses revoked, or which shall "voluntarily have been surrendered" until the ratio of licenses shall not exceed one saloon for every 500 inhabitants. In April, 1909, there were six licensed places for the retail sale of liquor in a township having a population of 1,249, and for the license term running to May, 1910, only five licenses were issued therein, one of the six licensees not applying for renewal, and for the year 1910-1911 only four licenses were issued, one of the five licensees of the preceding year not applying for renewal, and there being no new applicants. Held, on application for license, that licenses expiring by limitation, and for which neither the holder nor any other person made application for renewal, were "voluntarily surrendered," within the meaning of the act, and hence that no additional license could be issued until the population warranted its issuance. *Ploof v. Township Board of Bangor Tp.*, 134 N. W. 3, 4, 168 Mich. 697.

## VOLUNTEER

The term "volunteer," when used to designate persons as against whom equity will enforce an equitable assignment or lien upon a particular fund, means one who has received money from the debtor without consideration therefor, and does not contemplate an attaching creditor undertaking to secure a valid subsisting indebtedness. *Love v. Ardmore Stock Exchange*, 82 S. W. 721, 726, 5 Ind. T. 202, 67 L. R. A. 617, 5 Ann. Cas. 183.

"One who, in the performance of his own interests, or those of his master, assists servants of another in the performance of their work, is not, a 'fellow servant' of such servants, nor a 'volunteer,' but occupies a third position, viz., that of a 'licensee with an interest.'" A "volunteer" is one who intrudes himself into matters which do not concern him, or does or undertakes to do something which he is not legally nor morally bound to do, and which is not in pursuance or protection of any interest. To one who is a volunteer, properly speaking, even if assisting in the master's work at the request of a servant, no affirmative duty to exercise care is due originally, but only after knowledge of peril. *Kelly v. Tyra*, 114 N. W. 750, 752, 753, 103 Minn. 176, 17 L. R. A. (N. S.) 334 (citing 8 Words and Phrases, p. 1557, and quoting and adopting definition in *Ryan v. John O'Brien Boiler Works*, 68 Mo. App. 148, 151).

"A 'volunteer' is a person who gives his services without any express or implied promise of remuneration in return, and is entitled to no remuneration for his services. \* \* \* But a person who, though not obliged to do an act, yet has an interest in doing it, is not necessarily a volunteer." *Slate v. Henkle*, 78 Pac. 325, 327, 45 Or. 430.

"The terms 'stranger' and 'volunteer,' as used with reference to the subject of subrogation, mean one who in no event resulting from the existing state of affairs can become liable for the debt, and whose property is not charged for the payment thereof, and cannot be sold therefor." *Hoffman v. Hahighorst*, 91 Pac. 20, 21, 49 Or. 379.

A person who gives his services without any express or implied promise of remuneration in return is a "volunteer," and entitled to no remuneration for his services. Where it was shown that six members of the fire department of defendant city were paid annual or monthly salaries, and all other members of the department were paid, in accordance with the ordinance of the city, \$1 for the first hour, and 50 cents per hour for all subsequent time in the daytime, and 75 cents in the nighttime, for time spent in actual attendance at fires, such department was a "paid department," within the meaning of section 2968, Rev. Codes 1905, relating to distribution of certain funds. *Continental Hose*

*Co. No. 1 v. City of Fargo*, 114 N. W. 834, 836, 17 N. D. 5 (citing Black's Law Dict.).

## VOTE

See Casting Vote; Equal Vote; Give in His Vote; Greatest Number of Votes; Illegal Vote; Two-Thirds Vote.

Unanimous vote, see Unanimous—Unanimously.

Votes taken, see Taken.

"The Century Dictionary defines 'vote' as the formal expression of a will, preference, wish, or choice in regard to any measure proposed, in which the person voting has an interest in common with others, either in electing a person to fill a certain situation or office, or in passing laws, rules, regulations, etc." *Warren v. Pim*, 59 Atl. 773, 783, 66 N. J. Eq. 353.

The word "vote," used as a noun, is the expression of the choice or preference of a voter. The choice may be exercised in several different manners—*viva voce*, by the use of a "ballot," by show of hands, by a division of the house or meeting, and possibly by other methods. *State v. Blaisdell*, 119 N. W. 360, 363, 18 N. D. 31.

## As majority vote

The word "vote," when used in statutes, unless otherwise expressed, means a majority vote. *Bean v. Prudential Committee of School Dist. No. 11 in Glover*, 38 Vt. 177, 178.

## Ballot distinguished

"Ballot" and "vote," though sometimes used synonymously, are not synonymous, and a "ballot" is the instrument by which a voter expresses his choice between candidates, or in respect to propositions; while his "vote" is the choice or election as expressed by his ballot. *Clary v. Hurst*, 138 S. W. 566, 569, 104 Tex. 423 (citing 8 Words and Phrases, pp. 7358, 7359).

A ballot, as distinguished from a "vote," in the legal sense, and in a general way, is the piece of paper upon which the voter expresses his choice. *State v. Blaisdell*, 119 N. W. 360, 363, 18 N. D. 31.

"While the terms 'ballot' and 'vote' are sometimes confused, and while they may sometimes be used synonymously, the 'ballot' is in fact \* \* \* the instrument by which the voter expresses his choice between two candidates or two propositions, and his 'vote' is his choice or election between the two, as expressed by his 'ballot,' and when his 'ballot' makes no choice between any two candidates, or on any question, then he casts no 'vote' for either of these candidates or on the question. Those 'ballots' are not 'votes.' \* \* \* The official 'ballot,' so called, is not complete when furnished to the elector as he enters the booth to prepare his 'ballot.' It is a mere form for a 'ballot.' When marked and prepared by a voter so as to show his

choice at the election, then, and not until then, does it become his constitutional 'ballot.'" *State v. Custer*, 66 Atl. 306-308, 28 R. I. 222 (quoting and adopting definitions in *Davis v. Brown*, 34 S. E. 839, 841, 46 W. Va. 716, 723, and *State ex rel. Runge v. Anderson*, 76 N. W. 482, 484, 100 Wis. 523, 530, 42 L. R. A. 239).

The term "votes," in Const. art. 17, § 6, requiring a majority of the votes at a special election for the relocation of a county seat, is not the equivalent of "ballots," and distinguished, illegal, and blank ballots will not be considered. *Town of Eufaula v. Gibson*, 98 Pac. 577, 578, 22 Okl. 507.

Under St. 1912, c. 559, pt. 3, § 1, revising the charter of the city of Salem, which provided that the act should be submitted to the registered voters at the state election in 1912, for a vote primarily on the question whether the present charter should be repealed, and secondarily on the question whether, if it was repealed, the new charter should be plan 1 or plan 2, and that if, on a "majority of the ballots cast," the votes should be for a repeal, the plan receiving the largest number of votes cast should be adopted as the city charter, the ballot on which the questions were printed contained, besides the names of a large number of candidates for state and national offices, questions upon the adoption of constitutional amendments, and the total number of ballots cast was 6,906, of which, on the question of repealing the charter, 1,676 were blank, 2,240 were against repeal, and 3,050 were for repeal. Held that, in view of the legislative policy to make an acceptance of a city charter turn upon the affirmative votes of a majority of those voting on the question, the word "ballots" was synonymous with "votes," and that only the ballots carrying votes on the question of repeal were to be counted, and hence that, as there was a "majority of the ballots cast" in favor of repeal, the old charter was repealed, and the plan receiving the larger number of votes was adopted as the new charter. *Cashman v. Entwistle*, 100 N. E. 58, 59, 213 Mass. 153; *State ex rel. Weinberger v. Miller*, 99 N. E. 1078, 1081, 87 Ohio St. 12, 44 L. R. A. (N. S.) 712, Ann. Cas. 1913E, 761.

## VOTE OF THE MAJORITY

See Majority.

## VOTER

See Disfranchised Voters; Legal Voter; Qualified Voters; Registered Voter; Three-Fifths of the Voters.

The word "elector," or "voter," is a technical term, descriptive of a citizen having constitutional and statutory qualifications to vote. *Greenough v. Board of Police Com'rs of Town of Tiverton*, 74 Atl. 785, 788, 30 R. I. 212, 136 Am. St. Rep. 953.

A nonregistered voter may sign a petition for the nomination of a candidate for a public office, though the statute uses the words "voter" and "legally qualified voter or elector." *In re Herman*, 96 N. Y. Supp. 144, 145, 108 App. Div. 335.

The word "voters" has two meanings—persons who perform the act of voting, and persons who have the qualifications entitling them to vote. The term "legal voter" is defined, and we think properly so, as meaning unless a different meaning appears from other language in the act, a qualified voter who does in fact vote. *State v. Blaisdell*, 119 N. W. 360, 363, 18 N. D. 31.

As used in a requirement that a certain thing, to be adopted, should be favored by a certain percentage of the voters at a stated election, a "voter" is one who votes, and not one who, though qualified to vote, does not do so. *Fox v. City of Seattle*, 86 Pac. 379, 381, 43 Wash. 74, 117 Am. St. Rep. 1037.

As used in Rev. St. 1899, § 3027 (Ann. St. 1906, p. 1733), providing that on application by petition signed by one-tenth of the qualified voters of any county who shall reside outside the corporate limits of any city or town having at the time a population of 2,500 inhabitants or more, who are qualified to vote for members of the Legislature in any county in the state, the county court shall order an election to determine whether intoxicating liquors shall be sold within the county outside the corporate limits of such city or town, the word "inhabitants" is not synonymous with "voters." Hence it does not require that a city, in order to be excluded, shall have 2,500 qualified voters within its limits, but 2,500 general residents are sufficient. *State ex rel. Holladay v. Rinke*, 121 S. W. 159, 163, 140 Mo. App. 645.

Const. § 157, declaring that no city shall become indebted to an amount exceeding the income and revenue for the year in which the debt is incurred without the assent of "two-thirds of the voters" at an election to be held for the purpose, requires the assent of two-thirds of the voters voting on the proposition, and not two-thirds of all the voters at the election; and this requirement is not altered by Ky. St. 1903, § 3490, subsec. 34, authorizing the incurring of such an indebtedness if two-thirds of all the qualified voters of the town shall have voted in favor of incurring the indebtedness, for every provision of the Constitution is mandatory, and the Legislature can neither subtract from nor add to the constitutional requirement, which regulates the subject and removes it entirely from legislative control. Moreover, "the usual construction of such statutes, where no means are provided to ascertain the number of votes in the municipality, is that it refers to the votes cast on the question. *Board of Education of Winchester v. City of Winchester*, 87 S. W. 768, 120 Ky. 591.

**As citizen**

See Citizen.

**Elector distinguished**

A "voter," as distinguished from an "elector," is an elector who actually votes. *State v. Blaisdell*, 119 N. W. 360, 363, 18 N. D. 31; *Fabro v. Lown of Gallup*, 103 Pac. 271, 275, 15 N. M. 108.

"Voter" is not synonymous with "citizen," or "elector," as persons who cannot vote may be eligible to citizenship. *In re Rousos*, 119 N. Y. Supp. 34, 36.

The word "voters," as ordinarily used, has two meanings—persons who perform the act of voting, and persons who have the qualifications entitling them to vote. Its meaning depends on the connections in which it is used, and is not always equivalent to "electors." *Mills v. Hallgren*, 124 N. W. 1077, 1079, 146 Iowa, 215.

**Inhabitant synonymous**

See Inhabitancy—Inhabitant.

**As people**

See People.

**Registered voters**

Const. art. 6, §§ 1, 3, 4, provide the qualifications of voters, and declare that every person shall be able to read and write, unless registered under another clause, before being entitled "to register," as required by section 3, and that before he shall be entitled to "vote" he shall have paid his poll tax for the previous year. *Laws 1903*, p. 290, c. 233, § 7, requires an order for a municipal election to determine whether saloons shall be licensed in lieu of a city dispensary on petition of one-third of the "registered voters" therein for the preceding municipal election; and section 9 declares that "any person entitled to vote for," etc., "shall have the right to vote at such election." Held, that "registered voters" did not include all persons whose names were on the permanent registration roll at the preceding municipal election, but only included those who had paid their poll tax as required and were entitled to vote. *Pace v. City of Raleigh*, 52 S. E. 277, 278, 282, 140 N. C. 65.

**VOTERS PRESENT AND VOTING**

The act of Congress authorizing municipal bonds notwithstanding the limitations on municipal indebtedness, and if two-thirds of the qualified voters as defined shall vote therefor, requires two-thirds of those actually voting only, and not a two-thirds of all of the "voters" in the community. *Fabro v. Town of Gallup*, 103 Pac. 271, 275, 15 N. M. 108.

*St. 1904*, p. 469, c. 457, authorizing a town to establish a water system after acceptance of the act by "two-thirds of the voters present and voting" at a meeting called for the purpose," does not require acceptance by two-thirds of all the voters of the

town; but a vote adopted by two-thirds of all the voters present is sufficient. *Seward v. Revere Water Co.*, 87 N. E. 749, 750, 201 Mass. 453.

**VOTES CAST**

Under Const. art. 17, § 1, providing for an amendment of the Constitution by a majority of "votes cast," a majority of the votes cast on the proposition for amendment is sufficient. *Itasca Independent School Dist. v. McElroy* (Tex.) 124 S. W. 1011, 1013.

Blank ballots are not "votes cast." *Hicks v. Krigbaum*, 108 Pac. 482, 486, 13 Ariz. 237.

Const. § 168, provides that changes in the boundaries of organized counties shall be submitted to the electors of the county or counties to be affected, and be adopted by a majority of all the legal votes cast at such election. Held, that the phrase "votes cast" means the total of the separate votes, or expressions of voters' preference for or against such a change, and should be limited to mean the votes cast on that proposition, and that to effect such change requires merely a majority of the votes cast upon the question of a change, and not a majority of the highest number of votes cast for any candidate, or upon any proposition voted upon at the election, since to hold otherwise would be to give as much effect to the act of an elector who did not vote on such change as that of one who voted in the negative. *State v. Blaisdell*, 119 N. W. 360, 362, 18 N. D. 31.

If by virtue of Const. art. 17, § 6, the majority of the votes cast at a special county seat election shall not be received by or counted in favor of any place voted for, where there are more than two contestants for the location of the county seat, the names of all except the two receiving the greatest number of votes shall be dropped, and the Governor shall cause a second election to be held at which only such two places shall be voted for, but, where there were only two candidates, the Governor shall call a second election at which the same two places shall be voted for, and the place then receiving the requisite majority shall be the county seat. A ballot cast by a qualified elector who has not subscribed and sworn to the affidavit required by *Sess. Laws 1907-08*, p. 382, c. 31, art. 4, § 12, cannot be counted for any of the contesting places at a county seat election, but, where the elector was qualified and acted in good faith, it must be counted as one of the votes cast in determining the requisite authority for the determination of the question at issue at the election. For the purpose of determining the majority of "votes cast" at a county seat election held under the provisions of Const. art. 17, § 6, and *Sess. Laws 1907-08*, p. 378, c. 31, art. 4, there must be a majority of all the ballots cast on such question by the qualified electors of the county, whether counted or not for one of the con-

testants. *Incorporated Town of Westville v. Incorporated Town of Stilwell*, 105 Pac. 664, 667, 24 Okl. 892.

The word "votes," in Acts 1887, p. 59, c. 3, § 9, authorizing an election to determine whether a county shall subscribe to the stock of a railway company, and providing that, if three-fourths of the votes cast at the election are in favor of subscription, the election officers shall take such action as may be required to make the subscription effective, means legal votes, for illegal ballots do not really constitute votes and are not to be counted in determining whether or not three-fourths of the votes are in favor of subscription. *Catlett v. Knoxville, S. & E. Ry. Co.*, 112 S. W. 559, 562, 120 Tenn. 699.

Under St. 1912, c. 559, pt. 3, § 1, revising the charter of the city of Salem, which provided that the act should be submitted to the registered voters at the state election in 1912, for a vote primarily on the question whether the present charter should be repealed, and secondarily on the question whether, if it was repealed, the new charter should be plan 1 or plan 2, and that if, on a "majority of the ballots cast," the votes should be for a repeal, the plan receiving the largest number of votes cast should be adopted as the city charter, the ballot on which the questions were printed contained, besides the names of a large number of candidates for state and national offices, questions upon the adoption of constitutional amendments, and the total number of ballots cast was 6,966, of which, on the question of repealing the charter 1,676 were blank, 2,240 were against repeal, and 3,050 were for repeal. Held that, in view of the legislative policy to make an acceptance of a city charter turn upon the affirmative votes of a majority of those voting on the question, the word "ballots" was synonymous with "votes," and that only the ballots carrying votes on the question of repeal were to be counted. *Cashman v. Entwistle*, 100 N. E. 58, 60, 213 Mass. 153.

## VOTING

Under Const. Ark. 1874, art. 19, § 22, which provides that proposed amendments thereto shall be submitted to the electors of the state for approval or rejection at a general election for senators and representatives, and that, if a majority of the electors "voting at such election" adopt such amendments, the same shall become a part of this Constitution, the approval of a proposed amendment by a majority of the electors voting on that proposition is not sufficient for its adoption, unless they also constitute a majority of all those voting at the election. *Knight v. Shelton*, 134 Fed. 423, 428.

## VOTING BOXES

An order of the commissioners' court for an election under the local option law was not invalid because it authorized the voting

at "voting boxes," instead of "voting places," since the terms have a similar import, and no voter was deceived thereby. *Neal v. State*, 102 S. W. 1139, 51 Tex. Cr. R. 513.

## VOTING BY BALLOT

A "vote by ballot" consists in depositing a ballot in a box in such a way as to conceal the voter's choice, if he so desires it. *State v. Custer*, 66 Atl. 306, 308, 28 R. I. 222 (quoting and adopting the definition in *State ex rel. Runge v. Anderson*, 76 N. W. 482, 484, 100 Wis. 523, 530, 42 L. R. A. 239).

The word "ballot" is used to mean the ball or ticket used in voting; the act of voting; the result of voting. From the earliest times, "voting by ballot" has been a term used to contradistinguish open, viva voce, or public voting and secret voting (*Bouv. Law Dict.*); hence Const. art. 7, § 2, requiring all votes, except for township officers, to be given by ballot, merely declares the policy of the state to assure to the elector a secret, as distinguished from an open, vote, and does not permanently establish a particular mode of voting, and is not infringed by Pub. Acts 1903, p. 383, No. 234, amending Comp. Laws 1897, §§ 3750-3758, authorizing the use of voting machines, and requiring all voting by machine to be by a secret vote. *City of Detroit v. Board of Inspectors of Election for Fourth Election District of Second Ward of City of Detroit*, 102 N. W. 1029, 1031, 139 Mich. 548, 69 L. R. A. 184, 111 Am. St. Rep. 430, 5 Ann. Cas. 861.

## VOTING MARK

See Valid Voting Mark.

## VOTING PLACES

An order of the commissioners' court for an election under the local option law was not invalid because it authorized the voting at "voting boxes," instead of "voting places," since the terms have a similar import, and no voter was deceived thereby. *Neal v. State*, 102 S. W. 1139, 51 Tex. Cr. R. 513.

## VOUCH

## VOUCHER

A "voucher," in Sess. Laws 1899, pp. 405, 406, directing that the sheriff shall at the end of each quarter file with the commissioners a sworn statement, accompanied by proper vouchers, showing all expenses incurred, is a written acquittance or receipt showing the payment of the debt. *Moubert v. Bannock County*, 75 Pac. 239, 241, 9 Idaho, 470.

The ordinary meaning of "voucher" is a document which shows that services have been performed or expenses incurred. It covers any acquittance or receipt discharging the person or evidencing payment by him. When used in connection with the disbursement of moneys it implies some instrument that shows on what account or by what au-

thority a particular payment has been made, or that services have been performed which entitle the party to whom it is issued to payment. *First Nat. Bank of Chicago v. City of Elgin*, 136 Ill. App. 453, 465.

The process called "voucher" at the common law was one whereby an unpleaded warrantee might bring in his warrantor as the real party and thus make him defend the action. *Seyfried v. Knoblauch*, 96 Pac. 993, 995, 44 Colo. 86.

### VOUCHERING

The "vouchering" by a railroad company of a claim for repayment of freight charges paid, and the taking by the company of the amount of the claim as allowed for labor, supplies, equipment, and improvements and interest on bonded indebtedness, do not make the claim a lien prior to the mortgage bonded indebtedness, nor give the claimant the right to follow a specific fund into the hands of the receiver of the company and a purchaser from the receiver of the property of the company, subject to liens superior to the mortgage and bonds secured thereby, not chargeable with knowledge of the vouchering of the claim, and the creation of a lien thereby is not liable to the claimant for the amount of the claim; the "vouchering" of a claim merely meaning that the same has been investigated, passed on, and approved. *First Trust & Savings Bank v. Southern Indiana Ry. Co.*, 195 Fed. 330, 332.

### VOYAGE

See *Earnings of Voyage; Half Line Voyage*.

The term "voyage" has no fixed or technical meaning. It may refer to the outward voyage or to the homeward voyage or to the round voyage. *The Lucy*, 39 Ct. Cl. 221, 224.

Where a vessel was chartered for a "voyage" to St. Michael's, Alaska, the voyage began when she set about doing what was required of her to earn freight money for the owner; thus, where she was delivered at Seattle, where she took on coal, then proceeded to other ports, where she took on car-

go and a further supply of coal, proceeding thence to Alaska and returning to Seattle, where she was again taken in charge by the charterer, it was held that the voyage began at Seattle, and not at the last port of loading. *The Buckingham*, 129 Fed. 975, 976.

The word "voyage" may have different meanings under different circumstances, depending on the subject to which it relates or the context of the particular contract in which the word is employed. In common parlance, each of the trips made by a vessel from Havre to New York and from New York to Havre, without any immediate stops, was a separate "voyage." *Deslions v. La Compagnie Générale Transatlantique*, 28 Sup. Ct. 644, 678, 210 U. S. 95, 52 L. Ed. 973.

### VULGAR

The word "vulgar," as used in the act of May 6, 1893 (Gen. Laws, p. 177, c. 121), as amended by the act of April 27, 1901 (Gen. Laws, p. 314, c. 136), requiring a bond by liquor dealers to keep an orderly house, and providing that it must not contain any vulgar or obscene pictures, conveys such meaning as, with its companion word "obscene," will accomplish the purpose of the statute, which was to prevent the exhibitions in saloons of immoral and indecent pictures. The words "vulgar" and "obscene," in the act, are not limited to pictures suggestive of lewdness or lasciviousness. In an action on a liquor dealer's bond, required by the act, an instruction that "'vulgar,' as used in the statute, means mean, rustic, rude, low, unrefined, the opposite of refined, enlightened, scientific," was erroneous. *Raley v. State*, 105 S. W. 342, 343, 47 Tex. Civ. App. 426.

### VULGAR LANGUAGE

A remark to a married woman, "Look me in the eye; are you satisfied with the man you married?" will not sustain a conviction for using "obscene and vulgar language" in the presence of a female, where there is nothing in the evidence to indicate that the remark was intended to convey an obscene and vulgar meaning. *Roberts v. State*, 47 S. E. 511, 512, 120 Ga. 177.

## W

**WM.**

In a proceeding to sell land for taxes, an order of publication directed against W. N. W. is invalid as against the owner whose name is William N. W.; this being true, even though such owner had executed a mortgage, signing his name Wm. N. W., that being an abbreviation for William. *Woodruff v. Bunker Culler Lumber Co.*, 146 S. W. 1162, 1164, 242 Mo. 381.

**WABBLY**

"Wabbly," in connection with the term "out of plumb," in describing a wheel driving belting, could be understood as describing the manner in which the wheel worked in reference to the belting. There is no variance between an allegation that a wheel driving a belt was "out of plumb and wabbly," causing the belt to alternately tighten and loosen, and proof that the surface of the wheel over which the belting worked was not true to the axle, that the axle had gotten out of the true center by the wheel having worn on one side, and that its operation was thereby rendered irregular and unsteady. *Receivers of Kirby Lumber Co. v. Poindexter*, (Tex.) 103 S. W. 439, 440.

**WAGE-EARNER**

See Independent Contractor.

See, also, Wages.

Where an alleged bankrupt had engaged in a mercantile business in which he had contracted debts, and thereafter acquired property by inheritance, worth \$40,000, which he immediately assigned to his brother for \$180, and during the year the assignment was made received wages for his services exceeding \$1,500 per annum, he was not a "wage-earner," exempt from bankruptcy adjudication, under the provision of the bankruptcy act authorizing an adjudication against any natural person, except a "wage-earner," defined to be an individual working for wages at a rate not exceeding \$1,500 per year. In *re Wakefield*, 182 Fed. 247, 250.

So, where an alleged bankrupt nominally drew a salary of \$900 a year as salary, but owned two-thirds of the stock of the corporation, and drew more than \$2,000 a year preceding the institution of bankruptcy proceedings against him, and was also in the business of buying and selling real estate, his holdings outside the corporation being worth nearly \$90,000, he was not a "wage-earner" within the exemption. *Carpenter v. Cudd*, 174 Fed. 603, 605, 98 C. C. A. 449, 20 Ann. Cas. 977.

And one engaged in manufacturing and trading does not become a "wage-earner,"

within the exemption, because, while working as a manufacturer and trader, he also earns wages by working for another in a different occupation; and if debts are contracted while he is engaged as a manufacturer or trader, he is not exempt from involuntary bankruptcy because he subsequently becomes a wage-earner. In *re Naroma Chocolate Co.*, 178 Fed. 383, 384.

**Music teacher**

A music teacher, giving lessons at so much an hour, is not comprehended by the bankruptcy act provision that "wage-earners" whose compensation does not exceed \$1,500 a year shall not be subject to involuntary bankruptcy. *First Nat. Bank of Wilkes-Barre v. Barnum*, 160 Fed. 245, 247.

**WAGER-WAGERING CONTRACT**

The essence of a "wager" is that each party stands to win or lose on the result, and that the gains depend on the event. *Thompson v. Williamson*, 58 Atl. 602, 604, 67 N. J. Eq. 212.

The deposit of a sum of money by two persons in the hands of a third to abide the event of an unlawful game between the two is a "wager." *Monahan v. Monahan*, 59 Atl. 169, 173, 77 Vt. 133, 70 L. R. A. 935.

A "wager" is "a contract by which two or more parties agree that a certain sum of money or other thing shall be paid or delivered to one of them on the happening of an uncertain event." "A 'wager' is an agreement between parties differing as to an uncertain fact or forecast of a future event." In an action to recover money from defendants, obtained from the plaintiff by means of inducing him to believe that a foot race was "fixed," so that one party was sure to win, and persuading the plaintiff to participate to the extent of betting the money of one side to the simulated race as if it were his own, on the assurance that he should receive 20 per cent. of the sum won, he being ignorant at the time that the money all belonged to the parties on both sides of the pretended wager, held that, although he was in delicto, by consenting to act in such deceitful attitude, he was not in pari delicto with the conspirators, and is therefore entitled to recover back the sum of \$5,000 which the conspirators persuaded him to intrust to the possession of one of them as a stakeholder, not to be bet on the race, but to be used to make a showing by the stakeholder in the event of a count of the stake money being called for by one of the feigned bettors. *Wright v. Stewart*, 130 Fed. 905, 920 (quoting *Black*, Law Dict.; *Bish. Cont. par.* 530).



**As a bet**

A "bet" is defined as that which is laid, staked, or pledged as between two persons upon the event of a contract or any contingent issue, the act of giving such a pledge, and to be synonymous with "wager" applied both to the contract of betting and wagering and to the thing or sum bet or wagered. *Ex parte Walsh*, 129 S. W. 118, 121, 59 Tex. Cr. R. 409 (citing 1 Words and Phrases, p. 764).

A "wager" is "a 'bet'; a contract by which two parties or more agree that a certain sum of money, or other things, shall be paid or delivered to one of them on the happening or not happening of an uncertain event. A contract upon a contingency, by which one may lose, but cannot gain, or the other must gain, but cannot lose, is a 'wager.' \* \* \* A wager is something hazarded on the issue of some uncertain event; a 'bet' is a 'wager,' although a wager is not necessarily a 'bet.'" *Stevens v. Cincinnati Times-Star Co.*, 73 N. E. 1058, 1061, 72 Ohio St. 112, 106 Am. St. Rep. 586 (quoting and adopting definition in 2 Bouv. Dict. 793).

"A bet or 'wager' is ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agree to take part, shall become the property of one or more of them on the happening in the future of an event at the present uncertain, or upon the ascertainment of a fact in dispute. The term is applied both to the contract of betting or wagering, and to the thing or sum bet or wagered." One who, as agent for another, took money from the other, and sent it to a third person as a bet on a horse race, was not guilty under Acts Leg. 1903, p. 68, c. 50, § 1, making it an offense to "take or accept any bet on a horse race." *Windsor v. State*, 79 S. W. 312, 313, 46 Tex. Cr. R. 140 (citing *Rich v. State*, 42 S. W. 291, 38 Tex. Cr. R. 199, 38 L. R. A. 719).

Pub. St. 1901, c. 270, § 6, provides that, "if any person keeps any house, shop, or place resorted to for the purpose of gambling or lets any such place for that purpose, or suffers any person to gamble in any way in any such place, which is under his care or control, he shall be fined \* \* \* or imprisoned." Section 18 defines a bet or "wager" as "any contract or agreement for the purchase, sale, loan, payment, or use of money or property, \* \* \* the terms of which are made to depend upon or are to be varied or affected by any uncertain event in which the parties have no interest except that created by such contract or agreement." Section 7 provides that, "if any person shall gamble or bet on the sides or hands of such as are gambling or playing at any game he shall be fined \* \* \* or imprisoned." By section 8 a gambler is defined as every person who plays at a game of chance or skill in a place which is resorted to for the pur-

pose of gambling, unless it be shown that the game is for amusement only without a stake or possibility of gain or loss. Held, that gaming includes horse racing, and therefore betting on such races is illegal gaming. In re Opinion of the Justices, 63 Atl. 505 506, 73 N. H. 625, 6 Ann. Cas. 689.

**Dealing in futures**

Where money is deposited with stock-brokers as a margin, with the understanding that there is to be no actual delivery of stock, though in case of a purchase there could be delivery if desired, and that the contract was to be adjusted by the payment of the difference between the price named therein and the market price at the time of settlement, the contract is a "wager." *Wheeler v. Metropolitan Stock Exchange*, 56 Atl. 754, 756, 72 N. H. 315.

A contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods nor any other means of getting them than to go into the market and buy them; but such contract is only valid when the parties really intend a delivery by the seller and payment of the price by the buyer. And if the real intent be merely to speculate in the rise and fall of prices, and the goods are not to be delivered, but the difference is to be paid between the contract and market price at the date for executing the contract, then the transaction is nothing more than a "wager." *Richter v. Poe*, 71 Atl. 420, 422, 109 Md. 20, 22 L. R. A. (N. S.) 174; *Beidler & Robinson Lumber Co. v. Coe Commission Co.*, 102 N. W. 880, 881, 13 N. D. 689 (quoting and adopting definition in *Irwin v. Williar*, 4 Sup. Ct. 160, 110 U. S. 499, 28 L. Ed. 225, and citing *Dows v. Glaspel*, 60 N. W. 60, 4 N. D. 251).

Under Code 1907, § 3338 (Code 1896, § 2163), providing that all contracts founded on a gambling consideration are void, etc., contracts for the sale and purchase of "future cotton," in which actual delivery of the goods is not contemplated by the parties, and where it is understood that the contract may be satisfied by the payment of the difference between the agreed price and the market price at the time of delivery, are "wager contracts," and void. *Birmingham Trust & Savings Co. v. Curry*, 49 South. 319, 320, 160 Ala. 370, 135 Am. St. Rep. 102.

An express agreement in advance between grain brokers and a customer that no grain was to be delivered or received on his contracts, but that the transactions were entirely on margin and settlements to be made between them on differences in the market, rendered such contracts void as "wagering contracts," and unenforceable in an action by the brokers against the customer, although the customer's orders may in fact have been executed on the exchange by actual purchases from or sales to third persons, who dealt with the brokers as principals

without any knowledge of the customer. *Ware v. Pearsons*, 173 Fed. 878, 880, 98 C. C. A. 364.

### WAGER POLICY

A life policy, taken on the life of one by one having no insurable interest, is termed a "wager policy," or a mere speculative contract, and is void. An assignment of a life policy to a third person, not a relative or creditor, and having no insurable interest in the life of insured, is invalid. *Mutual Life Ins. Co. v. Lane*, 151 Fed. 276, 284 (quoting and adopting definition in *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924).

An insurance against fire, without an interest in the subject-matter insured, is a "wagering contract." *Bennett v. Mutual Fire Ins. Co.*, 60 Atl. 99, 101, 100 Md. 337 (quoting and adopting definitions in *Washington Fire Ins. Co. of Baltimore v. Kelly*, 32 Md. 421, 3 Am. Rep. 149, and *Angell, Life and Fire Ins.* § 193, p. 230).

A policy of life insurance, assigned to one having no insurable interest, with an agreement that the assignee should pay the premiums, and, when the policy was paid, retain the amount so paid and a certain part of the surplus, is void as a "wagering contract." *Smith v. Agneu*, 122 S. W. 231, 232, 137 Ky. 83.

"An insurable interest is such an interest, arising from the relation of the party obtaining the insurance, either as creditor or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured; otherwise the contract is a 'mere wager,' by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are therefore, independently of any statute on the subject, condemned as being against public policy." It is a question of fact for the court to determine whether an agreement, sought to be enforced in equity, by which the interest in a benefit certificate is to belong to a person not having an insurable interest in the life of the assured, falls under the ban of the law as a "wagering contract," and therefore entitles him to recover only his outlay made in pursuance thereof, or whether it is entered into in good morals, and in consequence entitles him to recover the entire proceeds. *Brett v. Warnick*, 75 Pac. 1061, 1062, 1064, 44 Or. 511, 102 Am. St. Rep. 639 (quoting and adopting definition in *Warnock v. Davis*, 104 U. S. 775, 779, 26 L. Ed. 924).

### WAGES

See *Future Wages; Laborer for Wages; Prevailing Rate of Wages.*  
See, also, *Wage-Earner.*

"Wages" is the reward paid for labor. It is none the less wages because it is paid for the piece; but compensation for labor is not wages, where payment is by the job, nor where it consists of the profits derived from the labor of others, and this though the claimant himself takes part in the work. In *re Thomas Deutschle & Co.*, 182 Fed. 430, 431, 433.

Under a statute giving preference in the distribution of the assets of an insolvent corporation to claims for "wages of mechanics, workmen and laborers," the wages preferred and the class of persons within the statute depend upon the nature and kind of work done, rather than on the social position or professional character and standing of the person rendering the service, and, if the service is such as to bring the person rendering it within the statute, his compensation, whether large or small, or whether payable by the day, week, month, or year, is "wages," within the meaning of the statute, and preferred. But under a statute providing that the wages of employes of corporations shall be preferred, and defining the word "employé" as meaning "a mechanic, workman or laborer who works for another for hire," an attorney at law employed by a company to procure options on property, at an understood compensation of \$10 per day and expenses for the time employed in the service, is not a "workingman" or "laborer," and hence is not an "employé" entitled to preference under the statute. *Gay v. Hudson River Electric Power Co.*, 178 Fed. 499, 502.

A per diem employé, as a driver of a team for an engineer in the department of highways of the city of New York, may only recover the wages on proof of actual work, and while he is awaiting orders for work he cannot recover the per diem; "wages" being that which is paid for a service rendered. *Doyle v. City of New York*, 132 N. Y. Supp. 774, 775.

The compensation received by a man who owned a team, wagons, and a plow, with which he worked by the day for different employers, as he could obtain work, earning usually from \$9 to \$15 per week, and working alone when he could not find work for his team, must fall within the meaning of either "wages," or "hire," as used in *Bankr. Act July 1, 1893, c. 541, § 1, cl. 27, 30 Stat. 545*, defining a wage-earner to be one who works for wages, salary, or hire, at a rate of compensation not exceeding \$1,500 per year. In *re Yoder*, 127 Fed. 894, 895.

The priority of payment of "wages" due "to workmen, clerks, or servants," given by

the Bankruptcy Act, extends to claims assigned before the bankruptcy proceedings. *Shropshire v. Bush*, 27 Sup. Ct. 178, 179, 204 U. S. 186, 51 L. Ed. 436.

#### Commissions

Commissions paid a traveling salesman for his services are "wages," within the meaning of Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563, and a claim for such commissions earned within three months prior to the bankruptcy of the employer is entitled to priority thereunder. In *re Fink*, 163 Fed. 135; In *re Dexter*, 158 Fed. 788, 789, 791, 89 C. C. A. 285. And so where a bankrupt corporation employed claimant to make sales of its product in a certain territory for 5 per cent. commission on all sales made within the territory to the dry goods, notion, and tailor trimming trade, out of which claimant was required to pay his expenses, such compensation constituted "wages," within the Bankruptcy Act. In *re New England Thread Co.*, 154 Fed. 742.

A contract employing a salesman, which stipulates for a commission on sales and a payment of \$1,000 a month in advance, and which provides that, at the end of the fiscal year, if it is found that his sales entitle him to commissions in excess of the amount paid, he shall receive the additional commissions, and where he has been overpaid, the overpayment shall be charged against future commissions, is a contract for the payment of wages in advance, and money advanced to him is "wages," within Code Civ. Proc. § 1391, as amended by Laws 1908, p. 433, c. 148, authorizing execution to reach wages. *Laird v. Carton*, 89 N. E. 822, 823, 196 N. Y. 169, 25 L. R. A. (N. S.) 189.

#### Compensation of condemnation commissioner

Compensation of a condemnation commissioner of New York appointed by a justice of the Supreme Court, not paid at stated times or in stated amounts, but allowed in bulk by a justice of the Supreme Court, is not "wages," "salary," or "earnings," within Code Civ. Proc. § 1391, providing that, where wages, earnings or salary are due to the amount of \$12 or more per week, an order directing execution may issue, which shall become a lien on such wages, the amount specified not exceeding 10 per cent. thereof, and shall be a continuing levy until the execution is paid. *Jones v. Nicoll*, 131 N. Y. Supp. 341, 342, 72 Misc. Rep. 483.

#### Compensation of employer of others

Complainant contracted to solicit orders for the bankrupt for weather strips, and, when obtained, to superintend the placing thereof by workmen acting under his direction. The bankrupt paid the wages of the workmen and furnished the material, and out of the price retained the cost of the labor and material and 15 per cent. of the price ad-

ditional, paying claimant whatever was left from the amount collected for his compensation. Held, that plaintiff was a "salesman," notwithstanding his duty of supervising the installation of the strips, and his compensation was "wages," within Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563, entitling wages of workmen, salesmen, etc., to priority. In *re Roebuck Weather Strip & Wire Screen Co.*, 180 Fed. 497, 498.

Bankrupts operated a sash, door, and blind factory; claimants having charge of the blind and sash departments under contract, by which claimants employed and discharged their own men and were responsible for the work that they turned out, but for convenience the men drew their wages from the bankrupts, the pay rolls being made out by claimants and turned in for that purpose. Claimants were compensated by an agreed schedule of prices for each character of work turned out; the bankrupts in general furnishing materials, as well as the tools and machinery. All the employes were subject to certain factory rules prescribed by the bankrupts, and the hours of the men were regulated by the shop whistle; the amounts received by claimants depending on their success in managing their departments and getting out the work for less than the scheduled prices. Held, that claimants were not "workmen," nor their compensation "wages," within Bankr. Act July 1, 1898, c. 541, § 64, subd. 4, 30 Stat. 563, giving priority to wages due to workmen earned within three months before bankruptcy proceedings, not exceeding \$300 to each claimant. In *re Thomas Deutsche & Co.*, 182 Fed. 430, 431.

Where the landlord furnishes to the cropper everything to make the crop, except labor, which is furnished by the cropper and his family, the amount due the cropper after full settlement with the landlord is in the nature of "wages" paid to day laborers, and is not subject to garnishment while in the hands of the landlord, under Civ. Code 1910, § 5298. *Thompson v. Passmore*, 72 S. E. 185, 186, 9 Ga. App. 771.

#### Earnings distinguished

Earnings synonymous, see Earnings.

The term "wages," as distinguished from salary, is commonly understood to apply to compensation for manual labor, skilled or unskilled, paid at stated times, and measured by the day, week, month, season, or piece, but not by the job. The term does not include profits on the services of others, and it is not so broad as "earnings," which comprehends returns from skill and labor in whatever way acquired. *First Nat. Bank v. Barnum*, 160 Fed. 245, 247.

#### Fees or salary

"Salary" refers to a superior grade of service, and implies a position or office, and suggests something higher, larger, and more

permanent than "wages." *First Nat. Bank v. Barnum*, 160 Fed. 245, 247.

The word "salary" imports a specific contract for a specific sum for a specified period of time, while "fees" are compensation for particular acts, and "wages" are compensation for services by the day or week. *Blick v. Mercantile Trust & Deposit Co. of Baltimore*, 77 Atl. 844, 846, 113 Md. 487 (quoting 7 Words and Phrases, pp. 6287-6291).

Lexicographers and some authorities class "salary" and "wages" as synonymous. *Board of Com'rs v. Trowbridge*, 95 Pac. 554, 556, 42 Colo. 449.

"Wages," in its ordinary acceptance, has a less extensive meaning than "salary," and is usually restricted to sums paid as hire to domestic or menial servants and to artisans, mechanics, laborers, and others employed in various manual occupations, while "salary" has reference to the compensation of clerks, bookkeepers, other employés of like class, officers of corporations, and public officers. *Massie v. Cessna*, 88 N. E. 152, 154, 239 Ill. 352, 28 L. R. A. (N. S.) 1108, 130 Am. St. Rep. 234; *Spellberger Bros. v. Brandes*, 58 South. 75, 78, 3 Ala. App. 590.

Broadly, the word "salary" means a recompense or consideration made to a person for his pains or industry in another man's business. Whether it be derived from "salarium," or more fancifully from "sal," the pay of the Roman soldiers, it carries with it the fundamental idea of compensation for services rendered. Indeed, there is eminent authority for holding that the words "wages" and "salary" are in essence synonymous. *Hopkins v. Cromwell*, 85 N. Y. Supp. 839, 841, 89 App. Div. 481.

Worcester says, in referring to "wages," that "in ordinary language the term 'wages' is usually employed to distinguish the sums paid to persons hired to perform menial labor." Winfield defines the term as meaning: "The compensation paid to a hired person for services. This compensation to the laborer may be a specified sum for a given term of service, or a fixed sum for a specified work; that is, payment may be made by the job." It has also been held: "If there is any difference in the popular sense between 'salary' and 'wages,' it is only in the application of them to the more or less honorable service. A farmer pays his farm hand, in common speech, 'wages,' whether by the day, the week, the harvest, or the year. If for any reason he has occasion to employ an overseer, his compensation, no matter how measured, is called a 'salary.' An iron master pays his workmen wages; his manager receives a salary. A merchant pays wages to his servant who sweeps the floor, makes the fire, and runs his errands; but he compensates his salesman or clerk by

a salary." *State v. Duncan*, 1 Tenn. Ch. App. 334, 339, 341, 342 (quoting *Commonwealth ex rel. Wolfe v. Butler*, 99 Pa. 542).

#### Money lent to pay laborers

Where a surety company, acting as surety on the bond of an insolvent, lends him money which is used to extinguish debt to his laborers, the claims of the surety company are not, at the time bankruptcy proceedings are instituted against the borrower, "wages due the workmen," within the meaning of Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563. *United Surety Co. v. Iowa Mfg. Co.*, 179 Fed. 55, 58, 102 C. C. A. 623.

#### As personal property

See Personal Property.

#### Seaman's allowances

A release, signed by seamen on their discharge at the end of a voyage, releasing the master and owners "from all claims for 'wages' in respect of the said past voyage or engagement," did not debar them from the right to maintain a suit, under Rev. St. § 4568 to recover for a reduction of allowance, or for the bad quality of the provisions furnished. *Billings v. Bausback*, 200 Fed. 523, 527, 119 C. C. A. 21.

## WAGON

The words "wagon" and "cart" are generic terms, and mean almost any vehicle, whether used for the transportation of persons or property. *Luce v. Hassam*, 58 Atl. 725, 726, 76 Vt. 450. See, also, *Fifth Avenue Coach Co. v. City of New York*, 111 N. Y. Supp. 759, 776, 58 Misc. Rep. 401 (quoting and adopting the definition in *Gordon v. Shields*, 7 Kan. 320-325; *Luce v. Hassam*, 58 Atl. 725, 76 Vt. 450).

#### Buggy or carriage

The word "wagon" is synonymous with the word "carriage," and may be used to designate any wheeled vehicle intended to be drawn by horses. *Luce v. Hassam*, 58 Atl. 725, 726, 76 Vt. 450.

#### As merchandise

See Merchandise.

#### Motor vehicle

Greater New York Charter (Laws 1901, p. 1, c. 466), provides that the word "vehicle" shall include wagons, cabs, carriages, omnibuses, motors, etc. An ordinance prohibits advertising wagons in the streets except business notices on ordinary business wagons. Held, that vehicles on four wheels, propelled by motors, designed primarily for the carriage of passengers, operated by a corporation maintaining a stage route, are "wagons" within the ordinance; a "wagon" being a wheeled carriage, a vehicle on four wheels. *Fifth Ave. Coach Co. v. City of New York*, 86 N. E. 824, 826, 194 N. Y. 19, 21 L. R. A.

(N. S.) 744, 16 Ann. Cas. 695; *Id.*, 110 N. Y. Supp. 1037, 126 App. Div. 657; *Id.*, 111 N. Y. Supp. 759, 58 Misc. Rep. 401.

### WAGON PASS

A deed requiring the construction of a "cattle or wagon pass" means a pass sufficient for cattle and farm wagons, whether loaded or unloaded. It is common knowledge that some farm products which are taken by wagon through a farm, or from one field to another, will need a space of 12 feet in width and 10 feet in height to pass through. *Owens v. Carthage & W. Ry. Co.*, 85 S. W. 987, 988, 110 Mo. App. 320.

### WAI SAN

Dutiable as vegetable, see Vegetable.

### WAINSCOTING

"Wainscoting" usually consists of narrow strips of wood placed upright and tongued together, extending from the floor upwards from three to four feet, except at windows, and about the entire rooms, except at door spaces, or it may extend only from the top, or near the top, of the baseboard upward. It may be next the studding, or it may be placed after the sides are lathed and plastered down to the floor, or only to the top of the baseboard. *Decker v. Sanford*, 135 Fed. 112, 114.

### WAIT

#### WAITING ROOM

Under the statute requiring railroad companies to provide a waiting room and to keep their ticket offices open for at least 30 minutes immediately preceding the departure of all passenger trains, and to open the waiting room for passengers at the same time, and to post the length of time of delay of any passenger trains a room in a hotel near the railroad track, which passengers were allowed to use, was not a "waiting room," within the statute; for it was not connected with any ticket office, had no bulletins of late trains, and was not kept open in accordance with the schedule of trains. *Louisville, H. & St. L. R. Co. v. Commonwealth*, 139 S. W. 776, 777, 144 Ky. 541.

### WAIVE

To "waive" means in law to relinquish intentionally a known right, or intentionally to do an act inconsistent with claiming it. *Chamberlain v. City of Saginaw*, 97 N. W. 156, 157, 135 Mich. 65; *Ridgeway v. City of Escanaba*, 117 N. W. 550, 551, 154 Mich. 68; *City of New Decatur v. Chappell*, 56 South. 764, 766, 2 Ala. App. 564. Thus the proper officers of a city who take final action on the merits of a claim for personal injuries to a traveler on a defective street, though not

presented as prescribed by Code 1907, § 1275, "waive" compliance with the statute requiring notice as a prerequisite to the maintenance of an action for the injuries. *City of New Decatur v. Chappell*, 56 South. 764, 766, 2 Ala. App. 564.

The legal definition of the word "waive" is: To throw away; to relinquish voluntarily a right which one may enforce if he chooses; to desert; to abandon. Thus, where one sued in assumpsit for the value of timber cut and appropriated by another, he waived the right to recover for any injury resulting from the trespass. *Roberts v. Moss*, 106 S. W. 297, 300, 127 Ky. 657, 17 L. R. A. (N. S.) 280 (quoting and adopting Webster).

The word "waived," in Const. art. 3, § 28, providing that a homestead set off and recorded shall not be waived by deed of conveyance, mortgage, or otherwise, unless executed by both husband and wife, does not exclude a grant or mortgage, or any other disposition which may be included in the word "otherwise," a waiver is an intentional relinquishment of a known right. *Davis v. Milledy*, 75 S. E. 363, 364, 92 S. C. 135.

A patient, who, by failure to object to the testimony of physicians on the trial of a civil action, "waived" under Code Civ. Proc. § 836, his privilege under section 834 not to have information, acquired by a physician in his professional capacity, disclosed, cannot thereafter invoke the privilege on the trial of a criminal action against him. *People v. Bloom*, 109 N. Y. Supp. 344, 124 App. Div. 767; *Id.*, 85 N. E. 824, 825, 193 N. Y. 1, 18 L. R. A. (N. S.) 898, 127 Am. St. Rep. 931, 15 Ann. Cas. 932.

In view of a court rule, providing that agreements waiving any of the requirements of the rules shall be in writing, etc., an appellee will not be deemed to have waived the presence in the appellate court of the statement of facts in place of a copy thereof unless there is an agreement to that effect; the term "waive" meaning more than a mere failure to object. *Royal Ins. Co. v. Texas & G. Ry. Co.*, 115 S. W. 123, 125, 53 Tex. Civ. App. 154.

### WAIVER

See Express Waiver; Implied Waiver.

A "waiver" is the intentional abandonment or relinquishment of a known right. *Reed v. Bankers' Union of the World*, 99 S. W. 55, 56, 121 Mo. App. 419 (quoting and adopting definition in *West v. Platt*, 127 Mass. 372); *Dunn v. City of Superior*, 135 N. W. 145, 149, 148 Wis. 636; *Aronson v. Frankfurt Accident & Plate Glass Ins. Co.*, 99 Pac. 537, 541, 9 Cal. App. 473; *Lehigh Valley R. Co. v. Providence Washington Ins. Co.*, 172 Fed. 364, 365, 97 C. C. A. 62; *Hendrickson v. Grand Lodge A. O. U. W.*, 138 N.

W. 946, 948, 120 Minn. 36; *Weatherbee v. Dedham & I. St. Ry. Co.*, 95 N. E. 81, 83, 209 Mass. 213; *Flndelsen v. Metropole Fire Ins. Co.*, 57 Vt. 520, 524; *Prichard v. Mulhall*, 118 N. W. 43, 45, 140 Iowa, 1; *Griffith v. Newell*, 48 S. E. 259, 260, 69 S. C. 300 (citing *Carolina Grocery Co. v. Moore*, 41 S. E. 88, 63 S. C. 184, 188; *In re Millers' & Manufacturers' Ins. Co.*, 106 N. W. 485, 487, 97 Minn. 98; *Mettner v. Northwestern Nat. Life Ins. Co.*, 103 N. W. 112, 114, 127 Iowa, 205.

A "waiver" is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. *Enterprise Mfg. Co. v. Oppenheim, Oberndorf & Co.*, 79 Atl. 1007, 1012, 114 Md. 308, 38 L. R. A. (N. S.) 548; *State ex rel. Drifill v. City of Anaconda*, 111 Pac. 345, 347, 41 Mont. 577; *Bank of Horton v. Knox*, 109 N. W. 201, 202, 133 Iowa, 443.

"Waiver" is the intentional relinquishment of a known right, which may be done by such conduct as warrants an inference of relinquishment. *Doane v. Simmons*, 77 Atl. 775, 776, 31 R. I. 530.

A "waiver" is the intentional relinquishment of a known right, and any conduct relied on which warrants the belief that such relinquishment has been made constitutes in law a waiver. *Currie v. Continental Casualty Co.*, 126 N. W. 164, 165, 147 Iowa, 281, 140 Am. St. Rep. 300.

A "waiver" is the intentional relinquishment of a known right, which may be shown by a course of conduct signifying a purpose not to stand on a right, and permitting the inference that the right in question will not be insisted on, and where the facts and circumstance relating to the subject are admitted, or clearly established, waiver becomes a question of law. *Swedish-American Bank of Minneapolis v. Koebernick*, 117 N. W. 1020, 1023, 136 Wis. 473, 128 Am. St. Rep. 1090.

A "waiver" is an intentional relinquishment of a known right, which may be manifested by word of mouth, or by such acts and conduct as would naturally give rise to an inference that a waiver is intended; and there is no waiver unless the intention to waive is understood by the party to be benefited, or where one party has misled the other, or unless the act relied on ought in equity to estop the party from denying it. *Alexander v. North Carolina Savings Bank & Trust Co.*, 71 S. E. 69, 70, 155 N. C. 124.

A "waiver" is the voluntary relinquishment of a known right. It may be made by express words or by conduct which renders impossible a performance by the other party, or which seems to dispense with complete performance at a time when the obligor might fully perform. It must be voluntary, with knowledge of the facts and of the party's rights, or it must be implied from conduct which amounts to estoppel. *List & Son*

*Co. v. Chase*, 88 N. E. 120, 122, 80 Ohio St. 42, 17 Ann. Cas. 61.

A "waiver" is an intentional relinquishment of a known right; its essence being voluntary choice, and not mere negligence. The intention need not be expressed, but must be evidenced by conduct of an unequivocal character, and the party must have acted with knowledge of all material facts affecting his rights. *Barber v. Vinton*, 73 Atl. 881, 883, 82 Vt. 327.

"Waiver," in a general way, may be said to occur whenever one in possession of a right, conferred either by law or by contract, and knowing the attendant facts, does or forbears to do something inconsistent with the exercise of the right, or of his intention to rely upon it, in which case he is said to have waived it, and he is estopped from claiming anything by reason of it afterwards." *Mettner v. Northwestern Nat. Life Ins. Co.*, 103 N. W. 112, 114, 127 Iowa, 205 (quoting and adopting definition in *Bish. Cont. § 792*); *Charlotte Harbor & N. Ry. Co. v. Burwell*, 48 South. 213, 217, 56 Fla. 217; *Murmann v. Wissler*, 92 S. W. 355, 357, 116 Mo. App. 397 (quoting and adopting *Bish. Cont. [1887] § 792*); *Henderson v. Koenig*, 91 S. W. 88, 93, 192 Mo. 600 (quoting and adopting the definition in *Williams v. Chicago, S. F. & C. R. Co.*, 54 S. W. 689, 153 Mo. 487; and *Bish. Cont. [1887] § 792*); *Ohio Valley Buggy Co. v. Anderson Forging Co.*, 81 N. E. 574, 575, 168 Ind. 593, 11 Ann. Cas. 1045 (quoting and adopting definition in *Bish. Cont. § 792*).

#### Based on acts or words

A "waiver" is the intentional relinquishment of a known right. It may be made by an agreement, or without one, depending altogether on the nature of the matter to which it pertains. Hence a depositor, who knew that the deposit had been transferred by the bank to another under the belief that it belonged to such other, could, by his conduct in acquiescing in the transfer, waive his right to the deposit without expressly assenting to the transfer. *Whitsett v. People's Nat. Bank*, 119 S. W. 999, 1002, 138 Mo. App. 81 (citing *West v. Platt*, 127 Mass. 372).

A "waiver" is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of the right, and it never occurs unless intended, or where the act relied on ought in equity to estop the person from denying it. If a railroad company, within 30 days after a servant was injured, began negotiations of settlement with him through its duly authorized agents, recognized his claim, and told him that the company would do what was right, and thereby induced him to believe that it had waived the provisions of a contract between the company and the servant requiring written notice of a claim for injuries within 30 days after the injury, its acts amounted to a waiver of the written no-

tice. *Missouri, K. & T. R. Co. v. Hendricks*, 108 S. W. 745, 749, 49 Tex. Civ. App. 314.

"Waiver" is an intentional relinquishment of a known right. Acts or conduct on the part of an insurance company which would justify a conclusion that it was not intending to insist upon full compliance with a statute requiring proofs of loss or a failure to require proper proofs upon a submission of defective proofs will amount to a "waiver" of their submission. *Nicholas v. Iowa Merchants' Mut. Ins. Co.*, 101 N. W. 115, 118, 125 Iowa, 262 (citing *Pringle v. Des Moines Ins. Co.*, 77 N. W. 521, 107 Iowa, 742).

"Waiver" being an intentional relinquishment of a known right, or conduct warranting an inference of relinquishment thereof—an election by one to dispense with something of value or to forego some advantage he might have taken or insisted on—the provision of a policy, insuring against losses by insolvency of insured's customers, relating to time for proof of loss, was not waived by the fact that in case of prior policies of insurer, an authorized agent of insurer had each year, and within 30 days after expiration of each policy, come to insured, and prescribed the manner in which his claim against insurer should be made out; such acts not having been subsequent to and with respect to the last contract. *Shedd v. American Credit Indemnity Co. of New York*, 95 N. E. 316, 318, 48 Ind. App. 23.

Where the by-laws of a fraternal insurance order provided that failure to pay an assessment when due would cause an immediate forfeiture of membership, and that reinstatement could be effected only by the payment of arrearages within a fixed time, accompanied by a certificate of good health, the acceptance by the association of dues from a delinquent member, without any showing as to his physical condition, constitutes a "waiver" of the requirement of a certificate of health. *Mosiman v. Occidental Mut. Ben. Ass'n*, 109 Pac. 413, 415, 82 Kan. 670.

An employer's liability policy provided that it did not cover loss or expense arising on account of or resulting from injuries or death to any person employed in violation of law, and that, if any suit be brought against the insured to enforce a claim for damages on account of an accident covered by the policy, the insurer would, at its own cost, defend such suit in the name and on behalf of insured. An injured servant brought an action against the insured, claiming that he was under 16 years of age, and that the insured negligently hired him in violation of the labor law. The insurance company, while notifying the insured that it was not liable, if the accident was the result of a hiring in violation of the labor law, defended the action. A judgment was recovered against the insured for negligence in violating the labor law.

The insured was invited to participate in the trial, and was represented by his own counsel. Held that, in defending the suit, the insurer did not waive the right to rely upon the exception in the policy; "waiver" being the intentional abandonment or relinquishment of an existing right, and the insurer having insisted on its nonliability, if the hiring was in violation of law, and defended merely to protect itself and comply with its agreement. *Mason-Henry Press v. Aetna Life Ins. Co.*, 130 N. Y. Supp. 961, 965, 146 App. Div. 181.

A complaint on a fire insurance policy alleged generally that plaintiff had fulfilled all the conditions of the policy on his part, and that 60 days and more before the commencement of the action plaintiff served upon defendant, as the proofs of loss, the complete inventory of the property destroyed and injured, the quantity and cost of each article and the amount claimed thereon, that it was retained by defendant without objection, and that no further proof was required or furnished. The policy required the furnishing of formal verified proofs of loss within 60 days after the fire, stating the time and origin of the fire, and other matters. Held, that the complaint was sufficient to enable plaintiff to avail himself of the waiver if proven, notwithstanding the fact that the word "waiver" was not found in the pleadings. *Glazer v. Home Ins. Co.*, 82 N. E. 727, 728, 190 N. Y. 6.

A "waiver" may be inferred from any circumstances which show that both parties understood that payment of the premium would not be required at a specified date. *Continental Casualty Co. v. Bridges (Tex.)* 114 S. W. 170, 171.

Though a forfeiture of an insurance contract has taken place, it will be treated as waived and the insurance reinstated, if insurer accepts a premium thereafter falling due and retains it for a sufficient length of time to indicate that it considered the insurance still in force. And so where a mutual benefit association, after a certificate was forfeitable for nonpayment of an assessment, received the assessment, writing insured that it would hold the money in abeyance until he furnished the health certificate required by the contract to reinstate him, and thereafter and without objection accepted payment of a subsequent assessment, it waived the forfeiture, and that insured later furnished a health certificate was not a waiver of his right to insist that the insurance was in force, though he stated in such certificate that the insurance had been forfeited and requested reinstatement. *Francis v. Supreme Lodge A. O. U. W.*, 130 S. W. 500, 502, 150 Mo. App. 347.

After a fire, the insurer sent its adjuster, authorized to settle claims, to the insured. The adjuster requested the insured to make a list of the goods destroyed, with the value

thereof, and stated that he would come back in a week or two and settle. Held, that if the insured relied on the statements of the adjuster, and for that reason did not furnish proofs of loss, there was a "waiver" on the part of the insurer of proofs of loss; but if the insured, knowing that proofs of loss were necessary, or being so informed by the insurer's agent refused to make them, there was no waiver. *Reed v. Continental Ins. Co. (Del.)* 65 Atl. 569, 571, 6 Pennewill, 204.

"To constitute a 'waiver' [of proofs of loss] there should be shown some official act or declaration by the company during the currency of the time dispensing with it, something from which the assured might reasonably infer that the underwriters did not mean to insist upon it. \* \* \* This never occurs unless intended, or where the act relied on ought in equity to estop the party from denying it. Mere silence is not enough." Under an insurance policy which provides that proof of loss shall be made within 30 days after loss, where such proof is not made within that time, and not waived within that time, the company does not waive a compliance with such condition on the part of the assured by denying all liability under the policy after the expiration of such 30 days. *State Ins. Co. v. School Dist. No. 19*, 71 Pac. 272, 273, 66 Kan. 77 (citing *Beatty v. Lycoming County Mut. Ins. Co.*, 66 Pa. 9, 17, 5 Am. Rep. 318; *Diehl v. Adams County Mut. Ins. Co.*, 58 Pa. 452, 98 Am. Dec. 302).

One holding the position of engineer at the waterworks plant of a village at pleasure of the board of trustees possessed the qualifications of an exempt volunteer fireman within Civil Service Law, § 22. The village trustees had annually appointed him to the position, and had issued to him an exempt fireman's certificate. Previous to a meeting of the board of trustees, he, as usual, orally requested the village clerk to present his application for reappointment as had been done in the years before when he was not an exempt fireman. The trustees were not misled into the belief that he made no claim to the retention of his position as an exempt fireman. Held, that he did not waive his rights as an exempt fireman holding his position as such for an indefinite term; a "waiver" being an intentional abandonment of a known right. *People ex rel. McBride v. Atchinson*, 123 N. Y. Supp. 577, 580, 68 Misc. Rep. 115.

Breach of contract by an employé, ceasing to act under it without giving the stipulated 60 days' notice, is "waived" by the employer agreeing with him to treat the contract as canceled as of the date of leaving, so that he is entitled to his compensation to that time, without deduction for any damages for such breach. *Bailey v. Bourn Rubber Co. (R. I.)* 67 Atl. 427, 428.

A landlord, in a lease providing for the payment of rent in advance and for forfeiture

for nonpayment, who accepts rent after default, waives the right to terminate the tenancy for such default, but on every subsequent failure to pay rent at maturity the right to terminate the tenancy is available, unless the landlord is estopped; a "waiver" being the intentional relinquishment of a known right, or such conduct as warrants a relinquishment. *Templer v. Muncie Lodge, I. O. O. F.*, 97 N. E. 546, 550, 50 Ind. App. 324.

"A 'waiver' is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. 29 Am. & Eng. Ency. Law, 1091." A contract recited that a vendor had executed a deed to a purchaser for a specified consideration, and stipulated that the vendor should furnish an abstract showing a good title, and, in the event of his failure to do so, the purchase price should be repaid to the purchaser, who should redeed the premises to the vendor. Before the making of the contract the vendor had rented the land to a third person, who executed his note for the rent, and the note was turned over to the purchaser, who collected it after maturity, and after he had been advised of defects in the abstract of title. The purchaser thereafter offered the land for sale. Held, that the facts did not show a waiver of the purchaser's right to recover the purchase price. *Moore v. Price*, 103 S. W. 234, 236, 40 Tex. Civ. App. 304.

The mere acceptance of goods by a buyer after the time specified for the delivery thereof is not a "waiver" of a claim for damages for delay in delivery. *Buick Motor Co. v. Reid Mfg. Co.*, 113 N. W. 591, 593, 150 Mich. 118.

A seller, in a contract of sale fixing the time for payment for each installment of goods delivered, does not, by accepting payment for installments after the expiration of the time fixed for the payment, and after his notification to the buyer of his election to rescind the contract for breaches due to the failure to pay within the time prescribed, "waive" his right to insist on a cancellation of the contract. *Ohio Valley Buggy Co. v. Anderson Forging Co.*, 81 N. E. 574, 575, 578, 168 Ind. 593, 11 Ann.-Cas. 1045 (quoting and adopting definition in *Bish. Cont.* § 792).

Where a seller treats a contract as a vital obligation, after ascertaining the breach of a covenant thereof authorizing rescission, and accepts the buyer's orders, acting as though the contract was still in force, such act constitutes a "waiver" of the right to rescind the contract. *Bernard v. Sloan*, 84 Pac. 232-235, 2 Cal. App. 737.

A patient's own testimony, or that of others given with his knowledge and consent, as to his physical condition, and as to the details of his treatment, in an action for malpractice, is a "waiver," under Code Civ. Proc. § 836, of his privilege under section



834 not to have information acquired by a surgeon in his professional capacity disclosed. *Capron v. Douglass*, 85 N. E. 827, 828, 193 N. Y. 11, 20 L. R. A. (N. S.) 1003.

Where a note was executed in consideration of an agreement by the payee to surrender to a corporation its corporate stock owned and held by him but the manner of the surrender was not prescribed a delivery of the stock to the president of the corporation with whom and others the agreement was made was proper and a failure to make objection to the mode of performance was a "waiver" within Civ. Code, § 1501, and Code Civ. Proc. § 2076, declaring that objections to the mode of an offer of performance which the creditor has an opportunity to state at the time to the person making the offer, and which can be obviated by him, are waived if not then stated, etc. *Hammond v. Haskell*, 112 Pac. 575, 576, 14 Cal. App. 522.

A mortgage of an unplanted crop was executed and recorded before January 1st of the year in which the crop was to be grown. The mortgagor subsequently and before January 1st mortgaged the same crop to another person, and subsequently the second mortgagee purchased the crop from the grower and applied the proceeds of a resale to the payment of his claim. The second mortgagee informed the first mortgagee that he had taken a mortgage on the crop, and that he had furnished the money to the mortgagor with which to make the crop, but the first mortgagee said nothing about his mortgage. Subsequent to the execution of the second mortgage, the first mortgagee attempted to induce the second mortgagee to take up the claim of the first mortgagee against the mortgagor, but said nothing about the mortgage. Held, that the first mortgagee did not waive his right to rely on his mortgage as against the second mortgagee; a "waiver" being a voluntary and intentional abandonment or relinquishment of a known legal right. *Clemmons, Powers & Co. v. Metcalf*, 54 South. 208, 209, 171 Ala. 101.

A statement by a railroad employé, two days after the sale of a ticket, that it would be good as soon as trains began to run, was not a "waiver" of the time limit on the ticket, where the employé making the statement was not the one who sold the ticket, and he was not shown to have any authority to make the waiver. *Elliott v. Southern Pac. Co.*, 79 Pac. 420, 424, 145 Cal. 441, 68 L. R. A. 393.

Under the statutory provision that depositions shall remain in court 10 days, subject to exception, before the cause shall be taken up for hearing, unless, by agreement of the parties, such time shall be "waived," consent to the taking up of a cause before the expiration of the 10 days amounts to a "waiver." *Clark v. Callahan*, 66 Atl. 618, 619, 105 Md. 600, 10 L. R. A. (N. S.) 616, 12 Aqn. Cas. 162.

A "waiver" or abandonment by implication of an express statutory power is not to be favored and where the certificate of organization of a corporation and the stock certificates issued by it do not contain an express "waiver" of the power conferred on it by the statute authorizing corporations to consolidate an abandonment of the power by the corporation will not be implied. *Colgate v. United States Leather Co.*, 67 Atl. 657, 663, 73 N. J. Eq. 72.

#### Based on estoppel

"Waiver" rests fundamentally on the doctrine of estoppel, and is ordinarily one of fact for the jury; but where the facts are undisputed it is a matter of legal inference. *Pittsburg Const. Co. v. West Side Belt R. Co.*, 75 Atl. 1029, 1032, 227 Pa. 90.

The doctrine of "waiver," whereby a mutual benefit society waives its right to declare a forfeiture of a certificate, rests on the assumption that by reason of the action of the society the member has been misled to his prejudice. *Kennedy v. Grand Fraternity*, 92 Pac. 971, 976, 36 Mont. 325, 25 L. R. A. (N. S.) 78.

"A 'waiver' need not be based either on a new agreement or an estoppel." In re *Millers' & Manufacturers' Ins. Co.*, 106 N. W. 485, 488, 97 Minn. 98.

"The principle of 'waiver' rests on estoppel; \* \* \* that is, when the plaintiff has been misled into thinking that nothing further will be required of him, and has on that account failed to take further steps which he might have taken, defendant company cannot take advantage of such failure induced by it or its authorized agent acting for it in the matter for the purpose of defeating its liability under the policy." Hence, when the acts of a fire insurance company and its agent led insured into believing that no further proofs of loss would be required, the insurer has waived the right to demand such further proofs. *Griffith v. Anchor Fire Ins. Co.*, 120 N. W. 90, 92, 143 Iowa, 88 (quoting and adopting the definition in *Erway v. Fire Ass'n of Philadelphia*, 93 N. W. 290, 119 Iowa, 304).

#### Consideration

A "waiver," to operate as such, must arise either by contract or by estoppel; and, if by contract, it must be supported by such a valuable consideration as will support any other contract. *Atlantic Coast Line R. Co. v. Bryan*, 65 S. E. 30, 31, 109 Va. 523.

A "waiver" is a voluntary and intentional relinquishment of a known right, and must be supported by some consideration, or the act relied upon as a waiver must be such as to estop a party from insisting on the right claimed to have been relinquished. *Schillinger Bros. Co. v. Bosch-Ryan Grain Co. (Iowa)* 116 N. W. 132, 136.

An owner who has employed a contractor to erect a building within a specified time, the contract making time of the essence, does not waive nonperformance within the time specified by accepting what was done by the surety of the contractor in furnishing financial aid to the contractor to enable him to complete the building, though he may not be able to do so within the time specified, and in allowing the work to go on to completion after the expiration of the time, the owner not being in fault for the delay, a "waiver" operating by way of an estoppel, or being supported by valuable consideration. *Huntsville Elks' Club v. Garrity-Hahn Bldg. Co.* (Ala.) 57 South. 750, 751.

A "waiver" is nothing more than the relinquishment of some right, which, being personal, requires no consideration for its support, it does not necessarily rest on the doctrine of estoppel, but results from an agreement between the parties, express or implied. *First Nat. Bank of City of Brooklyn v. Gridley*, 98 N. Y. Supp. 445, 451, 112 App. Div. 398.

"Waiver" is a similar doctrine to that of election. If a party to a contract not in default has the right, by reason of the conduct of the other party who is in default, to elect between treating the breach as a discharge of the contract, or treating the contract as in full force and effect, he may, if he so chooses, take the latter alternative. If he elects so to do, his right to treat the contract as discharged is thereby waived. A waiver may have reference either to the question of discharge of the contract or to the question of claiming damages by reason of a breach. If there is a consideration for waiving damages, an express or implied agreement to that effect is valid. Acquiescence may sometimes amount to waiver. Waiver includes the idea of intent, express or implied; but legal intent will often be presumed from one's conduct, and sometimes a party will not be allowed to overcome this by setting up what was his private purpose or intent. If a vendor agreed to ship certain personal property within a stated time, and did not do so, but shipped it some days later, and thereafter wrote to the purchaser that he had made the shipment, to which the purchaser replied that he would remit to the vendor for the "first payment" upon the arrival of the cars, and there was no evidence of any consideration for this statement in the letter, or that the vendor had acted upon it, or had done anything in reliance upon it, this did not constitute, as matter of law, such a waiver of any right on the part of the purchaser to claim damages resulting from a delay in the shipment as to authorize the presiding judge, in a suit by the vendor against the vendee for the purchase price, to refuse to admit evidence on the subject of damages, and to direct the jury to find a verdict in favor of the vendor for the

full amount of the purchase price. *Alabama Const. Co. v. Continental Car & Equipment Co.*, 62 S. E. 160, 163, 131 Ga. 365 (citing 3 Page, Cont. § 1494 et seq., and section 1506 et seq.; *Van Winkle v. Wilkins*, 7 S. E. 644, 81 Ga. 94, 12 Am. St. Rep. 299; *Poland Paper Co. v. Foote & Davies Co.*, 45 S. E. 374, 118 Ga. 458).

#### Election to forego advantage

A "waiver" is the voluntary and intentional relinquishment of a known right, and implies an election to dispense with something of value or forego some advantage which the party waiving it might, at his option, have demanded or insisted upon. *Clark v. West*, 86 N. E. 1, 5, 193 N. Y. 349.

A buyer paying for stock and then accepting a delivery thereof after the date fixed for delivery, notwithstanding the depreciation in its market value, does not thereby waive his right to recover the damages sustained for the refusal to deliver on the designated date; a "waiver" being the relinquishment of a known right and implying an election to dispense with something of value or some advantage which the party might insist on. *Chapman v. Fowler*, 116 N. Y. Supp. 962, 964, 132 App. Div. 250.

"Waiver" is intentional relinquishment of a known right, implying an election to forego some advantage which the party might at his option have insisted on. *Vicksburg Waterworks Co. v. J. M. Guffy Petroleum Co.*, 38 South. 302, 309, 86 Miss. 60 (citing *Davis v. Hoopes*, 33 Miss. 173; *Goodall v. Stewart*, 3 South. 257, 65 Miss. 157; *Moak v. Bryant*, 51 Miss. 560; *Sullivan v. Board of Supervisors of Lafayette County*, 58 Miss. 790).

#### Equitable estoppel distinguished

Estoppel in Pais distinguished, see Estoppel in Pais.

"Waiver" and "estoppel" are not synonymous, for, while they have attributes in common there are still marked differences; waiver being voluntary and intentional, while estoppel in pais may arise from an involuntary or unintentional act, or may result from an act which operates to the injury of another, while there may be a waiver while the opposite party is beneficially affected. Estoppel may arise between consistent remedies, but it depends rather upon what a party caused his adversary to do; while waiver depends on what one himself intended to do. *Kennedy v. Manry*, 66 S. E. 29, 31, 6 Ga. App. 816.

A "waiver" is a voluntary and intentional relinquishment of a known right, and may be shown by the express contract or other affirmative act of the party charged therewith, or it may be inferred from such conduct as warrants the conclusion that a waiver was intended. The term "waiver" generally implies an intention on the part of

the person possessing some right under the contract or the law to relinquish it for the benefit of another. It is ordinarily personal, and, in the absence of some special agreement or consideration, its existence is to be determined solely from the conduct of the parties making it, independent of the acts of the other party affected. It is distinguished from "estoppel," in that this personal element is not an essential of estoppel. Nor in estoppel is the intention to relinquish a right necessarily present; estoppel in pais arising in a case where, by the fault of one person, another has been induced, ignorantly or innocently, to change his position for the worse, and it being essential to an estoppel that the representation or concealment relied on must be made with the intention that the other party shall act or rely on it, that the opposite party must have been induced to act, and must have acted to his injury thereon. *Johnson v. Spencer*, 96 N. E. 1041, 1042, 49 Ind. App. 166.

"Waiver" is a different matter from estoppel, for, to constitute a waiver, action to the prejudice of the party in reliance on the conduct of the party seeking to enforce a forfeiture is not essential, while such reliance is essential where estoppel is sought to be shown. *Wandell v. Mystic Trollers*, 105 N. W. 448, 450, 130 Iowa, 639.

"Waiver" of a right or benefit may be established by the actions, declarations, acquiescence, or silence of a party, as well as by his expressed consent and approval. It may be said to occur wherever one in possession of a right conferred by law or contract, and knowing the attendant facts, does or forbears to do something inconsistent with the right, or of his intention to rely upon it, in which he is said to have waived it, and he is "estopped" from claiming anything by reason of it afterward. While it is not, in the proper sense of the term, a species of "estoppel," yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies, or objections which he is entitled to assert, he will be estopped to insist upon such rights, remedies, or objections to the prejudice of the one misled. In order to work an estoppel, it is not necessary that acts or declarations should be made to mislead, but it is sufficient if they were calculated to and did in fact mislead. *Marine Iron Works v. Wiess*, 148 Fed. 145, 153, 78 C. C. A. 279 (quoting and adopting statements in *Bish. Cont.* § 792; 16 Cyc. 805; *Swain v. Seamens*, 9 Wall. 274, 19 L. Ed. 554).

"Waiver" is sometimes the express abandonment of a right. More frequently it is implied from acts that are inconsistent with its continued assertion. \* \* \* 'Estoppel' is the shield of justice, interposed for the protection of those who have not been wise or strong enough to protect themselves. It

is the special grace of the court, authorized and permitted to preserve equities that would otherwise be sacrificed to cunning and fraud." *Johnson v. Etna Ins. Co.*, 51 S. E. 339, 341, 123 Ga. 404, 107 Am. St. Rep. 92 (quoting and adopting definition in *Ostrander, Fire Ins.* § 366).

#### As estoppel

Estoppel in pais distinguished, see Estoppel in Pais.

That, in an action on an employer's liability policy, plaintiff alleged that defendant "waived" the right of objection that a claim was not covered by the policy, did not restrict it to a recovery in accordance with the doctrine of waiver, if the facts showed an estoppel; the terms "waiver" and "estoppel" being sometimes loosely used interchangeably, especially with reference to situations arising under insurance policies. *Humes Const. Co. v. Philadelphia Casualty Co.*, 79 Atl. 1, 3, 32 R. I. 246, Ann. Cas. 1912D, 906.

A "waiver" operates as an estoppel on the party who waives; but it is not essential to a waiver that a party in whose favor it is made must prove all the elements of an estoppel in pais before he is entitled to avail himself of the waiver. *Loftis v. Pacific Mut. Life Ins. Co. of California*, 114 Pac. 134, 139, 38 Utah, 532.

"Waiver" is not, in the proper sense, a species of estoppel, unless the conduct of one party has induced the other to take such a position that he will be injured if the first be permitted to repudiate his acts. The kind of waiver capable of being described as an estoppel should have the marks of an estoppel, by causing the innocent party to forego some right, or otherwise to change his position. *Dary v. Providence Police Ass'n*, 62 Atl. 513, 515, 27 R. I. 377 (quoting and adopting definition in 16 Cyc. 805; *Bigelow, Estop.* [5th Ed.] p. 660, note 1).

"Laches," "waiver," and "estoppel" are distinct defenses. Laches, with some supporting circumstances, may run into waiver, and likewise into estoppel; but each has its own individuality. Waiver may run into estoppel. *Berwind-White Coal M. Co. v. Metropolitan S. S. Co.*, 173 Fed. 806, 809.

While the terms "waiver" and "estoppel," as applied to the law of insurance contracts, are usually considered as synonymous, yet there are some essential differences between them, as a waiver involves the act or conduct of one of the parties to the contract only, and is the intentional relinquishment of a known right, and does not necessarily imply that one has been misled to his prejudice, while an estoppel involves the act or conduct of both parties, and may arise where there is no intent to mislead, and also involves the misleading of one party to his prejudice. *Webster v. State Mut. Fire Ins. Co.*, 69 Atl. 319, 320, 81 Vt. 75.

While "waivers" and "estoppels" are theoretically very different things, and the distinction between them is one easy to preserve when express waivers are under consideration, it is nevertheless true that the dividing line between waivers implied from conduct and estoppels oftentimes becomes so shadowy that, in the law of insurance, the two terms have come to be quite commonly used interchangeably. When the term "waiver" is so used, however, the elements of an estoppel almost invariably appear, and it is quite apparent that it is employed to designate, not a pure waiver, but one which has come into an existence of effectiveness through the application of the principles underlying estoppels. Thus an insurance company is estopped to deny waiver of proof of loss, notwithstanding the provision of the policy that no representative of the company shall have power to waive any provision or condition of the policy, except by writing "Indorsed" thereon, where, after the fire, it sends a general agent to insured, who, after being furnished by insured with certain information, tells him that there are no further papers for him to make out, and that he, the agent, will attend to the rest. *Bernhard v. Rochester German Ins. Co.*, 65 Atl. 134, 136, 79 Conn. 388, 8 Ann. Cas. 298.

#### Existing right

There can be no "waiver" unless when it is exercised the right or privilege to be waived existed. *State ex rel. Drifill v. City of Anaconda*, 111 Pac. 345, 347, 41 Mont. 577.

The word "waiver" implies that something may be relinquished. Under Civ. Prac. Act, § 341 (Comp. Laws, § 3436), providing that, to render an appeal effectual, an undertaking shall be executed, an undertaking cannot be waived by stipulation. *Hoffman v. Owens*, 103 Pac. 414, 415, 31 Nev. 481, Ann. Cas. 1912A, 603.

"The term 'waiver,' or 'to waive,' implies the abandonment of a right which can be enforced or of a privilege which can be exercised; and there can be no waiver unless at the time of its exercise the right of privilege waived is in existence. There can be no waiver of a right that has been lost." *National Paraffine Oil Co. v. Chappellet*, 88 Pac. 506, 507, 4 Cal. App. 505 (quoting and adopting definitions in *San Bernardino Inv. Co. v. Merrill*, 41 Pac. 487, 108 Cal. 490).

"Waiver" has generally been defined by the courts as the voluntary relinquishment of a known right. Without the existence of a right, there can be no abandonment, for there would be nothing to abandon. Statements of local agents of a fire insurance company that one of them was authorized to adjust a loss, and the action of this agent in making out proofs of loss, and professing to adjust the claim, were not a waiver by the company of a provision of the policy that action thereon must be commenced within one

year after loss. *Barry & Finan Lumber Co. v. Citizens' Ins. Co.*, 98 N. W. 761, 762, 136 Mich. 42 (citing *Ostrander, Ins.* § 57).

"Waiver" generally involves the relinquishment of a known or existing right. It cannot be a basis for waiver of, or estoppel to assert, conditions in a fire policy against incumbering the property without consent written on the policy, that insured, when applying for the policy, told the agent he intended to put on a small mortgage on the property, as he did after obtaining the policy, and that the agent told him this would make no difference; these matters not relating to a known or existing fact, but to something intended to be done in the future. *McCarty v. Piedmont Mut. Ins. Co.*, 62 S. E. 1, 2, 81 S. C. 152, 18 L. R. A. (N. S.) 729.

In an action for goods lost by a carrier, and the statutory penalty for failure to adjust the claim within the time allowed after a claim is filed with the agent at the destination of the goods, it appeared that plaintiff had had a conversation with the carrier's local agent at the destination of the goods, who told him to send his claim to the general freight agent, which he did. In the correspondence with such agent there was no mention of the statutory penalty; and at that time defendant was not liable for it. Defendant had no right to compel plaintiff to file his claim with the local agent. Held, that the direction by such agent to send the claim to the general agent was not a waiver of the statutory requirement that the claim must be "filed" with the agent at the destination of the goods before the penalty sued for can be recovered, because "waiver" is the voluntary relinquishment of some existing right. *King v. Atlantic Coast Line R. Co.*, 68 S. E. 769, 770, 86 S. C. 510.

#### Knowledge and intention

"Waiver" is an intentional act. *Findley v. United Rys. Co. of St. Louis*, 141 S. W. 866, 869, 238 Mo. 6.

A "waiver" is the intentional abandonment or relinquishment of a known right; the matter of intention being the essential element. *Francis v. Supreme Lodge A. O. U. W.*, 130 S. W. 500, 501, 150 Mo. App. 347.

"Waiver" is the intentional relinquishment of a known right after knowledge of the facts. *Alden v. Mayfield*, 127 Pac. 45, 48, 164 Cal. 6.

A "waiver" is the intentional abandonment of a known right, and exists only when the party making it is possessed of knowledge in respect to the matter about which the waiver is asserted, and acted advisedly. *Oehler v. Phoenix Ins. Co. of Hartford, Conn.*, 139 S. W. 1173, 1176, 159 Mo. App. 696; *Connell v. Clifford*, 88 Pac. 850, 851, 39 Colo. 121 (quoting and adopting definitions in *Pence v. Langdon*, 99 U. S. 578, 581, 25 L. Ed. 420; *Scott v. Jackson*, 26 Pac. 898, 899, 89 Cal.

262, and citing *Brown v. Cockrell*, 33 Ala. 38, 47).

A person is not bound by a "waiver" of his rights, unless it be made with knowledge of the rights he intends to waive, and the fact that he intends to waive them must be made to appear. *Atlantic Coast Line R. Co. v. Bryan*, 65 S. E. 30, 32, 109 Va. 523.

There can be no "waiver" without actual or implied intent to waive. The intent may be actual or conclusively presumed from conduct without any element of estoppel; and such intent is conclusively presumed when a party chooses one of two plainly inconsistent remedies. *J. I. Case Threshing Mach. Co. v. Rice*, 139 N. W. 445, 446, 152 Wis. 8.

A "waiver" is a voluntary relinquishment of a known right, and before it will be enforced it must clearly appear that the party against whom it is sought to be enforced was in possession of all material facts affecting it. *Norton v. Catholi: Order of Foresters*, 114 N. W. 893, 895, 138 Iowa, 464, 24 L. R. A. (N. S.) 1030.

A "waiver" means the intention of relinquishment of a known right. It signifies nothing more than an expression of an intention not to insist upon such right. Both intent and knowledge, active or constructive, of the facts, are therefore essential elements. The intent may be inferred from facts and circumstances, as well as found in declarations of the party, and the knowledge may also be either active or constructive. In *re Millers' & Manufacturers' Ins. Co.*, 106 N. W. 485, 488, 97 Minn. 98. See, also, *Hendrickson v. Grand Lodge A. O. U. W.*, 138 N. W. 946, 948, 120 Minn. 36.

"Waiver" is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it, and intention is a question of fact. *Gafford v. Globe Transfer & Storage Co.*, 128 Pac. 228, 230, 71 Wash. 204.

"Waiver" implies the abandonment of some right which can be exercised or the renunciation of some benefit or advantage which, but for such waiver, the party relinquishing would have enjoyed; but generally there can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which would have enabled him to take effectual action for their enforcement, as no one can acquiesce in an injury while ignorant that it has been committed and that the effect of his action will be to confirm it. *Barroll v. Brice*, 80 Atl. 1035, 1038, 115 Md. 498.

"Waiver" involves the notion of an intention entertained by the holder of some right to abandon or relinquish, instead of insisting on the right. *Murmann v. Wissler*, 92 S. W. 355, 357, 116 Mo. App. 397 (quoting

and adopting *Fairbanks, Morse & Co. v. Bassett*, 71 S. W. 1113, 98 Mo. App. 53).

The doctrine of "waiver" is not peculiar to insurance contracts. To constitute a technical waiver, there need only be an intention to waive, either expressed or plainly to be inferred from circumstances. *Appel v. People's Surety Co.*, 132 N. Y. Supp. 200, 202, 148 App. Div. 70.

Though a "waiver" is essentially a matter of intention, such intention need not necessarily be proved by express declarations, but it may be inferred from the acts and conduct of the party. *Stewart v. Leonard*, 68 Atl. 638, 640, 103 Me. 128. See, also, *Burnham v. Austin*, 73 Atl. 1089, 1091, 105 Me. 196.

"Waiver," or acquiescence, which is a species of waiver by tacit assent, implies abandonment of some right which can be exercised, or the renunciation of some benefit or advantage which, but for such waiver, the party relinquishing would have enjoyed. As a general rule, there can be no waiver, unless the parties against whom it is claimed had full knowledge of his rights and of facts which would enable him to take effectual action to enforce his rights, and no one can acquiesce in a wrong while ignorant that it has been committed. *Dague v. Grand Lodge Brotherhood of Railroad Trainmen*, 73 Atl. 735, 738, 111 Md. 95.

To constitute a "waiver" of a condition in a contract of sale requiring payment of a portion of price in cash, there must be, not only an act of delivery, but an intent not to insist on immediate payment as a condition of the title not passing. *Ewing v. Sylvester* (Tex.) 94 S. W. 405, 406.

When a purchaser, in his written order for goods, stipulates that the title to them shall remain in the seller until payment of the price "in money," and it is therein also provided that a note may be given for the price, the acceptance by the seller of the purchaser's negotiable note for the price is not to be deemed a "waiver" of the condition of the sale, so as thereby to pass the title to the purchaser, unless it appears to have been so intended. *Anderson Carriage Co. v. Bartley*, 67 Atl. 567, 569, 102 Me. 492.

"Waiver" is the intentional relinquishment of a known right." Where, in an action against a nonresident in a state court, its attorney was directed to appear solely for the purpose of removing the cause to the federal court, and on the last day for filing an answer for the cause the attorney filed a petition for removal and removal bond, and applied to the judge for an order of removal, and when, over objection, the court postponed a hearing of the application for removal to the following week, the attorney, believing it necessary to sustain his right to remove, and for that purpose only, orally asked

for and obtained an extension of time to plead, such application for time should be construed as an application for an extension of time to appear for the purpose of pleading to the jurisdiction, or otherwise, and did not constitute an appearance sufficient to confer jurisdiction, for there was no relinquishment of the intention to deny the right of the state court to proceed in the cause. *Waters v. Central Trust Co. of New York*, 126 Fed. 469, 472, 62 C. C. A. 45 (citing *Shaw v. Spencer*, 100 Mass. 382, 97 Am. Dec. 107, 1 Am. Rep. 115; *Hoxie v. Home Ins. Co.*, 32 Conn. 21, 85 Am. Dec. 240).

An agent of an insurance company when taking an application and when delivering the policy knew that insured was in a hospital, but was informed that he was there for a slight operation. When collecting weekly premiums, he was informed that insured was getting along nicely. Insured represented that he had never had heart disease, while as a fact he had suffered from the disease for more than a year, and was in the hospital on account thereof, and he died therefrom within six weeks after the issuance of the policy. Held, that the misrepresentation was not waived; a "waiver" existing where one in possession of any right does or forbears the doing of something inconsistent with its existence and with full knowledge of the material facts. *Benson v. Metropolitan Life Ins. Co.*, 144 S. W. 122, 161 Mo. App. 480.

An absolute refusal to pay life insurance, grounded on the merits of the case, a denial of all liability, or a negotiation with insured without objection to the proof of death, has each been held to constitute a "waiver" of the requirement to produce proofs of death. Where the beneficiary in a policy filed proofs of death, and insured declined to pay the claim on the ground that the proofs which plaintiff supplied showed that insured was afflicted with consumption before the policy was issued, and that there was therefore a breach of warranty, and there was no evidence that insurer knew or had reason to believe that the proofs furnished did not relate to insured, there was no waiver of the production of the necessary proofs required by the policy, so as to entitle plaintiff to recover on evidence that the proofs furnished related to another. *Mutual Life Ins. Co. v. Thomas*, 61 Atl. 293, 294, 101 Md. 501 (citing *McElroy v. John Hancock Mut. Ins. Co.*, 41 Atl. 112, 88 Md. 149, 71 Am. St. Rep. 400).

A "waiver" is the voluntary relinquishment of some known right, benefit, or advantage which the party otherwise would have enjoyed, it being essentially a matter of intent, and, when the only proof of that intent rests in what a party does or forbears to do, his acts or omissions should be so manifestly indicative of an intent to voluntarily relin-

quish a then known particular right or benefit that no other reasonable explanation is possible, full knowledge of all the material facts that establish such right being necessary, and so that, where a health policy provided that insured should pay in advance without notice his specified assessments, the insurer, which had no information of facts establishing a forfeiture of the policy except what it had acquired from its investigations after his proof of claim for benefits was presented, and which turned the claim over to its attorney for investigation, did not waive the forfeiture by receiving in the ordinary course of business, and receipting for, two monthly assessments during the period of the investigation, and before all the material facts had been acquired, showing that insured's answers in his application were untrue, insured knowing when he voluntarily made the payments that his claim had been turned over to the company's attorney. *Berman v. Fraternities Health & Accident Ass'n*, 78 Atl. 462, 464, 107 Me. 368.

The "waiver" of a right presupposes a knowledge of the right waived, and therefore, before defendant can be held to be estopped, or to have waived any of its rights, by reason of the conduct of a subordinate lodge or its officers, it must be shown that it or they had knowledge of the facts. *Whigham v. Supreme Court I. O. F.*, 75 Pac. 1067, 1069, 44 Or. 543.

"A 'waiver' is an intentional relinquishment of a known right, implying an election to forego some advantage which one might, at his option, have insisted upon, and, to be effective as an estoppel, there must be, first, a knowledge of an existence of the right, and, second, an intention to relinquish it." An act of the general agent of defendant benefit society in accepting a premium without knowledge of the insured's death did not constitute a waiver by the forfeiture incurred by the insured's default. *Miller v. Head Camp*, 77 Pac. 83, 84, 45 Or. 192.

A "waiver" is an "intentional relinquishment of a known right, and there can be no waiver, unless the person against whom the waiver is claimed had full knowledge of his rights. \* \* \* Neither will waiver be implied from slight circumstances, but must be evidenced by an unequivocal and decisive act clearly proven." To be valid, a waiver must be made intentionally and voluntarily. The existence of an intent to waive is a question of fact, and must be made to clearly appear. *Hopkins v. Northwestern Nat. Life Ins. Co.*, 83 Pac. 1019, 1020, 1021, 41 Wash. 592.

A policy provided for forfeiture if the insured should become a railroad fireman without the insured's consent. Insured was killed while acting as such. In response to a request for blanks for proofs of death, the insurer sent blanks to plaintiff's attorney, containing a provision that the insurer, in

furnishing the blanks, did so on the express stipulation that it did not waive the right to determine any question as to its liability on the policy. These blanks were not used, but plaintiff submitted an affidavit concerning insured's death, showing that it was caused by the explosion of a boiler on an engine on which insured was fireman. This was refused, the insurer requiring proofs to be made on its blank forms, and sent plaintiff a new set, containing an indorsement similar to the originals, which plaintiff filled out and submitted. Held, that the sending of the second set of blanks, with knowledge of insured's occupation and manner of death, was not a "waiver" of the forfeiture, which ordinarily must consist of an intentional release of a right. *Elhart v. Pacific Mut. Life Ins. Co.*, 92 Pac. 419, 420, 47 Wash. 659.

Where, in an action on an accident policy, the first defense was an exposure to danger which limited recovery to one-fifth of the policy, and the second defense was the untruth of the warranties as to health and habits, which, under the policy, made it void, and on the trial plaintiff admitted on record the untruth of the warranties, and before trial defendant tendered one-fifth of the policy in accordance with the first defense, which plaintiff refused, the tender was no waiver of a right to insist on the second defense, as there was no evidence that when the offer was made the defendant knew the false warranties; a "waiver" being the voluntary relinquishment of a known right. *Kelly v. United States Health & Accident Ins. Co.*, 65 S. E. 949, 950, 84 S. C. 95.

#### As quasi estoppel

See Quasi Estoppel.

#### Ratification distinguished

"Ratification" and "waiver" are not synonymous. To approve is the gist of ratification, while to abandon or relinquish is the gist of waiver. *Holloway v. Darden*, 53 South. 187, 188, 168 Ala. 256 (citing 7 Words and Phrases, p. 5928 et seq.).

#### Voluntary act

"Waiver" is the voluntary relinquishment of a known right." *Montgomery v. Seaboard Air Line Ry.*, 53 S. E. 987, 988, 73 S. C. 503.

A "waiver in pais" is the voluntary relinquishment of a known right. *Bard v. Fireman's Ins. Co.*, 81 Atl. 870, 871, 108 Me. 506.

A "waiver in pais" is more than a passive, negative state of mind. It is a positive, affirmative act; not mere negligence to claim a right, but a voluntary choice not to claim it. *Hurley v. Farnsworth*, 78 Atl. 291, 292, 107 Me. 306.

A "waiver" is the voluntary relinquishment of some known right, benefit, or advantage, and which, except for such waiver, the

party otherwise would have enjoyed. *Gifford v. Workmen's Ben. Ass'n*, 72 Atl. 680, 681, 105 Me. 17, 17 Ann. Cas. 1173; *Stewart v. Leonard*, 68 Atl. 638, 640, 103 Me. 128; *Burnham v. Austin*, 73 Atl. 1089, 1091, 105 Me. 196; *Gray Lumber Co. v. Harris*, 68 S. E. 749, 752, 8 Ga. App. 70; *Mutual Life Ins. Co. of New York v. Durden*, 72 S. E. 295, 296, 9 Ga. App. 797.

A "waiver" is a voluntary relinquishment of some known right, benefit, or change, which except for such waiver, the party would have enjoyed. A party cannot be deemed to waive by word or act a right which he does not know that he possesses. *Rosen v. German Alliance Ins. Co.*, 76 Atl. 688, 689, 106 Me. 229.

"Waiver" is a voluntary relinquishment of a known right, benefit, or advantage which would have otherwise been enjoyed. It is essentially a matter of intention, which may be proved by a course of acts or conduct or by such neglect or failure to act as to induce the belief that it was the intention and purpose to waive. *Holt v. New England Telephone & Telegraph Co.*, 85 Atl. 159, 110 Me. 10.

A "waiver" is the voluntary relinquishment of a known right, benefit or advantage. Voluntary choice is the essence of waiver, and the doctrine of waiver is not necessarily predicated on estoppel. *Voss v. Northwestern Nat. Life Ins. Co.*, 118 N. W. 212, 215, 137 Wis. 492.

"Waiver" is a voluntary act, and is not an act forced upon a party by the court, so that where defendant objected to proof of conversations to show a contract, as being forbidden by the statute of frauds, and the objection was overruled and the evidence admitted, defendant did not waive such objection by giving his own understanding of the same conversations. *McKee v. Rudd*, 121 S. W. 312, 320, 222 Mo. 344, 133 Am. St. Rep. 529.

A "waiver" is the voluntary abandonment or relinquishment by a party of some right or advantage. *Draper v. Oswego County Fire Relief Ass'n*, 82 N. E. 755, 756, 190 N. Y. 12.

A "waiver" is a voluntary relinquishment of the right that one party has in his relations to another. *Astrich v. German-American Ins. Co.*, 131 Fed. 13, 20, 65 C. C. A. 251.

In order to constitute a "waiver" by the insurer of a provision of the policy, there must be some affirmative act on its part, such as to induce insured to rest on a well-founded belief that strict performance of the condition claimed to be waived will not be insisted upon, and mere neglect to insist upon a forfeiture is of itself insufficient. *Rundell & Hough v. Anchor Fire Ins. Co.*, 105 N. W. 112, 128 Iowa, 675, 25 L. R. A. (N. S.) 20.

The silence of a defendant on trial for crime, or his failure to object or protest against an illegal discharge of the jury before verdict, does not constitute a "consent" to such discharge, or a "waiver" of the constitutional inhibition against a second jeopardy for the same offense. *Allen v. State*, 41 South. 593, 52 Fla. 1, 120 Am. St. Rep. 188, 10 Ann. Cas. 1085 (citing *State v. Richardson*, 25 S. E. 220, 47 S. C. 166, 35 L. R. A. 238).

#### WAIVER OF JURY TRIAL

A motion by each party after impaneling of the jury to direct a verdict, made before evidence is offered, is a "waiver" of the jury trial and a submission to the court. *Strangward v. American Brass Bedstead Co.*, 91 N. E. 988, 990, 82 Ohio St. 121.

#### WAIVER OF NOTICE OF PRESENTMENT, DISHONOR, AND PROTEST

Where an indorser of a note executed by a corporation of which he was president "waived all notice of presentment, dishonor, and protest," he did not thereby waive presentment and demand of payment. *Hayward v. Empire State Sugar Co.*, 93 N. Y. Supp. 449, 450, 105 App. Div. 21.

#### WALK

See Crosswalk.

In railroad parlance, "walk" is used to indicate the involuntary movement of an engine, caused by steam leaking into the cylinders, causing the same to move without any action on the part of the operatives. *St. Louis, I. M. & S. Ry. Co. v. Fisher*, 97 S. W. 279, 80 Ark. 376.

There is no variance between a notice of a claim against city for injury, stating that the injury was caused by a fall on the "walk" near a certain street corner, and a petition, referring to the walk as a "crosswalk." "Walk", and "crosswalk" mean the same thing. Both are sidewalks, which the city is bound to keep in repair. *Ottawa v. Green*, 83 Pac. 616, 618, 72 Kan. 214.

#### WALKING

See Street-Walking.

#### WALL

See Division Wall; Exterior Walls; Green Wall; Partition Wall; Party Wall; Retreat to the Wall; Self-Supporting Iron Wall.

As building, see Building (In Insurance). Said wall, see Said.

See, also, Fence.

#### WALL-BEARING JOB

Labor Law (Laws 1897, p. 468, c. 415) § 20, relating to the protection of persons employed on buildings in cities, which provides that, if the floor beams are of iron or steel,

the contractors for the iron or steel work of buildings in course of construction or the owners of such buildings shall thoroughly plank over the entire tier of iron or steel beams on which the structural or steel work is being erected, except certain specified spaces, is not limited to any particular class of buildings, and a contractor or the owners were not excused from complying with the statute because the job was a "wall-bearing job," in which the iron floor beams projecting into brick walls rested on the walls themselves, instead of on other structural iron or steel work. *Schramme v. Lewinson*, 110 N. Y. Supp. 599, 600, 126 App. Div. 279.

#### WALL IN COMMON

The words "wall in common," as used in Code, tit. 14, c. 10, relating to party walls, means a wall for the common benefit and convenience of both the tenements which it separates. *Iederer & Strauss v. Colonial Inv. Co.*, 106 N. W. 357, 358, 130 Iowa, 157, 8 Ann. Cas. 317.

#### WALNUT

Not dutiable as vegetable, see Vegetable.

#### WANNEY

"Waney" means having a beveled edge, as the wane of a log, which is the beveled edge of a board sawed from a log; but timber, though not absolutely square-edged throughout its entire length, is not waney, within the meaning of a contract, where it would show no wane when cut down to the prescribed proportions. *Burton v. Jennings*, 185 Fed. 382, 385, 107 C. C. A. 438.

#### WANT

See Natural Want.

A statement by a surety to the holder of a note, "I want it settled," comes far short of being a notice or request to forthwith proceed and collect the note, and may be said to be simply the expression of a wish or desire which every honest man would entertain with reference to a pecuniary obligation resting on him. *Bowling v. Chambers*, 77 Pac. 16, 19, 20 Colo. App. 113.

#### As need or require

Where a clause in a will directed the trustees to pay the testator's wife out of the income of his estate during her natural life, and at suitable periods, such sums of money that she should "want or require" for her comfortable maintenance, and, during the minority of his children, for the support, maintenance, and education of such children also, the power and duty of deciding upon the amount wanted or required for the support and maintenance of the widow and minor children was intended to be upon the executors as trustees rather than upon the widow



so that the words "want or require" are an expression of necessity, equivalent to "need," and not to "wish or desire." *Coffin v. Watson*, 79 Atl. 275, 277, 78 N. J. Eq. 307.

#### **Failure synonyms**

An instruction in an action for personal injuries that, if plaintiff was injured on a certain day, "it then became her duty to use all reasonable care and precaution to minimize the damages that might result, and, if \* \* \* she failed to do this, then you cannot return a verdict for such damages that resulted by her want to exercise such care and precaution." was not so inaptly phrased as to be unintelligible to the jury notwithstanding that the word "want" was ill chosen, it being synonymous with "failure," so that it was error to refuse the charge, if otherwise correct and applicable, on the ground that it was meaningless and misleading. *Tiggerman v. City of Butte*, 119 Pac. 477, 478, 44 Mont. 138.

#### **WANT HER TO HAVE**

See 1 Want Her to Have.

#### **WANT OF JURISDICTION**

See Jurisdiction (Of Courts).

#### **WANT OF ORDINARY CARE**

There is a "want of ordinary care" on the part of the plaintiff only when, under all of the circumstances and surroundings of the case, he has done, or omitted to do, something which "an ordinarily careful and prudent person," in a like situation as the plaintiff, would not have done, or omitted to do, and which was the efficient and proximate cause of plaintiff's injury. The want of ordinary care, however, must be determined from the facts disclosed in each particular case, and is generally a question of fact for the jury, and not one of law. *Hone v. Mammoth Min. Co.*, 75 Pac. 381, 383, 27 Utah, 168.

#### **WANT OF PROBABLE CAUSE**

See, also, Probable Cause.

The "want of probable cause" does not mean the want of any cause, but the want of any reasonable cause, such as would persuade a man of ordinary care and prudence to believe in the truth of the charge. *Burt v. Smith*, 73 N. E. 495, 496, 181 N. Y. 1, 2 Ann. Cas. 576.

#### **WANTAGE**

The normal "outrage" or "wantage" is defined by the Board of General Appraisers as "the difference between the capacity of a cask or bottle and the quantity of wine or liquor which is usually placed in it, according to the custom of trade; a certain vacancy being allowed for the expansion of such wines and liquors." *Alexander D. Shaw & Co. v. United States*, 141 Fed. 469, 470.

#### **WANTON**

See Willful and Wanton.

"Wanton," when used to qualify negligence, means recklessness. *Mayes v. Metropolitan St. Ry. Co.*, 97 S. W. 612, 613, 121 Mo. App. 614.

A "wanton action" is not mere negligence, but means an action recklessly disregardful of right or consequences. *Marra v. New York Cent. & H. R. R. Co.*, 124 N. Y. Supp. 443, 445, 139 App. Div. 707.

In order that one may be held guilty of "willful or wanton conduct," it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result. *Montgomery St. Ry. v. Rice*, 38 South. 857, 142 Ala. 674.

"To constitute 'willful or wanton misconduct' there must be actual knowledge, or that which is esteemed in law as the equivalent of actual knowledge, of the peril of the person injured, coupled with a conscious failure to act to the end of averting the injury." Mere violation of a statutory duty is but simple negligence, and does not constitute "willful or wanton misconduct." *Smith v. Central of Georgia R. Co.*, 51 South. 792, 793, 165 Ala. 407.

The word "wanton," as used in an information for the unlawful, willful, and wanton killing of a dog, means that the act must have been committed, regardless of the rights of another, in reckless sport, or under such circumstances as evinces a wicked or mischievous intent without excuse. *Henderson v. State*, 111 S. W. 736, 53 Tex. Cr. R. 533.

In an action against a railroad for injuries to one ejected from a moving freight train, the definition of the word "wanton," in an instruction that "by wanton or willful injury is meant an injury deliberately and intentionally inflicted, or that the person or persons inflicting the injury acted with such utter disregard of plaintiff's safety that such an intention to injure him may be inferred therefrom," was too narrow in its scope. *Southern Pac. R. Co. v. Svensden*, 108 Pac. 262, 264, 13 Ariz. 111.

Though the word "wanton" is not an apt adjective in describing "negligence," still, when so used, the expression imports both wantonness and negligence. *Campbell v. Western Union Telegraph Co.*, 54 S. E. 571, 572, 74 S. C. 300.

The word "wanton" implies turpitude, and that the act to which it is applied was committed, or omitted, of willful, wicked pur-

pose. *Bailey v. North Carolina R. Co.*, 62 S. E. 912, 914, 149 N. C. 169.

A count is demurrable which in its charging part alleges that the act was recklessly "and" wantonly done while the specification shows that it was recklessly "or" wantonly done; "reckless" not being equivalent to "wanton" or "intentional." *Merrill v. Sheffield Co.*, 53 South. 219, 222, 169 Ala. 242.

The phrase "wanton and willful or reckless," in an instruction, in an action for injuries in a collision between vehicles driven by plaintiff and defendant, that though plaintiff was negligent, yet if defendant's conduct was wanton and willful or reckless, plaintiff might recover, might be considered as defining the doctrine of comparative negligence, which does not obtain in the state. *Buxton v. Ainsworth*, 101 N. W. 817, 818, 138 Mich. 532, 5 Ann. Cas. 146.

#### Act of lunatic

A "wanton" act is an unrestrained act, and the act of a lunatic is of that character. Thus, under a statute giving the widow and minor children of one killed by the careless, "wanton," or malicious use of firearms, not in self-defense, an action against the one doing the killing, a lunatic is liable in damages to the widow of a deputy sheriff, whom he killed without cause while the deputy was trying to take him in custody as a lunatic; the killing being "wanton" within the statute. *Young v. Young*, 132 S. W. 155, 156, 141 Ky. 76.

#### Malicious intent

"The term 'wanton' has no peculiar legal signification. It has various meanings depending on the connection in which it is used. It may mean sportively, playfully. When used to characterize wrongful conduct, it may mean foolhardiness, heartlessness, maliciousness, recklessness, reckless disregard of the right of others, gross carelessness, or negligence." As used in an instruction that if defendant beat plaintiff, causing him pain and injury, the jury should find for plaintiff, and that if they found that the assault was made "wantonly" they might also assess smart money, it meant maliciously, or done on purpose, without just cause or excuse, and could not have been understood by the jury to mean anything worse or more damaging to defendant. *Cody v. Gremmler*, 99 S. W. 46, 47, 121 Mo. App. 359.

The words "wanton," "willful," and "unlawful," do not necessarily mean, in statutes on malicious mischief, the same as "malicious." The word "malicious," as used in the statute on malicious wounding of domestic animals, means actual malice toward the owner, and any evidence which fairly shows that the act was necessary to prevent injury to the accused or to his property is admissible on the issue of malice. *People v. Jones*, 89 N. E. 752, 756, 241 Ill. 482, 16 Ann.

Cas. 332 (citing 25 Cyc. 1677; 5 Words and Phrases, p. 4307; *Glover v. People*, 68 N. E. 464, 204 Ill. 170).

#### Willful distinguished

While "wanton" is often used as synonymous with "willful," an injury may be wanton without being willful; "wanton" lacking the element of intent to injure contained in "willful." Thus a partial employment of available means, evidencing some degree of care, shows an injury not to be willful, although it may not establish that it was not wanton. *Adler v. Martin* (Ala.) 59 South. 597, 600.

"'Willful' imports a much more positive affirmative mental condition prompting the act than 'wanton.'" *Western Union Tel. Co. v. Catlett*, 177 Fed. 71, 75, 100 C. C. A. 489.

An act is "willful" where the resulting injury is intentional or the natural and probable consequence of the act. The word "wanton" is, however, more comprehensive, and to constitute "wantonness" it is not essential that the injury should have been intentional or the probable consequence of the wrongful act; it sufficing that the act indicates a reckless disregard of the rights of others, a reckless indifference to results, or that the injury is the likely and not improbable result of the wrongful act. *Conchin v. El Paso & S. W. R. Co.*, 108 Pac. 260, 262, 13 Ariz. 259, 28 L. R. A. (N. S.) 88.

#### WANTON INJURY

"Mere proof of an injury caused by breach of duty to exercise ordinary care is not sufficient to establish a cause of action for a 'wanton injury,' and a person cannot be permitted, in an action charging the latter, to recover for the former, if seasonable objections are made." *Turtenwald v. Wisconsin Lakes Ice & Cartage Co.*, 93 N. W. 948, 949, 121 Wis. 65 (citing *Wilson v. Chippewa Valley Electric R. Co.*, 98 N. W. 536, 120 Wis. 636, 66 L. R. A. 912).

Where an act is done or omitted under circumstances and conditions, known to the person, that his conduct is likely to or probably will result in injury, and through reckless indifference to consequences, or consciously and intentionally, he does a wrongful act, or omits an act which he ought to have done, the injury inflicted is "wanton." *Birmingham Ry., Light & Power Co. v. Drennen*, 57 South. 876, 878, 175 Ala. 338.

#### WANTON NEGLECT

A husband, whose income had been insufficient to support his wife and child, but who was not extravagant or unkind, and who, on reduction of his salary, went West, contributing practically nothing to the wife's support for five years, during which time she supported herself by keeping boarders, and who at the end of that time was earning a salary and hoping to have his wife and

child with him, was not guilty of "wantonly and cruelly" neglecting to support his family, within the meaning of the statute. *Carson v. Carson*, 138 N. W. 1076, 173 Mich. 452, 43 L. R. A. (N. S.) 255.

### WANTON NEGLIGENCE

See, also, Gross Negligence; Willful Negligence.

"Wanton negligence" always implies something more than mere negligence. *Bailley v. North Carolina R. Co.*, 62 S. E. 912, 914, 149 N. C. 169.

"Wanton negligence" consists in a heedless and reckless disregard for another's rights, with the consciousness that the act or omission to act may result in injury to that other. *Hazle v. Southern Pac. Co.*, 173 Fed. 431, 432.

"Wanton negligence" exists where the person guilty thereof, with knowledge of facts and circumstances likely to result in injury, exhibits a reckless indifference to the probable consequences thereof. *Kramm v. Stockton Electric R. Co.*, 86 Pac. 903, 904, 3 Cal. App. 606.

An instruction that, to constitute "wanton negligence," an act done or omitted must have been done or omitted with a present knowledge that injury would probably result, is correct. *Alabama Great Southern R. Co. v. Gust*, 39 South. 654, 658, 144 Ala. 373 (citing *Louisville & N. R. Co. v. Brown*, 25 South. 609, 121 Ala. 221; *Louisville & N. R. Co. v. Banks*, 31 South. 573, 132 Ala. 471).

"Willful or wanton negligence," whereby liability is incurred irrespective of the contributory negligence of the party injured, is a reckless disregard of the safety of the person or property of another, by failing, after discovering the peril, to exercise ordinary care to prevent the impending injury. *Gibbons v. Northern Pac. R. Co.*, 108 N. W. 471, 472, 99 Minn. 142 (citing *Alger, Smith & Co. v. Duluth-Superior Traction Co.*, 101 N. W. 298, 93 Minn. 314).

"Wanton and reckless negligence" on the part of a servant of a railroad company in dealing with a trespasser on its train "includes something more than ordinary inadvertence. In its essence it is like a willful, intentional wrong. It is illustrated by an act which otherwise might be unobjectionable, but which is liable or likely to do great harm, and which is done in a wanton and reckless disregard of the probable injurious consequences." Plaintiff, a boy from eight to nine years of age, who lived near a railroad and was familiar with trains, was injured in jumping off a slowly moving freight car on which he was stealing a ride. The immediate cause of his jumping was an order of the brakeman to get off "or I'll break your neck." There was no such apparent probability of

the injury caused as to indicate in the language of the brakeman wanton and reckless negligence. *Bjornquist v. Boston & A. R. Co.*, 70 N. E. 53, 55, 185 Mass. 130, 102 Am. St. Rep. 332.

A boy 8½ years old, with other boys, stepped from a retaining wall onto one of the cars of a standing train, and sat down on the car till it started up, when, proceeding to walk towards the rear of the train, he lost his balance and fell between the cars. He had played about the cars before, knew he was not wanted there, and was familiar with the signals for stopping and starting trains. Held, that a "wanton" disregard for his safety, making the company liable, was not shown by the starting of the train in the usual way, without first removing the trespassers or taking measures for their safety, though a few minutes before it was started a brakeman walked past them on the car, and he or another brakeman, while standing near them, signaled for the train to start. *Anternoltz v. New York, N. H. & H. R. Co.*, 79 N. E. 789, 790, 193 Mass. 542 (distinguishing *Bjornquist v. Boston & A. R. R.*, 70 N. E. 53, 185 Mass. 130, 102 Am. St. Rep. 332; *Albert v. Boston Elevated Ry.*, 70 N. E. 52, 185 Mass. 210; *Mugford v. Boston & M. R. R.*, 52 N. E. 1078, 173 Mass. 10).

### WANTONLY

See Rashly, Recklessly, or Wantonly.

"Wantonly" means without reasonable excuse, and implies turpitude, and an act to be done wantonly must be done intentionally and with design, without excuse and under circumstances evincing a lawless, destructive spirit. It is a reckless disregard for the lawful rights of others, such a degree of rashness as denotes a total want of care or a willingness to destroy, although destruction itself may have been unintentional. *Palmer v. Smith*, 132 N. W. 614, 617, 147 Wis. 70.

As used in a statute, describing an offense as consisting in willfully, maliciously, and "wantonly" tearing down, mutilating, defacing, or injuring any building standing or being upon the land of another, or held in trust, the word "wantonly" may be defined as showing reckless disregard of the lawful rights of the owner of the building, and heedlessness of the necessary results of the act complained of. *Werner v. State*, 67 N. W. 417, 419, 93 Wis. 266 (citing *Cobb v. Bennett*, 75 Pa. 326, 15 Am. Rep. 752; *Stucke v. Milwaukee & M. R. Co.*, 9 Wis. 202; *Lockwood v. Belle City St. R. Co.*, 65 N. W. 870, 92 Wis. 97).

By the expression "wantonly," as used in an indictment for slander by imputing to a woman a want of chastity, is meant that the words charged to have been uttered by defendant must have been uttered regardless of the consequences, in a reckless manner, or under such circumstances as evinced a mis-

chievous intent and without excuse. *Rainwater v. State*, 81 S. W. 38, 39, 46 Tex. Cr. R. 496.

"Wantonly," as used to characterize the act of shooting at a dog, so as to render the person shooting guilty of malicious mischief, means that the act must have been committed, regardless of the right of another, in reckless sport, or under such circumstances as evinced a wicked and mischievous intent, and without excuse. *Ross v. State* (Tex.) 108 S. W. 697.

The complaint in an action for the death of a person struck by a train, which alleges that defendant "unlawfully and grossly, negligently and wantonly, omitted to give any signal," and ran the train at a "speed grossly, negligently, and wantonly high," and "unlawfully, wantonly and grossly, carelessly and negligently," ran the train over decedent, and which charges a violation of a municipal ordinance regulating the speed of trains, and which states the facts showing the relative situation of the parties at the time and before the accident, charges negligence, for the word "unlawfully" refers to the alleged violation of the ordinance, and the words "willfully" and "wantonly" merely meaning "recklessly" or "heedlessly." *Neary v. Northern Pac. Ry. Co.*, 110 Pac. 226, 231, 41 Mont. 480.

A manifestly injurious act, done willfully, in reckless disregard of the rights of others, is done "wantonly," within a statute providing punishment for willfully and maliciously cutting trees; and a tree warden wantonly cut a tree on private land, where he did not try to ascertain what his rights and duties were. *Commonwealth v. Byard*, 86 N. E. 285, 286, 200 Mass. 175, 20 L. R. A. (N. S.) 814.

The term "wantonly" is of greater significance than "willfully," and includes it. *State v. Pellerin*, 43 South. 159, 160, 118 La. 547.

#### **Recklessly synonymous**

See Reckless—Recklessly—Recklessness.

#### **WANTONNESS**

"Wantonness" is the conscious failure by one charged with a duty to exercise due care and diligence to prevent an injury after the discovery of the peril, or under circumstances where he is charged with a knowledge of such peril, and being conscious of the inevitable or probable results of such failure. *Brown v. St. Louis & S. F. R. Co.*, 55 South. 107, 109, 171 Ala. 310; *Birmingham Ry., Light & Power Co. v. Williams*, 48 South. 93, 96, 158 Ala. 381.

"Wantonness" implies a willingness to inflict injury, or a willfulness in pursuing a course of conduct which will naturally or probably result in disaster, or an intent to perpetrate a wrong. *Louisville & N. R. Co. v. Orr*, 26 South. 35, 41, 121 Ala. 489 (citing

*Georgia Pac. R. Co. v. Lee*, 9 South. 230, 92 Ala. 262).

"Willfulness," or "wantonness," as applied in cases of injury to a person by a breach of duty, where the peril of the person injured is known, means a direct intent to inflict injury, or an act done, or omitted, with the consciousness that the act, or omission, will probably eventuate in injury. *Anniston Electric & Gas Co. v. Rosen*, 48 South. 798, 802, 159 Ala. 195, 133 Am. St. Rep. 321.

"Wantonness," as applied to negligence, consists in consciousness, from knowledge of the existing circumstances, that the conduct of the negligent person will probably result in injury, coupled with a reckless, but unintentional, disregard of the nature or probable consequences of his acts. *Southern Ry. Co. v. Bennefield*, 55 South. 252, 353, 172 Ala. 588, 35 L. R. A. (N. S.) 420.

"Wantonness" is a conscious failure by one charged with a duty to exercise due care to prevent an injury, after the discovery of the peril, with knowledge of the probable results of such failure, and it is immaterial whether such failure is occasioned by an act of omission or commission; and one may be guilty of wanton misconduct without actual intention to injure any one. *Birmingham Ry., Light & Power Co. v. Murphy*, 56 South. 817, 819, 2 Ala. App. 588.

"Wantonness" is the legal equivalent of "willfulness." In an action for personal injuries, a complaint averring that the act complained of was "willfully or wantonly done" is not demurrable because the averment is in the alternative form. *Mobile, J. & K. C. R. Co. v. Smith*, 40 South. 763, 764, 146 Ala. 312.

In order to constitute "willfulness," or "wantonness," or reckless indifference to probable consequences, the act done or omitted must be done or omitted with a knowledge or a present consciousness that injury will probably result; and this consciousness is not to be implied from mere knowledge of the elements of the dangerous situation a person may be in and negligent and inadvertent acts in respect of the peril. *Duncan v. St. Louis & S. F. R. Co.*, 44 South. 418, 423, 152 Ala. 118.

"Wantonness" is but descriptive of a condition so consciously leading to harmful results that the party charged may be deemed to have intended such results for his conscious dereliction or affirmative action. To a count in a complaint alleging willfulness and wantonness, by which decedent received fatal injuries, contributory negligence is no defense, and to such a count the only proper plea is a general traverse. *Louisville & N. R. Co. v. Perkins*, 44 South. 602, 604, 152 Ala. 133.

"Wantonness" consists in consciousness on the part of the person charged with it, from his knowledge of existing circumstances

and conditions, that his conduct will probably result in injury, and yet, with reckless indifference or disregard of the natural or probable consequences, but without intention to inflict injury, he does or fails to do the particular act; thus, where a motorman ran into a station at a rapid rate of speed, with knowledge that persons might be struck and injured, the facts were sufficient to indicate wantonness. *Birmingham Ry., Light & Power Co. v. Landrum*, 45 South. 198, 202, 153 Ala. 192, 127 Am. St. Rep. 25.

A count of a complaint alleging that defendant's servant "wantonly, recklessly, and intentionally" injured plaintiff amounts to a charge of wantonness and intentional injury. *Birmingham Ry., Light & Power Co. v. Lee*, 45 South. 292, 293, 153 Ala. 79 (citing *Alabama Great Southern R. Co. v. Williams*, 37 South. 255, 140 Ala. 237).

While carelessness does not necessarily imply "wantonness," wantonness may include negligence, since wantonness may exist without an intent to injure. *Kramm v. Stockton Electric R. Co.*, 86 Pac. 903, 904, 3 Cal. App. 606.

"Recklessness" and "wantonness" are stronger terms than ordinary negligence, and mean a disregard of security equivalent to bad faith and a willful or malicious disposition to injure. To constitute wantonness, there must be a design, purpose, or intent to do wrong or cause the injury, though recklessness amounting to an utter disregard of consequences will supply the place of a specific intent. *Chicago, R. I. & P. Ry. Co. v. Lacy*, 97 Pac. 1025, 1027, 78 Kan. 622.

As applied to acts causing injury by employes in charge of dangerous instrumentalities, "wantonness" implies conduct constituting a failure to take measures for the protection of a person in danger only when the employé actually knows of his presence, or when the situation is substantially the same as though the employé had such knowledge, to wit, when such knowledge may fairly be imputed to him. It is not enough for that purpose that exercise of ordinary diligence would have advised him of the fact, for his omission of duty in that regard amounts only to negligence, nor is it enough that he knows some one might be in the place of danger. The probability must be so great and its obviousness so insistent that the employé must be deemed to realize the likelihood that a catastrophe is imminent, and he would omit reasonable effort to prevent it because indifferent to the consequences. *Atchison, T. & S. F. Ry. Co. v. Baker*, 98 Pac. 804, 806, 79 Kan. 183, 21 L. R. A. (N. S.) 427.

"Wantonness" or willfulness is such gross want of care and regard for the rights of others as show a disregard of consequences or a willingness to inflict an injury. *Cleveland, C., C. & St. L. R. Co. v. Ricker*, 116 Ill. App. 428, 432.

"Willfulness," "wanton negligence," and "wantonness," are terms used in many states without any clearly defined distinction, but are, generally speaking, regarded as equivalent and interchangeable. *Pittsburgh, C., C. & St. L. Ry. Co. v. Ferrell*, 78 N. E. 988, 998, 39 Ind. App. 515.

"Wantonness" is an advertent or conscious failure to observe due care. *Tinsley v. Western Union Telegraph Co.*, 51 S. E. 913, 914, 72 S. C. 350.

"Wantonness" is properly defined as a conscious failure to observe due care; a conscious invasion of the rights of another; an intentional doing of an unlawful act, knowing such act to have been unlawful. *Bussey v. Charleston & W. C. Ry. Co.*, 55 S. E. 163, 167, 75 S. C. 116.

Each of the words, "wantonness," "willfulness," and "recklessness," embodies the element of malice, either express or implied, and are in law substantially the equivalent of each other, in so far as they give rise to an action based upon punitive damages. *Hull v. Seaboard Air Line Ry.*, 57 S. E. 28, 76 S. C. 278, 10 L. R. A. (N. S.) 1213 (citing *Pickett v. Southern Ry. Co., Carolina Division*, 48 S. E. 466, 69 S. C. 445).

## WAR

See Civil War; Contraband of War; In Time of War; Prisoners of War.

"War" is that state in which a nation prosecutes its rights by force. The "Boxer Uprising" in China, in June, 1900, during which the United States assembled an army of 15,000 men, over 5,000 of which were ordered to and did proceed to China to assist the forces of allied nations in quelling the uprising and to release the accredited representatives of the United States then imprisoned within the city of Peking, during which the pay of the officers and men in the United States military service was increased to a war basis, constituted "a time of war," within the fifty-eighth article of war, providing for the trial of certain offenses committed by soldiers in time of war by military court-martial. *Hamilton v. McClaughry*, 136 Fed. 445, 449 (quoting and adopting definition in *Prize Cases*, 67 U. S. [2 Black] 666, 17 L. Ed. 459).

As used in testimony that the witness knew the testator in 1862 and understood that he died during the war, the word "war" must be understood as the war between the states. *McDoel v. Jordan (Tex.)* 151 S. W. 1178, 1179.

## WARD

### Pueblo Indians

See Pueblo Indians.

### Public division

Under Const. 1898, art. 270, the police jury is without power to order an election

for special taxes in aid of a railroad in a justice of the peace ward forming a part of a regular parish ward; the "ward" mentioned in such article being a public division of the parish commonly called a "police ward." *Daigle v. Opelousas, G. & N. E. Ry. Co.*, 50 South. 846, 847, 124 La. 1047.

A parish precinct is not one of the subdivisions mentioned in Const. art. 232, authorizing special election to be held in any parish, municipal corporation, ward, or school district. *Regard v. Police Jury of Avoyelles*, 42 South. 438, 117 La. 952.

### WARD SCHOOL

As district school, see District School.

### WARDEN

As officer, see Officer.

### WARE

See Stock of Goods, Wares, and Merchandise.

Goods, wares, and merchandise, see Goods.

### WAREHOUSE

See Public Warehouse.

A "warehouse" is "a house in which wares or goods are kept; a storehouse." *Adams County v. Kansas City & O. Ry. Co.*, 99 N. W. 245, 247, 71 Neb. 549 (quoting Cent. Dict.).

### Barn

A barn signifies a place greatly different from a wharf or "warehouse," and does not, within any ordinarily accepted meaning of the word, indicate a place where the business of "storing the goods of others for hire" is conducted. *McReynolds v. People*, 82 N. E. 945, 950, 230 Ill. 623.

### Elevator

An elevator is not necessarily a warehouse, within the scope of the word "warehouse" as used in a policy of insurance on wheat while contained in a warehouse of a certain mill; and where it appeared that the mill owned a warehouse proper and an elevator, sometimes called an "elevator warehouse," but the wheat in question was contained in the elevator, there was a latent ambiguity, authorizing the admission of parol evidence; and as the hazard and rate were greater in the case of the elevator, there was no liability on a policy covering the wheat only while contained in the warehouse. *Fireman's Fund Ins. Co. v. Aachen & Munich Fire Ins. Co.*, 84 Pac. 253-255, 2 Cal. App. 690.

### Truck

Where dutiable goods are removed from a warehouse without payment of duty and subsequently concealed, the truck on which the goods are removed cannot be considered

to be a "warehouse," within Rev. St. § 2987, making it an offense to remove dutiable goods from a warehouse without payment of duty, etc. *United States v. Ehr Gott*, 182 Fed. 267, 273.

### WAREHOUSE PLATFORM

As house, see House.

### WAREHOUSE RECEIPT

As scrip, see Scrip.

An instrument on its face showing that the signer has in his possession designated goods of another for storage and obligating him to deliver the same to a specified person, or to his order, or bearer, on return of the instrument, is a "warehouse receipt" within Act Sept. 24, 1866 (P. L. [1867] 1363), and negotiable. *National Union Bank of Reading v. Shearer*, 74 Atl. 351, 225 Pa. 470, 17 Ann. Cas. 664.

Where the owner of a majority of the stock of a mining company and of a furnace company caused the furnace company to issue without consideration, but with no fraudulent intent, storage warrants in the usual form of warehouse receipts on the iron in its yards in favor of the mining company, but there was no actual delivery of, nor agreement to purchase, the iron, such warrants were not "warehouse receipts," not being issued by a warehouseman storing goods for compensation. *Gellfuss v. Corrigan*, 70 N. W. 306, 311, 95 Wis. 651, 37 L. R. A. 186, 60 Am. St. Rep. 143.

### WAREHOUSEMAN

A "warehouseman" is one who receives into his warehouse goods and merchandise for storage for hire. *In re Rohrer*, 186 Fed. 997, 1000; *State v. Minneapolis & St. L. Ry. Co.*, 131 N. W. 1075, 1077, 115 Minn. 116; *American Can Co. v. Erie Preserving Co.*, 171 Fed. 540, 547.

A "warehouseman" is one who receives and stores goods as a business for a compensation or profit. Act Sept. 24, 1866 (P. L. [1867] 1363), making a warehouse receipt negotiable, does not define a "warehouseman," and there is nothing in it requiring him to hold himself out to the general public as such. *National Union Bank of Reading v. Shearer*, 74 Atl. 351, 352, 225 Pa. 470, 17 Ann. Cas. 664.

Under Laws 1907, c. 732, § 27, now General Business Law (Consol. Laws, c. 20) § 112, limiting the right to a lien for charges for storing property to a "warehouseman," who is defined as one engaged in the business of storing goods for profit, a casual bailee of property is not entitled to a lien for storage charges. *Alton v. New York Taxicab Co.*, 121 N. Y. Supp. 271, 272, 66 Misc. Rep. 191.

Laws 1903, c. 391, entitled "An act to facilitate the sale of perishable or unclaimed property in the possession of common carriers," section 3 of which, relating to proper-

ty not perishable, provides that when any such property—i. e., property delivered to any common carrier, forwarding merchant, wharfinger, or warehouseman for carriage or storage—"shall not be claimed or taken away within one year after it shall have been so received, the same may be sold," etc., applies only to such warehousemen as are also common carriers, or perform a service incident to that of common carriers, and not to warehousemen engaged in the business of the mere storage of goods for hire, the method of enforcing the lien of which is provided by St. 1898, § 3347. *Devlin v. Wisconsin Storage Co.*, 133 N. W. 578, 147 Wis. 518.

#### **Carrier**

Where a carrier voluntarily receives trunks containing samples an unreasonable time before the owner intended to take passage, it is liable for their loss as a "warehouseman." *Fleischman, Morris & Co. v. Southern Ry.*, 56 S. E. 974, 976, 76 S. C. 237, 9 L. R. A. (N. S.) 519 (citing 6 Cyc. 670; *Denver, etc., R. Co. v. Peterson*, 97 Am. St. Rep. 102, note; *Murray v. International Steamship Co.*, 64 Am. St. Rep. 290, note; *Rossier v. Wabash R. Co.*, 91 S. W. 1018, 115 Mo. App. 515).

A commercial railroad, which maintains a warehouse merely for the purpose of receiving goods for shipment and storing goods shipped to such point, and does not seek or solicit goods for storage, but merely stores in such warehouse the goods of consignees, for the reason that such consignees fail or refuse to call for and receive the same, and charges only for such storage the amount authorized by the Railroad Commission of the state, and for the time so authorized, is not subject to the provision of a municipal ordinance levying an occupation tax upon "warehousemen." When a municipality is prohibited by law from taxing the general business of a commercial railroad as a common carrier, it cannot segregate from such business a necessary incident, and classify it as an occupation, and tax it as such. *Town of Arlington v. Central of Georgia Ry. Co.*, 56 S. E. 1015, 1017, 127 Ga. 721 (citing *Hewin v. City of Atlanta*, 49 S. E. 765, 121 Ga. 723, 67 L. R. A. 795, 2 Ann. Cas. 296).

#### **As depositary for hire**

See Depositary for Hire.

#### **Factor distinguished**

Rev. St. 1895, art. 4314, making it unlawful for any factor, commission merchant, or other person to employ any other than a public weigher to weigh produce sold or offered for sale, does not apply to maintaining a public warehouse and purchasing and selling produce without authority to sell for his principal and without selling in behalf of the owner, for he is a mere "warehouseman," and not a "factor." *Hedgepeth v. Hamilton Warehouse Co. (Tex.)* 128 S. W. 709, 710, (cit-

ing 8 Words and Phrases, p. 2640, and 8 Words and Phrases, p. 7392).

#### **Safe deposit vault**

A person in the business of running safe deposit vaults and warehousing valuable goods for hire is a warehouseman within P. L. 1907, p. 357, § 58, defining "warehouseman" to mean a person lawfully engaged in the business of storing goods for profit. *New Jersey Title Guarantee & Trust Co. v. Rector*, 75 Atl. 931, 932, 76 N. J. Eq. 587.

#### **As trustee**

See Trustee.

#### **WAREHOUSING**

See Field Storage Warehousing.

#### **WARNING—WARNED**

See Proper Warning.

"Warning" is defined to mean previous notice, caution against danger. *Antonian v. Southern Pac. Co.*, 100 Pac. 877, 883, 9 Cal. App. 718.

A charge permitting plaintiff to recover for injuries inflicted by a street car if defendant's agents operating the car failed to use due care in giving "proper" warning of the approach of the car, was not erroneous because of the use of the word "proper"; it being without meaning in that connection, since "warning" as understood could only mean notice of approaching danger, and, if warning was given, it was sufficient. *Engelman v. Metropolitan St. Ry. Co.*, 113 S. W. 700, 703, 133 Mo. App. 514.

The duty of the master to warn a servant ordinarily relates only to those nonobvious dangers which are not known to the servant, and which are or ought to be known to the master, though in common parlance the words "warn" and "warning" have a broader application, and are often used as designating the cries and signals which are used by experienced workmen for mutual convenience and as a part of the method of co-operation. *Galloway v. J. W. Turner Improvement Co.*, 126 N. W. 1033, 1035, 148 Iowa, 93.

As used in a special finding that the wire broke as plaintiff was passing under it, "without warning," the term "warned" would apply rather to plaintiff than to the defendant street car company, which might rather be said to be "advised" of the danger; and hence the interrogatory would not be construed as negating notice to the company, and therefore would not overthrow the general verdict for the plaintiff. *Citizens' St. R. Co. v. Batley*, 65 N. E. 2, 3, 4, 159 Ind. 368.

#### **Advise synonymous**

A confession stating that accused was advised by the county attorney is not insufficient for its use of the word "advised" for "warned" as any words which would show

that the offender was informed of his rights and then voluntarily made the confession to the person who gave him such information would amount to a compliance with the statute. *Overstreet v. State (Tex.)* 150 S. W. 899, 900.

#### Railroad crossing

"A railway crossing is itself a place of danger, and is an effectual warning of danger, a warning which must always be heeded, and the exercise of ordinary care in traveling over such a place is not excused by the negligent omission of the railway company itself to exercise reasonable care. Nor is it the law that, when a railroad company adopts safety gates or any other appliance for the protection of the public, the public is thereby absolved from all duty of taking care of itself. A person is still required to exercise due and ordinary care, and while the quantum of care which will be reasonable may be less where the gates are provided and are relied upon by the traveler, still the gates themselves are not an assurance and a warranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions." *Koch v. Southern California R. Co.*, 84 Pac. 176-178, 148 Cal. 677, 4 L. R. A. (N. S.) 521, 113 Am. St. Rep. 332, 7 Ann. Cas. 795.

### WARPING

"Warping" is a process of taking raw silk from the spool and arranging longitudinally a sufficient number of yarns of sufficient length and quality to constitute a warp of the precise size and quality of the fabric to be produced. But as to woven fabrics the operation of warping is not part of the process of weaving, within the purview of Tariff Act July 24, 1907, c. 11, providing that the component material of chief value in imported merchandise shall be determined by the ascertained value of such material in its condition as found in the article. *United States v. Hoeninghaus & Curtiss*, 137 Fed. 478, 479, 69 C. C. A. 626; *Hoeninghaus & Curtis v. United States*, 131 Fed. 570, 571.

### WARRANT

See Convey and Warranty; County Warranty; Township Warranty.

Covenant of warranty as contract, see Contract.

Draw warrant, see Draw.

Issuance, as commencement of action, see Commencement of Action.

In a stipulation in an insurance contract that it is "warranted by the assured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order," the word "warranted" added nothing to the force of the stipulation, as the expression of the word "warranty" does not necessarily constitute a

warranty, and it must be used in its ordinary signification. *Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 110 Pac. 36, 39, 59 Wash. 501, 140 Am. St. Rep. 863.

A mere "warrant," locatable on any public land, cannot be considered as the equivalent of a "certificate of entry," or receiver's receipt, showing that the applicant has paid for a particular tract of land and is entitled to a patent therefor. *J. W. Frelsen & Co. v. Crandell*, 45 South. 558, 559, 120 La. 712.

The usual rule is that when an officer of a public corporation, be it state, county, or town, draws upon another officer of the same public corporation for the purpose of discharging a public liability, whether the draft is by authorization of statute or by settled usage, it is ordinarily known as a "warrant," and is not commercial paper in the sense of the law merchant, and no peculiar estoppel arises with reference to it. Pension checks, or warrants, issued by a pension agent of the United States on an assistant treasurer, are commercial paper, and the right of the United States to recover from one to whom such a check was paid on a forged indorsement of the name of the payee is governed by the ordinary rules applicable to such paper. *Nat. Exchange Bank of Providence v. United States*, 151 Fed. 402, 407, 80 C. C. A. 632.

#### As certificate

See Certificate.

#### In conveyance or sales

By the express terms of Conveyance Act, § 11 (1 Starr & C. Ann. St. 1896, p. 924, c. 30), a conveyance using the word "warrant" is to be construed as if full covenants of seisin, good right to convey, against incumbrances, of quiet enjoyment, and general warranty were contained therein. *King v. King*, 74 N. E. 89, 94, 215 Ill. 100.

Under Code 1892, § 2479, providing that a conveyance of land in the following form, "I convey and warrant," etc., shall be effectual to transfer right, title, claim, and possession, and section 2480, declaring that the word "warrant" shall constitute a covenant that the grantor will forever warrant and defend the title, the word "warrant" constitutes a warranty of the possession as well as of the title. *Allen v. Caffee*, 38 South. 186, 85 Miss. 766.

Where a mortgage states that the mortgagor mortgages and "warrants" the property to the mortgagee, by the use of the words "and warrants" the mortgage executed is to be construed as if full covenants of seisin, good right to convey against incumbrances, quiet enjoyment, and general warranty were fully written therein. *Roderick v. McMee-kin*, 68 N. E. 473, 477, 204 Ill. 625 (citing 1 Starr & C. Ann. St. 1896 [2d Ed.] p. 924).

The word "warranted," as used in Code, art. 81, § 146 (Acts 1898, p. 819, c. 275), oblig-



ing a person loaning money on a mortgage on property in the state to make affidavit that he has not required, and will not require, the mortgagor to pay the taxes on the interest warranted to be paid in advance, etc., was intended to mean "covenanted," and the section, as amended by Acts 1902, p. 33, c. 26, uses the word "covenanted." The section does not apply to a mortgage to secure the purchase money of the mortgaged article, interest not being covenanted for, or, so far as appears, secretly or indirectly provided for. *Salabes v. J. Castelberg & Sons*, 57 Atl. 20, 22, 98 Md. 645, 64 L. R. A. 800.

#### **In practice**

The word "warrant," as used in section 16 of the charter of the city of Talapoosa (Acts 1888, p. 240), providing that all processes, writs, warrants, subpoenas, or other papers shall be issued by the clerk of council, in the name of the mayor of the city, and signed by the clerk, and it shall be the duty of the marshal of the city to serve all such processes, refers to warrants for the arrest of offenders against municipal ordinances. *Cason v. State*, 68 S. E. 554, 555, 134 Ga. 786.

An "information" is the allegation made to a magistrate that a person has been guilty of some designated crime, under the express provisions of Code Cr. Proc. § 145, and is the foundation for the jurisdiction of the magistrate, the office of a "warrant" being merely to bring the person charged before the magistrate; and where an information before a police justice alleged that plaintiff had for nine days without legal excuse not caused her child to attend upon instruction as required by law, and that she had not presented to the school authorities proof by affidavit that she was unable to compel the child to so attend, as required by Compulsory Education Law (Laws 1909, c. 409) § 537, subsec. 4 (Consol. Laws, 1910, c. 16, § 635, subsec. 4), the offense so stated was the only one the justice had power to try under the information, and the fact that the warrant stated that plaintiff had failed for nine days "to send the said child to school as provided in the compulsory education law" would not render the officer laying the information and procuring the warrant liable for malicious prosecution for having the arrest made for failure to send the child to school without probable cause, on the theory that he knew that the mother had sent the child to school each day, but that it had been excluded because of the mother's refusal to permit its vaccination, the uncontroverted testimony clearly establishing a violation of section 537, subsec. 4, of the compulsory education law, the offense charged in the information. *Shappee v. Curtis*, 127 N. Y. Supp. 33, 35, 142 App. Div. 155.

#### **As negotiable instrument**

See Negotiable Instruments.

#### **Order for payment of money**

As order, see Order.

"Warrants" and "orders" for payment of money are synonymous. A warrant is an order for the payment of money. *State v. Woods*, 36 South. 626, 627, 112 La. 617.

#### **As promissory note**

See Promissory Note.

#### **WARRANT OF ARREST**

As expressly defined by Snyder's Comp. Laws 1909, § 6578, a "warrant of arrest" is an order in writing in the name of the state, signed by a magistrate, commanding the arrest of accused. The clerk of a county court has no authority to issue a warrant for the arrest of one against whom an information has been filed in such court. *Bowen v. State*, 115 Pac. 376, 5 Okl. Cr. 605.

#### **WARRANT OF ATTACHMENT**

"A 'warrant of attachment' is mesne process, and is nothing more than a provisional remedy. It is ancillary to the relief sought in the principal action, and is intended to preserve the property or its proceeds if it has been sold as perishable in the hands of the sheriff or in the custody of the law to abide the event of the suit." *Virginia-Carolina Chemical Co. v. Sloan*, 48 S. E. 577, 136 N. C. 122.

Code Civ. Proc. § 2269, provides that the court authorized to punish for contempt may (1) order accused to show cause, or (2) issue an attachment. Section 2273, declares that an order to show cause may be made either before or after final judgment or the final order in special proceeding, that it is equivalent to a notice of motion, and subsequent proceedings thereon are as on a motion made therein. It also defines a "warrant of attachment" as a mandate whereby a special proceeding is instituted in behalf of the people on relation of complainant. Held that, where a debtor failed to appear, the creditor was either entitled to an attachment or an order to show cause why he should not be punished for contempt, and that the court in either event could afford him an opportunity to purge himself of contempt, and was not compelled to issue a commitment. *Sonn v. Kenny*, 116 N. Y. Supp. 613, 614, 63 Misc. Rep. 251.

#### **WARRANT OF ATTORNEY TO SUE OR DEFEND**

A "warrant of attorney to sue or defend" was a "special warrant from the crown authorizing a party to appoint an attorney to sue or defend for him." *First Nat. Bank of Kansas City v. White*, 120 S. W. 36, 39, 220 Mo. 717, 132 Am. St. Rep. 612, 16 Ann. Cas. 889 (quoting and adopting the definition in Cyc. p. 693).

**WARRANTY**

See Affirmative Warranty; Covenant of General Warranty; Covenant of Warranty; Express Warranty; Implied Warranty; Personal Warranty; Promissory Warranty.

Covenant of warrant as engagement, see Engagement.

Of title imported by deed, see Deed.

A "warranty" is a promise, usually collateral to the principal contract, but not necessarily so. *Modern Woodmen of America v. Vincent*, 80 N. E. 427, 82 N. E. 475, 476, 40 Ind. App. 711, 14 Ann. Cas. 89 (citing *Benj. Sales*, § 610; *Mechem Sales*, § 1334n [1], § 1393).

"Warranty" is an engagement or undertaking, express or implied, that a certain fact regarding the subject of a contract is or shall be as it is expressly or impliedly declared or promised to be. *Christian v. City of Eugene*, 89 Pac. 419, 420, 49 Or. 170 (citing *Webst. Int. Dict.*).

A "warranty" is at common law defined as a stipulation or covenant in a contract intended as a part of the agreement between the parties, but which is collateral to its main purpose. *Jaminet v. American Storage & Moving Co.*, 84 S. W. 128, 130, 109 Mo. App. 257 (citing *Flint-Walling Mfg. Co. v. Ball*, 43 Mo. App. 504; *Bouvier's Law Dict.*).

A "warranty" of title and of quiet possession and peaceable enjoyment is against one lawfully claiming or seizing the property, and not against one who unlawfully claims or seizes it. *Pierce v. Coryn*, 126 Ill. App. 244, 251.

The word "warranty," in application to contracts, is used as equivalent to a condition precedent, as a descriptive statement vital to the contract, or as a promise vital to it, and is used as meaning a condition, the breach of which, if acquiesced in, forms a cause of action, but does not create a discharge of the contract. *El Paso & S. W. R. Co. v. Elchel & Welkel (Tex.)* 130 S. W. 922, 935.

"A 'warranty' is always a matter of contract. For its breach, damages may be recovered by any party to the contract injured thereby, including any person for whose benefit the contract was made. But strangers to the contract have no right of action upon it. There is lacking privity, mutuality, consideration, and every other element essential to constitute the contractual relation between the claimant and the person sued." *Berger v. Standard Oil Co.*, 103 S. W. 245, 126 Ky. 155, 11 L. R. A. (N. S.) 238 (citing 2 *Benj. Sales*, § 1004; *King v. Creekmore*, 77 S. W. 689, 117 Ky. 172; *Simons v. Gregory*, 85 S. W. 751, 120 Ky. 116; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621).

A "warranty" is an express or implied statement of something which a party under-

takes shall be a part of a contract, and, though part of the contract, collateral to the express object of it. In many of the cases the circumstances of a party selling a particular thing by its proper description has been called a "warranty," and the breach of such a warranty a breach of warranty; but it would be better to distinguish such cases as a noncompliance with a contract which a party has engaged to fulfill. *Springfield Shingle Co. v. Edgecomb Mill Co.*, 101 Pac. 233, 235, 52 Wash. 620, 35 L. R. A. (N. S.) 258.

A recital in a deed that the land conveyed contains a certain number of acres is not a "covenant" or "warranty," but a mere representation. *Cotton v. Huston*, 84 S. W. 96, 97, 110 Mo. App. 53 (citing *Hobein v. Frick*, 69 Mo. App. 263, and *Wood v. Murphy*, 47 Mo. App. 539, and distinguishing *McGhee v. Bell*, 70 S. W. 493, 170 Mo. 121, 59 L. R. A. 761).

"'Warranty of the seaworthiness' of a ship is a warranty that the ship is in such a fit condition for all the ordinary hazards of the contemplated voyage as to be approved as seaworthy in the judgment of impartial, competent, and experienced men versed in that business." *J. J. Moore & Co. v. Cornwall*, 144 Fed. 22, 28, 75 C. C. A. 180 (citing *Svensen v. Stursberg*, 31 Fed. 86).

**False statement of existing fact distinguished**

See False Statement.

**Guaranty distinguished**

While the words "guaranty" and "warranty" are often used interchangeably and with the same effect, there is, in strict legal contemplation, a difference between them; a "guaranty" being the assurance of the payment of a debt or the performance of a duty or contract by another person, while a "warranty" is an assurance of the title or quality of property. *Gay Oil Co. v. Roach*, 125 S. W. 122, 123, 93 Ark. 454, 27 L. R. A. (N. S.) 914, 137 Am. St. Rep. 95.

In popular parlance, the words "guaranty" and "warranty" are used interchangeably without reference to any difference in meaning. While the term "warranty" is applied to a contract as to title, quality, or quantity of something sold, and the word "guaranty" is held to be a contract by which one person is bound to another for the fulfillment of a promise or engagement of a third party, the two words are derivatives from the same root, and are identical in significance and effect. In the stipulation, in a note given for the purchase money of a mule, that the seller "does in no wise guarantee except in title," the word "guarantee" is used in the sense of a warranty. *Branch v. James*, 60 S. E. 1027, 4 Ga. App. 90 (citing and adopting *McNeel v. Smith*, 32 S. E. 119, 106 Ga. 215; *Jackson v. Langston*, 61 Ga. 392).

**Guaranty synonymous**

The words with "guarantee against leakage," in an accepted order for a certain number of barrels of oil, in effect state that the barrels are warranted against leakage; "guarantee" being used synonymously with warranty. *Gay Oil Co. v. Roach*, 125 S. W. 122, 123, 93 Ark. 454, 27 L. R. A. (N. S.) 914, 137 Am. St. Rep. 95.

A petition which alleges that defendant sold to plaintiff oil to be used as a cooling agent for the cylinder and engine of an automobile owned and operated by plaintiff; that defendant "guaranteed" that the oil was not inflammable and was safe as a cooling medium; that, believing in the truth of defendant's representations, plaintiff purchased the oil, and it was placed in his automobile; that the oil was inflammable and was not safe for use as a cooling medium; that it ignited, and plaintiff's machine was burned and destroyed; and that defendant's representations were knowingly false—stated a cause of action in contract, and not in tort; the averment that the oil was "guaranteed" to be noninflammable and safe being the equivalent of an averment that there was a warranty of the character and quality thereof. *Conkling v. Standard Oil Co.*, 116 N. W. 822, 824, 138 Iowa, 596.

**In insurance**

"Warranties" in insurance law are of two kinds—affirmative and promissory. Affirmative warranties consist of a representation in the policy of a fact. Promissory warranties are those that require that something shall be done or not done after the policy takes effect." *Rosenthal Clothing & Dry Goods Co. v. Scottish Union & National Ins. Co.*, 46 S. E. 1021, 55 W. Va. 238.

"A 'warranty in an insurance contract' is a statement made therein by the assured, which is susceptible of no construction other than that the parties mutually intended that the policy should not be binding unless such statement be literally true." *Pennsylvania Fire Ins. Co. v. Waggener*, 97 S. W. 541, 543, 44 Tex. Civ. App. 144 (quoting *Phoenix Assurance Co. of London v. Munger Improved Cotton Mach. Mfg. Co.*, 49 S. W. 222, 92 Tex. 297).

"A 'warranty' in an insurance contract is a statement made therein by the assured which is susceptible of no construction other than that the parties mutually intended that the policy should not be binding unless such statement be literally true." *Daniel v. Modern Woodmen of America*, 118 S. W. 211, 215, 53 Tex. Civ. App. 570 (quoting and adopting definition in *Reppond v. Nat. Life Ins. Co.*, 101 S. W. 786, 100 Tex. 519, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618 and *Phoenix Assurance Co. of London v. Munger Improved Cotton Mach. Mfg. Co.*, 49 S. W. 222, 92 Tex. 297).

In determining whether a stipulation in an application for life insurance that the statements made or to be made to the medical examiner are "warranted" to be full, complete, and true, and without suppression of any fact tending to influence the company in issuing a policy, is a warranty, the court must look to the policy, the application, and the report of the medical examiner; the use of the word "warranty" not necessarily creating a warranty in law. *Reppond v. National Life Ins. Co. of America*, 101 S. W. 786, 788, 100 Tex. 519, 11 L. R. A. (N. S.) 981, 15 Ann. Cas. 618.

A "warranty" in insurance is "a stipulation or agreement on the part of the insured party, in the nature of a condition." A stipulation in a fire policy that the insurance company should not be liable for loss caused, directly or indirectly, by order of any civil authority, is not a "warranty," within Civ. Code Cal. §§ 2607, 2608, providing that a statement in a policy of a matter relating to the thing insured or to the risk as a fact, and a statement which imports that it is intended to do or not to do a thing which materially affects the risk, is a warranty; the statute not creating any new definition of warranty in insurance. *Conner v. Manchester Assur. Co.*, 130 Fed. 743, 744, 65 C. C. A. 127, 70 L. R. A. 106 (quoting *Bouv. Law Dict.*).

A "warranty" by insured enters into and is a part of the contract of insurance, and must be literally true to permit a recovery on the policy. The "warranty" must necessarily appear in the contract itself, and courts will not construe a statement as a warranty, unless the language of the policy is so clear as to preclude any other construction. Where a policy by express terms makes the application a part of the contract, or where it declares that the application is the basis on which the contract is made, or where the policy is declared to be issued on the faith of the application, representations in the application are a part of the policy, and are "warranties"; but a mere reference to the application in the policy, without indicating a purpose to make it part of the policy, is insufficient to change statements in the application from representations into warranties. *Spence v. Central Accident Ins. Co.*, 86 N. E. 104, 105, 236 Ill. 444, 19 L. R. A. (N. S.) 88.

"A 'warranty' in a contract of insurance must if affirmative be strictly and exactly true, and if promissory must be literally fulfilled. The validity of the contract depends thereon; otherwise, it becomes void. No departure can be allowed in the slightest particular in any matter warranted. The very purpose and meaning of a warranty is to preclude all questions for what purpose it was made, or whether it was made for any purpose at all by the insured. Once it is insert-

ed in the policy, or made a part thereof by proper reference, it binds the assured as made, it matters not whether the breach proceeds from fraud, negligence, misinformation, or to what cause noncompliance is attributable. If it be an affirmative warranty, and is false, there is a breach; if it be promissory, and is not strictly performed, the contract is vitiated." Insured warranted that the policy should be void if he concealed or misrepresented any material fact concerning the insurance, or subject thereof, or in case of any fraud or false swearing touching the insurance, or the subject thereof, before or after loss. Among the questions asked in the application was the cost of the house insured, which insured answered as \$2,000. The house was destroyed, and in an action on the policy he testified that the house cost \$1,700. Held, that such evidence constituted a breach of warranty, avoiding the policy. *Capital Fire Ins. Co. v. King*, 102 S. W. 194, 195, 82 Ark. 400 (quoting and adopting definition in 2 Joyce, Ins., § 1970; citing 3 Cooley, Briefs on Ins., pp. 1130, 1131, 1154; 1 May, Ins. § 156).

Where a by-law of a beneficial association required a beneficiary to be a member of a member's family, related by blood, or dependent upon the member, a statement of a member that the beneficiary named by him was dependent upon him amounted to a "warranty." *Caldwell v. Grand Lodge of United Workmen of California*, 82 Pac. 781, 782, 148 Cal. 195, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356.

A "warranty" of the truth of a statement in an application for life insurance concerning the family record of the applicant, and containing a statement that the health of an older brother is good, means merely that the individual inquired about has indicated in his action and appearance no symptoms or traces of disease, and to the observation of an ordinary friend or relative is in truth well. *Schmitt v. Michigan Mut. Life Ins. Co.*, 91 N. Y. Supp. 448, 450, 101 App. Div. 12.

Where a policy of life insurance recited that "in consideration of the stipulations and agreements in the application hereof, and also upon the next page of this policy, all of which are hereby made parts of this contract," but nowhere containing the word "warranty," the fact that the application made the applicant's answers warranties would not enable the company to defend an action on the policy on the ground of breach of warranty; the policy being on the paper which came into the possession of the applicant under the contract. *Logan v. Provident Sav. Life Assur. Society of New York*, 50 S. E. 529, 530, 57 W. Va. 384.

Laws 1892, p. 1991, c. 690, § 137, as amended by Laws 1894, p. 1378, c. 611, § 1, provides for the appointment of agents to procure policies of fire insurance in corporations not authorized to do business in the

state, and requires the filing of affidavits with the insurance department showing that insured was unable to procure the full amount of insurance required from corporations authorized to transact business in the state. Held, that the fact that an applicant for insurance in such a company, on request for the names of three admitted companies on the risk, gave the names of certain companies which were not on the risk, was no defense to an action on the policy, where three other admitted companies were in fact upon it. The erroneous statement made by the applicant did not amount to a "warranty"; the policy being on the standard form, which contains no such "warranty." *Hirsch v. Fidelitas Société Anonyme D'Assurances et de Reassurances*, 99 N. Y. Supp. 517, 519, 50 Misc. Rep. 582 (citing *Brooks v. Erie Fire Ins. Co.*, 78 N. Y. Supp. 748, 76 App. Div. 275).

#### Same—As a condition precedent

A "warranty," in insurance, is in the nature of a condition precedent and must be performed by the insured before he can demand performance of the contract on the part of the insurer; and it is quite immaterial for what purpose such warranty was made, and whether or not it was material to the risk, and whether the hazard was enhanced by reason of its falsity. *Donley v. Glens Falls Ins. Co.*, 91 N. Y. Supp. 302, 307, 100 App. Div. 69 (citing *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47, 20 Am. Rep. 451; *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 376; *Bryce v. Lorillard Fire Ins. Co.*, 55 N. Y. 240, 14 Am. Rep. 249; *Alexander v. Germania Fire Ins. Co.*, 66 N. Y. 464, 23 Am. Rep. 76; *Graham v. Firemen's Ins. Co.*, 87 N. Y. 69, 41 Am. Rep. 349).

A "warranty" in a contract of insurance, whether material or not, being part of the contract, has the force of a condition precedent, and, unless it is true, the insurer is not bound by his promise. *Donley v. Glens Falls Ins. Co.*, 76 N. E. 914, 916, 184 N. Y. 107, 6 Ann. Cas. 81.

In general, a "warranty" must be a part of the contract, made so by express agreement of the parties on the face of the policy, being in the nature of a condition precedent which must be strictly complied with or literally fulfilled to entitle the assured to recover on the policy; its falsity barring a recovery, regardless of the actual materiality to the risk, because of the express stipulation that the statement was warranted to be true and thus made material. *Pelican v. Mutual Life Ins. Co. of New York*, 119 Pac. 778, 781, 44 Mont. 277.

A "warranty" by insured, as applied to an application for insurance, is a stipulation for the absolute truth of the statements made in the application, and for strict compliance with some promised line of conduct, on penalty of forfeiture of his right to recover in

case of loss, should the statement prove untrue or the course of conduct promised be unfulfilled. A "warranty" is an agreement in the nature of a condition precedent, and, like that, must be strictly complied with. *Union Nat. Bank of New Orleans v. Manhattan Life Ins. Co.*, 26 South. 800, 806, 52 La. Ann. 36.

#### **Same—Condition precedent distinguished**

A "condition precedent" in an insurance contract is a condition without performance of which the contract, though in form executed by the parties and delivered, does not spring into life; whereas a "warranty" does not suspend or defeat the operation of the contract, but a breach affords either the remedy provided in the contract or those furnished by the law. A statement respecting the income of the insured appeared in a rider pasted on an accident policy, the heading of which was "Schedule of Warranties Made by the Insured on the Acceptance of This Policy," and, though not signed by him, the series of statements of which it was a part was in the first person, and gave information material to the acceptance of the risk, and at what amount and rate. Held, that the statement was a warranty, and not a condition precedent. *Everson v. General Fire & Life Assur. Corp., Limited*, of Perth, Scotland, 88 N. E. 658, 660, 202 Mass. 169.

#### **Same—Materiality**

Where an insurance policy recited that it was issued in consideration of the application which was made a part thereof, statements in the application, declared and warranted by insured to be complete and true, were "warranties," which formed a part of the contract of insurance, and any falsity therein, whether upon a material matter or not, vitiated the contract. *Prudential Ins. Co. of America v. Hummer*, 84 Pac. 61-65, 36 Colo. 208.

When an application for accident insurance is made a part of the policy, and the statements therein contained are warranted to be true, they are "warranties," and it is of no consequence whether they are or are not material to the risk. An application for an accident policy contained the following provision: "I hereby apply for an accident policy to be based on the following statement of facts, all of which I hereby warrant to be true." One of the statements following was as to the age of the applicant. Held, that the statement of the age of the applicant was a warranty, and that the beneficiary could not assert that the misstatement of such age was immaterial to the risk. *Central Acc. Ins. Co. v. Spence*, 126 Ill. App. 32, 41-45.

#### **Same—Representations distinguished**

A "warranty" in insurance enters into and is a part of the contract, and must be

literally true to permit a recovery on the policy, while a representation is not a part of the contract, but an inducement thereto. A representation must relate to a material matter, and is only required to be substantially true. *Spence v. Central Accident Ins. Co.*, 86 N. E. 104, 105, 236 Ill. 444, 19 L. R. A. (N. S.) 88.

The difference in legal effect between a "warranty" and a "representation," in an insurance policy, is that falsity in a warranty in any particular bars recovery on the policy, while a "representation" to do so must refer to some fact material to the insurance, and be false or fraudulent. *Holand v. Western Union Life Ins. Co. of Spokane*, 107 Pac. 866, 867, 58 Wash. 100; *Monahan v. Mutual Life Ins. Co. of Baltimore*, 63 Atl. 211, 212, 103 Md. 145, 5 L. R. A. (N. S.) 759.

There is a material and substantial difference between the legal effect of a "warranty" and a representation. A representation must relate to a material matter, and it is only required to be substantially true, while a "warranty" must be literally true, and its materiality cannot be called in question. It is said that "warranties" enter into and are made a part of the contract, while representations are merely inducements to it. *Minnesota Mut. Life Ins. Co. v. Link*, 230 Ill. 273, 82 N. E. 637, 638 (citing *Continental Life Ins. Co. v. Rogers*, 10 N. E. 242, 119 Ill. 474, 50 Am. Rep. 810; *Metropolitan Life Ins. Co. v. Moravec*, 73 N. E. 415, 214 Ill. 186).

A "representation" is not strictly a part of the contract of insurance, or of the essence thereof, but is something collateral or preliminary, in the nature of an inducement, so that its falsity, unlike a false "warranty," will not vitiate the contract or avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by agreement of the parties; it being sufficient if the representations are substantially true, though not strictly or literally so. A misrepresentation renders the policy void on the ground of fraud, while noncompliance with a warranty operates as an express breach of the contract. *Pelican v. Mutual Life Ins. Co. of New York*, 119 Pac. 778, 781, 44 Mont. 277.

The difference between a "warranty" and a "representation" lies in the fact that in the former the question of materiality is closed, while in the latter it is left open, and if untrue in the former case the policy is voidable at the option of the other party, while if untrue in the latter case and also material the same result follows. *American Bonding & Trust Co. of Baltimore v. Burke*, 85 Pac. 692, 693, 26 Colo. 49 (quoting and adopting definition in *Ostrander, Fire Ins.* [2d Ed.] § 135).

"A 'warranty' in the law of insurance is not matter collateral to the contract, stated

as an inducement to the other party to enter into the agreement, as a representation is. It is parcel of the contract, and, in the absence of a statute to the contrary, invalidates the obligation if not strictly true; and this though the thing warranted does not affect the risk." *Salts v. Prudential Ins. Co.*, 120 S. W. 714, 716, 140 Mo. App. 142.

All statements regarding the risk contained in or appearing on the face of a policy, are "warranties," and such is the rule irrespective of the use of the word "warranty" or "warranted." A stipulation in an insurance policy reducing the price of insurance 50 per cent. on "sprinkler risks," without requiring insured to use due diligence in maintaining an automatic sprinkler system in good working order, is a "warranty," and not a representation. *Port Blakely Mill Co. v. Springfield Fire & Marine Ins. Co.*, 106 Pac. 194, 195, 196, 56 Wash. 681, 28 L. R. A. (N. S.) 593.

Whether the answers made by the applicant for a policy of indemnity or insurance are "warranties" or mere representations must depend upon the character of the question and its answer, the opportunity of the insurer to guard against the representation in the light of its consequences, or whether it is material to the risk. A "warranty" must be strictly true. A representation need only be substantially true. The crucial distinction between a representation and a "warranty" is that the one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent to a recovery upon the policy or bond to which they relate. *Poultry Producers' Union v. Williams*, 107 Pac. 1040, 1041, 58 Wash. 64, 137 Am. St. Rep. 1041.

Statements made in good faith by the president of a bank to an indemnity company, for the purpose of inducing the company to give a bond guaranteeing the faithful discharge of the duties of a bookkeeper of the bank, that the bookkeeper had kept his accounts correct, and had made proper settlements for cash and securities intrusted to his care, and that the books had been inspected and examined, are "representations," and not warranties, where they are made on blanks furnished by the company, notwithstanding a stipulation therein that the answers are to be taken as conditions precedent, and as the basis of the bond applied for, and the liability of the company does not depend on the absolute truth of the statements. *Guthrie Nat. Bank v. Fidelity & Deposit Co. of Maryland*, 79 Pac. 102, 103, 14 Okl. 636.

In insurance a "representation" is a statement of the applicant to the insurer regarding a fact material to the proposed insurance, and it must be, not only false, but fraudulent, to defeat the policy. The crucial distinction between a "representation"

and a "warranty" is that the one is not, and the other is, a part of the contract, and that the truth of the one is not, and the truth of the other is, a condition precedent to a recovery on the policy. Thus, where the president of a bank applies to a bonding company for a bond indemnifying the bank against defalcations by an employé, and answers questions in writing at the request of the bonding company as to the former conduct of such employé, such questions and answers are representations, and not warranties, but must be given in good faith, and any material false representations will relieve the company from liability. *Fidelity & Deposit Co. of Maryland v. Guthrie Nat. Bank*, 87 Pac. 300, 17 Okl. 397 (citing *Rice v. Fidelity & Deposit Co. of Maryland*, 103 Fed. 430, 432, 43 C. C. A. 270, 275; *Moulton v. American Life Ins. Co.*, 4 Sup. Ct. 466, 111 U. S. 335, 28 L. Ed. 447).

The distinction between a "representation" and a "warranty," as applied to statements by insured in his application for a policy, is that in the case of representations it is sufficient if the representations are substantially true, while in the case of a "warranty" they must be literally true. In the case of a representation the policy is not avoided unless the statements are false to a degree or in a sense that materially affects the risk, or are such that if they had not been made the policy would not have been issued. In the case of a "warranty" it cannot be said that, though literally false, it is substantially true. In the case of a representation, the law clearly contemplates that it shall be viewed liberally, and though false as a matter of fact, to a degree sufficient to defeat the liability of the company if it were a warranty, it may nevertheless as a representation be held to be substantially true. An applicant for insurance might, in answer to a question, "How old are you?" say that he was 30; and should the proof show that he was 29, 31, or 36, it would be for the jury to say whether the answer was false in a particular material to the risk. So, likewise, in the case of a negative answer to the question, "Have you ever had hemorrhages or spitting of blood?" where the proof might tend to show that the blood-spitting resulted several times from the extraction of a tooth or an affection of the throat, or had occurred at a remote point of time and in inconsiderable quantities, in such case the jury would be called upon to say whether the representation, though false, if viewed literally, was false in a particular material to the risk. *Royal Neighbors of America v. Wallace*, 92 N. W. 897, 898, 66 Neb. 543.

"A 'warranty' is a stipulation expressly set out or by inference incorporated in the policy, whereby the assured agrees that certain facts relating to the risk are or shall be true, or certain acts relating to the same

subject have been or shall be true, or certain acts relating to the same subject have been or shall be done.' Its purpose is to define the limits of the obligation assumed by the insurer and it is a condition which must be strictly complied with, or literally fulfilled, before the right to recover on the policy can accrue. It is not necessary that the fact or act warranted should be material to the risk, for the parties by their agreement have made it so. Lord Eldon says: 'It is a first principle in the law of insurance that, if there is a warranty, it is a part of the contract that the matter is such as it is represented to be.' *Mechanics' Ins. Co. v. Thompson*, 21 S. W. 468, 469, 57 Ark. 279; *Western Assurance Co. v. Althelmer*, 25 S. W. 1067, 1069, 58 Ark. 565. On the other hand, representations are no part of the contract of insurance, but are collateral or preliminary to it. When made to the insurer, at or before the contract is entered into, they form a basis upon which the risks proposed to be assumed can be estimated. They operate as the inducement to the contract. Unlike a false warranty, they will not invalidate the contracts because they are untrue, unless they are material to the risks, and need only be substantially true. They render the policy void on the ground of fraud, 'while a noncompliance with a warranty operates as an express breach of the contract.' *Capital Fire Ins. Co. v. King*, 102 S. W. 194, 195, 82 Ark. 400 (quoting and approving definition in *Providence Life Assurance Society v. Reutlinger*, 25 S. W. 835, 58 Ark. 528).

#### As security

See Security.

#### In sales of personalty

Representations made at the time of a sale to induce a purchase are "warranties." *Chestnut v. Ohler* (Ky.) 112 S. W. 1101.

Whatever a seller represents at the time of the sale is a "warranty"; no particular words being required. *Heath Dry Gas Co. v. Hurd*, 108 N. Y. Supp. 410, 412, 124 App. Div. 68 (citing *Hawkins v. Pemberton*, 51 N. Y. 198, 10 Am. Rep. 595).

A clear representation of the quality of a thing sold, made by a seller, and relied upon by the buyer, is a "warranty." *Meshbesh v. Channellene Oil & Mfg. Co.*, 119 N. W. 428, 429, 107 Minn. 104, 131 Am. St. Rep. 441.

A positive representation of the quality of a thing sold, when made by a seller as a part of a contract of sale and relied upon by the buyer, is a "warranty." *Siegel v. Barker*, 125 N. W. 582, 583, 110 Minn. 344.

Any distinct assertion or affirmation of quality made by the owners to effect the sale of a chattel, and which does effect it, is a "warranty," whether the word "warranty" is used or not. *Iler v. Jennings*, 68 S. E. 1041, 1042, 87 S. C. 87.

A "warranty" in the sale of goods is an express promise that the articles sold shall answer a particular standard of quality, and is a condition until the sale is executed and a warranty thereafter. A representation by a manufacturer of machinery as to the character and capacity thereof, made to a buyer with knowledge of the facts, is a warranty. Any positive affirmation of facts, as distinguished from an expression of opinion, intended as a warranty of goods sold or received, and acted on by the buyer as such, is a "warranty." *El Paso & S. W. R. Co. v. Eichel & Weikel* (Tex.) 130 S. W. 922, 936.

A "warranty" is so clearly a part of the sale that, where the sale is evidenced by a written instrument, it is incompetent to ingraft on it a "warranty" by parol. *Lower v. Hickman*, 97 S. W. 681, 80 Ark. 505.

Whether a representation or affirmation accompanying a sale is a "warranty," or merely a simple commendation, is to be determined from the intention of the parties. *Phillips v. Crosby*, 59 Atl. 142, 70 N. J. Law, 785.

Any affirmation made at the time of a sale as to quality or condition is a "warranty," if so intended, and the buyer bought on the faith thereof, and such intent and reliance are questions of fact. *Hodgkins v. Dunham*, 103 Pac. 351, 358, 10 Cal. App. 690.

Where it was necessary that boxes sold under an express warranty of quality should be dry to be fit for the use intended, the express warranty was a warranty of quality and of fitness, within Civ. Code, § 3314, defining the measure of damages for breach of "warranty of fitness." *North Alaska Salmon Co. v. Hobbs, Wall & Co.*, 120 Pac. 27, 159 Cal. 380, 35 L. R. A. (N. S.) 501.

A "warranty of title," which is implied on a sale of property in the vendor's possession, is a warranty as to the whole title; and it therefore protects against partial defects, liens, charges, and incumbrances, by which the title transferred is rendered anything less than full, perfect, and unincumbered. *Clevenger v. Lewis*, 95 Pac. 230, 233, 20 Okl. 837, 16 L. R. A. (N. S.) 410, 16 Ann. Cas. 56 (quoting and adopting definition in 2 *Mechem, Sales*, § 1302).

"No particular words are necessary to create a 'warranty.' Every affirmation made by the seller as a fact, at the time of a sale, and as an inducement to the sale, if relied upon by the buyer, amounts to a warranty." Thus an affirmation by the seller of a horse that she was sound and all right, intended as an inducement to the sale and relied on by the buyer, constitutes a warranty. *Ellison v. Simmons* (Del.) 65 Atl. 591, 592, 6 Pennewill, 200.

Where a seller of strawberries affirmed that they were a certain variety, and the buyer bought relying on the affirmation, there

was an express "warranty" that they were such variety, though the word "warranty" was not used. *Alvin Fruit & Truck Ass'n v. Hartman*, 123 S. W. 957, 961, 146 Mo. App. 155.

In an action for breach of "warranty" of mules, an instruction that if the only representation made with reference to the mules was that they were sound so far as defendant knew, and if at that time he had no knowledge or information of the unsoundness, you will find for the defendant, even though they were unsound, was erroneous. *Mosby v. Larue*, 136 S. W. 887, 888, 143 Ky. 433.

A good-faith "representation and warranty" made by one joint purchaser of timber to his copurchasers as an inducement to the purchase, as to the quantity of lumber which could be cut from such timber, is not within the rules as to "warranties" in sales of property or insurance contracts to the extent of implying a promise to reimburse his copurchasers for loss on account of the failure of the tract to cut as much as represented, so as to create a liability therefor on an implied contract provable against his estate in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 63a (4). *Switzer v. Henking*, 158 Fed. 784, 785, 86 C. C. A. 140, 15 L. R. A. (N. S.) 1151.

Any distinct assertion or affirmation by the seller as to the quality or character of the thing sold during negotiations which may reasonably be supposed is intended to induce the purchase and was relied on by the purchaser is a "warranty," unless accompanied by an express statement that it is not intended as such. *Luitweller Pumping Engine Co. v. Ukiah Water & Improvement Co.*, 116 Pac. 707, 710, 16 Cal. App. 198.

By an executory contract for the sale and delivery of "select and common" poplar lumber, the seller becomes bound to deliver goods of the character described; but there is no "warranty," which survives the acceptance by the purchaser of the lumber, delivered by the seller in good faith as in performance of the contract, if the acceptance is with full knowledge of all the conditions affecting the character and quality of the article. *Bowman Lumber Co. v. Anderson*, 70 N. E. 503, 504, 70 Ohio St. 16.

It is not essential that the word "warranty" or any precise form of expression be used to create an express "warranty"; but if the vendor, at the time of the sale, affirms a fact as to the essential qualities of his goods as an inducement to the sale, in clear and distinct terms, and the vendee purchases on the faith of such affirmation, that will constitute an express "warranty." *Randall v. Thornton*, 43 Me. 226, 231, 69 Am. Dec. 56.

To constitute a warranty by a seller of quality and condition, the warranty need not be in writing, nor need the word "warranty" be used; but it is sufficient if there is a rep-

resentation of the state of the thing sold, or a direct, positive, unequivocal, and express affirmation of its quality and condition, forming a part of the consideration of the sale, and disclosing an intention to make good the quality of the thing sold, and so relied on by the buyer. *Detjen v. Moerschel Brewing Co.*, 138 S. W. 696, 157 Mo. App. 614.

"No particular form of words is necessary to constitute a 'warranty' as to the quality or soundness of chattels. Any form of words, whereby a vendor, pending negotiations, for the purpose of inducing a purchase, makes affirmation that the subject-matter of the proposed sale is of a particular quality or fitness, will constitute a warranty when relied upon by the purchaser." *Shuman v. Heater*, 106 N. W. 1042, 1043, 76 Neb. 119 (citing *Little v. Woodworth*, 8 Neb. 281; *Erskine v. Swanson*, 64 N. W. 216, 45 Neb. 767; *Unland v. Garton*, 66 N. W. 1130, 48 Neb. 202).

A mere praising of one's own property, a "simplex commendatio," is allowable in making a trade, and does not amount, under the common law, to a "warranty." *Brackett v. Martens*, 87 Pac. 410, 413, 4 Cal. App. 249 (quoting *Byrne v. Jansen*, 50 Cal. 627).

No particular words are necessary to create a "warranty" in a sale, and every affirmation made at the time of the sale as a fact, and as an inducement thereto, will, if the buyer relies thereon, amount to a "warranty." Whether statements made at the time of the transaction amount to an affirmation of a fact, or are simply expressions of opinion, depends on the nature and circumstances of the sale. The mere expression of an opinion, not amounting to an affirmation, and not showing an intention to warrant, will not constitute a "warranty." *Collins v. Tigner* (Del.) 60 Atl. 978, 979, 5 Pennewill, 345 (citing *Burton v. Young* [Del.] 5 Har. 233).

In order to constitute an express warranty, no particular language is necessary. It is not required that it shall be in writing, or be made in specific terms; and it is not at all necessary that the word "warrant" or "warranty" shall be used. Any direct and positive affirmation of a matter of fact, as distinguished from a mere matter of opinion or judgment, made by the seller during the sale negotiations and as a part of the contract, designed by him to induce the action of the purchaser, and actually relied upon by the latter in making the purchase, will be deemed to be a warranty. *Woolsey v. Ziegler*, 123 Pac. 164, 165, 32 Okl. 715.

"No special form of words is necessary to create a 'warranty.' It is now more than 200 years since Lord Holt first settled the rule in *Cross v. Gardner* and *Medina v. Stoughton*, which *Butler, J.*, in 1789 laid down, in an opinion given by him in the



famous leading case of *Pasley v. Freeman*, as follows: 'It was rightly held by Holt, C. J., and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appears in evidence to have been so intended.' It is a matter of contract between the parties, and the decisive question is the real intention as to whether the affirmation of fact was made for the purpose of inducing the purchase in the one instance, and whether it was relied upon by the purchaser in the other." *Wertheimer-Swartz Shoe Co. v. McDonald*, 122 S. W. 5, 9, 138 Mo. App. 328 (citing and adopting *Childs v. Emerson*, 93 S. W. 286, 117 Mo. App. 671; *Haines v. Neece*, 92 S. W. 919, 116 Mo. App. 499; *Young v. Van Natta*, 88 S. W. 123, 113 Mo. App. 550; *Danforth v. Crookshanks*, 68 Mo. App. 311; *Carter v. Black*, 46 Mo. loc. cit. 385).

A "warranty" is an engagement by which a seller assures to the buyer the existence of some facts affecting the transaction, whether past, present or future. Civ. Code, § 2370. To create an express warranty, the word "warranty" need not be used, nor are any particular words necessary. Any affirmation, other than mere dealers' talk, made at the time of the sale as to the quality or condition of the thing sold, will be treated as a warranty, if it was so intended, and the purchaser bought on the good faith of such affirmation. Whether it was so intended, and the purchaser acted upon it, are questions of fact. *Lander v. Sheehan*, 79 Pac. 406, 408, 32 Mont. 25 (citing *McLennan v. Ohmen*, 17 Pac. 687, 75 Cal. 558).

"A 'warranty' in the sale of personal property is a statement or representation of fact made by the vendor as to the character or quality of the article sold or the title thereto, whereby the vendor promises that the thing is or shall be as represented. It is otherwise defined as a statement of fact as to the article sold, coupled with an agreement to make the statement good." There is a warranty where, on a sale of hogs, the seller represents that they are of a certain kind and quality and agrees to make such representation good. *Afflick v. Streeter*, 103 S. W. 112, 113, 125 Mo. App. 703 (quoting and adopting the definition in 8 Words and Phrases, p. 7402; *Ingraham v. Union R. Co.*, 33 Atl. 875, 19 R. I. 350).

"When time of performance is made an essential element of the contract of sale, such stipulation is regarded as being in the nature of a 'warranty' that the goods will be delivered in the time agreed, and in case of failure of the vendor to so deliver the vendee has the option either to rescind the contract and refuse to accept the goods, or to receive them and recover from the vendor his damages." *Wall v. St. Joseph Artesian Ice & Cold Storage Co.*, 87 S. W. 574, 575, 112 Mo. App. 659.

A "warranty" in a contract of sale is an agreement by the vendor that the thing he sells is of a certain kind, character, or quality, affecting its value to the vendee, no particular form of words being necessary; and any covenant, promise, or assertion of the vendor concerning the quality of the article sold, if relied on by the vendee and understood by both parties as an absolute promise, and not a mere expression of opinion, or any representation as to quality made by the vendor to induce the purchaser, amounts to a warranty. A statement in a letter by one attempting to sell shingles that "they are mighty good shingles, they are as good as you can get anywhere," constitutes a warranty as to their quality. *Harroll v. McDuffie* (Tex.) 128 S. W. 1149, 1151.

Any affirmation of a material fact as a fact, intended by the vendor as and for a "warranty," and relied upon as such, is sufficient; but mere representations by way of commendation, or which merely express the vendor's opinion, belief, judgment, or estimate, do not constitute a warranty. "Simplex commendatio non obligat." Whether a particular representation is an affirmation of a positive fact, or, on the other hand, only praise and commendation, is a question for the jury, where the meaning is ambiguous, and the intention of the parties may be gathered from surrounding circumstances. *Sauerman & Ball v. Simmons*, 86 S. W. 429, 431, 74 Ark. 563 (quoting and adopting the definition in 2 Benj. Sales, American Notes, p. 664, and citing *James v. Bocage*, 45 Ark. 284).

To constitute a warranty on a sale, it is not necessary that the word "warranty" be used, nor is any particular phraseology necessary. It is sufficient if there be a representation of the state of the thing sold, or a direct, positive, unequivocal and express affirmation of its quality or condition, being part of the consideration of the sale, and showing an intention to warrant or make good the quality of the thing sold, and so understood and relied upon, instead of a mere recommendation or expression of opinion, leaving the buyer to understand that he must still examine and judge for himself. Where a letter proposing to sell an animal described his height, etc., and the purchaser in ordering described the animal in the language used by the seller, there was an express warranty that the animal was as represented in the offer. *Childs v. Emerson*, 93 S. W. 286, 287; 117 Mo. App. 671.

"No particular form or language is necessary to create a warranty. The expression 'warranty' need not occur specifically, though that is the term most often used. It is the subject-matter of the statement or representation, and the circumstances under which it was made, rather than its form, which are to be considered. Any distinct assertion or affirmation as to the quality or character of the thing to be sold, made by the seller during

the negotiations for the sale, which it may reasonably be supposed was intended to induce the purchase, and was relied on by the purchaser, will be regarded as a warranty, unless accompanied by an express statement that it is not intended as such. If the affirmation was made in good faith, it is still a warranty; if made with a knowledge of its falsity, it is none the less a warranty, though it is also a fraud." *Cockerell v. Henderson*, 105 Pac. 443, 444, 81 Kan. 335 (citing 20 Cyc. 86, 87).

#### Same—As collateral undertaking

A "warranty" in a contract of sale is an undertaking collateral to the object of the sale. *Wills v. Wright* (Del.) 81 Atl. 507, 508, 2 Boyce, 598.

A "warranty" is a collateral obligation accompanying a contract of sale, relating to the character or fitness of the article sold. *Crane Co. v. Collins*, 93 N. Y. Supp. 174, 178, 103 App. Div. 480 (citing *Waerber v. Talbot*, 60 N. E. 288, 167 N. Y. 48, 82 Am. St. Rep. 712).

A "warranty" in the sale of goods is an independent subsidiary promise, collateral to the main object of the contract, the breach of which gives rise to a claim for damages. *El Paso & S. W. R. Co. v. Eichel & Welkel* (Tex.) 130 S. W. 922, 936.

A "warranty" in the sale of a chattel is a collateral undertaking by the seller as to quality or title, and may be express when made so by agreement, or implied when the law derives it by implication from the nature of the transaction or the situation of the parties. *Millsap v. Wolfe*, 56 South. 22, 24, 1 Ala. App. 599.

A "warranty" is an express or implied undertaking by one of the parties, collateral to the main subject of the contract, whereby he promises or insures that the thing to be done, etc., shall be of the kind or quality stipulated. *Modern Machinery Co. v. Perkins* (Del.) 80 Atl. 1060, 1062.

A "warranty" is a collateral agreement, and not a constituent element of a sale. A breach of it does not alone warrant rescission, unless the breach is agreed on as ground for rescission, or the facts show that such was the intention of the parties, or fraud is shown to exist. No right to rescind exists under executed sales for mere breach of warranty. *Simonson v. Jensen*, 104 N. W. 513, 14 N. D. 417.

A "warranty" is a statement or representation made by the seller contemporaneously with and as a part of the contract of sale, though collateral to the express object of it, having reference to the character, quality, or title of the goods, and by which he promises to insure that certain facts are or shall be as he then represents them. *Whigham v. W. Hall & Co.*, 70 S. E. 23, 24, 8 Ga. App. 509.

A "warranty" is a collateral undertaking forming a part of a contract of sale, and

made so by the agreement of the parties, express or implied, to make the assurance good or pay for the deficiency. Mere words of praise and commendation, or which merely express the vendor's opinion, judgment, or estimate do not constitute a "warranty." A statement by the seller of fruit trees, after having explained to the buyer that they had not been very well taken care of and were of the cheapest grade, that they were good trees if taken care of, amounted merely to an expression of opinion, and did not constitute a warranty of merchantableness. *Brackett v. Martens*, 87 Pac. 410, 413, 4 Cal. App. 249 (citing *Benj. Sales*, § 610, and American note to the same section, pp. 606-608; *Byrne v. Jansen*, 50 Cal. 627; *Polhemus v. Helman*, 45 Cal. 579; *Henshaw v. Robins* [Mass.] 9 Metc. 83, 43 Am. Dec. 367; *McDonald Mfg. Co. v. Thomas*, 5 N. W. 737, 53 Iowa, 558; *Greenthal v. Schneider* [N. Y.] 52 How. Prac. 133; *Farrow v. Andrews*, 69 Ala. 96; *Worth v. McConnell*, 4 N. W. 198, 42 Mich. 473).

#### Same—Noncompliance with contract distinguished

A "warranty" is an express or implied statement of something which a party undertakes shall be part of a contract, and, though part of the contract, collateral to the expressed object of it. Many cases confuse a mere breach of the contract of sale with a breach of warranty. *Joseph Joseph Bros. Co. v. Schonthal Iron & Steel Co.*, 58 Atl. 205, 209, 99 Md. 382.

#### As stand behind

See *Stand Behind*.

#### WARRANTY DEED

See *Convey by Warranty Deed*; *Good Warranty Deed*.

#### WAS—WERE

"Was," as used in a will reciting that testator excluded his son because he was amply provided for by his grandmother, indicated that testator knew that the son had lost by speculation and otherwise a portion of the money received from the grandmother. *Heath v. Koch*, 77 N. Y. Supp. 513, 514, 74 App. Div. 338.

The finding that a certain sum "was unpaid" relates back to the filing of the complaint, and from it, in the absence of anything to the contrary, it follows that it was unpaid at the time of the trial. *Trels v. Berlin Dye Works & Laundry Co.*, 105 Pac. 275, 276, 11 Cal. App. 421.

The petition in an action for injuries to a servant by derailment of a train alleged that plaintiff's injuries were caused by defendant's negligence, in that the engine and train were old, worn, out of repair, and unsuited for the purposes for which they were being used, and also in the manner and way the engine and cars were being operated.

Held, that the words "manner and way" imported either the speed of the train, or something connected with the management and operation thereof, and that the words "were being operated" necessarily referred to that which was being done by the employes on the engine and cars at the time of the accident, so that such allegations were insufficient to justify the submission of an issue of negligence on defendant's part in directing the train to be run over the road as fast as 10 miles an hour. *Missouri, K. & T. Ry. Co. of Texas v. Poole*, 133 S. W. 239, 240, 104 Tex. 36.

## WASH

See Dry Wash.

### WASH SALE

A "wash sale," is a fictitious sale, made to fasten a fixed liability on a party. *F. W. Brockman Commission Co. v. Aaron*, 130 S. W. 116, 119, 145 Mo. App. 307.

In a "wash sale" there is no actual transaction of purchase and sale. It is merely a form of transaction wherein the broker purchases and sells for the party certain commodities, nothing being paid, save that the broker receives his commissions on the transaction. *People v. Kellogg*, 94 N. Y. Supp. 617, 622, 105 App. Div. 505.

## WASTE

See Equitable Waste; Permissive Waste; Voluntary Waste; Without Impeachment of Waste.

Greater New York Charter (Laws 1901, p. 35, c. 466) § 59, provides that the board of aldermen and the officers and employes of the city are trustees of its property, funds, and effects, that every taxpayer is a cestui que trust in respect to such property, that any co-trustee or cestui que trust may prosecute any action to prevent "waste" or "injury" to any property or funds held in trust, and that all the duties imposed by law on such trustees may be enforced by the city or by any co-trustee or cestuis que trust aforesaid. Held, that a taxpayer's action under such section to restrain the alleged improvident expenditure of municipal funds was similar to that prescribed by Code Civ. Proc. § 1925, and was not maintainable without proof of fraud, collusion, corruption, bad faith, or illegality, since the terms "waste" and "injury," as used in the two statutes are identical in meaning, and include only illegal, wrongful, or dishonest acts. *Hearst v. McClellan*, 92 N. Y. Supp. 484, 486, 102 App. Div. 336.

### In real property law

"Waste" consists of some definite physical injury to the premises leased. *Lehmeyer v. Moses*, 127 N. Y. Supp. 253, 259, 69 Misc. Rep. 476.

"Waste" is a permanent or lasting injury done or permitted to be done by the holder of a part of it to the inheritance, or to the prejudice of one who has an interest in the inheritance. *Mudge v. West End Brewing Co.*, 125 N. Y. Supp. 15, 20, 68 Misc. Rep. 362.

"Waste" is a spoil or destruction done or permitted to lands, houses, trees, or other corporeal hereditaments by the tenant thereof, to the prejudice of him in reversion or remainder. *Norris v. Laws*, 64 S. E. 499, 501, 150 N. C. 599. "Waste" is the omission of duty touching real estate by one rightfully in possession, which results in its substantial injury, so that the premises cannot revert to those having an underlying interest, undeteriorated by any willful or negligent act. *Delano v. Smith*, 92 N. E. 500, 501, 206 Mass. 365, 30 L. R. A. (N. S.) 474.

"Waste" is a destruction or material alteration or deterioration of the freehold, or of the improvements forming a material part thereof, by any person rightfully in possession, but who has not the fee title or the full estate. *Hayman v. Rownd*, 118 N. W. 328, 329, 82 Neb. 598, 45 L. R. A. (N. S.) 623.

"Waste" is that which does a lasting damage to the freehold or inheritance, and tends to the permanent loss of the owner in the fee, or to destroy or lessen the value of the inheritance; but the removal and appropriation by the lessee of a matured crop, whether rightful or wrongful, is not waste, as it does no injury to the inheritance. *Deltenre v. Deltenre*, 133 S. W. 632, 633, 152 Mo. App. 487 (citing *Davis v. Clark*, 40 Mo. App. 515).

"'Waste' is the destruction or improper deterioration or material alteration of things forming an essential part of the inheritance, done or suffered by the person rightfully in possession by virtue of a temporary or partial estate, as, for example, a tenant for life or for years." "'Waste' is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee tail." "Whatever the act or omission is, in order to its constituting 'waste,' it must either diminish the value of the estate, or increase the burdens upon it, or impair the evidence of title of him who has the inheritance. 'Waste,' in short, may be defined to be whatever does a lasting damage to the freehold or inheritance, and tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance." The term "waste," as used in the statute and in the bond given in conformity therewith to supersede an order of confirmation of sale in a foreclosure proceeding, should be construed according to its accepted legal significance, and an action to recover "waste," within the meaning of the accepted definitions, must be brought by the owner of the fee for some act of omission or commission done by one in possession under an inferior estate, or by a

mortgagee or other lien holder to protect his security, or to recover for an injury thereto, where the security would be or is rendered inadequate by the commission of such "waste." *United States Fidelity & Guaranty Co. v. Rieck*, 107 N. W. 389, 390, 76 Neb. 300 (quoting and adopting definition in 4 Pom. Eq. par. 1346, Blackstone's [Chitty] definition, and that in 1 Washb. Real Prop. [4th Ed.] p. 140).

"Waste" is an injury to the remainder or reversion (the fee), something that lessens the value of the estate. The cutting of timber for commercial purposes by a tenant for years is "waste." What constitutes "waste" by a tenant for a term of years is determined by a consideration as to whether or not an act done results in injury to the inheritance, and whether or not an act is "waste" is determined by the conditions which exist at the time the act is committed. *Moss Point Lumber Co. v. Board of Sup'rs of Harrison County*, 42 South. 290, 294, 89 Miss. 448.

"Waste" is defined to be 'a spoil or destruction, not arising from an act of God, or of a public enemy, in houses, gardens, trees, lands, or other corporeal hereditaments, to the disherison of him who has the immediate remainder or reversion in fee simple, or in England in fee tail. The three general heads of waste, therefore, are in houses, in timber, and in lands, although whatever else tends to the destruction or depreciation of the value of the inheritance is likewise waste, so that, at common law, waste could be committed only by a person in possession and not having the inheritance; the absolute owner being incapable of committing waste." *Brugh v. Denman*, 78 N. E. 349, 350, 38 Ind. App. 486 (citing 2 Minor's Inst. [3d Ed.] 598; 2 Bl. Com. 281).

"Waste" may be defined as the "doing of those acts which cause lasting damage to the freehold or inheritance, or the neglect or omission to do those acts which are required to prevent lasting damage to the freehold or inheritance. The term is not an arbitrary one, to be applied inflexibly, without regard to the quality of the estate, or the relation to it of the person charged to have committed the wrong, but the question as to whether it has been committed in a given case is to be determined in view of the particular facts and circumstances appearing in that case." A mortgagor removed from the mortgaged premises, giving notice of such fact to the mortgagee, and he took possession and rented the premises. At that time the buildings, fences, etc., were out of repair, and while the mortgagee was in possession he made no repairs, but on an accounting between the parties it did not appear that the premises had been in any way permanently injured owing to failure to make repairs. Since the mortgagor was credited on the accounting with any sum that might have been spent for repairs, she was not damaged,

and a finding that the mortgagee had not been guilty of permissive waste was correct. *Chapman v. Cooney*, 57 Atl. 928, 929, 25 R. I. 657.

"Waste" is commonly defined to be the permanent injury to land by a tenant, or one holding an intermediate estate. In Rev. St. Wis. § 3177, providing that the holder of a certificate of tax sale may have an action to restrain the commission of waste during the period of redemption, and after obtaining a deed may recover damages against any person for any waste committed by such person after the sale, the word "waste" is used to signify an act which amounted to waste at common law; and, under said section, an action for waste cannot be maintained by the tax title claimant against a mere trespasser, who is a stranger to the title and possession. *Lander v. Hall*, 34 N. W. 80, 81, 69 Wis. 326 (citing 1 Washb. Real Prop. [5th Ed.] § 4; 2 Burrill, Law Dict. [2d Ed.] "Waste"; Bac. Abr. [10th Ed.] "Of Waste").

The plowing up of blue grass sod on a farm is not "waste." *Mize v. Burnett*, 145 S. W. 150, 151, 162 Mo. App. 441.

The destruction of fruit trees is "waste." *Welling v. Strickland*, 126 N. W. 471, 474, 161 Mich. 235.

Where defendant, having a life estate in land, removed the wood and timber therefrom, his act constituted "waste" under Code Civ. Proc. § 1655, relating to actions for waste against the tenant of a particular estate. *McCartney v. Titsworth*, 104 N. Y. Supp. 45, 46, 119 App. Div. 547.

Dredging and carrying away sand and gravel by a life tenant from the shore of land bordering on a stream, and the removal of fast land and trees above high-water mark, was an injury to the inheritance and constituted "waste." *Potomac Dredging Co. of Baltimore City v. Smoot*, 69 Atl. 507, 509, 108 Md. 54.

Under the law of West Virginia as established by decision, the sinking of an oil or gas well on land by one tenant in common is a "waste," for which Code W. Va. 1899, c. 92, § 2 (Code 1906, § 3390), renders him liable in damages to his cotenants, and hence the sinking of such a well by a tenant in common or under his authority does not give him any right or equity to have the same set off to him as an improvement made by him on a partition of the land. *Dangerfield v. Caldwell*, 151 Fed. 554, 557, 81 C. C. A. 400.

The cutting of timber from wild lands in a careful and prudent manner, keeping in view the future value of the land, as well as the present income, is not "waste," within the meaning of R. S. 1871, c. 66, § 20, providing that, when an administrator commits waste or trespass on real estate of his intestate insolvent, he is liable to account for treble the amount of damage, and chapter

95, § 12, providing that when an heir, after the estate is represented insolvent, and before the real estate is sold for payment of debts, or before all the debts are paid, removes or injures any buildings or trees, except what is needed for fuel or repairs, or commits any strip or waste on such estate, he shall forfeit treble the amount of damages, to be recovered by the executor or administrator in an action of trespass. *McNichol v. Eaton*, 77 Me. 246, 247.

#### Same—Trespass distinguished

"Technically, there is a difference between 'waste' and 'trespass.' 'Waste' is some unauthorized act which goes to the injury or destruction of an estate, committed by one in the rightful possession thereof, while 'trespass' is the act of a mere intruder; but there is no substantial distinction, so far as the remedy is concerned." Where a complaint, in a suit to restrain the cutting of timber, is framed on the theory of restraining a trespass on land, and plaintiff's evidence showed, not an unlawful trespass, but a rightful entry and the commission of waste, a motion to dismiss the complaint was properly denied, since the relief sought was substantially the same. *Roots v. Boring Junction Lumber Co.*, 92 Pac. 811, 818, 50 Or. 298.

#### In tariff acts

See Cotton Waste; Silk Waste; Wool Waste.

"Waste," as used in Tariff Act July 24, 1897, par. 463, 30 Stat. 194, fixing the duty on "waste not specially provided for in this act," generally refers to remnants and by-products of small value, that have not the quality or utility either of the finished product or of the raw material. *Latimer v. United States*, 32 Sup. Ct. 242, 223 U. S. 501, 56 L. Ed. 526.

"The testimony upon this subject falls far short of establishing a commercial designation applicable to these articles with the certainty, uniformity, and generality required by the decisions of this court. \* \* \* In default of such evidence, the term 'waste' will be presumed to have been used in the tariff act in its ordinary sense of refuse." *Patton v. United States*, 16 Sup. Ct. 89, 159 U. S. 500, 40 L. Ed. 233.

Small disks produced in the manufacture of tin cans, being a by-product in the process of cutting an aperture for filling, and being of much less value than the tin from which they were cut, are not "waste," under Schedule N, par. 463, but are dutiable as articles of metal. *Shallus v. United States*, 162 Fed. 653, 654, 89 C. C. A. 445.

Flax nolls are dutiable as "waste," under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 463, and not under Schedule J, par. 326, as "tow of flax," by similitude. *G. B. Ritchie & Co. v. United States*, 141 Fed. 604.

Floral waters are dutiable as unenumerated manufactured articles, under Tariff Act July 24, 1897, c. 11, § 6, rather than as "waste," under section 1, Schedule N, par. 463. *Burr v. United States*, 167 Fed. 801, 802, 93 C. C. A. 191.

Small pieces of cork, which have been produced by grinding the refuse of cork bark for convenience in handling, and which need further preparation before becoming fit for its ultimate use in the manufacture of linoleum, etc., is dutiable as "waste," and not as a "manufacture" of cork. *Gudewill & Bucknail v. United States*, 142 Fed. 214.

Tobacco sweepings or scrap used in the manufacture of stogies and cigarettes are dutiable at 55 cents a pound, under Tariff Act 1897, par. 215, as unmanufactured tobacco, and not at 10 per cent. ad valorem under paragraph 463, as "waste not specially provided for in this act." *Latimer v. United States*, 32 Sup. Ct. 242, 223 U. S. 501, 56 L. Ed. 526.

As to combings of loose or dead hair obtained in preparing rabbit or hare skins, which are commercially known as "hares' combings" or "fur waste," and which, after further treatment, are used as an adulterant in cheap hats, held, that they are dutiable as waste under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 463, and not as furs prepared for hatters' use under paragraph 426, nor free of duty as "furs, undressed," under section 2, Free List, par. 561. *United States v. Hatters' Fur Exchange*, 153 Fed. 595, 596.

The term "waste," as used in paragraphs 361, 362, Tariff Act of 1897, is generally applied to threads or yarn, either before they have been woven into a fabric, or to such threads or yarn reduced by the disintegration of the refuse fabric. Portions of woolen material clipped from the pieces in the course of making up garments, commercially designated by dealers in waste and hosiery manufactures as "clippings" or "clips," and included by them within the designation "waste" as a generic term, are not dutiable under paragraph 362 as "waste not specially provided for," but are dutiable under paragraph 363 as woolen rags. *United States v. Pearson & Emmott*, 131 Fed. 571, 572; *Id.*, 137 Fed. 1021, 70 C. C. A. 306.

So-called granito or terrazo, produced by crushing the waste of marble quarries and sifting or sorting it into various sizes, is subject to classification as an unenumerated manufactured article, under Tariff Act July 24, 1897, c. 11, § 6, rather than as "waste," under section 1, Schedule N, par. 463, or as minerals "crude," under section 2, Free List, par. 614. *United States v. Graser-Rothe*, 164 Fed. 205.

Wood flour, produced by grinding small pieces of wood obtained by breaking or cut-

ting waste wood, etc., is dutiable as a manufacture of wood under Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 208, and not as "waste" under Schedule N, par. 463. *Nairn Linoleum Co. v. United States*, 151 Fed. 955, 956.

Selected pieces of second-hand jute bagging, intended for patching the covering of cotton bales, are not "bagging for cotton, gunny cloth, and similar fabrics, suitable for covering cotton," under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 344, 30 Stat. 181, nor "rags," under section 2, Free List, par. 648, 30 Stat. 201, but are dutiable as "waste" under section 1, Schedule N, par. 463, 30 Stat. 194. *United States v. Davies*, 160 Fed. 456, 457, 87 C. C. A. 672.

"Waste," as used in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 122, fixing the duty on " \* \* \* wrought and scrap iron and scrap steel \$4 per ton, but nothing shall be deemed scrap iron or scrap steel except waste or refuse iron or steel, fit only to be manufactured," is not limited to the pieces of material that fall off in the process of manufacturing, but includes old worn out goods, as old iron chains fit only for remanufacture. There can be no waste in the use of such articles as pig iron, which is simply thrown into a furnace and melted, or spiegeleisen, ferro-manganese, and ferro-silicon, which are treated in a like manner in the production of steel for the purpose of hardening it. *G. W. Sheldon & Co. v. United States*, 152 Fed. 318-320 (citing and adopting *In re Salomon*, 47 Fed. 711; *Train v. U. S.*, 113 Fed. 1020, 51 C. C. A. 623; *Dwight v. Merritt*, 11 Sup. Ct. 768, 769, 140 U. S. 213, 218, 35 L. Ed. 450; *Robertson v. Edelhoff*, 10 Sup. Ct. 186, 132 U. S. 614, 33 L. Ed. 477; *Ingersoll v. Magone*, 53 Fed. 1008, 4 C. C. A. 150).

Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 122, which provides for "scrap iron," and defines it as "waste or refuse iron \* \* \* fit only to be remanufactured," refers not only to pieces or scraps thrown off or discarded in the course of manufacture, but to completed articles worn out by use, such as old chains, in small pieces, fit only for remanufacture. *G. W. Sheldon & Co. v. United States*, 159 Fed. 105, 107, 86 C. C. A. 295 (citing *Schlesinger v. Beard*, 7 Sup. Ct. 546, 120 U. S. 264, 30 L. Ed. 656).

#### WASTE (Writ Of)

"The old 'writ of waste' called upon the tenant to appear and show why he had committed waste and destruction in the place named, to the deherison of the plaintiff." *Abernethy v. Orton*, 71 Pac. 327, 329, 42 Or. 437, 95 Am. St. Rep. 774 (quoting with approval from *Wade v. Malloy* [N. Y.] 16 Hun, 226, which cites 3 Bl. Comm. 228).

#### WASTE AND INJURY

The words "waste and injury" to property, authorizing relief in equity, include only

illegal, wrongful, or dishonest illegal action. *Trumbull v. Palmer*, 93 N. Y. Supp. 349, 351, 104 App. Div. 51.

#### WASTE WATER

Sess. Laws 1889, p. 215, § 1, providing that all ditches constructed to utilize the waste, seepage, or spring waters of the state shall be governed by the same laws relating to priority of right to water in ditches constructed for the purpose of utilizing the water of running streams, if valid, is applicable only to appropriations of "waste, seepage, and spring waters" before they reach a natural stream, whether by natural surface flow or percolation, or by being artificially turned into the same; and the waters, after reaching a natural stream, become, in the absence of an intention by the owner to reclaim them, a part of the stream, and inure to the benefit of the appropriators of its waters. *La Jara Creamery & Live Stock Ass'n v. Hansen*, 83 Pac. 644, 645, 35 Colo. 105.

Defendant, while it was experimenting to determine whether to operate its zinc mine on land adjoining plaintiffs', and before it had erected a mill at the mine, contracted with plaintiffs for the privilege of "pumping and running waste water from their mine" across plaintiffs' land; it not being certain then whether defendant would acquire the right to operate the mine. Held that, even if ambiguous, the term "waste water from their mine" did not include water charged with refuse matter, called "sludge," discharged from a concentrating mill at the mine, as well as water pumped from the mine, not containing sludge. *Pedeltz v. Wisconsin Zinc Co.*, 134 N. W. 356, 358, 148 Wis. 245.

#### WASTING BY ESCAPE

The term "wasting by escape," in Act 1891-93, pp. 60, 61, providing for the confinement of gas in wells until its utilization, to prevent the product wasting by escape, and providing for the plugging of abandoned wells, etc., is very broad and applies equally whether the escape is at the well or at the end of a pipe leading from the well, as the purpose of the act is to prevent the waste of gas, and where one maliciously and willfully wastes and intends to waste the gas from his well, it is immaterial whether he suffers the gas to escape at the well or pipes it off to another place, and there allows it to escape. An owner must confine the gas, irrespective of the point of its escape. *Commonwealth v. Trent*, 77 S. W. 390, 392, 117 Ky. 34, 4 Ann. Cas. 209.

#### WATCH

See Constant Watch; Vigilant Watch.  
As jewelry, see Jewel—Jewelry; Parts of Watches.  
As ornament, see Ornament.

As tool, see Tools—Tools of Trade.

As wearing apparel, see Wearing Apparel.

### WATCH MOVEMENTS

Incomplete watch movements, adjusted so as to run, the only part lacking being the dial, or the dial, the various hands, and the minute wheel, are dutiable as "watch movements," not as parts of watches. *Hipp Didisheim & Bro. v. United States*, 123 Fed. 998, 999.

So-called time detectors, used for registering the movements of watchmen, which have a clock mechanism or time indicator, are dutiable under Tariff Act 1897 as "watch movements, whether imported in cases or not." *Hensel, Bruckmann & Lorbacher v. United States*, 135 Fed. 255, 256.

### WATCHER

Baker Ballot Law 1893, § 23, declares that each political party shall be allowed to appoint three electors to act as "watchers" in each voting place without expense to the county, one of whom shall be allowed to remain in the room outside the inclosed space. Held, that the watchers so provided for were not the same as overseers of election; the only additional right given to watchers not possessed by ordinary voters being the right to be in the voting room. The watchers also hold their position by virtue of appointment by the political party, while the overseers are appointed by the court. *In re Parrish*, 63 Atl. 460, 461, 214 Pa. 63.

### WATCHMAN

As laborer, see Laborer.

The term "policeman," with respect to the power to arrest without warrant, is the legal equivalent of the term "watchman" at common law. *Porter v. State*, 52 S. E. 283, 285, 124 Ga. 297, 2 L. R. A. (N. S.), 730 (citing *State v. Evans*, 61 S. W. 590, 161 Mo. 95, 84 Am. St. Rep. 669).

### WATER

See Appropriation of Water; Duty of Water; Flood Water; Flowing Water; Gin and Water; Head of Water; Inland Waters; Land for Holding Water; Marasque Water; Old Water; Percolating Waters; Public Water; Running Water; Second Water; Spring Water; Square Inch of Water; Surface Water; Tide Water; Waste Water.

Any other water, see Any Other.

As land, see Land.

As mineral, see Mineral.

As real estate, see Real Property.

Navigable waters, see Navigable.

Stream of Water, see Stream.

"Water" is a movable, wandering thing, and must of necessity continue common by

the law of nature, so that I can have only a temporary, transient, usufructuary property therein." 1 Bl. Com. 18. The state has not by statute changed the rule of the common law, so as to make the water of lakes and streams the subject-matter of commerce in the ordinary sense, nor has it authorized water diversion for other than riparian uses, saving for a limited class of purposes beneficial to the people of the state. *McCarter, Atty. Gen., v. Hudson County Water Co.*, 65 Atl. 489, 496, 70 N. J. Eq. 695, 14 L. R. A. (N. S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116.

The words "feed" and "water," as used in a contract for shipping hogs, that the owner is to feed, water, and take care of his stock at his own expense and risk, has reference only to the ordinary sustenance such animals require in the course of transportation, and the word "water" does not relate to pouring water upon the animals in an exigency to prevent their overheating. *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 488, 92 Am. Dec. 85.

While "water" is to be defined as a mineral, the rules of law as to its use must logically vary from those applicable to coal, ore, and the like. Water is a fluid, and mobile, "a fugitive." *Erickson v. Crookston Waterworks, Power & Light Co.*, 111 N. W. 391, 393, 100 Minn. 481, 9 L. R. A. (N. S.) 1250, 10 Ann. Cas. 843.

A place in a creek which flows into Sandusky Bay, the waters of which are on a level with the bay and Lake Erie and subject to rise and fall under the same influences as affect the surface of the lake, is a "water," within the meaning of Gen. Code, § 1453, authorizing the catching of carp in nets therein, when permission to do so has been obtained from the commissioners of fish and game. *Jackson v. State*, 32 Ohio Cir. Ct. R. 181, 184.

### WATER ABSORPTION TEST

As applied to bricks, the "water absorption test" is done by breaking a brick across, then immersing it in water for a stated time, such as 72 hours, and then comparing the weight of the immersed brick with the weight of the brick before immersion. *City of Chicago v. Singer*, 66 N. E. 874, 875, 202 Ill. 75.

### WATER AND MUD

Where foreign bills of lading under which cotton was transported provided that the carrier should not be liable for injuries caused by "wet or country damage," and declarations charged that the cotton was damaged by "water and mud" prior to the termination of the inland transportation, the shipper was bound to allege, in order to state a cause of action, that such damage resulted from some concurrent negligence of the carrier or its servants, or that the damage

could have been avoided by the exercise of care, etc., and that the carrier was not therefore relieved by the exception in the bill of lading. *Inman & Co. v. Seaboard Air Line Ry. Co.*, 159 Fed. 960, 971.

### WATER-BEARING SAND

See Good Water-Bearing Sand.

### WATER BOARD

Members of, as officers, see Officer.

### WATER COMPANY

As trading corporation, see Trading Corporation.

### WATER CONDITIONS

"Water conditions," as used in a contract whereby defendant was to furnish sufficient water for plaintiff's rice crop, but exempting him from liability should there be insufficient water, provided reasonable effort was made to procure the same, and providing that defendant should be the judge of the water conditions necessary for the crop, means nothing less than the amount of water necessary for the crop and the proper times for its application. *Kelly v. Corrington* (Tex.) 105 S. W. 1155, 1156.

### WATER COURSE

See Natural Water Course.

See, also, Pass.

A "water course" is usually referred to as having well-defined bed and banks. *Quinn v. Chicago, M. & St. P. Ry. Co.*, 120 N. W. 884, 885, 23 S. D. 126, 22 L. R. A. (N. S.) 789.

A "water course" is a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. *Hutchinson v. Watson Slough Ditch Co.*, 101 Pac. 1059, 1063, 16 Idaho, 484, 133 Am. St. Rep. 125.

The elements of a "water course" are definite banks, and with an obvious bed or channel showing the presence of running water at times, anyway. *Erwin v. Erie R. Co.*, 90 N. Y. Supp. 315, 317, 98 App. Div. 402.

The natural channel, with defined bed and banks, through which water is conveyed and discharged, of varying width and depth, is a "water course," though water does not flow therein continuously. *Belzoni Drainage Commission v. Winn*, 53 South. 778, 779, 98 Miss. 359.

A drain across plaintiff's lot did not constitute a "water course" in a legal sense, where all the water that passed through it was surface water, or was led to it through a sewer drain laid by the city. *Walther v. City of Cape Girardeau*, 149 S. W. 36, 38, 166 Mo. App. 467.

Civ. Code 1901, par. 859, subd. 5, requiring railroad companies to restore streams, "water courses," etc., crossed by them, re-

quires restoration of any well-defined channel or arroyo, in which surface or flood waters flow. *Kroeger v. Twin Buttes R. Co.*, 114 Pac. 553, 555, 13 Ariz. 348, Ann. Cas. 1913E, 1229.

Where sufficient water flows from a spring to moisten the land below the mouth of the spring, it may constitute a "water course," on the theory that the law of gravitation compelled the water to take the direction it did, because of the conformation of the land; but, where there were no banks to such "water course" on the land moistened, the owner of the land could not be called a "riparian owner," within the meaning of that term. *Morrison v. Officer*, 87 Pac. 896, 897, 48 Or. 569.

A "water course" consists of bed, banks and water, yet the water need not flow continually; and there are many water courses which are sometimes dry. It need not be shown to flow continually, as stated above, and it may at times be dry; but they must have well-defined and substantial existence. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. *Sierra County v. Nevada County*, 99 Pac. 371, 374, 155 Cal. 1 (quoting and adopting definition in *Angell, Water Courses*, §§ 3, 4).

A "water course" consists of bed, banks, and water. The right of an appropriator of the water of a stream, for the purpose of irrigation, to have the water flow in the river to the head of its ditch, is an "incorporeal hereditament," appurtenant to the ditch and coextensive with the owner's right to the ditch itself. *Rickey Land & Cattle Co. v. Miller & Lux*, 152 Fed. 11, 13, 14, 81 C. O. A. 207 (citing *Lower Kings River Water Ditch Co. v. Kings River & F. Canal Co.*, 60 Cal. 408; *Angell, Water Courses*, § 4; *Oregon Const. Co. v. Allen Ditch Co.*, 69 Pac. 455, 458, 41 Or. 209, 93 Am. St. Rep. 701; *Wyatt v. Larimer & Weld Irrigation Co.*, 33 Pac. 144, 18 Colo. 298, 36 Am. St. Rep. 280; *Wiley v. Decker*, 73 Pac. 210, 225, 11 Wyo. 496, 100 Am. St. Rep. 939; *Smith v. Denniff*, 60 Pac. 398, 24 Mont. 20, 81 Am. St. Rep. 408; *Conant v. Deep Creek & Curlew Val. Irr. Co.*, 66 Pac. 188, 23 Utah, 627, 90 Am. St. Rep. 721; *Simmons v. Winters*, 21 Or. 35, 27 Pac. 7, 28 Am. St. Rep. 727; *Hindman v. Rizor*, 21 Or. 112, 27 Pac. 13; *Bear Lake & River Waterworks & Irrigation Co. v. Ogden City*, 33 Pac. 135, 8 Utah, 494; *Tucker v. Jones*, 8 Mont. 225, 19 Pac. 571; *Sweetland v. Olsen*, 27 Pac. 339, 11 Mont. 27; *Cave v. Crafts*, 53 Cal. 135).

"A 'water course' is defined as consisting of bed, banks, and water. It must be made to appear that the water usually flows through a regular channel, with banks or sides. The bed and banks, or the channel, is in all cases a natural object, to be sought



after, not simply by application of any abstract rule, but, like other natural objects, to be sought for and found by the distinctive appearance it represents. A channel is, however, necessary to the constitution of a water course, whether worn deep by action of the water, or following the exact depression, without any marked erosion of soil or rock, or whether distinguished by difference of vegetation, or otherwise rendered perceptible." *State v. Muncie Pulp Co.*, 104 S. W. 437, 443, 119 Tenn. 47 (quoting and adopting definition in *Lux v. Haggin*, 10 Pac. 770, 69 Cal. 417).

"To constitute a 'water course,' according to the ordinary signification of that term, there must be a stream usually flowing in a particular direction and in a definite channel, and it must usually discharge itself into some other stream or body of water." In Act May 31, 1887, as amended, forbidding during a certain part of the year catching fish with a seine "in or upon any of the rivers, creeks, streams, ponds, lakes, sloughs, bayous, or other water courses" of the state, the phrase "other water courses" was used, not by way of restricting anything which had already been mentioned, but to include any other water course of the same general nature as those specified, which was not sufficiently described in the specifications already made. *People v. Bridges*, 31 N. E. 115, 116, 142 Ill. 30, 16 L. R. A. 684.

In a legal sense a "water course" is a channel cut through the turf by the erosion of running water, with well-defined banks and bottom, and through which water flows, and has flowed immemorially, not necessarily all the time, but ordinarily, and permanently for substantial periods of each year. Under Burns' Ann. St. 1901, § 5153, authorizing railroads to construct roads across any stream of water, water course, etc., a drainage ditch fed by no spring or water course, and used and constructed solely for expediting surface drainage, is not a water course, which the railroad is obliged to preserve and restore to its former state. *New Jersey, I. & I. R. Co. v. Tutt*, 80 N. E. 420, 422, 168 Ind. 205.

#### Broadening of stream

Where a stream flows in a continuous current, it is a "water course," though the water spreads over a large area, without apparent banks. *Miller & Lux v. Madera Canal & Irrigation Co.*, 99 Pac. 502, 509, 155 Cal. 59, 22 L. R. A. (N. S.) 391.

A slough having well-defined banks, leading from a river to a creek, through which water flows, is a "water course," though at some points the channel spreads out and the water is quite shallow. *Cederburg v. Dutra*, 86 Pac. 838, 840, 3 Cal. App. 572.

"A stream does not cease to be a 'water course,' and become mere surface water, be-

cause at a certain point it spreads over a level meadow several rods in width, and flows for a distance without defined banks before flowing again in a definite channel." *Harrington v. Demaris*, 77 Pac. 603, 606, 46 Or. 111, 1 L. R. A. (N. S.) 756 (citing Gould, *Waters* [3d Ed.] § 264).

A "water course," in the legal sense of the term, does not necessarily consist merely of the stream as it flows within the banks which form the channel in ordinary states of water. When, in time of ordinary high water, the stream, extending beyond its banks is accustomed to flow down over the adjacent lowlands in a broader, but still definable, stream, it has still the character of a water course, and the law relating to water courses is applicable, rather than that relating to mere surface water. *Town of Jefferson v. Hicks* (Okla.) 102 Pac. 79, 82, 24 L. R. A. (N. S.) 214 (quoting and adopting definition in *Byrne v. Minneapolis & St. L. Ry. Co.*, 36 N. W. 339, 38 Minn. 212, 8 Am. St. Rep. 668).

#### Ditch

The term "water course," used in connection with "river" in State Boards and Commissions Law (Consol. Laws, c. 54) §§ 10, 11, authorizing proceedings for the improvement of rivers and water courses, means a living stream with defined banks and channel, fed from other and more permanent sources than mere surface water, though not necessarily running all the time, and does not include artificial drainage ditches. *People ex rel. Bingham v. State Water Supply Commission*, 126 N. Y. Supp. 637, 641, 70 Misc. Rep. 265.

#### Drain synonymous

Under Rev. St. 1906, c. 1, tit. 6, providing that the words "water course," as used in the county ditch law, are synonymous with the word "drain," county commissioners are without authority to convert a living stream of water into a ditch by proceedings for the locating and constructing of a ditch. *Greene County Com'rs v. Harbine*, 78 N. E. 521, 522, 74 Ohio St. 318.

#### Ravine or hollow

A gulch through which water flows from about March 1st until August, being derived from melting snows and springs, constitutes a "water course," waters of which are subject to appropriation. *Borman v. Blackmon*, 118 Pac. 848, 849, 60 Or. 304.

A swale or depression, through or over which surface water runs according to the laws of nature, is a "water course," even though it has no well-defined banks. *Parizek v. Hinek*, 123 N. W. 180, 181, 144 Iowa, 563 (citing *Hull v. Harker*, 106 N. W. 629, 130 Iowa, 190).

In its more restrictive sense, a "water course" is such a waterway as gives rise to riparian rights in the flow of the water, and excludes a depression or natural drain which

merely carries water in rainy seasons. *St. Louis Merchants' Bridge Terminal Ry. Ass'n v. Schultz*, 80 N. E. 879, 882, 226 Ill. 409.

To constitute a "water course," there must be a channel, a bed to the stream, and not merely low land, or a depression in the prairie, over which water flows. It matters not what the width or depth may be. A water course implies a distinct channel, a way cut and kept open by running water, a passage whose appearance, different from that of the adjacent land, discloses to every eye on a mere casual glance the bed of a constant or frequent stream." *Rait v. Furrow*, 85 Pac. 934, 935, 74 Kan. 101, 6 L. R. A. (N. S.) 157, 10 Ann. Cas. 1044 (quoting and adopting the definition in *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241).

An instruction that a "water course" is a stream usually flowing in a particular direction, in a definite channel, and discharged into some other stream or body of water, and that the term does not include surface water conveyed from a higher to a lower level for limited periods during the melting of snow, or during or soon after the fall of rain, through hollows or ravines which at other times were dry, is correct. *McHenry v. City of Parkersburg*, 66 S. E. 750, 753, 68 W. Va. 533, 29 L. R. A. (N. S.) 860 (citing 2 Bouv. Law Dict. 468, 1219; *Neal v. Ohio River R. Co.*, 34 S. E. 914, 47 W. Va. 316).

To constitute a "water course," there must be a stream usually flowing in a particular direction, though it need not flow continually. It must flow in a definite channel, having a bed, sides, or banks, and usually discharges itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing into the hollows or ravines in land, which is mere surface water. In an action for damages caused by the obstruction of a slough, a petition that did not allege that the slough was a natural water course, or describe it as such, but described it as a swale or slough which received overflow water from a creek, was insufficient to raise an issue as to whether or not the slough was an actual water course, or to support recovery on the theory that it was. *Webb v. Carter*, 98 S. W. 776, 777, 121 Mo. App. 147 (quoting and adopting the definition in *Hoyt v. City of Hudson*, 27 Wis. 661, 9 Am. Rep. 473).

#### Surface waters

Whenever surface water flows in one continuous, well-marked channel, it becomes a "water course," if this regularly recurs each season. *Borman v. Blackmon*, 118 Pac. 848, 850, 60 Or. 304.

Under the law of Iowa as established by decision, which will be followed by the fed-

eral courts in that state in matters relating to public drains, if surface water in fact uniformly flows off over a given course, having reasonable limits as to width, the line of its flow constitutes a "water course." *Chicago, B. & Q. R. Co. v. Board of Sup'rs of Appanoose County, Iowa*, 182 Fed. 291, 294, 104 C. C. A. 573, 31 L. R. A. (N. S.) 1117.

A "water course," within the rule as to obstruction is a living stream of water with well-defined banks, and a channel and bed, though the stream need not run continuously, but it must be fed from other and more permanent sources than mere surface water resulting from rain or snow discharged from a higher to a lower level and find exit through its channel. *Scott v. Missouri Southern R. Co.*, 139 S. W. 259, 261, 158 Mo. App. 625.

A "water course" is a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. The flow of water need not be constant, but must be more than mere surface drainage occasioned by extraordinary causes; there must be substantial indications of the existence of a stream, which is ordinarily a moving body of water. *Hutchinson v. Watson Slough Ditch Co.*, 101 Pac. 1059, 1061, 16 Idaho, 484, 133 Am. St. Rep. 125.

Where the natural conformation of the surrounding country necessarily collects therein so large a body of water, after heavy rain or the melting of large bodies of snow, as to require an outlet to some common reservoir, and where such water is regularly discharged through a well-defined channel which the force of the water has made for itself, and which is the accustomed channel through which it flows or has ever flowed, it constitutes a "water course" or "waterway." *Chicago, R. I. & P. Ry. Co. v. Groves*, 93 Pac. 755, 761, 20 Okl. 101, 22 L. R. A. (N. S.) 802.

#### WATER COURSE DIVIDING COUNTIES

The Little river above the junction with the Withlacoochee river, though the entire stream lies in Brooks county, is a "water course dividing two counties," within Pol. Code 1895, §§ 367, 371, providing for county line bridges. *Brooks County v. Carrington*, 66 S. E. 625, 626, 7 Ga. App. 225.

#### WATER CRAFT

A houseboat, drawn upon the beach, may properly be called a "water craft," and need not be called a dwelling house or other building, in describing it in an indictment. *Nagel v. People*, 82 N. E. 315, 318, 229 Ill. 598.

#### WATER DEED

Contracts entered into by several parties for the sale of water rights, uniform in their provisions, printed blanks being used, are spoken of as "water deeds." *Creer v. Ban-*

croft Land & Irrigation Co., 90 Pac. 228, 229, 13 Idaho, 407.

### WATER DISTRICT

As public corporation, see Public Corporation.

### WATER FRONT

See Shore or Water Front.

### WATER FURNISHED FOR MANUFACTURING PURPOSES

In an action by a brewery to recover an excess paid for water from the rate required by ordinance for "water furnished for purely manufacturing purposes," it was not necessary, in order that the water be deemed to be used "purely for manufacturing purposes," that all of it went into the composition of beer if it was used in the business of making beer, and a finding of the trial court, if based on such assumption, was reversible error. *American Brewing Co. v. City of St. Louis*, 108 S. W. 1, 2, 209 Mo. 600.

### WATER MAINS

As machinery, see Machinery.

As property, see Personal Property; Property.

### WATER MARK

See High-Water Mark.

### WATER MILL

Under the Flowage Act (Pub. St. 1901, c. 142) § 12, authorizing a corporation to erect and maintain a "water mill" and dam on non-navigable streams, the erection and maintenance of a dam to develop water power to operate intricate machinery for producing electricity to be distributed to the public is operating a "water mill" within the terms of the statute. *McMillan v. Noyes*, 72 Atl. 759, 761, 75 N. H. 258.

### WATER PERMIT

Under the provisions of Act March 11, 1903 (Laws 1903, § 223), the "water permit," when granted as therein provided for, gives the applicant an inchoate right, which will ripen into a legal and complete appropriation only upon the completion of the works and the application of the water to a beneficial use. The right given by such permit may ripen into a complete appropriation, or may be defeated by the failure of the holder to comply with the requirements of the statute. The permit, therefore, is not an appropriation of the public waters of the state, but is the consent of the state given in the manner provided by law to construct and acquire real property. *Speer v. Stephenson*, 102 Pac. 365, 366, 16 Idaho, 707.

### WATER PERMITTING

A stipulation as to "water permitting," in a contract requiring a party to saw logs as far as water would permit, refers to natural conditions, such as drought and the like, bear-

ing upon the supply of water in the ditch and wasteways, and does not cover the fortuitous breaking of his dam. *Fletcher v. Prestwood*, 38 South. 847, 848, 143 Ala. 174 (citing *Jones v. Anderson*, 2 South. 911, 82 Ala. 302).

### WATER PIPE

As appendage, see Appendage.

### WATER RATES

As taxes, see Tax—Taxation.

### WATER RENTS

As taxes, see Tax—Taxation.

### WATER RIGHT

As appurtenance, see Appurtenance—Appurtenant.

As personal property, see Personal Property.

As real estate, see Real Property.

As right and franchise, see Right and Franchise.

A "water right" is a "freehold," within the statute creating the Court of Appeals and requiring it to retransfer to the Supreme Court cases involving a freehold. *Monte Vista Canal Co. v. Centennial Irrigating Ditch Co.*, 123 Pac. 831, 833, 22 Colo. App. 364.

A "water right" is the legal right to the use of any unappropriated water of any natural stream, water course, or source of supply, and exists only in contemplation of law, and is for purposes of taxation "personal property," within Const. art. 12, § 17, and Pol. Code 1895, §§ 16, 3680, defining "property" as including money, franchises, and other things capable of private ownership, and defining "real estate" as including the possession or ownership of land, mines, minerals, and quarries, and "improvements" as including all buildings, structures, etc., and "personal property" as including everything which is the subject of ownership, not included within real estate or improvements, so that under section 3716, providing that the personal property and franchises of water companies must be assessed in the district where the principal works are located, a water company owning a water right without the limits of a school district and conveying water by pipe lines into the district, where it is distributed to the inhabitants thereof, is properly assessed in the district; that being the place of business and principal works of the company. *Helena Waterworks Co. v. Settles*, 95 Pac. 838, 839, 37 Mont. 237.

Complainant's ancestors claimed title to the water power of a certain pond, but they and defendant (an adjoining owner of land) disputed as to their relative rights. Defendant afterwards filed a bill to enjoin complainant's ancestors from interfering with his rights in the pond, which resulted in the purchase of defendant's land and his rights in the pond, under an agreement enabling

complainant's ancestors to use the water rights agreed to be granted, and they gave back their mortgage on the land and rights so granted. The deeds remained unquestioned for 20 years, when complainant sued to exclude the water rights from the mortgage on the ground of mutual mistake, alleging that defendant mortgagee never had title thereto. Held, that the term "water rights" was undoubtedly meant to convey more than riparian rights, and covered rights in the water power which might exist or be claimed apart from any title in the land covered by the dam or pond, and that, as the mortgagee claimed title to such rights at the time the mortgage was executed, complainant was not entitled to relief. *Cranston Print Works v. Dyer*, 32 Atl. 922, 923, 924, 19 R. I. 208.

### WATER SIDE

Where a proprietary grant of shore land described it as bounded on the east by the "water side," the grant was not subject to the doctrine that sovereign grants should be strictly construed in so far as they affect public rights, and should be held to pass to the grantee the private title to the land to low-water mark, subject to the *jus publicum* in the fore shore. *Bardes v. Herman*, 114 N. Y. Supp. 1098, 1101, 62 Misc. Rep. 428.

### WATER SUPPLY

See Sufficient Water Supply.

As public business, see Public Business.

As public calling, see Public Calling.

As public service, see Public Service.

As public use, see Public Use (In Eminent Domain).

### WATER-TIGHT

A contract to make a cellar "water-tight" is not carried out where, after the work is completed, water leaks in, but the contractor puts under the floor an automatic instrument which, while at work, keeps the cellar dry. *MacKnight Flintic Stone Co. v. City of New York*, 43 N. Y. Supp. 139, 141, 13 App. Div. 231.

### WATER-TUBE BOILER

The term "water-tube boiler," in a patent reciting that the patentee has invented new and useful improvements in sectional steam boilers, of which the following is a specification: "The herein described water-tube boiler is especially adapted to marine service"—is used synonymously with sectional steam boiler, because such use was common, and because the term "sectional steam boiler," used in the specification, relates to a class of boilers no less comprehensive than the class referred to by the term "water-tube boiler." *Babcock & Wilcox Co. v. North American Dredging Co.*, 151 Fed. 265, 267.

### WATER WELL

"Water wells," in oil fields, are those in which the inpour of salt water requires con-

stant pumping to recover oil, and the continuous services of an attendant known as a "pumper." *Glendenning v. Superior Oil Co.*, 70 N. E. 976, 977, 162 Ind. 642.

### WATERED, FED, AND CARED FOR

A freight contract for the shipment of hogs, providing that the animals are to be "watered, fed, and cared for" by the shipper or his agent in charge, means no more than that the shipper shall see that the stock is furnished with such feed and water as is required for consumption, and has no connection with the general treatment of stock essential to safe transportation; and hence does not impose on the shipper the duty of showering the hogs to keep down their temperature. *Peck v. Chicago Great Western Ry. Co.*, 115 N. W. 1113, 1114, 138 Iowa, 187, 16 L. R. A. (N. S.) 883, 128 Am. St. Rep. 185.

### WATERED STOCK

Corporate stock is "watered" when issued by the company for property at an overvaluation, or where the company does not receive money or money's worth therefor. *Goodnow v. American Writing Paper Co.*, 66 Atl. 607, 72 N. J. Eq. 645.

If an investment of \$100,000 in a franchise-protected business authorized in the opinion of the promoters, the issue of \$200,000 worth of stock, and such stock for a number of years maintains itself at par, paying satisfactory dividends, it would be obviously fair to assert that in the opinion of the shareholders the franchise is worth \$100,000, assuming no appreciation of tangible assets; yet it will always be true that, unless the whole net return, compared with the value of tangibles, is above a satisfactory return on tangible investment alone, the addition of stock issued for franchise will be regarded as "water," and detract from the value of the entire issue. *Consolidated Gas Co. v. New York*, 157 Fed. 849, 878.

### WATERING

See Feeding and Watering.

### WATERS AS BOUNDARY BETWEEN STATES

See Boundary.

### WATERS OF THE STATE

In Pen. Code, § 636, providing that every person who shall set any net for catching fish in waters of the state shall be guilty of a misdemeanor, the words "waters of the state" refer to the waters coming within the regulating power of the state concerning the fish therein. *People v. Miles*, 77 Pac. 666, 669, 143 Cal. 636.

Defendant took game fish from an inland unnavigable lake and shipped the same from the state. His grantors owned the fee to the lands in part bounding the lake prior to the passage of any law regulating the taking of any fish from the waters of the state. The

lands at the time he acquired them were chiefly valuable for the fishing adjacent thereto, and they continued to be chiefly valuable for such purpose. Held, that he violated Kirby's Dig. § 3620, as amended, making it unlawful to export from the state game fish; and also Laws 1907, p. 912, prohibiting fishing in the waters of the state by means of any net, in view of Act March 17, 1885, § 2, defining the term "waters of the state" as all streams, lakes, etc., wholly or in part within the state. *Fritz v. State*, 115 S. W. 385, 386, 88 Ark. 571.

### WATERS OF THE UNITED STATES

See Navigable Water of the United States.

A fleet in Manila bay, about six weeks after the treaty with Spain by which the Philippine Islands were acquired by the United States, were not in the "waters of the United States." *United States v. Smith*, 25 Sup. Ct. 489, 491, 197 U. S. 386, 49 L. Ed. 801.

### WATERPROOF CLOTH

Woolen or worsted fabrics known as "cravenette cloths," which have been subjected to a process to render them nonabsorbent, are dutiable under Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule J, par. 369, as "waterproof cloth." *Brown & Eadie v. United States*, 126 Fed. 446.

The titles of the various schedules in tariff acts are not intended to be perfectly accurate, but furnish general information only of the articles enumerated in the paragraphs therein; and the principle of ejusdem generis should not be applied to exclude waterproof woolen cloth from the provision for "waterproof cloth" in paragraph 369, Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule J, because the subject of that schedule is flax, hemp, and jute. Certain woolen goods known as "cravenette cloths," which have been subjected to a process intended to make them rain-repellent, which are chiefly used for outer garments to be worn in rainy weather, and which, for all ordinary purposes, are waterproof, are dutiable as "waterproof cloth," under paragraph 369, and not under paragraphs 392 and 395. *United States v. Brown & Eadie*, 136 Fed. 550, 551, 69 C. C. A. 260.

### WATERWAY

Where the natural conformation of the surrounding country necessarily collects therein so large a body of water, after heavy rain or the melting of large bodies of snow, as to require an outlet to some common reservoir, and where such water is regularly discharged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows or has ever flowed, it constitutes a "water course" or "waterway." *Chicago, R. I. & P. Ry. Co. v. Groves*,

93 Pac. 755, 761, 20 Okl. 101, 22 L. R. A. (N. S.) 802.

### WATERWORKS

As internal improvements, see Internal Improvement.

As public utility, see Public Utility.  
Control of waterworks, see Control.

One who obtained from a city a franchise authorizing him to sink an artesian well to supply water to the public therefrom for pay, through mains and pipes which he was authorized to lay over certain streets in a particular part of the city, was conducting a system of "waterworks," within Code 1906, § 3836, imposing an annual privilege tax on waterworks in cities; the fact that the water supply is an artesian well not making the business taxable as an artesian well, instead of a waterworks, where the main purpose of the well is to conduct a waterworks business, and is not merely incidental to its use by the owner. *Randall v. Smith*, 51 South. 917, 918, 96 Miss. 647.

### WATERWORKS AND ELECTRIC LIGHT PLANT

The phrase "a waterworks and electric light plant," in an ordinance providing for an election to determine the advisability of issuing bonds for the purpose of erecting a waterworks and electric light plant, relates to but one plant on one site, to be conducted by one management, so that the ordinance is not defective as submitting two propositions in such a manner that the voters cannot vote for one. *State ex rel. City of Chillicothe v. Wilder*, 98 S. W. 465, 466, 200 Mo. 97.

### WATERWORKS COMPANY

As manufacturer, see Manufacturer.

As public improvement corporation, see Public Improvement Corporation.

As quasi public corporation, see Quasi Public Corporation.

### WATERMELON

As fruit, see Fruit.

As vegetable, see Vegetable.

### WATT

The unit of power, called the "watt," equals 10,000,000 units of power in the C. G. S. system, or one ampere times one volt. One horse power is 746 watts, or three-fourths of a kilowatt. *Peoria Waterworks Co. v. Peoria Ry. Co.*, 181 Fed. 990, 1001.

### WAX

Carnauba wax substitute, which is, compounded of carnauba wax (vegetable wax), and paraffin (mineral wax), and which is to all appearance a waxy substance used for the same purpose as other waxes, is covered

by the provision for "wax, vegetable or mineral," in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 695. *United States v. Charles Morningstar & Co.*, 168 Fed. 541, 542, 94 C. C. A. 123.

## WAY

See By Way of; County Ways; Established Road or Way; Passageway; Private Way; Public Way; Right of Way; Sluiceway; Traveling Way; Under Way; Waterway.

Any way dispose of, see Any.

Any way mentioned, see Any.

See also, Avenue.

A "way" is an incorporeal hereditament consisting of the right of passing over another's ground, and may arise from grant, prescription, or necessity, and is either in gross, attached to the person using it, or appurtenant, annexed to and passing with a conveyance of the estate, but it is never presumed to be in gross when it can be fairly construed to be appurtenant. *Lucas v. Rhodes*, 94 N. E. 914, 917, 48 Ind. App. 211.

"A 'way' ex vi termini imports a right of passing in a particular line." An easement of private way over land must have a particular definite line. *Crosier v. Brown*, 66 S. E. 326, 327, 66 W. Va. 273, 25 L. R. A. (N. S.) 174 (citing Washb. Easem. 160; 3 Kent, Comm. 419).

"The word 'passageway' cannot be any broader in its signification than 'way' or 'highway,' and can have essentially no different meaning." Hence the reservation of the privilege of a passway, reading "passway" as "passageway," was merely the reservation of a way or right of passage over the ground. *Chandler v. Goodridge*, 23 Me. 78, 82.

A "way" is a right, the enjoyment of which requires no exclusive possession of the locus in quo by the owner. It is the right of going over another man's ground. A reservation of "the right of passway near the original road through said land for a passway," while not void for uncertainty, reserves no specific land, but only a right to pass over a way to be selected "near" the original road. *Bunch v. Wheeler*, 109 S. W. 654, 655, 210 Mo. 622.

A "way" imports a right of passing in a particular line, and not everywhere, over the land upon which the right may be claimed, and this does not mean that a person using the right of way may not deviate at all from the traveled road or track, to the extent, at least, that this may become necessary in a reasonable use of the right of way; but it does mean that the claimant may not abandon one track or right of way and adopt another, and where defendant, before acquiring a right of way over plaintiff's land by prescription, made a material deviation from the

previously traveled way to avoid a washout on the old way, such deviation broke the continuity of the use required by law to establish a prescriptive right. *Lund v. Wilcox*, 97 Pac. 33, 35, 34 Utah, 205.

Rev. Laws, c. 111, § 188, provides that the bell of an engine shall be rung or its whistle blown where the railroad crosses on the same level any highway, townway, or traveled place at which a signboard is required to be maintained by sections 190 and 191. Section 190 requires a signboard to be maintained at any highway or townway where a railroad crosses at the same level. Held that, a "way" being a highway within the meaning of Rev. Laws, c. 111, §§ 188, 190, the failure to ring the bell or sound the whistle at a crossing thereon was of itself evidence of negligence. *Giacomo v. New York, N. H. & H. R. Co.*, 81 N. E. 899, 900, 196 Mass. 192.

### Road distinguished

Private road distinguished, see Private Road.

The terms "public highway" and "public road" are not synonymous. The word "road" refers to the piece or strip of land taken. "Way," in legal parlance, merely denotes an easement, and that the land has been subjected to servitude. "Highway" is also a generic term, which includes other uses besides the right of ordinary locomotion over land which has been subjected to public use. *Johnson v. State*, 58 S. E. 265, 267, 1 Ga. App. 195.

In the common acceptance of the term, roads or "ways" are considered to be either public or private; but in the legal acceptance a way may be a road that is neither a public highway nor a private road or way under the statute, and an indictment under Pen. Code, § 524, for malicious injury to a private way is bad unless it alleges the facts showing that it was laid out by authority of law. *Territory v. Richardson*, 76 Pac. 456, 457, 8 Ariz. 336.

## WAY OF NECESSITY

See, also, Common of Ways Implied.

A "way by necessity" arises only between grantor and grantee; none arising where there is no privity of title. *Roper Lumber Co. v. Richmond Cedar Works*, 73 S. E. 902, 904, 158 N. C. 161.

A "right of way from necessity" must be in fact what the term naturally imports, and cannot exist, except in cases of strict necessity. That the way over his land is too steep or too narrow, or that other and like difficulties exist, does not alter the case; and it is only when there is no way through his own land that a grantee can claim a right over that of his grantor. It must also appear that the grantee has no other way. No right of way over another's land exists as a way of necessity, where claimant's land is bounded by a road connecting with the county roads, though there is not easy access to

that road, and no constructed track for teams connecting his land with it. *Corea v. Higuera*, 95 Pac. 882, 884, 153 Cal. 451, 17 L. R. A. (N. S.) 1018 (citing *Kripp v. Curtis*, 11 Pac. 879, 71 Cal. 63).

A purchaser of land, excluded from the public highway except by passing over the vendor's land, takes a way over the vendor's land as a "way of necessity." *Bentley v. Hampton* (Ky.) 91 S. W. 266, 267.

Where land is so situated that access to it from the highway cannot be had except over other land of the grantor or lessor, the grantee or lessee is entitled to a "way of necessity" over such intervening land of the grantor or lessor. *Commonwealth v. Burford*, 73 Atl. 1064, 1066, 225 Pa. 93.

A right of way over a street, passing as an incident to a conveyance of a lot described with reference to a plat "as bounded on the street," is not a "way of necessity," but is an easement created by estoppel, which exists, though there are other ways, public or private, leading to the land. *New England Structural Co. v. Everett Distilling Co.*, 75 N. E. 85, 86, 189 Mass. 145.

Where an owner of land was a stranger to the title of land owned by a lumber company, the latter was not entitled to a "private way of necessity," since a "way of necessity" can only be raised out of land granted or reserved by the grantor, but not out of the land of a stranger. *Healy Lumber Co. v. Morris*, 74 Pac. 681, 686, 33 Wash. 490, 63 L. R. A. 820, 99 Am. St. Rep. 964.

That there may be a "way of necessity," the relation of grantor and grantee must have existed between the parties, or persons in their lines of title; and it is not enough that the land was once part of the public domain, and hence owned by a common grantor. That defendants may have a "way of necessity" over plaintiff's land, it is necessary that there be no other way to reach their lands; and it is not enough that it is the only way by which a wagon can reach them, if a way can be constructed over defendant's lands. *Bully Hill Copper Mining & Smelting Co. v. Bruson*, 87 Pac. 237, 238, 4 Cal. App. 180 (citing *Kripp v. Curtis*, 11 Pac. 879, 71 Cal. 65).

L. S. was the owner of a tract of 198 acres of land, entirely surrounded by the lands of others, and without access to a public road. L. S. purchased a tract of 80 acres adjoining to and lying between the 198-acre tract and the public road, and made a private way through the 80 acres to the public road, placing gates or bars to admit of passage through wherever it was necessary to build fences across said way. In a suit to enforce liens against the 198 acres, the same were sold, and a conveyance thereof made by special commissioner to the purchaser. Held, there was a "way of necessity" in favor of

the purchaser through the 80 acres still remaining the property of L. S. *Proudfoot v. Saffie*, 57 S. E. 256, 257, 62 W. Va. 51, 12 L. R. A. (N. S.) 482.

It is a familiar principle of law that, when one sells land surrounded by other lands of the grantor, a right of way across such other land, as a necessity, is implied from the grant. But that is because the existence of such way is necessary to the use and enjoyment of the granted estate, and hence, by operation of law, is included in the grant. But the principle does not control when there exists over the lands of the grantee, or otherwise, an open and convenient way of access to the granted estate. Such additional way of ingress and egress, while perhaps a convenience which might enhance the value of the land, cannot be in any proper legal sense classed as a "way of necessity." *Wills v. Reed*, 38 South. 793, 795, 86 Miss. 446.

The right to a "way of necessity" is based upon the theory of an implied grant; the way being necessary to the use and enjoyment of the estate granted, and for the purpose of enabling one to use and enjoy one's own lands, and not to use or enjoy the lands of another. It is an incorporeal right appurtenant to the estate granted, and not a personal right or one incident to personal property. The fact that a person has more cattle than can be supported on his own lands, and that for many years he has engaged in stock raising and used the public range, does not any more entitle him to ways of necessity over surrounding lands than any other cattle owner would be, whether he owns real estate or not, in order that his cattle might pasture upon the public domain, or than would be a resident of a town, owning a cow, that the same might reach some particular section of public land, though it could not be reached in any other way. *McIlquham v. Anthony Wilkinson Live Stock Co.*, 104 Pac. 20, 22, 18 Wyo. 53.

#### WAY OPENED AND DEDICATED TO PUBLIC USE

A road laid out by park commissioners partly across private land is not a "way opened and dedicated to public use," within Rev. Laws, c. 48, §§ 98, 99, making cities, etc., liable for injury caused by defects in such ways, though such road is of such appearance as to lead an ordinarily observant traveler to suppose that it was a public highway, and not a parkway. *Jones v. City of Boston*, 87 N. E. 589, 590, 201 Mass. 267.

#### WAYBILL

In a prosecution for the theft of whisky, testimony that a car was found to be short according to the waybill is admissible, even though the "waybill" is not shown to have been made by or to be correct within the knowledge of the witness; for it is a docu-

ment containing a description of and shipping directions for goods transported by common carriers on a land route, and so is admissible in evidence itself, being in the nature of an act, rather than a declaration. *Berry v. State* (Ark.) 146 S. W. 139, 140.

#### Bill of lading distinguished

"Waybill" is not technically synonymous with "bill of lading," though sometimes so used, but rather indicates the bill accompanying the goods. *Sellers v. Savannah, F. & W. R. Co.*, 51 S. E. 398, 400, 123 Ga. 386.

A "waybill" goes with the shipment, and shows the routing, free charges, and such matters. It is very different from a bill of lading, which in many ways represents the property, its contents or contract or affreightment, and largely fixes the representative rights of carrier, shipper, and consignee. *Berry Coal & Coke Co. v. Chicago, P. & St. L. Ry. Co.*, 92 S. W. 714, 717, 116 Mo. App. 214.

#### WAYLEAVE

In 12 Ency. of Laws of England, 575, it is said: "The term 'wayleave' means a right of way. \* \* \* In considering the extent to which a wayleave may be used, the very object of the grant or reservation to which it is ancillary must be borne in mind, and this may involve a user of a different kind from that which was actually in contemplation at the time of the grant or reservation." *Jones & Co. v. Venable*, 47 S. E. 549, 551, 120 Ga. 1, 1 Ann. Cas. 185.

#### WAYS, WORKS, MACHINERY, OR PLANT

Where a construction company was blasting a trench in an excavation, the rock which was being blasted out was not, under the Employers' Liability Act, a "way" provided by the master for his servants. *McGowan v. New York Contracting Co., Pennsylvania Terminal*, 127 N. Y. Supp. 532, 534, 143 App. Div. 1.

A wall in course of construction is not "works," "ways," nor "means," within the Employers' Liability Act, making an employer liable for injuries caused by defective works, ways, or means. *Ripp v. Fuchs*, 113 N. Y. Supp. 361, 364, 129 App. Div. 321.

A signal rope in a mine extending from the hoisting engine on top into the mine, used to signal the engineer, is part of the "ways, works, machinery, or plant." *New Connells-ville Coal & Coke Co. v. Kilgore*, 50 South. 205, 209, 162 Ala. 642.

A pole, with a "T" end to aid employes in lifting quarters of beef suspended from an overhead track by a wheel and hook, is not "ways, works, machinery, or plant," within Employers' Liability Act. *Davis v. Plant*, 138 N. Y. Supp. 145, 146.

Where a servant was injured by the fall of certain bales of cotton which were alleged to have been negligently piled, such bales did not constitute a part of the master's "ways, works, or machinery," within the Employers' Liability Act. *Cahill v. Boston & M. R. R.*, 76 N. E. 911, 912, 190 Mass. 421 (citing *Lynch v. Allyn*, 35 N. E. 550, 160 Mass. 248, 252).

Whether a crosspiece nailed across lumber on a flat car and from the standards on one side to those on the other, for the purpose of staying the lumber, was a "way or appliance," within the statute (Revisal 1905, § 2646), which defendant was bound to inspect and see that it was properly nailed, was on the evidence for the jury. *Wallace v. Seaboard Air L. R. Co.*, 54 S. E. 399, 402, 403, 141 N. C. 646, 13 L. R. A. (N. S.) 384.

The ladder having been used for from one to two weeks by defendant's employes in passing from the ground to the dredge, it could have been properly found to be a part of defendant's "ways" within Labor Law, § 200, providing that the employer should be liable for an injury caused to an employé by reason of any defect in the "ways" connected with the business of the employer which arose from or which had not been remedied owing to the employer's negligence, etc. *Cooney v. Central Dredging Co.*, 135 N. Y. Supp. 472, 473, 151 App. Div. 345.

While the fellow-servant law, giving a right of action to an employé injured by reason of defective machinery, ways, or appliances, extends to logging railroads, the term "ways" refers rather to roadways and material objects, which it is the duty of the employer to provide, than to methods of work. *Hamilton v. Hines Bros. Lumber Co.*, 72 S. E. 588, 589, 156 N. C. 519.

An unguarded rip saw is a defect in the condition of the "ways, works, and machinery," within the provisions of the Employers' Liability Act, giving a servant a right of action for injuries received because of such defect. *Proctor v. Rockville Centre Milling & Construction Co.*, 99 N. E. 81, 205 N. Y. 508.

Under St. 1887, p. 899, c. 270, § 1, making employers liable for injuries to employes caused by any defect in the "ways, works, or machinery," an employer is not liable for injuries caused by the falling of a casting which an employé was preparing to attach to an elevator gate, since the appliance did not become a part of the "ways, works, or machinery," until it was attached. *Nye v. Dutton*, 73 N. E. 654, 655, 187 Mass. 549.

Mule holes in mines made to prevent mules from straying and being a source of danger to employes on mine cars are part of the "works" of mine owners, and failure to provide them with hitching posts to keep the mules therein is a "defect in the works," within Act June 10, 1907, which renders the



owner liable for injuries to an employé caused thereby, though negligence of a fellow servant was shown. *Toward v. Meadow Lands Coal Co.*, 79 Atl. 129, 131, 229 Pa. 553.

The floor of a brewery room used for washing empty beer kegs, with its sink hole, was not a "way," within the meaning of Labor Law, § 202, formerly Employers' Liability Act, § 3, providing that an employer is liable for injury to an employé caused by "any defect in the condition of the ways, works or machinery" due to negligence chargeable to the employer; "ways" having reference to passageways between the machines, vats, etc., or between different departments, and not to a proper and adequate part of the works adapted to a particular purpose. *Kern v. Welz & Zerweck*, 136 N. Y. Supp. 412, 415, 151 App. Div. 432.

Evidence held to show that a wall of a stone quarry was a part of the "ways or works" of the master within the meaning of Employers' Liability Act, Code 1907, § 3910, subd. 1, making the master liable for injuries to a servant as if he were not engaged in such employment in case the injury is caused by reason of any defect in the condition of the ways, works, etc., connected with or used in the business of the master. *Alabama Consol. Coal & Iron Co. v. Hammond*, 47 South. 248, 249, 156 Ala. 258.

The harness of a horse attached to a delivery wagon which an employé was driving was not a part of the employer's "machinery," within Rev. Laws, c. 106, § 71, cl. 1, giving an employé the same right of action against his employer for personal injuries by a defect in the ways, works, and machinery connected with the employer's business, as if he had not been an employé; "machinery" only including such machines or mechanical devices as are in use, and such appurtenances thereof as are used incidental to the use of the machine. Nor was the harness a part of the "ways" or "works." *Murphy v. O'Neil*, 90 N. E. 406, 407, 204 Mass. 42, 26 L. R. A. (N. S.) 146.

A tree projecting over a railroad track so as to injure employés riding on trains is a part of the "way" of a railroad company, within Code 1907, § 3910, subd. 1, making an employer liable to an employé as to a stranger, when the employé is injured by any defect in the condition of the ways, works, or machinery used in the employer's business; the "way" of a railroad company including such adjacent space as may be necessary for the unobstructed operation of the train, and any permanent obstruction to their operation being a part of the way. *Southern Ry. Co. v. Bentley*, 56 South. 249, 251, 1 Ala. App. 359.

Under the construction placed by the Supreme Court of Alabama upon the subsection of the Employers' Liability Act of that

state which provides that an employer is liable for a personal injury received by his employé when the injury is caused by any defect in the "ways, works, machinery, or plant" connected with or used in the business of the employer, a wire stretched over the track of a railroad company, not sufficiently high above a freight car running on the track to permit an employé standing on the top of such car to safely pass under the wire, does not constitute a defect in the way or track, where there is nothing to indicate that the wire is not a mere movable object, temporarily placed too near the track. *Hubbard v. Central of Georgia Ry. Co.*, 63 S. E. 19, 22, 131 Ga. 658, 19 L. R. A. (N. S.) 738.

#### Hatchways and hatches

In the absence of a contract governing the relation between shipowner and stevedore, hatchways and hatches are not a part of the "ways, works, and machinery" of the stevedore or owner. *Crimmins v. Booth*, 88 N. E. 449, 451, 202 Mass. 17, 132 Am. St. Rep. 468.

A hatch cover on the second deck of a vessel, which when in place constituted part of the gangway over which employés were required to move cargo in loading the vessel, constituted a "way," within Employers' Liability Act, which makes employers liable under certain conditions for injuries resulting from defects in the condition of ways, works, and machinery. *La Compagnie Generale Transatlantique v. Maguire*, 168 Fed. 34, 35, 93 C. C. A. 385.

Where plaintiff's intestate was killed by the defectiveness of the hatch of a vessel which he was unloading by virtue of his employment by defendant, a stevedore, and the hatch was not under defendant's control, it was no part of defendant's "ways, works, or machinery" within Rev. Laws, c. 106, § 71, cl. 1, authorizing a recovery by an employé for an injury resulting from a defect in the ways, works, or machinery connected with or used in his employer's business. *Hyde v. Booth*, 74 N. E. 337, 188 Mass. 290.

#### Skids

A skid used for the transferring of freight from a car to the platform of a warehouse, which rests loosely upon a wooden horse set in the street, is not a "way," within the purview of the Employers' Liability Act, giving a right of action to an employé injured by reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer. *Heiser v. Cincinnati Abattoir Co.*, 98 N. E. 747, 205 N. Y. 379; *Id.*, 126 N. Y. Supp. 265, 269, 141 App. Div. 400.

An iron skid or running board, one end of which was placed on a railroad freight-house floor against a cleat to prevent it from slipping, and the other end in a car door,

for loading and unloading cars, the skid and cleats being moved about from car to car, was not a part of the "ways, works, or machinery" within Employers' Liability Act (Laws 1902, p. 1748, c. 600) § 1, subd. 1, making the employer liable for injuries caused by defects in the ways, works, or machinery not remedied owing to the employer's negligence, etc.; the skid and cleats being a part of the tools and appliances furnished the freight handlers. *Nappa v. Erie R. Co.*, 88 N. E. 30, 32, 195 N. Y. 176, 21 L. R. A. (N. S.) 96.

#### Staging or scaffold

A scaffold, which collapsed while plaintiff was standing on it nailing strips to the ceiling, which was portable and consisted of planks resting upon horses, was a part of the employer's "ways, works, and machinery," within Employers' Liability Law, § 200, as amended. *Keyser v. Reid-Palmer Const. Co.*, 138 N. Y. Supp. 452, 453, 78 Misc. Rep. 393.

Staging constructed by a third person with his own materials and for his own purposes is not a part of the "ways, works, or machinery" of another contractor, though occasionally used by his employes, within Rev. Laws, c. 106, § 71, cl. 1, and St. 1909, c. 514, § 127, cl. 1, which makes the employer liable for injuries resulting from negligence in "ways, works, or machinery." *Granara v. Jacobs*, 98 N. E. 1029, 1030, 212 Mass. 271.

Under the Massachusetts employer's liability act, as construed by the state courts, a staging built by a shipbuilding company under the direction of its superintendent around a vessel under construction for the carpenters and caulkers to work upon and required for that purpose is a permanent structure which constitutes "ways, works, or machinery," within the meaning of the statute, and a defect in its construction by a failure to spike one of the cross-pawls to the uprights may authorize a recovery against the company for an injury to an employe resulting therefrom. *Richard T. Green Co. v. Young*, 179 Fed. 493, 494, 103 C. C. A. 73.

Plaintiff, a car painter, was injured by the collapse of a loose staging erected by carpenters who had been working on a car, and which plaintiff used in his work, instead of constructing a staging for himself. The different mechanics were each required to provide their own staging. Held, that such staging, easily movable and not fastened together, was not a part of the "ways, works, and machinery" of defendant, which the employer was bound to keep in a reasonably safe condition by the employer's liability act, and that the railroad company was not responsible to plaintiff for the condition in which he found and used it. *Nichols v. Boston & M. R. R.*, 92 N. E. 711, 713, 206 Mass. 463.

## WE

#### As joint obligation

Where a vendor's lien note stated that "we or either of us promise to pay," etc., the liability of the four makers was joint and several, though the conveyance, a part of the consideration of which was represented by the note, stated that the cash payment was made in the proportions of one-fourth, one-third, one-sixth, and one-fourth, and that the amounts to be paid on the note were in the same proportions. *Dolinski v. First Nat. Bank (Tex.)* 122 S. W. 276, 278.

#### Personal or corporate liability implied

The word "we," when used in a note, does not always or necessarily imply a plurality of makers, and is often used to designate or describe a corporation aggregate. A promissory note, which reads, "Thirty days after date we promise to pay," etc., and signed by a corporation per its officers, is on its face the note of the company alone, and is not the note of the officers, and the latter are not personally bound thereon. *Aungst v. Creque*, 74 N. E. 1073, 1074, 72 Ohio St. 551 (citing *Randolph*, Commercial Paper, § 143; *Bean v. Pioneer Mining Co.*, 6 Pac. 86, 66 Cal. 453, 56 Am. Rep. 106; *Atkins v. Brown*, 59 Me. 90; *Castle v. Belfast Foundry Co.*, 72 Me. 167; *Latham v. Houston Flour Mills*, 3 S. W. 462, 68 Tex. 127; *Reeve v. First Nat. Bank of Glassboro*, 23 Atl. 853, 54 N. J. Law, 208, 16 L. R. A. 143, 33 Am. St. Rep. 675; *Liebscher v. Kraus*, 43 N. W. 166, 74 Wis. 387, 5 L. R. A. 496, 14 Am. St. Rep. 171; *Miller v. Roach*, 22 N. E. 634, 150 Mass. 140, 6 L. R. A. 71).

The phrase, "we, or either of us," in a note reciting, "We, or either of us, trustees" of a designated school district, promise to pay to the order of a person named, a specified sum without interest until after maturity, for money borrowed to build schoolhouse in the district, and signed by two members, followed by the word "trustees," does not show a personal liability of the makers, but the entire note shows that they do not intend to promise in their individual capacity. *Warford v. Temple (Ky.)* 73 S. W. 1023, 1024.

A note reciting "the G. Association," etc., "and 'we,' the undersigned, promise to pay," and signed in the corporation's name, "by P." and others, who were its officers, binds both the corporation and the officers as individuals. *Nunnemacher v. Poss*, 92 N. W. 375, 376, 116 Wis. 444.

## WEAK

#### WEAK ALKALINE SOLUTION

A "weak alkaline solution," under a process for preventing stain in lumber, includes lime water. *Lumber Anti-Stain Co. v. Nes-ter*, 178 Fed. 927, 933, 102 C. C. A. 299.

## WEALTH

The term "wealthy," as applied to an individual, is too indefinite and general to charge any one with the knowledge of the kind and amount of property possessed by him. *Warner v. Warner*, 85 N. E. 630, 637, 235 Ill. 448.

## WEAPON

See Assault with Dangerous or Deadly Weapon; Carrying Arms or Weapons; Carrying Concealed Weapons; Concealed Weapons; Cruel and Unusual Weapon; Dangerous Weapon; Deadly Weapon.

Other deadly weapon, see Other.

Possession of, see Possession.

See, also, Arms; Club; Gun; Pistol.

### Plank

"A 'weapon' is any instrument of offense; anything used, or designed to be used, in attacking an enemy, as a sword, a dagger, a club, a rifle, or a cannon; \* \* \* any object, particular, or instrumentality that may be of service in a contest or struggle or in resisting adverse circumstances, whether for offense or defense; anything that may figuratively be classed among arms." A piece of plank is not necessarily a weapon. *State v. Jones*, 58 S. E. 8, 77 S. C. 385 (citing Cent. Dict.); *State v. Jones*, 58 S. E. 8, 77 S. C. 385.

### Stick

As a rule, in the construction of statutes, where a specific term is followed by a more general one, the principle of ejusdem generis is applied; but this rule is not to be applied to the statute relating to the jurisdiction of the offense of assaults in which no "stick or other weapon" is used, since a "stick" is not technically a "weapon," though the statute manifestly intended it as such, and therefore the term "or other weapon" will not be restricted either to a weapon in a technical sense or to what might be commonly termed such, but, as employed, includes any substance or matter foreign to the person used in committing a battery. *Martin v. State*, 47 South. 104, 105, 156 Ala. 89.

## WEAR

### WEAR AND TEAR

See Natural Wear and Tear; Ordinary Wear and Tear.

### WEARING APPAREL

Neither a watch and chain, nor a sword and belt, constituting a part of Masonic regalia, are exempt to a bankrupt as "wearing apparel," under the Vermont statute. In re Everleth, 129 Fed. 620.

### Fan

See Fans

### Garters

"Garters" are included within the term "wearing apparel" in the Tariff Act of 1890. *United States v. A. Steinhardt & Bro.*, 141 Fed. 494, 495.

### As goods and chattels

See Goods.

### As household goods or furniture

See Household Furniture; Household Goods.

### Jewelry, watch, etc.

The phrase "wearing apparel," as used in the declaration, made on board a vessel by a passenger in possession of a pearl chain, is a sufficient mention of the chain, within the meaning of section 2802, Rev. St., so that its seizure, while the passenger is awaiting opportunity to give information for completing the entry, is illegal. *United States v. One Pearl Chain*, 139 Fed. 513, 514, 71 C. C. A. 500.

Under the statute exempting "wearing apparel," a diamond ring worn on the finger is exempt from execution. *First Nat. Bank v. Robinson (Tex.)* 124 S. W. 177, 179.

A ring and a watch and chain, worn by decedent, may be set apart as exempt to the widow and minor children as "wearing apparel" of decedent, within the statute as to exemptions in favor of the widow and minor children. *Phillips v. Phillips*, 44 South. 391, 151 Ala. 527, 125 Am. St. Rep. 40, 15 Ann. Cas. 157 (citing 1 Words and Phrases, p. 440); *Chamboredon v. Fayet (Ala.)* 57 South. 845, 849.

The term "all the wearing apparel," as used in 14 Del. Laws, p. 652, c. 562, § 1, relating to exemptions, includes gold watch and chain, cuff links, watch fobs, gold ring with diamond setting, scarf pins, and shirt studs. In re H. L. Evans & Co., 158 Fed. 153, 154.

Where a testatrix by her will distributes various articles of personal property and her wearing apparel among friends and gives the residue of her estate to her next of kin, the words "wearing apparel" will not be construed to include jewelry. In re Dox's Estate, 30 Pa. Super. Ct. 393, 394.

A watch was held "wearing apparel" in *Mack v. Parks (Mass.)* 8 Gray, 517, 520, 69 Am. Dec. 267. See, also, *Bumpus v. Maynard (N. Y.)* 38 Barb. 626, 631, 632.

Whether jeweled rings were exempt as "wearing apparel," under Ky. St. 1909, § 1697 (Russell's St. § 4656), depends largely on whether they were acquired and used as ornamental apparel, or as an investment of value as a matter of business. In re Leech, 171 Fed. 622, 624, 96 C. C. A. 424.

A diamond ring, worth several hundred dollars, and worn by a bankrupt himself, is not exempt under a state statute as "wearing apparel." In re Gemmell, 155 Fed. 551, 553.

**Lace neckwear**

Lace neckwear is included in "wearing apparel made wholly or in part of lace," as that phrase is used in the Tariff Act of 1897. *Goldenberg Bros. & Co. v. United States*, 130 Fed. 108, 109, 64 C. C. A. 442.

**Shawls**

In *Maillard v. Lawrence*, 16 How. 261, 14 L. Ed. 925, it was held that "wearing apparel," as used in the Tariff Act, was not a technical term, and included shawls. *Greenleaf v. Goodrich*, 101 U. S. 278, 285, 25 L. Ed. 845.

**Wearing apparel in chief value of silk**

In applying the provision in the Tariff Act of 1897 for "hats \* \* \* trimmed, \* \* \* composed wholly or in chief value of fur," the composition of the hats should be determined by reference to the whole hat, including the trimming so that where hats, the bodies of which are fur, are so trimmed that the silk trimming is the component of chief value in the hats, they are dutiable under the provision for "wearing apparel in chief value of silk." *Leon Rheims Co. v. United States*, 160 Fed. 925, 926, 88 C. C. A. 107.

**WEATHER**

See *Stress of Weather*.

**WEATHER WORKING DAY**

Under a charter party for carriage of a cargo for delivery at Savannah, providing that the vessel should be discharged at the rate of 300 tons a "weather working day," where during the discharge it rained shortly before noon and nothing further was done that day, the cargo being of a character which would be injured by being wet, the charterer was entitled to the deduction of such day from the lay days, under the rule of the Savannah Board of Trade, following an old-established custom of the port, providing that rain during working hours previous to noon shall prevent that day from counting. *Pyman S. S. Co. v. One Hundred Tons of Kainit*, 164 Fed. 364, 365.

**WEB HOSE**

A "web hose" is a hollow structure for the transmission of water, although, when water is not flowing through it, it may lie perfectly flat and be folded upon itself, with no suggestion of a tube about it. *Ferry v. Waring Hat Mfg. Co.*, 129 Fed. 389, 392.

**WEDGE**

Where a servant, breaking rock with a steel instrument intended to cut steel rails, made of the best steel and practically new, was injured by a piece of steel flying from the instrument, the master was not liable, though a tool called a "wedge" was generally

used for splitting rock. *Langhorn, Johnson & Co. v. Wiley (Ky.)* 91 S. W. 255, 256.

**WEED**

"The word 'weed' has a common, everyday meaning to the mind of every man. It may also have a technical meaning to the botanist or the chemist. It is a nuisance to the farmer, the gardener, or the owner of a well-kept lawn, notwithstanding that some weeds may contain valuable medicinal properties, which, when extracted, may be of benefit and profit to mankind. But it is a fact of common information, of which courts may properly take judicial notice, that a high rank growth of weeds in a populous community has a strong tendency to produce sickness and to impair the health of the inhabitants, and so may be a nuisance in such locality, notwithstanding they may be comparatively innocuous in the country, when far away from human habitation." A city ordinance made it a misdemeanor for any owner, lessee, etc., of any part of any lot to allow or maintain on any such lot any growth of weeds to a height of over one foot, and defined the word "weeds," as therein used, to include all rank vegetable growth which exhale unpleasant and noxious odors, and also high and rank vegetable growth that may conceal filthy deposits. Held, that a conviction for the violation of such ordinance was proper under evidence tending to prove that, at the time the city gave defendant notice to cut down the weeds on his lot, there were weeds on the lot from four to five feet high, about one-third of which were sunflowers. the notice to cut down the weeds having been given in July. *City of St. Louis v. Galt*, 77 S. W. 876, 877, 179 Mo. 8, 63 L. R. A. 778.

**WEEK**

See *Once a Week*.

Four consecutive weeks, see *Four*.

Successive weeks, see *Successive*.

Three weeks successively, see *Three*.

The word "week" is usually regarded as referring to a period of seven consecutive days. *Jackson v. Guss*, 120 Pac. 353, 354, 86 Kan. 280.

Const. 1901, § 116, provides that the Governor shall hold office for four years "from" the first Monday after the second Tuesday in January next succeeding his election and until his successor shall be elected and qualified. Section 48 declares that the Legislature shall meet on the second Tuesday in January next succeeding their election, and section 115 provides that the returns of every election for Governor and other state officers shall be transmitted to the Speaker of the House, "who shall, during the first week of the session \* \* \* open and publish

them." Held that, since the word "week" in section 115 can only mean seven consecutive days, the returns might be opened as late as the Monday following the meeting of the Legislature, so that the word "from" contained in section 116, relating to the commencement of the term of office of the Governor, must be construed according to the context and subject-matter as a word of exclusion. *Oberhaus v. State ex rel. McNamara*, 55 South. 898, 900, 173 Ala. 483.

An ordinance required the city engineer to advertise for bids for sidewalks as provided by statute for advertising for bids for work upon the roadway of any street. *Sess. Acts 1901*, p. 65 (*Ann. St. 1906*, § 5859), requires not less than "one week's" advertisement for bids on such work. An advertisement for bids for sidewalks was published on Wednesday morning, January 1st, and every day thereafter until and including the morning of January 7th, and the contract was awarded at 8 p. m. on that day. Held that, as seven full days had not elapsed when the contract was awarded, the ordinance was not complied with. *Michel v. Taylor*, 127 S. W. 949, 950, 143 Mo. App. 683.

An acrobatic performer's contract provided that she should receive \$300 at the end of each "week" after the last performance on Saturday for services rendered, to be performed at such theaters and such other places and on such "days" as might be determined by plaintiff. Held, that it was no objection to the enforcement of such contract by injunction that it provided for exhibitions on Sunday, since, if such exhibitions were prohibited, the words "days" and "week" as used in the contract would be construed to mean week days only. *Keith v. Kellermann*, 169 Fed. 196, 201.

#### As from Sunday to Sunday

The term "week" means a calendar week, commencing on Sunday and ending on Saturday. *Derby v. Dancy*, 86 South. 795, 796, 112 La. 891 (citing *Ronkendorff v. Taylor's Homestead*, 4 Pet. 360, 7 L. Ed. 882; *In re City of New Orleans*, 27 South. 592, 52 La. Ann. 1078; *Hanson v. Maubefret*, 28 South. 167, 52 La. Ann. 1567; *Schenck v. Schenck*, 28 South. 302, 52 La. Ann. 2102).

#### WEEKLY

See *Semiweekly*.

Under Kirby's Dig. § 7085, requiring the delinquent tax list to be published weekly for two weeks between the second Monday in May and the second Monday in June in each year, "weekly for two weeks" means two weeks in succession, and a biweekly publication did not comply with the statute. *Byrne v. Less*, 122 S. W. 635, 836, 92 Ark. 211.

#### WEEKLY NEWSPAPER

The ordinary acceptance of the expression "weekly newspaper" unerringly conveys

the idea of a paper issued once a week. Hence, an affidavit of publication of a notice of foreclosure sale, which recites that such notice was published "seven successive times, commencing on July 17, 1885, and ending on August 28, 1885, both inclusive, in [a specified paper], a weekly newspaper," is sufficient proof that it was published once in each week for six successive weeks, as required by *Comp. Laws 1887*, § 5414. *Cook v. Lockerby*, 111 N. W. 628, 629, 16 N. D. 19. See, also, *Wilson v. Petzold*, 76 S. W. 1093, 116 Ky. 873.

A newspaper, published each week under the name of the "Bismark Weekly Tribune," by the publishers of the "Bismark Daily Tribune," such weekly being composed of matter printed in the daily paper, is a "weekly edition" of the Daily Tribune, within *Rev. Codes 1899*, § 1259 (*Rev. Codes 1905*, § 1574), requiring a delinquent tax list and notice of sale to be published, in counties having daily papers, in one issue of the daily edition and in two issues of the weekly edition of the same paper. *Griffin v. Denison Land Co.*, 119 N. W. 1041, 1042, 18 N. D. 246.

#### WEIGHT

See *Avoldupois Weight*; *Dry Weight*; *Estimated Weight*; *Mine Weights*; *Net Weight*; *Scale Weight*.  
Exact weight, see *Exact*.

"Figured weight" is the means of ascertaining the weight by a standard fixed and adopted by dealers in structural steel. For example, steel columns, girders, and other connections necessary for the steel part of a structure, according to their dimensions, are given a standard weight by manufacturers and dealers in such materials. *Hale Bros. v. Milliken*, 90 Pac. 365, 369, 5 Cal. App. 344.

#### WEIGHT OF EVIDENCE

See, also, *Preponderance*.

The expression "weight of evidence" signifies that the proof on one side is greater than on the other. *Pumorio v. City of Merrill*, 103 N. W. 464, 466, 125 Wis. 102.

The "preponderance of evidence" may not be determined by the number of witnesses, but by the greater weight of all the evidence, and the greater weight does not necessarily mean a greater number of witnesses, but the opportunity for knowledge, the information possessed, and the manner of testifying must be considered to determine the "weight" of testimony. *Garver v. Garver*, 121 Pac. 165, 166, 52 Colo. 227, *Ann. Cas.* 1913D, 674.

#### WEIR

A contrivance for the purpose of regulating the amount of water that should pass from a feeder through different flumes is

called a "weir." *Merrifield v. Canal Com'rs*, 72 N. E. 405, 407, 587, 212 Ill. 456, 67 L. R. A. 369.

## WELFARE

See General Welfare; Inimical to the Public Welfare; Relative Interested in Welfare.

In determining to whom an infant child shall be awarded, its "welfare" means, not alone its financial well-being, but also that peacefulness of mind and content upon which its happiness depends. *Evans v. Lane*, 70 S. E. 603, 605, 8 Ga. App. 826.

## WELL

See Water Well.

The use of the term "well," in well drilling contracts, is not conclusive that a producing well was intended. An oil lease provided that, if a well was not completed on the leased premises within six months, it could be kept in force by a quarterly payment of \$10 until one was completed; that if, at any time after a well was drilled, six months should elapse without any revenue being received therefrom, and without any further drilling being done, the lease should be deemed abandoned. An attempt was made to drill a well which proceeded until a depth of about 1,000 feet was reached, then the casing was pulled out and the hole was plugged; no further drilling was done. More than six months thereafter the lessor brought an action to declare the lessee's rights lost by abandonment. Held, there being evidence from which it might be inferred that the drilling done showed the existence of oil in sufficient quantity to warrant shooting, which was not attempted, the court was justified in finding that the operations described amounted to the drilling of a well, within the meaning of the contract, and that the cessation of operations for six months thereafter constituted an abandonment of the lease. *Federal Betterment Co. v. Blaes*, 88 Pac. 555, 556, 75 Kan. 69.

"Tunnels" are practically horizontal "wells," differing from ordinary "wells" only in that the waters from the former find their way to the surface by gravity, while in the latter pumping must be resorted to to bring the water to the surface; both disturbing the natural flow of the subterranean waters, and both being artificial means of reaching and controlling the natural subterranean flow to develop water power. *Garvey Water Co. v. Huntington Land & Improvement Co.*, 97 Pac. 428, 432, 154 Cal. 232.

## WELL-DEFINED BOUNDARY

A boundary described in a deed by natural or artificial objects, so that it can be run by a surveyor, is a "well-defined" boundary, entitling a person taking possession, un-

der the deed, of part of the land inclosed to claim title by adverse possession to the entire tract, although the boundary might not constitute a well-defined boundary, if there was no deed. *Burt & Brabb Lumber Co. v. Sackett*, 144 S. W. 34, 38, 147 Ky. 232.

## WELL FOUNDED

In discussing the contention that the trial court erred in charging that a reasonable doubt must be "well founded" it is said: "The expression is certainly a loose one, and not to be commended. The term 'well founded' has a double significance. It may mean founded on good reasons, or it may be defined as not baseless or having no support. In the latter sense the instruction is not erroneous, for, it is well settled that a doubt, to be reasonable, must have some basis either in the evidence, or from a lack of evidence on some material proposition. In other words, it is not a barely possible one, nor one sought after, not a capricious nor an imaginary one, nor one based upon a surmise or groundless conjecture. In other words, it must be a rational or substantial one, having some basis in reason, although it need not be such a one as the jurors may be able to give a reason for." *State v. Mahoney*, 97 N. W. 1089, 1091, 122 Iowa, 168.

A "well-founded doubt" is a reasonable doubt. *Willis v. State*, 33 South. 226, 235, 134 Ala. 429; *Creagh v. State*, 43 South. 112, 114, 149 Ala. 8 (citing *Turner v. State*, 27 South. 272, 124 Ala. 59; *Stewart v. State*, 31 South. 944, 133 Ala. 109).

## WELL-GROUNDED BELIEF

See Reasonable and Well-Grounded Belief.

## WELL KNEW

The words "well knew" or "well knowing" supply the place of a positive averment that defendant knew the fact charged. *State v. Waterbury*, 110 N. W. 328, 329, 133 Iowa, 135; *State v. Wilson*, 67 Atl. 533, 534, 80 Vt. 249; *United States v. Mitchell*, 141 Fed. 666, 670 (citing *Dunbar v. United States*, 15 Sup. Ct. 325, 156 U. S. 186, 39 L. Ed. 390).

## WEST

A call in a description in a deed for "west" will be construed to mean east where such change is necessary to enable the survey to close upon its starting corner. *Upton v. Santa Rita Mining Co.*, 89 Pac. 275, 281, 14 N. M. 96.

## WEST HALF

Where there is nothing to suggest the contrary, the word "half," in connection with the conveyance of a part of a tract of land, is interpreted as meaning half in quantity. The words "east half" and "west half" in a deed, while naturally importing an equal division, may lose that effect when it appears

that at the time some fixed line or known boundary or monument divides the premises somewhere near the center, so that the expression more properly refers to one of such parts than to a mathematical division which never has been made. *Gunn v. Brower*, 105 Pac. 702, 703, 81 Kan. 242.

The description, in a complaint in partition of the land, involved as the "westerly one-half of" a specified lot and block according to a certain recorded plat, etc., was sufficient. *Home Security Bldg. & Loan Ass'n of Alameda County v. Western Land & Title Co.*, 78 Pac. 626, 145 Cal. 217.

### WESTERLY

The word "westerly," as used in an order of the county court incorporating a village, which describes the commons as "on the west side of said limits one quarter of a mile in a westerly direction," should be construed to mean due west, rendering the description definite and certain. *State ex rel. Chandler v. Huff*, 79 S. W. 1010, 1012, 105 Mo. App. 354.

### WEST POINT CADET

As army officer, see *Army Officer*.

### WET AND COUNTRY DAMAGE

Where special cotton transportation contracts exempted all carriers from liability for "wet and country damage," declarations alleging that the cotton was injured by "water and mud" prior to the termination of the inland transportation stated a cause of damage within such exemption; the terms "water and mud" and "wet and country damage" being synonymous. *Inman & Co. v. Seaboard Air Line R. Co.*, 159 Fed. 960, 971.

### WHARF

See *Public Wharf*.

Use of wharf, see *Use—Used*.

See, also, *Pier*.

A "wharf" is a space of ground artificially prepared for the reception of merchandise from a ship or vessel, so as to promote the convenient loading and discharge of the vessel; a structure used for the handling of freight in connection with the shipment or discharge of a cargo from a vessel; an artificial landing place. It need not be of any particular design; the only necessity being that it affords a place where vessels land. *John J. Sesnon Co. v. United States*, 182 Fed. 573, 576, 105 C. C. A. 111.

"Wharves" belong to a class of property in which the public is concerned, and as to which the government has always reserved the right, as between its citizens, to regulate and control. This has prevailed in England from time immemorial, and in this country from its earliest colonization; that

is to say, the government has exercised the authority to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc. And hence this class of property, when used by the public, becomes affected with a public interest, and it ceases to be *juris privati* only." A wharf built on the bank of a navigable river, not in a city or town where there are a number of others, but at the terminus of public highways in the country, or at a small place, where it constitutes the only means by which the people of the community can reach the river and use the mediums of commerce navigating the same, and which was built for such use, or is being so used, is impressed with a public interest; and a single carrier cannot, by purchasing or leasing the same, convert it into private property, so as to have the right to exclude the public or other carriers from using it for the loading or unloading of vessels on the payment of reasonable wharfage. *Weems Steamboat Co. of Baltimore v. People's Steamboat Co.*, 141 Fed. 454, 456.

*Los Angeles City Charter* (St. 1889, p. 457) art. 1, § 2, subd. 7, confers on the city of Los Angeles power to lay out, open, extend, pave, repave, and improve streets, and as amended in 1909 (St. 1909, p. 1291) authorizes the city to acquire or construct and operate public wharves, docks, piers, or moles along the seashore in connection with the transportation of passengers and freight between the ocean and the city. By the charter (section 258), as amended by St. 1909, p. 1303, the city was authorized, throughout its entire area, to acquire, construct, own, operate, and maintain docks, wharves, piers, canals, and sea walls; and by section 262, as amended by St. 1909, p. 1305, was given power to incur a bonded debt for all the foregoing purposes, including the maintaining of the streets in question. Held that, since the term "dock" means an artificial basin, in connection with a harbor, for the reception of vessels and the slip or waterway extending between two piers or projecting wharves, waterways were included within the term, and warehouses were included within the right to erect "wharves," so that the city was authorized to contract indebtedness for the construction of docks, wharves, and warehouses, including the maintaining of streets and highways to navigable waters and the construction and maintaining of canals and waterways. *Clark v. City of Los Angeles*, 116 Pac. 966, 968, 160 Cal. 317.

### As building

See *Building* (In Criminal Law).

### Highway

A dock or wharf is not in any ordinary sense a "highway." *State ex rel. Wauconda Inv. Co. v. Superior Court for King County*, 124 Pac. 127, 128, 68 Wash. 660, Ann. Cas. 1913E, 1076.

P. L. 1897, p. 69, § 48, par. 1, providing that city councils may by ordinance vacate "any street, road, highway or alley," does not, when construed in connection with section 18, par. 7 (page 52), empowering councils to regulate streets, highways, wharves, etc., authorize a city council to discharge the public right in a wharf dedicated to the public; the word "highways" in section 48 not including a wharf. *Palen v. Ocean City*, 62 Atl. 947, 948, 72 N. J. Law, 15.

**As house**

See House.

**WHARF OR OTHER BUILDING**

See Other.

**WHARFAGE**

"Wharfage" is the use of a wharf furnished in the ordinary course of navigation. *The James T. Furber*, 129 Fed. 808, 810.

"Wharfage" is a charge against a vessel for lying at a wharf, and not a charge for caring for the goods. *New York Dock Co. v. India Wharf Brewing Co.*, 111 N. Y. Supp. 432, 434, 127 App. Div. 385.

**Dockage and moorage**

The word "wharfage" is usually and ordinarily employed to designate the charge made for the use of a wharf for the purpose of loading or unloading freight on or from vessels lying by its side. The word is sometimes used synonymously with "dockage" or "moorage" to describe the charge made by the owner of a dock or basin for the privilege of allowing a vessel to lie there. *Mayor, etc., of Baltimore v. Baltimore & Philadelphia Steamboat Co.*, 65 Atl. 353, 358, 104 Md. 485.

**WHARFBOAT**

A stationary building of three floors, erected on piles, into which goods are unloaded from boats, and which during low stages of the river is not reached by the water, is not a "wharfboat," within Code 1906, § 3780, imposing a tax for the privilege of conducting a wharfboat, although the building serves the purposes of a wharfboat. *Bluff City Ry. Co. v. Clarke*, 49 South. 177, 95 Miss. 689.

**WHARFINGER**

Wharfage business as common carrier, see Common Carrier.

A "wharfinger" is one who for hire receives merchandise upon his wharf either for the purpose of forwarding or for delivery to the consignee upon such wharf. *Morse v. Steel*, 86 Pac. 693, 694, 149 Cal. 303 (citing *Chapman v. State*, 38 Pac. 457, 104 Cal. 690, 43 Am. St. Rep. 158).

A "wharfinger" is one who keeps a wharf for receiving goods for hire. That this was his business may be proved against him by showing that he so held it out to the public generally and actually received and

charged for whatever goods were deposited on his wharf. *National Union Bank of Reading v. Shearer*, 74 Atl. 351, 353, 225 Pa. 470, 17 Ann. Cas. 664.

**WHAT**

**WHATEVER**

See By Any Device Whatever.

**WHATEVER REMAINS**

As giving power of disposal, see Remain.

**WHATSOEVER**

Any cause whatsoever, see Any.

Any other house whatsoever, see Any Other.

**WHATSOEVER IS LEFT**

A life estate in all of the testator's property, real and personal, given to his wife, who is charged with the administration of the estate for the benefit of herself and the other beneficiaries named in the will, is not enlarged into a fee-simple estate in either the real or personal property by the following phrase describing the property to go over "whatsoever what may be left." *Behrens v. Baumann*, 66 S. E. 5, 6, 66 W. Va. 56, 27 L. R. A. (N. S.) 1092.

**WHEAT**

Wheat injured by frost to such an extent as to reduce it to a low grade, or to "no grade," but which can still be used for seed and for making flour, is dutiable as "wheat," under the tariff act, and not as a nonenumerated unmanufactured article. *United States v. W. P. Devereux Co.*, 135 Fed. 428, 429.

**WHEAT MIDDINGS**

"Wheat middlings" are only a part of the ground grains, from which the coarser bran and usually the finer flour has been separated, so that the quality of middlings as feed stuff depends upon the milling process. This by-product of wheat is a "concentrated commercial feeding stuff," within the statute requiring sellers of "concentrated commercial feeding stuff" to affix a label thereto reciting certain facts, and providing that the term "concentrated commercial feeding stuff" shall include wheat middlings, etc., but shall not include unmixed meals made directly from the entire grain of the wheat, etc. These provisions are not repugnant. *State v. Weller*, 171 Ind. 53, 85 N. E. 761, 762.

**WHEEL DROP**

As machine, see Machine.

**WHEELED CHAIRS**

Included in vehicles and other mechanical contrivances, see Vehicles and Other Mechanical Contrivances.



## WHEELS

See Buggy the Wheels.

## WHEELWRIGHT

### Automobile repairer

A "wheelwright," within Kirby's Dig. §§ 5013-5016, giving a wheelwright a lien on wagons for labor and materials in repairing wagons, is one whose occupation is to make or repair wheels and wheeled vehicles; and one who maintains a garage and who repairs an automobile placed therein is a "wheelwright," and entitled to a lien for labor and materials furnished. *Shelton v. Little Rock Auto Co.* (Ark.) 146 S. W. 129.

## WHEN

See If When.

A scheme for the consolidation of the traction lines of San Francisco contemplated the issuance of \$20,000,000 bonds to be delivered to B. & Co., who were entitled to offer them for sale prior to February 1, 1903, at the best price obtainable, but not less than 90 per cent. of their face value, with accrued interest. On or before June 16, 1902, \$3,500,000 of the bonds were duly certified and delivered according to directions from B. & Co. to a syndicate by which large amounts of them were sold on the San Francisco market. Defendants on March 17, 1902, contracted to sell plaintiffs 100 of the bonds at 89 and interest payable and deliverable "when, as and if issued," etc. Held, that the words, "when, as and if issued," did not relate only to the total issue of bonds contemplated by the scheme, but meant that the contract should mature and delivery be due when such a reasonable amount of the bonds had been issued as would enable defendants with due diligence to procure the bonds and make delivery, and, defendants having refused to deliver after the \$3,500,000 issue, plaintiffs were entitled to sue immediately for breach of contract. *Zimmermann v. Timmermann*, 86 N. E. 540, 541, 193 N. Y. 486.

### As at the time of

The word "when" means "at the time" or "at that time." *State v. Donahoe* (Del.) 63 Atl. 643, 646, 5 Pennewill, 278 (quoting 2 Bouv. Law Dict. p. 1227).

Ann. St. 1906, p. 178, providing that "when any county shall be entitled to more than one representative, the county court shall subdivide" the county into districts, fixes the time when the county court shall act as the time when it appears by law that a county is entitled to more than one representative, and the power of the county court is dependent on prior legislative action, and the Legislature may only act once in every 10 years, and the subdivisions must be made by the county court at once and must remain until the next decennial period; the word

"when" being equivalent to the words "at the time that." *State ex rel. Major v. Patterson*, 129 S. W. 888, 891, 229 Mo. 373.

### As if

The word "when" is frequently employed as equivalent to the word "if," in legislative enactments and in common speech. *Atlantic Coast Line R. Co. v. Jones*, 63 S. E. 834, 837, 132 Ga. 189.

In an instruction charging that "when" plaintiff entered defendant's employment he assumed all the risks, etc., the word "when" cannot be construed as synonymous with "if" to save the instruction from an objection that it assumes an employment. *Ft. Worth & D. C. Ry. Co. v. Lynch* (Tex.) 136 S. W. 580, 583.

The word "when," in an instruction, on a trial of the right of property levied on under execution, that the burden was on plaintiff to make a prima facie case that the property is defendant's, which burden is discharged "when" he shows that defendant was in possession thereof at the time of the levy, and that then the burden shifts, means "if," and is not objectionable as assuming a fact relative to the possession of the property. *Lightman Bros. & Goldstein v. Epstein*, 51 South. 164, 168, 164 Ala. 660.

The word "when," as used in Willson's Rev. & Ann. St. 1903, § 6567, providing that the Attorney General shall appear for the territory and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court in which the territory shall be interested as a party, and shall also, when requested by the Governor or either branch of the Legislature, appear for the territory and prosecute or defend in any other court or before any officer in any case or matter, civil or criminal, in which the territory may be a party or interested, means no more than "in case" or "if." *State ex rel. Haskell v. Huston*, 97 Pac. 982, 986, 21 Okl. 782.

### As relating to time of vesting or enjoyment of estate

The word "when," used in a devise of a remainder following a life estate, is not in and of itself sufficient to justify a conclusion that the remainder is contingent and not vested. Such word, unless there is something else in the will to indicate to the contrary, is construed to relate merely to the time of the enjoyment of the estate and not to the time of its vesting in interest. *Trowbridge v. Coss*, 110 N. Y. Supp. 1108, 1111, 126 App. Div. 679 (citing *Connelly v. O'Brien*, 60 N. E. 20, 166 N. Y. 406; *Hersee v. Simpson*, 48 N. E. 890, 154 N. Y. 496; *Nelson v. Russell*, 31 N. E. 1008, 135 N. Y. 137; *Davidson v. Jones*, 98 N. Y. Supp. 265, 112 App. Div. 254).

"When," as referring to a period of life, standing by itself and unqualified by any words or circumstances, is a word of condition, denoting the time when the gift is to take effect in substance. Thus a legacy left

to a daughter "when she is 18 years old" is contingent and not vested and not subject to a legacy tax. *Heberton v. McClain*, 135 Fed. 226, 227.

#### As thereafter

A will creating a trust for the benefit of testator's sons, and providing for the payment of a certain proportion of the income of the trust fund until each son should have arrived at the age of 30 years, "When I bequeath to them, after all deductions, 98 per cent. of the net income, the balance of 2 per cent. keeping the estate in heart and to be invested," contemplated that the sons should have 98 per cent. of the income from the time of their arrival at the age of 30 years; the word "when" being equivalent to "thereafter." *Central Trust Co. of New York v. Egleston*, 77 N. E. 989, 185 N. Y. 23.

#### WHEN APPEALED

See Appeal.

#### WHEN CONVENIENT

See Convenience—Convenient.

#### WHEN ESTATE IS TO BE KEPT TOGETHER

Civ. Code 1895, § 3466, declares: "When an estate is to be kept together for a longer time than twelve months," the widow and children shall have a year's support for each year that the estate may be kept together. Where a will was propounded by an executor, and a caveat interposed by heirs at law, not including the widow, and a year's support was set apart to her, and by reason of the appeal the estate was kept together for longer than 12 months under this section the widow was entitled to have a second year's support assigned to her though there was no provision in the will directing the estate to be held together for more than 12 months. *Edenfield v. Edenfield*, 62 S. E. 980, 981, 181 Ga. 571.

#### WHEN MADE

See Made.

#### WHEN PAYABLE

See Payable.

#### WHENEVER

"Whenever" is an adverb of time. It is not the equivalent of "in any case." Its meaning, and the only meaning given to it by lexicographers, is "at whatever time." As used in a constitutional provision that, whenever the requisite majority of the judges of the Supreme Court of Appeals sitting are unable to agree upon a decision, the case shall be reheard by a full bench, it does not mean in any case in which the requisite majority of the judges sitting, etc., but means at whatever time it may happen that the requisite majority of the judges sitting, etc., the case shall be reheard. *Funkhouser v. Spahr*, 46 S. E. 378, 379, 102 Va. 306.

The word "whenever" is an adverb of time, which, speaking from the date of the act, looks to the future rather than to the past. B. & C. Comp. § 2225, providing that, "whenever a judgment is given" in a justice's court, the judgment creditor may at any time thereafter, while the judgment is enforceable, file a transcript, etc., enacted in 1899, supercedes Hill's Ann. Laws 1892, § 2103, providing that, whenever a judgment is given in a justice's court, the judgment creditor may within one year thereafter file a transcript thereof, and operates prospectively only, the word "whenever" being an adverb of time, and, when used with the present tense of the verb excludes the idea of a judgment theretofore given, and, though construed to operate retroactively, the statute cannot apply to a justice's judgment rendered in 1896, no transcript of which had been filed within one year after its rendition. *Denny v. Bean*, 93 Pac. 693, 695, 51 Or. 180.

The word "whenever," used in Bankr. Act, July 1, 1898, c. 541, § 55e, 30 Stat. 560, providing that the court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect, etc., should be construed to mean "whenever after the first meeting" previously required to be held by section 55a (30 Stat. 559), which can only be held not less than 10 nor more than 30 days after adjudication. In re Back Bay Automobile Co., 158 Fed. 679, 682.

#### WHERE

The word "where," as used in the statute providing that notice of the time and place of taking depositions shall be served on the adverse party or his attorney, where such party or his attorney resides in the state, is synonymous with "if," and assumes the condition of one or the other—either adverse party or litigant—residing in the state. *Swink v. Anthony*, 81 S. W. 915, 916, 107 Mo. App. 601.

An instruction that where the negligence of two unite in causing an accident, by which another is injured, it is no defense for one to show that the other was to blame was not subject to the objection that the word "where," instead of the word "if," was misleading in assuming that there was negligence on the part of two. *Frank Parmelee Co. v. Wheelock*, 79 N. E. 652, 654, 224 Ill. 194 (citing *Illinois Cent. Ry. Co. v. Johnson*, 221 Ill. 42, 77 N. E. 592; *Chicago & N. W. Ry. Co. v. Moranda*, 108 Ill. 576).

The word "where," in a statute relating to the removal of causes "where a suit is now pending or may hereafter be brought in any state court," etc., is the equivalent of "when." *Campbell v. Milliken*, 119 Fed. 982, 986.

The word "where," as used in Acts 29th Leg. (Gen. Laws 1905, p. 116, c. 83, § 1), pro-

viding that where advisable in the opinion of the judge of the district court in which any county may be situated, a special term or terms of the district court therein may be held, does not refer to place but to the time when he may deem it advisable. *Ex parte Boyd*, 96 S. W. 1079, 1080, 50 Tex. Cr. R. 309.

## WHEREAS

See For That Whereas.

An affidavit annexed to a chattel mortgage, which states "whereas" the mortgagee loaned a specified sum to the mortgagor at his special request, and that the whole amount thereof with interest is due, and "whereas" deponent at the special instance of the mortgagor became an accommodation indorser on promissory notes, etc., is insufficient to state the consideration, as required by Gen. St. 1895, p. 2113, § 52, since the items of the indebtedness are stated by way of recital, instead of as positive facts. *Simpson v. Anderson* (N. J.) 70 Atl. 696, 698.

The word "whereas" implies a recital, and in general cannot be used in the direct and positive averment of a fact. "The thing being so that; considering that things are so; implying an admission of facts, something followed by a different statement, and sometimes by inference of something consequent. While, on the contrary, the fact or case really being that; when in fact." *Dalton v. U. S.*, 127 Fed. 544, 547, 62 C. C. A. 238 (quoting Cent. Dict.).

## WHEREBY

The clause "whereby he promised and agreed for value received \* \* \* to pay," etc., in a declaration on a promissory note, is a sufficient averment of a promise. The word "whereby" is grammatically and logically equivalent to the words "and by it," so that it has the same effect as if the pleader had said the defendant had made his note and by it promised and agreed to pay, etc. It is undoubtedly descriptive of the note, but it is also affirmative and narrative of the legal effect thereof, or rather of the act of the defendant in making the note. It merely performs a double function, and yet it does not subject the count to the rule against duplicity. *Acme Food Co. v. Older*, 61 S. E. 235, 236, 64 W. Va. 255, 17 L. R. A. (N. S.) 801.

## WHEREIN

The word "wherein," as used in St. 1901, p. 154, c. 214, § 3, authorizing a street railway company to generate and transmit electricity "in any city or town 'wherein'" it is entitled to operate a street railway, and "for that purpose" to erect and maintain poles and feed wires for conducting electricity over any streets of "any of said cities and towns," relates to the words "any city or town," and includes all parts of such cities and towns.

A statement of the more specific authority is introduced by the words, "and for that purpose may erect." These words do not indicate a limitation of the general authority, but a more particular definition of it. The word "wherein" is not the word which naturally would be chosen to relate to bridges over or on which a railroad was operated, while it is strictly accurate as referring to a city or town in which the operation of a railway is authorized. *Williams v. Old Colony St. Ry. Co.*, 79 N. E. 484, 485, 193 Mass. 305.

## WHEREUPON

The word "whereupon," as used in a municipal charter directing that, on ordinances being passed over his veto, the mayor shall cause them to be published, whereupon they shall be of force as law, means "after which," and the meaning of the provision is that after the commands of the law as thus given have been obeyed, and not before, the ordinances shall be of the force of law. *Mayor & Board of Trustees of Town of New Iberia v. Moss Hotel Co.*, 36 South. 552, 553, 112 La. 525.

In Rev. St. 1892, § 722, providing for the filing of objections to the extension of the limits of incorporated cities "whereupon" the court shall order notice to be served on the mayor, etc., the word "whereupon" does not mean "immediately" so that failure to serve such notice does not confer authority on the city to proceed after the objections were properly filed. *City of Orlando v. Orlando Water & Light Co.*, 39 South. 532, 534, 50 Fla. 214.

## WHETHER

### WHETHER OR NOT

An order of the commissioners' court for local option election is not objectionable because submitting the question "whether or not" local option shall be adopted, though the language of the law is "whether" it shall be adopted. *Thurmond v. State*, 79 S. W. 316, 317, 46 Tex. Cr. R. 162.

An order submitting to popular vote the issue as to "whether" the sale of intoxicating liquors should be prohibited was not objectionable in failing to use the words "whether or not." *Wade v. State*, 109 S. W. 191, 192, 53 Tex. Cr. R. 184.

## WHETSTONE

The provision for "hones and whetstones," in the Tariff Act, includes only articles used in sharpening edged instruments. *R. J. Waddell & Co. v. United States*, 135 Fed. 211, 213.

## WHICH

See Outside Which.

"Which" refers to the last antecedent, be it word or clause, to which it can properly

apply, unless a common-sense reading of the enactment requires a different construction. *Peterson v. Turney*, 2 Tenn. Ch. App. 519, 534 (citing *Endlich*, Int. Stat. p. 582).

### WHICH PARENT WOULD HAVE TAKEN IF LIVING

As taking by representation, see *By Right of Representation*.

### WHICH PRODUCES INTOXICATION

The qualifying phrases "which produces intoxication," in Rem. & Bal. Code, § 6288, prohibiting the sale or giving away of "malt, spirituous or vinous liquor \* \* \* or any essence \* \* \* compound \* \* \* which produces intoxication," refers only to the enumerated essences and compounds preceding it, and does not qualify spirituous liquor which is deemed intoxicating. *State v. Bailey*, 121 Pac. 821, 67 Wash. 336 (citing 7 Words and Phrases, pp. 6610-6615).

### WHILE

The word "while," as used in a statute to protect persons, while engaged in the work of operating cars, etc., against the negligence of any employé of the company, places a time limit on this protection, and means during the time such employé may be engaged in the work of operating the cars, etc. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 103 S. W. 447, 449, 47 Tex. Civ. App. 74; *Gulf, C. & S. F. Ry. Co. v. Howard*, 80 S. W. 229, 230, 97 Tex. 513.

The term "while," as used in Burns' Ann. St. 1901, § 5073, providing that corporate officers, who failed to make an annual report, shall be "liable for all damages resulting from such failure on their part while they are stockholders in such company," means during the time they are stockholders in the company. *Stafford v. St. John*, 73 N. E. 596, 600, 164 Ind. 277.

The complaint, in an action under Act March 17, 1875 (Laws Sp. Sess. 1875, p. 59, c. 13) § 20, declaring one who sells intoxicating liquors in violation of the act liable to any one damaged on account of the use of such liquor, and based on section 15, making it an offense to sell intoxicating liquor to a person "at the time in a state of intoxication," which alleges that defendants sold intoxicating liquors to plaintiff's husband, "while" he was in an intoxicated condition, is not open to the objection of averring the intoxication by way of recital; "while" having the meaning of "at the same time," and being equivalent to and complying with the terms of the statute on which the action is founded. *Greener v. Nielhaus*, 89 N. E. 377, 378, 44 Ind. App. 674.

Rev. St. 1874, c. 30, § 13, makes every estate in land devised a fee simple, though other words heretofore necessary to pass such estate be not added, if a less estate be not expressly limited, or do not appear to

have been devised by operation of law. The will devised and bequeathed to testator's wife all the realty and personalty that he might die seised of, "provided she remains my widow, but should she marry, then all the property shall go to my children that are alive," except a life estate in one-third of the land. Held, that the widow took a conditional or base fee, subject to be terminated by her subsequent marriage, so that her grantee took such fee subject to divestiture by her marriage, and a child of testator had only an expectancy in the land until the happening of such event; the word "provided," as used in the will, not meaning the same as "while," which is merely an adverb expressing duration, but being an apt word to express a conditional estate, unless a different intention appears from the whole instrument. *Cummings v. Lohr*, 92 N. E. 970, 972, 246 Ill. 577.

### WHILE ACTING IN FIDUCIARY CAPACITY

The words "while acting as an officer or in any fiduciary capacity," found in section 17, cl. 4, Bankr. Act July 1, 1898, c. 541, 30 Stat. 550, excepting from the operation of a discharge in bankruptcy debts created by fraud, etc., while acting as an officer, etc., qualifies the words "fraud, embezzlement, misappropriation, or defalcation," and are not restricted in their scope to the limitation of the word "defalcation." In *re Harper*, 133 Fed. 970, 972.

### WHILE ACTUALLY RIDING AS A PASSENGER

See *Actually Riding as a Passenger*.

### WHILE IN DISCHARGE OF OFFICIAL DUTY

The words "while in the discharge of his official duty," as used in proviso of Code 1904, § 3780, as amended by Act March 14, 1908, (Acts 1908, p. 671, c. 385), punishing persons carrying concealed weapons, that such section shall not apply to any police officer, town or city sergeant, constable, sheriff, conservator of the peace, or to carriers of United States mail in rural districts, or collecting officer while in the discharge of his official duty, do not apply to all the officers named in the statute, but only to a collecting officer, and hence a commissioner in chancery, as a conservator of the peace, is permitted to carry a concealed weapon, though not at the time in the discharge of official duties. *Withers v. Commonwealth*, 65 S. E. 16, 18, 109 Va. 837.

### WHIP

As deadly weapon, see *Deadly Weapon*.

### WHISKY

See *Bourbon Whisky*; *Pure Rye Whisky*; *Scotch Whisky*.

"Whisky" is a spirit distilled from grain, the word "whisky" per se indicates an intox-

icating liquor. *State v. Carmody*, 91 Pac. 446, 448, 50 Or. 1, 12 L. R. A. (N. S.) 828. See, also, *United States v. Fifty Barrels of Whisky*, 165 Fed. 966, 971.

"Whisky" is spirituous or distilled liquor. *State v. York*, 65 Atl. 685, 686, 74 N. H. 125, 13 Ann. Cas. 116.

"Whisky" is alcohol, diluted with water and mixed with other elements or ingredients. *Marks v. State*, 48 South. 864, 868, 159 Ala. 71, 133 Am. St. Rep. 20.

"Whisky," within the purview of Food & Drugs Act June 30, 1906, c. 3915, 34 Stat. 768, is the product of sound grain, distilled at a low temperature so as to retain in the distillate the congeneric properties of the grain, which give to the liquor, when matured by aging in charred casks, its desirable potable character. Neutral spirits, which are distilled at a high temperature, may be made from different materials and do not contain such properties, and which are not rendered potable by aging, although reduced by water to potable strength and from which most of the fusel oil has been removed, are not whisky nor a like substance with whisky. *Woolner & Co. v. Rennick*, 170 Fed. 662, 663.

**As an intoxicating liquor**

See Intoxicating Liquor.

**As property**

See Property.

**WHISKY SALOON**

See Saloon.

**WHITE**

**WHITE OAK**

A deed to cut and remove on land described "white oak timber" is ambiguous, and parol evidence is admissible to show the sense in which the parties used the term, defined as an American oak of the Eastern United States, having characteristic leaves with usually seven deep, rounded, entire lobes, and by extension including any species of oak of the group of which the above is typical. *Taylor v. Union Sawmill Co.*, 152 S. W. 150, 151, 105 Ark. 518 (quoting Webster).

**WHITE PAINT**

Enamel white paint, which contains zinc, but not lead, and is ground in oil, and to which, after grinding, ingredients are added to increase the gloss, is dutiable as "white paint \* \* \* containing zinc, but not containing lead, \* \* \* ground in oil." *United States v. J. A. & W. Bird & Co.*, 167 Fed. 319, 320, 92 C. C. A. 631.

**WHITE PERSON**

Under the naturalization law, which authorizes naturalization only of "white per-

sons" or Africans, or persons of African descent, an alien's right to citizenship depends upon parentage and blood, and not upon nationality or status. In *re Young*, 195 Fed. 645.

The term "free white persons," within Rev. St. § 2169, limiting the naturalization act (Act June 29, 1906, c. 3592, 34 Stat. 596), to such persons, includes members of the white, or Caucasian race, as distinct from the black, red, yellow, and brown races; and hence a Parsee is entitled to admission to citizenship. *United States v. Balsara*, 180 Fed. 694, 695, 103 C. C. A. 660. The term comprehends a Syrian, who is a native of Palestine and a Maronite; the term "white" being used in its popular sense to denote at least the members of the Caucasian race. In *re Ellis*, 179 Fed. 1002, 1003. A Syrian from Mt. Lebanon, near Beirut. In *re Najour*, 174 Fed. 735. And a Syrian born in Damascus. In *re Mudarri*, 176 Fed. 465, 466. The word "white," in the statute, is used to classify the inhabitants and to include all persons not otherwise classified, not as synonymous with "European," there being in fact no "European" or "white" race as a distinctive class, or "Asiatic" or "yellow" race, including substantially all the people of Asia; and hence the term "free white persons" includes Armenians born in Asiatic Turkey and on the west side of the Bosphorus. In *re Halladjian*, 174 Fed. 834, 835.

**Chinese or Japanese**

One born at sea on a British schooner, of an English father and mother half Chinese and half Japanese, is not a free "white person," and, though he served 10 years in the United States Navy, is not entitled to naturalization, under Rev. St. § 2169, providing that the act shall apply to aliens being free white persons and those of African nativity and descent, and Act Cong. May 6, 1882, c. 126, § 14, 22 Stat. 61, prohibiting the admission of Chinese to citizenship. In *re Knight*, 171 Fed. 299, 300.

Rev. St. § 2166, authorizing the naturalization of aliens honorably discharged from the military service of the United States, as limited by section 2169 of the same title, as amended in 1875 (Act Feb. 18, 1875, c. 80, 18 Stat. 318), by providing that "the provisions of this title shall apply to aliens being free, white persons and to aliens of African nativity, and to persons of African descent," does not extend the right of naturalization to a person of the Japanese race, although having an honorable discharge from the army of the United States. In *re Buntaro Kumagai*, 163 Fed. 922, 923.

The son of a German father and a Japanese mother is not entitled to naturalization as a "white person." In *re Young*, 195 Fed. 645, 646; *Id.*, 198 Fed. 715, 716.

**WHO****WHOEVER**

"Whoever," as used in Rev. St. c. 93, § 46, providing that "whoever labors" at cutting, hauling, rafting logs or lumber or at "cooking" for persons engaged in such labor has a lien on the logs and lumber for the amount due for his personal services, which may be enforced by attachment, is a very comprehensive term, but it has been held that it does not include a contractor, though he labors personally at cutting, hauling, etc. This lien can be enforced only by a personal action against the one contracting to pay such wages, and by an attachment of the logs and lumber on the writ in that action. And as a wife cannot sue her husband for her personal services in cooking for him and men employed by him in laboring on logs and lumber under Rev. St. c. 63, § 3, providing that a married woman may receive the wages of her personal labor not performed in her own family, she has no lien on the logs and lumber for such services under chapter 93, § 46; such lien existing only against one legally liable for the services. *Mott v. Mott*, 78 Atl. 900, 107 Me. 481.

**Artificial persons**

In analogy to Rev. Laws, c. 8, § 5, which provides that the word "person" may "extend and be applied to bodies politic and corporate," unless a contrary intention is clearly shown, the word "whoever," under Rev. Laws, c. 56, § 55, which provides a punishment for the possession of adulterated milk with intent to sell, includes a corporation. *Commonwealth v. Graustein & Co.*, 95 N. E. 97, 99, 209 Mass. 38.

**WHOLE****WHOLE AMOUNT**

A municipality issued bonds for the construction of a subway. The bonds, as required by statute, provided that the "whole amount" of the tolls for persons passing through the subway should be pledged for the payment of the principal and interest. The law contemplated the collection of the tolls by an elevated railway company, acting as the city's agent, and suggested payment of compensation for collecting. Held, that the intent of the statute (St. 1897, p. 509, c. 500, § 17) is accomplished on the city retaining as security the amount received for the tolls, less a reasonable allowance to the railway company for the collection of them. In re Opinion of Justices, 77 N. E. 1038, 1040, 190 Mass. 605.

**WHOLE CONGREGATION**

Where the constitution of a religious corporation, adopted by the unanimous consent of the members of the society, provided that controversies should be determined by a majority rule, the fact that it also provid-

ed that the management of its affairs should be vested in the "whole congregation" did not require the assent of every member to every vote; such provision being construed merely to refer to action at a meeting which all the members were entitled and had an opportunity to attend. *Duessel v. Proch*, 62 Atl. 152, 154, 78 Conn. 343, 3 L. R. A. (N. S.) 854.

**WHOLE COUNCIL**

In a city charter, providing that the city council shall consist of a mayor and board of aldermen, and that a majority of the members of the "whole council" shall be necessary to pass any ordinance in any wise increasing or diminishing the city revenues, the term "council" is used synonymously with the "board of aldermen," and the "whole council" referred to means the whole board of aldermen, as distinct from a quorum thereof, so that, one of the aldermen having died prior to the passage of a tax levy ordinance passed by the vote of seven, such ordinance should be considered as having received a majority of the whole board or council. *Nalle v. City of Austin*, 93 S. W. 141, 145, 41 Tex. Civ. App. 423.

**WHOLE EXPENSE**

The terms "expense" and "whole expense," as used in statutes relieving towns under certain circumstances from the burden of building and keeping in suitable repair highways or bridges, mean the same. *Town of Bridgewater v. Grafton County*, 69 Atl. 941, 942, 74 N. H. 549.

**WHOLE INSURANCE**

The term "whole insurance," as used in a policy on property covered by several policies, which provide that the company should not be liable for a greater proportion of any loss than the amount of the policies bore to the "whole insurance," contemplates the aggregate maximum risk assumed under all the policies. *Stephenson v. Agricultural Ins. Co.*, 93 N. W. 19, 21, 116 Wis. 277.

A fire insurance policy provided that the company should not be liable for a greater portion of any loss than the amount insured by its policy should bear to the "whole insurance" on the policy. Held, that the words "whole insurance" meant the face value of the policy, together with the face value of all other policies issued on the same property, and in apportioning a loss all other insurance is to be included, whether made by another company alone or by a contract between it and the insured, under which, on a partial loss, each stands part as a coinsurer. *Farmers' Feed Co. of New Jersey v. Scottish Union & Nat. Ins. Co. of Edinburgh*, 65 N. E. 1105, 1107, 173 N. Y. 241.

A fire policy provided that the insurer should not be liable for a greater proportion of any loss than the amount insured by the

policy bore to the "whole insurance," whether valid or not, "covering such property," etc. Held, that a floating insurance policy covering plaintiff's injured goods, but providing that the policy should not cover in whole or in part any merchandise on which there might be at the time specific insurance, excepting on the excess of value over and above such specific insurance, when such specific insurance was exhausted, did not cover the goods insured by the first policy, and was not to be considered in determining the "whole insurance" on the property at the time of the loss. *Klotz Tailoring Co. v. Eastern Fire Ins. Co.*, 102 N. Y. Supp. 82, 84, 116 App. Div. 723.

### WHOLE TIME

A provision of a statute requiring an officer to devote his "whole time" to his official duties, means "all his time." It is not meant that he shall at all times be engaged in the performance of some work incident to his office, but that he shall not engage in any other employment. *McBrian v. Nation*, 97 Pac. 798, 799, 78 Kan. 665.

### WHOLE TURN

A "half turn," as used in the irrigation law, consists in the right to take water every 10 or 12 days for 19 or 20 hours, while a "whole turn" is the right to take water every 20 or 21 days for 39 hours. *Bartholomew v. Fayette Irr. Co.*, 86 Pac. 481, 31 Utah, 1, 120 Am. St. Rep. 912.

### WHOLE WORK

See Performance of the Whole Work.

## WHOLESALE

The primary and usual meaning of the word "wholesale" is the sale of goods in gross to retailers who sell to consumers. *State v. Spence*, 53 South. 596, 597, 127 La. 336.

The words "at wholesale" are used in opposition to the words "at retail" and mean in large quantities, and the sale of a quart of wine cannot be said to be a sale at wholesale. *Commonwealth v. Poulin*, 73 N. E. 655, 656, 187 Mass. 568.

The word "wholesale," in Rev. Laws, c. 100, § 1 (St. 1903, c. 460, § 1), providing that the statute prohibiting the sale of intoxicating liquors shall not apply to sales of cider at wholesale by the original makers thereof, must, as required by Rev. Laws, c. 8, § 4, cl. 3, be understood as having a meaning acquired by a prior judicial construction; and the word, in view of such prior judicial construction, means sales made in large quantities, as distinguished from those made in small quantities, which are to be regarded as sales at "retail," and the court must charge that, in determining whether sales were at wholesale, sales at retail are sales made in small quantities, such as are adapted to in-

dividual purchasers, while sales at wholesale are sales made in large quantities, which are beyond the needs of ordinary consumers. *Commonwealth v. Greenwood*, 91 N. E. 141, 205 Mass. 124, 18 Ann. Cas. 185.

Acts 1902, No. 90, § 68, subjects to a penalty all persons selling liquor without a license, except as authorized by a license granted. Section 23 provides for seven classes of licenses, the fourth of which is one by which the licensee may sell at wholesale. Held, that a person having a license of the fourth class could sell only to persons to sell direct to consumers for the purpose of consumption. A sale by "wholesale" means a sale by a merchant to a retailer, and as a general rule wholesale merchants deal only with people who buy to sell again. *State v. Scampini*, 59 Atl. 201, 206, 77 Vt. 92.

The International Dictionary defines the term "wholesale" as the sale of goods by the piece or large quantities, as distinguished from retail, and this is its accurate popular meaning. The word "wholesale" accurately imports a selling, and to sell by wholesale is defined by Bouvier as to sell by large parcels, generally in original packages and not by retail. Acts 29th Leg. p. 353, c. 148, is in part entitled "An act for the levy and collection of a tax on individuals," etc., owning, operating, managing, or controlling for profit the business of wholesale dealers in coal oil, etc., and section 9 requires that only those on whom the tax is imposed shall engage in the wholesale oil business. Held, that one engaged in the wholesale oil business was a wholesale "dealer," within such act, whether he bought the oil to sell again, or whether he bought crude oil and refined it into different petroleum products, and sold the latter. *Texas Co. v. Stephens*, 103 S. W. 481, 486, 100 Tex. 628.

### WHOLESALE COST

A contract for the exchange of plaintiff's land for defendant's stock of merchandise provided that the price of the stock should be "the wholesale cost of the same." The stock was somewhat old, and at the time of the sale the parties took an inventory, and it appears that by the general custom among merchants in the town the term "wholesale cost" included the dray and transportation charges, and meant the wholesale cost of the goods in the merchant's house, including such charges, and not the selling price in the wholesale market. Held, that the term "wholesale cost," as used in the contract of exchange, did not mean the original wholesale price, but that price added to the estimated expenses for freight charges and drayage. *J. W. Finn & Co. v. Culberhouse*, 150 S. W. 698, 700, 105 Ark. 197.

### WHOLESALE DEALER

A "wholesale dealer" is one who sells in large or wholesale quantities, as contra-

distinguished from one who sells in small lots at retail. *Florida Packing & Ice Co. v. Carney*, 41 South. 190, 192, 51 Fla. 190 (citing *Goodwin v. Clark*, 65 Me. 280; *Commonwealth v. Gormly*, 34 Atl. 282, 173 Pa. 586; *Overall v. Bezeau*, 37 Mich. 506).

Under the general license act (No. 171 of 1898), providing that persons shall not be deemed "wholesale dealers" unless they sell by the original or unbroken package or barrel only, and unless they sell to dealers for resale, and, if they sell in less than original, unbroken packages or barrels, they shall be considered retail dealers and pay license as such, a dealer in intoxicating liquors who sells to individuals for consumption is a retailer and may be convicted as such in a prohibition parish. *State v. Spence*, 53 South. 596, 597, 127 La. 336.

A "wholesale dealer" in oleomargarine is defined by statute to be one permitted to sell in the manufacturer's original packages. *Ripper v. United States*, 178 Fed. 24, 25, 28, 101 C. C. A. 152. A retail grocer ceased handling oleomargarine, but, having two or three customers who desired it, at their request and for their accommodation he sent orders in their respective names to the manufacturer for 10-pound packages at a time, to be shipped to each customer in his care. The manufacturer shipped the same to its local branch house, addressed and billed to the customers. The branch house which did not deliver to retail customers, left the packages at plaintiff's store, and he delivered the same with other groceries. The customers returned the bills to him, and he remitted for the same to the manufacturers each month, charging the customer with the cash so sent. There was no fraud nor attempt at concealment, and plaintiff made no profit whatever on the transactions. It was held that such transactions were not sales of the article by plaintiff and did not render him subject to tax as a "wholesale dealer." *Grier v. Tucker*, 150 Fed. 658, 663. Plaintiff and his brother were both retail dealers in oleomargarine, and had paid the tax for the first six months of 1910. During that time, a wholesale shipment ordered by plaintiff not having arrived, he borrowed an unbroken package of the same material from his brother, which the latter had obtained from the same wholesale dealer from whom plaintiff's supply had been ordered, and on arrival of plaintiff's order the precise amount borrowed of the same product and brand was returned. Held, that such transaction did not constitute plaintiff a "wholesale dealer" in oleomargarine, nor subject him to a tax imposed on wholesalers. *Weaver v. Ewers*, 195 Fed. 247, 250, 115 C. C. A. 219.

Pub. Acts 1911, No. 170, § 1, provides that wholesale dealers shall include all persons who shall sell or offer liquors for sale as beverages at wholesale in original sealed

trade packages not to be drunk on the premises, provided, however, that it shall be unlawful for any person to engage in the wholesale liquor business in any town, village, or city of less than 2,000 population, or to sell in quantities of less than three gallons. Held, that the word "wholesale" means pertaining to or engaged in trade by the piece or large quantity, selling to retailers or jobbers rather than to consumers, sales en masse or in gross, etc., and hence a wholesale liquor dealer had no right under his wholesale license to sell beer by the pint bottle, or in quantities less than three gallons, though not to be drunk on the premises. *People v. Cain*, 137 N. W. 159, 171 Mich. 279.

Pol. Code, § 2834, imposes a license tax of \$500 on wholesale liquor dealers, to be paid in each precinct, town, or city in which the wholesaler has or operates a warehouse or depository; "wholesaler" being defined by section 2835 to include all persons who sell or offer for sale or deliver liquors in quantities of five gallons or more at any one time to any one person or persons. Section 2836 provides that every person engaged in business mentioned in section 2834 shall pay such license, and section 2838 provides that any person violating the article shall be guilty of a misdemeanor. Held, that section 2834 was not limited to wholesale liquor dealers who operate a warehouse or depository within the state, but extended to and included nonresident liquor dealers selling liquor in South Dakota at wholesale by means of traveling salesmen. *Jones v. Yokum*, 123 N. W. 272, 274, 24 S. D. 176.

The liquor law of 1887 (Pub. Acts 1887, No. 313) repealed all prior ordinances prohibiting saloons in villages, but the village incorporation act of 1895 (Pub. Acts 1895, No. 3, c. 7, § 1, subd. 7 [Comp. Laws 1897, § 2769, subd. 7]) authorized village councils to suppress saloons for the sale of spirituous and intoxicating liquors. The Warner Crampton Act of 1909 (Pub. Acts 1909, No. 291), amending certain sections of the general liquor law, and adding other sections, provided, section 2, that wholesale liquor dealers shall be deemed to include all persons who sell or offer for sale liquors at wholesale in original packages and in bulk and by measure not to be drunk on the premises. Held, that subdivision 7 was not repealed by anything in the act of 1909. *Boos v. Scudder*, 127 N. W. 1040, 1041, 163 Mich. 678.

#### Quantity sold

Under Burns' Ann. St. 1908, § 8351 (Acts 1907, p. 689, c. 293), making any person selling intoxicants without a license guilty of a misdemeanor, but providing that the act shall not apply to any person, etc., engaged as a wholesaler who does not sell less than five gallons at a time, and defining a "wholesale dealer" as a person whose sole business in connection with the liquor traffic is to sell to



licensed retail liquor dealers, or to wholesale dealers, druggists, etc., a wholesale dealer cannot sell liquor in any quantity to a consumer. *Skelton v. State*, 89 N. E. 860, 861, 173 Ind. 462.

### WHOLESALE PRICE

Rev. St. § 3394, as amended by Act Cong. July 24, 1897, c. 11, § 10, 30 Stat. 206, classifies cigars and cigarettes for internal revenue duty, and imposes a stamp tax of 54 cents per thousand on cigarettes weighing not more than three pounds to the thousand, and the wholesale value or price of which is not more than \$2 per thousand, including the tax, and, if the value exceeds such sum, then they are required to carry a tax of \$1.08 per thousand. Held that, where intestate manufactured cigarettes and sold them at wholesale at his store-room to any one who might apply in reasonable wholesale quantities at \$2 per thousand, the fact that the larger part of the cigarettes manufactured by him were purchased by his son at \$2 per thousand and sold by him at wholesale with cigarettes of other manufacture for more than such price did not make the "wholesale price or value" of intestate's cigarettes more than \$2 per thousand, and hence he was not subject to an assessment prescribed by section 3371, as amended by Act March 1, 1879, c. 125, § 14, 20 Stat. 346, for insufficient stamping. *Epremlam v. Ward*, 169 Fed. 691, 693.

### WHOLESOME

See Pure and Wholesome.

### WHOLLY

A shipment from New York City to Buffalo by way of New Jersey and Pennsylvania, is interstate commerce, and so is subject to the provisions of the Elkins Law as to rebates; the interstate commerce act, though providing that the provisions of the act shall apply to any carrier engaged in the transportation of passengers or property from one state to any other state, having a proviso that the provisions of this act shall not apply to the transportation of property "wholly" within one state. The word "wholly," as there used, imports that such provisions shall apply to any transportation of property which is not wholly within one state. *United States v. Delaware, L. & W. R. Co.*, 152 Fed. 269, 272.

#### Of straw

A small amount of cotton thread in straw braids will not remove such articles from the provision in the Tariff Act for braids composed "wholly" of straw, where the thread is only used for temporarily tying the ends of the braids to prevent them from unraveling. Judgment, *Samuel Schiff & Co. v. United States*, 140 Fed. 63.

Straw laces sewn with cotton thread are not within the provision in the Tariff Act for

laces "composed wholly" of straw. *Schmitz v. United States*, 146 Fed. 127-129, 76 C. C. A. 553.

#### Of tin plate

Small disks produced in the manufacture of tin cans, being a by-product in the process of cutting an aperture for filling, and being of much less value than the tin from which they were cut, are not articles "wholly or partly manufactured from tin plate," under the Tariff Act, but are dutiable as articles of metal, "whether partly or wholly manufactured." *Shallus v. United States*, 162 Fed. 653, 656, 89 C. C. A. 445.

### WHOLLY CONVERTIBLE CAR

A "wholly convertible car" is one where the sides, from floor to roof, are composed of panels and ribs or posts, and which panels may be removed in some way to some place so as to make the car wholly open on the sides. *O'Leary v. Utica & M. V. Ry. Co.*, 139 Fed. 330, 333.

### WHOLLY DESTROYED

Property is to be regarded as having been "wholly destroyed" or a "total loss" within the meaning of an insurance contract, no matter how great a portion thereof may remain unconsumed, if it is so injured that it must be torn down, or that what remains cannot be utilized in reconstructing the building without incurring a greater expense than if it were not so utilized. *Kinzer v. National Mut. Ins. Co.*, 127 Pac. 762, 763, 88 Kan. 93, 43 L. R. A. (N. S.) 121 (citing *Insurance Co. v. Heckman*, 67 Pac. 879, 64 Kan. 388, 395).

Property is "wholly destroyed" for school purposes by the construction and operation of a railroad, if, after reasonable effort and diligence on the part of the board of education and the teachers to avoid the physical dangers and to overcome the interference from the operation of the trains, it is no longer practicable to conduct the school. So long as these things may be overcome by reasonable effort, the efficiency and safety of the school is only impaired but not wholly destroyed. *San Pedro, L. A. & S. L. R. Co. v. Board of Education of Salt Lake City*, 90 Pac. 565, 567, 32 Utah, 305, 11 L. R. A. (N. S.) 645.

### WHOLLY DISABLED

A clause, in an accident policy, providing that by "wholly disabled" shall be understood that the insured is "totally unable" to perform "any part" of the duties of his occupation as merchant, cannot be construed literally, but means inability to perform any substantial part of the business. *James v. United States Casualty Co.*, 88 S. W. 125, 127, 113 Mo. App. 622.

An insured was held to be incapacitated from following his occupation as a supervising builder, within the terms of an accident

policy against injury which should "wholly and continuously" disable him from transacting any and every kind of business, where, while supervising the construction of a building, he fell and injured the base of his spine, from which he became unable to conduct his work, and devoted substantially his entire time to obtaining relief from his injury, which developed into a severe injury to his hip and leg, though he was able to give some attention to his correspondence. *United States Casualty Co. v. Hanson*, 79 Pac. 176, 178, 20 Colo. App. 393.

### WHOLLY DUE AND PAYABLE

An administrator gave his surety a bond and warrant in the same sum as the bond for administration, payable on a fixed date. An indorsement recited that the bond was given to indemnify against loss on the administration bond. Judgment by confession was entered on the bond and warrant several years before the obligor's default of the administration bond. Under 19 Del. Laws, c. 778 (Rev. Code 1852, amended to 1893, p. 814, c. 110), a judgment wholly due and payable when entered ceases to be a lien after 10 years. Held, that the bond was not "wholly due and payable" when judgment thereon was entered, within the statute, but that it was an indemnifying bond, thus requiring discharge of a rule to have the judgment declared no longer a lien. *Faulkner v. Everson* (Del.) 78 Atl. 879, 882, 7 Pennewill, 245.

### WHOLLY OR PARTLY

See Reverse or Affirm Wholly or Partly.

### WHOLLY VOID

Where a deed of land is made to a foreign corporation which has not complied with St. 1898, § 1770b, prohibiting a foreign corporation from transacting business, or acquiring, holding, or disposing of property in the state without first complying with the statute, and declaring that every contract relating to property entered into before a compliance with the law shall be "wholly void," the deed is a nullity and a prior mortgagee of the vendor under an unrecorded mortgage may show the fact of noncompliance and take the benefit thereof; the words "wholly void" meaning absolutely void and a nullity. *Hanna v. Kelsey Realty Co.*, 129 N. W. 1080, 1082, 145 Wis. 276, 33 L. R. A. (N. S.) 355, 140 Am. St. Rep. 1075. The words "wholly void," as used in this statute, mean void absolutely and not simply voidable at the option of the other party to the contract. *Ashland Lumber Co. v. Detroit Salt Co.*, 89 N. W. 904, 908, 114 Wis. 66.

### WHORE

#### WHORING BITCH

To call a woman "a whoring bitch" is a slander per se. *Cameron v. Cameron*, 144 S. W. 171, 173, 162 Mo. App. 110.

### WIDE

#### WIDEN

As repairs, see Repair—Repairs.

#### WIDEST CHANNEL

The widest expanse of water which can reasonably be called a channel is what is meant by the words "widest channel" in Act Feb. 14, 1859, 11 Stat. 383, c. 33. *Washington v. Oregon*, 29 Sup. Ct. 631, 632, 214 U. S. 205, 53 L. Ed. 969.

### WIDOW

As legal representative, see Legal Representative.

As personal representative, see Personal Representative.

As representative, see Representative.

As unmarried person, see Unmarried.

Heirs as including, see Heirs.

"Widow" implies a lawful marriage, so that where plaintiff was only the putative wife of decedent, who had contracted a bigamous marriage with her, she was not his widow. *Vaughan v. Dalton-Lard Lumber Co.*, 43 South. 926, 927, 928, 119 La. 61 (citing *Walton v. Booth*, 34 La. Ann. 913; *Walker v. Vicksburg, S. & P. R. Co.*, 34 South. 749, 110 La. 718; *Lynch v. Knoop*, 43 South. 252, 118 La. 611, 8 L. R. A. (N. S.) 480, 118 Am. St. Rep. 391, 10 Ann. Cas. 807).

Where insured was coerced into a marriage, and never thereafter cohabited or visited his pretended wife, she was not his widow, within the terms of an insurance certificate, payable to insured's "widow or other heirs." *Grand Lodge K. P. of North and South America, Europe, Asia, and Africa v. Smith*, 42 South. 89, 89 Miss. 718.

A wife dying and leaving a husband surviving is in no sense a "widow." *Chesterfield v. Hoskin*, 113 N. W. 647, 649, 133 Wis. 368.

The word "widow" in Sayles' Ann. Civ. St. 1897, art. 2046, requiring the setting apart of the homestead for the use of the widow and minor children and unmarried daughters, refers to the surviving lawful wife of decedent. *Hayworth v. Williams*, 116 S. W. 43, 45, 102 Tex. 308, 132 Am. St. Rep. 879.

Transfer Tax Law (Laws 1896, p. 869, c. 908) § 221, as amended by Laws 1905, p. 829, c. 368, provides that, when property of the value of less than \$10,000 passes by any such transfer to or for the use of any wife or widow of a son, such transfer of property shall not be taxable. Held, that the widow of an adopted son, who under Domestic Relations Law (Laws 1896, p. 227, c. 272) § 64, was a son of the testator, was the "widow of a son," within the meaning of the act. In re *Duryea's Estate*, 112 N. Y. Supp. 611, 128 App. Div. 205.

A will, after giving real estate to testator's son, provided that if the son, who then had a wife and one child living, should die before testator's wife, the property given to the son should be "equally divided between my said wife and my said son's widow and the child or children, that is, my wife to have one-half thereof and my son's widow and child or children, the other one-half." The son's wife living when the will was made died, and the son married again, and at his death before testator's widow left surviving him the child by his first marriage and his widow. Held, that the term "widow," as used in the will, was not restricted to his wife at the time of the will, but included the wife who survived him. *Meeker v. Draffen*, 94 N. E. 626, 627, 201 N. Y. 205, 33 L. R. A. (N. S.) 816, Ann. Cas. 1912A, 930; *Same v. Meeker*, 121 N. Y. Supp. 1051, 137 App. Div. 537.

#### Alien

Act Pa. 1891 (P. L. 207), providing for the health and safety of persons employed in and about anthracite mines, in article 17, § 8, declares that for any injury to person or property occasioned by any failure to comply with the act by any owner of any coal mine, etc., a right of action shall accrue to the person injured; and, in case of loss of life, a right of action shall accrue to the "widow" and lineal heirs of the decedent for like recovery for damages for the injury they shall have sustained. Held, that the word "widow" construed in connection with Act April 15, 1851 (P. L. 674), and Act April 26, 1855 (P. L. 309), giving a right of action to a "widow" for the wrongful death of her husband, did not include a nonresident alien widow, and hence such widow who was an Italian subject and had resided in Italy since before July 11, 1907, was not entitled to recover under the Act of 1891 for the negligent death of her husband in a coal mine in Pennsylvania, notwithstanding such a right might be enforced under the laws of Italy. *Debitulla v. Lehigh & Wilkesbarre Coal Co.*, 174 Fed. 886, 889.

#### Divorced wife

Where a member of a benefit society designated his wife as the beneficiary, and thereafter the parties were divorced, she could not be considered as his "wife" at the time of his death, nor was she his "widow." *Farra v. Braman* (Ind.) 82 N. E. 926, 929.

An application for a benefit certificate was made subject to the association's constitution and laws then in force and that might thereafter be adopted. A subsequent by-law provided that in case a wife is designated as beneficiary, and subsequent thereto becomes divorced from the member, the divorce should annul the designation. Pub. Acts 1893, p. 186, No. 119, § 1, relative to such associations, provides that payment of benefits shall be

made only to the widow, children, etc., of the member, provided that if the member have no such relatives he may designate any other person or his estate as beneficiary. Held that, where a member designated his wife as beneficiary, and was divorced from her at the time of his death, she was neither his wife nor his "widow," and therefore was not entitled to benefits under the certificate. *Dahlin v. Knights of Modern Maccabees*, 115 N. W. 975, 977, 151 Mich. 644.

Testatrix bequeathed the residue of her estate in trust, one share to be invested and the income paid semiannually to complainant for life, and, if she should die either before or after testatrix and her daughter should survive her, the income to be similarly paid to the daughter for life. By a codicil she provided that on complainant becoming a "widow," or should she be a "widow" at testatrix's decease, the principal should be paid her absolutely for her own use, and, if she should die before her husband and their daughter should survive her, on the daughter's attaining 21 years of age one-half of the share should go to her and the other one-half to others. At the execution and probate of the will complainant was the wife of A. G., but was subsequently divorced from him and married C., who died in January, 1907, after which A. G. died. Held, that the codicil did not require that complainant be the "widow" of A. G. in order to be entitled to such share of the estate so bequeathed, and that she was a "widow" within such codicil. *Crocheron v. Fleming*, 70 Atl. 691, 692, 74 N. J. Eq. 567.

The word "widow," used in statutes with regard to dower, simply means the person whose right to dower has accrued. Where a wife obtained a judgment for separation in New York, and thereafter procured a divorce in Kansas on the ground of cruelty, without personal service on the husband or his appearance, and afterwards married, she cannot recover dower in lands thereafter acquired by the husband, or which he owned at the time of the divorce. *Voke v. Platt*, 96 N. Y. Supp. 725, 726, 48 Misc. Rep. 273.

#### Marriage of widow

The term "widow," under Gould's Dig. c. 68, § 29, entitling certain persons to homesteads, and under section 30, making such homesteads exempt while occupied by the widow, etc., of such persons, includes one who has remarried on death of her former husband. *Davis v. Neal*, 140 S. W. 278, 279, 100 Ark. 399.

#### Widower

The exemption allowed by Ky. St. 1903, § 1403, subsec. 5, to be set apart to "the widow or infant child" from the estate of an intestate, to the infant child, if no "mother" survives, and to the "widow" if there be no infant children, or if none reside in the family with the "widow," does not apply to the husband and children of the intestate wife.

*Thaxton's Guardian v. Walters' Adm'r*, 113 S. W. 118, 119, 130 Ky. 235.

## WIDOWHOOD

See *During Widowhood*.

## WIDOW'S DOWER

Subject to widow's dower, see *Subject To*.  
See, also, *Dower*.

## WIDOWER

As included in the term *widow*, see *Widow*.

As used in Rev. St. 1899, § 2938, providing that, when a wife shall die without any child or other descendants in being capable of inheriting, her "widower" shall be entitled to one-half of the real and personal estate belonging to the wife at the time of her death, etc., the term "widower" means one who has been reduced to that condition by the ordinary and usual vicissitudes of life, and not one who, by felonious act, has himself created that condition, and hence where a husband murdered his wife, and three hours afterward killed himself, he did not upon his wife's death acquire under the section any estate in her property to which his heirs could succeed upon his death. *Perry v. Strawbridge*, 108 S. W. 641, 648, 209 Mo. 621, 16 L. R. A. (N. S.) 244, 123 Am. St. Rep. 610, 14 Ann. Cas. 92.

## WIDTH

See *Entire Width of Lot*; *Original Width*.

## WIFE

See *Housewife*; *Husband and Wife*.

My wife, see *My*.

Service of wife, see *Service*.

Surviving spouse as owner, see *Owner*.

The term "wife" necessarily implies a lawful marriage; thus, where plaintiff was induced to enter in good faith into a bigamous marriage with decedent, she was not entitled to sue for his wrongful death under Civ. Code, art. 2315, conferring the right to sue for damages for the death of a husband on wife or widow. *Vaughan v. Dalton-Lard Lumber Co.*, 43 South. 926, 928, 119 La. 61.

Under a will providing that at the death of testator's son his estate should belong to his son's "wife and children then living, in equal shares," the second wife of the son was entitled to a share of the estate as the "wife" referred to in the will, though the former wife was living at the death of testator, and died thereafter. *In re Harris*, 136 N. Y. Supp. 711, 712, 152 App. Div. 52.

Unless there is something in a will indicating the contrary, a gift to the "wife" of a designated married man is a gift to the wife existing at the making of the will, and not to

the one he may subsequently marry, but a gift to the "widow" of a designated person includes such wife as may survive him. *Meeker v. Meeker*, 121 N. Y. Supp. 1051, 1053, 137 App. Div. 537; *Meeker v. Draffen*, 94 N. E. 626, 201 N. Y. 205, 33 L. R. A. (N. S.) 816, Ann. Cas. 1912A, 930.

Under Rev. St. 1895, art. 333, requiring that the application for certiorari shall distinctly set forth the error, a petition for certiorari to review orders of the probate court appointing one administratrix, on the theory that she was the putative wife of decedent and awarding her allowances and the homestead, which alleges that the court erred, in that she was not the surviving wife of decedent, is, in the absence of any special exception, sufficient to raise the question whether she was the putative wife; the word "wife" in the petition being used in its generic sense as including a putative, as well as a lawful, wife. *Walker v. Walker's Estate (Tex.)* 136 S. W. 1145, 1148.

Where a mutual benefit association was empowered to make provision for widows and any person dependent on deceased members, and the policy was issued to deceased, payable to "Ella J. Palmer (wife)," the term "wife" was merely *descriptio personæ*, and her dependency on insured was not controlled by the legality of the marital relation existing between herself and assured. *James v. Supreme Council of the Royal Arcanum*, 130 Fed. 1014, 1016.

The term "wife" means a lawful wife. A woman has an insurable interest in the life of a man with whom she has for years been living as his wife, though there has been no marriage ceremony, where he has openly and notoriously recognized her as his wife. Where the beneficiary of a life policy, which was obtained by decedent voluntarily for her benefit, had in good faith married him in the belief that he was divorced from his first wife, and lived with him many years without being informed that there was even a doubt of the legality of her marriage until after his death, though his first wife and daughters had every opportunity to advise her of it long before his death, and the beneficiary and her children were dependent on decedent for support, the beneficiary, independently of the validity of the marriage, had an insurable interest in decedent's life, and the contract could not be regarded as within the rule against wagering policies. *Scott v. Scott (Ky.)* 77 S. W. 1122, 1124.

Where a fraternal relief association which insures its members only for benefit of their wives, children, heirs, and other similar relations accepts assessments upon the policy or certificate issued to a member and payable to a named person as his "wife," and the member and such woman are at the time of his death living together as husband and wife in the honest belief that they are lawfully

married, the policy is not void, but the designated beneficiary upon insured's death is entitled to the proceeds, though when insured contracted the marriage with the beneficiary there existed between him and another woman a prior undissolved marriage which he believed was terminated by death, the woman whom he had previously married having departed and not having been heard of for over seven years, the word "wife" as used in the policy embracing the woman living with him as his wife in view of the spirit of the plan of insurance and the purposes of the policy. *Grand Lodge Knights of Pythias v. Barnard*, 70 S. E. 678-683, 9 Ga. App. 71.

Under Code Civ. Proc. § 16, declaring that words and phrases must be construed according to the context and the approved usage of the language, but that technical words and phrases or those which have acquired a peculiar meaning are to be construed according to such peculiar meaning, and Code Civ. Proc. § 1474, providing that if a homestead, selected by the husband and wife or either during coverture and recorded while both were living, was selected from the community or from the separate property of the one selecting it or joining in its selection, it vests, on the death of the husband or wife, absolutely in the survivor. The words "husband" and "wife," as used in section 1474, mean, respectively, a man who has a wife and a woman who has a husband, and do not mean an unmarried man or woman; and the word "survivor," as therein used, refers to the husband and wife as such, and means that, upon the death of the husband as a husband or the wife as a wife, the homestead shall vest absolutely in the survivor of such marriage relation, so that the survivor must be a surviving spouse, and the surviving individual after the dissolution of the marriage is not within the statute. *Zanone v. Sprague*, 116 Pac. 989, 993, 16 Cal. App. 333.

#### **As creditor**

See Creditor.

#### **Divorce**

A member of a benefit society designated in his application his "wife," E., as the beneficiary of the fund. Held that, after the parties were divorced, E. could not be considered as the "wife" of the member at the time of his death, nor was she his widow. *Farra v. Braman* (Ind.) 82 N. E. 926, 929.

*Burns' Rev. St. 1901*, § 7298a, subjects to a penalty any male person who, having become civilly or criminally liable for bastardy or seduction, shall marry the wronged female with intent to escape prosecution, and afterwards maltreat, desert, or fail to provide for her. Section 7298b provides that the action shall be instituted in the name of the state on the relation of the "wife," but such "wife" shall not be liable for costs, except, etc. Section 7298d provides the practice to be followed, assimilating it to that

in bastardy proceedings, and permits the defendant to be released from jail after a year's imprisonment if he is unable to satisfy the judgment, and the judge deems him sufficiently punished. Held, that a divorce obtained by the wife after the husband's desertion, and before the institution of suit under these statutes, was no defense thereto. The word "wife" is used in the statute to designate and identify the person who may sue as relatrix, and was not intended to fix the status of the person having the right to sue. *State ex rel. Lannoy v. Lannoy*, 65 N. E. 1052, 1053, 30 Ind. App. 335.

The words "my wife," prefixed to the name of a devisee in a will, held not to imply any condition that the beneficiary shall remain his "wife" but to be a word of description only. Testator devised a legacy to his wife M. B. Held not to lapse, though the wife, after the date of the will, obtained a divorce; the word "wife" being descriptive only. *Act June 4, 1879* (P. L. 88), providing that a will is to be construed as of the time of the death of the testator with reference to any property embraced in it, does not apply to a legacy to testator's "wife," though she obtained a divorce prior to testator's death. In *re Jones' Estate*, 60 Atl. 915, 916, 211 Pa. 364, 69 L. R. A. 940, 107 Am. St. Rep. 581, 3 Ann. Cas. 221.

#### **As next of kin**

See Next of Kin.

#### **As purchaser**

See Purchaser.

#### **As servant**

See Servant.

#### **As surety**

See Surety.

### **WIFEHOOD**

Under Const. art. 16, § 51, and Rev. St. 1895, art. 2396, defining a homestead, the homestead right of a married woman rests upon the fact that she has the status of a wife, and that as such she actually used and occupied the 200-acre homestead for the purpose of a home, at the time of its attempted alienation, and did not join in the execution of the conveyance or in any way assent thereto; the term "marriage" meaning the civil status of a man and woman lawfully united in the relation of husband and wife, and "wifehood" being defined as the state of being a wife. *McCracken v. Taylor* (Tex.) 146 S. W. 693, 695.

### **WILD**

#### **WILD AND FOREST LANDS**

Testator owned in his lifetime an undivided interest of land in the Adirondack forest, consisting of about 854 acres covered with forest, except one acre and one-half on the shore of a pond, where buildings had been

constructed by the former owner, who had used the property as a fish and game preserve, about one-half acre of the acre and a half being used for garden purposes. Testator also owned other conceded forest lands. By his will his executors were directed to convey to plaintiff and two other persons, all his "wild and forest lands." Held that, at the time of testator's death, all of this land was wild and forest land within the meaning of the devise. *Newcombe v. Ostrander*, 122 N. Y. Supp. 823, 826, 66 Misc. Rep. 103.

#### WILD AND UNCIVILIZED COUNTRY

Where an accident to insured occurred in a sawmill camp, in which some 300 people were residing, distant about 35 miles from a railroad station in the province of Ontario, Dominion of Canada, it was not in a "wild and uncivilized country," within an accident policy excepting injuries sustained in such a place. *United States Casualty Co. v. Hanson*, 79 Pac. 176, 177, 20 Colo. App. 393.

#### WILD ANIMAL

As property, see Personal Property; Property.

#### WILD-CAT BUSINESS

The term "wild cat," used by a solicitor of an insurance company, in reference to the business of another insurance company, implied that the latter company was an irresponsible and predatory concern, and, where such charge was false, the latter company was justified in publishing a statement that such solicitor was guilty of misrepresentation and fraudulent conduct. *Wells v. Payne*, 133 S. W. 575, 576, 141 Ky. 578.

#### WILD-CAT TERRITORY

In the parlance of oil men, a new field is designated as "wild-cat territory." *Lowther Oil Co. v. Miller-Sibley Oil Co.*, 44 S. E. 433, 435, 53 W. Va. 501, 97 Am. St. Rep. 1027.

#### WILD-CAT TRAIN

A freight train not scheduled is known as a "wild cat." *Kelly v. Delaware, L. & W. R. Co.*, 84 N. E. 801, 802, 192 N. Y. 203.

#### WILD DEER

See, also, Deer.

"Wild deer" are deer roaming at large in the forest and used for food. "Deer," as used in Game Law 1896 (Acts 1896, p. 74), prohibiting the killing of any wild deer between certain dates, and the selling of any game, bird, or animal or any part of either, whether dead or alive, relates to wild deer, such as would be commonly denominated "game," and hence a showing that accused sold the meat of a deer without showing that the animal was "wild" was insufficient. *Crosby v. State*, 48 S. E. 913, 914, 121 Ga. 198.

#### WILD GAME

The fish within the waters of the state constitute the most important constituent of that species of property commonly designated as "wild game," the general right and ownership of which is in the people of the state, as in England it was in the king; and the right and power to protect and preserve such property for the common use and benefit is one of the recognized prerogatives of the sovereign coming from the common law and preserved and expressly provided for by statutes of the Union. *People v. Truckee Lumber Co.*, 48 Pac. 374, 116 Cal. 397, 399, 39 L. R. A. 581, 58 Am. St. Rep. 183.

#### WILD LAND

See Wild and Forest Lands.

The word "wild" is used interchangeably with the words "unimproved and uninclosed," relative to lands claimed under Kirby's Dig. § 5057, relating to adverse possession, and a finding that lands were wild was sufficient to show that they were uninclosed and unimproved. *Fenton v. Collum*, 150 S. W. 140, 141, 104 Ark. 624.

As used in Rev. St. c. 62, § 9, providing that, when a divorce is decreed to a wife, she shall be entitled to one-third, in common and undivided, of all of the husband's estate except wild lands, the words "wild lands" do not include a wood lot or other land used with a farm or dwelling house, although uninclosed. *Leavitt v. Tasker*, 76 Atl. 953, 955, 107 Me. 33.

Land valuable for pasturage during the summer, or valuable for a summer resort as laid out by the deceased owner, and which may be occupied and improved by the widow without committing waste, is not "wild land," within Rev. Laws, c. 132, § 3, declaring that a widow shall not be entitled to dower in wild land, and the same may be set off to her as dower. *Goodspeed v. Lawrence*, 94 N. E. 395, 396, 208 Mass. 258.

"Improved lands," in the sense in which the phrase is used in Civ. Code 1895, § 3065, which provides that "the right of private way over another's land may arise \* \* \* from prescription by seven years' uninterrupted use through improved lands, or twenty years' use over 'wild lands,'" comprehends the entire tract, though only part thereof be in actual cultivation. The woodland on such a tract is not wild land, but, in connection with the portion which is cultivated, constitutes a single tract of "improved land." If a tract of land is cultivated in part, and a road through the entire tract traverses both field and woodland, the woodland adjacent to the field is not to be treated as "wild land." The land which the statute designates as wild is that which is located separate and apart from lands which are partly in cultivation. It is a segregated tract of land, remaining in a state of nature, uninclosed, and with no

indications of use by the owner. The woodland of a plantation is not "wild land" simply because it is uninclosed, where it adjoins lands which are in cultivation, and the woodland in its natural state is retained by the owner, either for plantation uses, or because he prefers to defer the time for bringing it into cultivation. *Hopkins v. Roach*, 56 S. E. 303, 304, 127 Ga. 153 (citing *Watkins v. Country Club*, 47 S. E. 538, 120 Ga. 45; *Kirkland v. Pitman*, 50 S. E. 117, 122 Ga. 256).

### WILD TRAIN

See Wild-Cat Train.

A train which does not run by any schedule, but under special instructions, is called, among railroad men, a "wild train." *Abend v. Terre Haute & I. R. R. Co.*, 111 Ill. 202, 207, 53 Am. Rep. 616.

### WILD WEST SHOW

As circus, see Circus.

## WILL

See Good Will; Hiring at Will; I Will. My will, see My.  
See, also, Volonte.

"Will" is sometimes used synonymously with choice, wish, pleasure, but it is also used frequently in the sense of command, direction, determination, and resolution. It has, when founded in testamentary papers, a universally received mandatory significance. A testament is "a just sentence of our will, touching that we would have done after our death." *McRee's Adm'r's v. Means*, 34 Ala. 349, 365 (quoting and adopting a definition in 1 Swin. Wills 4).

The word "will" is strictly applicable to the disposition of real property. *Barker v. Town of Petersburg*, 82 N. E. 996, 997, 41 Ind. App. 447 (citing *Mills v. Franklin*, 28 N. E. 60, 128 Ind. 444, 447).

In a clause of a will, giving testator's widow power to divide certain property according to her "will," the word "will" means "according to her choice, decision, or discretion," and not "according to her last will and testament," and hence the widow had power to make division by deed. *Seaboard Air Line Ry. v. Garrett*, 67 S. E. 903, 904, 85 S. C. 543.

As used in the certificate of a member of a beneficiary society, providing that he was "entitled to participate in the death beneficiary fund to the extent of \$1,000, which sum shall at his death be paid to the person or persons named in his will as herein indicated," etc., the word "will," as applied to the manner of disposing of the benefit fund should not be construed in its technical sense, but should be held as the equivalent of "wish," "desire," or "direction." *Prokes v.*

*Bohemian Roman Catholic First Cent. Union*, 165 Ill. App. 105, 107.

Testator devised certain property absolutely to certain of his sons, with a provision that it was his "will and desire" that none of the real estate so devised should be sold until the oldest son was 35, etc. Held, that the word "will" in such connection amounted to a restriction equivalent to the expression "I direct," and that the devisees were therefore incompetent to convey the property prior to the time specified, though their interest was subject to their debts as expressly provided by St. 1903, §§ 1681, 2355. *Girdler v. Girdler* (Ky.) 113 S. W. 835, 836.

A testator in one item of his will stated, "I give and bequeath to my son" certain specified items of personal property, "and will that he should stay with his mother until he is 21 years old." The word "will," as used in such item, was intended as a desire or request of his son that he should live with his mother during the period named; that being the natural and only construction that can be given to the word as used in that item of the will. *Hume v. McHaffie*, 81 N. E. 117, 118, 40 Ind. App. 703.

### WILL (Auxiliary Verb)

"The words 'intends to appeal,' 'will appeal,' or 'give notice of their application to appeal' are equivalent to and have the same effect as the more direct phraseology of the statute ('appeals from the judgment'); that is, each will effect an appeal. Of course if the phrases above cited are sufficient to effect the appeal, the words 'has appealed' will likewise perform the same office." *James v. James*, 77 Pac. 1082, 35 Wash. 655 (citing *Ranahan v. Gibbons*, 62 Pac. 773, 23 Wash. 255; *In re Murphy's Estate*, 66 Pac. 424, 26 Wash. 222; *Brown v. Calloway*, 75 Pac. 630, 34 Wash. 175).

An instruction in a personal injury action that the jury, in assessing the damages, may consider the character of the injury, if any, sustained by plaintiff, the pain and suffering, if any, endured, and "which will be endured," if any, as the result of the injuries, if any, etc., properly limits a recovery for the suffering endured, and for such suffering as the evidence discloses he will endure in the future, since the word "will," as employed in the instruction, must have been understood in its proper sense as referring to the unconditional existence of the fact, and not in the sense of "may," which imports a mere possibility. *Scaally v. W. T. Garratt & Co.*, 104 Pac. 325, 326, 332, 11 Cal. App. 138.

### As imperative or mandatory

The word "will," as used in section 1 of an act approved March 18, 1911 (Laws 1910-11, c. 107), entitled "An act amending section 2, art. 1, chapter 66 of the Session Laws of 1910," and providing "any citizen of the state

may, within 10 days, by written notice to the Secretary of State and to the party or parties who filed such petition, protest against the same, at which time he will hear testimony and arguments for and against the sufficiency of such petition," means "shal" and is mandatory, and, being addressed to a public official, excludes the idea of discretion. *Russell v. Harrison*, 124 Pac. 762, 763, 33 Okl. 225.

### WILL (Testament)

See Confirming My Last Will; Controversy Respecting Existence of Will; Counter Wills; Foreign Will; Found with the Will; Holographic Will; Instrument in Nature of Will; Joint Will; Material Portion of Will; Mutual Will; Nonintervention Will; Reciprocal Will; Unnatural Will.

Any will, see Any.

Cancellation of will, see Cancel—Cancellation.

Contest of wills, see Contest.

Date of will, see Date.

End of will, see End.

Establish will, see Establish.

Execution of will, see Execute.

Factum of a will, see Factum.

Interest in will, see Interest.

Principal as used in will, see Principal.

Probate of will, see Probate.

See, also, Intestacy—Intestate; Testament.

A written instrument, no matter what its form may be, which is of a testamentary character, is a "will," and, if not executed as required by statute, is void. *Thomas v. Singer Sewing Mach. Co.*, 117 N. W. 155, 156, 105 Minn. 88.

The term "will," as applied to a testament, means in ordinary conception the formal instrument by which a person disposes of his property to take effect at his death. In *re Peirce's Estate*, 115 Pac. 835, 837, 63 Wash. 437.

A "will" is an instrument by which a person makes a disposition of his property to take effect after his death. *Noble v. Fickes*, 82 N. E. 950, 951, 230 Ill. 594, 13 L. R. A. (N. S.) 1203, 12 Ann. Cas. 282 (citing 1 Jarm. Wills, 26; Schouler, Wills, p. 1; 1 Redf. Wills [4th Ed.] c. 2, § 2, par. 1; *Robinson v. Brewster*, 30 N. E. 683, 140 Ill. 649, 33 Am. St. Rep. 265).

A "will" is an instrument by which a person makes a disposition of his property, to take effect after his decease, and which is in its own nature ambulatory and revocable during his life. *Blacksher Co. v. Northrup*, 57 South. 743, 744, 176 Ala. 190, 42 L. R. A. (N. S.) 454; *Rice's Adm'r v. Rice*, 68 Ala. 216, 218 (quoting and adopting a definition in 1 Jarm. Wills, 1); *Daniel v. Hill*, 52 Ala. 430, 436.

A "will" is an instrument executed by a person of full age and sound mind, for the purpose of disposing of his property after his death, which instrument must be signed by him in the presence of two witnesses, who must sign in his presence and in the presence of each other. In *re Brown's Will*, 120 N. W. 667, 672, 143 Iowa, 649.

The word "will," in Rev. Codes, § 4736, declaring that the execution of a codicil referring to a previous will has the effect to republish the will as modified by the codicil, means a document which itself has testamentary character. In *re Noyes' Estate*, 106 Pac. 355, 357, 40 Mont. 231.

Under Rem. & Bal. Code, § 1322, which provides that a will in writing shall not be revoked except by subsequent will in writing or by burning, etc., the word "will" is used in the sense of a writing executed with the solemnity of a will, and where a testator in a writing, executed with all the formalities required by section 1320, but which makes no disposition of property, declares a revocation of a former will, the writing operates as a revocation. In *re Peirce's Estate*, 115 Pac. 835, 837, 63 Wash. 437.

"The word 'will' has a technical meaning, and implies an instrument executed in conformity with prescribed formalities, but subject to alteration or cancellation at the volition of the maker. It is his will because his own mind, untrammelled and free, has determined to give the disposition of his property a certain designated direction. It does not take effect until his mental and physical powers have been destroyed by disuse and dissolution, and, while he has a disposing mind, it is under his control." *Robbins v. Smith*, 73 N. E. 1051, 1055, 72 Ohio St. 1 (quoting and adopting the definition in *Wilks v. Burns*, 60 Md. 64).

"A 'will' is defined by *Johnson, J.*, in *Tomkins v. Tomkins* (S. C.) 1 Bailey, 96, 19 Am. Dec. 656, to be a declaration of a man as to the manner in which he would have his estate disposed of after his death. *Jarman* defines it as an instrument by which a person makes a disposition of his property, to take effect after his decease. 1 Jarm. Wills, 16. At the present day, and under the jurisprudence of our state, there is no doubt that, as the word 'will' is employed in our statutes, it is not limited to instruments which appoint an executor, for it is well settled that there may be a valid 'will' without the appointment of an executor, and our statutes provide for the administration of the estate in a case where no executor is named in the will. It is equally clear that the word 'will,' as used in our statutes, includes instruments that relate to real estate only. Accordingly the most recent definition that I have found (29 Am. & Eng. Encyc. of Law, 124) defines a will as the legal declaration of a man's intention which he wills to be performed after his death



touching either the disposition of his property, the guardianship of his children, or the administration of his estate." In the settling of an account by an administrator, he may set off against the share due the next of kin a debt due by such heir and contracted during the lifetime of the decedent. In *re Robinson*, 92 N. Y. Supp. 967, 970, 45 Misc. Rep. 551.

The steps prescribed by the statute to be taken in executing a "will" must be shown to have concurred before an instrument of testamentary character will be recognized as a valid will; and an instrument, which is in form a will, is inoperative and void as such, where not attested by two or more credible witnesses. *Belgarde v. Carter* (Tex.) 146 S. W. 964, 965.

"A 'will' is an instrument by which a person makes a disposition of his property to take effect after his death." An instrument by which a married woman leases premises to her husband during his life, rent free, such lease to take effect from its date, cannot on her death be probated as a will. In *re Ogle's Estate*, 72 N. W. 389, 97 Wis. 56 (quoting *Schouler, Wills*, § 1).

A "mere will" is one which takes effect on the death of testator, and is ambulatory during his lifetime. A "mere will" is a composite and superserviceable instrument, which becomes fixed, stationary, and irrevocable in its clause of revocation, while the remainder is ambulatory. An instrument is a will, or it is not. All wills are "mere" wills; a "mere" will is a perfect will. We cannot conceive of such a thing as perfection plus. All parts of wills must remain ambulatory during the lifetime of the testator. *Bates v. Hacking*, 68 Atl. 622, 628, 29 R. I. 1, 14 L. R. A. (N. S.) 937.

"The statute (Gen. Statutes, p. 369, § 2) requires a 'will' to be 'in writing, subscribed by the testator, and attested by three witnesses, all of them subscribing in his presence and in the presence of each other.' The charge declares the law to be that the signature of a testator to a will is not duly attested unless at the time of attestation the attesting witness knows that the instrument is a will. This attributes too much meaning to the word 'attestation'; more than has been given to it by courts which have been called upon to define it, where used in similar statutes." *Appeal of Canada*, 47 Conn. 450, 460.

Under a statute declaring that all devises shall continue in force unless altered by some other will or codicil or other writing of the deviser, signed in the presence of three or more witnesses declaring such alteration, an instrument purporting to be a "will," but executed in the presence of two witnesses only, and containing no clause of revocation, will not revoke a former will, although it purports to dispose of all the property of the party signing it in a manner different from and in-

consistent with the disposition in the first will, nor would it operate as a revocation if it contained a clause of revocation. *Reese v. Newport Probate Court*, 9 R. I. 434, 435.

An instrument, reciting that the person executing it gave and bequeathed to a person named land described, and declared that on the death of the person named without issue the legacy should be returned to the children of the person executing it, and signed and sealed, and delivered to a third person and witnessed by three attesting witnesses, is a "will" within Civ. Code 1902, § 2476, providing that wills of real property shall be in writing, and signed by the party devising the same, and shall be attested by three or more credible witnesses. *Rountree v. Rountree*, 67 S. E. 471, 476, 85 S. C. 383.

The statute of wills, though it does not alter the law admitting extrinsic proof to identify the subject of a bequest, nor the law treating a codicil as attached to a validly executed will, does limit the power of testamentary disposition to a writing containing in itself the bequest intended to be made, denoted by the language used therein and signed and attested with prescribed formalities, and an instrument executed by decedent, directing a disposition of her property at her death in accordance with a certain deed of trust, was insufficient to constitute a "will" though signed and attested as required in the execution of wills. *Hatheway v. Smith*, 65 Atl. 1058, 1059, 79 Conn. 506, 9 L. R. A. (N. S.) 310, 9 Ann. Cas. 99.

A written instrument reciting that according to the last wishes of F., in the presence of A. and B., he makes the following statement: "Funeral expenses paid first. Turn his affairs over to M. & B. to assist in the selling of the same and all household goods to be equally divided between her and A. John Tapp to be fully paid for his trouble. And enough of his property sold to pay all debts. The balance to be equally divided between" two persons named and signed by A. and B.—does not meet the requirements of a "will" under Gen. St. 1901, § 7938, and is insufficient to convey the real estate to the beneficiaries named. *Osborne v. Atkinson*, 94 Pac. 796, 798, 77 Kan. 435.

An instrument, entitled a contract and designating the parties thereto as parties of the first and second parts, provided that the party of the second part agreed to support the party of the first part during the balance of her life, and that in consideration thereof, the party of the first part should convey certain real property by deed to the party of the second part. This property was held by the party of the first part under a provision of her husband's will which authorized her to dispose of it by will with the consent of her husband's executors. It was further provided by the contract that all the residuary estate of the party of the first part should on

her death be paid by her legal representatives to the party of the second part. Held, that the writing was a "will." *Heaston v. Krieg*, 77 N. E. 805-807, 187 Ind. 101, 119 Am. St. Rep. 475.

Decedent acquired, through his wife's death, corporate stock which was her individual property, and thereafter he wrote to his son: "Through your mother, whose wishes I have tried to follow, and shall continue to do, you to-day are entitled to quite a property. I have transferred a portion of it to you. \* \* \* Your mother's stock \* \* \* I have retained in such manner that the income goes to me, but so that neither your creditors can get it \* \* \* nor can my creditors touch it." On the same day the father transferred the stock to himself as attorney for the son. The certificate was never delivered to the son, and he had no knowledge of its existence until after his father's death; the father having in the meantime voted the stock and applied the dividends to his own use until he canceled the certificate and issued one without consideration to another to avoid "double taxation," she subsequently transferring the stock to him in his own name, which was so retained until his death. Seven years after the writing of the first letter to his son he wrote: "I have no funds \* \* \* belonging to you in trust or that have accumulated for your benefit from your mother's estate." Held, that the transaction could not be sustained as a testamentary disposition of the stock, though the father's subsequent dominion over the same and his denial that he was in any manner trustee for the same had never been made. *Paine v. Paine*, 67 Atl. 127, 129, 28 R. I. 307, 12 L. R. A. (N. S.) 547.

#### **Codicil included**

The word "will," in its most comprehensive sense, means the "will" as first executed, together with all codicils, be they many or few, which have been added thereto, and the meaning and effect of which, taken together, is reaffirmed or changed by the last codicil, and the "will" so changed or reaffirmed speaks from the date of its republication by the last codicil. *Pardee v. Kuster*, 89 Pac. 572, 573, 15 Wyo. 368.

#### **As color of title**

See Color of Title.

#### **As constituting attested order**

See Attested Order.

#### **As conveyance, contract, or gift**

See Conveyance.

See, also, Contract.

A "contract" is an agreement between the parties, while a "will" is no contract at all, but a unilateral disposition of property. *Isler v. Griffin*, 67 S. E. 854, 855, 134 Ga. 192.

#### **Deed distinguished**

In determining whether an instrument be a deed or a "will," the main question is:

Did the maker intend any estate or interest whatever to vest before his death and upon the execution of the paper? Or, on the other hand, did he intend that all the interest and estate should take effect only after his death? If the former, it is a deed; if the latter, a will. And it is immaterial whether he calls it a will or a deed. The instrument will have operation according to its legal effect. *McLain v. Garrison*, 89 S. W. 284, 39 Tex. Civ. App. 431 (citing *Gillham v. Mustin*, 42 Ala. 366; *Trawick v. Davis*, 5 South. 83, 85 Ala. 345).

"The general characteristics which distinguish deeds from wills have been repeatedly declared; yet no definite, uniform test has been stated by which to determine the character and operation of each particular instrument, and none can well be. The intention of the maker is the ultimate object of inquiry, whether it was intended to be ambulatory and revocable, or to create rights and interests at the time of execution which are irrevocable. If the instrument cannot be revoked, defeated, or impaired by the act of the grantor, it is a deed; but if the estate, title, or interest is dependent on the death of the testator—if in him resides the unqualified power of revocation—it is a 'will.' " An instrument on its face purporting to be a deed, though there was evidence that the grantor told the draftsman that he wished to make a will, in the absence of any other proof from which a contrary intention could be inferred, is a deed, provided there has been a valid delivery. *Griswold v. Griswold*, 42 South. 554, 555, 148 Ala. 239, 121 Am. St. Rep. 64 (citing *Crocker v. Smith*, 10 South. 258, 94 Ala. 295, 16 L. R. A. 576; *Jordan v. Jordan*, 65 Ala. 306).

To constitute a "will," the instrument must be one which is not by its terms sufficient to convey a present interest in the property, and the provision in a deed reserving to the grantors and the survivor of them the use and occupation of the premises, and providing that the full title and enjoyment thereof "shall only become operative on the death of the survivor of the grantors," does not change the nature of the instrument to that of a will, as a present interest passed by delivery of the deed. In *re McIntyre's Estate*, 120 N. W. 587, 588, 156 Mich. 240.

A will is "an instrument by which a person makes a disposition of his property to take effect after his decease, which is in its own nature ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristics of wills, for though a disposition by deed may postpone the possession or enjoyment or even the vesting, until the death of the disposing party, yet the postponement is in such case produced by the express terms, and does not result from the nature, of the instrument." Consequently an instrument whereby a husband conveys to his wife all his property, stipulating that the

same shall be void during the husband's life, and then to become effective on his death without court process of any kind, is a deed and not a "will". In *re Hall's Estate*, 84 Pac. 839, 840, 149 Cal. 143.

The rule is that if a paper passes no interest in the lifetime of the maker, whatever may be its form, if it is operative only upon his death, it is a "will," and to be effective must be probated. On the other hand, the object of all construction is to arrive at the intention of the parties, and their intention, where it is apparent on the face of the papers, will be carried into effect, if it can be fairly done under its terms. The law favors the vesting of estates, and it prefers a construction of an instrument that will give it some effect to one which will give it no effect. A deed to the grantor's wife and son recited that it was executed in order that the grantees might be provided for after the grantor's death; "that is, at the time of the death of the first party," the wife "is to have and to hold for life the property, and at her death the property is the property of" the son "to have and to hold to him and his heirs forever." Held, that there was a present grant with reservation of a life estate in the grantor, and not a testamentary disposition. *Ecklar's Adm'r v. Robinson* (Ky.) 96 S. W. 845, 846.

"A 'will' is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life. It is this ambulatory quality which forms the characteristics of wills, for though a disposition by deed may postpone the possession or enjoyment, or even the vesting, until the death of the disposing party, yet the postponement is, in such case, produced by the express terms, and does not result from the nature of the instrument. Thus, if a man, by deed, limit lands to the use of himself for life, with remainder to the use of A. in fee, the effect upon usufructuary enjoyment is precisely the same as if he should, by his will, make an immediate devise of such lands to A. in fee, and yet the case fully illustrates the distinction in question, for, in the former instance, A., immediately on the execution of the deed, becomes entitled to a remainder in fee, though it is not to take effect in possession until the decease of the settlor, while, in the latter, he would take no interest whatever until the decease of the testator should have called the instrument into operation." Nor does the fact that a deed of trust contains a full power of revocation render the instrument testamentary. *Robb v. Washington & Jefferson College*, 78 N. E. 359, 361, 185 N. Y. 485 (quoting and adopting definition in *Jarm. Wills*, p. 17).

The test whether a writing is a will or deed is the *animus testandi*, and, where the

maker of an instrument intends a disposition which is in legal effect testamentary, the writing made will be held a "will"; but if he merely intends to convey a present estate or interest the instrument is a "deed." Where a person on his deathbed sent for a justice of the peace to prepare an instrument disposing of all his property, an instrument prepared by such scrivener, which was in form and substance a will, stating that it is "my last will," etc., and mentioning no consideration, expresses an intention to devise rather than to convey, and must be held a will rather than a deed. That an instrument in the form of a will, and intended to be a will, was invalid as such for a failure to have it attested by two credible witnesses would not of itself transform it into a deed. *Belgarde v. Carter* (Tex.) 146 S. W. 964, 965, 967.

A paper in the form of a deed, attested as a deed, and delivered to a named grantee, conveying certain property, together with all the rights and privileges thereunto belonging, "at my death forever in fee simple," is not testamentary. *Kytle v. Kytle*, 57 S. E. 748, 749, 128 Ga. 387.

Where an instrument contained the usual words of conveyance, having premises, habendum, tenendum, reddendum, condition, warranty, and covenants, and was not authenticated as a will, but was acknowledged as a deed, it must be accepted as a deed, the grant being in the present tense, for a will is an instrument which vests no present interest, but only appoints what is to be done after the death of the maker. *Taylor v. Purdy*, 151 S. W. 45, 46, 151 Ky. 82.

A deed in which the grantor's wife joined, which stipulates that the "grantors \* \* \* reserve the use \* \* \* of said premises for \* \* \* their natural lives and the title of said grantees \* \* \* shall become absolute only on the death of" the grantor and wife, is a "deed," and not a "will"; the quoted clause only reserving a life estate in the grantor and wife. *White v. Willard*, 83 N. E. 954, 957, 232 Ill. 464.

An instrument conveying land "in consideration of the sum of \$1 and other valuable considerations that" the defendant "shall look after my welfare and business when so required to do," "to take effect and be of force after my death," is not a "will," but a deed of a remainder interest. *Rogers v. Rogers* (Miss.) 43 South. 434 (citing *Baum v. Lynn*, 18 South. 428, 72 Miss. 932, 30 L. R. A. 441).

Testator and wife executed warranty deeds conveying their real property to their sons and sons-in-law which were delivered to W. to be delivered to the grantees after the death of the wife. On the same day testator executed a will reciting that he and his wife had sold their real estate to their heirs and deeded the same to them, with instructions

that the wife should have one-half of the crop annually raised on certain of the property, etc. Held, that such deeds were not testamentary in character, but were operative of their own force independent of the will. *Schillinger v. Bawek*, 112 N. W. 210, 213, 135 Iowa, 131.

An instrument from a husband to his wife, containing apt words of conveyance, and directing her to hold the property on certain trusts for the grantor, the trustee, and the grantor's children, and reserving a right to direct conveyances by the trustee to others and a power to revoke the entire instrument was a "deed" and not a "testament." "To determine the character of an instrument as to its being a 'will' or a 'deed,' it is necessary to ascertain the intention of the maker from the whole instrument, read in the light of surrounding circumstances. If the intention, at the time of the execution of the instrument, was to convey a present estate, though the position be postponed until after his death, it is a 'deed'; but if the intention was that it should not convey any vested right or interest, but should be revocable during his life, it is a will." *Cribbs v. Walker*, 85 S. W. 244, 245, 74 Ark. 104 (quoting and adopting definition in *Bunch v. Nicks*, 7 S. W. 563, 50 Ark. 367).

Decedent executed an instrument in consideration of love and affection and \$10, granting certain described premises on the condition that: "If I, the said C. A., outlive the said A. J. [his wife], the land reverts back to me in fee. That if I should die first then the said A. J. shall have this land for her lifetime for her use and support, and at her death said land to go in fee to C. L., my son. In connection with this I give all my live stock to go to her at my death." The instrument was acknowledged and delivered as of date, but not recorded until after the death of the grantor. Held that, considering the fact that the grantor was an old man and died within six months after the execution of the instrument together with his intention as gathered from the instrument, the instrument would be construed as a testamentary disposition of land and not a deed, under Rev. St. 1899, § 4596, providing that "an estate of freehold or of inheritance may be made to commence in the future by deed in like manner as by will," so that the instrument not being executed as a will was void. *Aldridge v. Aldridge*, 101 S. W. 42, 43, 202 Mo. 565.

#### As instrument

See Instrument.

#### As matter of intention

A "will" is the legal declaration of a man's intent, which he wills to be performed after his death. In *re Stinson's Estate*, 77 Atl. 807, 808, 228 Pa. 475, 30 L. R. A. (N. S.) 1173, 139 Am. St. Rep. 1014.

"A 'will' is the legal declaration of a man's intentions, which he wills to be performed after his death." *Burnes v. Burnes*, 137 Fed. 781, 792, 70 C. C. A. 357 (citing 2 Black. Com. 499).

A "will" is the legal declaration of one's mind as to the manner in which he would have his property disposed of after his death. *Smith v. Smith*, 70 S. E. 491, 492, 112 Va. 205, 33 L. R. A. (N. S.) 1018.

"A 'will' is a legal declaration of intention as to the disposition of one's property after death. To this intention, made known through the written declaration, the law gives effect, and so executes the testator's will." *Jacobs v. Button*, 65 Atl. 150, 151, 79 Conn. 360.

A "will" is the legal declaration of a man's intention, which he wills to be performed after death, and an indorsement by the payee of a note, whereby he transferred it to a third person with the provisions that the third person should have no right to sell or collect it during the payee's life, who might, if he lived until maturity, collect it himself, but that, if not collected until after his death, the indorsee should have the same, having been witnessed by two persons, is a will; it being the obvious intention of the testator to reserve all property in the note to himself, unless he should die before its maturity. *Morrison v. Bartlett*, 147 S. W. 761, 762, 148 Ky. 833, 41 L. R. A. (N. S.) 39.

#### WILL, DEVISE, OR TRUST

Domestic Relations Law, § 60, providing that nothing in regard to an adopted child inheriting from the foster parent shall apply to any "will, devise, or trust," created before a specified date, or interfere with such "will, devise, or trust," and as to any such "will, devise, or trust," a child adopted before that date is not an heir, so as to alter estates, or trusts, or devises in wills so created, does not prevent a child adopted in 1883 by a beneficiary for life in a deed executed prior to the date specified in the statute conveying land in trust for the beneficiary for life, with remainder to heirs, from taking the remainder as an heir of the beneficiary, for the words "will, devise, or trust" in the statute are confined to a testamentary disposition, and even if the word "trust" be assumed to extend to a trust deed, the trust created by the deed was only for the benefit of the beneficiary for life, and terminated at her death. *Gilliam v. Guaranty Trust Co. of New York*, 78 N. E. 697, 699, 186 N. Y. 127, 116 Am. St. Rep. 536.

#### WILLFUL—WILLFULLY

"Willful" is sometimes properly defined as done with a specific intent or with some particular design. *Fidelity & Casualty Co. v. Bank of Timmons ville*, 139 Fed. 101, 103.

71 C. C. A. 299 (citing 8 Words and Phrases, p. 7468).

"A 'willful' act is an obstinate, stubborn, perverse, act; and an act done willfully is one done stubbornly, by design, with set purpose." *Claus v. Chicago Great Western Ry. Co.*, 111 N. W. 15, 17, 136 Iowa, 7 (quoting and adopting definition in *Stewart v. Burlington & M. R. Co.*, 32 Iowa, 561).

The word "willfully" has various meanings, and is used to denote the quality of an act, or the intent with which it is done. It is frequently used in the sense of intentionally, willingly, designedly, or with set purpose. When used in criminal statutes, it usually means with a malevolent purpose or motive, with a wicked or criminal intent, especially if the forbidden act is one that is wrong in itself or involves moral turpitude; but if the forbidden act is not wrong in itself, or does not involve moral turpitude, the word is then used in the sense of intentionally or purposely, so that when the act is so done it is done willfully. The word, however, should be given that meaning only which the context indicates was intended. *United States v. Sioux City Stock Yards Co.*, 162 Fed. 556, 562 (citing 8 Words and Phrases, p. 7468 et seq.).

"The word 'willfully' is variously construed. It is defined by Mr. Webster to mean in a willful manner; obstinately; by design; with set purpose. In many of the adjudicated cases it is said that it means, not merely voluntarily, but with bad purpose; that it includes the idea of an act intentionally done with a design to injure another." *Carpenter v. Trinity & B. V. Ry. Co.*, 119 S. W. 335, 336, 55 Tex. Civ. App. 627 (citing *Richardson v. State*, 5 Tex. App. 470-472; *Hewitt v. Newburger*, 36 N. E. 593, 141 N. Y. 538; *Parker v. Parker*, 71 N. W. 421, 102 Iowa, 500; *Birmingham Ry. & Elec. Co. v. Bowers*, 20 South. 345, 110 Ala. 328; *Huff v. Chicago, I. & L. Ry. Co.*, 56 N. E. 932, 24 Ind. App. 492, 79 Am. St. Rep. 274; *Miller v. Miller*, 47 N. E. 338, 17 Ind. App. 605; *Wales v. Miner*, 89 Ind. 118-127).

"Doing or omitting to do a thing knowingly and 'willfully,'" said the Supreme Court, in *Felton v. United States*, 96 U. S. 702, 24 L. Ed. 875, "implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. 'The word "willfully,"' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means, not merely voluntarily, but with a bad purpose.' *Commonwealth v. Kneeland*, 20 Pick. (Mass.) 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' 1 Crim. Law, § 428." See, also, *Potter v. United States*, 155 U. S. 446, 15 Sup. Ct. 144, 39 L. Ed. 214. Referring to the word "willful," as employed in a penal statute, Judge Pardee, speaking for the Circuit

Court of Appeals, in *Roberts v. United States*, 126 Fed. 904, 81 C. C. A. 427, quoted with approval the following language used by the Court of Appeals of Texas in *Thomas v. State*, 14 Tex. App. 204: "In a penal statute the word 'willful' means more than it does in common parlance. It means with evil intent, or legal malice, or without reasonable ground for believing the act to be lawful. *State v. Preston*, 34 Wis. 675; *State v. Clark*, 29 N. J. Law, 96; *Savage v. Tullar*, *Brayton (Vt.)* 223; *United States v. Three Railroad Cars*, 1 Abb. U. S. 196, 28 Fed. Cas. 144. In common parlance it is used in the sense of intentional, as distinguished from accidental or involuntary." "To the same purport," said Judge Pardee, "see *Sam Lane v. State*, 16 Tex. App. 172; *Wood v. State*, 16 Tex. App. 574; *Shubert v. State*, 16 Tex. App. 645. See, also, *Owens v. State*, 19 Tex. App. 249, where the court approved 'by willfully, as used in this charge, is meant that the act was done without reasonable ground to believe the act of taking was lawful.' It was said by Mr. Chief Justice Stayton, speaking for the Supreme Court of this state, in *State v. Alcorn*, 14 S. W. 664, 78 Tex. 393: "It is universally held that the word 'willful,' when used in a penal statute, means with evil intent or without reasonable ground to believe the act lawful." *United States v. Praeger*, 149 Fed. 474, 478.

The words "unlawfully," "willfully," "fraudulently," and "feloniously" in an indictment include the word "wrongfully." *State v. Pellerin*, 43 South. 159, 161, 162, 118 La. 547 (citing *State v. Brown*, 6 South. 541, 41 La. 345; *Marr's Cr. Juris. of La.*

An instruction that "willful" is what the word implies; it means an act proceeding from a will; done of a purpose; an intention to do it; and that "willfulness" is an act which proceeds from the will, so as to make the act a purpose act—was not error, where the court, in connection therewith, illustrated the difference between "negligence" and "willfulness." *Talbert v. Charleston & W. C. Ry.*, 55 S. E. 138, 139, 75 S. C. 136.

The act of doing a thing intentionally, recklessly, without regard to propriety or the rights of others by the act of the will (thus, the fact that plaintiff, a peddler, "willfully" and wantonly entered defendant's house, where he was attacked by a dog), did not constitute provocation to the dog, since the willfulness and wantonness of the act were not in the outward, visible aspect of the act, but in the mind of the actor. *Carroll v. Marcoux*, 56 Atl. 848, 850, 98 Me. 259.

The term "willful wrong" contemplates the doing of an act intended to injure the legal rights of another or the doing of an act so certain to cause injury that the doer must be deemed to have intended that particular injury. *Koerber v. Patek*, 102 N. W. 40, 45, 123 Wis. 453, 68 L. R. A. 956.

Ky. St. 1903, § 1149, defining "willful murder," does not create a new statutory crime, but only appends one of the elements of and fixes the punishment for the common-law offense, so that an indictment charging defendant with "murder," instead of "willful murder," sufficiently charged the offense defined by such section. *Metcalf v. Commonwealth* (Ky.) 86 S. W. 534, 535.

The word "willful," as used in the miners' act, is not alone used in the sense that it implies a wrongful intent, but it is employed, likewise, as including a conscious failure to perform or meet a duty imposed by statute. *Springfield Coal Min. Co. v. Gedutis*, 127 Ill. App. 327, 329.

To be guilty of "willful" or wanton conduct causing injury, the person charged therewith must be conscious of his conduct, and conscious from his knowledge of existing conditions, that injury would likely or probably result therefrom, and that, with reckless indifference to consequences, he consciously and intentionally does some wrongful act, or omits some known duty which produces injury. *Montgomery St. Ry. v. Rice*, 38 South. 857, 142 Ala. 674.

An intentional and unreasonable refusal by a telegraph company to receive and transmit a proper message, for whose transmission payment has been tendered, is a "willful" refusal, within Rev. Laws, c. 122, § 10, imposing a penalty on a company willfully refusing to receive and transmit messages. *Vermilye v. Postal Tel. Cable Co. of Massachusetts*, 91 N. E. 904, 905, 205 Mass. 598, 30 L. R. A. (N. S.) 472.

Under Revisal 1905, § 3294, making it a misdemeanor to willfully violate any regulation of the board of agriculture for the quarantine of animals, etc., in a prosecution for "allowing" a cow to run at large, by reason of which she strayed from quarantined territory into territory free from infection, the mere fact that the defendant allowed the cow to run at large and that she crossed the line was sufficient to establish that he "willfully" allowed her to move across the line. *State v. Garner*, 74 S. E. 458, 158 N. C. 630.

A "willful injury" involves a deliberate purpose not to discharge some duty necessary to safety, which duty the person owing it has assumed by contract, or which is imposed on him by law. It is differentiated from negligence by the fact that the latter arises from inattention or thoughtlessness. The word "willful" or "willfully" as used in this connection means the quality of being willful, obstinate, stubborn, perverse, voluntary. As so used, it implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It implies nothing more than that he knows what he is doing, and intends to

do what he is doing, and is a free agent. *Southern Ry. Co. v. McNeeley*, 88 N. E. 710, 711, 44 Ind. App. 126.

A statute providing that, when a dog shall do any damage, the owner shall be liable therefor does not render the owner liable for all damages done by it, but when one's conduct toward a dog is "willful," in the sense of intentional, purposely, and knowingly, and such as is calculated to provoke it to the actual damage, the consequences in law are referable to him. *Kelley v. Killourey*, 70 Atl. 1031, 1032, 81 Conn. 320, 129 Am. St. Rep. 220, 15 Ann. Cas. 163.

It is not every intentional act that is a willful or wanton act. When used in a penal statute, the word "willful" means more than it does in common parlance. It means with evil intent, or legal malice, or without reasonable ground for believing the act to be lawful. In common parlance it is used in the sense of intention, as distinguished from accidental or involuntary. To make the killing of the sheep, therefore, a willful act, it must have been committed with an evil intent, with legal malice, and without legal justification. In a trial for malicious mischief in shooting a dog, evidence that the presence of dogs among defendant's sheep at the time of the killing would have frightened the sheep, and caused the ewes, which were heavy with lambs, to lose them, was admissible to rebut the charge of malice and wantonness in shooting the dog. *Caldwell v. State*, 115 S. W. 597, 55 Tex. Cr. R. 164, 131 Am. St. Rep. 809 (quoting and adopting *Thomas v. State*, 14 Tex. App. 200).

To constitute a "willful injury," there must be a design, purpose, intent to do wrong and inflict injury. Then there is that reckless indifference or disregard of the natural or probable consequences of doing an act, or omission of an act, designated, whether accurately or not, in our decisions, as "wanton negligence," to which is imputed the same degree of culpability, and held to be equivalent to willful injury. A purpose or intent to injure is not an ingredient of wanton negligence. Where either of those exist, if damage ensues, the injury is willful. In wanton negligence, the party doing the act or failing to act is conscious of his conduct, and, without having the intent to injure, is conscious, from his knowledge of existing circumstances and conditions, that his conduct will likely or probably result in injury, and that wanton negligence, which is the equivalent of willful injury, drawn and applied in our decisions. *Lacey v. Louisville & N. R. Co.*, 152 Fed. 134, 136, 81 C. C. A. 352 (quoting and adopting *McGhee v. Campbell*, 101 Fed. 936, 42 C. C. A. 94; *Birmingham Railway & Electric Co. v. Bowers*, 20 South. 345, 110 Ala. 328, 331; citing and adopting *Alabama G. S. R. Co. v. Hill*, 8 South. 90, 90 Ala. 71, 9 L. R. A. 442, 24 Am. St. Rep. 764; *Louis-*

ville & N. R. Co. v. Markee, 15 South. 511, 103 Ala. 160, 49 Am. St. Rep. 21; Louisville & N. R. Co. v. Orr, 26 South. 35, 121 Ala. 489).

Literally construed, the word "willfully," as used in Wis. St. 1898, § 4466a, which imposes imprisonment or fine on persons who combine to willfully or maliciously injure another in his reputation, trade, business, or profession, by any means whatever, etc., would embrace all injuries intended to follow from the parties' acts, though they were intended only as the necessary means to ulterior gain for the parties themselves. Taken in that way, the word would hit, making a new partnership if it was intended thereby to hurt some one's else business by competition. Aikens v. Wisconsin, 25 Sup. Ct. 3, 4, 195 U. S. 194, 49 L. Ed. 154.

Rev. Laws 1902, c. 111, § 124, requires railroad tracks to be laid across public ways so as not to obstruct them, and chapter 111, § 196, prohibits the willful or negligent obstruction of a crossing by a railroad company for more than five minutes at one time. Held, that the words "willfully" or "negligently" did not limit the absolute prohibition of the obstruction of a street crossing for more than five minutes, and it was no defense that the valves on the air brakes had been maliciously opened by strangers without defendant's knowledge, and that the train could not be operated within the period, owing to the delay required to find and close the valves. Commonwealth v. New York Cent. & H. R. R. Co., 88 N. E. 764, 765, 202 Mass. 394, 23 L. R. A. (N. S.) 350, 132 Am. St. Rep. 507, 16 Ann. Cas. 587.

Pen. Code, § 397, subd. 1, declares a person who willfully violates any lawful order or regulation of a local board of health or local health officer guilty of a misdemeanor. Yonkers City Charter, tit. 6, § 10, declares any person willfully violating any lawful ordinance guilty of a misdemeanor. An information charged an unlawful violation of Yonkers Sanitary Code, art. 15, § 144, by using a building as a boarding and lodging house for over 200 men; the building not being constructed as required by Yonkers Sanitary Code, and especially of article 15 thereof. Held, that as the information did not charge, in terms or in substance, that the violation was "willful," it charged no crime; the term "willful" in the statutes having a substantial meaning. People v. Potter, 112 N. Y. Supp. 298, 300.

The enforcement of the law in cities of the metropolitan class is placed by the Legislature directly under the control of the board of fire and police commissioners, of which the mayor is principal officer. The chief of police is appointed by the board and removable at its pleasure. It is the duty of the mayor to "order, direct and enforce" the law. Comp. St. 1911, c. 12a, § 65. If

the board directs in what manner and to what extent the law for the suppression of prostitution and the sale of intoxicating liquors shall be enforced, and the chief of police in good faith believes it is his duty to be governed by the established policy of the board and the directions of the mayor, and faithfully enforces the law accordingly, it cannot be found that he did "willfully fail, neglect, or refuse to enforce any law which it is made his duty to enforce." Comp. St. 1911, c. 71, § 1a. State ex rel. Thompson v. Donahue, 135 N. W. 1030, 1034, 91 Neb. 311, Ann. Cas. 1913D, 18.

Acts 30th Leg. 1907, p. 31, c. 19, declares that in all prosecutions for felonies defendant must be personally present when verdict is heard, unless he escaped after commencement of trial, provided that in all cases the verdict may be received in his absence when such absence is "willful or voluntary." Held, that "voluntary" as so used means proceeding from the will; produced in or by an act of choice; done by design or intention; unconstrained by external interference, force, or influence; not prompted or suggested by another; so that where accused was on bail during his trial, and during the jury's consideration of the case, while court was not in session, was at his boarding house within two blocks, and on the jury returning a verdict the judge was informed defendant had been notified by telephone and was on his way to the courthouse, which he reached just after verdict was received and the jury discharged, and dispersed, his absence was neither voluntary nor willful, and reception of the verdict of guilty in his absence was reversible error. Derden v. State, 120 S. W. 485, 488, 56 Tex. Cr. R. 396.

The application for a life insurance policy, which was expressly made a part of the policy, contained a stipulation limiting the time within which any action should be brought. A complaint, in an action on the policy, alleged that insurer "purposely and willfully concealed" from plaintiff the contents of the application to induce her to delay the bringing of the suit until after the expiration of the time limited, and purposely, willfully, and with intent to defraud induced her to delay the bringing of the action until the time limited had elapsed, and that she was never able to obtain an inspection of the application, and that the copy attached to the complaint was a copy of the application as furnished by insurer after repeated demands therefor, and that the application was not furnished until after the expiration of the time limited. Held, that the complaint was insufficient for failing to aver facts on which to predicate relief from the consequences of the delay; the words "purposely" and "willfully" adding nothing to the charge that the insurer concealed the contents of the application, for "to conceal" means purposely to keep from discovery.

Gill v. Manhattan Life Ins. Co., 95 Pac. 89, 90, 11 Ariz. 232.

#### Accidental distinguished

"Willful" and "willfully" mean intentional or intentionally and not accidental or accidentally. Hill v. Commonwealth (Ky.) 91 S. W. 1123, 1124; State v. Brown, 79 S. W. 1111, 1112, 181 Mo. 192; Same v. Todd, 92 S. W. 674, 676, 194 Mo. 377; Same v. McCarver, 92 S. W. 684, 686, 194 Mo. 717; Same v. Vaughan, 98 S. W. 2, 5, 200 Mo. 1; Same v. Atchley, 84 S. W. 984, 988, 186 Mo. 174.

The word "willfully" implies a purpose or willingness to commit the act referred to, and excludes the inference that it might have resulted from accident or mistake. State v. Edmunds, 104 N. W. 1115, 1117, 20 S. D. 135.

"Willfully," as used in criminal law, means intentionally and not accidentally. State v. Kinder, 83 S. W. 964, 969, 184 Mo. 276.

"Willful," as used in defining murder, means intentional, not accidental. State v. Hottman, 94 S. W. 237, 239, 196 Mo. 110.

"Willfully," as used with reference to the commission of assault with intent to kill, means intentional, not accidental. State v. Temple, 92 S. W. 494, 496, 194 Mo. 228.

In a prosecution for conspiracy to murder, an instruction that the words "willful" and "willfully" mean intentional, not accidental or voluntary, is correct. Gambrell v. Commonwealth, 113 S. W. 476, 480, 130 Ky. 513.

The word "willful" in an instruction declaring that, where the act of killing another is done willfully, feloniously, and with malice aforethought, accused is guilty of murder, means intentional, not accidental. Combs v. Commonwealth (Ky.) 112 S. W. 658, 660.

The word "willful," as used in an indictment charging "willful" murder and in the instructions defining "willful murder" and "voluntary manslaughter," means intentionally, not accidental or involuntary. Ball v. Commonwealth, 101 S. W. 956, 960, 125 Ky. 601.

The word "willfully," as used in Rev. St. U. S. § 5341, defining manslaughter, is synonymous with "intentionally" or "designedly," without lawful excuse, not accidental. O'Barr v. United States, 105 Pac. 988, 989, 3 Okl. Cr. 319, 139 Am. St. Rep. 959.

An indictment against a railroad company for "willfully" obstructing a street crossing for an unreasonable length of time, by the use of the word "willfully," meant that the crossing was intentionally obstructed, and not accidentally. Louisville & N. R. Co. v. Commonwealth (Ky.) 112 S. W. 573.

"Willfully" is a word generally construed to mean intentionally instead of accidentally, but occasionally in cases dealing with certain offenses, among which is willfully maiming stock, etc., it carries the idea of evil intent. State v. Prater, 109 S. W. 1047, 1049, 130 Mo. App. 348.

An instruction defining "murder in the second degree" as the killing of a human being "willfully, premeditatedly and with malice aforethought," and then defining "willfully" to mean intentionally, not by accident, "premeditatedly" to mean thought of beforehand for any length of time, however short, and stating that "malice" did not mean mere hatred or dislike, but that condition of mind which prompted a person to intentionally take the life of another, and that "malice aforethought" meant malice with premeditation, properly defined "murder in the second degree." State v. Myers, 121 S. W. 131, 136, 221 Mo. 598.

Where a petition in an action for damages for wrongful diversion and discharge of rainwater by defendant against the owner of adjoining lands alleges that such act was done willfully and maliciously, the word "willfully" means on purpose, and not accidentally; not necessarily on purpose to produce the injury, but done of purpose, and not the consequence of a mere accidental act, so that proof that it was done "willfully" and maliciously in that sense was not necessary. Thoele v. Marvin Planing Mill Co., 148 S. W. 413, 417, 165 Mo. App. 707.

The word "willfully," as used in U. S. Comp. St. 1901, § 5341, making one who unlawfully and "willfully," but without malice, injures another, from which injury the other dies, guilty of manslaughter, means not merely voluntarily, but with a bad purpose. It is a synonymous term with "intentionally," "designedly," "without lawful excuse"; that is, not accidental. It is frequently understood as signifying an evil intent without justifiable excuse. Miller v. State, 107 Pac. 948, 3 Okl. Cr. 575 (citing Thomp. Tr. 2209).

#### Bad purpose

"Willful" indicates a bad purpose with evil intent. State v. Fairbanks, 39 South. 443, 444, 115 La. 457 (citing [Am. & Eng.] Cyc. vol. 12, p. 151).

In a penal statute, the word "willful" generally means with a bad or evil purpose, without ground for believing the act to be lawful. Roby v. Newton, 49 S. E. 694, 696, 121 Ga. 679, 68 L. R. A. 601 (citing Hateley v. State, 44 S. E. 852, 118 Ga. 81).

The word "willful" in a criminal statute means not only designedly, but with a bad purpose. State v. Clifton, 67 S. E. 751, 752, 152 N. C. 800, 28 L. R. A. (N. S.) 673 (quoting 8 Words and Phrases, p. 7469).



The word "willfully," within U. S. Comp. St. 1901, § 5341, making one who unlawfully and willfully, but without malice, injures another, of which injury the other dies, guilty of manslaughter, means not merely voluntarily, but with a bad purpose, being synonymous with "intentionally," "designedly," "without lawful excuse." *Miller v. State*, 107 Pac. 948, 3 Okl. Cr. 575.

#### Deliberation and premeditation

The word "willful," when used in a statute creating an offense, implies the doing of the act purposely and deliberately in violation of law. *State v. Banks*, 57 S. E. 174, 176, 143 N. C. 652.

The term "willful," used in P. L. 1898, p. 824, providing that any willful, deliberate, and premeditated killing should be murder in the first degree, implies a state of mind which is the consequence of premeditation and deliberation. *State v. Mangano*, 72 Atl. 366, 367, 77 N. J. Law, 544.

Pub. Acts 1901, c. 154, provides that every person who shall willfully sell or offer to sell the flesh of any calf less than four weeks old when killed shall be punished by a fine, etc. Held, that guilty knowledge was an essential element of the crime defined by such act, and it was therefore error for the court to charge that by "willfully selling" was meant deliberately selling, without regard to defendant's motive. *State v. Nusenholtz*, 55 Atl. 589, 591, 76 Conn. 92.

A "willful injury" involves a deliberate purpose not to discharge some duty necessary to safety, which duty the person owing it has assumed by contract, or which is imposed on him by law. It is differentiated from negligence by the fact that the latter arises from inattention or thoughtlessness. The word "willful" or "willfully" as used in this connection means the quality of being willful, obstinate, stubborn, perverse, voluntary. As so used, it implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It implies nothing more than that he knows what he is doing, and intends to do what he is doing, and is a free agent. *Southern Ry. Co. v. McNeeley*, 88 N. E. 710, 711, 44 Ind. App. 126.

Kirby's Dig. § 2228, provides that an indictment is sufficient if it can be understood therefrom, among other things, that the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case. By section 2242 the words used in an indictment must be construed according to their usual acceptation in common language. Section 2243 requires it to contain a statement of the acts constituting the offense in ordinary and concise language, so as to enable a person of common understanding to know what is

intended. Held, that an indictment using the words "unlawful, feloniously, of his malice aforethought, with deliberation and premeditation," to characterize the act charged clearly and certainly that it was "willful," and fully met the requirements of these statutes. *Harding v. State*, 126 S. W. 90, 91, 94 Ark. 65.

#### Design

The word "willfully," as used in Rev. St. U. S. § 5341, defining manslaughter, is synonymous with "designedly," without lawful excuse, not accidental. *O'Barr v. United States*, 105 Pac. 988, 989, 3 Okl. Cr. 319, 139 Am. St. Rep. 959.

A willful act is one done subject to the volition and will of the doer and intentionally, and a willful or malicious injury is one caused by design. Willfulness and malice alike import intent, and the characteristic element of "willful" or "malicious injury" is the design to injure, either actually entertained or to be implied from the conduct and circumstances. *Sharkey v. Skilton*, 77 Atl. 950, 951, 83 Conn. 503.

There is a "willful killing," within the statute defining murder, wherever there is simply a specific intent, a design or purpose formed, to take life. *Smith v. State*, 55 S. E. 475, 126 Ga. 544 (citing *People v. Poole*, 27 Cal. 572, 585).

The word "willfully," within U. S. Comp. St. 1901, § 5341, making one who unlawfully and willfully, but without malice, injures another, of which injury the other dies, guilty of manslaughter, means not merely voluntarily, but with a bad purpose, being synonymous with "intentionally," "designedly," "without lawful excuse." *Miller v. State*, 107 Pac. 948, 3 Okl. Cr. 575.

Under Civ. Code Cal. § 2629, providing that "an insurer is not liable for a loss caused by the willful act of the insured, but he is not exonerated by the negligence of the insured, or of his agents or others," expressly made a part of a marine policy on a cargo, there can be no recovery for loss or damage resulting directly from the act of the master in designedly undertaking to force the vessel through floating ice on a voyage to Alaska, with knowledge of the dangers to be encountered, and with ample time to have avoided them, in order to arrive more quickly at his destination and secure a better market for his cargo. Such conduct is not mere negligence but is a willful omission to perform his legal duty and an intentional commission of a wrongful act. The court quoted from the opinion of Chief Justice Shaw in *Chandler v. Worcester Mut. Fire Ins. Co.*, 3 Cush. (Mass.) 328, which was an action on a fire policy: "By an intent to burn the building we understand a purpose manifested and followed by some act done, tending to carry that purpose into effect, but not including a mere nonfeasance. Suppose the assured, in

his own house, sees the burning coals in the fireplace roll down onto the wooden floor, and does not brush them up. This would be mere nonfeasance. It would not prove an intent to burn the building; but it would show a culpable recklessness and indifference to the rights of others. \* \* \* To what extent such negligence must go, in order to amount to gross misconduct it is difficult, by any definitive or abstract rule of law, independently of circumstances, to designate. The doctrine of the civil law, that 'crassa negligentia' was of itself proof of fraud, or equivalent to fraudulent purpose or design, was no doubt founded in the consideration that although such negligence consists in doing nothing, and is therefore a nonfeasance, yet the doing of nothing, when the slightest care or attention would prevent a great injury, manifests a willingness, differing little in character from a fraudulent and criminal purpose, to commit such injury." *Standard Marine Ins. Co., Limited, or Liverpool, Eng., v. Nome Beach Litharge & Transp. Co.*, 133 Fed. 636, 648, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095.

#### Evil intent, etc.

In the criminal law "willful" involves evil intent or legal malice. *State v. McAloon*, 124 N. W. 1067, 142 Wis. 72.

In a penal statute the word "willful" generally means with a bad or evil purpose, without ground for believing the act to be lawful. *Roby v. Newton*, 49 S. E. 691, 696, 121 Ga. 679, 68 L. R. A. 601 (citing *Hateley v. State*, 118 Ga. 81, 44 S. E. 852).

The term "willful" signifies with evil intent or legal malice, or without legal ground to believe the act to be lawful; and the court should, as an essential part of the law of the case, instruct the jury as to the legal meaning of the term. *Windom v. State*, 119 S. W. 309, 56 Tex. Cr. R. 198.

To willfully fail, neglect, or refuse to enforce a law involves more than oversight or carelessness or voluntary neglect. It must be prompted by some evil intent, or legal malice, or, at least, be without sufficient grounds to believe that he is performing his duty. *State ex rel. Thompson v. Donahue*, 135 N. W. 1030, 1034, 91 Neb. 311, Ann. Cas. 1913D, 18.

The word "willfully," when used in statutes to describe acts punishable criminally, includes, in addition to mere purpose to do the act, a purpose to do wrong. It involves evil intent or legal malice, and is used to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty. *Brown v. State*, 119 N. W. 338, 340, 137 Wis. 543.

The word "willfully," as used in U. S. Comp. St. 1901, § 5341, making one who unlawfully and "willfully," but without malice,

injures another, from which injury the other dies, guilty of manslaughter, means not merely voluntarily, but with a bad purpose. It is a synonymous term with "intentionally," "designedly" "without lawful excuse"; that is not accidental. It is frequently understood as signifying an evil intent without justifiable excuse. *Miller v. State*, 107 Pac. 948, 3 Okl. Cr. 575 (citing *Thomp.*, Tr. 2209).

While the word "willful" is sometimes synonymous with "voluntary" or "intentional," yet, when used in penal or quasi penal statutes, it usually implies an evil intent, and it is so used in Code, § 1251, providing that any county officer may be removed for willful misconduct or maladministration in office, so that, in a proceeding thereunder to remove a county treasurer, evidence of his good faith and innocence of intentional wrong was admissible, so as to take the question of the willfulness of his wrongful act to the jury. *State v. Meek*, 127 N. W. 1023, 1024, 148 Iowa, 671, 31 L. R. A. (N. S.) 566, Ann. Cas. 1912C, 1075.

On a prosecution for perjury, a definition of "willfully" as meaning that the act of the defendant was done with an evil intent or without reasonable grounds to believe the act to be lawful was correct. *Clay v. State*, 107 S. W. 1129, 1130, 52 Tex. Cr. R. 555.

"Willfully" is a word generally construed to mean intentionally instead of accidentally, but occasionally in cases dealing with certain offenses, among which is willfully maiming stock, etc., it carries the idea of evil intent. *State v. Prater*, 109 S. W. 1047, 1049, 130 Mo. App. 348.

"Willful," as used to characterize the act of shooting at a dog, so as to render the person shooting guilty of malicious mischief, means that the act must have been done with an evil intent, with legal malice, without reasonable ground for believing the act to be lawful, and without grounds justifying the act. *Ross v. State* (Tex.) 108 S. W. 697.

The word "willful," in an information for the "unlawful," "willful," and "wanton" killing of a dog, meant that the act must be done with evil intent, with legal malice, without reasonable ground for believing it to be lawful, and without grounds justifying the act. *Henderson v. State*, 111 S. W. 736, 53 Tex. Cr. R. 533.

The term "willful" implies an evil intent without justifiable excuse. Under Comp. Laws, § 11361, making the willful abstraction of papers and records belonging or appertaining to the office of a township a misdemeanor, it is necessary, to constitute the offense, that the abstraction be done with a criminal intent. *People v. Jewell*, 101 N. W. 835, 836, 138 Mich. 620.

The use of the word "willful" in *Elkins Act* Feb. 19, 1903, c. 708, § 1, to characterize

offenses thereunder, conceding it to apply to the granting of rebates from the published schedule rates, does not require that there should have been an evil intent to constitute the offense, but it is sufficient if the act was done knowingly and purposely. *Chicago, St. P., M. & O. Ry. Co. v. United States*, 162 Fed. 835, 841, 90 C. C. A. 211.

The word "willful," as used in Rev. St. U. S. § 5341, defining "manslaughter" as the unlawful and willful killing of another without malice, means done wrongfully, with evil intent. It means any act which a person of reasonable knowledge and ability must know to be contrary to duty; and, while the act must be done with evil design and knowingly, still a killing which takes place under circumstances showing a reckless disregard for the life of another, and the reckless and negligent use of means reasonably calculated to take the life of another, would be a killing done willfully. *Roberts v. United States*, 126 Fed. 897, 902, 61 C. C. A. 427.

It is not necessary that a mine examiner should have had an evil intent in order to make his failure to mark a dangerous place in a mine and report the same to the manager, as required by the mines and mining act (Hurd's Rev. St. 1905, p. 1388, c. 93, § 18), a willful violation of such act, but the words "willful violation" mean only a conscious violation. *Mertens v. Southern Coal & Mining Co.*, 85 N. E. 743, 745, 235 Ill. 540.

Under section 33 of the mining act of 1899, giving a right of action for injuries caused by any willful violation of the provisions of the act, any conscious violation of the statute is a "willful" violation, although not accompanied by an evil intent. *Kellyville Coal Co. v. Strine*, 75 N. E. 375, 380, 217 Ill. 516.

Under Mines and Miners Act, § 33, making a mining operator liable for injuries caused by "willful" violation of section 98, requiring lights to be maintained at the bottom of shafts, etc., a conscious violation of the statutes is a "willful" violation; an evil intent being non-essential to the operator's liability. The word as used in the statutes implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It means that the person acting knows what he is doing and intends to do what he is doing, and is a free agent, and an owner, operator, or manager, who knowingly operates his mine without conforming to the provisions of the statute, willfully disregards its provisions, and willfully disregards the safety of miners employed therein. *Eldorado Coal & Coke Co. v. Swan*, 81 N. E. 691, 692, 227 Ill. 586 (citing *Odin Coal Co. v. Denman*, 57 N. E. 192, 194, 185 Ill. 413, 418, 76 Am. St. Rep. 45; *Carterville Coal Co. v. Abbott*, 55 N. E. 131, 134, 181

Ill. 495, 502; *Marquette Third Vein Coal Co. v. Dielle*, 70 N. E. 17, 208 Ill. 116; *Kellyville Coal Co. v. Strine*, 75 N. E. 375, 217 Ill. 516).

The term "willful failure," as used in Acts 1905, giving a right of action for injuries occasioned by any violation or willful failure to comply with the provisions of the act, implies more than mere nonconformity, inattention, thoughtlessness, or heedlessness, and goes to the intent implied in failing to do the thing after attention is called to it or notice given under the statute by the mine inspector, and implies the intentional and conscious violation and persistent refusal or neglect not necessarily with evil or malicious intent; it amounts to more than mere passive negligence; it is active refusal. *Princeton Coal Min. Co. v. Lawrence*, 95 N. E. 423, 427, 176 Ind. 469.

In Act June 29, 1906, c. 3594, § 3, known as the "28-hour law," which prohibits carriers of live stock from keeping the same confined for more than 28 consecutive hours without unloading "unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight," and imposes a penalty on any carrier which "knowingly and willfully" fails to comply with its provisions, the word "willfully" is not used as implying a vicious or evil intent, but as meaning intentionally or voluntarily. *United States v. Atchison, T. & S. F. Ry. Co.*, 166 Fed. 160, 163; *Same v. Union Pac. R. Co.*, 169 Fed. 65, 67, 68, 94 C. C. A. 433.

Where, on a trial of the presiding judge of an election on a criminal charge of false imprisonment, based on his ordering the arrest and detention of a voter having in his possession while preparing his ballot the names of the persons he proposed to vote for, the defense was that the judge was ignorant of the law and exceeded his authority, an instruction that the word "willful" means with evil intent or legal malice, and that if accused, without lawful authority, imprisoned the voter, but a reasonable doubt existed whether the imprisonment was willfully done, accused should be acquitted, properly gave accused the benefit of the jury's belief as to whether his act was done willfully or not. *Smyth v. State*, 103 S. W. 899, 903, 51 Tex. Cr. R. 408.

Kirby's Dig. § 1899, makes it a misdemeanor to willfully and intentionally destroy, injure, or obstruct any telegraph or telephone line and imposes a penalty of double damages. Held, that the words, "willfully" and "intentionally," implied an evil intent without justifiable excuse so that the destruction of a portion of a telephone line by a railway company which is mistakenly believed was an unlawful obstruction of its right of way, and was also a hindrance and a menace to the safe operation of the railway, was not an act for which the owners of the

telephone line were entitled to recover double damages under such section. *St. Louis, I. M. & S. Ry. Co. v. Batesville & Winerva Telephone Co.*, 97 S. W. 660, 662, 80 Ark. 499.

Under Rev. St. 1899, providing that it shall not be necessary to show, in the trial of an offense for malicious injury to property specified in that article, that the offense was committed from malice conceived against the owner of the property or against the animal or property itself, but, if the act was wrongfully, intentionally, and willfully done, it may be inferred it was done maliciously, the state is relieved from proving that malice was held toward either the owner or the property, but in both sections 1988 and 1989 (Ann. St. 1906, pp. 1332, 1333) general malice is retained as an element, and, though it may be inferred from certain facts, it is not necessarily to be so inferred, and the prohibited offense is not "willfully and maliciously" committed unless the animal is maimed, beaten, or tortured from an evil impulse springing from a state of mind rendering the perpetrator indifferent to the sufferings of the animal and the wrongful quality of the act. *State v. Prater*, 109 S. W. 1047, 1049, 130 Mo. App. 348.

#### Intentional

"A 'willful act' is one that is intentional." *Brown v. Boston & M. R. R.*, 64 Atl. 194, 201, 73 N. H. 568.

The word "willful," although broader in its signification than "intentional," embraces the latter in its meaning. *State v. Deliso*, 69 Atl. 218, 222, 75 N. J. Law, 808.

The word "willfully" has been construed to mean intentionally and to be synonymous therewith. *Roberts v. United States*, 126 Fed. 897, 903, 61 C. C. A. 427 (citing *Harrison v. State*, 37 Ala. 156; *State v. Preston*, 34 Wis. 675).

"Willfully" means intentionally; that is, that the person doing the act intended at the time to perform the particular act. *State v. Smith*, 105 S. W. 68, 70, 119 Tenn. 521.

The word "willful," as used with relation to penal offenses, means more than "intentional." It means an intentional act done purposely to violate the law. *Kendall v. State*, 72 S. E. 164, 165, 9 Ga. App. 794.

A "willful killing" is an intended killing. *Blevins v. State*, 107 S. W. 393, 394, 85 Ark. 195 (citing *Aubrey v. State*, 35 S. W. 792, 62 Ark. 368).

There is a "willful killing," within the statute defining murder, wherever there is simply a specific intent, a design or purpose formed, to take life. *Smith v. State*, 55 S. E. 475, 126 Ga. 544 (citing *People v. Poole*, 27 Cal. 572, 585).

"Willfully" is a word generally construed to mean intentionally instead of accidentally, but occasionally in cases dealing

with certain offenses, among which is willfully maiming stock, etc., it carries the idea of evil intent. *State v. Prater*, 109 S. W. 1047, 1049, 130 Mo. App. 348.

The intentional doing of a wrongful act is sufficient to constitute "willfulness." Such rule, however, does not dispense with proof of willfulness as an element of a crime, when it is included in a statutory definition thereof. *Des Moines v. Outler*, 123 N. W. 218, 220, 144 Iowa, 535.

In Gen. St. 1906, § 3357, providing for prosecution against one who willfully obstructs or hinders the lienholder in prosecuting his rights against the property, subject to the lien; the word "willfully" means "intentionally." *Shuman v. State*, 56 South. 694, 696, 62 Fla. 84.

A charge on the corroboration of witnesses that if any witness has "willfully testified falsely" is sufficient, without stating that such testimony must be "willfully and intentionally false;" the words "willfully" and "intentionally" being synonyms in such case. *State v. Winney*, 128 N. W. 680, 681, 21 N. D. 72.

"Willful" means on purpose, intentional, and where a defendant by her conduct drove her husband from his home the desertion was "willful." *Hudson v. Hudson*, 51 South. 857, 858, 59 Fla. 529, 29 L. R. A. (N. S.) 614, 138 Am. St. Rep. 141, 21 Ann. Cas. 278.

The word "willfully" in Act April 24, 1903, relating to the killing of domestic animals, is synonymous with the word "intentionally." *Commonwealth v. Frederick*, 27 Pa. Super. Ct. 228, 230.

The word "willfully," as used in United States statutes, defining manslaughter, is synonymous with "intentionally" or "designedly." *O'Barr v. United States*, 105 Pac. 988, 989, 3 Okl. Cr. 319, 139 Am. St. Rep. 959.

An instruction in conversion, authorizing exemplary damages if defendant seized the property "willfully or maliciously and with intent to vex" plaintiff, was erroneous because of the use of the word "or" instead of the word "and," for every act intentionally done is done willfully. *Baldwin v. G. M. Davidson & Co. (Tex.)* 127 S. W. 562, 564.

The word "willfully," within U. S. Comp. St. 1901, § 5341, making one who unlawfully and willfully, but without malice, injures another, of which injury the other dies, guilty of manslaughter means not merely voluntarily, but with a bad purpose, being synonymous with "intentionally," "designedly," "without lawful excuse." *Miller v. State*, 107 Pac. 948, 3 Okl. Cr. 575.

The word "willful," as used in the provision of the bankrupt law excepting from the operation of a discharge judgments for "willful" injuries, etc., means "intentional." *Flanders v. Mullin*, 66 Atl. 789, 790, 80 Vt. 124, 12 Ann. Cas. 1010.

The term "willful" as used in Bankr. Act July 1, 1898, c. 541, § 17, providing that a discharge in bankruptcy shall relieve the bankrupt from all his provable debts except judgments in actions for willful and malicious injuries to the person or property of another, means nothing more than intentional. *McChristal v. Clisbee*, 76 N. E. 511, 190 Mass. 120, 3 L. R. A. (N. S.) 702, 5 Ann. Cas. 769.

The word "willful," as used in Bankr. Act July 1, 1898, c. 541, § 17, as amended by Act Feb. 5, 1903, c. 487, § 5, providing that a discharge in bankruptcy shall relieve the bankrupt from all provable debts except liabilities for obtaining property by false pretenses or false representations, or for "willful and malicious" injuries to the person or property of another, means nothing more than intentional; while the word "malice," as there used, is intended to imply nothing more than a disregard of duty which is involved in the intentional doing of a willful act to the injury of another. *Kavanaugh v. McIntyre*, 112 N. Y. Supp. 987, 990, 128 App. Div. 722.

The word "willful," as used in Pen. Code 1895, § 219, making the willful cutting or felling of timber upon the land of another without his consent an indictable offense, means intentional, with a bad purpose, an evil purpose, without grounds for believing the act to be lawful. *Black v. State*, 59 S. E. 823, 3 Ga. App. 297.

A "willful" refusal or neglect of a servant to obey the lawful and reasonable orders of his master or those representing him justifies his discharge, but a willful disobedience is an intentional disobedience, and is something more than a conscious failure to obey, and involves a wrongful and perverse disposition, such as to render his conduct unreasonable and inconsistent with proper subordination. *Ernst v. Grand Rapids Engraving Co.*, 138 N. W. 1050, 1051, 173 Mich. 254.

An intentional and unreasonable refusal by a telegraph company to receive and transmit a proper message, for whose transmission payment has been tendered, is a "willful refusal," within Rev. Laws, c. 122, § 10, imposing a penalty on a company willfully refusing to receive and transmit messages. *Vermilye v. Postal Telegraph Cable Co. of Massachusetts*, 91 N. E. 904, 905, 205 Mass. 598, 30 L. R. A. (N. S.) 472.

An instruction that the word "willfully" signified intentionally, though not necessarily with express intent or purpose, as used in determining whether defendant was guilty of willful negligence, was correct so far as it went, and was not prejudicial for not using the words "actual intent," instead of "express intent," and not explaining that constructive intent was sufficient to constitute gross negligence, especially in absence of

request for such explanation. *Barlow v. Foster*, 136 N. W. 822, 826, 149 Wis. 613.

A willful act is one done subject to the volition and will of the doer and intentionally, and a willful or malicious injury is one caused by a design. Willfulness and malice alike import intent, and the characteristic element of "willful" or "malicious injury" is the design to injure, either actually entertained or to be implied from the conduct and circumstances. *Sharkey v. Skilton*, 77 Atl. 950, 351, 83 Conn. 503.

An act is "willful" where the resulting injury is intentional or the natural and probable consequence of the act. The word "wanton" is, however, more comprehensive, and to constitute "wantonness" it is not essential that the injury should have been intentional or the probable consequence of the wrongful act; it sufficing that the act indicates a reckless disregard of the rights of others, a reckless indifference to results, or that the injury is the likely and not improbable result of the wrongful act. *Conchin v. El Paso & S. W. R. Co.*, 108 Pac. 260, 262, 13 Ariz. 259, 28 L. R. A. (N. S.) 88.

The word "willful," used "in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately; indicating a purpose to do it without authority; careless whether he has the right or not; in violation of law; and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute." *State v. Morgan*, 48 S. E. 670, 671, 136 N. C. 628 (quoting *State v. Whitener*, 93 N. C. 590).

While the word "willful" is sometimes synonymous with "voluntary" or "intentional," yet, when used in penal or quasi penal statutes, it usually implies an evil intent, and it is so used in Code, § 1251, providing that any county officer may be removed for willful misconduct or maladministration in office, so that, in a proceeding thereunder to remove a county treasurer, evidence of his good faith and innocence of intentional wrong was admissible so as to take the question of the willfulness of his wrongful act to the jury. *State v. Meek*, 127 N. W. 1023, 1024, 148 Iowa, 671, 31 L. R. A. (N. S.) 566, Ann. Cas. 1912C, 1075.

"To constitute a 'willful injury,' the act which produced it must have been intentional or must have been done under such circumstances as evinced a reckless disregard for the safety of others and a willingness to inflict the injury complained of. It involves conduct which is quasi criminal. \* \* \*"  
*Memphis St. Ry. Co. v. Roe*, 102 S. W. 343, 346, 118 Tenn. 601; *Rideout v. Winnebago Traction Co.*, 101 N. W. 672, 674, 123 Wis. 297, 69 L. R. A. 601 (quoting and adopting

definition in *Louisville, N. A. & C. R. Co. v. Bryan*, 7 N. E. 807, 808, 107 Ind. 51, 53).

"To constitute a 'willful injury,' the act which produced it must have been intentional or must have been done under such circumstances as evidenced a reckless disregard for the safety of others and a willingness to inflict the injury complained of." The intentional omission to perform a duty or the intentional doing of an act contrary to duty, although culpable and resulting in injury, falls short of showing that the injury was intentionally wantonly inflicted. *Baltimore & O. S. W. R. Co. v. Reynolds*, 71 N. E. 250, 254, 33 Ind. App. 219 (quoting and adopting definition in *Belt Railroad & Stockyard Co. v. Mann*, 7 N. E. 893, 107 Ind. 89).

The term "willful failure" as used in Acts 1905, giving a right of action for injuries occasioned by any violation or willful failure to comply with the provisions of the act, implies more than mere nonconformity, inattention, thoughtlessness or heedlessness, and goes to the intent implied in failing to do the thing after attention is called to it or notice given under the statute by the mine inspector, and implies the intentional and conscious violation and persistent refusal or neglect not necessarily with evil or malicious intent; it amounts to more than mere passive negligence; it is active refusal. *Princeton Coal Min. Co. v. Lawrence*, 95 N. E. 423, 427, 176 Ind. 469.

In Pen. Code, § 639, providing for the punishment of a person who "willfully" removes, injures, or destroys a public highway, the word "willfully" means something more than a voluntary act, and more than an intentional act, which is in fact wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with design to injure another, or one committed out of mere wantonness or lawlessness. *People v. Gillies*, 109 N. Y. Supp. 945, 946, 57 Misc. Rep. 568.

In an action for injuries to a trespasser on a freight train by kicking him off, an instruction that if defendant willfully kicked or pushed plaintiff off its rapidly moving train, injuring him, the jury should find for him, was not objectionable for using the word "willfully" instead of "intentionally"; the two words being synonymous in ordinary usage and as used in the instruction. *Jones v. Mobile & O. R. Co. (Ky.)* 127 S. W. 144, 145.

In an action for assault, in which it appeared that plaintiff was knocked down with a club and severely beaten by defendant, an instruction that, if the jury found that the injuries were "willfully" inflicted, they might assess as punitive damages a further sum, which would be a warning to defendant, was not objectionable for not requiring a finding of express malice before awarding punitive

damages; the word "willfully" implying that the battery was intentional. *Jennings v. Appleman*, 139 S. W. 817, 818, 159 Mo. App. 12.

In Act June 29, 1906, c. 3594, known as the "28-hour law," which prohibits carriers of live stock from keeping the same confined in cars, etc., for more than 28 consecutive hours without unloading for rest, water, and feeding, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight, and imposes a penalty on any carrier which "knowingly and willfully" fails to comply with its provisions, the word "willfully" is not used as implying a vicious or evil intent, but as meaning intentionally or voluntarily. *United States v. Union Pac. R. Co.*, 169 Fed. 65, 67, 68, 94 C. C. A. 433; *Same v. Atchison, T. & S. F. Ry. Co.*, 166 Fed. 160, 163.

P. S. 5131, requires fourth-class liquor licensees authorized to sell at wholesale to give a bond in form, so far as applicable, to that required by section 5117 of retail licensees, and the bond required by that section provides that the obligor shall become liable to the penalty prescribed if the principal "shall willfully violate any of the conditions or prohibitions" of the license. Held, that the bond was not forfeited unless there was an intentional violation of the act by the licensee, even though he might be convicted and fined for violating some provision of the act; the word "willful" meaning intentionally and by design. *State v. Burlington Drug Co.*, 78 Atl. 882, 886, 84 Vt. 243.

Where a lessee assigned his lease to his wife with the consent of the landlord, and the landlord subsequently instituted summary proceedings to dispossess the lessee without making the wife a party, and under the judgment of dispossession the landlord, through agents, took possession of the premises and removed the wife's property and forcibly removed the wife, a judgment for the wife for damages for the acts of the landlord was based on "willful" and "malicious" acts, within Bankruptcy Act July 1, 1898, c. 541, § 17, providing that a discharge in bankruptcy does not release the bankrupt from judgments for willful and malicious injuries to the person or property of another; the word "willful" meaning nothing more than "intentional," and the word "malice" in its legal sense meaning a wrongful act done intentionally, without just cause or excuse. *In re Munro*, 195 Fed. 817, 823 (citing 5 Words and Phrases, pp. 4298-4312).

A complaint for "willful injury," involving, as it does, conduct which is quasi criminal, must aver that the injurious act was purposely and intentionally committed, with the intent willfully and purposely to inflict the injury complained of. Plaintiff was struck and injured at a railway crossing by

defendant's passenger train, which approached and passed over the crossing at a speed of from 50 to 60 miles per hour. The highway at the point in question, including the crossing at that season of the year, was used by from 100 to 125 teams daily. As the train approached the whistle was sounded one-fourth of a mile north of the crossing, and the bell was rung continuously from that time until the train passed over the crossing. The engineer did not see plaintiff at any time before the collision occurred, and did not know of his presence in the vicinity of the track, and the fireman did not discover plaintiff until he was just about to enter on the track, too late to take steps to stop the engine and avert the accident. Plaintiff approached the crossing from a canning factory, driving at a brisk trot, which was continuously maintained until the horses slowed down of their own volition as they proceeded to go on the crossing. Held, that such facts were insufficient to establish a willful injury on the part of the railway company. *Pittsburgh, C. & St. L. Ry. Co. v. Ferrell*, 78 N. E. 988, 989, 39 Ind. App. 515 (citing *Kalen v. Terre Haute & I. R. Co.*, 47 N. E. 694, 18 Ind. App. 202, 63 Am. St. Rep. 343; *Parker, Adm'r, v. Pennsylvania Co.*, 34 N. E. 504, 134 Ind. 673, 23 L. R. A. 552).

In an action by a passenger for his expulsion from a railroad train, the defendant's plea averred that, when the conductor demanded of him his ticket or fare, plaintiff "refused" and "willfully failed" to present or tender any ticket or fare, and the conductor thereupon ejected him, and plaintiff's replication alleged that, when the conductor demanded his ticket or fare, he had misplaced his ticket in his clothing, and the conductor ejected him without giving him a reasonable time within which to produce the ticket. Held that, as the replication was in the nature of a confession and avoidance, it was insufficient, for, while the word "fail" at times is synonymous with "refuse," the word "refuse" here means to decline to accept, or reject, and the words "willfully fail" mean an intentional neglect, and so it does not show that plaintiff attempted to produce his ticket or notified the conductor that he had one, and requested reasonable time within which to search for his ticket, which was necessary before he could complain of his ejection. *Louisville & N. R. Co. v. Mason*, 58 South. 963, 965, 4 Ala. App. 353 (citing 7 Words and Phrases, p. 631; 8 Words and Phrases, p. 7468).

#### Knowingly

The word "willfully" implies the doing of an act knowingly, and with stubborn purpose, but without malice. *Bailey v. North Carolina R. Co.*, 62 S. E. 912, 914, 149 N. C. 169.

A "willful act" is one that is done knowingly and purposely, with the direct object

in view of injuring another. *Hazle v. Southern Pac. Co.*, 173 Fed. 431, 432.

Acts performed with a knowledge of facts and conditions that render the same greatly dangerous to the lives of others, and where there is a probability that they will result injuriously, may be said to be "willful." *Montgomery St. Ry. Co. v. Lewis*, 41 South. 736, 739, 148 Ala. 134 (citing *L. & N. R. Co. v. Webb*, 12 South. 374, 97 Ala. 308; *Alabama G. S. R. Co. v. Anderson*, 19 South. 516, 109 Ala. 299; *Southern Ry. Co. v. Bryan*, 28 South. 445, 125 Ala. 297; *Birmingham S. R. Co. v. Powell*, 33 South. 875, 136 Ala. 232; *Southern Ry. Co. v. Bonner*, 37 South. 702, 141 Ala. 517; *Southern Ry. Co. v. Jones*, 39 South. 118, 143 Ala. 328).

An instruction that, if the jury believe that any witness has "knowingly" testified falsely, they may disregard his entire testimony, was not subject to the objection that it failed to use the word "willfully," since such words are of equivalent meaning. *Peterson v. Pusey*, 86 N. E. 692, 693, 237 Ill. 204.

The phrase "willfully and corruptly," as used in the statement of the requisites of the offense of perjury that the false testimony must have been given "willfully and corruptly," means knowingly and intentionally. *State v. Hunter*, 80 S. W. 955, 956, 181 Mo. 316.

Where an indictment of a bankrupt alleged that he "willfully" concealed property belonging to his estate in bankruptcy, the word, "willfully" was sufficient to charge that he knew that the assets which were concealed belonged to such estate. *McNiel v. United States*, 150 Fed. 82, 84, 80 C. C. A. 36.

In order that one may be held guilty of "willful" or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result. *Montgomery St. Ry. v. Rice*, 38 South. 857, 142 Ala. 674.

Pub. Acts 1901, c. 154, provides that every person who shall willfully sell or offer to sell the flesh of any calf less than four weeks old when killed shall be punished by a fine, etc. Held, that guilty knowledge was an essential element of the crime defined by such act, and it was therefore error for the court to charge that by "willfully selling" was meant deliberately selling, without regard to defendant's motive. *State v. Nusenholtz*, 55 Atl. 589, 591, 76 Conn. 92.

Where the sufficiency of an indictment for causing nonmailable matter to be deposited in the postoffice is not questioned until after verdict, the words "willfully, unlaw-

fully, wrongfully, and knowingly," as used therein, were to be taken in their broadest sense, as applying to all that was expressed in respect of the act, and therefore as imputing to defendants knowledge of the contents of the circular alleged to have been mailed, and of the book of which it was an advertisement. *Burton v. United States*, 142 Fed. 57, 59, 73 C. C. A. 243.

The terms "fraudulent," "false," and "willful," in Customs Administrative Act June 10, 1890, c. 407, § 9, providing for forfeiture of imports entered by means of a fraudulent or false invoice, imply the necessity of a guilty scienter and intent to constitute the offense, and, where merchandise is mistakenly entered by a person on an invoice fraudulently made out by the foreign shipper, a forfeiture is not warranted. *United States v. Twenty Boxes of Cheese*, 163 Fed. 369, 371.

To vote "willfully," in violation of Code, § 4921, providing that if any person "willfully vote who has not been a resident of the state for six months," etc., he shall be punished, etc., involves either knowledge of the voter's disqualification or a reckless disregard of whether he is qualified or not, and where a person on due inquiry ascertains all the facts, and basing his judgment thereon in good faith concludes that he is qualified to vote and does so, his act is not willful, though on further inquiry it turns out that he was not in fact qualified. *State v. Savre*, 105 N. W. 387, 389, 129 Iowa, 122, 3 L. R. A. (N. S.) 455, 113 Am. St. Rep. 452.

The crime of perjury, as defined in Rev. St. § 5392, consists in a witness willfully stating, contrary to his oath, any material matter which he does not believe to be true; and while, in an indictment for subornation of perjury, under section 5393, the omission of the identical word "willful," in charging the false swearing by the witness, may not be fatal, the indictment must in such case contain equivalent words, themselves free from ambiguity or equivocation. Such requirement is not met by an averment that the defendant knew, at the time of the subornation, that the testimony to be given by the witness was "false, willful, and contrary to the oath" to be taken by the witness, which relates to the knowledge of defendant, and not to the state of mind of the witness. *United States v. Howard*, 132 Fed. 325, 326, 350.

Under the coal mine law of Illinois (Laws 1899, p. 325, § 33), which makes a mineowner liable in damages for any injury to person or property or for death "occasioned by any willful violation of this act or willful failure to comply with any of its provisions," as construed by the Supreme Court of the state, a knowing and intentional failure to comply with the requirements of the act is a "willful" failure within its meaning, and a wrongful or evil intent is not necessary to give a right of action thereunder for the

death of a miner. *Fulton v. Wilmington Star Min. Co.*, 133 Fed. 193, 195, 66 C. C. A. 247, 68 L. R. A. 168.

Under Hurd's Rev. St. 1899, p. 1174, § 33, an instruction that, where an owner, operator, or manager so operates his mine that he knowingly operates it without conforming to the provisions of the mining act of this state, he willfully disregards its provisions, and willfully disregards the safety of the miners employed therein, in the sense that the word "willful" is used in the statute, is correct. *Donk Bros. Coal & Coke Co. v. Stroff*, 66 N. E. 29, 32, 200 Ill. 483.

Mines and Miners' Act, § 18, requires a daily inspection of the mine, and provides that no one shall remain in the mine until dangerous conditions discovered therein have been made safe. In a miner's injury action the declaration alleged that the dangerous condition which caused the injury existed the day before it happened, and that defendant "willfully" permitted plaintiff to enter the place. Held, that the word "willfully" was synonymous with "knowingly," and the declaration, at least argumentatively, alleged that defendant knew of the dangerous condition so as to sustain a judgment for plaintiff. *Peebles v. O'Gara Coal Co.*, 88 N. E. 166, 168, 239 Ill. 370.

The term "willful," employed in the statute regulating the operation of mines, means knowingly disregarding the statutory safety of miners, and an operator knowingly disregarding a duty willfully disregards it, and he cannot say that a miner, with knowledge of the facts, is guilty of contributory negligence. Where a miner was injured by reason of the mineowner's willful failure to maintain an open passageway around the landing place at the bottom of the shaft, as required by a statute declaring that for any injury occasioned by any willful violation of the act or willful failure to comply with its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby, the contributory negligence of the miner was no defense. *Chicago-Coulterville Coal Co. v. Fidelity & Casualty Co. of New York*, 130 Fed. 957, 961 (quoting and adopting definition in *Carterville, Coal Co. v. Abbott*, 55 N. E. 131, 181 Ill. 495; *Western Anthracite Coal & Coke Co. v. Beaver*, 61 N. E. 336, 192 Ill. 333).

"The act (relating to trespassing on state timber lands) very wisely makes a distinction between trespasses committed involuntarily and those committed willfully. The definition of 'casual and involuntary' should not be restricted. The words are intended to convey the idea that, when an illegal cutting of state timber lacks the elements of willfulness and intention, then the damage shall be double the value only. One who, through mistake or inadvertence, passes beyond his own boundary line, and cuts and carries away timber of an-



other, is not guilty of willful trespass. \* \* \* 'Willful,' in the present case, is not determined by the mere fact that appellant knowingly and purposely entered upon the land in question and cut the state timber thereon. \* \* \* To determine what is meant by 'willful,' we must ascertain the purpose with which the act was performed. Did appellant intend to commit a wrong against the state and appropriate the timber without regard to the rights of the state? \* \* \* The finding of the trial court that appellant was guilty of the willful trespass is not sustained by the evidence. On the contrary, the record conclusively shows that appellant had reasonable ground for believing that authority had been granted, and honestly acted on such belief." *State v. Shevlin-Carpenter Co.*, 113 N. W. 634, 637, 102 Minn. 470.

The word "willful" is "a word of familiar use in every branch of the law, and it amounts to nothing more than this: That the person knows what he is doing, and intends to do what he is doing, and is a free agent." "Willful" is used to denote the intent with which an act is done, is sometimes so modified and reduced as to mean a little more than intentionally or designedly, but implies an intention, act, or commission or of omission. A trustee under a will exempting him from liability, for "losses occurring without his own willful default," though knowing that his cotrustee collected the rents of the estate, and had converted the same to his own use to an amount equal to nearly a third of the corpus of the estate, permitted the cotrustees to continue to collect the rents, without attempting to control the receipts, and the cotrustees misappropriated them. Held, that the trustee was personally liable for the amount misappropriated because he intentionally disregarded the rules regulating the actions of prudent men in conducting their own business; the exemption clause merely protecting the trustee from losses occurring through his carelessness or bad judgment. *In re Mallon's Estate*, 97 N. Y. Supp. 23, 24, 110 App. Div. 61 (quoting 8 Words and Phrases Judicially Defined, p. 7479, and citing *Bouv. Law, Dict.*; *Crabb v. Young*, 92 N. Y. 56, 65; *Stratton v. Central City Horse Ry. Co.*, 95 Ill. 25; *State v. Preston*, 34 Wis. 675, 683).

A "willful injury" involves a deliberate purpose not to discharge some duty necessary to safety, which duty the person owing it has assumed by contract, or which is imposed on him by law. It is differentiated from negligence by the fact that the latter arises from inattention or thoughtlessness. The word "willful" or "willfully," as used in this connection, means the quality of being willful, obstinate, stubborn, perverse, voluntary. As so used, it implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the

spontaneous action of his will. It implies nothing more than that he knows what he is doing, and intends to do what he is doing, and is a free agent. *Southern Ry. Co. v. McNeeley*, 88 N. E. 710, 711, 44 Ind. App. 126.

"The word 'willfully' is sometimes used in statutes and indictments, and sometimes omitted from them, for very differing reasons. In order that there shall be a punishable evil intent, the criminal law ordinarily requires that there shall be a knowledge of the facts, and when with a knowledge of the facts is combined an injurious result which the actor foresaw, or might reasonably have foreseen, all the law ordinarily implies by the word 'willfully' is accomplished. Nevertheless there are numerous phases of the law where a knowledge of all the facts involved is not required, arising, for example, with reference to questions of adultery and incest, and under statutes in regard to sales of liquors to minors, and the pure food laws, etc. Therefore sometimes, to guard against any possible inference of criminality in the absence of knowledge, the word 'willfully' is inserted in the statutes; and sometimes it is inserted for other reasons." In the provision of the 28-hour law (Act June 29, 1906, c. 3594, 34 Stat. 607), subjecting railroads to a penalty for knowingly and willfully failing to obey such act, the words "knowingly and willfully" do not require an evil intent, but only that defendant should have failed to obey the statute purposely and with knowledge of the facts. *New York Cent. & H. R. Co. v. United States*, 165 Fed. 833, 841, 91 C. C. A. 519.

#### Malice

The word "willfully" implies the doing of an act knowingly, and with stubborn purpose, but without malice. *Bailey v. North Carolina R. Co.*, 62 S. E. 912, 914, 149 N. C. 169.

"Willful," as used in the statutes relating to punishment for willful trespasses, embodies an element of maliciousness. *Price v. Denison*, 103 N. W. 728, 729, 95 Minn. 106.

"Willful," in a statute against libel, is covered by "malicious" in an indictment; the latter meaning all that the former does, and more. *Glover v. People*, 68 N. E. 464, 466, 204 Ill. 170 (quoting and adopting definition in 1 *Bish. Cr. Proc.* [3d Ed.] § 613).

There is no substantial difference in the meaning of the terms "willfully" and "maliciously," as used in *Rev. St. 1899*, § 1957, punishing every person who shall willfully and maliciously injure or destroy the wires, etc., of any telephone or telegraph company. *State v. McKee*, 104 S. W. 486, 487, 126 Mo. App. 524.

In general a malicious act involves all that is usually understood by the term "willful," and is further marked by either hatred or ill will toward the party injured or by

such utter recklessness and disregard of the rights of others as denotes a corrupt or malevolent disposition. It is true that "malice" may be and is often implied or presumed from the willfulness of the wrongful act. *State v. Willing*, 105 N. W. 355, 356, 129 Iowa, 72.

An instruction on a trial for homicide, authorizing a verdict of "willful murder" if the jury believe that the killing was done with malice aforethought and a verdict of "voluntary manslaughter" if they believe that the killing was done in sudden heat of passion and without previous malice, is not erroneous as placing on accused the burden of showing that the killing was without previous malice to reduce the homicide to manslaughter. *Ball v. Commonwealth*, 101 S. W. 956, 959, 125 Ky. 601.

The words "wanton," "willful," and "unlawful" do not necessarily mean, in statutes on malicious mischief, the same as "malicious." The word "malicious," as used in the statute on malicious wounding of domestic animals, means actual malice toward the owner, and any evidence which fairly shows that the act was necessary to prevent injury to the accused or to his property is admissible on the issue of malice. *People v. Jones*, 89 N. E. 752, 756, 241 Ill. 482, 16 Ann. Cas. 332 (citing 25 Cyc. 1677; 5 Words and Phrases, p. 4307; *Glover v. People*, 68 N. E. 464, 204 Ill. 170).

An instruction on a trial for homicide, that if the jury should believe that accused willfully, feloniously, and with malice aforethought killed decedent by shooting him with a gun, from which shooting decedent died within a year and a day thereafter, and the same was not done in apparently necessary self-defense, accused was guilty of "willful murder," correctly defined "willful murder." *Williamson v. Commonwealth (Ky.)* 101 S. W. 370, 371.

Under Rev. St. 1899, providing that it shall not be necessary to show in the trial of an offense for malicious injury to property specified in that article that the offense was committed from malice conceived against the owner of the property or against the animal or property itself, but if the act was wrongfully, intentionally, and willfully done, it may be inferred it was done maliciously, the state is relieved from proving that malice was held toward either the owner or the property, but in both sections 1988 and 1989 (Ann. St. 1906, pp. 1332, 1333) general malice is retained as an element, and though it may be inferred from certain facts it is not necessarily to be so inferred, and the prohibited offense is not "willfully and maliciously" committed unless the animal is maimed, beaten, or tortured from an evil impulse springing from a state of mind rendering the perpetrator indifferent to the sufferings of the animal and the wrong-

ful quality of the act. *State v. Prater*, 109 S. W. 1047, 1049, 130 Mo. App. 348.

#### Negligence

Negligence distinguished, see Negligence.

An allegation of "willful" or wanton wrong cannot be sustained by a proof of simple negligence. *Robinson v. Helena Light & Ry. Co.*, 99 Pac. 837, 843, 38 Mont. 222.

Under the 28-hour law, a negligent failure to comply with the law with a knowledge of fact is a willful failure. *United States v. Atlantic Coast Line R. Co.*, 173 Fed. 764, 769, 98 C. C. A. 110.

A complaint, in an action for injuries to a passenger while alighting from a train, which alleges that plaintiff, urged by the "willful," "unlawful," and "reckless" injunctions of the conductor, and in obedience to his directions, proceeded to alight from the train while in motion, and in so doing was injured, does not charge negligence, but charges willfulness; the word "unlawful" assigning no specific legal character to the acts alleged, and the word "reckless" being equivalent to "willful." *Crosby v. Seaboard Air Line Ry.*, 61 S. E. 1064, 1067, 81 S. C. 24.

The term "willful failure," as used in Acts 1905, giving a right of action for injuries occasioned by any violation or willful failure to comply with the provisions of the act, implies more than mere nonconformity, inattention, thoughtlessness, or heedlessness, and goes to the intent implied in failing to do the thing after attention is called to it or notice given under the statute by the mine inspector, and implies the intentional and conscious violation and persistent refusal or neglect not necessarily with evil or malicious intent; it amounts to more than mere passive negligence; it is active refusal. *Princeton Coal Min. Co. v. Lawrence*, 95 N. E. 423, 427, 176 Ind. 469.

A "willful injury" involves a deliberate purpose not to discharge some duty necessary to safety, which duty the person owing it has assumed by contract, or which is imposed on him by law. It is differentiated from negligence by the fact that the latter arises from inattention or thoughtlessness. The word "willful" or "willfully" as used in this connection means the quality of being willful, obstinate, stubborn, perverse, voluntary. As so used, it implies nothing blamable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It implies nothing more than that he knows what he is doing, and intends to do what he is doing, and is a free agent. *Southern Ry. Co. v. McNeeley*, 88 N. E. 710, 711, 44 Ind. App. 126.

"A distinction may be taken between the willful act done by the defendant in those cases, in deliberately planting a dan-

gerous weapon in his ground with the design of deterring trespassers, and the mere negligence of the defendant's servant in leaving his cart in the open street. But between 'willful mischief' and 'gross negligence' the boundary line is hard to trace. I should rather say impossible. The law runs them into each other, considering such a degree of negligence as some proof of malice." The law imposes no liability upon a railroad company for maintaining, upon its private property, an unlocked, unfastened, and unguarded turntable, in favor of children, though located in a thickly settled community, near a public street, and on ground on which children are wont to congregate for play. *Conrad v. Baltimore & O. R. Co.*, 61 S. E. 44, 46, 64 W. Va. 176, 16 L. R. A. (N. S.) 1129.

#### Purpose or willingness

The term "willful," when applied to the intent with which an act is done, implies a purpose or willingness to do the act. *State ex rel. Register v. McGahay*, 97 N. W. 865, 867, 12 N. D. 535, 1 Ann. Cas. 650.

"Willful" means on purpose, intentional, and where a defendant by her conduct drove her husband from his home the desertion was "willful." *Hudson v. Hudson*, 51 South. 857, 59 Fla. 529, 29 L. R. A. (N. S.) 614, 138 Am. St. Rep. 141, 21 Ann. Cas. 278.

That the term "willfully," when applied to the intent with which an act is done, implies simply a purpose or willingness to commit the act referred to. It does not require any intent to violate law or injure another. *Klenk v. Oregon Short Line R. Co.*, 76 Pac. 214, 215, 27 Utah, 428.

"Willfully," as used in the penal section of the federal 28-hour law, means purposely or obstinately, and is designed to describe the attitude of a carrier who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements. *St. Louis & S. F. R. Co. v. United States*, 169 Fed. 69, 71, 94 C. O. A. 437; *Chicago, B. & Q. R. Co. v. United States*, 194 Fed. 342, 344, 114 C. O. A. 334; *St. Joseph Stockyards Co. v. United States*, 187 Fed. 104, 105, 110 C. O. A. 432.

The rule prescribed by Rev. Codes, § 8099, declaring that the word "willfully," when applied to the intent with which an act is done or omitted, implies simply a willingness to commit the act or make the omission referred to, and does not require any intent to violate the law or to injure another, or to acquire any advantage, applies also in civil cases. *Haddox v. Northern Pac. Ry. Co.*, 113 Pac. 1119, 1122, 43 Mont. 8.

The term "willfully" simply means a purpose or willingness to commit the act or omission referred to, and does not require any intent to violate the law; consequently a railroad company, which negligently fail-

ed to file its tariff with the corporate commission, may be guilty of willfully violating the statute, although it did not intend the violation of law. *Atchison, T. & S. F. Ry. Co. v. State*, 125 Pac. 721, 723, 33 Okl. 371.

The word "willfully," when used in statutes to describe acts punishable criminally, includes, in addition to mere purpose to do the act, a purpose to do wrong. It involves evil intent or legal malice, and is used to characterize an act done wantonly, or one which a man of reasonable knowledge and ability must know to be contrary to his duty. *Brown v. State*, 119 N. W. 338, 340, 137 Wis. 543.

The words "willfully," "unlawfully," "feloniously," and "maliciously" import only that criminal intent which is the necessary part of every felony, or other crime, but they do not necessarily include the specific "purpose" to do the act which is an element of the crime charged. Whether the indictment is on a statute or at the common law, it is a rule universal and without exception that every intent, like everything else, which the law makes an element of the offense must be alleged, for otherwise no *prima facie* case appears. *Newby v. State*, 105 N. W. 1099, 1100, 75 Neb. 33.

In an action against a railroad company to recover for killing of plaintiff's team while it was on defendant's tracks in its switchyards, an allegation that defendant "recklessly and willfully ran said train against and over said team" was sufficient, standing alone, to present a case of willful injury, since the word "willful" implies purpose and intent; but, where such averment is accompanied with a further statement that the train was run "without seeing or endeavoring to see said wagon and team," the complaint was converted into one based on negligence and was insufficient to charge a willful injury. *Vandalia R. Co. v. Clem*, 96 N. E. 789, 790, 49 Ind. App. 94.

A complaint for "willful injury," involving, as it does, conduct which is quasi criminal, must aver that the injurious act was purposely and intentionally committed, with the intent willfully and purposely to inflict the injury complained of. Plaintiff was struck and injured at a railway crossing by defendant's passenger train, which approached and passed over the crossing at a speed of from 50 to 60 miles per hour. The highway at the point in question, including the crossing at that season of the year, was used by from 100 to 125 teams daily. As the train approached, the whistle was sounded one-fourth of a mile north of the crossing, and the bell was rung continuously from that time until the train passed over the crossing. The engineer did not see plaintiff at any time before the collision occurred, and did not know of his presence in the vicinity of the track, and the fireman did

not discover plaintiff until he was just about to enter on the track, too late to take steps to stop the engine and avert the accident. Plaintiff approached the crossing from a canning factory, driving at a brisk trot, which was continuously maintained until the horses slowed down of their own volition as they proceeded to go on the crossing. Held, that such facts were insufficient to establish a willful injury on the part of the railway company. *Pittsburgh, C., C. & St. L. R. Co. v. Ferrell*, 78 N. E. 988, 989, 39 Ind. App. 515 (citing *Kalen v. Terre Haute & I. R. Co.*, 47 N. E. 694, 18 Ind. App. 202, 63 Am. St. Rep. 343; *Parker v. Pennsylvania Co.*, 34 N. E. 504, 134 Ind. 673, 23 L. R. A. 552).

#### Reckless or careless

An act cannot be both careless and willful. Negligence is an unintentional act or omission. "Willful" is intentional, an act purposely done, not negligently or carelessly done or left undone; hence evidence to prove negligence would negative willfulness, and vice versa. *Cramer v. Springfield Traction Co.*, 87 S. W. 24, 27, 112 Mo. App. 350.

An allegation in the complaint, in an action against a railroad company, characterizing the act by which plaintiff was injured as "reckless," is equivalent to characterizing it as "willful," so as to justify punitive damages; the word "reckless" being defined as rashly negligent, utterly careless or heedless. *Pickett v. Southern R. Co.*, Carolina Division, 48 S. E. 466, 469, 69 S. C. 445 (citing *Webst. Int. Dict.*).

The use of the word "carelessly," in an instruction that a verdict for punitive damages could have been given if defendant either willfully, intentionally, or carelessly injured the plaintiff, was not fortunate, as it was more nearly synonymous with negligently or inadvertently than with "willfully" or "wantonly." *Horn v. Southern Ry.*, 58 S. E. 963, 965, 78 S. C. 67.

A complaint, in an action for injuries to a passenger while alighting from a train, which alleges that plaintiff, urged by the "willful," "unlawful," and "reckless" injunctions of the conductor, and in obedience to his directions, proceeded to alight from the train while in motion, and in so doing was injured, does not charge negligence, but charges willfulness; the word "unlawful" assigning no specific legal character to the acts alleged, and the word "reckless" being equivalent to "willful." *Crosby v. Seaboard Air Line Ry.*, 61 S. E. 1064, 1067, 81 S. C. 24.

The complaint in an action for the death of a person struck by a train, which alleges that defendant "unlawfully and grossly negligently and wantonly omitted to give any signal," and ran the train at a "speed grossly negligently and wantonly high," and "unlawfully, wantonly and grossly carelessly and negligently" ran the train over decedent, and which charges a violation of a municipal

ordinance regulating the speed of trains, and which states the facts showing the relative situation of the parties at the time and before the accident, charges negligence, for the word "unlawfully" refers to the alleged violation of the ordinance, and the words "willfully" and "wantonly" merely meaning "recklessly" or "heedlessly." *Neary v. Northern Pac. Ry. Co.*, 110 Pac. 226, 231, 41 Mont. 480.

Wilson's Rev. & Ann. St. 1903, § 2393, declares that every person who "willfully" discharges a firearm in a public place, etc., is guilty of a misdemeanor. A complaint charged defendants with violating such section by shooting "recklessly" and in a manner liable to injure some one. Held, that the words "recklessly" and "willfully" were not synonymous; the word "willfully" being employed in penal statutes as synonymous with intentionally, designedly, or without lawful excuse, while the word "recklessly" is used to mean heedlessly, carelessly, or indifferent to consequences, without contemplating or intending such consequences, there being in general a wide difference between "intentional" acts and those resulting as the consequence of recklessness or carelessness. *Thurman v. State*, 104 Pac. 67, 68, 2 Okl. Cr. 718.

#### Rudely

An information charging that accused "willfully" and "unlawfully" displayed an alleged deadly weapon in a manner calculated to disturb, etc., is insufficient to charge an offense under Pen. Code 1895, art. 334, providing punishment for those who "rudely" display any pistol or other deadly weapon in a manner calculated to disturb, for "willfully" is not synonymous with "rudely," nor does it convey the same meaning. The instrument could be displayed "willfully" or "unlawfully" without coming within the terms of the statute. *Fuller v. State*, 87 S. W. 832, 48 Tex. Cr. R. 300.

#### Unlawful or felonious

The word "unlawful" is not confined to criminal acts. It includes all "willful," actionable violations of civil rights. *White v. White*, 111 N. W. 1116, 1119, 132 Wis. 121 (quoting and adopting definition in *Martens v. Reilly*, 84 N. W. 840, 843, 109 Wis. 464, 473).

The use of the word "willingly," in an indictment for murder, instead of "willfully," which latter word was doubtlessly intended, does not render such indictment insufficient, where the indictment charges that defendant unlawfully, feloniously, and of his malice aforethought, and after deliberation and premeditation, did kill and murder, etc.; these latter words include all the meaning that could be conveyed by the word "willfully." *Daniels v. State*, 88 S. W. 844, 845, 76 Ark. 84.

An instruction, on a trial for homicide, that if the jury should believe that accused willfully, feloniously, and with malice aforethought killed decedent by shooting him with

a gun, from which shooting decedent died within a year and a day thereafter, and the same was not done in apparently necessary self-defense, accused was guilty of "willful murder," correctly defined "willful murder." *Williamson v. Commonwealth* (Ky.) 101 S. W. 370, 371.

Kirby's Dig. § 2228, provides that an indictment is sufficient if it can be understood therefrom, among other things, that the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment on conviction according to the right of the case. By section 2242 the words used in an indictment must be construed according to their usual acceptation in common language. Section 2243 requires it to contain a statement of the acts constituting the offense in ordinary and concise language so as to enable a person of common understanding to know what is intended. Held, that an indictment using the words "unlawful, feloniously, of his malice aforethought, with deliberation and premeditation" to characterize the act charged clearly and certainly meant that it was "willful," and fully met the requirements of these statutes. *Harding v. State*, 126 S. W. 90, 91, 94 Ark. 65.

#### Voluntary

"Willful" is not the synonym of "voluntary." In truth, they express no distinct idea which is common to both. The former is a word of much greater strength than the latter. *Roberts v. United States*, 126 Fed. 897, 903, 61 C. C. A. 427 (quoting and adopting definition in *McManus v. State*, 36 Ala. 285).

In a prosecution for conspiracy to murder, an instruction that the words "willful" and "willfully" mean intentional, not accidental or voluntary, is correct. *Gambrell v. Commonwealth*, 113 S. W. 476, 480, 130 Ky. 513.

The word "willfully," within U. S. Comp. St. 1901, § 5341, making one who unlawfully and willfully, but without malice, injures another, of which injury the other dies, guilty of manslaughter, means not merely voluntarily, but with a bad purpose, being synonymous with "intentionally," "designedly," "without lawful excuse." *Miller v. State*, 107 Pac. 948, 3 Okl. Cr. 575.

While the word "willful" is sometimes synonymous with "voluntary" or "intentional," yet, when used in penal or quasi penal statutes, it usually implies an evil intent, and it is so used in Code, § 1251, providing that any county officer may be removed for willful misconduct or maladministration in office, so that, in a proceeding thereunder to remove a county treasurer, evidence of his good faith and innocence of intentional wrong was admissible so as to take the question of the willfulness of his wrongful act to the jury. *State v. Meek*, 127 N. W. 1023, 1024, 148 Iowa,

671, 31 L. R. A. (N. S.) 566, Ann. Cas. 1912C, 1075.

The word "willfully," in Pen. Code, § 639, subjecting to punishment any person who willfully or maliciously displaces, injures, or destroys any water main, means something more than a voluntary act, and more also than an intentional act which in fact is wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with a design to injure another, or one committed out of mere wantonness or lawlessness. *McMorris v. Howell*, 85 N. Y. Supp. 1018, 1021, 89 App. Div. 272 (citing *Wass v. Stevens*, 128 N. Y. 123, 28 N. E. 21).

In Pen. Code, § 639, providing for the punishment of a person who "willfully" removes, injures, or destroys a public highway, the word "willfully" means something more than a voluntary act, and more than an intentional act which is in fact wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with design to injure another, or one committed out of mere wantonness or lawlessness. *People v. Gillies*, 109 N. Y. Supp. 945, 946, 57 Misc. Rep. 568.

A "willful injury" involves a deliberate purpose not to discharge some duty necessary to safety, which duty the person owing it has assumed by contract, or which is imposed on him by law. It is differentiated from negligence by the fact that the latter arises from inattention or thoughtlessness. The word "willful" or "willfully," as used in this connection, means the quality of being willful, obstinate, stubborn, perverse, voluntary. As so used, it implies nothing blamable, but merely that the person, of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It implies nothing more than that he knows what he is doing, and intends to do what he is doing, and is a free agent. *Southern Ry. Co. v. McNeeley*, 88 N. E. 710, 711, 44 Ind. App. 126.

In Act June 29, 1906, c. 3594, known as the "28-hour law," which prohibits carriers of live stock from keeping the same confined in cars, etc., for more than 28 consecutive hours without unloading for rest, water, and feeding, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight, and imposes a penalty on any carrier which "knowingly and willfully" fails to comply with its provisions, the word "willfully" is not used as implying a vicious or evil intent, but as meaning intentionally or voluntarily. *United States v. Union Pac. R. Co.*, 169 Fed. 65, 67, 68, 94 C. C. A. 433; *Same v. Atchison, T. & S. F. Ry. Co.*, 166 Fed. 160, 163.

#### Wanton

While "wanton" is often used as synonymous with willful, an injury may be wanton

without being willful, "wanton" lacking the element of intent to injure contained in willful; thus a partial employment of available means evidencing some degree of care shows an injury not to be willful, although it may not establish that it was not wanton. *Adler v. Martin* (Ala.) 59 South. 597, 600.

An act is "willful" where the resulting injury is intentional or the natural and probable consequence of the act. The word "wanton" is, however, more comprehensive, and to constitute "wantonness" it is not essential that the injury should have been intentional or the probable consequence of the wrongful act; it sufficing that the act indicates a reckless disregard of the rights of others, a reckless indifference to results or that the injury is the likely and not improbable result of the wrongful act. *Conchin v. El Paso & S. W. R. Co.*, 108 Pac. 260, 262, 13 Ariz. 259, 28 L. R. A. (N. S.) 88.

In Pen. Code, § 639, providing for the punishment of a person who "willfully" removes, injures, or destroys a public highway, the word "willfully" means something more than a voluntary act, and more than an intentional act which is in fact wrongful. It includes the idea of an act intentionally done with a wrongful purpose, or with design to injure another, or one committed out of mere wantonness or lawlessness. *People v. Gillies*, 109 N. Y. Supp. 945, 946, 57 Misc. Rep. 568.

"Willful" imports a much more positive affirmative mental condition prompting the act than 'wanton.' Many judges hold, and with much reason, that willful negligence is a contradiction—an anomaly. It has been generally held that willful injury is not charged by an allegation that the act was committed recklessly, wantonly, or purposely, wrongfully, or unlawfully. Nor is a charge of gross negligence equivalent to an allegation of a willful act." *Western Union Tel. Co. v. Catlett*, 177 Fed. 71, 75, 100 C. C. A. 489 (citing 29 Cyc. 574, *McAdoo v. Richmond & D. R. Co.*, 11 S. E. 316, 105 N. C. 140).

Rev. St. 1909, § 5433, provides that "if any person shall willfully set on fire any woods," etc., a person injured thereby shall make satisfaction in double damages. Held, that "willfully" means wantonly, or with intent that the fire shall be allowed to spread uncontrolled, and the statute does not apply to a farmer who, in the cultivation of his farm or for the protection of his property, while using ordinary care, sets out fire intending to burn over only a limited space and with no intention to permit it to spread beyond his control, and he would not be required to wait until his property was threatened with immediate danger before setting such a fire, and if such fire spreads recovery can be had only at common law on the ground of negligence, unless his conduct is so wanton that willfulness will be inferred therefrom.

*Belk v. Stewart*, 142 S. W. 485, 486, 160 Mo. App. 706.

#### Without just or lawful cause or excuse

The word "willfully," as used in Rev. St. U. S. § 5341, defining manslaughter, is synonymous with "intentionally" or "designedly," without lawful excuse, not accidental. *O'Barr v. United States*, 105 Pac. 988, 989, 3 Okl. Cr. 319, 139 Am. St. Rep. 959.

The word "willfully" within U. S. Comp. St. 1901, § 5341, making one who unlawfully and willfully, but without malice, injures another, of which injury the other dies, guilty of manslaughter, means not merely voluntarily, but with a bad purpose, being synonymous with "intentionally," "designedly," "without lawful excuse." *Miller v. State*, 107 Pac. 948, 3 Okl. Cr. 575 (citing *Thomp. Tr.* 2209).

The term "willful" implies an evil intent without justifiable excuse. Under Comp. Laws, § 11361, making the willful abstraction of papers and records belonging or appertaining to the office of a township a misdemeanor, it is necessary, to constitute the offense, that the abstraction be done with a criminal intent. *People v. Jewell*, 101 N. W. 835, 836, 138 Mich. 620.

*Kirby's Dig.* § 1899, makes it a misdemeanor to willfully and intentionally destroy, injure, or obstruct any telegraph or telephone line, and imposes a penalty of double damages. Held, that the words "willfully" and "intentionally" implied an evil intent without justifiable excuse, so that the destruction of a portion of a telephone line by a railway company, which is mistakenly believed was an unlawful obstruction of its right of way, and was also a hinderance and a menace to the safe operation of the railway, was not an act for which the owners of the telephone line were entitled to recover double damages under such section. *St. Louis, I. M. & S. Ry. Co. v. Batesville & W. Telephone Co.*, 97 S. W. 660, 662, 80 Ark. 499.

#### Without reasonable belief

On a prosecution for perjury, a definition of "willfully" as meaning that the act of the defendant was done with an evil intent or without reasonable grounds to believe the act to be lawful was correct. *Clay v. State*, 107 S. W. 1129, 1130, 52 Tex. Cr. R. 555.

"Willful," as used to characterize the act of shooting at a dog so as to render the person shooting guilty of malicious mischief, means that the act must have been done with an evil intent, with legal malice, without reasonable ground for believing the act to be lawful, and without grounds justifying the act. *Ross v. State* (Tex.) 108 S. W. 697.

The word "willful," in an information for the "unlawful," "willful," and "wanton" killing of a dog, meant that the act must be done with an evil intent, with legal malice,

without reasonable ground for believing it to be lawful, and without grounds justifying the act. *Henderson v. State*, 111 S. W. 736, 53 Tex. Cr. R. 533.

### WILLFUL ACT

See Willful—Willfully.

### WILLFUL AND MALICIOUS INJURY

The phrase "willful and malicious injuries to the person or property of another," as used in Bankr. Act July 1, 1898, c. 541, § 17, subd. 2, providing that a discharge in bankruptcy shall release a bankrupt from all his provable debts except such as are judgments in actions for fraud or for willful and malicious injuries to the person or property of another, includes a judgment for damages for criminal conversation, and hence such a judgment is not discharged by a discharge in bankruptcy. *Tinker v. Colwell*, 24 Sup. Ct. 505, 506, 193 U. S. 473, 48 L. Ed. 754. It does not necessarily involve hatred or ill will as a state of mind, but arises from a wrongful act done intentionally without just cause or excuse; it being sufficient, to constitute a willful and malicious injury to person or property, that the wrongful act is intentionally done without just cause or excuse, special malice not being required. Where a judgment against a bankrupt was rendered on a declaration containing a count for trespass vi et armis, alleging that she overstepped her authority as a school teacher in administering corporal punishment to the plaintiff, it would be assumed, under the full faith and credit clause of the federal Constitution, that the verdict rendered in the state court on which the judgment was based was sustained by sufficient evidence, and was rendered under proper instructions, and hence that the judgment was for a willful and malicious injury from which a discharge in bankruptcy would not relieve, under the rule that a judgment for damages under a count for trespass vi et armis cannot lawfully be rendered except on proof of a willful and malicious injury. *Peters v. United States*, 177 Fed. 885, 887, 101 C. C. A. 99. Where a lessee assigned his lease to his wife, and the landlord recognized her as the actual tenant and subsequently obtained possession under process of dispossession issued against the lessee and retained possession against the wife wrongfully and by means of force and threats inspiring fear, a judgment for the wife against the landlord in forcible detainer, entered on a verdict returned under instructions allowing only a recovery for the value of the lease for the term above the rent to be paid, was for a liability for "willful and malicious injury" to property rights within the statute, though there was no evidence of express malice, and though express malice could not be implied from the forcible detainer, since there was a disregard of the duty which the landlord owed to the wife. *In re Munro*, 197 Fed. 450, 453. A conversion

of property is not a "willful and malicious injury to person or property," within the meaning of the statute. *In re Ennis & Stoppani*, 171 Fed. 755, 756. Where a defendant, against whom a judgment has been obtained for an assault, on being arrested on execution makes application to take the poor debtor's oath, and gives a recognizance under Rev. Laws Mass. c. 168, § 29 et seq., such recognizance is merely a cumulative security for the original judgment, and a judgment subsequently rendered thereon constitutes a liability for a willful and malicious injury to the person, within the statute, which is not released by a discharge. *In re Colaluca*, 133 Fed. 255, 256. The exception of the statute extends to all actions in which the facts of intent and malice are judicially ascertained, and a close jail certificate may be included in the consideration of the question whether the injuries for which judgment was recovered were willful and malicious, and a close jail certificate, in an action for injuries sustained while undergoing a surgical operation, that the cause of action "arose from the willful and malicious act of the defendant and for willful injuries to the person of the plaintiff" sufficiently shows that the judgment was founded on a "willful and malicious injury to the person," under the bankrupt act. *Flanders v. Mullin*, 66 Atl. 789, 80 Vt. 124, 12 Ann. Cas. 1010.

### WILLFUL AND UNLAWFUL

While the term "willful and unlawful," used in determining whether exemplary damages may be awarded for the commission of a tort, may not under all circumstances imply malice, an act "unlawfully and purposely" committed with knowledge that it is wrong and unlawful is in legal contemplation malicious. *Anderson v. International Harvester Co.*, 116 N. W. 101, 103, 104 Minn. 49, 16 L. R. A. (N. S.) 440 (citing *State v. Preston*, 34 Wis. 675; *Wills v. Noyes*, 12 Pick. [29 Mass.] 324; *Lynd v. Pickett*, 7 Minn. 184 [Gil. 128], 82 Am. Dec. 79).

### WILLFUL AND WANTON

A "willful and wanton" tort need not be a conscious invasion of the rights of another if it is done under such circumstances that an ordinary person would say that it was in reckless disregard of another's rights. *Tolleson v. Southern Ry. Co.*, 70 S. E. 311, 313, 88 S. C. 7.

To shoot at a mad dog is not necessarily the "willful and wanton firing of a weapon," within the terms of a statute forbidding shooting on Sunday. It is the duty of the court, upon the trial of one charged with a violation of this statute, to instruct the jury as to the meaning of the words "willful and wanton," as used in the statute; and it is error to restrict the defense of the accused to cases of actual self-defense or defense of property. It is for the jury to determine

whether shooting at a mad dog on Sunday is a willful and wanton shooting, within the meaning of the statute, although they might believe that the dog was fleeing at the time he was shot at, and that neither the defendant's person nor his property was in danger. *Manning v. State*, 64 S. E. 710, 711, 6 Ga. App. 240.

Where defendant's engineer acted "willfully and wantonly" (that is to say, in intentional or reckless disregard of human life) by not giving any warning and by allowing the engine to run on and strike the plaintiff, whom he saw sitting in an intoxicated condition, helpless on the cross-tie, in the way of the rapidly moving train, the plaintiff ought to recover such damages, as he can legally show to the satisfaction of the jury. *Central of Georgia Ry. Co. v. Moore*, 63 S. E. 642, 644, 5 Ga. App. 562.

An exception to the rule that contributory negligence of a person injured precludes recovery therefor is that when such contributory negligence is discovered in time to avoid the injury, and it could be avoided with due diligence, but is not avoided, the person injured can recover; the act of the defendant being characterized as "willful and wanton." In the earlier cases the conduct of those in charge of a train, who, seeing one in a dangerous position, made no effort to avoid injuring him when it could have been easily avoided, is characterized as "willful and wanton." The cases, however, all hold that the discovery of such a person in a dangerous position in time to prevent injury by the exercise of ordinary care is necessary to constitute an exception to the rule that one guilty of contributory negligence can recover. Where, in an action for injuries from being struck by a street car, evidence showed that the motorman did not see plaintiff, but that the motorman was looking back, no recovery could be had. *Bennichsen v. Market St. R. Co.*, 84 Pac. 420, 421, 149 Cal. 18.

#### WILLFUL CONDUCT

See Willful—Willfully.

#### WILLFUL DEFAULT

The words "willful default" imply more than negligence or carelessness. The word "willful" means intentional, while the word "default" means transgression. Where a testator exempted his trustee from liability for losses occurring without his own willful default, it was evidently his intention to relieve the trustee from everything but his individual intentional transgression. In *re Mullon's Estate*, 89 N. Y. Supp. 554, 43 Misc. Rep. 569.

Willful default on the part of a trustee, within the terms of a will providing that the trustees should be liable only for willful default, and not for any loss or damage which might happen to the trust property without their respective "willful neglect or default,"

meant intentionally making away with the trust property, and a willful neglect means such reckless indifference to true interests of the trust as to amount to or partake of a willful violation of duty; neither being fulfilled by a mere improper exercise of discretion on the part of the trustees in using \$850,000 of the principal of the trust, amounting to \$920,000, in the construction of a new building. Where trustees had become committed to the construction of a new building out of the funds of the trust estate, and the plans had been practically completed, they were not guilty of willful neglect or default in purchasing a lease of a tenant in an old building that was to be destroyed, and in agreeing to pay the rent of another store for such tenant during the erection of the new building, in order to lease to the tenant the first floor and basement of the new building for ten years at a rent of \$17,000 a year. *Warren v. Pazolt*, 89 N. E. 381, 382, 203 Mass. 328.

#### WILLFUL DESERTION

See, also, Desertion.

##### Of spouse

"Willful" means on purpose, intentional, and, where a defendant by her conduct drove her husband from his home, the desertion was willful. *Hudson v. Hudson*, 51 South. 857, 858, 59 Fla. 529, 29 L. R. A. (N. S.) 614, 138 Am. St. Rep. 141, 21 Ann. Cas. 278.

The essence of a "willful," obstinate desertion by a wife consists in her refusing to live with her husband when he does his marital duty, and wants her to live with him. *Hill v. Hill*, 56 South. 941, 942, 62 Fla. 493, 39 L. R. A. (N. S.) 1117.

"Willful desertion," as used in the divorce laws, means that the desertion must be wrongful (that is, in disregard of the marital obligations), but it is not essential that it be with any purpose of working an injury. *Kupka v. Kupka*, 109 N. W. 610, 611, 132 Iowa, 191.

A letter written by a wife to her husband, stating, in response to his request for information, that she intended never to live with him again, indicates a "willful desertion." *Edwards v. Edwards*, 61 Atl. 531, 532, 69 N. J. Eq. 522.

Where complainant was not living with her husband at the time he uttered certain threats and committed certain acts of violence against her, such misconduct did not constitute "willful desertion." *Corson v. Corson*, 61 Atl. 157, 69 N. J. Eq. 513.

Under B. & C. Comp. § 507, providing that "willful" desertion for the period of one year shall be a ground for divorce, an intentional desertion is willful, within the meaning of the term as defined by the statute. *State v. Luper* (Or.) 95 Pac. 811, 813 (quoting and adopting definition in *Ogilvie v. Ogilvie*, 61 Pac. 627, 37 Or. 171).



"Willful desertion" is a breach of matrimonial duty, and is composed, first, of a breaking off of matrimonial cohabitation; and, second, an intent in the mind to desert. Both facts must be shown. Mere cessation of cohabitation is not enough. *Tillis v. Tillis*, 46 S. E. 926, 55 W. Va. 198.

Absence from a wife without her knowledge of the cause thereof, or of the place where the husband is residing, or the business in which he is engaged, or of his ability to support her, and living with another woman, for the period required by the statute, is evidence from which a finding may be made of "willful desertion." *Carroll v. Carroll*, 61 Atl. 383, 385, 68 N. J. Eq. 724.

Where a husband fails to furnish his wife a home suitable to their condition and reasonable support, and she is compelled by necessity to leave him and seek employment whereby to earn her own support, without intent of deserting him, such a leaving is not "willful desertion," within Rev. St. 1887, § 2460, so as to constitute a ground of divorce. *Bell v. Bell*, 96 Pac. 196, 199, 15 Idaho, 7.

Where a wife, in leaving her husband, wrote to him indicating that she had taken the step because of serious quarrels with her husband's mother, and gave him permission to come and see her, and signed herself in an affectionate manner, there was no "willful desertion," and it was the husband's duty to seek his wife and urge a reconciliation. *Edwards v. Edwards*, 61 Atl. 531, 532, 69 N. J. Eq. 522.

Where plaintiff and defendant were married, not expecting to establish a marital home, and plaintiff, who was a mere child, after occupying a room in a hotel with her husband for two or three days, went to her own home, and he to his former residence, after which they met at times, when on one occasion she demanded that he support her or make a home for her, his refusal did not establish "willful desertion," in the absence of proof that he was able to do so. *Corson v. Corson*, 61 Atl. 157, 69 N. J. Eq. 513.

"Willful desertion," to be ground for divorce, is a voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended marital relation, without justification either in the consent or wrongful conduct of the other. A divorce cannot be granted a husband for desertion, if the wife's separation from him was either by his compulsion or with his consent. A wife's separation from her husband by his compulsion may be caused either by actual physical force, or by threats and conduct on his part to afford her reasonable ground for belief or fear that the security of her life or person will be seriously endangered, unless she seeks safety by separation. A husband's consent to his wife's continued separation from him may be either ex-

press or implied, and may be proven either by a direct declaration or admission, or by such conduct and other circumstances as plainly and reasonably import such consent. Where a wife left her husband because of his threats, growing out of a mistake and belief on his part that she had taken certain money belonging to him, it was his duty, on discovering his mistake, to seek his wife, assure her of her future safety, and invite her to return, and without such an invitation her continued absence is not desertion. *Ward v. Ward* (Del.) 75 Atl. 611, 612, 7 Pennwilt, 364.

A husband, who leaves the family home merely because the wife declared that she would not live with him if he continued in the saloon business, cannot charge the wife with "willful desertion," under Rev. Civ. Code, § 70, subsec. 3, defining what will justify a spouse in leaving the family dwelling without being chargeable with desertion, but which will charge the other spouse with desertion, as departure caused by threats of bodily harm, etc.; the opinion of the wife on the subject of the saloon business being entitled to as much consideration as the opinion of the husband, for section 94 provides that husband and wife contract toward each other obligations of mutual respect, etc. *Barrett v. Barrett*, 105 N. W. 463, 464, 20 S. D. 210.

#### WILLFUL FAILURE

See Willful—Willfully.

#### WILLFUL INJURY

See Willful—Willfully.

#### WILLFUL KILLING—WILLFULLY KILL

See Willful—Willfully.

#### WILLFUL MANSLAUGHTER

See Willful—Willfully.

#### WILLFUL MISAPPLICATION—WILLFULLY MISAPPLY

The terms "willfully misapplied" have no marked technical meaning, and therefore do not of themselves fully and clearly set forth every element of an offense charged. *United States v. Martindale*, 146 Fed. 280-286 (quoting and adopting the definition in *Britton's Case*, 108 U. S. 193, 2 Sup. Ct. 526, 27 L. Ed. 701).

In a prosecution of a national bank officer for "willful misapplication" of the moneys, funds, and credits of the bank, the indictment properly alleged facts showing how the misapplication was made and the illegality thereof; the words "willful misapplication" having no settled technical meaning. *United States v. Heinze*, 161 Fed. 425, 428.

"Willful misapplication" of the moneys, funds, or credits of a national bank, within Rev. St. § 5209, consists in their misapplica-

tion by an officer, clerk, or agent of the bank, made willfully and wrongfully, and with intent to injure or defraud the association or some other person or company, and their conversion to his own use, or to the use of some one other than the bank. No previous lawful possession is necessary to constitute the crime. *United States v. Breese*, 131 Fed. 915, 921.

"Willful misapplication" of the funds of a national bank, in order to constitute an offense denounced by Rev. St. § 5209, must be a willful misapplication for the use or benefit of accused, or of some person or company other than the banking association, with intent to injure and defraud the association, or some other body corporate or natural person, being entirely different from acts constituting an official maladministration, subjecting the bank to a forfeiture of its charter, as provided by section 5239 (page 3515). *United States v. Steinman*, 172 Fed. 913, 915, 97 C. C. A. 271.

The words "willfully misapply," as used in Rev. St. § 5209, making it a criminal offense for any officer or agent of a national bank to embezzle, abstract, or "willfully misapply" any of the moneys, funds, or credits of the association, are not used in describing any offense at common law. They have no settled technical meaning like the word "embezzle," as used in the statute, or like steal, take, and carry away, as used at common law, they do not of themselves fully and clearly set forth every element of the offense charged. It would therefore not be sufficient simply to aver that defendant "willfully misapplied" the funds of the association, but there must be averments to show how the misapplication was made and that it was an unlawful one. Hence an indictment under section 5209, charging the defendant, as president and director, with having willfully misapplied certain credits of the bank by procuring the authority of the board of directors to an acceptance of an assignment of an interest in a partnership in satisfaction of an indebtedness due the bank, and charging the amount of such indebtedness to the account of stocks and bonds, knowing that the assignor had in fact no interest in such partnership, does not state an offense under the statute, since what was done seems to have been by authority of the board of directors, and the facts set out do not show a misapplication of credits by defendant, nor is it averred that such misapplication was made to his own use, benefit, or gain, nor to that of any person other than the bank. *United States v. Smith*, 152 Fed. 542, 543, 547.

#### WILLFUL MISAPPROPRIATION

Defendant's use of the funds of an estate for his sole benefit, as the controlling stockholder in a bank, amounted to a "willful misappropriation" of funds, within Bankr.

Act July 1, 1898, c. 541, § 17, 30 Stat. 550, providing that a discharge shall release the bankrupt of all his provable debts, except such as are created by misappropriation, etc. *Morris v. Covey*, 148 S. W. 257, 261, 104 Ark. 226.

#### WILLFUL MISCONDUCT

Since degrees of negligence are not recognized in Colorado, the terms "willful misconduct" and "actual negligence," as used in a bill of lading exempting the carrier from loss caused by acts of its servants, not amounting to willful misconduct or actual negligence, should be construed as a stipulation for exemption from ordinary negligence, and invalid. *Adams v. Colorado & S. Ry. Co.*, 113 Pac. 1010, 1012, 49 Colo. 475, 36 L. R. A. (N. S.) 412.

"To constitute 'willful or wanton misconduct,' there must be actual knowledge, or that which is esteemed in law as the equivalent of actual knowledge, of the peril of the person injured, coupled with a conscious failure to act to the end of averting the injury." Mere violation of a statutory duty is but simple negligence, and does not constitute "willful or wanton misconduct." *Smith v. Central of Georgia R. Co.*, 51 South. 792, 793, 165 Ala. 407.

While the word "willful" is sometimes synonymous with "voluntary" or "intentional," yet, when used in penal or quasi penal statutes, it usually implies an evil intent, and it is so used in Code, § 1251, providing that any county officer may be removed for willful misconduct or maladministration in office, so that, in a proceeding thereunder to remove a county treasurer, evidence of his good faith and innocence of intentional wrong was admissible so as to take the question of the willfulness of his wrongful act to the jury. While by Code, § 1403, requiring every person subject to taxation to attend at the office of the treasurer and pay his taxes in full, the Legislature seems to have contemplated that each property owner should appear in person and pay his taxes, the receipt by the county treasurer of taxes paid by check on responsible banks is not willful official misconduct within Code, § 1251, permitting any county officer to be removed for willful official misconduct, even though there is a delay of several days in actually collecting the money. *State v. Meek*, 127 N. W. 1023, 1024, 148 Iowa, 671, 31 L. R. A. (N. S.) 566, Ann. Cas. 1912C, 1075.

The phrase "misconduct in office" is broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office (citing *State v. Slover*, 20 S. W. 788, 113 Mo. 208). It does not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or official neglect to do an act which ought to have been done, will constitute the offense, although there was no corrupt or

malicious motive (citing *Mechem*, Public Officers, § 457). After defining "misconduct," Webster declares it to be synonymous with "misbehavior," "misdemeanor," "delinquency," and "offense." Pen. Code, § 758, provides that an accusation against any municipal officer for "willful or corrupt misconduct in office" may be presented by the grand jury. Section 772 provides for the summary removal of public officers on an accusation verified by the oath of any person alleging that the officer has "neglected or refused to perform the official duties pertaining to his office." Section 335 declares every public officer who refuses or neglects to inform against and prosecute persons whom he has reasonable cause to believe offenders of the chapter on gambling guilty of a misdemeanor. Under the definitions and statutory provisions recited above, a public officer, who fails to prosecute gamblers of whom he has knowledge, is guilty of "willful misconduct," within the meaning of section 758, and may be accused by the grand jury thereunder. *Coffey v. Superior Court of Sacramento County*, 82 Pac. 75, 76, 77, 147 Cal. 525.

#### WILLFUL MISSTATEMENT

Where a fidelity bond provided that any "willful misstatement" or suppression of fact by the employer, in his statement or declaration concerning the employed, should render the bond void from the beginning, the phrase "willful misstatement" was intended to mean any material false statement made with knowledge of its falsity, voluntarily, and not inadvertently, and hence an instruction that the bond was not avoided unless the misstatements were made "with intent to secure renewals of the bond" was erroneous. *Fidelity & Casualty Co. v. Bank of Timmons ville*, 139 Fed. 101, 103, 71 C. C. A. 299.

#### WILLFUL MURDER

See Willful—Willfully.

#### WILLFUL NEGLIGENCE

The words "knowingly and willfully fails," in a statute imposing a penalty, where a corporation or person charged "knowingly and willfully fails" to comply therewith, are about equivalent to "willfully neglects," and mean the same as "willfully omits." *New York Cent. & H. R. R. Co. v. United States*, 165 Fed. 833, 840, 91 C. C. A. 519.

The term "willful neglect," as used in Civ. Code, § 92, as constituting a cause of divorce, means "a neglect of the husband to provide for his wife the common necessities of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy, or dissipation." *Locke v. Locke*, 94 Pac. 244, 153 Cal. 56 (quoting Civ. Code, § 105).

The enforcement of the law in cities of the metropolitan class is placed by the Legislature directly under the control of the

board of fire and police commissioners, of which the mayor is principal officer. The chief of police is appointed by the board and removable at its pleasure. It is the duty of the mayor to "order, direct and enforce" the law. Comp. St. 1911, c. 12a, § 65. If the board directs in what manner and to what extent the law for the suppression of prostitution and the sale of intoxicating liquors shall be enforced, and the chief of police in good faith believes it is his duty to be governed by the established policy of the board and the directions of the mayor, and faithfully enforces the law accordingly, it cannot be found that he did "willfully fail, neglect, or refuse to enforce any law which it is made his duty to enforce." Comp. St. 1911, c. 71, § 1a. *State ex rel. Thompson v. Donahue*, 135 N. W. 1030, 1034, 91 Neb. 311, Ann. Cas. 1913D, 18.

"Willful default" on the part of a trustee, within the terms of a will providing that the trustees should be liable only for willful default, and not for any loss or damage which might happen to the trust property without their respective "willful neglect or default," meant intentionally making away with the trust property, and a willful neglect means such reckless indifference to true interests of the trust as to amount to or partake of a willful violation of duty; neither being fulfilled by a mere improper exercise of discretion on the part of the trustees in using \$850,000 of the principal of the trust, amounting to \$920,000 in the construction of a new building. Where trustees had become committed to the construction of a new building out of the funds of the trust estate, and the plans had been practically completed, they were not guilty of willful neglect or default in purchasing a lease of a tenant in an old building that was to be destroyed, and in agreeing to pay the rent of another store for such tenant during the erection of the new building, in order to lease to the tenant the first floor and basement of the new building for 10 years at a rent of \$17,000 a year. *Warren v. Pazolt*, 89 N. E. 381, 382, 203 Mass. 328.

#### WILLFUL NEGLIGENCE

See, also, Gross Negligence; Willfulness.

There are no degrees of negligence, and negligence, no matter how reprehensible, can never approximate willfulness. *Vandalia R. Co. v. Clem*, 96 N. E. 789, 790, 49 Ind. App. 94.

The term "willful negligence" is a misleading and contradictory expression. Conduct cannot be both "willful" and "negligent," as "negligence" involves inattention, and "willfulness" intention. *Anderson v. Minneapolis, St. P. & S. S. M. R. Co.*, 114 N. W. 1123, 1126, 103 Minn. 224 (dissenting opinion, citing 8 Words and Phrases, pp. 7468, 7835; *Bolin v. Chicago, St. P., M. & O. R. Co.*, 84 N. W. 446, 108 Wis. 333, 81 Am.

St. Rep. 911; Louisville & N. R. Co. v. Perkins, 44 South. 602, 152 Ala. 133; Lake Shore & M. S. R. R. v. Bodemer, 29 N. E. 692, 139 Ill. 596, 32 Am. St. Rep. 218).

The conflict in instructions submitting the issue of negligence of defendant and the issue of a willful wrongful act cannot be harmonized on the theory that the term "negligence," as used in the first instruction, covers willful acts, since "negligence" signifies the absence of care and implies a failure of duty and excludes an idea of intentional wrong, while "willful negligence" implies an intentional failure to perform a manifest duty. Tognazzini v. Freeman, 123 Pac. 540, 543, 18 Cal. App. 468.

Whether the term "willful or wanton negligence," which is sometimes employed in relation to a failure to comply with the statutory requirement as to the giving of a signal or the taking of some precaution in connection with railway crossings, and which merely raises the standard of diligence, is accurately used or not, it does not mean that mere negligence alone, as a rule authorizes charges on the subject of exemplary and punitive damages. Southern R. Co. v. Davis, 65 S. E. 131, 133, 132 Ga. 812 (citing 4 Elliott, R. R., § 1801; 1 Thomp. Neg. § 22; Alabama Great Southern R. Co. v. Mooror, 22 South. 900, 116 Ala. 642, 644; Parker v. Pennsylvania R. Co., 34 N. E. 504, 134 Ind. 673, 23 L. R. A. 552).

While the term "willful negligence" may not be strictly accurate, and many cases hold that willfulness repels, or is inconsistent with, the idea of negligence, this is not necessarily or entirely true. Negligence contains the idea of inadvertence as one of its features, and inadvertence and willfulness are as a rule antagonized. Negligence is the failure to exercise the proper degree of care in the performance of some legal duty which one owes another and causing unintended damage. The breach of duty can be, and frequently is, intentional and willful, and yet the act may be negligent, and it is only when there has been a designed injury caused, or an intended damage done, that the idea of negligence is eliminated. Hence, when the willfulness is referred to the breach of duty instead of the injury caused or damage done, the term "willful negligence" is not improper. Foot v. Seaboard Air Line Ry., 54 S. E. 843, 844, 142 N. C. 52 (citing Shear. & R. Neg. §§ 3, 4; 1 Thomp. Com. Neg. § 21; 2 Thompson, § 1626; Louisville, N. A. & C. Ry. Co. v. Bryan, 7 N. E. 807, 107 Ind. 51; Southern Express Co. v. Brown, 7 South. 318, 8 South. 425, 67 Miss. 261, 19 Am. St. Rep. 306).

"Willful negligence" consists of a failure on the part of the party charged or his servant to use reasonable care to avoid an accident after acquiring knowledge that it is impending. In an action for injuries by collision with a street car, an instruction that it

was the duty of the motoneer, after he discovered plaintiff in a position of danger, to use ordinary care to stop the car, and if he failed to do so he would be guilty of willful negligence, with a further instruction that willful negligence is simply that "first you must find that the motoneer actually saw the plaintiff in a condition of danger. Now, willful negligence is after that, that he did not use reasonable care to avoid the danger"—is proper. Teal v. St. Paul City Ry. Co., 104 N. W. 945, 96 Minn. 379.

#### As gross negligence

The term "willful negligence," even if not self-contradictory, is not equivalent to gross negligence. Chicago, R. I. & P. R. Co. v. Hamler, 74 N. E. 705, 710, 215 Ill. 525, 1 L. R. A. (N. S.) 674, 106 Am. St. Rep. 187, 3 Ann. Cas. 42.

#### As wanton or reckless conduct

"Willful negligence," whereby liability is incurred, irrespective of the contributory negligence of the party injured, is a reckless disregard of the safety of the person or property of another, by failing, after discovering the danger, to exercise ordinary care to prevent injury. Alger, Smith & Co. v. Duluth-Superior Traction Co., 101 N. W. 298, 299, 93 Minn. 314; Gibbons v. Northern Pac. R. Co., 108 N. W. 471, 472, 99 Minn. 142 (citing Alger, Smith & Co. v. Duluth-Superior Traction Co., 101 N. W. 298, 93 Minn. 314).

"Willful negligence," whereby liability is incurred, irrespective of plaintiff's negligence, is not simply greater negligence than that of the injured party, nor does it include the element of malice, but is a reckless disregard of the safety of the person or property of another, by failing after discovering the peril to exercise ordinary care to prevent the injury. Havel v. Minneapolis & St. L. R. Co., 139 N. W. 137, 138, 120 Minn. 195; Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co., 114 N. W. 1123, 1125, 103 Minn. 224.

"Willful or wanton negligence," which is distinguished from "ordinary negligence" in that liability is incurred thereby, irrespective of contributory negligence, is not simply greater negligence than that of the injured party, nor does it necessarily include the element of malice or an actual intent to injure another, but it is reckless disregard of the safety of the person or property of another by failing, after discovery of the peril, to exercise ordinary care to prevent the impending injury. Alger, Smith & Co. v. Duluth-Superior Traction Co., 101 N. W. 298, 299, 93 Minn. 314 (citing Fonda v. St. Paul City Ry. Co., 74 N. W. 166, 71 Minn. 438, 70 Am. St. Rep. 341; Sloniker v. Great Northern Ry. Co., 79 N. W. 168, 76 Minn. 306; Lando v. Chicago, St. P., M. & O. Ry. Co., 83 N. W. 1089, 81 Minn. 279; Olson v. Northern Pac. Ry. Co., 87 N. W. 843, 84 Minn. 258; Rawitzer v. St. Paul City Ry. Co., 100 N. W. 664, 93 Minn. 84).

"The use of the phrase 'willful negligence,' in the connection in which it is frequently employed, is, to say the least, inapt. Whatever idea the word 'willful' may express when so used, it is beyond question that, to entitle one to recover for an injury to which his own negligence may have contributed, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been so committed, under such circumstances, as that its natural and probable consequence would be to produce injury to others. There must have been either an actual or constructive intent to commit the injury. The act must have involved conduct quasi criminal in character. \* \* \* To constitute a willful injury, the act or omission which produced it must have been purposed and intentional, or must have been committed under such circumstances as evinced a reckless disregard for the safety of others." *Pittsburgh, C., C. & St. L. R. Co. v. Ferrell*, 78 N. E. 988, 990, 39 Ind. App. 515 (quoting and adopting definition in *Belt Railroad & Stockyard Co. v. Mann*, 7 N. E. 893, 107 Ind. 89, 92).

#### WILLFUL OMISSION

The words "knowingly and willfully fails," in a statute imposing a penalty when a corporation or person charged "knowingly and willfully fails" to comply therewith, are about equivalent to "willfully neglects," and mean the same as "willfully omits." *New York Cent. & H. R. R. Co. v. United States*, 165 Fed. 833, 840, 91 C. C. A. 519.

#### WILLFUL REFUSAL

See Willful—Willfully.

#### WILLFUL TRESPASS

See Willful—Willfully.

#### WILLFUL TRESPASSER

One who takes the ore of another from his land without right either recklessly or with the actual intent so to do is a "willful trespasser"; but one who takes such ore without right, but inadvertently and unintentionally, or in the honest belief that he is exercising his own right, is not a "willful trespasser." *Resurrection Gold Min. Co. v. Fortune Gold Min. Co.*, 129 Fed. 668, 679, 64 C. C. A. 180.

#### WILLFUL VIOLATION

See Willful—Willfully.

#### WILLFUL WRONG

See Willful—Willfully.

#### WILLFULLY

See Knowingly and Willfully.

#### WILLFULNESS

"Willfulness" is a wrongful act done intentionally without just cause. *McNamara v. St. Louis Transit Co.*, 81 S. W. 880, 881,

182 Mo. 676, 66 L. R. A. 486 (quoting *United States v. Taylor*, 2 Sumn. 586, 28 Fed. Cas. p. 31).

Wantonness or willfulness is such gross want of care and regard for the rights of others as show a disregard of consequences or a willingness to inflict an injury. *Cleveland, C., C. & St. L. R. Co. v. Ricker*, 116 Ill. App. 428, 432.

"Willfulness" or "wantonness," where the peril of the person injured is known, means a direct intent to inflict injury, or an act done or omitted, with the consciousness that the act or omission will probably eventuate in injury. *Anniston Electric & Gas Co. v. Rosen*, 48 South. 798, 802, 159 Ala. 195, 133 Am. St. Rep. 32.

Each of the words "wantonness," "willfulness," and "recklessness" embodies the element of malice, either express or implied, and are in law substantially the equivalent of each other, in so far as they give rise to an action based upon punitive damages. *Hull v. Seaboard Air Line Ry.*, 57 S. E. 28, 76 S. C. 278, 10 L. R. A. (N. S.) 1213 (citing *Pickett v. Southern Ry. Co., Carolina Division*, 48 S. E. 466, 69 S. C. 445).

#### Negligence distinguished

Mere "negligence" and "willfulness" are not synonymous terms. *Southern Ry. Co. v. Davis*, 65 S. E. 131, 132, 132 Ga. 812.

An act done "willingly" on full information is not done negligently. Negligence is the result of inattention or oversight. *Dean v. St. Louis Woodenware Works*, 80 S. W. 292, 296, 106 Mo. App. 167.

Negligence cannot be of such degree as to become "willfulness." *Cleveland, C., C. & St. L. Ry. Co. v. Starks*, 92 N. E. 54, 56, 174 Ind. 345.

There are no degrees of negligence, and negligence, no matter how reprehensible, can never approximate "willfulness." *Vandalia R. Co. v. Clem*, 96 N. E. 789, 790, 49 Ind. App. 94.

"An inadvertent failure to observe due care indicates mere negligence, but an advertent or conscious failure to observe due care passes beyond mere negligence into 'wantonness' or 'willfulness.'" *Tinsley v. Western Union Telegraph Co.*, 51 S. E. 913, 914, 72 S. C. 350.

"Willfulness" means something more than mere oversight, carelessness, neglect, or even shiftlessness. True, in the legal sense of the word, an intentional act is ordinarily willful; but the intentional act in opening a gate or leaving it open does not necessarily imply an intention that cattle shall pass through such gate on a railroad track. *Claus v. Chicago Great Western Ry. Co.*, 111 N. W. 15, 16, 136 Iowa, 7.

"Willfulness" and 'negligence' are the opposites of each other; the former signify-

ing the presence of intention and the latter its absence." *Rideout v. Winnebago Traction Co.*, 101 N. W. 672, 675, 123 Wis. 297, 49 L. R. A. 601 (quoting and adopting definition in *Cleveland, C. C. & St. L. R. Co. v. Miller*, 49 N. E. 445, 449, 149 Ind. 490-501).

"Willfulness" and "negligence" are diametrically opposed; negligence importing inattention, inadvertence, and indifference, while willfulness imports intention, purpose, and design; and there being no negligence with, and no willfulness without, intent. *Barrett v. Cleveland, C. C. & St. L. Ry. Co.*, 96 N. E. 490, 492, 48 Ind. App. 668.

"Willfulness" and 'negligence' are the opposite of each other; the former signifying the presence of intention and the latter its absence. Negligence arises from inattention, thoughtlessness, while willfulness cannot exist without purpose or design, \* \* \* and, when willfulness is the essential in the act or conduct charged to the party with a wrong, the case ceases to be one of negligence." *Memphis St. Ry. Co. v. Roe*, 102 S. W. 343, 346, 118 Tenn. 601 (quoting and adopting the definition in *Cleveland, C. C. & St. L. R. Co. v. Miller*, 49 N. E. 445, 149 Ind. 490)

"Willfulness" and 'negligence' are the opposites of each other; the one signifying the presence of intention or purpose, the other its absence. This distinction has not always been observed. Consequently there are cases that use the terms 'gross' or 'willful' negligence to designate willful injuries. Late cases have made the distinction clear. And the principle of the responsibility of the willful wrongdoer for all the consequences of his misconduct is really an old one." *Morrison v. Lee*, 113 N. W. 1025, 1029, 16 N. D. 377, 13 L. R. A. (N. S.) 650.

"Willfulness" or "wantonness," as applied in cases of injury to a person by a breach of duty, where the peril of the person injured is known, means a direct intent to inflict injury, or an act done or omitted, with the consciousness that the act or omission will probably eventuate in injury. *Anniston Electric & Gas Co. v. Rosen*, 48 South. 798, 799, 802, 159 Ala. 195, 133 Am. St. Rep. 32.

"Willfulness" is the intentional doing of some act or the failure to do some act, according to one's own will, regardless of the right of others, when the party knows, "or is under legal obligation to know," that the doing or the failing to do such act might cause injury to other persons. *Geddings v. Atlantic Coast Line R. Co.*, 75 S. E. 284, 286, 91 S. C. 477.

A conscious act or neglect is willful, though there is no evil intent, but "willfulness" implies something more than mere failure to use ordinary care; there being a clear distinction between a negligent omission and a willful failure to act. *Cook v. Big Muddy-*

*Carterville Mining Co.*, 94 N. E. 90, 94, 249 Ill. 41.

Negligence and carelessness are generally esteemed as not only not "willfulness," but rather the opposite. *Schooler v. Harrington*, 81 S. W. 468, 469, 106 Mo. App. 607 (following *Gibeline v. Smith*, 80 S. W. 961, 106 Mo. App. 545).

"Negligence" and 'willfulness' are the opposites of each other. They indicate radically different mental states. \* \* \* Negligence is also to be carefully distinguished from fraud; the distinction arising in this case, as before, upon the element of inadvertence. Fraud is invariably intentional, either actually or constructively; negligence is never so." *Standard Marine Ins. Co., Limited, of Liverpool, Eng., v. Nome Beach Light-erage & Transp. Co.*, 133 Fed. 636, 647, 648, 67 C. C. A. 602, 1 L. R. A. (N. S.) 1095.

"Willfulness" implies design. It involves conduct which is quasi criminal. Willfulness and negligence are held inconsistent. Purpose or design is foreign to negligence. Willfulness cannot be inferred from a mere knowledge on the part of operatives of the presence of the injured party. Before it will be inferred, such operatives must have knowledge also of the inability of the injured party to avoid the injury. *Pittsburgh, C. C. & St. L. R. Co. v. Ferrell*, 78 N. E. 988, 989, 39 Ind. App. 515.

In order to constitute "willfulness" or wantonness or reckless indifference to probable consequences, the act done or omitted must be done or omitted with a knowledge or a present consciousness that injury will probably result; and this consciousness is not to be implied from mere knowledge of the elements of the dangerous situation a person may be in and negligent and inadvertent acts in respect of the peril. *Duncan v. St. Louis & S. F. R. Co.*, 44 South. 418, 420, 152 Ala. 118.

The term "willful negligence" is a misleading and contradictory expression. Conduct cannot be both "willful" and "negligent," as "negligence" involves inattention, and "willfulness" intention. *Anderson v. Minneapolis, St. P. & S. S. M. R. Co.*, 114 N. W. 1123, 1126, 103 Minn. 224 (dissenting opinion, citing 8 Words and Phrases, pp. 7468, 7835; *Bolin v. Chicago, St. P., M. & O. Ry. Co.*, 84 N. W. 446, 108 Wis. 333, 81 Am. St. Rep. 911; *Louisville & N. R. Co. v. Perkins*, 44 South. 602, 152 Ala. 133; *Lake Shore & M. S. R. R. v. Bodemer*, 29 N. E. 692, 139 Ill. 596, 32 Am. St. Rep. 218.

Negligence may result from omission respecting duty. An "act" or "wrongful act" denotes affirmative action or performance; and an expression of will or purpose, as distinguished from "omission" or "wrongful omission," which denotes a negative and in-

action. *Randle v. Birmingham Ry., Light & Power Co.*, 53 South. 918, 921, 169 Ala. 314.

The conflict in instructions, submitting the issue of negligence of defendant and the issue of a willful wrongful act, cannot be harmonized on the theory that the term "negligence," as used in the first instruction, covers willful acts, since "negligence" signifies the absence of care and implies a failure of duty, and excludes an idea of intentional wrong, while "willful negligence" implies an intentional failure to perform a manifest duty. *Tognazzini v. Freeman*, 123 Pac. 540, 543, 18 Cal. App. 468.

An instruction that "willful" is what the word implies; it means an act proceeding from a will; done of a purpose; an intention to do it; and that "willfulness" is an act which proceeds from the will, so as to make the act a purpose act—was not error, where the court, in connection therewith, illustrated the difference between "negligence" and "willfulness." *Talbert v. Charleston & W. C. Ry.*, 55 S. E. 138, 139, 75 S. C. 136.

A complaint for willful injury must show that the injurious act was purposely done, with an intent to inflict willfully and purposely the particular injury complained of; "willfulness" being a desire or intent to produce a certain result, and inconsistent with negligence. *Southern Ry. Co. v. McNeeley*, 88 N. E. 714, 715, 44 Ind. App. 126.

## WILLIAM

See Wm.

## WILLING

An instruction that, under the requirements of the law, a valid location of a mining claim may be made when the prospector has discovered such indications of mineral that he is willing to spend his time and money in following with the expectation of finding ore was improperly modified by substituting the word "justified" for the word "willing." The question whether the miner is "willing" to spend his time and money is an entirely different one from the question whether he is "justified" in doing it. The former is a question to be answered by the miner himself, while the latter would present a question for experts and a jury. *Ambergris Min. Co. v. Day*, 85 Pac. 109, 113, 12 Idaho, 108.

## WILLINGLY

As willfully, see Willful—Willfully.

An instruction, in a prosecution for homicide, that, when the law says one must not fight "willingly," it does not mean that he shall not fight willingly or intentionally for his own protection, but that he shall not fight willingly and intentionally to gratify his own desire to fight, is erroneous. The law requires that he must not fight at all,

unless he is free from fault in bringing on the difficulty, and has no reasonable way open for retreat, and the assault on him is of such a character as to endanger life, or to impress a reasonable man that, to save his own life or himself from great bodily harm, it is necessary to strike. *Harbour v. State*, 37 South. 330, 332, 140 Ala. 103.

## WILLOW

Manufactures of, see Manufactures—Manufactured Articles.

## WINCH

A "winch" is a windlass upon the upper deck of a vessel, by means of which freight is elevated or lowered by a rope wound around a drum upon the windlass. *Suderman & Dolson v. Kriger*, 109 S. W. 373, 376, 50 Tex. Civ. App. 29.

## WIND

### WIND AFT

Within the meaning of International Navigation Rules, art. 17, subd. "e," 26 Stat. 326, which provides that the one of two sailing vessels which has the wind aft shall keep out of the way of the other, a vessel has the "wind aft" when it is not more than 2½ points from directly aft. *The Gov. Ames*, 187 Fed. 40, 43, 109 C. C. A. 94.

### WIND SHOT

Evidence held to sustain a finding that plaintiff, a miner, was injured by an explosion of mine gas or mine dust due to insufficient ventilation, and not as a result of a "wind shot," consisting of a failure to make the holes for a blast of sufficient depth or to sufficiently tamp the powder so that when it was exploded it would flash out of the drill holes instead of tearing out the coal. *Nicholson Coal Mining Co. v. Moulden*, 136 S. W. 620, 621, 143 Ky. 348.

### WINDRODE

A vessel is "windrode" when it is held in equilibrium between the wind and tide. *The Ciudad De Reus*, 171 Fed. 470, 473.

### WINDSTORM

"Windstorm," as used in a policy insuring against loss of live stock by tornado, cyclone, or windstorm means more than an ordinary gust of wind no matter how prolonged. *Jordan v. Iowa Mut. Tornado Ins. Co. of Des Moines*, 130 N. W. 177, 178, 151 Iowa, 73, Ann. Cas. 1913A, 266.

## WINDING UP

Where a testator, by his will, directed his executors to proceed with moderation and patience, but with due diligence, to the winding up of his estate, and the question was whether the will as a whole manifested his

intention to have the real estate sold and the proceeds divided, the term "winding up," as used therein, was held to imply a disposition of the estate which would turn it into money. *May v. Brewster*, 73 N. E. 546, 547, 187 Mass. 524.

## WINE

See Native Wine; Still Wine.

A Japanese alcoholic beverage made from rice by processes similar to those in making beer, which resembles still wine in its percentage of alcohol, which in quality is only remotely similar to wine, is not sufficiently similar to warrant its classification as such, under Act July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174. *Nishimiya v. United States*, 131 Fed. 650, 651.

"Wine" is the fermented juice of the grape. To establish the fact that liquor sold in a local option territory was wine, the formula under which the liquor was made, its composition, and the amount of alcohol it contained, as shown by a chemical analysis, could be proven by an expert, or by nonexpert testimony as that the wine sold was intoxicating. The fact that the liquor sold was intoxicating could be shown by any competent evidence, direct or circumstantial. *Nussbaumer v. State*, 44 South. 712, 714, 54 Fla. 87.

Vermuth is not "wine" within either the commercial or the popular meaning of that term, and therefore is not subject to the stamp tax on "sparkling or other wines," provided in War Revenue Act June 13, 1898, c. 448, 30 Stat. 463. *Taylor v. Treat*, 153 Fed. 656.

Vermuth is not a "wine," "cordial," or "liqueur," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174, prohibiting an allowance for the leakage of those three articles. *United States v. Julius Wile, Sons & Co.*, 178 Fed. 269, 270, 101 C. C. A. 574.

### Cider

Cider is not "wine" or any mixture thereof. *Donithan v. Commonwealth*, 64 S. E. 1050, 109 Va. 845.

### As intoxicating liquor

See Intoxicating Liquor.

### As liquor

See Liquor.

## WINE GALLON

The "wine gallon," which is the gallon of 231 cubic inches, is the customs gallon of the United States and should be used in computing the duty on such articles as olives in brine. *J. M. Ceballos & Co. v. U. S.*, 139 Fed. 705.

## WINE GROWER

The term "wine grower," as used in Rev. St. 1899, § 3015, giving a wine grower the right

to sell wine of his own production in any quantity on his own premises, means one who manufactures wine from grapes grown on his own premises. *State v. Miller*, 78 S. W. 643, 104 Mo. App. 297 (citing Stand. Dict. p. 2068; Cent. Dict. p. 6939).

## WINE ROOM

A "wine room" is a place established for the sale of wines. *Barker v. State*, 43 S. E. 744, 745, 117 Ga. 428.

To make a room a "wine room," within Sess. Laws 1891, p. 315, § 1, prohibiting the keeping of a wine room in connection with a saloon into which females are permitted to enter and supplied with liquor, it must be kept as a part of a saloon; the statute intending to designate the place which patrons of the saloon might use for private tipping purposes instead of drinking at the bar. *Ellis v. People*, 88 Pac. 461, 38 Colo. 516 (citing *Walker v. People*, 37 Pac. 30, 5 Colo. App. 37.)

## WING NETS

Fishing with a "wing net," which consists of netting stretched over hoops somewhat similar to barrel hoops, the first of which is about 30 inches in diameter, and of succeeding hoops greatly decreasing in size, and is about 12 feet in length and a wing about 5 feet long on each side, one end of the net being attached to the shore, mouth upstream, does not come within the exception in Acts of 1895, c. 127, p. 256, § 1, allowing minnows to be caught by dip nets not exceeding 6 feet in length. *Freeman v. State*, 100 S. W. 723, 724, 118 Tenn. 95.

## WINNER

All those who have won more than they have lost during one sitting by playing at cards are "winners," within the meaning of Hurd's Rev. St. 1901, c. 38, § 132, which provides that any person who shall at any time or sitting by playing at cards lose to any person so playing any money amounting to \$10, and shall pay the same, may sue and recover the money by action in assumpsit. *Zellers v. White*, 70 N. E. 669, 672, 208 Ill. 518, 100 Am. St. Rep. 243.

The word "winner," as used in Comp. Laws, § 3200, relating to the recovery of money or property lost at gaming, and giving a right of action against the "winner," was not intended to include merely the party in whose favor the wager is theoretically decided, but includes the one to whom, in addition, the money or property wagered has been delivered. Until this delivery is made, he cannot be said in law to have won the money or property; ample redress up to the time of such delivery being given by another section of the statute by suit against the stakeholder. *Armstrong v. Aragon*, 79 Pac. 291, 292, 13 N. M. 19.



## WINNOWER MACHINE

A "winnowing machine" is "a machine in which grain, accompanied by chaff, dirt, cheat, cockle, grass seeds, dust, straw, and other foul [matter] either or all is subjected to a shaking action on riddles and sieves in succession, the while an artificial blast of wind is driven against it on and through the sieves, and as it falls from one to another." The Baker patents, No. 726,812 and No. 736,346, each for a process of treating coffee and the product of such process, which consists of cutting or crushing the roasted coffee bean and winnowing the dust, chaff, and disengaged silver skin of the bean from the granulated product by means of an apparatus designed for the purpose and consisting of a hopper, crushing or cutting rolls, and a screen or sieve through and over which a blast of air is forced, are void for lack of invention, in view of the old and familiar use of the same process in the cleaning of grain, so long known and practiced that a court may take judicial cognizance of it. *Baker v. F. A. Duncombe Mfg. Co.*, 146 Fed. 744, 748, 77 C. C. A. 234 (quoting and adopting the definition in Knight, Mech. Dict. vol. 3, p. 2786).

## WINTER

"Winter" means the cold season, including the last part of one year and the first part of the next. *J. T. Day's Committee v. Exchange Bank of Kentucky (Ky.)* 116 S. W. 259, 260.

## WIRE

See Deadened Wire; Guard Wire; Hot Wire; Jumping a Wire; Live Wire; Messenger Wires; Round Steel Wire. Articles manufactured from, see Articles Within Tariff Act. Coated wire, see Coated. Manufactures of wire, see Manufactures—Manufactured Articles.

The word "wires," in Laws 1890, c. 566, p. 1148, § 65, providing that the occupant of any premises within 100 feet of the wires of any electric light corporation may require it to supply him with electric light, was intended to designate the wire through which was distributed the electricity with which the houses were to be lighted. *Moore v. Champlain Electric Co.*, 85 N. Y. Supp. 37, 39, 88 App. Div. 289.

In the title of St. 1906, p. 79, c. 117, "An act relative to the granting of locations for poles and wires in towns," the word "wires" comprehends their location under, as well as above, the surface of highways. *Metropolitan Home Tel. Co. v. Emerson*, 88 N. E. 670, 672, 202 Mass. 402.

## WIRE-GLASS

"Wire-glass" is a sheet of plate glass having imbedded in its center a fine wire-web. This web strengthens the sheet and prevents its being shattered by fire or a blow. Rough wire-glass is cast in two varieties; one adapted for polishing, the other not. Unpolished wire-glass is used for skylight and area purposes. Polished, or wire-glass plate, is used as ordinary plate glass in large buildings for window lights. In addition to window-light service, however, wire-glass plate, by reason of its imbedded mesh, serves the further purpose of an iron shutter. It is thus a protection against entry and a fire retardant. *Schmertz Wire-Glass Co. v. Pittsburgh Plate-Glass Co.*, 168 Fed. 73, 74.

## WIRING OUT

The process by which electric cars were run out into the street from the building in which they were stored was denominated "wiring out"; the electric power being carried by movable wires 20 to 30 feet long. *Mullen v. Metropolitan St. Ry. Co.*, 85 N. Y. Supp. 134, 89 App. Div. 21.

## WISH

### As creating a trust

"Undoubtedly the word 'wish' may be equivalent to will or request or direct, if the context justifies that meaning." A testator left his property to his wife and daughter, the will reciting that his mother was living, and dependent upon her children, and therefore requested his wife to pay her such sums as might be requisite for her comfort. The will then added, "and it is my wish and expectation that when my wife, J., shall make her will, disposing of the property left her by me, that she will generously remember the children of my deceased brother, W., and such others as she may choose." The will did not create a trust in favor of the children of the deceased brother. *Russell v. United States Trust Co. of New York*, 127 Fed. 445, 447 (citing *Bliven v. Seymour*, 88 N. Y. 469; *Phillips v. Phillips*, 19 N. E. 411, 112 N. Y. 197, 8 Am. St. Rep. 737).

### As elect

The word "elect," as used in a statute providing for the submission of a proposed amendment to a Constitution, and providing that upon the ballot there shall be written or printed the words "for the constitutional amendment or against the constitutional amendment," as the voters shall "elect," is equivalent to the word "wish." *Warfield v. Vandiver*, 60 Atl. 538, 544, 101 Md. 78, 4 Ann. Cas. 692.

## WISH AND DESIRE

Where a will created a trust of the residue of the estate, and provided that, after the death of testator's wife, one-half of the principal of the trust fund should be

paid to her appointee, that it was testator's "wish and desire" that she should appoint the share to testator's daughter and her children, the words "wish and desire" did not constitute a trust but merely expressed a wish. *Holmes v. Dalley*, 78 N. E. 513, 514, 192 Mass. 451.

### WISH AND EXPECTATION

A testator willed and bequeathed two-thirds of all his property to his wife, and one-third to his daughter. The will then contained the following: "And it is my 'wish and expectation' that when my wife J. shall make her will disposing of the property left by me that she will generously remember the children of my deceased brother W." Held that, in the absence of any evidence of circumstances which might effect its construction, such clause did not create a trust in favor of the children of the deceased brother. *Russell v. United States Trust Co. of New York*, 136 Fed. 758, 760, 69 C. C. A. 410.

### WIT

Where a deed has the names of two persons written in the place where the names of subscribing witnesses are usually placed, and the letters "Wit" are written above the names of the two persons, and where the testificandum clause is, "In witness whereof we hereunto set our hands and seals this the 4th day of May, 1903," other facts showing delivery, the attestation of the deed is sufficient. *Richbourg v. Rose*, 44 South. 69, 72, 53 Fla. 173, 125 Am. St. Rep. 1061, 12 Ann. Cas. 274.

### WITH

See Inconsistent With; Left With; Together With.

The fact that an alleged agent used cards having "A. G. S., 'with' J. S. B. Co.," did not by the use of such words define his powers, or indicate whether he was the president or the porter of the company, or merely its traveling solicitor, and would not warrant the defendant or the court in concluding that A. G. S. had been authorized by the plaintiff to dispose of its property. *Jos. Schlitz Brewing Co. v. Grimmer*, 81 Pac. 43, 46, 28 Nev. 235.

As used in a will providing that the testator's wife should receive the house and lot with the furniture contained therein, etc., the word "with" was a word denoting continuity, not separation, so far as the different classes of property as named were to have relation to the words which followed them. *Ludlam v. Ludlam*, 95 N. Y. Supp. 862, 864, 47 Misc. Rep. 232.

The word "with," preceding the grant of the right to set up, operate, and maintain a telegraph or telephone line and also preced-

ing the grant of the right of ingress and egress, imports a close and inseparable union between those rights and the right to maintain the pipe lines, and indicates that the rights granted by the clauses following it were incidental to the pipe line right. *North-eastern Telephone & Telegraph Co. v. Hepburn*, 69 Atl. 249, 251, 73 N. J. Eq. 657.

#### As in addition to

"With" is frequently used in the sense of "in addition to." *Beddow v. Flage*, 126 N. W. 97, 98, 20 N. D. 66.

The word "with," as used in a clause in a will providing that "with" the above legacies I leave them my only heirs of all the real estate credits and real estate that they shall be my only heirs with the obligation to bear the maintenance of the new-born son of my son V.," is to be taken in its ordinary signification, and, where it was previously stated in the will that testatrix would leave "the legacies," it seems apparent that she intended to add to the legacies previously made a devise and bequest of the residuum. *Lavaggi v. Borella*, 67 Atl. 929, 930, 73 N. J. Eq. 419.

#### By synonyms

The word "with" in an information for robbery, charging that defendant then and there willfully, etc., and "with" force and fear, committed the offense, was used as synonymous with "by" and equivalent to the expression "by means of"; the meaning of the word not being limited to accompaniment, association, or proximity, though such is its primary meaning. *State v. Pemberton*, 104 Pac. 556, 557, 39 Mont. 530.

The term "with" denotes or expresses some situation or relation of nearness, proximity, association, connection, or the like. It is used to denote the accompaniment of cause, means, instrument, etc.; sometimes equivalent to "by." *Bertig-Smythe Co. v. Bonsack Lumber Co.*, 86 S. W. 870, 872, 112 Mo. App. 259 (quoting and adopting the definition in *Webst. Dict.*).

### WITH AS LITTLE DELAY AS POSSIBLE

A contract requiring plaintiff to fill defendant's orders for lumber "with as little delay as possible" meant within a reasonable time. *Wm. Cameron & Co. v. Matthews (Tex.)* 124 S. W. 192, 193 (citing 1 Words and Phrases, p. 528).

### WITH COLLECTION

A contract reading "with collection" should be interpreted to mean with a charge for collection; that is to say, a reasonable and customary charge for the nature of the collection which may be necessary. A note payable with collection charges is nonnegotiable, since the payment of the principal sum becomes connected with another and uncertain sum. *Buck v. Harris*, 102 S. W. 640, 125 Mo. App. 365.

**WITH COSTS**

The rule that the words "with costs" or "with costs to the respondents," where there are several respondents, means only one bill of costs is well settled in suits of equity, and some of the cases seem also to apply the same rule to condemnation proceedings, where the owners of the leasehold and reversion appear by separate attorneys. In *re Pine's Stream & East Meadow Stream in Town of Hempstead*, 114 N. Y. Supp. 681, 682, 62 Misc. Rep. 61.

**WITH THE DEED**

A power of attorney is recorded "with the deed" executed in pursuance of it, though it is recorded at an earlier date than the deed. *Flint River Lumber Co. v. Smith*, 49 S. E. 745, 746, 122 Ga. 5, 106 Am. St. Rep. 85 (citing *Rosenthal v. Ruffin*, 60 Md. 324; *Mix v. Hotchkiss*, 14 Conn. 32).

**WITH EVERY OTHER PERSON**

Since Factors Act (Laws 1830, c. 179) § 6, excluding carriers from the benefits of the act, does not exclude pawnbrokers they are entitled to the protection of the act, the phrase "with every other person" in section 3 by necessary implication making the act of general application except as expressly stated. *Freudenheim v. Gütter*, 94 N. E. 640, 644, 201 N. Y. 94.

**WITH EXCHANGE**

Where a negotiable note is executed at one place, and payable at another, the insertion of the words "with exchange" by the payee, without the knowledge or consent of the maker, does not render the note non-negotiable. *First Nat. Bank of Galva v. Nordstrom*, 78 Pac. 804, 805, 70 Kan. 485.

If a note or bill reads for the payment of money "with exchange," it means with a charge for exchange at current or customary rate. The negotiability of a note drawn and payable at the same place is not affected by the words "with exchange." *Buck v. Harris*, 102 S. W. 640, 125 Mo. App. 365.

**WITH INTENT OF BRINGING ACTION**

Code Civ. Proc. § 73, provides that no attorney shall directly or indirectly buy or be in any manner interested in buying anything in action, etc., "with the intent and for the purpose of bringing an action thereon." Held that, where one against whom there was a valid claim was given ample notification that an action would be brought thereon, but he failed to pay it, the subsequent purchase of the claim by an attorney was not violative of the statute, as the statute only applies to the purchase of claims, where the primary purpose is to enable the bringing of an action. The court in *Moses v. McDivitt*, 88 N. Y. 62, 64, in commenting upon the language of this section, says: "This language is significant and indicates that a mere intent to bring a suit on a claim purchased does not constitute the offense. The purchase must be made for

the very purpose of bringing such suit, and this implies an exclusion of any other purpose. As the law now stands, an attorney is not prohibited from discounting or purchasing bonds and mortgages and notes, or other choses in action, either for investment or for profit, or for the protection of other interests, and such purchase is not made illegal by the existence of the intent on his part at the time of the purchase, which must always exist in the case of such purchases, to bring suit upon them if necessary for their collection. To constitute the offense, the primary purpose of the purchase must be to enable him to bring a suit, and the intent to bring a suit must not be merely incidental and contingent." The court adds that this case has never been overruled or criticised, so far as it has been able to discover, and it undoubtedly states the objects and limitations of the statute. *Wightman v. Catlin*, 98 N. Y. Supp. 1071, 1073, 113 App. Div. 24.

**WITH INTENT TO INTIMIDATE**

Gen. St. 1902, § 1296, provides that one who threatens or uses any means to intimidate one to compel him to do, or abstain from doing, a lawful act, or who persistently follows one in a disorderly manner or injures or threatens to injure his property, "with intent to intimidate him," shall be fined. Held, that the quoted clause does not qualify all the provisions preceding it and is not the only language making intent an essential element of the crime defined. *State v. McGee*, 72 Atl. 141, 142, 81 Conn. 696.

**WITH INTEREST**

Where plaintiffs failed to comply with an order directing that they deposit with the New York City chamberlain a specified sum, "with interest" from May 12, 1905, to the credit of the action, and were thereupon adjudged in contempt, it was improper for the court to permit plaintiffs to purge themselves by depositing the amount directed, "with interest" at 2½ per cent., as the words "with interest" meant interest at the legal rate of 6 per cent. *Lawrence v. Binninger*, 106 N. Y. Supp. 500, 501, 121 App. Div. 701.

Under Laws 1893, p. 1447, c. 644, directing the assessors to divide the assessment imposed upon any lot for street improvements into 20 annual installments and each year thereafter for 20 years to assess an amount equal to one of said annual installments, "with interest" upon the lot, the interest to be added to the installment is only the interest upon the installment to be paid in the year during which the assessment is imposed, and not interest upon all the installments remaining unpaid. In *re Hagemeyer*, 99 N. Y. Supp. 369, 371, 113 App. Div. 472.

If a contract reads, for the payment of money "with interest," it means with a charge of interest at the legal rate. *Buck v. Harris*, 102 S. W. 640, 125 Mo. App. 365.

A judgment awarding defendant a certain sum of money, "with interest thereon," on a cross-complaint, should be construed as allowing legal interest only from the date of its rendition. *Mixer v. Mixer*, 83 Pac. 273, 274, 2 Cal. App. 227.

The words "with interest annually" are not ordinarily used in notes signed by sureties for the purpose of constituting the maker the agent of the sureties to renew the note, but to prescribe the rule by which the interest is to be computed. So the mere fact that a note is payable on demand, with interest annually, has no tendency to prove that the sureties intended to constitute the maker their agent to renew it. *Newell v. Clark*, 61 Atl. 555, 73 N. H. 289.

#### WITH LIKE INTENT

The words "with like intent," as used in the part of the section prohibiting the bringing into the United States, with intent to pass, any forged, counterfeited, or altered obligation of the United States, refers only to the intent to defraud, and not to the intent to pass, so that an indictment charging possession with knowledge of the counterfeit character of the obligation was not defective for failure to charge an intent to pass the same, in addition to an intent to defraud. *United States v. Provenzano*, 171 Fed. 675, 676.

#### WITH MALICE AFORETHOUGHT

See, also, *Malice Aforethought*.

In an indictment for murder, the words "with malice aforethought" are equivalent to the words of the statute, "of his malice aforethought," and are sufficient; they clearly conveying the meaning of the statute, and fully stating the elements of the crime so as to apprise accused of the crime with which he is charged. *State v. Fletcher*, 53 South. 877, 879, 127 La. 602.

#### WITH NOTICE

The expression "with notice" usually means and includes all facts discoverable by reasonable inquiry. *Third Nat. Bank of Columbus v. Poe*, 62 S. E. 826, 829, 5 Ga. App. 113.

#### WITH PREJUDICE

See *Without Prejudice*.

#### WITH THE PRIVILEGE

A lease of premises "for the term of three years, with the privilege of five years, for" a certain sum per annum, is not a lease for three years with the privilege of five additional years. *Geusler v. Nicholas*, 115 N. W. 458, 460, 151 Mich. 529, 14 Ann. Cas. 452.

A lease providing that the lessees were to take the premises "for one year and the privilege of four years," at \$500 per year, meant that the term was for one year, but at the election of the lessees might be for

four years. The particle "and" indicates the relation of connection or addition. Expressions in text-books and decisions may be found treating like clauses, where the word "with" is used instead of "and." But, in the connection employed, the insertion of "with" in place of "and" would not change the meaning. *Willis v. Weeks*, 105 N. W. 1012, 1014, 129 Iowa, 525.

#### WITH SAME EFFECT

Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087), which went into effect January 1, 1912, changed the amount required to confer federal jurisdiction from a sum in excess of \$2,000 to a sum in excess of \$3,000. Section 299 exempted from the operation of the act all pending proceedings and rights accruing or accrued, providing that all such suits and proceedings for causes arising or acts done prior to that date might be commenced and prosecuted within the same time, and with the same effect, as if the repeal or amendments had not been made. Held, that the phrase "with the same effect" must be construed to mean with the same result, or with the same consequence, and that where a cause of action involving less than \$3,000 but more than \$2,000, exclusive of interest and costs, arose November 14, 1911, and suit was brought on January 25th following, it was governed by the old law, and therefore involved an amount sufficient to sustain federal jurisdiction. *Taylor v. Midland Valley R. Co.*, 197 Fed. 323, 324.

#### WITH STRONG HAND

As applied to trespass, the words "strong hand" mean something more than a common trespass. *Polack v. McGrath*, 25 Cal. 54, 59.

#### WITH THE WILL

See *Found with the Will*.

### WITHDRAW

#### WITHDRAWAL

One provoking a difficulty may not rely on self-defense unless he in good faith withdraws therefrom, and a retreat which may be a continuance of hostilities is not sufficient, a "withdrawal" being the abandonment of the difficulty by the party provoking it, and notice of such abandonment by the other party. *State v. Heath*, 141 S. W. 26, 29, 237 Mo. 255.

#### WITHDRAWING STOCKHOLDERS

A provision contained in a certificate of membership in a building association that no money should be drawn from the loan fund, except to make loans on security, and to pay amounts due withdrawing shareholders, does not prevent the payment of an amount called for by the certificate on its maturity; the term "withdrawing stockholders" meaning those who withdraw at the

maturity of their certificates or afterwards, as well as those withdrawing before the maturity thereof. *Vought v. Eastern Building & Loan Ass'n of Syracuse*, 65 N. E. 496, 497, 172 N. Y. 508, 92 Am. St. Rep. 761.

## WITHHOLD

The word "withhold" is broader than either conceal or secrete; for example, a bankrupt may withhold money from his trustee by stubbornly refusing to turn it over without concealing the same, though whatever property is withheld from an officer by fraud is concealed. *United States v. Phillips*, 196 Fed. 574, 576.

Code Civ. Proc. § 283, provides that, in an action for recovery of specific property, the jury may assess the value of the property and assess damages, if any, claimed, which the prevailing party has sustained by reason of the withholding of the same. Section 299 provides that, in an action to recover personalty, judgment may be for possession, or recovery of possession, or the value thereof, if delivery cannot be had, and damages for "detention." Held, not to authorize punitive damages, in an action for claim and delivery. By a well-known rule of construction, for the sake of consistency the word "withholding," used in section 283, is to be interpreted and applied as in section 299. To be consistent with 299, the provision of 283, as to damages to the prevailing party, "sustained by reason of the 'detention or taking and withholding' such property," must be held to mean that, when the prevailing party is the plaintiff, the jury must assess the damages for the detention, but when the prevailing party is the defendant, and the property has been taken in the claim and delivery proceedings, the jury may assess for such taking and for the withholding. *Tittle v. Kennedy*, 50 S. E. 544, 546, 71 S. C. 1, 4 Ann. Cas. 68.

Under Code, § 1374, providing that, "when property subject to taxation is withheld, overlooked or from any other cause is not listed or assessed," the county treasurer may within a specified time demand of the owner the amount the property should have been taxed in each year the same was so withheld or overlooked and not listed and assessed, etc., a county treasurer may list for taxation all taxable property which has not been listed for taxation, and may list for taxation property which the assessor knowingly omitted because of the erroneous decision that it was not taxable; the word "withhold" meaning to hold back, to restrain, to keep from action, to refrain from giving, and the word "overlook" meaning to look beyond, so that what is near by is not perceived, to omit to see by looking at other objects, to refrain knowingly from notice, etc. *Talley v. Brown*, 125 N. W. 248, 253, 146 Iowa, 360, 140 Am. St. Rep. 282.

## WITHIN

See Lying or Being Within.

Under a statute providing that all railroad corporations which have fenced their right of way may be required to make crossings through their fence and over their roadbed every one and one-half mile, provided that, if such fence shall divide any inclosure, at least one opening shall be made "within" such inclosure, a gate on a lane which ran to a crossing is not within an inclosure, and hence a railroad company is bound to keep it shut, so as maintain the fence for the protection of stock. *Chicago, R. I. & G. R. Co. v. Wilson (Tex.)* 124 S. W. 132, 133.

"Unto" a jail or building "is not a common form of expression, and in no popular sense has it ever been used to mean to convey 'within' a building. Probably no case can be cited where that word has ever been construed to be synonymous with, or to mean 'into.'" *People v. Klammer*, 100 N. W. 600, 137 Mich. 399.

Where a policy insuring an automobile provided that the policy should not cover loss or damage caused by fire originating "within" the vehicle, the word "within" was used as the antithesis of "extrinsic" or "without," and not as a synonym of "interior," so the policy did not cover loss by fire resulting from the explosion of gasoline, which, after an accident to the automobile, flowed from its gasoline tank and covered the surface of certain water in a ditch, and was thereafter ignited from fire burning in an oil lamp on the automobile. *Preston v. Aetna Ins. Co.*, 85 N. E. 1006, 1008, 193 N. Y. 142, 19 L. R. A. (N. S.) 133.

Laws 1905, c. 116, § 1, provides that the fact that any person summoned to serve as a juror in any court shall have served as a juror at any prior term within one year next preceding shall be sufficient to excuse such person from service and may be ground for challenge for cause. An act of 1889 (*Mills' Ann. St. § 2595*) used the language "within the year next preceding," and an act of 1891 (*Mills' Ann. St. Rev. Supp. § 2609*) used the language "within one year then last past." Held, that the act of 1905 means at any prior term within a year next preceding, regardless of the fact that the time of service may not have been within a year and that it is the terms of court which control. *Denver City Tramway Co. v. Kennedy*, 117 Pac. 167, 168, 50 Colo. 418.

Election Law (Consol. Laws 1909, c. 17) § 381, provides that, if any certified original statement of the result of the canvass in an election district show that any of the ballots were rejected by the inspectors as void, a mandamus may, upon the application of any candidate voted for at such election, within twenty days thereafter issue out of

the Supreme Court and the inspectors, requiring the recount of such ballots. Held, that the words "within twenty days thereafter" refer to the application of mandamus, and not to the actual issuance of the writ within that time after the election, so that it was sufficient if the application was made within that time. *Tamney v. Atkins*, 136 N. Y. Supp. 865, 867, 151 App. Div. 309.

Under Kirby's Dig. § 5703, permitting redemption from a tax sale "within one year after the sale" the year begins to run from the date of the sale, and not from that of the confirmation. *Brasch v. Mumey*, 138 S. W. 458, 460, 99 Ark. 324, Ann. Cas. 1913B, 38.

A fire policy, which requires insured "within sixty days after a fire" to render a statement to insurer, requires submission of the statement within sixty days after the fire has terminated or abated to such an extent that an inspection of the property damaged may be made. *Slócum v. Saratoga & Washington Fire Ins. Co. of Saratoga & Washington Counties*, 134 N. Y. Supp. 72, 73, 149 App. Div. 867.

The phrase "within ten days from date of invoice" in a contract for the sale of goods, terms sixty days, or 2 per cent. discount for cash, after deducting freight, if remitted within ten days from the date of invoice, means that the buyer is entitled to 2 per cent. discount if he make remittances within ten days from the date of the arrival of the goods at destination. *Taussig v. Southern Mill & Land Co.*, 101 S. W. 602, 604, 124 Mo. App. 209.

In order that a former discharge in voluntary bankruptcy proceedings should be "within six years," so as to defeat the right to a second discharge in subsequent proceedings, it must have been granted within six years prior to the hearing on the application for the second discharge. *In re Jordan*, 142 Fed. 292.

As used in the bankruptcy law, authorizing the discharge of a bankrupt unless he has been granted a discharge in bankruptcy within six years, the expression "within six years" measures the time between the first and second discharge, and not between the first discharge and the filing of the second petition in bankruptcy. *In re Smith*, 155 Fed. 688, 689 (citing *In re Little*, 137 Fed. 521, 70 C. C. A. 105).

Comp. Laws 1897, § 896, provides that it shall not be necessary to prepare a bill of exceptions within 10 days after judgment, but, if any party desires to have any material matter not apparent on the face of the record made a part of the record, he may prepare a bill of exceptions and present the same to the judge at any time within 20 days before the first day of the term of the Supreme Court at which the case shall be docketed; and the judge shall settle and sign the excep-

tions at least 10 days before such term, unless, for cause, he shall extend the time. Held, that the word "within" as there used was a legislative pleonasm used in repetition of the pre-existing act of 1880, requiring settlement "within thirty days after judgment," and that the words "at any time within twenty days" shall be construed as meaning at any time not less than 20 days, so that a bill of exceptions in a criminal case under such section must be settled and filed at least 10 days before the term of the Supreme Court at which the case is first docketed unless the time is extended by order of the judge. *United States v. Sena*, 106 Pac. 383 385, 15 N. M. 187.

The phrase "within two miles of," as used in Pol. Code Cal. § 3488, excepting tide lands "within two miles of" any incorporated city or town from the operation of the law authorizing the sale of state lands, does not mean merely lands outside of the limits of the city, though within two miles, but refers also to lands actually within the city limits. *Williams v. City of San Pedro*, 94 Pac. 234, 235, 153 Cal. 44.

#### As during

The word "within," in Code 1907, § 4324, providing that, where a garnishee fails to answer, the conditional judgment must be rendered, which will be made absolute unless he answers within the first three days of the next term, means "during," though the word as used in statutes may mean before the expiration of the last day. *First Nat. Bank v. Dimmick (Ala.)* 58 South. 658, 666.

#### As not later than

The word "within," as used in Laws 1901, p. 198, c. 50, § 5, as amended by Laws 1905, p. 932, c. 770, § 1 (2), providing that any person aggrieved by the taking of land for a highway may, within six months after the change of road or new road is completed, apply for a jury to assess damages, means "not later than" six months after the road has been changed or the new road has been opened or completed. *In re Wittkowsky's Land*, 55 S. E. 617, 618, 143 N. C. 247.

In an action tried in the justice court, a motion for a new trial for insufficiency of the evidence was filed after verdict, but before judgment. The statute (Comp. Laws 1907, § 3742) provides that a new trial may be granted by the justice on motion made within ten days after the entry of judgment. Held, that the words, "within ten days after," fixed only the limit beyond which the motion might not be filed, and that the motion was not prematurely made. *Bellion v. Durand*, 117 Pac. 798, 799, 39 Utah, 532.

On the appointment of a receiver for a railroad company, defendants formed themselves into a reorganization committee, and invited the first mortgage bondholders to deposit their bonds with the committee for

mutual protection and as preliminary to the preparation of a reorganization of the corporation. The deposit agreement gave the committee title to the bonds, with power to dispose of them in acquiring the railroad property either before or after formulating a plan, and also declared that any holder of a certificate of deposit might within sixty days after first publication of the plan withdraw his bonds on paying his pro rata share of the committee's expenses and be relieved from the obligation of the agreement, etc. The agreement, however, imposed no obligation on the committee to prepare and present a plan at any time; the committee reserving the right to return the deposited bonds. Held, that the word "within," as used in the clause "within sixty days" from the publication of the plan of reorganization, must be construed in the sense of "before," and hence depositing bondholders, on becoming dissatisfied with the acts of the committee before any plan had been formulated or promulgated, were entitled to withdraw from the agreement and to a surrender of their bonds. *Colonial Trust Co. v. Wallace*, 183 Fed. 897, 898.

A provision in a will that legacies shall "be paid 'within three years' from the probating of this will at the discretion of the trustees" meant that the legacies were to be paid within three years of the probate of the will, or sooner, at the discretion of the executors. *Pope v. Hinckley*, 95 N. E. 798, 800, 209 Mass. 323.

**As to**

See To.

**As wholly within**

A county seat is "within five miles" of the geographical center of the county, within *Sayles' Ann. Civ. St.* 1897, art. 811, providing that, when the county seat is within five miles of the geographical center, it shall not be removed except by a two-thirds vote of the electors of the county voting on the subject, where any part of the county seat would be included within a circumference described around such center with a five-mile radius, although the whole of the county seat is not within such circumference. *Ralls v. Parish*, 149 S. W. 810, 812; *Id.*, 147 S. W. 564, 105 Tex. 253.

**Holidays excluded**

Notice was posted in a custom house that it would be closed June 17th—a holiday observed by local custom, but not established by law. Certain importers, having notice of the closing of the custom house on that day, which was the tenth day after the liquidation of their entry, filed a protest on the day following. Held, that the protest was filed in accordance with the requirements of section 2931, Rev. St., providing that protests shall be made "within ten days after the ascertainment and liquidation of

the duties." *Frost & Adams v. Saltonstall*, 129 Fed. 481, 482.

**WITHIN ANY COUNTY OR PRECINCT**

The words "within any county or precinct," as used in Gen. Laws 30th Leg. p. 166, c. 81, § 1, subdiv. 2, making one a creator and promoter of a public nuisance who establishes and conducts a saloon "within any county or precinct" of the state where the sale of intoxicating liquors has been prohibited by law, must be construed to mean and include, not only the entire county or precinct, but any definite or prescribed portion thereof within which the sale of intoxicating liquors has been prohibited and in which it is made unlawful for a person to manage or conduct any public place or business where such liquors are stored, drank, or sold. *Paul v. State*, 106 S. W. 448, 451, 48 Tex. Civ. App. 25.

**WITHIN CITY**

See Property within City.

**WITHIN THE COMMONWEALTH**

See Incorporated within the Commonwealth.

**WITHIN THE CURTILAGE**

Under Laws 1905, p. 114, penalizing drunkenness "within the curtilage of any private residence," the appearing in an intoxicated condition in any portion of the area enclosed by the curtilage, whether it be within or without the dwelling house, is a violation of the act. *Haines v. State*, 70 S. E. 84, 86, 8 Ga. App. 627.

**WITHIN THE DISTRICT**

Shares of stock in a incorporated company, held and claimed by a nonresident of the district where the company has its domicile or is engaged in business, cannot be considered "personal property within the district," so as to authorize the court, in a suit in which complainant sets up title to the stock, to order the holder to be constructively served in the manner provided by statute. *McKane v. Burke*, 132 Fed. 688, 689 (citing *Kilgour v. New Orleans Gaslight Co.*, 2 Woods, 144, 14 Fed. Cas. 468).

**WITHIN IMMEDIATE KNOWLEDGE**

The words, "in his presence," as used in Pen. Code 1910, § 917, authorizing an officer to arrest without a warrant if the offense is committed in his presence, and the words "within his immediate knowledge," as used in section 921, authorizing a private person to arrest where the offense is committed in his presence or within his knowledge, are synonymous. *Piedmont Hotel Co. v. Henderson*, 72 S. E. 51, 55, 9 Ga. App. 672.

**WITHIN THE JURISDICTION**

A foreign corporation not subject to process issuing from the courts of the state is not "within its jurisdiction," within the

meaning of Const. U. S. Amend. 14, § 1, providing that no state shall deny to any person "within its jurisdiction" the equal protection of its laws. *Merchants' Nat. Bank of Lafayette, Ind., v. Ford*, 99 S. W. 280, 282, 124 Ky. 403.

A foreign corporation applying for admission to do business in a state, although a "person," is not within the jurisdiction of such state within Const. U. S. Amend. 14, forbidding a state to deny to any person "within its jurisdiction" the equal protection of its laws. *State ex rel. Atlantic Horse Ins. Co. v. Blake*, 144 S. W. 1094, 1096, 241 Mo. 100, Ann. Cas. 1913C, 1283.

A foreign corporation, which has complied with state laws, so that process can be served upon it, and paid the fees required for the privilege of doing business in the state, and also purchased property in the state and entered upon the transaction of the business authorized, is "within the jurisdiction of the state" within Const. U. S. Amend. 14, forbidding a state to deny to any person "within its jurisdiction" the equal protection of the laws. *Southern Ry. Co. v. Greene*, 49 South. 404, 409, 160 Ala. 396.

#### WITHIN THE LIMITS

Where a street railroad company agreed to issue transfer tickets within the city limits, "within the city limits" was interpreted as not to apply only to limits as then fixed, as it must have had in contemplation that the city in the future might exercise the right of annexing territory and thereby extend its limits. *Indiana R. Co. v. Hoffman*, 69 N. E. 390, 401, 161 Ind. 593.

The term "within the corporate limits," as used in a city ordinance requiring the ringing of the engine bell and the sounding of the whistle at every crossing while an engine or cars are in motion within the city limits, and prohibiting a greater rate of speed than seven miles an hour within the city limits, includes railroad yards situated within the city. *Gulf, C. & S. F. Ry. Co. v. Melville (Tex.)* 87 S. W. 863, 865.

The phrase "within the limits of two miles thereof," in a city ordinance making it unlawful for any one to sell intoxicating liquors within the limits of two miles of the city, does not mean within the city, but within a two-mile limit without the city. *Territory v. Robertson*, 92 Pac. 144, 146, 19 Okl. 149.

#### WITHIN ONE YEAR

See To be Brought within One Year.

#### WITHIN SAID COUNTY

In an agreed statement, stating that the assessment on the franchise of a telegraph company represents the valuation of the right or privilege of carrying on telegraph business "within the said county," the quoted phrase refers to business originating or terminating in or passing through the offices in

the county, and cannot be construed to refer to business wholly between points within the county. *State v. Western Union Telegraph Co.*, 117 Pac. 93, 94, 42 Mont. 445.

#### WITHIN SAID LIMITS

See Streets within said Limits.

#### WITHIN SCOPE OF EMPLOYMENT

See Scope of Employment.

#### WITHIN A SPECIFIED TIME

As used in Code Civ. Proc. § 1810, permitting an order for inspection of evidence to be had "within a specified time," the words "within a specified time" indicate that the inspection must not be extended over a longer time than may be reasonably necessary under the facts of the particular case, to be fixed by the court and not left to the discretion of the moving party. *State ex rel. Boston & M. Consol. Copper & Silver Min. Co. v. District Court of Second Judicial Dist.*, 76 Pac. 206, 209, 30 Mont. 206 (citing *State ex rel. B. & M. C. C. & S. M. Co. v. District Court of Second Judicial Dist.*, 71 Pac. 602, 27 Mont. 441, 94 Am. St. Rep. 831).

#### WITHIN THE STATE

See Property Not within the State.

Business done within the state, see Business Done.

Capital employed within the state, see Capital Employed.

Employed within the state, see Employed.

In a statute providing that "all actions hereafter accruing for injuries to persons caused by the wrongful act, neglect, or default of any person or persons, firm or firms, individual or individuals, corporation or corporations, within this state, shall be commenced and instituted within two years next after the cause of such action shall have accrued and not after," the phrase "within this state" is not a part of the description of the torts, and therefore an action for a tort committed outside the state must be brought within two years. *Mooney v. Camden Iron Works*, 83 Atl. 770, 83 N. J. Law, 32.

The mere presence in the state of notes and mortgages belonging to a nonresident does not give them a situs therein for the purpose of taxation, notwithstanding Ky. St. 1903, § 4020, providing that all personal estate "within the state" shall be taxable under the state laws, and Const. § 171, providing that taxation shall be uniform on all property subject to taxation "within the state," for, until the situs of such property is changed by law, it is not "within the state" for taxing purposes. *Commonwealth v. Northwestern Mut. Life Ins. Co. (Ky.)* 107 S. W. 233, 234.

Though it may be doubted whether personal property casually brought into the state for a temporary purpose, as by a visitor or



traveler, is "within the state," within the meaning of the tax law, yet wherever the money of a nonresident is invested in the state, as in a bond and mortgage, or deposits are made by him in savings banks, or the property is habitually kept, even for safety, in the state, it is "within the state," within the meaning of that law. *Buck v. Beach*, 71 N. E. 963, 966, 164 Ind. 37, 108 Am. St. Rep. 272.

### WITHIN THREE DAYS

See Day.

### WITHIN A YEAR

See Not to be Performed within a Year.

Where a wife deserted her husband December 8, 1896, and the husband began a suit for divorce on July 1, 1899, a finding that, long prior to the commencement of the action for divorce, defendant returned to plaintiff, is not a finding that she returned "within a year" of the desertion, so as to cure the desertion, as provided by statute. *Kusel v. Kusel*, 81 Pac. 297, 147 Cal. 52.

### WITHOUT

Under Rev. St. 1899, § 5908, providing that certain cities shall have power to borrow money or to issue bonds for the purpose of erecting certain public works and buildings "without increasing the annual rate of taxation," the word "without" need not be read as meaning "unless" or "except." Good usage permits its meaning to be, when employed in a correct prepositional sense, "independently of," or "otherwise than with." So read, the phrase would stand, "independently of increasing the annual rate of taxation." In other words, the annual rate of taxation was to be left to be used for every-day municipal purposes, and any rate of taxation rendered necessary by the bond issue should be otherwise than by increasing such annual rate which by the Constitution is devoted to the municipal life proper. *Evans v. McFarland*, 85 S. W. 873, 879, 186 Mo. 703 (citing *Webst. Int. Dict.*; *Anderson's Law Dict.*).

### WITHOUT ADDITION OR ERASURE

A written contract providing that the machine shall be warranted according to the terms of the written warranty, "without addition or erasure," did not preclude the agent of the seller from waiving the terms of the written warranty, or some of them, after the machine had been delivered. *McCormick Harvesting Mach. Co. v. Hiatt*, 95 N. W. 627, 629, 4 Neb. (Unof.) 587.

### WITHOUT ADMINISTRATION

An antenuptial contract, which provides that the wife, on the death of the husband, shall receive from his estate "without any administration" \$1,000, does not require the husband to provide the sum by will or other affirmative means, but the contract makes

the wife a creditor, and authorizes collection of her claim in the mode applicable to creditors of estates; the quoted phrase merely allowing the wife to receive the sum in advance of complete administration and distribution. In *re Warner's Estate*, 111 Pac. 352, 353, 158 Cal. 441.

### WITHOUT ANY PERSON IN CHARGE

Where a laundry wagon driver left his team standing at the curb unattended while he went into the second story of a building, 40 to 50 yards away and 30 feet from the sidewalk, to deliver some articles from the laundry, the team was left standing "without any person in charge," within the meaning of an ordinance punishing such neglect, and the occasion was not within an exception when the vehicle is being loaded and unloaded, which exception is not to be extended so as to include more than such temporary abandonment of the reins as is reasonably incident to loading and unloading by the driver. *Excelsior Steam Laundry Co. v. Lomax*, 52 South. 347, 166 Ala. 612.

### WITHOUT AUTHORITY OF LAW

An indictment for murder must allege that the killing was done "without authority of law," but it need not allege it in the exact language of the statute, the use of any other words equivalent in effect and meaning being sufficient; and the word "unlawfully" is the full equivalent in effect and meaning of the phrase "without authority of law" as used in the statutory definition of murder. *Fooshee v. State*, 108 Pac. 554, 559, 3 Okl. Cr. 666.

Prima facie at least the father is entitled to the custody of his minor children as against the exclusive possession by the mother, and any detention of such children from the father by the mother may be "without lawful authority," within Gen. St. 1906, § 2248 et seq., regulating the use of the writ of habeas corpus. *Porter v. Porter*, 53 South. 546, 547, 60 Fla. 407, Ann. Cas. 1912C, 867.

### WITHOUT A CERTIFICATE

Under Medical Practice Act (Laws 1899, p. 275) § 6, which imposes a penalty for practicing medicine "without a certificate" issued by the state board of health, an action for penalty may be maintained after revocation of a license, since one whose certificate has been revoked is without a certificate as much as one to whom no certificate has been issued. *People v. Apfelbaum*, 95 N. E. 995, 999, 251 Ill. 18.

### WITHOUT CHILDREN

See Die Without Children.

### WITHOUT CLAIM FOR DAMAGE

Where the grantor of land by conveyance and lease reserved to himself the right to flow said premises by the waters of the river as they may be raised by the dam belonging to the lessor as the dam now exists, or might

thereafter be raised or lowered, the words "without claim for damage" are unimportant, and mean no more than that the lessor might exercise the rights reserved therein without claim for damage on the part of the lessees. *Stadler v. Missouri River Power Co.*, 139 Fed. 305, 307, 71 C. C. A. 435.

### WITHOUT CONSENT

Where the statutes defining rape contain the words "against her will," the indictment should contain the words of the statutes, instead of the words "without her consent," for, "though the former ['against her will'] are a permissible substitute for the latter ['without her consent'], it is not so plain that the latter is such for the former." *Beard v. State*, 97 S. W. 667, 669, 79 Ark. 293, 9 Ann. Cas. 409.

Upon the trial of one under indictment for rape the court did not err (the evidence authorizing it) in instructing the jury: "If you believe and find from the evidence submitted in this case that the defendant now on trial had knowledge of Penny Jones [the prosecutrix, and the wife of another], and that at the time she was asleep and not consenting, or having given the defendant any reason to believe she consented, and the sexual connection was against her will, the jury would be authorized to find that the act was one of rape. Carnal knowledge of a woman while she is asleep and unconscious of the act, and her body being penetrated before she awakes, would be against her will and without her consent, and would constitute the offense of rape, unless she had given the party charged with the rape some reason to believe that she consented to the act." *Harvey v. State*, 14 S. W. 645, 53 Ark. 425, 22 Am. St. Rep. 229; *Maupin v. State* (Ark.) 14 S. W. 924; *Malone v. Com.*, 15 S. W. 856, 91 Ky. 307; *Payne v. State*, 49 S. W. 604, 40 Tex. Cr. R. 202, 76 Am. St. Rep. 712; *State v. Shroyer*, 16 S. W. 286, 104 Mo. 441, 24 Am. St. Rep. 344; *State v. Welch*, 89 S. W. 945, 191 Mo. 179, 4 Ann. Cas. 681. In *Gore v. State*, 46 S. E. 671, 119 Ga. 418, 100 Am. St. Rep. 182, it was held that the words "against her will," in the definition of rape, are synonymous with "without her consent," and that therefore "a man who had sexual intercourse with an imbecile female; who is mentally incapable of expressing any intelligent assent or dissent, or of exercising any judgment in the matter, is guilty of rape, though no more force be used than is necessary to accomplish the carnal act, and though the woman offer no resistance." This ruling in effect authorized the instruction complained of. See, also, *Carter v. State*, 35 Ga. 263; *Com. v. Burke*, 105 Mass. 376, 7 Am. Rep. 531; *Brown v. State*, 76 S. E. 379, 138 Ga. 814.

In a prosecution for receiving stolen goods, a charge authorizing a conviction, if the jury should find that the property was un-

lawfully stolen from the possession of the owner by some person other than defendant, with the intent on the part of the thief to convert the property to his own use and to permanently deprive the owner thereof "without its consent," and the defendant afterwards received the property into his possession, knowing at the time he received the property that it was stolen, was not subject to the objection of failing to require the jury to find, in order to convict defendant, that the taking was without the owner's consent. The clause "without its consent" evidently refers to the stealing, taking, and carrying away, as well as to the conversion of the property. *State v. Sakowski*, 90 S. W. 435, 440, 191 Mo. 635, 4 Ann. Cas. 751.

### WITHOUT DELAY

See At Once.

The requirement of the administration of justice "without delay" means without unreasonable and unnecessary delay. *Ex parte Ryan*, 50 South. 385, 389, 124 La. 356.

By the use of such vague and indefinite terms as "without delay" in a statute merely prescribing the form and requisites of a return of a commission to take depositions, the statute is meant to be directory, and in the absence of anything to show that the delay has prejudiced appellant, or that appellee is chargeable therewith, the motion to suppress the deposition should be overruled. *Kane v. Sholars*, 90 S. W. 937, 938, 41 Tex. Civ. App. 154.

In a contract to indemnify a person in case of accident, for injury sustained by violent means which shall, "Independently of all other causes, immediately, wholly, and continuously prevent him from the prosecution of any and every kind of business pertaining to his occupation," the word "immediately" is not synonymous with "instantly," "at once," and "without delay." A disability is immediate, within the meaning of such contracts, when it follows directly from an accidental hurt, within such time as the processes of nature consume in bringing the person affected to a state of total incapacity to prosecute every kind of business pertaining to his occupation. *Order of United Commercial Travelers of America v. Barnes*, 80 Pac. 1020, 1023, 1024, 72 Kan. 293, 7 Ann. Cas. 809.

### WITHOUT EXCUSE OR JUSTIFICATION

Though Comp. Laws 1897, § 1379, uses the word "unlawfully" in describing the crime of assault with a deadly weapon, it was not error in an instruction as to the circumstances under which defendant might be convicted, to omit the word "unlawfully" where the jury were informed in such instructions that the assault must have been committed without "excuse or justification"; such phrase being

clearly equivalent to the word "unlawfully." *Territory v. Gonzales*, 89 Pac. 250, 252, 14 N. M. 31.

#### WITHOUT FAULT

One is not "without fault," as used in the law of self-defense, who does that which a reasonable man would expect to bring on a physical encounter, and which did actually contribute to bringing it on. It would be manslaughter to kill a man found in the house for purposes of illicit intercourse with the owner's daughter; but such wrongful act on the part of the person entering the house will deprive him of any right of self-defense, should he kill the owner of the house, who attacks him on the spot. *State v. Emerson*, 58 S. E. 974-978, 78 S. C. 83.

#### WITHOUT GOOD CAUSE

In a prosecution of a husband for abandonment of his wife "without good cause," the phrase quoted means such cause as will authorize a decree of divorce in favor of the husband. *State v. Williams*, 116 S. W. 1128, 1129, 136 Mo. App. 304.

#### WITHOUT GRACE

The words "without grace," as used in a note given for a premium on an insurance policy, the policy providing for a grace of one month on the payment of all premiums except the first, refers to the month of grace named in the policy, and not to the days of grace allowed by the law merchant in the payment of certain negotiable instruments. *Henningsen v. United States Fidelity & Guaranty Co.*, 143 Fed. 810, 814, 74 C. C. A. 484.

#### WITHOUT HEIRS

See *Die Without Heirs*.  
See, also, *Having No Heir*.

#### WITHOUT HER CONSENT

Against her will synonymous, see *Against Her Will*.

#### WITHOUT IMPEACHMENT OF WASTE

In the case of an estate devised "without impeachment of waste," the quoted words "do not operate as a license to the tenant to destroy the estate or commit malicious waste." *Wiley v. Wiley*, 85 N. W. 702, 1 Neb. (Unof.) 350 (citing *Stevens v. Rose*, 37 N. W. 205, 69 Mich. 259).

#### WITHOUT ISSUE

See *Die Without Issue*; *Die Without Leaving Issue*.

#### WITHOUT LAWFUL EXCUSE

The word "willfully," as used in U. S. Comp. St. 1901, § 5341, making one who unlawfully and "willfully," but without malice, injures another, from which injury the other dies, guilty of manslaughter, means not merely voluntarily, but with a bad purpose. It is a synonymous term with "intentionally," "designedly," "without lawful excuse"; that

is, not accidental. It is frequently understood as signifying an evil intent without justifiable excuse. *Miller v. State*, 107 Pac. 948, 3 Okl. Cr. 575 (citing *Thomp. Trials*, 2209).

#### WITHOUT LEGAL CAUSE

In an action against a water company to recover damages for shutting off plaintiff's supply of water, an allegation in plaintiff's petition that defendant company, without giving plaintiff any notice and "without legal cause," cut off the supply of water from his premises, was an allegation to the effect that the company without any justification wrongfully discontinued to serve him, and was not a mere conclusion of law. *Freeman v. Macon Gaslight & Water Co.*, 56 S. E. 61, 63, 126 Ga. 843, 7 L. R. A. (N. S.) 917.

#### WITHOUT A LICENSE

See *License (Governmental Regulation)*;  
*Sale Without a License*.

#### WITHOUT LITIGATION

The answer, in an action on a mortgage, providing for allowance for reasonable attorney's fee, having denied the averments of the complaint, among which was one that \$25 was a reasonable sum for an attorney's fee, it was error to allow such a fee in the absence of evidence of what sum would have been reasonable on account thereof; the phrase "without litigation," in circuit court rule 17, that in actions on contracts providing for attorney's fees, in which judgment is obtained without litigation, and in which such a fee is allowed by the court, the fee shall be a certain per cent. of the amount involved, meaning where there is no controversy concerning the reasonableness of an attorney's fee. *Guernsey v. Marks*, 106 Pac. 334, 336, 55 Or. 323.

#### WITHOUT NOTICE

See *Notice*.

*Bona fide purchaser without notice*, see *Bona Fide Purchaser*.

The words "without notice" and the words "in good faith" signify the same thing. As used in Rev. St. 1899, § 3412, providing that where personal property is sold, to be paid for in installments or delivered to another on a condition reserving title, etc., such condition shall be void as to all subsequent purchasers in "good faith" and creditors, unless evidenced by a writing executed and recorded as in cases of mortgages of personal property, the words "good faith" were confined to a case of a subsequent purchaser and did not apply to a subsequent chattel mortgagee of the holder of the property, mortgaged under an alleged conditional sale, who was not therefore precluded by notice of claim of the conditional seller. *Gilbert Book Co. v. Sheridan*, 89 S. W. 555, 557, 114 Mo. App. 332.

The phrase "without notice," used in relation to the taking of a note, usually refers to some defense of the maker or to some claim of title to it other than that of the seller, with or without notice of which a purchaser has taken it. *Vansickle v. Watson*, 123 S. W. 112, 116, 103 Tex. 37.

#### WITHOUT PREJUDICE

The terms "with prejudice" and "without prejudice," in reference to the dismissal of actions, have been recognized by the Legislature and by the decision of the courts as having reference to and being determinative of the right to bring future actions. Where a party voluntarily dismisses a case and wishes to reserve to himself the privilege of enforcing his right in a subsequent proceeding, he should procure and have entered an order of dismissal stating in express terms that it is "without prejudice." An order dismissing "with prejudice" is equivalent to an adjudication upon the merits, and will operate as a bar to a future action. *Hargis v. Robinson*, 79 Pac. 119, 121, 70 Kan. 589.

The phrase, "without prejudice to interested parties," as used in an order consolidating with involuntary proceedings in bankruptcy the proceedings on a voluntary petition subsequently filed, cannot be construed to mean that a third person who took goods from the possession of the bankrupt on a writ of replevin from a state court, after the petition in involuntary bankruptcy had been filed and a receiver appointed therein, shall be permitted to retain possession of the merchandise taken under the replevin suit. If any signification be attached to the phraseology of the order it must be that the words quoted were inserted for the protection of the petitioning creditor's rights which might otherwise be defeated, and not for the benefit of the adverse claimant. In *re Briskman*, 132 Fed. 201, 203.

The court dismissed the bill without prejudice. The intention and effect of such a reservation in a decree are, by express terms, to prevent it from operating as a bar to another suit. A dismissal "without prejudice" leaves the parties as if no action had been instituted. It has been held that such a reservation prevents the bar, even though it has been erroneously incorporated in the decree. *Reynolds v. Hennessy*, 20 Atl. 307, 308, 23 Atl. 639, 17 R. I. 169.

A judgment of dismissal "without prejudice" is not res judicata of the merits of the controversy, notwithstanding the judgment entry further recites that testimony was taken, and was not sufficient to warrant the relief asked. *A. H. Averill Machinery Co. v. Allbritton*, 97 Pac. 1082, 1083, 51 Wash. 30.

The effect of a dismissal "without prejudice" in a decree of dismissal is to prevent such decree from constituting a bar to another bill brought upon the same title; but

it by no means compromises the court as a judicial determination in favor of such title. *Lang's Heirs v. Waring*, 25 Ala. 625, 639, 60 Am. Dec. 533.

In an action against T. and O., in which T. was not served, but appeared as a witness for plaintiff, there was a judgment on the merits for O., and on appeal it was affirmed with the words "without prejudice to a new action." Held, that these words referred only to defendant T., so that the judgment for O., when affirmed, settled the litigated issues between him and plaintiff. *O'Hare v. Thompson*, 123 N. Y. Supp. 339.

#### WITHOUT PREVIOUS MALICE

The use of both the expressions "in sudden heat and passion" and the expression "without previous malice" was proper, to make clear to the jury that to reduce homicide from murder to manslaughter there must not exist malice aforethought. Frequently tautology is useful, where clearness of meaning rather than logical refinement is desired. *Metcalfe v. Commonwealth (Ky.)*, 86 S. W. 534, 535.

#### WITHOUT RECOURSE

The indorsement of commercial paper "without recourse" does not avoid the warranty of its genuineness and of title under the express provisions of Code Supp. 1902, § 3060-a65. *State v. Corning State Sav. Bank*, 115 N. W. 937, 938, 139 Iowa, 338.

"Now care must be taken to remember distinctly that the defendants, having hedged about their assignment with the words 'without recourse,' are protected against any claim by the plaintiff to respond in value for the thing assigned, and that the liability of the defendants arises purely from having assigned something which never in fact existed as a fact, but was a paper which was not genuine." *Hall v. Latimer*, 61 S. E. 1057, 1059, 81 S. C. 90.

Under Acts 1899, p. 148, c. 94, § 38, providing that an indorsement of a note "without recourse" does not impair the negotiable character of the instrument, and independent of the act, an indorsement of a note "without recourse" is not sufficient to put the purchaser on notice. *Elgin City Banking Co. v. Hall*, 108 S. W. 1068, 1070, 119 Tenn. 548.

When an indorsement of a bill or note is "without recourse," the indorser specially declines to assume any responsibility as a party thereto, but by transferring it he engages that it is what it purports to be—the valid obligation of those whose names are upon it. He is like a drawer, who draws without recourse, but who is nevertheless liable if he draws upon a fictitious party, or one without funds; and hence the holder may recover against the indorser without recourse, if any of the prior signatures were

not genuine, or if the note was invalid between the original parties because of the want or illegality of the consideration, or if any prior party was incompetent, or the indorser was without title. *Challiss v. McCrum*, 22 Kan. 157, 164, 31 Am. Rep. 181 (citing 1 Daniel, Neg. Inst. § 670).

#### WITHOUT THE STATE

Under St. 1898, § 4096, authorizing examination of parties on oral interrogatories and if taken without the state in the manner provided for taking other depositions, an examination may be had when the party to be examined resides in a foreign country; the words "without the state" not being limited to territory within the United States. *Hite v. Keene*, 119 N. W. 303, 304, 137 Wis. 625.

#### WITHOUT SUFFICIENT CAUSE

Where there was fair ground for claiming the right to reduce the wages of a mate because of neglect of duty, the refusal to pay him the agreed wages in full on his discharge was not "without sufficient cause," so as to subject the master or owner to the penalty imposed by Rev. St. § 4529, as amended by Act Dec. 21, 1898, c. 28, § 4, 30 Stat. 756. *The Sadle C. Sumner*, 142 Fed. 611, 613.

#### WITHOUT TIME LIMIT

Where plaintiffs agreed to ship "without time limit" by defendant's line 50,000 boxes of macaroni from Naples to New York, and claimed that the contract entitled them to make the shipments at any time during an ordinary lifetime at least, while defendant insisted that the phrase referred only to the colder season of the fall and winter following the making of the contract, in which condition of the weather macaroni was ordinarily shipped, the phrase "without time limit" was ambiguous, and parol evidence was admissible to explain it. *Sholl v. Prince Line*, 96 N. Y. Supp. 368, 369, 109 App. Div. 591.

#### WITHOUT UNDERSTANDING

See Entirely Without Understanding.

### WITNESS

See Attesting Witness; Competent Witness; Credible Witness; Disinterested Witness; Duly Witnessed; Eyewitness; Impachment of Witness; Subscribing Witness; Surrogate's Witnesses; Tampering with a Witness; Wit.

Any other witness, see Any Other.

Bribery of witness, see Bribery.

Confronting witness, see Confront.

Expert witness, see Expert.

Interest of witness, see Interest (In Suit or Action).

List of, see List.

Respectable witness, see Respectable.

Witness fees as costs, see Costs.

See, also, Attest—Attestation.

The term "witness," as applied to a will signifies more than the mere formality of affixing one's name to a will as a witness. There must be an active mentality connected with it. The witness must take cognizance of the signature of the person executing, either by seeing him write, or by his acknowledgment of it in some manner, either expressly or impliedly, so that he can be able to say surely and unequivocally that the signature to the instrument is that of the person executing, previously appended. But the attestation of the will does not depend upon the memory of the attesting witness. The act is one, when once performed, which stands as an accomplished fact, and any subsequent failure of the memory of the witness, or willful purpose in suppressing what is known to have transpired, does not change or obliterate it. It may, perchance, stand unsubstantiated after applying the test of legal proof; but, if it once existed, it stands for all time as any other fact. In *re Mendonhall's Will*, 43 Or. 542, 73 Pac. 1033, 1035 (citing *In re Skinner's Will*, 62 Pac. 523, 67 Pac. 951, 954, 40 Or. 571).

Civ. Code Prac. § 556, providing that upon an affidavit of a party and the statement of his attorney that the testimony of a witness is important, and that an oral examination in court is necessary, the court may order the personal attendance of the witness though he is otherwise exempt, applies only to "witnesses" within the jurisdiction of the court. *Hey v. Emerson*, 135 S. W. 294, 295, 142 Ky. 767.

The term "whose evidence," in an instruction that there was testimony in the case from which the jury might find that the defendant was guilty of negligence," but that depends upon "whose evidence" you believe," is not equivalent to "whose witnesses," so as to render the charge objectionable as directing the jury to find for the plaintiff if they believe plaintiff's witnesses and for the defendant if they do not. *Harker v. Detroit United Ry.*, 114 N. W. 657, 658, 150 Mich. 697.

Code Civ. Proc. § 2707, relates to proceedings by an executor or administrator to obtain property belonging to the estate, but in the possession of and under the control of a person who withholds the same or refuses to reveal its whereabouts, and authorizes such person to be cited to appear before the surrogate, where he may be sworn to answer concerning the property. Section 2710 provides that, if the facts admitted by the "witness" show that he was in control of the property to which the petitioner is entitled, a surrogate may decree that it may be delivered, but if the "witness" admits control of the property, but the question of right is in dispute, the proceedings shall end, unless the parties consent to the determination by the surrogate. The court says that it is not able to accept the contention as to the mean-

ing of the word "witness" as employed in section 2710, saying: "A simple reading of these sections in their consecutive order will exhibit the fact that, until the proceeding progresses to the point where the respondent is sworn and actually becomes a 'witness' in the ordinary meaning of the word, he is not so denominated. He is spoken of as 'a person who withholds the same,' or 'the person complained of,' or 'the person to be cited,' or 'the party cited,' but he is never called a 'witness' until that part of the proceeding is reached at which the statute contemplates his having been sworn as a 'witness.' It seems to me, therefore, that the statute contemplates the respondent as having been sworn, and as having been examined, and that a dispute has been developed by such examination in regard to the facts as to the petitioner's right to the moneys or property, in relation to which discovery is sought. This means something more, it seems to me, than the mere statement of a conclusion on the part of the witness that the property is his, or that he has a right to its custody. It is the facts out of which his right to maintain such a claim arises, and not the mere fact that he makes it, which end the proceeding, and those facts, I apprehend, are the facts brought out upon the examination contemplated by the statute. *Glick v. Stumpf*, 98 N. Y. Supp. 299, 303, 49 Misc. Rep. 32.

A person who has made a dying declaration, which is admitted on the trial, is not a "witness" on the trial, either within the definition given in Code Civ. Proc. § 1878, or within the common acceptance of the word; and where the court, in a prosecution for homicide, charged as to the right of the jury to reject the testimony of any witness whose testimony was distrusted, it was error to refuse a charge applying the same rule to the dying declarations of decedent, which had been admitted in evidence. *People v. Thomson*, 79 Pac. 435, 437, 145 Cal. 717.

#### **As person sworn**

Where a witness, testifying to the testimony an absent witness gave at the examining trial, stated that the absent witness was a witness in the trial and gave testimony therein, it sufficiently appeared that the witness was sworn as such in the examining trial; a "witness" being one who has been sworn according to law and deposes as to his knowledge of the facts in issue, and the word "testimony" meaning a statement made by a witness under oath in a legal proceeding. *Poe v. State*, 129 S. W. 292, 295, 95 Ark. 172.

#### **Attest synonymous**

*Mills' Ann. St. Rev. Supp. § 4664*, provides that all wills by which any property is devised or bequeathed shall be attested in the testator's presence by two or more wit-

nesses. Held, that the word "attested" contemplates, not only the mental act of observing, but also the certification of the thing noted by the manual act of subscription, the word being derived from the Latin words "ad" and "testari," meaning to witness or to bear witness, and being in effect synonymous with "witnessed" when used in connection with wills, which word implies the act of subscribing as well as of observing; and hence where two persons saw a testator execute a purported codicil and heard him declare it to be such, but only one of them subscribed it in his presence, it was insufficiently attested. *International Trust Co. v. Anthony*, 101 Pac. 781, 782, 45 Colo. 474, 22 L. R. A. (N. S.) 1002, 16 Ann. Cas. 1087.

#### **Interpreter**

One acting as an interpreter before the grand jury is not a "witness" examined before it within Pen. Code, § 995, requiring the setting aside of an indictment "when the names of the witnesses examined before the grand jury," are not appended at the foot of the indictment. *People v. Gee Gong*, 114 Pac. 78, 15 Cal. App. 28.

#### **Party**

It may be said that a "suitor" is but a witness after all, and may be allowed the common infirmities of his kind, such as lapses of memory, inability to see things precisely as others do, and failure to hear, or forgetfulness of things actually said or done. It would be a harsh rule that would cast a litigant merely because he did not agree in toto with his witnesses. Although plaintiff and his witnesses may not agree, the case may, nevertheless, be a proper one for the jury, if there be competent evidence from any witness to entitle the case to go to the jury. *Knorpp v. Wagner*, 93 S. W. 961, 967, 195 Mo. 637.

Accused, testifying in his own behalf, is a "witness," within Rev. Laws, c. 175, §§ 20, 21, declaring that accused shall at his own request be allowed to testify, and providing that the conviction of a witness of crime may be shown to affect his credibility, and his prior conviction of crime cannot be proved on his cross-examination, but only by the record thereof. *Commonwealth v. Walsh*, 82 N. E. 19, 196 Mass. 369, 124 Am. St. Rep. 550.

Where an indictment was based on the testimony of the witnesses whose names were indorsed thereon, and accused, learning of the investigation, voluntarily made a statement before the grand jury, after being warned that his statement might be used against him, and no vote was thereafter taken by the grand jury, accused was not a "witness," within Rem. & Bal. Code, §§ 2043, 2099, requiring an indorsement on the indictment of the names of the witnesses examined by the grand jury, or the indictment

must be set aside; the purpose of the statute being to inform accused who his accusers are, and the prosecuting attorney who his witnesses are. *State v. Kulbe*, 120 Pac. 510, 511, 67 Wash. 21.

The word "witness," as used in Code Civ. Proc. § 2980, giving a justice court power to issue commissions to take the deposition of a witness, includes a party to the action. *Murphy v. Sullivan*, 77 N. Y. Supp. 950, 951.

#### **Persons not subpoenaed**

In order that one may be deemed a "witness" within Gen. St. 1909, § 2647, making it a misdemeanor to induce a witness to absent himself from a trial, it is not necessary that he shall have been served with a subpoena. *State v. Sills*, 118 Pac. 867, 868, 85 Kan. 830.

One who has not been summoned or recognized as a witness in a pending suit, and who is not acquainted with either of the parties thereto, and who has no knowledge of any fact, either direct or collateral, which may be the subject of inquiry therein, is not a "witness" within the meaning of Cr. Code, § 164, punishing any person who shall attempt to corrupt a witness either by promises, threats, or any other undue means. *Gandy v. State*, 110 N. W. 862, 863, 77 Neb. 782.

#### **WITNESS AGAINST HIMSELF**

Where accused made a confession to police officers, without objection, immediately after he was arrested while attempting to kill his wife, but before he was charged with any crime, that the confession, which was taken in shorthand, was made under oath did not render it a deposition, in a judicial proceeding against himself within Const. art. 6, § 32, providing that one accused of crime shall not be compelled to be a "witness" against himself. *People v. Owen*, 118 N. W. 590, 154 Mich. 571, 21 L. R. A. (N. S.) 520.

A confession freely and voluntarily made, without compulsion or inducement, does not come within the constitutional privilege that one shall not be compelled in a criminal case to be a "witness against himself," contained in the fifth amendment of the Federal Constitution; but a confession obtained through fear, duress, hope, or inducement cannot be given in evidence without compelling one to incriminate himself, and is violative of the constitutional privilege. One who takes the witness stand in his own behalf in a criminal case waives his constitutional privilege, and the prosecution may cross-examine him with respect to statements discrediting his testimony, though such statements would not be admissible as a voluntary confession. *Harrold v. Territory*, 89 Pac. 202, 205, 18 Okl. 395, 10 L. R. A. (N. S.) 604, 11 Ann. Cas. 818.

Civ. Code Prac. § 606, subd. 2, provides that no person shall testify for himself as to any verbal statement of or any transaction with one who is dead, unless the decedent or representative of an interest in his estate "shall have testified against such person with reference thereto." Held, that the phrase "shall have testified," in such statute means "has previously testified," so that defendant's testimony as to verbal statements of or transactions with her father prior to his death to prove her title to the property in controversy was not rendered competent by the subsequent testimony of defendant's sister as to other declarations made by decedent in defendant's presence. *Foley v. Dillon* (Ky.) 105 S. W. 461, 463.

The words "criminal cases," used in the state and federal Constitutions, in the provision that no person shall be required to give evidence in criminal cases tending to incriminate himself, have been construed by the courts to extend to and include imprisonment, fine, forfeiture, and penalty, whether to be recovered in a criminal or civil proceeding. *People ex rel. Akin v. Butler St. Foundry & Iron Co.*, 66 N. E. 349, 355, 201 Ill. 236.

Requiring the bankrupt to deposit his books of account in the office of the receiver, there to remain in the custody of the bankrupt, who is to afford the receiver free opportunity to inspect them, the receiver to use and permit them to be used only for the purpose of the civil administration of the bankrupt estate, and not for any criminal proceeding, is a proper exercise of the authority of the bankruptcy court, and does not compel the bankrupt to be a "witness" against himself in a criminal case in the constitutional sense, although the knowledge gained from the books may be used to procure other evidence for use against him in a criminal prosecution. *In re Harris*, 31 Sup. Ct. 557, 558, 221 U. S. 274, 55 L. Ed. 732.

The word "witness," as used in Const. art. 1, § 6, declaring that no person shall be compelled in any criminal case to be a witness against himself, applies to one required to furnish documentary proof, and to one potentially able to give testimony and to one called on to testify. *People v. Rosenheimer*, 128 N. Y. Supp. 1093, 1095, 70 Misc. Rep. 433.

#### **WITNESSES BEFORE GRAND JURY**

The phrase, "witnesses duly summoned by the state," contained in Laws 1893, p. 45, c. 4120, § 2, construed in connection with Laws 1893, p. 44, c. 4119, § 1, and in connection with Laws 1903, p. 35, c. 5114, § 2, the latter appropriating \$70,000 for the payment of jurors and witnesses before grand juries for the year 1904, imposes on the state the duty of paying the per diem and mileage of

witnesses before grand juries. *State ex rel. Guyton v. Croom*, 37 South. 303, 306, 48 Fla. 176.

## WOLLEN

As used in an antenuptial agreement executed in German, the word "wollen" (wish) is a word importing obligation. *Kleb v. Kleb*, 62 Atl. 396, 397, 70 N. J. Eq. 305.

## WOMAN

See Assault on a Woman; Common Women; Diseases Peculiar to Women; Innocent Woman; Low Woman; Marriageable Woman; Married Woman.

Where the indictment charged an assault with an intent to rape on a woman named, it was not error to permit prosecutrix to testify to her age and that she was just past 14 at the time of the offense; the word "woman," under Pen. Code, 1895, art. 21, signifying a female person of any age. *Rogers v. State* (Tex.) 143 S. W. 631, 634.

Under Pen. Code 1895, art. 21, providing that the word "woman" includes a female of any age, and article 608, punishing a person assaulting a woman with intent to rape, and article 611, providing that an assault to commit any other offense is constituted by the existence of facts which bring the offense within the definition of an assault coupled with an intention to commit such other offense, solicitation accompanied by the expectation of consent and laying on of hands without the use of such force as indicates a purpose to obtain intercourse at the very time is not an assault with intent to rape a female under the age of consent, but where a man puts his hand on a female child and at the time intends instantly to have intercourse with her without suspension of action, and without waiting to ascertain whether or not she will consent, and thereby places her in such attitude that the final act may be performed, whether the purpose is to place her in such attitude by force alone or by her free co-operation, he has gone far enough to commit an assault with intent to rape. *Crommeans v. State*, 129 S. W. 1129, 1132, 59 Tex. Cr. R. 611.

**As citizen**  
See Citizen.

**As person**  
See Person.

**As qualified elector or voter**  
See Qualified Elector; Qualified Voter.

## WOMAN'S CHRISTIAN TEMPERANCE UNION

As Charity, see Charity.

## WOOD

See Furniture of Wood; Logs of Wood; Pulp Wood; Rossed Pulp Wood; Veneers of Wood.

Manufactures of, see Manufactures—Manufactured Articles.

Unmanufactured wood, see Unmanufactured.

The words "trees" and "wood" are not synonymous. The latter refers to the substance of the former when cut for use. The old maxim is "Lignum cum crescere nescit" (a tree while it grows; wood when it cannot grow). Hence an agreement for the sale of wood on a certain lot of land is an executory sale of goods. *Graham v. West*, 55 S. E. 931, 932, 126 Ga. 624.

## WOOD ALCOHOL

"Methyl alcohol" is obtained by the distillation of wood, and is the "wood alcohol" of commerce. *People v. Bowen*, 74 N. E. 489, 493, 182 N. Y. 1 (quoting and adopting definition in *Webst. Int. Dict.*).

The pharmacy act does not, by legislative construction or repeal of section 260 of the crimes act, render it lawful for one, whether a registered pharmacist or not, to sell "wood alcohol" without labeling it as a poison. *Campbell v. Brown*, 117 Pac. 1010, 1012, 85 Kan. 527.

## WOOD CENTERS

"Wood centers," as used in a contract for the construction of a cement floor, were wooden erections or false work put in place to support the floor while the concrete was setting and hardening, to be subsequently removed. *Sulinski v. Leahy*, 84 N. Y. Supp. 928, 929.

## WOOD-NUT OIL

"Wood-nut oil," derived from the fruit of "aleurites vernica" of China, so called because it is used on wood as a substitute for varnish, is classifiable for tariff taxation under paragraph 626, Free List, § 2, c. 11, *Tariff Act July 24, 1897*, 30 Stat. 199, for nut oil or oil of nuts not otherwise specially provided for. *Edward Hill's Sons & Co. v. U. S.*, 127 Fed. 970.

## WOOD PULP

Wood flour, produced by grinding small pieces of wood obtained by breaking or cutting waste wood, etc., is dutiable as a manufacture of wood under *Tariff Act July 24, 1897*, c. 11, § 1, Schedule D, par. 208, and not as "wood pulp," under Schedule M, par. 393, nor as "waste" under Schedule N, par. 463. *Nairn Linoleum Co. v. United States*, 151 Fed. 955, 956.

## WOOD WORKER

A "wood worker" is a machine used to cut wood into desired shapes, and for that purpose supplied with knives attached to a



shaft, which, when the machine is operated, revolves, bringing the knives in contact with wood placed on a table and run over the knives, which machine should be supplied with springs to hold the wood in proper position as it is run over the knives. *American Car & Foundry Co. v. Clark*, 70 N. E. 828, 829, 32 Ind. App. 644.

### WOODEN

The words "wooden" and "frame" are interchangeable, having the same meaning. A wooden building is a frame building, and a frame building is a wooden building. It has been said that "frame," as applied to a building, means "wooden," and the Century Dictionary defines a frame house as being a house constructed with a skeleton frame of timber covered in with boards and sometimes with shingles. *Olmstead v. People*, for use of Town of Littleton, 91 Pac. 1113, 41 Colo. 32.

### WOODS

Under Kirby's Dig. § 1898, which provides that a person taking certain animals running at large in the range or woods, and which are not designated by brands or ear-marks, shall not be guilty of larceny, but simply liable to the owner for the value of such animals, a cow, though not under the physical restraint of a halter or inclosure, which was, upon being turned out in the woods during the day to feed, accustomed to return to its home at night, did not run at large and, though unmarked, it was a subject of larceny; "range" meaning a sparsely populated and uninclosed tract of land over which stock and cattle are permitted to roam and feed without restraint, "in the woods" referring to uninclosed and unpopulated woodland, and "running at large" being applicable to animals which roam and feed at will, and which are not under the control and direction of any one. *Jefferies v. State*, 144 S. W. 514, 102 Ark. 373.

### WOOL

See Merino Wool; Steel Wool.  
As merchandise, see Merchandise.  
Manufactures of, see Manufactures—  
Manufactured Articles.

The growth on cabretta skins is "wool," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule K. *Lawrence Johnson & Co. v. United States*, 159 Fed. 189; *Id.*, 166 Fed. 728, 729, 92 C. C. A. 418.

### WOOL GREASE

So-called olein, a distillate from wool grease, in the form of an oil, is not "wool grease," within the meaning of Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 279, but is dutiable as a "distilled oil," under Schedule A, par. 3. *Swan & Finch Co. v. United States*, 172 Fed. 173. The provision does not include the refined and expen-

sive products from wool grease, known as "adepts lanæ anhydrous" and "adepts lanæ cum aqua," and used medicinally. *Zinkelsen & Co. v. United States*, 167 Fed. 312, 92 C. C. A. 624. The provision includes a refined wool grease, from which the natural odor and mineral matter have been removed by a superior process, and which is commercially known as "wool grease." *Swan & Finch Co. v. United States*, 149 Fed. 304.

### WOOL ON THE SKIN

Cabretta skins are sheepskins, within the meaning of the provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 664, 30 Stat. 201, relating to raw skins, "except sheepskins with the wool on," and the growth thereon is subject to duty, as provided in paragraph 360, Schedule K, § 1, for "wool on the skin." *Lawrence Johnson & Co. v. United States*, 140 Fed. 116, 117.

A growth on skins of Mocha sheep imported from Arabia, which is commercially known, designated, and dealt in as Mocha hair, having none of the characteristics of wool, and which would not be accepted by dealers therein as a good delivery of wool, is not dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 360, as "wool on the skin," but is entitled to free entry under paragraph 664, placing on the free list "skins of all kinds, raw (except sheepskins with the wool on), and hides not specially provided for in this act." *Goat & Sheepskin Import Co. v. United States*, 27 Sup. Ct. 634, 637, 206 U. S. 194, 51 L. Ed. 1022.

### WOOL OR WORSTED CLOTHS

Certain woolen goods known as "cravenette cloths," which have been subjected to a process intended to make them rain-repellent, which are chiefly used for outer garments to be worn in rainy weather, and which, for all ordinary purposes, are waterproof, are dutiable as "waterproof cloth," under paragraph 369, Tariff Act Oct. 1, 1890, c. 1244, § 1, Schedule J, and not under paragraphs 392 and 393, Schedule K, of said act, relating, respectively, to "woolen or worsted cloths" and "dress goods \* \* \* of wool, worsted," etc. *United States v. Brown & Eadie*, 136 Fed. 550, 551, 69 C. C. A. 260.

### WOOL WASTE

Wool sweepings, such as carpet shearings and wool fly, not having sufficient fiber to be of value for manufacturing purposes, are not "wool waste" within the meaning of the customs law. *In re R. F. Downing & Co.*, 139 Fed. 590, 591.

### WOOLEN RAGS

Clippings of woolen material, produced in the process of making up garments, are "rags," within both the popular and the commercial signification of the term, and are

more specifically provided for as "woolen rags," in Tariff Act July 24, 1897, c. 11, § 1, Schedule K, par. 363, than in paragraph 362, as "wastes composed wholly or in part of wool, not specially provided for." *United States v. Pearson & Emmott*, 131 Fed. 571; *Id.*, 137 Fed. 1021, 70 C. C. A. 306.

## WORD

"Words" are but the vehicle of thought; and if, since they were employed by the Legislature, they have undergone change, or if the subject they refer to has undergone modification since their employment, the sense which they bear when the statute was enacted must be searched for and adopted by the courts, because such it must be presumed was the intention of the lawmaking body. *City of Clearwater v. Bowman*, 82 Pac. 526, 72 Kan. 92 (citing *Sikes v. State*, 67 Ala. 77).

Under the statute providing that the stenographer transcribing the shorthand notes of the testimony shall be allowed not exceeding 20 cents per folio of 100 "words," he should not be allowed for punctuation marks. *Walsh v. Jackson*, 81 Pac. 258, 259, 33 Colo. 454.

## WORK

.See *Assessment Work*; *Brick Work*; *Carpenter's Work*; *Construction Work*; *County Work*; *Day's Work*; *Extra Work*; *Good Work*; *Public Work*; *Rub Down Brick Work*; *Safe Place to Work*; *Same Piece of Work*; *Sick and Unable to Work*; *Street Work*; *Team Work*; *Visible Commencement of Work*.

Cost of work, see *Cost*.

Development work, see *Development*.

Extent of the work, see *Extent*.

Furnishing work, see *Furnish*.

Kind of work, see *Kind*.

Other works, see *Other*.

Inability to work, see *Inability*.

Such work, see *Such*.

An article stating that it is easy "to work" the county commissioners held actionable; for the word "work," in the connection and manner in which it appears in the publication, conveys a reflection upon the competency and integrity of the officials. *Palmerlee v. Nottage*, 138 N. W. 312, 119 Minn. 351, 42 L. R. A. (N. S.) 870.

The word "work," as used in a city charter, providing that all work exceeding in cost a specified sum shall be let to the lowest reasonable and responsible bidder, includes structures such as buildings and bridges. *Chippewa Bridge Co. v. City of Durand*, 99 N. W. 603, 606, 122 Wis. 85, 106 Am. St. Rep. 931.

In a city charter providing that the term of office of commissioners previously appointed to construct an aqueduct between

certain termini shall cease on the completion of the work, the term "the work" means the completing of an aqueduct with necessary reservoirs as contemplated on their original appointment. *Walter v. McClellan*, 96 N. Y. Supp. 479, 481, 48 Misc. Rep. 215.

Withing the meaning of a building contract providing that no alterations shall be made "in the work" as shown by the specifications, except upon the written order of the owner, and requiring the contractors to take down the "work" condemned by the architect, to protect the "work" from the weather, maintain insurance on the "work," and referring to the "work" shown on the drawings, a substitution of ivory hard wall plaster for lime plaster was an alteration in the "work," within the meaning of the contract, requiring a written order from the owner; the word "work" being defined, as applied to building contracts, to be the product of labor and material combined which terminates in the execution of the contract, and applies to all work done thereunder. *Trustees of Seventh Baptist Church v. Andrew & Thomas*, 82 Atl. 452, 453, 115 Md. 541.

A provision in an ordinance for a street improvement that the contractor shall use precautions to prevent accidents to persons and property by providing barriers and shall be responsible for damage to persons, property, or the work, due to the nature of the work, when considered in connection with the provision that all work or materials shall be performed or furnished in accordance with the specifications, refers exclusively to damages arising during the progress of the work, and not to damages arising subsequently thereto, caused by the nature of the work when completed, and it does invalidate an assessment for the work; the word "work" meaning the state of actively working or operating. *McQuiddy v. Worswick Street Paving Co.*, 116 Pac. 67, 69, 160 Cal. 9.

Under a city charter providing that it should be the duty of the city officers to let contracts for any work or material in excess of \$50 to the lowest bidder, the word "work" is used in a restrictive sense, as applicable only to work which may be safely awarded to the lowest bidder, and does not apply to the occasional services of a court stenographer at an investigation of the management of city officers, so as to require such services to be obtained by competitive bids. *O'Brien v. City of Niagara Falls*, 119 N. Y. Supp. 497, 499, 65 Misc. Rep. 92 (citing *People v. Flagg*, 17 N. Y. 584; *Gleason v. Dalton*, 51 N. Y. Supp. 337, 28 App. Div. 555).

A contract for the excavation of a bulkhead, the inner line of which was about 9 feet inshore from an established bulkhead line, and the base of which was to be 15 feet below mean low-water mark with allowance to the contractor for whatever he might excavate within an extra foot in each direction,

specified that no payment should be made for excavation beyond those limits, "except where known loose rock is shown in the cross-sections above the top grade of the indicated rock, at a line ten feet westerly of and parallel to the bulkhead line, allowance will be made and paid for to a positive line which is forty-five degrees to the horizontal," and specified, as to "typical sections," that they were given as a guide only and to show approximately what the contractor might expect to encounter in the prosecution of the "work," and represented the "typical sections" as information upon (1) "the existing rock bottom which was the top of the loose rock; (2) the corresponding theoretical sections to be obtained, meaning the so-called nine-foot and fifteen-foot lines; and (3) the corresponding limiting lines to which payment will be made when it is impossible to produce the theoretical sections; and that all material was to be measured by comparison of 'accurate cross-sections.'" The points at which the 45-degrees lines should commence could not be ascertained before the work commenced. Held, that the "corresponding theoretical sections" meant the 10-foot and 16-foot lines; that the "typical" cross-sections could not be regarded as the "accurate cross-sections"; that "work" had a double meaning, and, for the purpose of fixing the beginning points of the 45-degree lines, did not begin until the blasting began, when the junctions between the loose rock and the ledge rock became "known," so as to be "indicated" upon the cross-sections made by the city after the work was completed; and that work to such junctions was necessitated and contemplated by the contract. *R. G. Packard Co. v. City of New York*, 137 N. Y. Supp. 9, 12, 151 App. Div. 941.

#### Act synonymous

The word "work," as used in the statute protecting persons while engaged in the work of operating cars, etc., against the negligence of any employé of the company, is synonymous with "act," and means the doing of those things which constitute the operating of the locomotive, etc. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 103 S. W. 447, 449, 47 Tex. Civ. App. 74.

"Work," as used in Batts' Ann. St. art. 4560e, protecting all persons while engaged in the work of operating cars against the negligence of any servant or employé of the company, is synonymous with "act," and in its connection means the doing of those things which constitute operating the locomotives, etc., and the person so engaged is protected against the negligence of any other employé during the time he is engaged in the act of operating the machinery. A person employed about a locomotive roundhouse to take charge of engines was not, while on his way to take charge of a locomotive and before he began to perform the act of oper-

ating the machinery, a servant engaged in the work of operating the cars, locomotive, or trains of a railroad, so as to give him or his representatives a right to recover for his injury when caused through the negligence of a fellow servant. *Gulf, C. & S. F. Ry. Co. v. Howard*, 80 S. W. 229, 230, 97 Tex. 513.

#### Business synonymous

Acts 1902, c. 160, which provides by section 8 that, before any person should engage in the business of undertaking or any assistant or employé of such person whose duties engaged him in the care, preservation, disposition, or burial of the dead should perform such duties, he should apply to the state board of undertakers for a license to practice such business and employment, and which as amended by Acts 1904, c. 389, requires the board to find that the applicant "has been employed at least two years prior to said application by some person or firm actively engaged in the work of practical embalming and undertaking \* \* \* is possessed of skill and knowledge of the said business," must be construed to mean that the applicant has been so employed in the work of embalming and undertaking, and that he possesses the skill and knowledge of embalming as well as undertaking, and that the word "work" in the amending clause is synonymous with the word "business." *State v. Rice*, 80 Atl. 1026, 1029, 115 Md. 317, 36 L. R. A. (N. S.) 344, Ann. Cas. 1913A, 1247.

#### As labor

The word "work" has a much more comprehensive meaning than the term "labor," and has been defined to mean to exert one's self for a purpose, to put forth effort for the attainment of an object, to be engaged in the performance of a task, duty, or the like; and, as thus defined, covers all forms of physical or mental exertions, or both combined, for the attainment of some object other than recreation or amusement. *State v. Rose*, 51 South. 496, 497, 125 La. 462, 26 L. R. A. (N. S.) 821.

A receipt, by a contractor for labor and material, of money "on account of \* \* \* contract for mason work," must be treated as evidence of a partial payment on the contract, and does not affect the right of the contractor to enforce a lien, as authorized by Rev. Laws, c. 197, § 2, for an amount not exceeding, with the payment, the contract price; the word "work" being used in the sense of an undertaking, enterprise, or project, and not synonymous with the word "labor." *Thompson v. Luciano*, 97 N. E. 892, 893, 211 Mass. 169.

#### As occupation or occupy

As used in a deed relating to the occupation of a coal bed, the word "occupy" is synonymous with "work" or "appropriate." *Hoysradt v. Delaware, L. & W. R. Co.*, 151 Fed. 321, 330.

In an action on an accident policy, insuring one as "contractor, office and traveling," and exempting the insurer from liability for death while riding on any locomotive, or while walking on the roadbed of any steam railway, an instruction that if insured was killed while traveling as a contractor engaged in railroad "work," using the ordinary means of travel in that occupation, the insurer was liable on the policy, as it insured him while he was traveling in the usual way of a contractor engaged in railroad "work," was not erroneous as assuming that he was insured as a working contractor; the word "work" in the instruction only meaning "occupation." *Ward's Adm'r v. Preferred Acc. Ins. Co.*, 67 Atl. 821, 824, 80 Vt. 321.

#### In child labor laws

Section 1 of Act No. 301 of 1908 makes it unlawful for any person to employ a child under 14 years of age to labor or "work" in any mill, factory, mine, mercantile establishment, etc., or in any theater, concert hall, etc. Held, that the word "work" is comprehensive enough to cover any performance on the stage of a theater of a girl 10 years of age. *State v. Rose*, 51 South. 496, 497, 125 La. 462, 26 L. R. A. (N. S.) 821.

The word "work," in Rev. Laws, c. 106, § 28, as amended by St. 1905, p. 190, c. 267, providing that no child under the age of 14 years shall be "employed at work performed for wages," etc., during school hours, or after 7 o'clock in the evening, is not used in a narrow meaning, and is not limited to work done in a factory, workshop, or mercantile establishment, but includes a theatrical exhibition, and prohibits the employment of children therein; the word "work" having a broad signification, and meaning effort directed to an end. *Commonwealth v. Griffith*, 90 N. E. 394, 395, 204 Mass. 18, 25 L. R. A. (N. S.) 957, 134 Am. St. Rep. 645.

#### In Sunday law

"Work required" in maintaining or operating a railroad, etc., excepted in Ky. St. 1903, § 1321, providing a penalty for Sabbath work, means that which is necessary, and does not refer to work that may as well be done on other days. *Com. v. Chesapeake & O. R. Co.*, 108 S. W. 851, 852, 128 Ky. 542.

#### WORK HORSE

The term "work horses," used by the constitutional exemption provision, includes mules. *McElveen v. Goings*, 41 South. 229, 116 La. 977, 114 Am. St. Rep. 574 (citing *Ray v. Hayes*, 28 La. Ann. 641; *Goldsmith v. State* [Tenn.] 1 Head, 156).

Two horses used by a business man in driving from his home to his place of business, in driving his family about for pleasure, and occasionally used by him to make business trips, are not "work horses," within a statute exempting two work horses from

execution. *Tishomingo Sav. Institution v. Young*, 40 South. 9, 11, 87 Miss. 473, 3 L. R. A. (N. S.) 693, 112 Am. St. Rep. 454, 6 Ann. Cas. 776.

#### WORK OF CHARITY

See Charity (In Sunday Law).

#### WORK OF INTERNAL IMPROVEMENT

See Internal Improvement.

#### WORK OF NECESSITY

See Necessity (Sunday Labor).

#### WORKAWAY

"Workaway" is a term applied to destitute seamen who work their passage home without compensation. *The August Belmont*, 153 Fed. 639, 640.

#### WORKED

Counts alleging a statement by defendant that plaintiff had worked defendant's husband charged words actionable per se; the word "worked" having a well-understood meaning as alleging adultery at the place where the words were spoken. *Schaefer v. Schoenborn*, 111 N. W. 843, 101 Minn. 67.

#### WORKING CAPITAL

"Working capital" means the amount of cash necessary for the safe and convenient transaction of a business, having regard to the owner's ordinary outstandings, both payable and receivable, the ordinary condition of his stock or supplies in hand, the natural risk of his business, and the condition of his credit; and unless these matters, and perhaps others, be looked into, no comparison can be drawn between one business and another, or even between those of the same general nature. *Consolidated Gas Co. v. City of New York*, 157 Fed. 849, 859.

The ordinary meaning of "working capital" is "cash," money that is instantly available for any corporate need, and not raw material or finished articles, which may not be available at all when the credit and life of the enterprise may be at stake. So where a corporation assigned certain patents as collateral security, and the assignee agreed to reassign the same if within a stated time the corporation had "secured the sum of \$5,000 as working capital for its business" by the sale of treasury stock or otherwise, it was held that the agreement to obtain "working capital for its business" through the sale of stock contemplated the sale of such stock for cash, which would be available for any corporate need. *Janney v. Pancoast International Ventilator Co.*, 122 Fed. 535, 537, 538.

#### WORKING CIRCUIT

Where a patent relates to improvements in the regulation of the compensating action of a storage battery when applied to compensate for fluctuations of electrical condition of a working circuit, and consists essentially in

reinforcing such battery by a supplemental generator at the time of discharge and regulating the action of the reinforcing agent automatically by the electric condition of the working circuit, and throughout the specifications and claims the circuit into which the regulation coil is to be electrically connected is referred to indifferently as "main circuit," "working circuit," "mains," etc., evidently the patentee understood that the terms "main circuit" and "working circuit" were synonymous or interchangeable. When, therefore, the patentee says that "the coil in any case [should be] electrically connected into the main circuit," it seems reasonably clear that what he intended to describe and claim was a coil connected into the working circuit. *Electric Storage Battery Co. v. Gould Storage Battery Co.*, 158 Fed. 610, 611, 614, 85 C. C. A. 432.

### WORKING CONTRACT

Assignment distinguished, see Assignment.

### WORKING DAYS

See Actual Working Days; Weather Working Day.

In a provision of a bill of lading which entitles the ship to discharge "continuously," the word must be construed to mean continuously during working days, and "working days" exclude Sundays and holidays usually observed, and include only the usual working hours of days on which usual work is only prevented by weather. *Tweedie Trading Co. v. Pitch Pine Lumber Co.*, 156 Fed. 88, 89.

Where a charter provided that after one idle day the charterer had ten "days" to load, and that for every day's detention thereafter he should pay demurrage, he was entitled to eleven "days" to load, including Sundays, holidays, or stormy days; and likewise where a charter party provided that the charterer, after one idle day, should have ten "working days" to load before demurrage should be charged, he was entitled to eleven days, excluding Sundays and holidays, but not stormy days. *Hughes v. J. S. Hoskins Lumber Co.*, 136 Fed. 435, 436 (citing *Pedersen v. Eugster*, 14 Fed. 422; *Sorensen v. Keyser*, 52 Fed. 163, 2 C. C. A. 650; *Hagerman v. Norton*, 105 Fed. 996, 46 C. C. A. 1).

### WORKING IN A SHOP

An action against a railroad company for injury to a stone mason's helper in the construction of an addition to a roundhouse is governed by Pub. Acts 1909, No. 104, § 1, making railroad companies liable for negligent injury to their employes, and not by section 7, which provides that the act shall not extend to employes "working in shops." *Ferguson v. Lake Shore & M. S. Ry. Co.*, 135 N. W. 268, 269, 169 Mich. 260.

### WORKING ORDER

See Good Working Order.

### WORKING PLACE

The running board of a machine on which employes operating the machine stand is a "working place," within the rule requiring a master to provide a reasonably safe working place. *Marshal v. Dalton Paper Mills*, 74 Atl. 108, 112, 82 Vt. 489, 24 L. R. A. (N. S.) 128.

### WORKING TOGETHER

The general rule of the master's liability in case of injury to an employe through the negligence of a fellow servant is not changed by Rev. St. Utah, 1898, § 1343, defining "fellow servants" as "all persons who are engaged in the service of such employer, and who, while so engaged, are in the same grade of service and working together at the same time and place to a common purpose, neither of such persons being intrusted by such employer with any superintendency or control over his fellow employes," except in relation to the matter of superintendency; the statute not requiring, by the provision that they must be "working together," that the servants should be doing the same kind of work, or engaged in aiding each other in the same detail of labor, but only that they shall be working to a common purpose and sufficiently near each other to arouse in the one a reasonable appreciation of probable danger from the neglect of the other. *Lukic v. Southern Pac. Co.*, 160 Fed. 135.

Comp. Laws 1907, § 1343, provides that all persons who, while engaged in the service of a common employer, are working together at the same time and place and to a common purpose, etc., without being intrusted with superintendence, are "fellow servants." The court instructed that the term "working together at the same time and place" does not mean that the employes were working at the exact spot and doing exactly the same kind of work, but means whether, in the discharge of their duties, they are thrown in such contact with each other that they may have a fair opportunity of observing the habits and demeanor of each other, so as to form a conclusion as to the carefulness of the habits of the other. Held, that the instruction was erroneous, as it was not essential to constitute two employes fellow servants that they should have been thrown in contact for such time as to enable them to observe the habits of each other. *Shepherd v. Denver & R. G. R. Co. (Utah)* 126 Pac. 692, 695.

### WORKING TOOLS

In the eighth section of the "act prescribing the forms of writs and the manner of serving them," which exempts from attachment, in favor of the housekeeper, "the 'working tools' necessary for his usual occupation," to the value of fifty dollars, and

in favor of any debtor, "his 'working tools,' " to the same value, the same meaning is to be attached to the language in both instances, and should be construed to include, not only such tools as are indispensably necessary to the mechanic, or even such as are in general use by individuals of the same craft, but also such as the individual in question has adopted to facilitate and diminish his labor, and not only 'working tools,' so called in the dictionary and by learned men, but such as are so called by the craft, such as the individual uses and has set apart as tools for the advantageous prosecution of his business. *Healy v. Bateman*, 2 R. I. 454, 455, 456, 60 Am. Dec. 94.

### WORKINGMAN

Under a statute giving preference in the distribution of the assets of an insolvent corporation to claims for "wages of mechanics, workmen and laborers," the wages preferred and the class of persons within the statute depend upon the nature and kind of work done, rather than on the social position or professional character and standing of the person rendering the service, and, if the service is such as to bring the person rendering it within the statute, his compensation, whether large or small, or whether payable by the day, week, month, or year, is "wages," within the meaning of the statute and preferred. *Laws N. Y. 1897, c. 415, § 8*, provides that, "upon the appointment of a receiver of a partnership or of a corporation organized under the laws of this state and doing business therein, other than a moneyed corporation, the wages of the employes of such partnership or corporation shall be preferred to every other debt or claim." Section 2 defines the word "employé" as used in the act as meaning "a mechanic, workingman or laborer who works for another for hire." Held that, under the construction placed upon a similar prior statute by the Court of Appeals of the state, an attorney at law employed by an electric company to procure options on certain property and water power sites which the company desired to buy, at an understood compensation of \$10 per day and expenses for the time employed in the service, was not a "workingman" or "laborer," and hence not an "employé" entitled to preference under the statute. *Gay v. Hudson River Electric Power Co.*, 178 Fed. 499, 501-507.

### WORKMAN

The differences in meaning of the words "workman," "laborer," "artisan," "artificer," "mechanic," and "craftsman" are as follows: "Workman" is the general term which frequently applies to one who does relatively skilled work, as contrasted with a "laborer," whose work demands strength or exertion rather than skill. An "artisan" is one who is employed in an industrial or mechanic art or trade. "Mechanic," once synonymous with "artisan," is now commonly restricted to a

workman who is skilled in constructing, repairing, or using machinery. A "craftsman" is one who practices a handicraft. "Artificer" commonly implies power of contrivance or adaptation in the exercise of one's craft. *State v. City of Ottawa*, 113 Pac. 391, 393, 84 Kan. 100.

Rev. St. c. 28, § 38, provides that every building in which any business is carried on requiring the presence of "workmen" above the first floor must be provided with fire escapes. Held that, though "workmen" includes any one who does manual labor, the word could not have been so used, and that, while it means something more than the word "operatives," it was not intended to apply to a building where a very limited number only of persons were required to be engaged in work above the first floor. *Carrigan v. Stillwell*, 59 Atl. 683, 685, 99 Me. 434, 68 L. R. A. 386.

### Branch office manager

The manager of a branch office of a broker in another city is not a "workman, clerk, or servant," within the meaning of Bankr. Act July 1, 1898, c. 541, § 64b(4), 30 Stat. 563, and his claim for wages is not entitled to priority on the bankruptcy of his employer. "Workman" is possibly a wider phrase than "operative," and "servant" is undoubtedly wider than "house servant." *In re Albert O. Brown & Co.*, 171 Fed. 281

### Contractor

Bankrupts operated a sash, door, and blind factory; claimants having charge of the blind and sash departments under contract, by which claimants employed and discharged their own men and were responsible for the work that they turned out, but for convenience the men drew their wages from the bankrupts, the pay rolls being made out by claimants and turned in for that purpose. Claimants were compensated by an agreed schedule of prices for each character of work turned out; the bankrupts in general furnishing materials, as well as the tools and machinery. All the employes were subject to certain factory rules prescribed by the bankrupts, and the hours of the men were regulated by the shop whistle; the amounts received by claimants depending on their success in managing their departments and getting out the work for less than the scheduled prices. Held, that claimants were not "workmen," nor their compensation "wages," within Bankr. Act July 1, 1898, c. 541, § 64, subd. 4, 30 Stat. 563, giving priority to wages due to workmen earned within three months before bankruptcy proceedings, not exceeding \$300 to each claimant. *In re Thomas Deutsche & Co.*, 182 Fed. 430, 431, 433.

### Corporate officer

Officers are not within Revisal 1908, § 1206, providing that, in case of insolvency of a corporation, "laborers" and "workmen"

shall have a prior lien on its assets for work and labor. *Alexander v. Farrow*, 66 S. E. 209, 210, 151 N. C. 320.

#### **Railroad yard foreman**

In an action for death of a railroad yard foreman crushed between cars while making a coupling, where it appeared that deceased had not complied with a rule reciting that a blue flag by day and a blue light by night displayed on an engine or train indicates that workmen are about it, and providing that, when thus protected, such engine or car must not be moved or coupled with any other train, etc., and that "workmen" will display the blue signals, etc., but the uncontradicted evidence showed that it was never the custom for yard crews in moving trains to use a blue light, though they might be delayed for a few minutes by an emergency, and that the yard crews had never been supplied with any signals except the ordinary white lantern used by trainmen, the jury was warranted in finding that the rule did not apply to deceased; he not being a "workman" within its meaning. *Cincinnati, N. O. & T. P. Ry. Co. v. Lovell's Adm'r*, 132 S. W. 569, 571, 141 Ky. 249, 47 L. R. A. (N. S.) 909.

#### **Laborer distinguished**

"Workman" is the general term which frequently applies to one who does relatively skilled work, as contrasted with a "laborer," whose work demands strength or exertion rather than skill. *State v. City of Ottawa*, 113 Pac. 391, 393, 84 Kan. 100.

#### **WORKMANLIKE**

See Good and Workmanlike Job; Good and Workmanlike Manner.

#### **WORKMANSHIP**

Where a contractor for the construction of a building guaranteed that the workmanship should be first-class and satisfactory in every respect, the term "workmanship," as used in such guaranty, was sufficient to protect the owner against the use of bad or unsuitable materials by a subcontractor. *Lambert v. Jenkins*, 71 S. E. 718, 720, 112 Va. 376, Ann. Cas. 1913B, 778.

#### **WORKS**

See Constructed Works; Gas Works; Ways, Works, Machinery, or Plant; Waterworks.

Employed in any of the work, see Employed.

A wall in course of construction is not "works," within the Employers' Liability Act (Laws 1902, p. 1748, c. 600), making an employer liable for injuries caused by defective works, etc. *Ripp v. Fuchs*, 113 N. Y. Supp. 361, 364, 129 App. Div. 321.

A clay bank, on which an employé is working, is regarded as "works," within the Employers' Liability Act (Consol. Laws,

c. 31), extending the liability of the employer to the employé to defects in the condition of the works connected with the business. *Bacelli v. New England Brick Co.*, 122 N. Y. Supp. 856, 138 App. Div. 656. Where a construction company was blasting a trench in an excavation, the holes made for blasts and the dynamite used were not, under the Employers' Liability Act (Consol. Laws, c. 31), a part of the "works or machinery" supplied by the master. *McGowan v. New York Contracting Co.*, Pennsylvania Terminal, 127 N. Y. Supp. 532, 143 App. Div. 1. In an action for injuries under Employers' Liability Act (Consol. Laws 1909, c. 31), held, a cable and its hoisting machinery used in lowering a heavy steel section of a bridge into place were within the term "works or machinery." *McGlynn v. Pennsylvania Steel Co.*, 129 N. Y. Supp. 45, 49, 144 App. Div. 343. The word "works," as used in such statute, comprehends the entire plant, including all the real estate, buildings, and machinery used in the particular business. *Kern v. Welz & Zerweck*, 136 N. Y. Supp. 412, 416, 151 App. Div. 432.

The harness of a horse attached to a delivery wagon which an employé was driving was not a part of the employer's "machinery," within Rev. Laws, c. 106, § 71, cl. 1, giving an employé the same right of action against his employer for personal injuries by a defect in the ways, works, and machinery connected with the employer's business, as if he had not been an employé; "machinery" only including such machines or mechanical devices as are in use, and such appurtenances thereof as are used incidental to the use of the machine. Nor was the harness a part of the "ways" or "works." *Murphy v. O'Neil*, 90 N. E. 406, 407, 204 Mass. 42, 26 L. R. A. (N. S.) 146.

A levee constructed by the trustees of a reclamation district on a right of way procured for that purpose is a part of the "works" which the trustees of the district are authorized to take materials for and construct for the purpose of reclaiming and keeping reclaimed the land within the district, under Pol. Code, § 8454, and is public property acquired by the agents of the state for state purposes. *Reclamation Dist. No. 551 v. Superior Court of Sacramento*, 90 Pac. 545, 546, 151 Cal. 263.

#### **WORKS OF ART**

Pen and ink drawings of an artistic character, of a proposed building, produced by an architect, are within paragraph 703, Free List, § 2, c. 11, Tariff Act July 24, 1897, 30 Stat. 203, relating to "works of art, the production of American artists." *Young v. Bohn*, 141 Fed. 471, 473.

The provision in Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 703, 30 Stat. 203, for "works of art," does not include fashion

plate drawings, which, though possessing artistic merit, are for purely practical and utilitarian purposes. *Harper & Bros. v. United States*, 172 Fed. 289, 290.

The term "works of art," in *Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 703, 30 Stat. 194*, held not to include a monument on which the only free sculpture is the cornice, a relief bust, and a garland of flowers, all covering only a very slight area of the whole surface. *F. B. Vandegrift & Co. v. United States*, 162 Fed. 1003.

In determining whether marble altars imported for a church were "works of art" within the meaning of the tariff list, the board of appraisers, whose report was adopted by the court, said that it would be presumptuous to question the correctness of the views of eminent artists as to what constitutes a work of art in the strict and technical understanding of sculptors, who exclude architectural works from their definition. But when such sculptors undertake to determine what is a work of art in the phraseology of the law, and what was the intention of the framers of the law, they manifestly overlooked the well-settled rule in the interpretation of the tariff act that words used therein are to be understood in the sense which they bear in the common speech of the people of this country. In that sense the altar and reredos was a work of art. The court gave definitions by sculptors to the effect that "any human work, made with a specific purpose of stirring human emotions, is a work of art," and that "art is the work of a human being, in plastic material or color, or something to render a sentiment, to imitate a form, or something of that kind, which does not grow on trees, which is not in nature." If the proportions are sufficiently symmetrical, and the lines so far free from faults as to stir the emotions of people, the work is to them a work of art. The work as an entirety confessedly falls within the accepted definition of a work of art. It represents the handiwork of an artist; it embodies something more than the mere labor of an artisan; it is a skillful production of the beautiful in visible form. It is none the less a work of art because adapted to beautiful things. *United States v. Ecclesiastical Art Works*, 139 Fed. 798, 799. The provision in *Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 703, 30 Stat. 203*, for "works of art" intended for presentation to religious societies, held to include marble altars imported for presentation to a church, which were carved by a professional sculptor and were of a value of \$1,800. *United States v. Ecclesiastical Art Works*, 139 Fed. 798; *Id.*, 142 Fed. 1038, 71 C. C. A. 685.

#### WORKS OF IMPROVEMENT AND PUBLIC WORKS

The city charter of Houston provides that all "works of improvements and public

works" for the city, the cost of which shall exceed \$500, shall be let out by sealed bids to the lowest bidder, and declares that "work of which it is manifestly impossible to make specifications is not embraced in this requirement." Held, that the term "works of improvement and public works" refers to the construction of public buildings and other permanent improvements, and such charter provision does not apply to the employment by the city of an architect to prepare plans for a public building. *City of Houston v. Glover*, 89 S. W. 425, 428, 40 Tex. Civ. App. 177.

#### WORKS OF INTERNAL IMPROVEMENT

See Internal Improvement.

#### WORKS OF THE STATE

"Works of the state," as used in a statute exempting works of the state from liability to taxation, did not include the property of a railroad company; the roadbed and depot grounds not being held as an easement of the public by the railroad company as the agents of the state, but by them as a private corporation. *State v. Missouri Pac. R. Co.*, 105 N. W. 983, 984, 75 Neb. 4 (quoting *Burlington & M. R. R. Co. v. Spearman*, 12 Iowa, 117).

#### WORKSHOP

The word "workshop," as used in a statute prohibiting employment of children under fourteen in any mercantile institution, office, laundry, manufactory, "workshop," restaurant, hotel, or apartment house, could not be said not to include a barber shop; it being a place where a handicraft is carried on. *In re Spencer*, 86 Pac. 896, 897, 149 Cal. 396, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105.

Rev. Laws 1905, § 1814, requiring the owner of any factory, mill, or workshop to furnish belt shifters, if practicable, applies to the owners of grain elevators. The term "workshop," as defined by Laws 1907, c. 356, § 2, means any premises, room, or place, not a mill or factory, wherein manual labor is exercised for purposes of cleaning or adapting for sale any article or part thereof, and includes a grain elevator. *Sorselell v. Red Lake Falls Milling Co.*, 126 N. W. 903, 905, 111 Minn. 275.

A plant for mixing the materials used in making asphalt pavement, consisting of machinery mounted on an open or flat car, moved from place to place as required, is not a "factory, mill, or workshop," within the meaning of Laws Wash. 1905, c. 84, as amended by Laws 1907, c. 205, providing for the protection and health of employes in factories, mills, and workshops, and requiring the boxing or guarding of machinery and shafting therein, etc. *Casey v. Barber Asphalt Paving Co.*, 192 Fed. 432, 433.



Acts 1899, p. 234, c. 142, in relation to the safety of employes, is made applicable in section 1 to any manufacturing or mercantile establishment, laundry, renovating works, bakery, or printing office; and section 18 (page 237) provides that "the words 'manufacturing or mercantile establishment, mine, quarry, laundry, renovating works, bakery or printing office,' mean any mill, factory, workshop, store, \* \* \* or other establishment where goods, wares, or merchandise are manufactured or offered for sale," or where persons are employed for hire. Held, that a shop maintained by a street railroad company, where the principal work was in the way of repair of cars or other appliances used in carrying on the business of the corporation, was within the statute as a "workshop." *Hoffmeyer v. State*, 77 N. E. 372-374, 37 Ind. App. 526.

## WORLD

See Notice to the World.

## WORLDLY

### WORLDLY BUSINESS OR EMPLOYMENT

The purchase of a cigar on Sunday for the purpose of consumption is not a "worldly employment or business," within the meaning of the Sunday law of April 22, 1794. *Commonwealth v. Hoover*, 25 Pa. Super. Ct. 133, 134.

## WORSHIP

See House of Public Worship; House of Religious Worship; House of Worship; Place of Public Worship.

"Worship" includes prayer, praise, and thanksgiving. In the ordinary church meeting the congregation is regarded as engaged in religious worship while listening to the sermon, reading the Holy Scriptures or hearing them read, or engaging in singing. Devotional, religious exercises constitute worship. Prayer is a chief part of worship. *People ex rel. Ring v. Board of Education of Dist. 24*, 92 N. E. 251, 252, 245 Ill. 334, 29 L. R. A. (N. S.) 442, 19 Ann. Cas. 220.

## WORSTED CLOTH

See Wool or Worsted Cloths.

## WORTH

See Money's Worth; Reasonable Worth.

The "worth" of a thing is what it can be sold for. *Mayor, etc., of Baltimore v. Latrobe*, 61 Atl. 203, 205, 101 Md. 621.

Though strictly "price" tokens agreement on a value by parties in interest, while "value" is, as a rule, the general estimate of the pecuniary equivalent of the subject of in-

quiry, the terms "worth," "price," and "value" may be treated as synonymous in determining the damages for breach by the buyer of a contract of sale. *Scruggs & Echols v. Riddle*, 54 South. 641, 645, 171 Ala. 350.

## WORTHY

The word "worthy" is elastic in its meaning, according to the context in which used. It may—perhaps, more exactly, does—mean virtuous, or of good standing, but its restriction to such significance would be absurd when used in a will enjoining the trustees of a fund to select subjects worthy of assistance; would strain through a distorting filter this testator's bounty, in view of the situations which he evidently contemplated as likely to surround its distribution. *Kronshage v. Varrell*, 97 N. W. 928, 930, 120 Wis. 161.

## WORTLES

"Wortles" and "draw-plates," so called, consisting respectively of bars and blocks with holes for wire drawing, are not dutiable as steel "plates" under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 135; that term being, in the absence of evidence of a contrary commercial usage, limited to articles in the form of sheets. *Newman v. United States*, 159 Fed. 123, 86 C. C. A. 511.

## WOULD

A warning given by an officer to one in his custody, which was in the usual form, with the exception of the use of the word "might" instead of "would" or "could," the officer telling the one in custody that any statement he might make "might" be used against him, was sufficient. *Garrett v. State*, 91 S. W. 577, 49 Tex. Cr. R. 235.

## WOULD AFFECT

The term "would affect," used in decisions holding that adverse parties upon whom notice of appeal must be served under Rev. St. 1887, § 4808, are such parties as a reversal of judgment would affect, means adversely affect. *Nelson Bennett Co. v. Twin Falls Land & Water Co.*, 92 Pac. 980, 13 Idaho, 767, 13 Ann. Cas. 172 (citing and adopting the definitions in *Aulbach v. Dahler*, 4 Idaho, 522, 43 Pac. 192; *Titiman v. Alamance Mining Co.*, 9 Idaho, 240, 74 Pac. 529).

## WOULD ENDEAVOR

Where one desiring to ship goods informed the agent of the carrier that he would want two cars in which to transport the goods, an allegation, in a complaint founded on a failure to furnish the cars, that the agent "notified" the shipper that he "would endeavor" to secure the cars, was insufficient to show an acceptance of the proposal according to the terms in which it was made, or

an unconditional promise to comply with it. It was no more than a promise that the agent "would endeavor" to comply with the order, which it was his duty to do without a contract. *Lake Shore & M. S. Ry. Co. v. Anderson*, 79 N. E. 381, 383, 39 Ind. App. 112.

## WOUND

See Gunshot Wounds.

"Wounds," within the meaning of an accident policy requiring injury to result from external, etc., means leaving wounds visible to the naked eye, means injuries of every kind which affect the body, including bruises, contusions, fractures, luxations, etc., or any lesion of the body. *Thompson v. Loyal Protective Ass'n*, 132 N. W. 554, 557, 167 Mich. 31.

Disease brought about as the result of a "wound," even though not the necessary or probable result, yet if it is the natural result of the wound, and not of an independent cause, is properly attributed to the wound; and death resulting from the disease is a "death resulting from the wound," even though the wound was not in its nature mortal or even dangerous. Even though the wound results in disease and death through the negligence of the injured persons in failing to take ordinary and reasonable precautions to avoid the possible consequence, the death is the result of the wound. *Delaney v. Modern Accident Club*, 97 N. W. 91, 93, 121 Iowa, 528, 63 L. R. A. 603.

An accident policy covered, inter alia, blood poison sustained by physicians or surgeons resulting from septic matter introduced into the system through "wounds" suffered in professional operations. Plaintiff, a dentist, was operating on a patient, who suddenly coughed, and particles of septic matter from his mouth were thrown against the mucous membrane of plaintiff's eye. The septic matter, without abrading, penetrating or bruising the membrane, infected it and caused blood poisoning. Held, that plaintiff had not received any "wound," within the meaning of the policy, and was not entitled to recover under such provision. It was error for the court under such circumstances to charge that the term "wound" as used in the policy included any lesion of the body resulting from external violence whether accompanied by a rupture of the skin or mucous membrane or not. *Fidelity & Casualty Co. v. Thompson*, 154 Fed. 484, 486, 83 C. C. A. 324, 11 L. R. A. (N. S.) 1069, 12 Ann. Cas. 181.

**As disease**

See Disease.

**Nature of instrument used**

To constitute a "wound," within the meaning of Code 1906, c. 144, § 9, the injury must have been inflicted with a weapon other than any of those with which the human body is provided by nature, and must include a complete parting of the external or

internal skin. *State v. Gibson*, 68 S. E. 295, 67 W. Va. 548, 28 L. R. A. (N. S.) 965.

Inflicting wounds with a rawhide whip and a hot stove-lid lifter constitutes a "wounding," within Rev. St. 1899, § 1849 (Ann. St. 1906, p. 1279), providing that where one is maimed, wounded or disfigured, etc., by another under circumstances constituting murder or manslaughter if death ensues, the person occasioning the injury shall be punished, though the whip and stove-lid lifter were not deadly or dangerous weapons. *State v. Nieuhaus*, 117 S. W. 73, 77, 217 Mo. 332.

## WOUND UP

A statement by a partner that "at the end of ten years, if he [the copartner] shall not have received all his money and interest out of the sales, the joint account shall be 'wound up' and I shall have 5 per cent. for all the lands I have sold," means that at the end of ten years a sufficient length of time should be given to cast up the accounts of the partnership, to ascertain where the parties stood, and for settlement on the basis stated. *Corbin v. Holmes*, 154 Fed. 593, 596, 598, 83 C. C. A. 367.

## WOVEN FABRIC

As article, see Articles Within Tariff Act.

## WRAPPER

### WRAPPER TOBACCO

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule F, 30 Stat. 169, imposing duties upon tobacco, and providing that the "term 'wrapper tobacco,' as used in this act, means that quality of leaf tobacco which is suitable for cigar wrappers, and the term 'filler tobacco' means all other leaf tobacco," the importer is limited to a choice between the terms "wrapper" and "filler" tobacco, and it was improper for the importer to describe his importation as "mixed tobacco." *United States v. Seventy-Five Bales of Tobacco*, 147 Fed. 127, 182, 77 C. C. A. 353.

## WRECK

### WRECKER

See House Wrecker.

## WRIT

See Proper Writ; Receipt of Writ.

Issue of, see Issuance—Issue.

Issuance or service as commencement of action, see Commencement of Action.

A "writ" is an instrument in writing in an epistolary form, running in the name of the sovereign of a state and issued out of a court of justice by a judge thereof, at the commencement of an action or at any time during its progress or incident thereto, usual-

ly under the seal of the court, duly attested, and directed to some municipal officer, or to the party to be bound by it, commanding the commission of some act at or within a time specified, or prohibiting the doing of some act. The cardinal requisites are that the instrument issue from a court of justice, or a judge thereof; that it run in the name of the sovereign of the state; that it be duly attested, but not necessarily by the judge, though usually, but not always, under seal; and that it be directed to some one, commanding or prohibiting the commission of an act. *Watson v. Keystone Iron Works Co.*, 74 Pac. 272, 273, 70 Kan. 43.

Code Civ. Proc. § 2170, makes any unlawful interference with the process or proceedings of a court a contempt. Section 3463 defines "process" as a writ issued in the course of judicial proceedings, and "writ" is defined as a written order or precept, issued in the name of the state, of a court or judicial officer. Sections 840-843, in relation to the recovery of possession of personal property, provides that, when a delivery is claimed, plaintiff must make an affidavit stating certain facts, and that he may, by an indorsement on the affidavit, require the sheriff of the county to take the property from defendant, and the officer is required to serve on the defendant a copy of the affidavit and undertaking. Held, that where defendant in replevin refused to receive a copy of papers, and threatened the officer with violence if he took possession of the property, and while the officer was absent seeking assistance secreted the property, he was guilty of a contempt, though he had not been served with summons and though the order indorsed by plaintiff on the affidavit was not strictly within the definition of "process." *State ex rel. Bruce v. District Court of Second Judicial Dist. for Silver Bow County*, 83 Pac. 641, 642, 33 Mont. 359.

Rev. St. c. 83, § 94, provides that when a writ falls of sufficient service, etc., or is abated, or the action is otherwise defeated for any matter of form, the plaintiff may commence a new action within six months after the abatement or determination of the original suit. As originally enacted as section 11, c. 62, Laws 1821, it provided that any action which should be actually declared on, and in which the writ purchased therefor should fall of a sufficient service, etc., or when such writ should be abated, or the action avoided by demurrer or otherwise, for informality of proceedings, the plaintiff might commence another action upon the same demand and thereby save the limitation thereof. Section 8 of that chapter provided that any action of the case or debt, etc., which should be actually declared upon in a proper writ, returnable according to law within six years after the cause accrued, should be deemed and taken to be duly commenced within the meaning of that act. Held, that chapter 83,

§ 94, does not apply to a case where an action was dismissed because the writ was made returnable at a term other than the first term after its issuance, contrary to law, since the word "action," as used in section 11, had the same meaning as in section 8, where it was defined as one declared upon in a proper writ returnable according to law, which meaning has not been changed by any subsequent provision; and while the words "proper writ" did not mean one that could not be abated or defeated for any matter of form, but merely meant one adapted to the cause of action, the words "returnable according to law" were definite and explicit and not subject to judicial construction, and hence the word "writ," as used in section 94, means a writ returnable according to law. *Densmore v. Hall*, 84 Atl. 983, 984, 109 Me. 438.

#### Execution

Where judgment is entered on a warrant of attorney accompanying a bond and mortgage after the mortgagor has parted with the title to the real estate, a writ of execution thereon is not a writ within Act April 23, 1903, providing that the plaintiff in any writ to charge particular land with the payment of a particular debt running with the land shall file with his praecipe an affidavit setting forth who are the real owners of the land charged, and the affidavit is not required in such case. *Keene Home v. Startzell*, 83 Atl. 584, 585, 235 Pa. 110.

#### Information

An information is not a "writ" or "process." It is an accusation, upon which writs and processes issue. *Caples v. State*, 104 Pac. 493, 497, 3 Okl. Cr. 72, 26 L. R. A. (N. S.) 1033 (citing 8 Words and Phrases, p. 7531).

#### Notice of appeal

A notice of appeal is not a "writ," within Rev. Codes 1905, § 6738, defining "process" as a writ or summons issued in a judicial proceeding and need not be served in the manner in which process is required to be served. *Gooler v. Eidness*, 121 N. W. 83, 85, 18 N. D. 338.

#### WRIT OF AD QUOD DAMNUM

See Ad Quod Damnum.

#### WRIT OF ASSISTANCE

The "writ of assistance" is a process of a court of equity, and not of a court of law. *Kirkendall v. Weatherley*, 109 N. W. 757, 759, 77 Neb. 421, 9 L. R. A. (N. S.) 515.

A "writ of assistance" is a process issued by a court of equity to enforce its decree; the scope of the writ being coextensive with the court's jurisdiction to hear and determine the rights of the parties. *Fay v. Stubenrauch*, 83 Pac. 82, 84, 2 Cal. App. 88.

"A 'writ of assistance' is the ordinary process used by a court of chancery to put a party, receiver, sequestrator, or other person into possession of property when he is

entitled thereto, either upon a decree or upon an interlocutory order." *Escrutt v. Michaelson*, 106 N. W. 1016, 1017, 73 Neb. 634, 10 Ann. Cas. 1039.

The "writ of assistance" is a writ in aid of a decree of a court of equity issuable only when the right is clear, and it runs in aid of a mortgage foreclosure decree against one in privity with the mortgagor, but it does not run against one asserting an independent title. *State ex rel. Biddle v. Superior Court of King County*, 115 Pac. 307, 308, 63 Wash. 312, Ann. Cas. 1913D, 1119.

#### Possessory writ

A "writ of assistance" is the ordinary process used by a court of chancery to put a party into possession of property, when he is entitled thereto, either upon a decree or an interlocutory order. *Long v. Morris* (Ala.) 58 South. 274, 275.

#### WRIT OF AUDITA QUERELA

See *Audita Querela*.

#### WRIT OF CERTIORARI

See *Certiorari*.

#### WRIT OF DISTRINGAS

See *Distringas*.

#### WRIT OF ERROR

A "writ of error" is an original writ, and in England issues out of the Court of Chancery and runs in the name of the king. It is in the nature as well of a certiorari to remove a record from an inferior into a superior court as of a commission to the judges of the superior court to examine the record and to affirm or reverse it according to law. *Fugitt v. State*, 37 South. 534, 535, 85 Miss. 94, 107 Am. St. Rep. 268, 3 Ann. Cas. 326.

#### Appeal distinguished

See *Appeal*.

#### Exceptions distinguished

"Exceptions" and "error" are inherently proceedings of different character. On exceptions, various specific rulings, whether interlocutory or final, whether brought up immediately or only after final judgment, are made direct and independent subjects for review. Only so much of the record is brought up as is necessary for passing upon the specific exceptions. The decision usually is that the exceptions be sustained or overruled and that such further proceedings be had as the rulings on the exceptions call for. On error the final judgment alone is brought up, and specific rulings, whether excepted to or not, are considered only incidentally in passing upon the correctness of the final judgment. The entire record is brought up, and the judgment of the appellate court is such as the facts and law warrant, as shown by the entire case. *Cotton v. Hawaii*, 29 Sup. Ct. 85, 89, 211 U. S. 162, 53 L. Ed. 131 (citing *Territory v. Cotton Bros.*, 17 Hawaii, 379).

#### As a new suit

A "writ of error" is a new action. *Kelme v. Nine*, 97 S. W. 635, 636, 121 Mo. App. 718 (citing *Macklin v. Allenberg*, 100 Mo. 343, 13 S. W. 350).

A "writ of error" is the beginning of a new action in the appellate tribunal. *State ex rel. City of Duluth v. Northern Pac. Ry. Co.*, 109 N. W. 238, 239, 99 Minn. 280.

The suing out of a "writ of error" is the commencement of a new suit. *Ohio-Colorado Min. & Mill. Co. v. Elder*, 99 Pac. 42, 43, 47 Colo. 63 (citing *Wise v. Brocker*, 1 Colo. 550; *Western Union Tel. Co. v. Graham*, 1 Colo. 182; *Talpey v. Doane*, 2 Colo. 298; *Fille v. Cody*, 3 Colo. 221; *Cheever v. Minton*, 12 Colo. 557, 21 Pac. 710, 13 Am. St. Rep. 258; *Stout v. Gully*, 22 Pac. 954, 13 Colo. 604).

A "writ of error" is a suit of common-law origin, and it removes nothing for retrial but the law. It is a new suit, and not a continuation of the suit the law of which is sought to be reviewed. *Wingfield v. Neall*, 54 S. E. 47, 50, 60 W. Va. 106, 10 L. R. A. (N. S.) 443, 116 Am. St. Rep. 882, 9 Ann. Cas. 982.

A "writ of error" is an independent action, and, when not served and returned within the prescribed period before the return day, it must fail, and the court must abate it. *Wakefield v. Chevalier*, 82 Atl. 973, 974, 85 Conn. 374.

A "writ of error" is a new suit prosecuted in the appellate court by a plaintiff in error against a defendant in error, and the appellate court obtains jurisdiction over the person of the latter, either by his voluntary appearance or the service of appropriate summons. *Rudolph v. Rudolph*, 114 Pac. 977, 50 Colo. 243.

A "writ of error" has been called an original writ, because it issued out of a reviewing court and was directed to the trial court; but it acts upon the record rather than upon the parties, removing the record into the supervising tribunal. The Supreme Court declares it to be "rather a continuation of the original litigation than the commencement of a new action." *Bristol v. United States*, 129 Fed. 87, 89, 63 C. C. A. 529.

While for some purposes a "writ of error" is a new suit, it is ordinarily a continuation of a suit already begun. It is like a new suit, in that it can be prosecuted only upon notice to the opposite party, but that notice may be either personal or constructive. On the other hand, the writ will not lie unless there has been an original action, and it is but a suit on the record in the original cause. *Tipton v. Tipton*, 104 S. W. 237, 240, 118 Tenn. 691 (quoting and adopting definitions in *Fitzsimmons v. Johnson*, 17 S. W. 102, 90 Tenn. 426; *Cohens v. Virginia*, 6 Wheat. [19 U. S.] 410, 5 L. Ed. 257; *Pennoyer v. Neff*, 95 U. S. 734, 24 L. Ed. 565; *Shannon's Code*, §§ 4569, 4575).

"A 'writ of error at common law,' being a command from a superior to an inferior court of record, commanding the inferior court, in some cases itself to examine the record, in others to send it to the superior court to be examined, that some alleged error might be corrected, was the commencement of a new action, and hence the application for the writ and the writ itself had to point out clearly, not only the cause in which the error lay which was sought to be corrected, but the parties thereto, that they might be summoned to appear in the reviewing court. But the 'statutory writ of error or appeal,' which is sued out as a matter of right in the court rendering the judgment on which the error is predicated, is in no sense the commencement of a new proceeding or action, but is a mere continuation of the pending proceeding or action, being its transfer from a lower to a higher court for further proceedings." *Philadelphia Mortgage & Trust Co. v. Palmer*, 73 Pac. 501, 502, 32 Wash. 455.

#### WRIT OF ERROR CORAM NOBIS

The function of a "writ of error coram nobis" is to "vacate a judgment in the court where it was rendered, by bringing some fact to the knowledge of that court which was not previously known, and which, if known, would have prevented the rendition of the judgment." On such a writ only such errors of fact can be assigned as are consistent with the record before the court in which the case was tried. *Hadley v. Bernero*, 78 S. W. 64, 67, 103 Mo. App. 549.

A "writ of error coram nobis" was a common-law remedy to review a judgment by the same court in which the record lies, for error of fact as distinguished from errors of law, and was proper at common law where the court had assumed the existence of a material fact which did not exist, and the absence of which deprived the court of power to attain a valid result, but would not lie for errors arising on facts submitted to a jury, referee, or to the court as a trier of fact, nor for the purpose of correcting errors of law. *Cross v. Gould*, 110 S. W. 672, 676, 131 Mo. App. 585.

While a "writ of error coram nobis" will lie to correct a judgment for an error in fact in the proceedings of a court of record it will not lie to enable a court to review and revise its opinion. Such writ lies only to correct an error of fact not appearing upon the face of the record, and does not authorize any court to recall its adjudications after lapse of the term. *State v. Stanley*, 125 S. W. 475, 476, 225 Mo. 525.

A motion to vacate a judgment because entered after the death of the party against whom it was rendered and supported by evidence dehors the record takes the place of the common-law "writ of error coram nobis," so that, where death did not appear of rec-

ord but had to be shown by evidence, the writ of error coram nobis was the common-law remedy. *State ex rel. Potter v. Riley*, 118 S. W. 647, 651, 219 Mo. 667.

The "writ of error coram nobis" lies in the same court which rendered the judgment and brings its own judgment before it for review on account of an error affecting the validity and regularity of the proceedings, and which was not brought in issue, but it does not lie to correct matters that appear of record, nor to correct the recitations of the court's own records with the records before it, showing where an entry was incorrect. Under Rev. St. 1899, § 2931 (Ann. St. 1906, p. 1689), providing that no final judgment in cases for divorce shall be reversed or modified by any appellate court by appeal or writ of error unless the appeal was granted during the term at which the judgment was rendered, or unless the writ of error was issued within 60 days after judgment, the judgment as made in an action for divorce, though not properly spread on the record, cannot be appealed from except during the term, and cannot be touched by writ of error after the lapse of 60 days, and a writ of error coram nobis applied for two years after judgment will be denied, since it will not give any relief because of lapse of time. *Hartman v. Hartman*, 133 S. W. 669, 670, 154 Mo. App. 243.

#### Writ of error coram vobis distinguished

When the object of the writ is to correct an error of fact in the same court that rendered a judgment, it is called a "writ of error coram nobis," if it be in the King's Bench, and a "writ of error coram vobis" if it be in the Common Pleas. These writs differ from a writ of error in two particulars: (1) They contain no certiorari clause, for there is no record to be certified; and (2) they have no return day, as they are in the nature of a commission only to the court to correct error. They lie for errors of fact, and for errors in the process, or through the default of the clerks, but do not lie when the error is in the judgment of the court itself, and not in the process. The writ is called a "writ of error coram nobis" in the King's Bench, because the record and proceedings are stated in the writ, but remain "before us" (coram nobis)—that is in the Court of King's Bench—where the king by a fiction of law is supposed to preside in person. In the Common Pleas, where the king is not supposed to preside, the writ is called a "writ of error coram vobis," because the record and proceedings are stated in the writ to remain "before you" (coram vobis)—that is, the king's justices. The judgment for plaintiff for an error of fact on a writ coram nobis or coram vobis is that the judgment be revoked, while on a writ of error it is that the judgment be reversed. *Fugitt v.*

State, 37 South. 554, 555, 85 Miss. 94, 107 Am. St. Rep. 268, 3 Ann. Cas. 326.

### WRIT OF ERROR CORAM VOBIS

Writ of error coram nobis distinguished, see Writ of Error Coram Nobis.

"The English 'writ of error coram vobis' was used to correct mistakes of fact or errors in process, which can be brought to the attention of the court in which they were committed by means of this writ, but cannot be relied upon where the error is in the judgment itself, or where the question relates to the power of the court, and not to the mode of procedure." *United States v. One Trunk Containing Fourteen Pieces of Embroidery*, 155 Fed. 651, 652 (citing *Rolle*, Abr. p. 749, and *Bronson v. Schulten*, 104 U. S. 410, 28 L. Ed. 797, and cases therein cited).

### WRIT OF ESTREPEMENT

The common-law "writ of estrepement" was designed to prevent waste after judgment obtained in a real action, and before possession delivered. The scope of the writ was later enlarged by statute to embrace cases of waste pending suit, and as an auxiliary to cases in which no recovery of land was sought, as actions of waste, trespass, etc. *Brigham v. Overstreet*, 128 Ga. 447, 57 S. E. 484, 488, 10 L. R. A. (N. S.) 452, 11 Ann. Cas. 75 (citing 3 Bl. Comm. 225, 227, 228; *Duvall v. Waters* [Md.] 1 Bland, 569, 18 Am. Dec. 350; *Jacob*, Law Dict.).

### WRIT OF EXECUTION

See Execution (Writ of).

### WRIT OF HABEAS CORPUS

See Habeas Corpus.

### WRIT OF INQUIRY

"A 'writ of inquiry' is issued in no cases except in actions sounding in damages, and only for the purpose of ascertaining the amount of the plaintiff's damages. A 'writ of inquiry' in common-law practice is defined in *Black's Law Dictionary* to be a writ 'which issues after the plaintiff in an action has obtained a judgment by default on an unliquidated claim, directing the sheriff, with the aid of a jury, to inquire into the amount of the plaintiff's demand and assess his damages.' *Bouvier*, in his *Law Dictionary*, defines a 'writ of inquiry' as one 'sued out by a plaintiff in a case where the defendant has let the proceedings go by default, and an interlocutory judgment has been given for damages generally, where the damages do not admit of calculation. It issues to the sheriff of the county in which the venue is laid, and commands him to inquire, by a jury of 12 men, concerning the amount of damages.' The same definition, in very much the same language, of a 'writ of inquiry,' is given in the law dictionaries of *Rapalje & Lawrence*, *Abbott*, *Anderson*, and *Burrill*. 'If the action

sounds in damages (according to the technical phrase)—that is, be brought, not for specific recovery of land, goods, or sums of money (as is the case in real or mixed actions, or the personal actions of debt and detinue), but for damages only, as in covenant, trespass, etc.—and if the issue be an issue in law, or any issue in fact not tried by jury, then the judgment is only that the plaintiff ought to recover his damages, without specifying their amount, for, as there has been no trial by jury in the case, the amount of damages is not yet ascertained. The judgment is then said to be interlocutory. On such interlocutory judgment the court does not, in general, itself undertake the office of assessing the damages, but issues a 'writ of inquiry,' directed to the sheriff of the county where the facts are alleged by the pleadings to have occurred, commanding him to inquire into the amount of damages sustained by the oath of 12 good and lawful men of his county, and to return such inquisition, when made, to the court. Upon the return of the inquisition the plaintiff is entitled to another judgment, viz., that he recover the amount of the damages so assessed; and this is called 'final judgment.' *Stephen on Pleading*, 105. Of course, the damages are assessed under the Code by the jury in the presence of and under the direction of the judge." *Junge v. McKnight*, 49 S. E. 474, 476, 137 N. C. 285 (citing *Witt v. Long*, 93 N. C. 388).

### WRIT OF MANDAMUS

See Mandamus.

### WRIT OF MANDATE

See Mandate (In Practice).

### WRIT OF NE EXEAT

See Ne Exeat.

### WRIT OF PERAMBULATION

Though under the common law the "writ of perambulation" issues on consent of both parties, when they are in doubt as to the bounds of their respective estates, and when there is no dispute as to the title, nor the right to occupy the adjoining tenements, under *Revisal* 1905, §§ 325, 326 (Acts 1893, p. 44, c. 22), either owner where there is a disputed boundary line may have the land processioned without the other's consent and even when the question of title may become incidentally involved. *Green v. Williams*, 56 S. E. 549, 550, 144 N. C. 60.

### WRIT OF POSSESSION

A "writ of possession" is now generally employed to designate any writ by virtue of which the sheriff is commanded to place a person in possession of real or personal property, and there may be a *fi. fa.* clause added thereto, commanding the sheriff to levy the damages awarded by the judgment. *Decuir v. Loeb*, 42 South. 955, 956, 118 La. 332 (citing 2 *Freem. Ex'ns* [2d Ed.] § 43).

**WRIT OF PROCEDENDO**

See Procedendo.

**WRIT OF PROHIBITION**

See Prohibition (Writ of).

**WRIT OF RESTITUTION**

See Restitution.

**WRIT OF REVIEW**

The scope of the "writ of review" is to review the determination of the lower tribunal when it has exceeded its jurisdiction or exercised the same erroneously in making such determination, and original relief cannot be secured thereby. *Elmore v. Tillamook County*, 105 Pac. 900, 901, 55 Or. 224.

A "writ of review" brings up the record of the tribunal board, or body whose acts are to be examined, to review the law applicable to the case, instead of to examine the facts, except in so far as an examination of the facts is necessary in the determination of the single question of jurisdiction. *Lansdon v. State Board of Canvassers*, 111 Pac. 133, 18 Idaho, 596.

A "writ of review" will lie only when the inferior court or tribunal has exceeded its jurisdiction or exercised its functions illegally or contrary to the course of procedure applicable to the matter before it. It cannot be used as a substitute for an appeal, nor can the mere error of an inferior court, officer, or tribunal, either of fact or of law, in the exercise of rightful jurisdiction, be reviewed or considered in such a proceeding. *Farrow v. Nevin*, 75 Pac. 711, 713, 44 Or. 496.

Under the express terms of Rev. St. § 4968, review upon a "writ of review" cannot extend beyond a determination whether the inferior tribunal, board, or officer has regularly pursued the authority given such tribunal, etc. The Supreme Court cannot inquire into the constitutionality of a revenue law upon a writ of review on the application of a private citizen in a matter involving his private rights. Under a writ of review, errors and mistakes of judgment of a board as to the value of property that it is authorized to assess cannot be reviewed; neither can such writ be invoked to review the facts upon which the inferior tribunal, board, or officer acted, except to ascertain the fact of jurisdiction. The provisions of such writ are limited to a review of questions of law invoked in the matter, and the court must confine its inquiry to the question as to whether or not the action complained of was beyond the jurisdiction conferred on the tribunal, board, or officer. On such writ the Supreme Court cannot review the question of fact as to whether the board in its judgment or opinion has valued the railway, telephone, and telegraph lines at less than their cash value. *McConnell v. State Board of Equalization*, 83 Pac. 494, 496, 497, 11 Idaho, 652.

**Certiorari**

"In this state a writ of certiorari is known as a 'writ of review.'" *Hager v. Knapp*, 78 Pac. 671, 673, 45 Or. 512 (citing B. & C. Comp. § 594).

A "writ of review" is substantially the common-law remedy by certiorari. *Gue v. City of Eugene*, 100 Pac. 254, 255, 53 Or. 282.

The "writ of review" bears the same relation to our system of civil procedure that the writ of certiorari sustained to the common law, the name only of the latter having been changed by statute, and, like the ancient mode of procedure, the modern writ merely brings up the record. *McAnish v. Grant*, 74 Pac. 396, 397, 44 Or. 57.

The statutory "writ of review" is substantially the same as the common-law writ of certiorari, and will lie when an inferior court or tribunal has exceeded its jurisdiction, or exercised its judicial functions illegally or contrary to the course of procedure applicable to the matters before it. *Oregon R. & Nav. Co. v. Umatilla County*, 81 Pac. 352, 355, 47 Or. 198.

The "writ of review," by B. & C. Comp. § 594, made substantially the same as the common-law writ of certiorari, is a special proceeding; and under section 597 the only inquiry proper upon a return to the writ is a question of law, in the examination of which the parties are not entitled to a jury trial, so that the existence of a remedy by court of review does not necessarily exclude a remedy in equity. *Hall v. Dunn*, 97 Pac. 811, 813, 52 Or. 475, 25 L. R. A. (N. S.) 193.

The "writ of review" granted by a court of superior authority or by a judge thereof on petition, which, as provided by B. & C. Comp. § 596, describes with certainty the judicial functions claimed to have been exercised to the substantial injury of plaintiff's right, and which sets forth the errors alleged to have been committed, is substantially the common-law remedy of certiorari. *Curran v. State*, 99 Pac. 420, 421, 53 Or. 154.

The "writ of review" is substantially the common-law certiorari, but under the express provisions of B. & C. Comp. 1901, §§ 595, 603, it lies only to review a determination of the proceeding, and not from an interlocutory order, nor to remove a cause for hearing in another court; while at common law certiorari was used both as a writ of review after final judgment, and also for removing the entire cause at any stage for hearing and determination in the upper court. *Holmes v. Cole*, 94 Pac. 964, 965, 51 Or. 483.

**WRIT OF SCIRE FACIAS**

See Scire Facias.

**WRIT OF SUBPENA**

See Subpœna.

**WRIT OF SUPERSEDEAS**

See Supersedeas.

**WRIT OF SUPERVISORY CONTROL**

See Supervisory Control.

**WRIT OF WASTE**

See Waste (Writ of).

**WRITE—WRITING**

See Decision in Writing; Public Writing.

A requirement that a poll clerk shall "write his name" on the backs of ballots is equivalent to a requirement that his name shall be there written in his own handwriting. *Kirkpatrick v. Board of Canvassers*, 44 S. E. 465, 469, 53 W. Va. 275.

**Ditto marks**

Under Rev. St. 1908, § 4096, requiring that the date of signing the petition for a local option election and the residence address of the signer shall be written opposite his name, the use of ditto marks is permissible, for "writing" consists of any symbols generally used to transmit ideas, and as no particular style is required, ditto marks, which are to be read as a repetition of the line above, and are as much a part of the English language as punctuation marks, may be used. *People ex rel. Arfman v. Newell*, 113 Pac. 643, 646, 49 Colo. 349 (citing 3 Words and Phrases, p. 2141).

**Marks**

Crosses and marks made as signatures to documents were "writings," within the meaning of the statutes relating to comparison of writings by experts. The statutes do not purport and were not intended to change the meaning of the word "writings." *Ausmus v. People*, 107 Pac. 204, 212, 47 Colo. 167, 19 Ann. Cas. 491 (citing *Lawson*, Ex. Ev. p. 296).

**Pasters**

Under Rev. Laws 1905, § 275, subsec. 3, providing that a voter may write other names in the blank spaces under the printed names of candidates, authorizes the use of pasters for that purpose; the words "write" and "written," as used therein, including any mode of representing words or letters, as provided by Rev. Laws 1905, § 5514, subsec. 24. *Snortum v. Homme*, 119 N. W. 59, 106 Minn. 464.

**Printing and typewriting**

The word "signature" being defined as "the act of putting down a man's name at the end of an instrument to attest its validity" (*Bouvier's Law Dict.* tit. "Signature"), and "writing" as "words traced with a pen, or stamped, printed, engraved, or made legible by any other device" (*Anderson's Law Dict.* tit. "Writing"), it was held that, an attorney in fact being authorized to sign

a remonstrance against the issue of a liquor license, it was immaterial that he did so by typewriter. *Ardery v. Smith*, 73 N. E. 840, 841, 35 Ind. App. 94 (citing *Hamilton v. State*, 2 N. E. 299, 103 Ind. 96, 53 Am. Rep. 491).

Rev. St. 1892, § 5916, provides that every last will and testament shall be in "writing," and may be handwritten or typewritten. Held, that the word "writing," in such section, included printing. *Sears v. Sears*, 82 N. E. 1067, 1069, 77 Ohio St. 104, 17 L. R. A. (N. S.) 353, 11 Ann. Cas. 1008.

Under Code 1907, § 6845, making it an offense for a person to enter into any contract in writing for services with fraudulent intent, etc., the word "writing" includes printing. *Frazier v. State*, 49 South. 245, 159 Ala. 1.

"The great increase in the use of printing for all forms of instruments, such as deeds, bonds, tickets, tokens for the payment of goods, etc., have seemed to demand that where, either by the common law or by statute such instruments are required to be in writing, the term 'writing' should be held to include printing as well as script." *Benson v. McMahon*, 8 Sup. Ct. 1240, 127 U. S. 457, 32 L. Ed. 234.

Typewriting has largely taken the place of handwriting, and may be considered as handwriting, and the service of a typewritten notice under the Employers' Liability Act is the service of a notice in "writing." *Hunt v. Dexter Sulphite Pulp & Paper Co.*, 91 N. Y. Supp. 279, 283, 100 App. Div. 119.

**Shorthand**

An oral charge of the court, taken down by the stenographer in the employ of both parties to report the proceedings in the cause, is in "writing," within Laws 1903, p. 120, c. 81, § 1, subd. 4, providing that on request of either party the charge must be in writing, and that a stenographic report thereof shall be considered a charge in writing. *Sturgeon v. Tacoma Eastern R. Co.*, 98 Pac. 87, 51 Wash. 124.

A certificate in shorthand attached to the shorthand report of a trial, signed by the judge and reporter, and filed with the clerk, is not a certificate, within Code, §§ 3675, 3749, 3752, 3753, requiring the report of trial to be certified by the judge and reporter, etc.; shorthand characters not being "writing." *Howerton v. Augustine*, 132 N. W. 814, 815, 153 Iowa, 17.

A stenographer employed by both parties to report a trial is virtually under the direction of the court, and hence, the court's charge having been reported by such stenographer, the same was in "writing," within Laws 1903, p. 120, c. 81, § 1, subd. 4, providing that on request of either party the charge must be in writing, but that a stenographic report thereof shall be considered a charge in



writing. *Collins v. Huffman*, 93 Pac. 220, 223, 48 Wash. 184.

The notes of a stenographer were not "writing," within the meaning of a statute providing that "in equitable actions, wherein issues of fact are joined, all the evidence offered in the trial shall be taken down in writing, or the court may order the evidence, or any part thereof, to be taken in the form of depositions, etc." *Richardson v. Fitzgerald*, 109 N. W. 866, 867; 132 Iowa, 253 (citing *Smith v. Wellslager*, 74 N. W. 914, 105 Iowa, 140; *Dwyer v. Rock*, 87 N. W. 495, 115 Iowa, 722).

### WRITING—WRITINGS

See Comparison of Writings.

"The word 'writing,' when not used in connection with analogous words of more special meaning, is an extensive term, and may be construed to denote a letter from one person to another. But such is not its ordinary and usual acceptation. Neither in legislative enactments nor in common intercourse are the two terms 'letter' and 'writing' equivalent expressions. When in ordinary intercourse men speak of mailing a 'letter' or receiving by mail a 'letter,' they do not say mail a 'writing' or receive by mail a 'writing.' In law the term 'writing' is much more frequently used to denote legal instruments, such as deeds, agreements, memoranda, bonds and notes, etc. In the statute of frauds the word occurs in that sense in nearly every section. And in the many discussions to which this statute has given rise, these instruments are referred to as 'the writing' or 'some writing.' But in its most frequent and most familiar sense the term 'writing' is applied to books, pamphlets and the literary and scientific productions of authors. As for instance in that clause in the United States Constitution which provides that Congress shall have power 'to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.'" U. S. v. Chase, 135 U. S. 255, 258, 10 Sup. Ct. 756, 34 L. Ed. 117.

A memorandum made by the owner of real estate which shows the price of the property, but which does not set forth any agreement or terms of any agreement, is not a sufficient writing, within Civ. Code, § 1624, subd. 6, providing that an agreement employing an agent to sell real estate for compensation must be in "writing." *Beaver v. Continental Building & Loan Ass'n*, 116 Pac. 1105, 1106, 15 Cal. App. 190.

The word "writing," as used in Code 1887, § 2472, which protects a subsequent purchaser under a contract not required to be recorded to the extent of the payments made when he receives notice of the prior unrecorded deed or writing, etc., refers to con-

tracts in writing by which a party acquires some interest, not to judgments by which a party acquires a mere lien upon land. *Fulkerson's Adm'x v. Taylor*, 46 S. E. 309, 311, 102 Va. 314.

An indorsement on a note is within the letter and spirit of Rev. St. 1899, § 2019 (Ann. St. 1906, p. 1344), providing that every instrument partly printed and partly written, or wholly printed with a written signature thereto, and every signature of an individual, firm, or corporate body, and every writing purporting to be such signature, shall be deemed a "writing," within the meaning of the act. *State v. Carragin*, 109 S. W. 553, 559, 210 Mo. 351, 16 L. R. A. (N. S.) 561.

### In copyright law

The word "writings," with reference to protection by copyright, is not limited to the actual script of the author, but includes his printed books, and all forms of writing, printing, engraving, etching, etc., by which the ideas in his mind are given visible expression. A photograph which is not only a light-written picture of some object, but also an expression of an idea, or thought, or conception of the one who takes it, is a "writing" within the constitutional sense, and a proper subject of copyright. *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, 137 Fed. 262, 265.

Const. U. S. art. 1, § 8, gives Congress power to promote the progress of science and useful arts by securing for a limited time to authors and inventors an exclusive right to their "writings" and discoveries. Held, that the word "writings" includes maps, charts, engravings, etchings, prints, paintings, drawings, cromos, statues, models, designs, photographs, and the negatives thereof, dramatizations of copyrighted works, and may also be extended to moving pictures, tending to reproduce an artist's conception of an author's situation as described in words. *Harper & Bros. v. Kalem Co.*, 169 Fed. 61, 64, 94 C. C. A. 429.

The meaning of the word "writings," as employed in the constitutional provision giving authors the benefit of what they have written, has been expressly defined to include all forms of writing, printing, engraving, etching, etc., by which the ideas in the mind of the author are given visible expression. The restricted definition of the word "writings" does not, it is thought, permit the inclusion in section 4952 of the Revised Statutes of a musical conception, or the inclusion of collated musical sounds or expressions of a musical composition. The words of the statute have reference to the tangible object that appeals to the sense of sight, and that which is susceptible of being reproduced by printing, copying, publishing, etc. The word "writings" refers to musical compositions as employed in Rev. St. U. S. § 4952, is restricted to a writing, as that word is defined, and

would not include a composition of music perforated for reproduction by mechanism. *White-Smith Music Pub. Co. v. Apollo Co.*, 139 Fed. 430, 431.

**In criminal law**

The word "writing," as used in Pen. Code 1910, § 249, making it an offense for any person, by color of any counterfeit writing, to obtain from any person money or other valuable things, includes a "check." *Saffold v. State*, 75 S. E. 338, 339, 11 Ga. App. 329.

An indictment for forgery of a writing "or" paper did not describe the instrument in the alternative, since the words "writing" and "paper" when connected disjunctively clearly amount to the same thing, a written instrument. *Blais v. State*, 126 S. W. 1064, 1065, 94 Ark. 327.

**In postal laws**

The term "writing," in the federal statute prohibiting the mailing of obscene writings, includes a letter inclosed in a sealed envelope. *United States v. Gaylord*, 17 Fed. 438, 441.

**WRITING OBLIGATORY**

The words "writing obligatory" imply a written contract under seal. *Smith v. Woman's Medical College of Baltimore City*, 72 Atl. 1107, 1108, 110 Md. 441; *Kidd v. Beckley*, 60 S. E. 1089, 1090, 64 W. Va. 80 (citing 8 Words and Phrases, p. 7543).

Where a subscription paper is headed with merely the title, character, authorship, and price of a book, followed by the word "subscribers," a name written under "subscribers" clearly imports a promise to take a copy of the book and pay the price indicated, and constitutes a "writing obligatory," within the meaning of *Burns' Ann. St. 1901*, § 2354, defining forgery. *State v. Hazzard*, 80 N. E. 149, 168 Ind. 163.

**WRITTEN ACCEPTANCE OF RENEWAL OF LEASE**

Under a lease providing for a renewal on the same terms, if the lessees signified acceptance in writing, where a member of the lessee firm forwarded to the lessor by registered mail a letter inclosed in one of the firm's business envelopes, with the firm name and address in the corner, reciting a description of the lease, and stating that H. G. & Co., as the lessee firm, "elects to avail itself of the renewal privilege and requests the continuance of the lease for a new term," such notice was sufficient, though no signature was subscribed thereto. *Wiener v. H. Graff & Co.*, 95 Pac. 167, 170, 7 Cal. App. 580.

**WRITTEN BALLOTS**

Rev. Laws, c. 11, § 270, and St. 1905, p. 234, c. 313, § 2, providing for the use of voting machines at elections, whereby the voter trusts to the accuracy of the machine, whose workings he cannot see, is unconstitutional,

under Const. pt. 2, art. 3, c. 1, § 3, providing that representatives shall be chosen by "written votes"; the method of voting by machine being entirely unlike the writing of a name of chosen candidates upon a piece of paper, and its deposit in a box, to be afterwards taken out and counted. *Nichols v. Minton*, 82 N. E. 50, 196 Mass. 410, 124 Am. St. Rep. 568, 12 L. R. A. (N. S.) 280.

**WRITTEN CHARGE OR INSTRUCTION**

A submission of special issues to the jury, as authorized by Rev. St. 1893, arts. 1331-1333, constitutes a "written charge," provided for by article 1316, as amended by Acts 1903, c. 39. *Adams v. Burrell (Tex.)* 127 S. W. 581, 584.

Under *Burns' Ann. St. 1908*, § 2136, subd. 5, accused, on requesting the court to charge in writing, has the absolute right to written instructions. The act of the court reporter in taking down the oral instructions does not convert them into "written instructions"; but where accused consented, on the jury coming in for further instructions, to the reading by the reporter of the oral instructions given, he waived his right to written instructions. *Le-seuer v. State*, 95 N. E. 239, 241, 176 Ind. 448.

**WRITTEN CONSENT**

A wife's signature as a witness to a contract for the sale of her husband's real estate, she being in no way referred to in the contract as a party, is not a "written consent" to the sale, within Rev. Laws 1905, § 3648, giving a wife one-third interest in all real estate owned by her husband, to the sale of which she has not consented in writing. *Stromme v. Rleck*, 119 N. W. 948, 950, 107 Minn. 177, 131 Am. St. Rep. 452.

**WRITTEN CONSTITUTION**

"A 'written constitution' is, in every instance, a limitation upon the powers of government in the hands of agents. For there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent and incapable of definition. *State v. Braxton County Court*, 55 S. E. 382, 384, 60 W. Va. 339.

A "written constitution," while in every instance a limitation upon the powers of government in the hands of its agents, is also a delegation and grant of power, and a limitation of the exercise of the power granted. *Ex parte Anderson*, 81 S. W. 973, 981, 46 Tex. Cr. R. 372.

"A 'written constitution' is the fundamental expression of the sovereign will. Under our form of government, that sovereign will resides in the people. A written constitution is not only the direct and basic expression of the sovereign will, but it is the absolute rule of action and decision for all departments and offices of government in re-

spect to all matters covered by it, and must control as it is written until it shall be changed by the authority that established it. \* \* \* The logical corollary of the proposition that the Constitution is the supreme law of the land is that the power to legislate is a purely delegated one, derived from the Constitution and controlled by it." *Wright v. Hart*, 75 N. E. 404, 405, 182 N. Y. 330, 2 L. R. A. (N. S.) 338, 3 Ann. Cas. 263.

#### WRITTEN CONTRACT OR AGREEMENT

Partly written contract as parol contract, see Parol Contract.

A "written contract" has been defined as "one which in all its terms is in writing." *Bishop on Cont. (Enlarged Ed.)* § 163. The signature of both parties is not always a necessary requisite to a written contract. *National Cash Register Co. v. Lesko*, 58 Atl. 967, 968, 77 Conn. 276.

Where a written instrument purports to set forth the mutual obligations of a contract, and is unilateral in form and signed by one party only, who delivers it to the other party, who accepts it as the contract, the instrument is a "written contract." *McDermott v. Mahoney*, 115 N. W. 32, 35, 139 Iowa, 292 (citing *Attix v. Pelan*, 5 Iowa, 336; *Dows v. Morse*, 17 N. W. 495, 62 Iowa, 231; *Sellers v. Greer*, 50 N. E. 246, 172 Ill. 549, 40 L. R. A. 589; *Vogel v. Pekoc*, 42 N. E. 386, 157 Ill. 339, 30 L. R. A. 491; *Horn v. Hansen*, 57 N. W. 315, 56 Minn. 43, 22 L. R. A. 617; *Bigler v. Baker*, 58 N. W. 1026, 40 Neb. 325, 24 L. R. A. 255; *Graves v. Smedes' Adm'r* [Ky.] 7 Dana, 344; *Woodlock v. Meyerstein*, 5 Mo. App. 591).

An ordinance offering to let the right to construct and operate a telephone system in a city to the one offering therefor at a public bidding the greatest percentage of its gross earnings and a bond given by the successful bidder accepting the provisions of the ordinance together constitute a contract "in writing," within the meaning of Rev. St. 1899, § 6759, requiring contracts with cities and counties to be in writing. *City of California v. Bunceton Telephone Co.*, 87 S. W. 604, 605, 112 Mo. App. 722.

Where a customer verbally engaged a stock dealer to buy or sell stocks, and after the purchase or sale had been made, received from him a ticket setting forth the transaction, but unsigned by the parties, the ticket was not a "written agreement," the effect of which could not be varied by extrinsic evidence. *Picard v. Beers*, 81 N. E. 246, 248, 195 Mass. 419.

Receipts are not within the rule prohibiting oral evidence to vary or contradict a "written agreement." *Beall v. Hudson County Water Co.*, 185 Fed. 179, 181.

To be a "written contract," within the statute of frauds, the whole contract of in-

surance must be in writing, and must be signed by the insurer. *Delaware Ins. Co. v. Pennsylvania Fire Ins. Co.*, 55 S. E. 330, 334, 126 Ga. 380, 7 Ann. Cas. 1134.

A writing reading: "100 cases eggs 3,000—19c. \* \* \* He to pay interest at 6 per cent. on amount exceeding deposits of \$1 per case"—is nothing more than a mere "bill of parcels," with a statement of interest to be charged, and not a "contract in writing"; and hence parol evidence as to what the terms of the contract were was admissible. *North Packing & Provision Co. v. Lynch*, 81 N. E. 891, 892, 196 Mass. 204.

A shipping order signed by the shipper and accepted by the defendant becomes a "contract in writing" between the parties as fully and completely as if the carrier had signified its acceptance in writing. *Michigan Cent. R. Co. v. Chicago Electric Vehicle Co.*, 124 Ill. App. 158, 160.

Though an offer of a reward by publication for the "discovery" of a criminal becomes a valid contract between the offerer and those who accept it by performance upon the discovery required, it does not become a "contract in writing." *Cunningham v. Fiske*, 83 Pac. 789, 13 N. M. 331.

A subscription for shares of stock in a corporation is a "contract in writing." *Collins v. Southern Brick Co.*, 123 S. W. 652, 653, 92 Ark. 504, 135 Am. St. Rep. 197, 19 Ann. Cas. 882 (quoting and adopting 1 *Morawetz, Corp.* § 77).

A contract created by the indorsement and delivery of a negotiable promissory note is a "contract in writing," and is not open to contradiction or susceptible of annulment by a separate contemporaneous agreement, although also in writing, unless at least the terms of the latter plainly disclose that the parties so intended. *Crilly v. Gallice*, 148 Fed. 835, 836, 78 C. C. A. 525 (citing *Martin v. Cole*, 104 U. S. 30, 26 L. Ed. 647).

#### Contract as importing

See Contract.

#### WRITTEN DEMAND

Code 1907, § 5747, provides that, on foreclosure, possession of the land must be delivered to the purchaser, within 10 days after sale, by the debtor, if in his possession, or by any one holding under him by privity of title, if in his possession, on written demand of the purchaser or his vendee. Held, that a "written demand" required by such section must be served on the debtor to bar his right to redeem, and that a mere reading to him of an alleged written demand was insufficient. *Hutchison v. Flowers*, 57 South. 719, 720, 175 Ala. 651.

#### WRITTEN EVIDENCE

Stenographers' notes are "written evidence," within Code, § 4466, providing that, "where the action of the court [for con-

tempt] is founded on evidence given by others, such evidence must be in writing and filed and preserved." *Hatlestad v. Hardin* County District Court, 114 N. W. 628, 629, 137 Iowa, 146.

### WRITTEN INSTRUMENT

Abbott defines "written instrument" as "something reduced to writing as a means of evidence." *Bouvier* (16th Ed.) 1064, says: "An instrument, in the ordinary accepted sense, is a document or writing." *Burrill* says: "A writing, as the means of giving formal expression to some act; a writing expressive of some act (and this is the definition adopted by Webster as expressing the legal meaning of the word)." *People v. Rouss*, 118 N. Y. Supp. 433, 439, 63 Misc. Rep. 135.

Where a note was given for the right to sell a patent right and patented articles, a subsequent written admission by one of the signers that he had received full consideration for the note was not a contract nor a "written instrument," within Civ. Code 1895, § 5201, providing that parol contemporaneous evidence is inadmissible to contradict the terms of a valid written instrument. *Crooker v. Hamilton*, 59 S. E. 722, 723, 3 Ga. App. 190.

A pledge of notes secured by a trust deed executed by a corporation to a bank as collateral security for a loan to the payee of the notes, not being in writing, was not within Rev. St. Mo. 1909, § 2809, requiring record of any "instrument in writing" by which real estate may be affected. *Sturdivant Bank v. Schade*, 195 Fed. 188, 195, 115 C. C. A. 140.

The "instrument of writing" on which the claim of the beneficiary under a trust deed for taxes paid on the land against the estate of the mortgagor was founded, within the meaning of Rev. St. 1908, § 7212, requiring the filing in the county court of the "instrument of writing" whereon a claim against an estate is founded, was the covenant of the trust deed, which required the mortgagor to pay all costs of the trust, including money advanced for taxes, and not the tax receipts or the secured notes, so that the covenant in the tax deed must be exhibited in probate court. *Gilmour v. First Nat. Bank of Central City*, 121 Pac. 767, 768, 21 Colo. App. 301.

### Agreement to purchase stock

The obligation of one of several persons uniting in the purchase of corporate stock under a contract stipulating that each of them shall be interested in the proportion that the number of shares subscribed for by him bears to the total number, and that each shall share in the profits and losses in the same proportion, is contractual, and where the stock is purchased in accordance with the contract and within the time specified, his

obligation to pay his proportionate share is founded on a "written instrument," within Comp. Laws 1907, § 2875, subd. 2, limiting actions founded on written instruments. *McMillan v. Whitley*, 113 Pac. 1026, 1028, 38 Utah, 452.

### Agreement to sell real estate

An instrument reciting that, in consideration of \$500, the maker agreed to sell to a person named or his assigns his real estate described for \$225 an acre, and, if said person buys said property, he is to get credit for a certain sum as part of the purchase money, is an "instrument in writing," the subject of forgery, under Pen. Code 1895, § 243, as amended by Acts 1907, p. 57. *McLean v. State*, 60 S. E. 332, 333, 3 Ga. App. 660.

### Book subscription

Where a subscription paper is headed with merely the title, character, authorship, and price of a book, followed by the word "subscribers," a name written under "subscribers" clearly imports a promise to take a copy of the book and pay the price indicated, and constitutes an "instrument in writing," within the meaning of Burns' Ann. St. 1901, § 2354, defining forgery. *State v. Hazard*, 80 N. E. 149, 150, 168 Ind. 163.

### Indorsement on note

An indorsement on a note is within the letter and spirit of Rev. St. 1899, § 2019 (Ann. St. 1906, p. 1344), providing that every instrument partly printed and partly written, or wholly printed with a written signature thereto, and every signature of an individual firm, or corporate body, and every writing purporting to be such signature, shall be deemed a "written instrument" within the meaning of the act. *State v. Carragin*, 109 S. W. 553, 559, 210 Mo. 351, 16 L. R. A. (N. S.) 561.

### Judgment

A judgment is not a "written instrument," within Burns' Rev. St. 1901, § 365, providing that where any pleading is founded on a written instrument, the original, or a copy thereof, must be filed with the pleading. *Kelley v. Houts*, 66 N. E. 408, 409, 30 Ind. App. 474.

### Order of court

An order of the federal court, directing its receiver of a railroad to restore to the railroad its property in his hands on the agreement that the railroad assume all liabilities and obligations of the receiver and save him harmless against the payment of any liabilities incurred by him, is not a "written instrument," within Burns' Ann. St. 1908, § 368, requiring the original or a copy to be filed with the complaint in an action founded on a written instrument. *Vandalla Ry. Co. v. Keys*, 91 N. E. 173, 174, 46 Ind. App. 353.

**Pay roll**

A pay roll signed by one over the words "in full release of all damages sustained March 31, 1906," is an "instrument in writing" within Rev. St. 1899, § 746, providing that, when any pleading is founded on any instrument in writing, its execution shall be adjudged confessed, unless denied by a verified pleading, and section 643 (Ann. St. 1906, p. 662), declaring that, when a pleading is founded on any written instrument, it shall be filed with the pleading, and hence, such instrument having been properly pleaded in the answer, and plaintiff not having denied its execution under oath, he could not prove that it was a forgery. Rev. St. 1899, § 746, does not apply to instruments signed by both parties. *Hahs v. Cape Girardeau & C. R. Co.*, 126 S. W. 524, 526, 147 Mo. App. 262.

**Return to writ of certiorari**

Pen. Code, § 566 (Penal Law, § 932), providing that a person who, with intent to defraud, obtains, by false pretenses, a signature to a written instrument, shall be punished as therein prescribed, does not require that money or property shall be affected, or obtained, by such writing; but a return to a writ of certiorari, to review the trial, conviction, and dismissal of a patrolman from the police force, is a "written instrument" within its meaning. *People v. Rouss*, 118 N. Y. Supp. 433, 437, 63 Misc. Rep. 135.

**WRITTEN NOTICE OF APPEARANCE**

Under Municipal Court Act (Laws 1902, c. 580) § 332, which allows costs to a prevailing party who appears by attorney and who files a verified pleading or a written notice of appearance, such costs are not allowable to such a party who entered no written appearance by attorney and whose pleadings were oral, as a memorandum containing the attorney's name and address, handed to the judge, but not becoming part of the record of the case was not a filed pleading, nor a "written notice of appearance"; rule 2, subd. "d," of the rules of the Municipal Courts, declaring that the indorsement of the name and address of an attorney on any paper in an action shall be an appearance within the meaning of such section, being merely an interpretation of the term "written notice of appearance," and not dispensing with the filing of such a notice as a prerequisite to the court's jurisdiction. *Kaufman v. Cohn*, 138 N. Y. Supp. 403, 404, 78 Misc. Rep. 368.

Service on plaintiff of interrogatories, regularly entitled by defendant, though prematurely served, constitute "written notice of his appearance," within Ballinger's Ann. Codes & St. § 4886, providing that a defendant appears when he answers, demurs, or gives plaintiff written notice of his appearance. *State ex rel. Trickel v. Superior Court of Clallam County*, 100 Pac. 155, 156, 52 Wash. 13.

**WRITTEN SIGNATURE**

See Sign—Signature.

**WRITTEN VOTES**

See Written Ballots.

**WRONG**

See Distinguish between Right and Wrong; Legal Wrong; Private Wrong; Public Wrong; Right and Wrong Test. Willful wrong, see Willful—Willfully.

The term "wrong," in the maxim, "Equity will not suffer wrong without a remedy," has a significance which does not reach violations of mere moral rights. Any other wrong is said to involve a corresponding primary legal or equitable right, with an equitable or legal remedy, according to circumstances, for the former, and an equitable remedy for the latter. *Harrigan v. Gilchrist*, 99 N. W. 909, 933, 121 Wis. 127 (citing Pom. Eq. Jur. 424).

"When it is said in contemplation of the law that there is no wrong without a remedy, it must be noted that the term 'wrong' has a legal significance distinct from 'damage,' and is synonymous with 'injuria,' signifying a legal injury." *Thomason v. Seaboard Air Line Ry.*, 55 S. E. 205, 209, 142 N. C. 318.

Every breach of contract may in a qualified sense be considered a "wrong." It is a violation by one party of a right to which the other was entitled, and an allegation that the defendants "wrongfully refused" to deliver securities, as it was otherwise alleged they had agreed to do, is, in legal effect, no more than if the word "wrongfully" had been omitted. *Austin v. Rawdon*, 44 N. Y. 63, 69.

"'Wrongs' are divisible into two sorts or species: Private wrongs and public wrongs. The former are in infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed 'civil injuries.' The latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and are distinguished by the harsher appellation of 'crimes and misdemeanors.'" *Chicago, R. I. & P. Ry. Co. v. Territory of Oklahoma*, 105 Pac. 677, 679, 25 Okl. 238 (citing *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123); *United States v. Illinois Cent. R. Co.*, 156 Fed. 182, 185 (citing *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 228, 36 L. Ed. 1123).

Under Rem. & Bal. Code, §§ 7778, 7784, requiring the court to apportion the compensation awarded in condemnation proceedings by municipal corporations, and requiring the court to enter an order that the municipality on paying the award into court, may take possession of the property, a city, in condem-

nation proceedings, which proceeds in strict accordance with the statute and brings the property to be taken within the jurisdiction of the court and makes all interested therein parties and pays the amount awarded into court, need not see to the application of the amount awarded, and it is not affected by any error of the court in apportioning the award, and one injured by a wrongful apportionment may not sue the city therefor; a "wrong" consisting in a trespass on the right of another or in the omission of a duty imposed by law. *Carton v. City of Seattle*, 120 Pac. 111, 112, 66 Wash. 447.

### WRONG VERDICT

A verdict may technically be said to be a "wrong verdict" as well when it is perfect in form, but not supported by the evidence, as when it is on its face so imperfectly formed or irresponsible to the issues as to be a nullity. In the former case it cannot be assailed by motion in arrest of judgment, but in the latter case it may be. *Harris v. State*, 43 South. 311, 312, 53 Fla. 37.

### WRONGFUL—WRONGFULLY

The term "wrongful" imports the infringement of some right. *State v. Van Peit*, 49 S. E. 177, 187, 136 N. C. 633, 68 L. R. A. 760, 1 Ann. Cas. 495.

The word "undue," when used to qualify "influence," has the legal meaning of "wrongful." *Sears v. Vaughan*, 82 N. E. 881, 887, 230 Ill. 572.

Where a jury is instructed that the burden of proof was on plaintiff to show that defendant wrongfully killed the plaintiff's dog, the word "wrongful" is presumed to be used in its legal and not in its ethical sense. *Brown v. Graham*, 114 N. W. 153, 154, 80 Neb. 281.

Where the sufficiency of an indictment for causing nonmailable matter to be deposited in the post office is not questioned until after verdict, the words "willfully, unlawfully, wrongfully, and knowingly," as used therein, were to be taken in their broadest sense, as applying to all that was expressed in respect of the act, and therefore as imputing to defendants knowledge of the contents of the circular alleged to have been mailed, and of the book of which it was an advertisement. *Burton v. United States*, 142 Fed. 57, 59, 73 C. C. A. 243.

### Felonious synonyms

"Wrongful," used in describing the taking of personal property in the possession of another, means not a mere taking without authority of law, but includes a taking with an evil motive or with a criminal mind, and in this connection it is synonymous with "felonious." *State v. Fordham*, 101 N. W. 888, 889, 13 N. D. 494.

### Malicious

Under Rev. St. 1887, § 7153, making the "malicious" killing, maiming, or wounding of a dog an offense, the word "malicious" as used is not equivalent to the word "wrongful" as used in the law of torts. The former word means more than the latter. It necessarily involves crime, while the latter does not necessarily do so. *State v. Churchill*, 98 Pac. 853, 857, 15 Idaho, 645, 16 Ann. Cas. 947 (citing *Chappell v. State*, 35 Ark. 345; *State v. Hussey*, 60 Me. 410, 11 Am. Rep. 206; 2 Whart. Cr. Law, §§ 1068, 1070; *State v. Phipps*, 64 N. W. 411, 95 Iowa, 491; *United States v. Gideon*, 1 Minn. 292 [Gil. 226]; *State v. Rector*, 34 Tex. 565).

### Unlawful—Unlawfully

The gist of the action of replevin is the "wrongful" or "unlawful" detention, there being no distinction in that action between the two terms; hence a petitioner in replevin properly alleged the wrongful detention of his property. *Boswell v. First Nat. Bank of Laramie*, 92 Pac. 624, 632, 16 Wyo. 161.

Pen. Code, § 633, defines extortion as the obtaining of property from another with his consent, induced by a wrongful use of force or fear. Section 634 declares that fear such as will constitute extortion may be induced by a threat, either to accuse another of any crime or to expose any secret affecting him, and section 638 declares that every person who, with intent to extort any money or property from another, sends any person any threatening letter shall be punished as if the money or property were actually obtained by means of such threat. Held, that the word "wrongful," as used in section 633, relates solely to the method used; and a person may be guilty of extortion under such sections if he obtains money from another by unlawful means, though he does not seek to obtain any benefit for himself and believes that the money or property obtained in fact belongs to the person for whom it is obtained. In re *Sherin*, 130 N. W. 761, 764-767, 27 S. D. 232, 40 L. R. A. (N. S.) 801, Ann. Cas. 1913D, 446.

The words "unlawfully," "willfully," "fraudulently," and "feloniously," in an indictment, include the word "wrongfully." *State v. Pellerin*, 43 South. 159, 161, 162, 118 La. 547 (citing *State v. Brown*, 6 South. 541, 41 La. Ann. 345; *Marr, Cr. Jur. La.*, verbo "Indictment," subd. "The Words of the Statute").

Under Code, § 595 (Gen. St. 1901, § 5082), stating that in ejectment it shall be sufficient for plaintiff to allege that the defendant "unlawfully" keeps him out of possession, an allegation that the defendant "wrongfully" keeps the plaintiff out of possession does not make the pleading demurrable, as the Code does not prescribe an exact form. *Rhea v. Williams*, 103 Pac. 119, 80 Kan. 698.

**WRONGFUL ACT**

"Malice" in the law means the intentional doing of a wrongful act without justification or excuse. A "wrongful act," within the meaning of this definition, is any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right. *Brennan v. United Hatters of North America*, Local No. 17, 65 Atl. 165, 171, 73 N. J. Law, 729, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698.

"Wrongful acts" knowingly and intentionally committed cannot be justified on the ground of innocent intent. Ordinarily the intent with which a man does a criminal act is not proclaimed by him, and ordinarily there is no direct evidence from which the jury may be satisfied from declarations of the criminal himself as to what he intended when he did a certain act, and this question of intent, like all other questions of fact, is solely for the jury. *Chadwick v. United States*, 141 Fed. 225, 230, 72 C. C. A. 343.

The words "wrongful act" and "negligence" are sufficiently broad to embrace every degree of tort that can be committed against the person. In *Ky. St. 1903, § 6*, giving the personal representative a cause of action for death resulting from the negligent or "wrongful act" of another, the words were used to embrace every injury that might be committed against the person, whether negligently done or not. A wrongful act may or may not be negligent, depending upon how it is committed and the relation between the parties. A wrongful act may be criminal, willful, wanton, or reckless. Many wrongful acts are committed in which there is no element of negligence, no breach of duty. In short, every injury inflicted upon the person without legal right or excuse is a "wrongful act," without reference to the relation existing between the perpetrator and his victim. Within this definition, the death of a person caused by the careless, wanton, or malicious use of firearms is a wrongful act as much as if the death were due to a blow. *Howard's Adm'r v. Hunter*, 104 S. W. 723, 724, 126 Ky. 685.

The term "wrongful act," as used in *Rev. St. Idaho, § 4100*, providing that when a person's death is caused by the wrongful act of another his heirs or personal representatives may maintain an action for damages against the person causing the death, implies the omission of some duty, and that duty must be a duty owing to the decedent. It cannot be that if the death was caused by rightful act, or an unintentional act, with no omission of duty owing to the decedent, it can be considered wrongful. The death of a free passenger on a railway train, not due to the omission on the part of the rail-

way company of any duty owing to the deceased, cannot be considered wrongful, within *Rev. St. Idaho, § 4100*. *Northern Pac. R. Co. v. Adams*, 24 Sup. Ct. 408, 409, 192 U. S. 440, 48 L. Ed. 513.

Where commissioners were appointed by a city to build a city hall according to certain plans, with power to employ agents and to contract, and by one of the contracts they were to furnish at the site of the building sections for brick arches, and they put the sections in place, and one of the sections, being insecurely fixed, fell and killed a laborer, the city, through the commissioners, had committed a "wrongful act," within the meaning of a statute providing that, in cases in which the death of any person ensued from injury inflicted by the "wrongful act" of another, the person inflicting such injury shall be liable to an action for damages. *McCaughy v. Tripp*, 12 R. I. 449, 451.

**Wrongful omission distinguished**

Negligence may result from omission respecting duty. An "act" or "wrongful act" denotes affirmative action or performance, and an expression of will or purpose as distinguished from "omission" or "wrongful omission," which denotes a negative and inaction. *Randle v. Birmingham Ry., Light & Power Co.*, 53 South. 918, 921, 169 Ala. 314.

**WRONGFUL OBSTRUCTION**

A "wrongful obstruction" of a water course is an obstruction placed therein without legal right. An obstruction of a stream necessary to the use of the right of way acquired by grant or condemnation proceedings goes as a part of the right of way, or as incident to it, and therefore is not wrongful as against the party from whom the right of way is acquired. *Lampley v. Atlantic Coast Line R. Co.*, 50 S. E. 773, 774, 71 S. C. 156.

**WROUGHT**

The ordinary meaning of "wrought" is worked up, elaborated, worked into shape, labored, manufactured; not rough or crude. "Unwrought" imparts the reverse of these conditions. When one speaks of an unwrought material, he means one which has not been worked into shape, one which is unlabored, unelaborated, rough, and crude. But the word also implies a material which is capable of being transformed from its crude material to an improved condition produced by the labor to which it may be subjected. To be more specific, "unwrought metal" implies a metal which is capable of being wrought, and not a substance which is only fit to be thrown into the crucible, to be melted up with other ingredients to produce an entirely different and distinct product. *United States v. Roessler & Hasslacher Chemical Co.*, 137 Fed. 770, 772, 70 C. C. A. 346.

**WROUGHT BY HAND**

The provision for "statuary \* \* \* 'wrought by hand' \* \* \* from metal," in Tariff Act July 24, 1897, c. 11, § 1, Schedule N. par. 454, 30 Stat. 194, does not include a

bronze statue cast in a foundry by artisans from a model that was made in plastic material by an artist, but upon which he did little or no retouching. *Altman & Co. v. United States*, 172 Fed. 161, 162.

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## X

## X-RAYS

The so-called "X-rays," discovered by Roentgen, have been recognized and known to scientists, both in and out of the medical profession, for some eight years. During this time the apparatus for the generation of the X-rays, together with the fluoroscope, has been used very generally by electricians, professors of physics, skiagraphers, physicians, and others for experimental and demonstrative purposes. It is a scientific and mechan-

cal appliance, the operation of which is the same in the hands of the college professor or the physician of the allopathic, homeopathic, or any other school of medicine. It may be applied by any person possessing the requisite scientific knowledge of its properties, and there would seem to be no reason why its application to the human body may not be explained by any person who understands it. *Henslin v. Wheaton*, 97 N. W. 882, 883, 91 Minn. 219, 64 L. R. A. 126, 103 Am. St. Rep. 504, 1 Ann. Cas. 19.

## Y

**YAMS**

In Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 704, 30 Stat. 203, the provision for "yams" includes a vegetable (*pueraria* roots) which, though not scientifically known as a yam, has always been so called in the trade that deals in it, and was the only vegetable so known that was imported prior to the passage of the act. *Kwong Yuen Shing v. United States*, 175 Fed. 317, 318.

**YARD**

See Freightyard; In Yard; Switchyard.  
As public place, see Public Place.

In an action under Code 1907, § 6037, for statutory penalty for destruction of fruit trees inclosed on premises, a general charge for defendant because there was no proof that the trees were removed from an inclosure was properly refused; it appearing that the trees were taken from a yard and orchard, which showed *prima facie* an inclosure; "orchard" being defined by Webster as meaning, among other things, "an inclosure containing fruit trees," etc., and the word "yard" meaning by common acceptance an "inclosure." *Wright v. Sample*, 50 South. 268, 162 Ala. 222.

Where, in the rear of a row of tenement houses, there is a private way, and the buildings are so constructed as to leave, unbuilt upon, on each side of each lot, a space or court, two of which coming together, form between the rear portions of each two buildings an open space, half on one lot and half on another, one-half of the open right of way in the rear of each lot constitutes its "yard," within the meaning of Tenement House Act (Laws 1901, p. 889, c. 334) § 2, subd. 2, defining a "yard" as an open unoccupied space on the same lot with the tenement house, between the extreme rear of the house and rear line of the lot. *People ex rel. Cohen v. Butler*, 109 N. Y. Supp. 900, 906, 125 App. Div. 384.

**YARD ENGINES**

Engines which regularly run between different points on a railroad line, are known as "road engines," in contradistinction to "yard engines," which perform services only in the yards. *Central of Ga. Ry. Co. v. Goodson*, 45 S. E. 680, 681, 118 Ga. 833.

**YARDMASTER**

It is the duty of the "yardmaster" to designate which track or tracks the incoming trains of the different railway companies referred to should occupy and the different points at which they were to stop, and to direct the making up of passenger trains and designate points from which the outgoing trains should start. He has charge of the

switching in the yards, and directs what engine or engines are to be used at each particular occasion for that purpose. *Brown v. Southern Pac. Co.*, 88 Pac. 7, 8, 31 Utah, 318.

**YARN**

See Cotton Yarn.

As embroidery cotton, see Embroidery.

Artificial horsehair is not a "yarn," because it has no twist, and is not composed of twisted or spun filaments. *Eckstein v. United States*, 160 Fed. 287, 288.

**YEAR**

See Calendar Year; Current Fiscal Year; Current Year; During Year; Estate for Years; First Ten Years; For a Year; Longer Period than One Year; Municipal Year; Once a Year; Per Year; Previous Year; Same Year; Tenant from Year to Year; This Year; Within a Year.

Ensuing year, see Ensuing.

"The 'year' in law is 365 calendar days. One born on the first day of the year is consequently deemed to be one year old on the 365th day after his birth—the last day of that year." *Erwin v. Benton* (Ky.) 87 S. W. 291, 294.

The term "year" usually means calendar year, but not always, since the meaning is often determined in contracts by the intention of the parties. It may mean the cropping season in farming operations, or the fruit season among horticulturists, and in like manner may be a longer or shorter period of time than 12 months, according to the connection in which it is used, so, also, the term may be modified by prefixing modifying words such as "fiscal year," "political year," "solar year," "leap year," etc., and such term may or may not correspond with 12 calendar months. *Reusch v. City of Lincoln*, 112 N. W. 377, 378, 78 Neb. 828.

**As calendar year**

Under Ky. St. 1903, § 452, providing that "year" shall be construed to mean a calendar year, etc., the word "year" in section 2516, providing that an action for personal injuries shall be commenced within one "year" after the accrual of the cause of action, means a calendar year, which in common acceptance consists of 365 days, and therefore an action commenced September 19, 1904, for injuries received September 19, 1903, was barred, since, in computing the time within which the action must be commenced, the day of the injury must be included. *Geneva Cooperage Co. v. Brown*, 98 S. W. 279, 124 Ky. 16, 124 Am. St. Rep. 388.

The phrases "two years," "four years," and "six years," in Act March 26, 1891 (Gen. Laws 1891, p. 109, c. 103), creating a state board of assessors and fixing the term of office of the assessors first chosen at one for two years, one for four years, and the other for six years, the assessors thereafter elected to each hold for six years, mean calendar years, not legislative years, and an original term and any succeeding term of six years did, and does not, end at any time when a successor was, and is, elected and qualified during a legislative session. *Marshall v. State*, 72 Atl. 873, 874, 105 Me. 103.

A railroad lease which took effect April 15, 1907, provided that the lessee should pay the full amount of the taxes assessed for the "year" 1907, but should be reimbursed by lessor a pro rata portion thereof to cover the period of 1907 prior to the taking effect of the lease. Comp. Laws, § 50, par. 10, provides that the word "year" shall mean a calendar year, and Pub. Acts 1905, p. 441, No. 282, § 6, requires railroad companies annually, between the 1st day of July and the 31st day of August in each year, to file a return for taxation with the state board of assessors. Held, that since the tax law provides for taxes for each calendar year, and the taxes for one year are not fixed, or payable until the first of the following year, such section 6 did not contemplate a fiscal year for the assessment of railroad taxes extending from July 1st to June 30th; and hence the word "year," as used in the lease, meant a calendar year for which the lessee was entitled to reimbursement, and not an alleged fiscal year extending from July 1st to June 30th. *Pere Marquette R. Co. v. Kalamazoo, L. S. & C. Ry. Co.*, 122 N. W. 356, 357, 158 Mich. 40.

The "year" referred to in Act March 22, 1906 (98 Ohio Laws, p. 89), fixing the salaries of certain county officers, is the calendar year beginning January 1st, and the end of each quarter, referred to in section 6 of that act, required payment into the county treasury of all fees collected during said quarter, means the end of each three months after January 1st of such year. *State v. Van Gunten*, 95 N. E. 664, 665, 84 Ohio St. 172.

#### As fiscal year

When reference is made to a certain "year," the presumption is that the calendar year is meant; but where a legislative body is acting under a Constitution providing a fiscal year different from the calendar year, its fiscal legislation should be referred to the fiscal year, and not to the calendar year. *State v. Jennings*, 47 S. E. 683, 685, 68 S. C. 411.

#### As school year

A contract of a teacher with school trustees to teach one year from July 5, 1899, at a salary of \$1,000, payment to be made by requisitions upon the county superintendent

of schools, was a contract to teach for a school "year." *Westerman v. Cleland*, 106 Pac. 606, 609, 12 Cal. App. 63.

The term "year" does not necessarily mean a calendar year. Its meaning is to be gathered from the connection in which the term is used. "The contract was with reference to school-teaching, and, in the absence of anything to the contrary, it must be construed as if the provision of the law limiting the time for which the contract could be made was inserted in it, and that the term 'year' meant a school year (Pol. Code, § 1878), which begins the 1st day of July and ends on the 1st day of June." *Williams v. Bagnelle*, 72 Pac. 408, 410, 138 Cal. 699 (citing and adopting *Brown v. Anderson*, 77 Cal. 236, 19 Pac. 487).

The word "year," when used in employing teachers, means a college or school year, and not a calendar year. *Brookfield v. Drury College*, 123 S. W. 86, 94, 139 Mo. App. 339.

#### As twelve months

A provision of a state statute that no person shall at any time be allowed to vote in the election of the council of a certain city or upon any proposition to impose a tax or for the expenditure of money unless he shall "within the year next preceding" have paid a tax assessed upon his property therein valued at least at \$131, the words "within the year next preceding" denote the twelve months next previous to the election, and not the calendar year preceding. *In re Providence Voters*, 13 R. I. 737, 739.

#### As year of our Lord

Under Code, § 48, par. 11, providing that the word "year" is equivalent to "year of our Lord," the word "year" in section 2450, providing that only one statement of consent for the sale of intoxicating liquors shall be canvassed "in any one year," means a calendar year, the phrase "year of our Lord" meaning a calendar year. *Sawyer v. Steinman*, 126 N. W. 1123, 1124, 148 Iowa, 610.

The word "year," as used in Comp. Laws 1879, c. 25, § 220, which provides that the board of county commissioners shall not levy a tax for the current expenses of any one year over 1 per cent. on the property valuation, and in Comp. Laws 1879, c. 25, art. 16, § 1, which provides that it shall be the duty of the commissioners to levy a county tax each year for county expenses, and that it shall be unlawful for any board of commissioners or county clerk to issue warrants to an amount in excess of the amount of the county tax levied in the same year, will be construed under rule 11 for the construction of statutes (Gen. St. 1897, c. 1, § 8), which provides the word "year" alone, and also the expression "year A. D.," are equivalent to the expression, "year of our Lord," to mean a calendar year. *Garfield Tp. v. Hubbell*, 59 Pac. 600, 9 Kan. App. 785.

**YEARLING**

The term "yearling," in its popular sense, sufficiently indicates an animal of the cow kind. *State v. Majors*, 59 South. 904, 905, 131 La. 466.

The court takes judicial notice of the ordinary meaning which words have attached to them by general usage, and that, in the vernacular of this state, "yearlings" means animals of the cattle species. *Barron v. San Angelo Nat. Bank (Tex.)* 138 S. W. 142, 144.

In an action on a contract for the delivery of "yearlings," it is admissible to prove by persons engaged in the cattle business that, when a contract is made between cattlemen in the section of the country where the contract sued on was made and to be executed for the delivery of yearlings, they are expected to deliver cattle born at any time from January 1st to June 1st of the year previous. *Parks v. O'Connor*, 8 S. W. 104, 107, 70 Tex. 377.

**YEARLY PAY**

See Current Yearly Pay.

**YEARLY PROFITS**

A contract between an insurance company and its agents contained no express provision as to termination, and provided as compensation a contingent commission of 10 per cent., predicated on the yearly profits of the agency, and that in computing such commission the agents should be credited with the gross amount of premiums written, less cancellations, reinsurance, and returns of every nature on the one hand, and debited with commissions and incidental agency charges, etc., the commission to be predicated upon the profit balance thus shown. Held, that the phrase "predicated on the yearly profits" did not indicate an intent that no such profits should be ascertained in the event of a termination of the agency between the annual dates fixed in the contract, but rather described a term of calculation to be used year by year so long as the contract might be in force, and for any fraction of a year remaining unadjusted when the relation of principal and agent might cease. *Federal Ins. Co. v. Gilmour*, 92 N. E. 36, 206 Mass. 203.

**YEARS**

When "years" are reckoned for limitation purposes, the first day is included. *Vose v. Kuhn*, 92 N. Y. Supp. 34, 45 Misc. Rep. 453.

**YEARS OF AGE**

The contributory delinquent law (Sess. Laws 1903, p. 198, c. 94) prescribes a punishment for persons who contribute to the delinquency of a child, as defined by law. The delinquent children law (Sess. Laws 1903, p. 178, c. 85) provides that the words "delinquent child" shall include any child "16

years of age or under" who violates any law. Held, that the words "16 years of age or under" exclude children who have passed beyond their sixteenth birthday, and hence one cannot be convicted of contributing to the delinquency of a child who has passed his sixteenth birthday. *Gibson v. People*, 99 Pac. 333, 334, 44 Colo. 600.

**YEAST**

In its most technical and limited sense, "leaven" is sour dough, and in this sense the term was understood 2,000 years ago. Later "yeast" was substituted for sour dough as a leaven. Each of these substances leaven, in the sense that they set up fermentation. *F. H. Leggett & Co. v. U. S.*, 131 Fed. 817, 818.

**YELLOW BUTTER**

The term "yellow butter," within a statute making it an offense to sell any article made from oleaginous substance not produced from milk or cream in imitation of yellow butter, is used in its popular rather than in trade or technical sense, and does not mean all kinds of butter, but excludes that which is a light shade of yellow. *Meyer v. State*, 114 N. W. 501, 503, 134 Wis. 156, 14 L. R. A. (N. S.) 1061.

"Every one is presumed to know the color of an article which is in such general use as butter, and as to whether or not an article intended as a substitute therefor bears the 'yellow color' of true butter." Hence, on a prosecution for unlawfully selling an imitation of yellow butter, in violation of Code, § 2516 et seq., the question of whether the product bore the yellow color of true butter was not a subject of expert evidence. *State v. Armour Packing Co.*, 100 N. W. 59, 124 Iowa, 323, 2 Ann. Cas. 448.

**YES**

Whether the answer "Do not know," to a special finding of fact returned by a jury, is equivalent to "Yes" or "No," depends upon the form of the question answered. Generally such an answer shows that the party whose duty it was to establish the fact involved in the question failed in his proof. In a case where it was the duty of the defendant to prove that E. did not sign a certain promissory note, and the jury returned the following finding and answer: "Did E. sign the note in question? Do not know"—such answer is equivalent to "Yes." *Croan v. Baden*, 85 Pac. 532, 533, 73 Kan. 364.

**YIDDISH**

"Yiddish" is a language used by German and other Jews, being a middle German dialect, developed under Hebrew and Slavic influence; Judea-German. *Gold v. S. Pian*

Time Payment Jewelry Co., 145 S. W. 1174, 1178, 165 Mo. App. 154 (citing Webst. Int. Dict., Ed. 1910).

## YIELD

### YIELDING MEANS

The underlying idea of "yielding means" or "yielding mechanism" is something that will give way under pressure. *Palmer v. Jordan Mach. Co.*, 186 Fed. 496, 501.

## YOKE OF OXEN

A "yoke of oxen" is a term used in the sense of unity. It implies something more than merely two oxen; thus, in detinue for a yoke of oxen, the value of them need not be assessed separately, but may be assessed in the aggregate, in the absence of evidence of their separate value. *Hammond Bros. & Co. v. Lusk*, 43 South. 573, 150 Ala. 487.

## YOU

### YOUR HOUSE

See *At Your House*.

### YOUR STATION

A purchaser of coal received the following letter from a dealer: "Until otherwise advised, the price of coal for future orders will be \$4 for lump and nut, and \$2.50 for pea coal, f. o. b. E., J. & E. tracks, your station." In accepting an order the dealer further stated: "We cannot make the pea coal any lower than \$2.75 per ton, f. o. b. E., J. & E. tracks, Aurora." Held, that the words "your station," in the first letter, meant "Aurora," and that the contract required delivery to the purchaser at his home town, and that he was not required to look to the carrier for delay in delivery. *Olson v. Wabash Coal Co.*, 126 Ill. App. 253, 255.

### YOUR TIMBER

Where a letter written by a carrier in referring to timber to be hauled under a contract between it and a logging company referred to it as "your timber," and at the time the contract was negotiated the logging company not only made known its then holdings, and its outstanding contracts of purchase, but also its purpose to acquire other timber properties and continue the logging business at a certain point as long as profitable or until the tributary timber was exhausted, held, that in determining what timber was embraced in the contract the term "your timber" meant the timber concerning which the parties were negotiating, and not the specific quantity then owned by the logging company. *Sultan Ry. & Timber Co. v.*

*Great Northern Ry. Co.*, 109 Pac. 320, 324, 58 Wash. 604.

## YOUNG

### YOUNGEST

Where a testator devised a life estate in trust for his widow, and on her demise the property was to be sold and the income from a share of the proceeds applied to the support of the wife and children of testator's son until the "youngest child" attained the age of 21 years, when such share was to be divided among them, the bequest was not void as suspending the alienation of the estate for a life not in being at the testator's death; the phrase "youngest child" meaning youngest child living at the time of testator's death. *Cogan v. McCabe*, 52 N. Y. Supp. 48, 52, 23 Misc. Rep. 739.

Where a will provided that the estate should be held in trust "until the 'youngest of my children' becomes of age," when the property was to be sold and the proceeds divided, it indicated the youngest of the entire class which survived testator. In *re Mikantowicz's Will*, 113 N. Y. Supp. 278, 279, 60 Misc. Rep. 273.

## YOUNG MEN'S CHRISTIAN ASSOCIATION

As charity, see *Charity*.

As educational corporation, see *Educational Corporation*.

## YOUNG WOMEN'S CHRISTIAN ASSOCIATION

As charity, see *Charity*.

## YOUTH

"Youth" is specified by Webster to be the "part of life that succeeds childhood." Code 1886, § 2367, providing for the adoption of children, uses the word "child" in the sense of relationship, and not of infancy; and hence one 26 years of age is subject to adoption. *Sheffield v. Franklin*, 44 South. 373, 374, 151 Ala. 492, 12 L. R. A. (N. S.) 884, 125 Am. St. Rep. 37, 15 Ann. Cas. 90.

### YOUTHFUL

"Youthful" is a quality that may well be ascribed to a young man even above 21, and the averment of youth in an injured employé in connection with the allegation that he is a minor may be consistent with the fact that he is fully matured for one of his age, and competent to appreciate dangers obvious to an adult. *Louisville & N. R. Co. v. Wilson*, 50 South. 188, 191, 162 Ala. 588.

## Z

## ZINC

See Oxide of Zinc; Sulphide of Zinc.

Held, that nickel-plated zinc sheets are not dutiable as "zinc \* \* \* in sheets," under Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 192, 30 Stat. 167, but as "articles or wares not specially provided for,

\* \* \* composed wholly or in part of  
\* \* \* nickel, \* \* \* zinc, \* \* \* or  
other metal," under paragraph 193. Eck-  
stein v. United States, 140 Fed. 94.

&—&C.—& CO.

See volume 1, page 1, of this series.











